STATE OF MICHIGAN

COURT OF CLAIMS

TANNER CREEK DRAIN NO. 514 DRAINAGE DISTRICT, PAINTERVILLE DRAIN NO. 388 DRAINAGE DISTRICT, and BERRIEN COUNTY DRAIN COMMISSIONER,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant,

and

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Counter-Plaintiff,

v

BERRIEN COUNTY DRAIN COMMISSIONER,

Counter-Defendant.
_____/

OPINION AND ORDER

Case No. 23-000058-MZ

Hon. James Robert Redford

At a session of said Court held in the City of Grand Rapids, County of Kent, State of Michigan.

Before the Court are the following five motions for summary disposition:

1. Defendant, the Michigan Department of Environment, Great Lakes, and Energy's (EGLE), August 4, 2023 motion for summary disposition under MCR 2.116(C)(4), and plaintiffs' countermotion for summary disposition under MCR 2.116(I)(2);

2. EGLE's October 9, 2023 motion for partial summary disposition of Count I of the complaint under MCR 2.116(C)(8);

3. Plaintiff/counter-defendant Berrien County Drain Commissioner's October 23, 2023 motion for partial summary disposition of the counterclaim, only, under MCR 2.116(C)(10);

4. EGLE's February 21, 2024 motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), and plaintiffs' countermotion for partial summary disposition under MCR 2.116(I)(2); and

5. Berrien County Drain Commissioner's February 21, 2024 motion for summary disposition of the counterclaim under MCR 2.116(C)(10), and EGLE's countermotion for summary disposition under MCR 2.116(I)(2).

The Court has reviewed the briefing and heard oral arguments on May 2, 2024. For the reasons discussed below, the Court:

1. DENIES EGLE'S August 4, 2023 motion for summary disposition under MCR 2.116(C)(4) and GRANTS plaintiffs' countermotion under MCR 2.116(I)(2) to the extent the Court declares it has subject-matter jurisdiction;

2. GRANTS EGLE's October 9, 2023 motion for partial summary disposition of Count I of the complaint under MCR 2.116(C)(8);

3. DENIES Berrien County Drain Commissioner's October 23, 2023 motion for partial summary disposition of the counterclaim under MCR 2.116(C)(10);

4. DENIES Berrien County Drain Commissioner's February 21, 2024 motion for summary disposition of the counterclaim under MCR 2.116(C)(10), and DENIES EGLE's countermotion under MCR 2.116(I)(2); and

5. DENIES EGLE's February 21, 2024 motion for summary disposition under MCR 2.116(C)(8) and (C)(10), and DENIES plaintiffs' countermotion under MCR 2.116(I)(2).

I. BACKGROUND

This matter involves work that has or will be performed on two stormwater drains in Berrien County: the Tanner Creek Drain, serving most of the city of Bridgman, Michigan, and the Painterville Drain, serving an area in Lake Township, Michigan. The Drains are natural watercourses, but were modified and designated as county drains over a century ago.

Plaintiffs filed this two-count complaint, requesting declaratory relief regarding whether certain work performed on the Tanner Creek Drain, and certain work they intend to perform on the Painterville Drain, complies with Part 353 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.35301 *et seq.*, which is known as the Sand Dunes Protection and Management Act. Both Drains are in areas designated as critical dune areas governed by Part 353. See MCL 324.35301(c).

The central dispute is whether the Berrien County Drain Commissioner, Christopher J. Quattrin, required a permit and special exception from EGLE to perform the repair work. According to plaintiffs, in July 2021, an operator for a nearby water treatment plant told the Drain Commissioner that the Tanner Creek Drain suffered from erosion that was placing the surrounding infrastructure at risk. When the Drain Commissioner inspected the area, he confirmed the erosion threatened nearby Lake Street, as well as electric poles serving the water plant.

The Drain Commissioner ordered emergency maintenance and repair of the Drain. The Drain Commissioner alleges his authority came from the Drain Code, MCL 280.1 *et seq.*, which grants him emergency repair powers. An engineering company repaired the Drain by placing a "revetment," which contained rock "riprap," along the banks. The work started in July 2021, and was completed on August 4, 2021.

Plaintiffs claim if the Drain Commissioner had not acted, then the Tanner Creek Drainage District may have been liable for resulting property damage or personal injuries. On August 10, 2021, the repaired portions of the Tanner Creek Drain withstood an historic flooding event after 15 inches of rain fell in the area overnight. Plaintiffs assert the work prevented a bank collapse and damage to nearby utilities. The Tanner Creek Drain suffered some significant damage in other areas because of the flooding event, and work was performed over the next few weeks to restore its banks. To date, no work has been completed on the Painterville Drain, which plaintiffs allege also suffers from erosion.

According to EGLE, it learned of the repair activity about a month later, in September 2021, when EGLE representatives were in the area for an unrelated reason. EGLE maintains the work on the Tanner Creek Drain required not only a permit, but also a special exception because of the grade of the slopes where the work was performed. In February 2022, EGLE provided the Drain Commissioner with a violation notice for the Tanner Creek Drain. In the notice, EGLE representative (and litigation expert) Zachary Chamberlin requested the Drain Commissioner take several steps to bring the site into compliance with Part 353. Plaintiffs have not performed the restoration work; they claim that following EGLE's directives could harm nearby electric lines and a watermain, placing the Tanner Creek Drainage District at risk of liability. On October 25, 2022, EGLE issued an enforcement notice. The parties were unable to resolve the issue, and this lawsuit followed.

In Count I of the complaint, plaintiffs request a declaration that the Tanner Creek Drain is exempt from the permitting requirements under Part 353 because the work performed on the drain was maintenance, repair, or replacement of a "utility facility" as defined under MCL 324.35306(4). In Count II, plaintiffs request a declaration that the "grandfather" provision within Part 353, MCL

324.35306(1), applied to both Drains, and the Drain Commissioner did not need a permit provided that the work was done on reasonable terms and consistent with the relevant local zoning ordinances. EGLE has filed a counterclaim against the Drain Commissioner for performing the Tanner Creek Drain repair work without obtaining a permit and a special exception.

The parties have filed a total of five motions for summary disposition, which are discussed in more detail below. In short, the parties dispute whether plaintiffs were required to request a declaratory ruling from EGLE, as outlined in MCL 24.263 and MCL 24.264, before suing EGLE in this Court. They also dispute whether the work performed on the Tanner Creek Drain and the work to be performed on the Painterville Drain fell within two exemptions to the permitting requirements, as outlined in MCL 324.35306(1) and (4). The Court concludes plaintiffs were not required to request a declaratory ruling from EGLE before suing EGLE in this Court. Additionally, the work did not qualify for a permitting exemption under MCL 324.35306(4) because the Drains are not "other utility facilities". However, MCL 324.35306(1) is another permitting exemption that applied in this case. A genuine issue of material fact exists on whether the work was performed on "reasonable terms" in compliance with MCL 324.35306(1).

II. ANALYSIS

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES

As a threshold issue, EGLE argues this Court lacks subject-matter jurisdiction because plaintiffs failed to request a declaratory ruling from EGLE before suing EGLE in this Court.

Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). " 'When viewing a motion under MCR 2.116(C)(4), [the] Court must

determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact.' " *Id.* (citation omitted). Summary disposition is appropriate under MCR 2.116(C)(4) when the plaintiff fails to exhaust their administrative remedies. *True Care Physical Therapy, PLLC v Auto Club Group Ins Co*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 362094); slip op at 4.

In general, "when an administrative scheme of relief exists, an individual must exhaust those remedies before the circuit court has jurisdiction." *Id.* at ___; slip op at 10. " 'The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court.' " *Id.* at ___; slip op at 10 (citation omitted). The court cannot exercise jurisdiction where the Legislature has expressed its intent to make an administrative tribunal's jurisdiction exclusive. *Id.* at ___; slip op at 10. An exception to the exhaustion rule applies when an appeal to the administrative agency would be futile. *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007). However, futility should not be presumed, and "it must be *clear* that an appeal to an administrative board is an exercise in futility and nothing more than a formal step on the way to the courthouse." *Id.* (quotation marks and citation omitted).

" 'The Court of Claims is created by statute and the scope of its subject-matter jurisdiction is explicit.' " *O'Connell v Dir of Elections*, 316 Mich App 91, 101; 891 NW2d 240 (2016) (citation omitted). This contrasts with the jurisdiction of a circuit court, which is a court of "general equity jurisdiction." *Id.* (quotation marks and citation omitted). The Court of Claims' jurisdiction is outlined in MCL 600.6419 of the Court of Claims Act, which provides that, with limited exceptions, the Court of Claims has exclusive jurisdiction over any claim against "the state or any

of its departments or officers." MCL 600.6419(1)(a). The statute expressly incorporates claims for equitable or declaratory relief. See *id.*

Here, EGLE argues plaintiffs were required to request a declaratory ruling from EGLE under MCL 24.263, a section of the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, which provides:

> On request of an interested person, an agency may issue a declaratory ruling as 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. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

MCL 24.264 adds:

> 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. The action shall be filed in the circuit court of the county where the plaintiff resides or has his or her principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. 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. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

EGLE has promulgated a rule relating to a request for a declaratory ruling. Mich Admin Code, R 324.81 (Rule 81) provides, in relevant part, "An interested person requesting a declaratory ruling as to the applicability of a licensing statute, rule, or order administered by the department

to an actual state of uncontested facts may do so on a form provided by the department. *Requests regarding enforcement issues are not a proper subject for a declaratory ruling.*" R 324.81(1) (emphasis added). Rule 81 adds, "The department shall issue a declaratory ruling only in matters where all relevant facts are stipulated to by the requesting party and appropriate division. If relevant facts necessary to issue a declaratory ruling are contested, then a declaratory ruling shall not be issued." R 324.81(4).

With this legal framework in mind, the Court turns to the language of Part 353 of NREPA. In *O'Connor v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 360002), slip op at 1-2, the issue was whether the plaintiff was required to follow the administrative process for recovering unclaimed property under the Uniform Unclaimed Property Act (UUPA), MCL 567.221 *et seq.*, as opposed to filing a claim and delivery action in the Court of Claims. The plaintiff argued because the UUPA used the permissive term "may," the Legislature did not intend for the administrative process outlined in the statute to be the exclusive method to recover abandoned property. *Id.* at ___; slip op at 4. The Court of Appeals determined the word "may" signaled that the plaintiff had the discretion whether to appeal the decision in the first instance, but the statute did not grant the plaintiff discretion on the method by which to appeal the state treasurer's decision. *Id.* at ___; slip op at 6. And because the statutory language established an intent to give the state agency exclusive jurisdiction over the process for claimants to assert an interest in the property, the court could not exercise its jurisdiction until the administrative proceedings were complete. *Id.* at ___; slip op at 5.

O'Connor supports that the Court's analysis starts with the plain language of Part 353 of NREPA. Part 353 outlines an administrative process for disputes regarding permits or special exceptions, which includes a formal hearing and judicial review under the APA. See MCL

324.35305. But Part 353 is silent on the process for determining whether the work falls within the statutory exemptions to the permitting requirement. Regarding enforcement, Part 353 contemplates the Attorney General may initiate a lawsuit on EGLE's behalf and at its request. See MCL 324.35310(2). However, Part 353 does not indicate whether (and in what forum) an aggrieved party challenging EGLE's enforcement decision may institute an action for declaratory relief. Therefore, no meaningful answer can be gleaned from the language of Part 353.

Plaintiffs do not invoke jurisdiction under MCL 24.264 or any other provision of the APA. Rather, they contend MCL 600.6419(1)(a) of the Court of Claims Act authorizes this Court's subject-matter jurisdiction. MCL 600.6419(1)(a) vests this Court with the ability to hear and determine a claim for declaratory relief against a state agency. MCL 24.264 does not apply in this circumstance. The issue in this case involves the enforcement of Part 353 of NREPA, rather than the applicability of a rule or order to an actual state of facts. See MCL 24.264. Moreover, the request for a declaratory ruling would have been futile based on EGLE's own policy in Rule 81 that it will not issue declaratory rulings in enforcement actions, or in circumstances where the parties have not stipulated on all relevant facts. As demonstrated by the voluminous dispositive motions filed by the parties and the competing expert affidavits, including on the issue regarding whether the work was performed on reasonable terms, there are several key disputed facts in this case. Therefore, EGLE would not have issued a declaratory ruling. Plaintiffs were not required to take this futile step before suing EGLE in this Court. For these reasons, this Court has subject-matter jurisdiction under MCL 600.6419(1)(a).

The caselaw supports this conclusion. The Court of Appeals recently discussed the contours of MCL 24.264 in *Mich Farm Bureau v Dep't of Environment, Great Lakes, & Energy*, 343 Mich App 293; 997 NW2d 467 (2022), lv gtd 511 Mich 971 (2023). In that case, the Court

of Appeals addressed whether the plaintiffs, several farmers' associations and livestock farms, were required to obtain a declaratory ruling from EGLE before suing in this Court for declaratory relief in relation to a dispute over pollutant discharges. *Id.* at 296-297. Like this case, *Mich Farm Bureau* also involved a permitting issue. *Id.* at 297. The plaintiffs initially petitioned EGLE for a contested case hearing under the relevant provision of NREPA, the APA, and the relevant administrative rule. *Id.* at 298. But before the hearing, the plaintiffs sued in this Court for declaratory and injunctive relief, including in relevant part, a declaration that EGLE failed to follow required procedures under the APA to promulgate as rules certain conditions placed upon the plaintiffs. *Id.* at 299. In relevant part, the Court of Appeals held MCL 24.264 required the plaintiffs to request a declaratory ruling from EGLE before suing in this Court. *Id.* at 305. This was because the plaintiffs were challenging the validity of the conditions imposed by EGLE on the basis that they were required to be promulgated as rules. *Id.* at 313-314.

Where *Mich Farm Bureau* differs from this case is in the fact that the plaintiffs in *Mich Farm Bureau* requested a declaration that EGLE follow the required procedures under the APA and promulgate rules. Unlike *Mich Farm Bureau*, the issue in this case does not involve the validity or applicability of a rule promulgated by EGLE or EGLE's rulemaking authority under the APA. Rather, this case involves EGLE's enforcement of a statute it regulates. This situation falls outside the scope of MCL 24.264, which differentiates this case from *Mich Farm Bureau.*

EGLE relies on *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43; 620 NW2d 546 (2000). In *Citizens*, the plaintiff was a ballot-question committee that opposed a ballot proposal. *Id.* at 45-46. A private, nonprofit corporation, the Michigan Municipal League (MML), was alleged to have expended funds to support the ballot proposal. *Id.* at 46. The MML was funded largely from dues assessed against member cities and villages. *Id.* A section of the

Michigan Campaign Finance Act (MCFA), MCL 169.257 (Section 57), prohibited public bodies from spending money directly to influence a ballot proposal. *Id.* The plaintiff alleged the MML's expenditures were a backdoor method for public bodies to influence a ballot proposal without technically violating Section 57. *Id.* However, 14 years earlier, the Attorney General had issued an opinion that the MML did not violate the law by spending funds to influence a ballot proposal, if the MML complied with the MCFA. *Id.* at 46, 48, citing OAG, 1981-1982, No. 5882, p 137 (April 22, 1981). The plaintiff claimed the defendant (the Secretary of State) would not enforce Section 57 against the MML because of the Attorney General's opinion. *Id.* at 46-47. So, rather than pursuing an administrative remedy, the plaintiff sued the Secretary of State in circuit court, requesting a declaratory ruling *Id.* at 49.

On appeal, the Court of Appeals noted, first, that the MCFA does not create a private right of action and that its remedies are the "exclusive means" to enforce the Act. *Id.* at 51, citing MCL 169.215(9). Unlike in this case, the Legislature directed the Secretary of State to implement the MCFA "pursuant to the APA." *Id.*, citing MCL 169.215(1)(e). The Court of Appeals disagreed regarding whether exhaustion was futile, reasoning the Secretary of State could have requested further guidance from the Attorney General, and the Attorney General may have issued a new opinion. *Id.* at 53. Thus, the plaintiff was required to exhaust its administrative remedies. *Id.* at 54.

This case differs from *Citizens* because the relevant statute in *Citizens* (the MCFA) expressly referred to the APA and directed the state agency to implement the MCFA under the APA's provisions. Part 353 does not contain a similar directive. Moreover, the plaintiff in *Citizens* had requested a declaration of the applicability of a law to a particular set of facts. Here,

plaintiffs request a declaration that the relevant statute does not authorize EGLE to act to enforce the permit requirement, which is an enforcement question falling outside the scope of the APA.

This case is more closely aligned with *Huggett v Dep't of Natural Resources*, 232 Mich App 188; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001). In *Huggett*, the plaintiffs purchased property that was previously deeded to the Michigan National Bank from the state of Michigan and included a condition that the land be used for peat farming. *Id.* at 190. The plaintiffs wanted to construct a cranberry farm. *Id.* The plaintiffs requested a wetland permit from the defendant (the DNR) to begin the project, and when that permit was denied, the plaintiffs sued the DNR in the circuit court for declaratory relief. *Id.* at 190-191.

The Court of Appeals held the circuit court had jurisdiction over the case. *Id.* The Court explained that the plaintiffs did not challenge the denial of the permit, but rather, alleged that the defendant had no authority to act in the first place, so exhaustion of administrative remedies was not required because the DNR's final decision would not provide an adequate remedy. *Id.* at 191-192. The issue was essentially a question of law, which "did not call for extensive findings of fact or technical expertise." *Id.* at 193. Thus, "requiring exhaustion of the available administrative remedies would have been nothing more than a formal step on the way to the courthouse." *Id.* (quotation marks and citation omitted).

Like with *Huggett*, this case also involves a question of law regarding whether Part 353 required plaintiffs to obtain a permit and special exception before performing the repair work in question. Plaintiffs are not challenging the denial of a permit or special exception, which would require the agency's technical expertise. For the reasons discussed earlier, requiring plaintiffs to request a declaratory ruling in this instance would have been nothing more than a formal step

before suing in this Court. Accordingly, plaintiffs were not required to request a declaratory ruling before suing EGLE in this Court. This Court has subject-matter jurisdiction over this case under MCL 600.6419. The Court DENIES EGLE's motion for summary disposition under MCR 2.116(C)(4).

B. PERMIT EXEMPTION UNDER MCL 324.35306(4)

Next, EGLE moves under MCR 2.116(C)(8) to dismiss Count I of the complaint, which relates to the permitting exemption in MCL 324.35306(4), on the basis that plaintiffs cannot establish that the Drains constituted "other utility facilities." EGLE also moves for summary disposition under MCR 2.116(C)(10) on the basis that plaintiffs did not fulfill the other requirements for a permit exemption outlined in MCL 324.35306(4) when performing the work on the Tanner Creek Drain. Plaintiffs, in contrast, move for partial summary disposition of the counterclaim under MCR 2.116(C)(10) on the basis that the Drains are "other utility facilities" exempt from permitting requirements, as outlined in Section 35306(4).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint on the sole basis of the allegations contained in the pleadings, and examines whether the plaintiff has stated a claim on which relief may be granted. *Rataj v City of Romulus*, 306 Mich App 735, 746-747; 858 NW2d 116 (2014). "When considering such a motion, a trial court must accept all factual allegations as true[.]" *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). The Court may only grant the motion "when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The

evidence submitted by the parties is reviewed in a light most favorable to the nonmovant. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (citation and quotation marks omitted). A genuine issue of material fact exists when the "record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (quotation marks and citation omitted). "When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

The parties ask this Court to interpret several provisions of Part 353 and the APA within the context of this issue. Statutory interpretation is a matter of law. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). When interpreting a statute, the primary goal of the Court is to determine and give effect to the Legislature's intent. *O'Connor*, ___ Mich App at ___; slip op at 2. The Court considers provisions of a statute in the context of the entire statute and "must 'give effect to every word, phrase, and clause . . . [to] avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *Id.* at ___; slip op at 2 (citation omitted; alteration in original). If the statutory terms are not defined, the Court will examine and determine their plain and ordinary meaning, considering the context, and may also consult a dictionary to determine their plain meaning. *Id.* at ___; slip op at 2.

As part of the model zoning plan,[1] Part 353 generally requires an EGLE-issued permit to initiate a "use" within a critical dune area. MCL 324.35304 provides, in relevant part, "A person shall not initiate a use within a critical dune area unless the person obtains a permit from the local unit of government in which the critical dune area is located or the department [EGLE] if the department issues permits as provided under [MCL 324.35304(7).]" MCL 324.35304(1). Additionally, if the use will be on a slope within a critical dune area steeper than "a 1-foot vertical rise in a 3-foot horizontal plane" (i.e., a 33% slope), a special exception (or variance) is required. MCL 324.35316(1)(b) and MCL 324.35304(7). The term "use" is defined, in relevant part, to mean "a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area or a contour change done or caused to be done by a person." MCL 324.35301(k).

Part 353 provides that in an emergency, a local government (or, presumably, EGLE) *may* issue a conditional permit before a 20-day notice period contemplated under the statute has expired. MCL 324.35304(1)(e). But the statute does not outline any procedures for obtaining a permit or special exception under emergency circumstances or provide any mandatory time frame under which EGLE must act.

MCL 324.35306(4) outlines the following permitting exemption:

> A use needed to maintain, repair, or replace existing utility lines, pipelines, or other utility facilities within a critical dune area that were in existence on July 5, 1989, or were constructed in accordance with a permit under this part, is exempt for purposes for which the permit was issued from the operation of this part or a local

[1] The parties agree that because the local government did not implement its own zoning ordinance in relation to the critical dune area in question, EGLE administered the model zoning plan as contemplated in MCL 324.35303(1)(b).

ordinance approved under this part if the maintenance, repair, or replacement is completed in compliance with all of the following:

(a) Vehicles shall not be driven on slopes greater than 1-foot vertical rise in a 3-foot horizontal plane.

(b) All disturbed areas shall be immediately stabilized and revegetated with native vegetation following completion of work to prevent erosion.

(c) Any removal of woody vegetation shall be done in a manner to assure that any adverse effect on the dune will be minimized and will not significantly alter the physical characteristics or stability of the dune.

(d) To accomplish replacement of a utility pole, the new pole shall be placed adjacent to the existing pole, and the existing pole shall be removed by cutting at ground level.

(e) In the case of repair of underground utility wires, the repair shall be limited to the minimal excavation necessary to replace the wires by plowing, small trench excavation, or directional boring. Replacement of wires on slopes steeper than 1-foot vertical rise in a 4-foot horizontal plane shall be limited to installation by plowing or directional boring only.

(f) In the case of repair or replacement of underground pipelines, directional boring shall be utilized, and if excavation is necessary to access and bore the pipeline, the excavation area shall be located on slopes 1-foot vertical rise in a 4-foot horizontal plane or less.

There is no dispute that both Drains were in existence on July 5, 1989. However, the parties dispute whether the Drains are "other utility facilities" for purposes of this statutory exemption, as well as whether the Drain Commissioner complied with MCL 324.35306(4)(a) through (4)(c) when performing the repair work on the Tanner Creek Drain. The parties acknowledge that Subdivisions (d) through (f) do not apply to these Drains. However, as discussed later, these Subdivisions shed light on the meaning of the term "other utility facility."

Turning first to the issue whether the Drains are "other utility facilities," Part 353 of NREPA does not define the term "utility facility." Thus, the parties both start with dictionary definitions to support their interpretation of the terms. *Black's Law Dictionary* (11th ed) defines a "utility," in relevant part, as "[a] business enterprise that performs an essential public service

and that is subject to governmental regulation," "[a] company that provides necessary services to the public, such as telephone lines and service, electricity, and water," or "[a] person, corporation, or other association that carries on an enterprise for the accommodation of the public, the members of which are entitled as a matter of right to use the enterprise's facilities."

The *Merriam-Webster Collegiate Dictionary* (11th ed) defines the term "utility," in relevant part, as "fitness for some purpose or worth to some end," and "something useful or designated for use." In the context of a public utility, the term is defined as "a service (as light, power, or water) provided by a public utility," and "equipment or a piece of equipment to provide such service or a comparable service." *Id.* The term "facility" is defined, in relevant part, as "something that makes an action, operation, or course of conduct easier," and "something (as a hospital) that is built, installed, or established to serve a particular purpose." *Id.*

Taking these definitions into consideration, a utility facility is best understood as a piece or pieces of equipment, such as poles, lines, or pipes, that serve the function of conveying a utility, such as gas, light, or water, to the public. Both Drains are preexisting creeks that were modified to collect stormwater runoff. There is no doubt the Drains provide a service to the public. But they are not equipment, such as a utility line or a pipeline, conveying a utility to the public. Therefore, the plain language of MCL 324.35306(4) does not support plaintiffs' interpretation of the statute.

Additionally, under the interpretive canon of *ejusdem generis*, when general words follow a list of particular subjects, "the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." *Rott v Rott*, 508 Mich 274, 299

n 11; 972 NW2d 789 (2021) (quotation marks and citation omitted). The term "utility facility" follows two more specific words in a list. When considered in context, the term utility facility must be interpreted like a utility line or a pipeline to mean a constructed line or piece of equipment designed to convey power, gases, or solids. More information about the scope of the terms in "utility facility" can be derived from Subdivisions (d) through (f) of the statute. These Subdivisions refer to "pipelines," "utility lines," and "utility poles," which further supports that the phrase "utility facility" was meant to include equipment or items such as lines, pipes, and poles, as opposed to creeks or streams that were modified to better collect stormwater runoff. Therefore, the context of the statute provides further support for EGLE's interpretation.

Other sections of NREPA support EGLE's position. As the Court of Appeals has explained, "provisions [of a statute] must be read in the context of the entire statute so as to produce a harmonious whole . . . and identical language in various provisions of the same act should be construed identically[.]" *People v Wiggins*, 289 Mich App 126, 128-129; 795 NW2d 232 (2010). For example, Part 303 of NREPA, which governs Wetland Protection, expressly exempts from its permitting requirements "[m]aintenance of a drain that was legally established and constructed pursuant to the drain code of 1956 . . . if the drain was constructed before January 1, 1973 or under a permit issued pursuant to this part." MCL 324.30305(2)(i). Part 301 of NREPA, which governs Inland Lakes and Streams, also exempts from its permitting requirement, with certain exceptions, "[m]aintenance of a drain that either was legally established and constructed before January 1, 1973, pursuant to the drain code of 1956 . . . ." MCL 324.30103(1)(g). The fact that the Legislature expressly exempted drains from permitting requirements in other parts of NREPA shows that the Legislature knew how to refer to drains, and chose not to do so for purposes of Part 353.

Plaintiffs argue the sections of NREPA were enacted at different times and accumulated from various preexisting statutes. See 1994 PA 451. However, when NREPA was enacted in 1994, and later amended in 1995 to include Part 353, the statute incorporated Parts 301, 303, and 353 to create a comprehensive statutory scheme. See 1994 PA 451 and 1995 PA 59. Additionally, Subsection (4) was added to Section 35306 in 2012, nearly 20 years after NREPA was enacted. So, the Legislature was aware of Parts 301 and 303 of NREPA when it amended the statute to include the exemption to the permit requirement outlined in MCL 324.35306(4). See MCL 324.35306, as amended by 2012 PA 297. Reading these parts of NREPA in harmony supports EGLE's position that a stormwater drain is not a utility facility under Part 353.

Plaintiffs also rely on the Michigan Supreme Court's decision in *Co Drain Comm'r of Oakland Co v Royal Oak*, 306 Mich 124; 10 NW2d 435 (1943). The Michigan Supreme Court addressed the Oakland County Drain Commissioner's request for a declaration allowing him to construct a sanitary and sewage disposal system, or drainage district, that was designed to run through several municipalities. *Id.* at 129-130. Throughout its opinion, the Supreme Court referred to the potential sewage drainage district as a "public utility." *Id.* at 144, 147. Specifically, one of the issues was whether the plaintiff's proposed activities would violate several provisions of the version of the Michigan Constitution in effect at the time, Const 1908, art 8, §§ 25, 28, and 29, which related to public utilities. *Id.* at 144. The Court did not, however, analyze whether a drain constitutes a public utility, which was not a matter of dispute. More importantly, *Co Drain Comm'r* is distinguishable because that case involved a sewage disposal system, which is different in nature and functionality from a stormwater drain.

The parties also dispute whether the Tanner Creek Drain is a natural stream, or an artificial drainage ditch constructed from a preexisting waterway. EGLE relies on Chamberlin's November

14, 2023 affidavit to support that the Tanner Creek Drain was a natural watercourse that was designated a county drain in 1889. Plaintiffs, in contrast, point to historical documents to support that some construction occurred to convert the Tanner Creek from a natural watercourse to a stormwater drain. The construction included clearing, deepening, widening, and straightening the creek to make it more suitable to serve as a stormwater collection drain. The parties do not highlight what modification, if any, may have been made to the Painterville Drain. Regardless, even assuming both waterways were modified in some respect to serve as better stormwater drains, the fact remains the Drains are not of the same character as utility lines or pipelines.

Accordingly, MCL 324.35306(4) did not provide an exemption to the permit requirement for the work performed on the Tanner Creek Drain or the work to be performed on the Painterville Drain. For this reason, the Court does not address whether the other criteria outlined in MCL 324.35306(4)(a)-(c) were met. The Court GRANTS EGLE's motion for partial summary disposition of Count I of the complaint.

C. PERMIT EXEMPTION UNDER MCL 324.35306(1)

The parties also filed competing motions for summary disposition regarding whether the work on the Drains constitutes a lawful preexisting use under MCL 324.35306(1), and whether MCL 324.35306(1) is an exemption to the general permitting requirement.

MCL 324.35306(1) states:

> The lawful use of land or a structure, as existing and lawful within a critical dune area at the time the department implements the model zoning plan for a local unit of government, may be continued although the use of that land or structure does not conform to the model zoning plan. The continuance, completion, restoration, reconstruction, extension, or substitution of existing nonconforming uses of land or a structure may continue upon reasonable terms that are consistent,

to the extent possible, with the applicable zoning provisions of the local unit of government in which the use is located.

To start, the Court rejects EGLE's argument that this statute is not an exemption to the permitting and special-exception requirements outlined in Section 35304. EGLE does not challenge that the Drains were lawful preexisting uses of the land. The statute provides the lawful uses of the land that existed when EGLE implemented the model zoning plan may be continued even if those uses to not conform to the model zoning plan. Part 353 defines the model zoning plan as including "the model zoning plan provided for in sections 35304 to 35309 and 35311a to 35324." MCL 324.35301(f). Section 35304 requires a permit to initiate a use in a critical dune area and outlines when EGLE may issue special exceptions. MCL 324.35304(1) and (7). See also MCL 324.35317 (outing the procedure for granting a special exception). Therefore, MCL 324.35306(1) is an exemption to the permitting and special-exception requirements of the model zoning plan.

EGLE argues the title to MCL 324.35306 contains two categories, "[e]xisting lawful use of land or structures," and "exemptions." EGLE suggests the distinction between these two phrases means that a lawful use is not the same thing as a permitting exemption. However, editorial catch lines are not part of the statute or relevant to the interpretation of the statute. MCL 8.4b ("The catch line heading of any section of the statutes that follows the act section number shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate . . . ."). The Court therefore declines to read a distinction into the language of the statute based on the catch line alone. Instead, the language of MCL 324.35306(1) supports that it is an exemption to the permitting requirement.

MCL 324.35306(1) allows work on a preexisting, nonconforming use of the land to continue on reasonable terms. MCL 324.35306(1) does not provide EGLE the authority to impose or dictate the reasonable terms. In contrast, another statute within Part 353, MCL 324.35308, *does* give EGLE the authority to outline what terms are reasonable. Section 35308 governs prohibited uses in a critical dune area. MCL 324.35308(1). The statute adds, "Uses described in subsection (1) that are lawfully in existence at a site on July 5, 1989 may be continued. The continuance, completion, restoration, reconstruction, extension, or substitution of those existing uses shall be permitted *upon reasonable terms prescribed by the department*." (Emphasis added.) Thus, the Legislature expressly granted EGLE the authority to describe what terms are reasonable. The "prescribed by the department" language is absent from MCL 324.35306(1), which indicates the Legislature did not intend for EGLE to determine in advance whether a restoration or reconstruction of a preexisting, nonconforming use is on reasonable terms.

This conclusion does not mean, however, that plaintiffs had carte blanche authority to engage in any activities they deemed appropriate. The work had to be reasonable. The Legislature's use of the legal term of art "reasonable" suggests a balance between the need of individuals like the Drain Commissioner who are granted authority to take swift emergency actions to respond to dangerous conditions on the land and the public's interest in protecting and maintaining the invaluable public resource of the critical dune areas of this State. See MCL 324.35302(a) and (b) (outlining the purposes of Part 353). If the work extended beyond what was reasonable to address the emergency issue regarding the soil erosion, then plaintiffs would be in

violation of Part 353. The remedy for a violation of Part 353, as outlined in MCL 324.35310, is for EGLE to bring an enforcement action.[2]

A genuine issue of material fact exists on whether the work performed on the Tanner Creek Drain (and the anticipated work on the Painterville Drain) was reasonable. The parties dispute whether the work on the Tanner Creek Drain expanded the Drain beyond its existing footprint. MCL 324.35306(1) does not define what measures are "reasonable," but an important clue comes later in that statute, when the Legislature outlined the terms for maintaining or repairing utility facilities without a permit, and include stabilizing the area with native vegetation and avoiding driving vehicles on steep slopes. See MCL 324.35306(4). While the terms outlined in MCL 324.35306(4) do not necessarily encompass every act that may be considered reasonable, they provide context as far as what steps the Legislature may have viewed as reasonable to protect the critical dune areas. The statute also contemplates that the use should comply with the applicable zoning provisions for the local government where the use is located. See MCL 324.35306(1).

As far as whether the work complied, to the extent possible, with the zoning provisions of the local government, plaintiffs cite Bridgman Zoning Ordinance § 7.04(A), which requires that any nonconforming use of land "shall not be enlarged or extended beyond the use existing at the time of enactment of the Ordinance." The parties have submitted competing expert affidavits and other documentary evidence on the issue whether the work enlarged or extended the use of the Tanner Creek Drain.

[2] The Court notes, however, that the most practical way for future parties to ensure that the work is performed on reasonable terms, in compliance with Part 353, is to engage EGLE, the subject-matter expert, from the outset.

In his November 14, 2023 expert affidavit, Chamberlin stated the work on the Tanner Creek Drain did not account for the goals of protecting, preserving, and restoring the critical dune area. Chamberlin maintains that plaintiffs did not employ proper bank-stabilization methods, which was likely to interrupt the flow of sediment. Chamberlin also stated that he had observed signs of erosion and the dislodging of stones into Tanner Creek. He opined, "The Commissioner's impacts changed the use and expanded the Tanner Creek Drain within the [critical dune area] beyond the scope of any previous disturbance to the resource know[n] to EGLE."

Chamberlin executed a February 20, 2024 affidavit after conducting another site inspection in early 2024, where he opined the work performed on the Tanner Creek Drain did not comply with the requirements outlined in MCL 324.35306(4)(a)-(c), based on his observation of the conditions at the site. He stated that vehicles were driven on steep slopes, that plaintiffs failed to stabilize the disturbed areas with native vegetation, and that plaintiffs failed to remove woody vegetation in a way that avoided harming the dune area.[3] As discussed earlier, while these requirements are specific to MCL 324.35306(4), they provide insight into whether the work was performed on reasonable terms.

[3] Plaintiffs argue that Chamberlin's February 20, 2024 affidavit was untimely under MCR 2.302(E)(1)(a)(*i*). This court rule provides that a party must supplement or correct a disclosure or response under MCR 2.302(A) "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]" EGLE explains that Chamberlin first learned of plaintiffs' engineering reports describing the work performed on the Tanner Creek Drain during his December 2023 deposition. He completed a follow-up inspection in early 2024, which prompted his February 20, 2024 affidavit. Considering this explanation, EGLE has supplemented its expert disclosures in a timely manner in compliance with MCR 2.302(E)(1)(a)(*i*).

Jeremy Jones, an EGLE-employed analyst with a background in Geographic Information Systems, used a software system to create a series of maps of the conditions at the Tanner Creek Drain. Based on his work, Jones stated that "the stream itself was changed or relocated during the 2021 work." He also opined the riprap was placed in new areas along the Tanner Creek Drain, and that some trees and vegetation were removed to alter the path of the creek. Jones's opinions are supported by aerial maps he prepared of the area, which EGLE maintains show that plaintiffs initiated a use outside of the original footprint of the Tanner Creek by placing riprap in areas that were not previously part of the Drain or its banks.

Plaintiffs do not challenge the qualifications of either expert under the standard outlined in MRE 702. Instead, plaintiffs challenge the accuracy of the expert opinions. Specifically, plaintiffs argue Jones's conclusions from the aerial imaging were not accurate. They argue Jones had no firsthand knowledge of the work that was performed on the Tanner Creek Drain. They challenge the accuracy of Chamberlin's opinions based on a site inspection he conducted several years after the work was performed. They also contend EGLE's experts examined only a portion of the Tanner Creek Drain and did not account for work in other sections of the Drain (or the proposed work on the Painterville Drain). However, the weight of the expert testimony and the credibility of the expert witnesses are issues for the trier of fact. See *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 101; 776 NW2d 114 (2009) ("[A] trial court's doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility.") (quotation marks and citation omitted).

On the other hand, plaintiffs have met their burden to present evidence showing that a genuine issue exists for trial. This evidence includes the reports from the Drain Commissioner's

engineering contractor outlining the issues with the Tanner Creek Drain in 2021. Plaintiffs also submitted expert affidavits. Plaintiffs' expert, James F. Burton, addresses EGLE's contention that the work modified the course of the Tanner Creek. He states that various factors altered the Tanner Creek Drain, which would make it "surprising if Tanner Creek Drain were in almost the exact same location as a prior natural watercourse." He opined the new stone revetments "reflect standard engineering practice of using appropriately-sized angular stone revetment." Burton opined, "The work completed by the Commissioner appears to respect the geometry of the Drain and preserve its ability to transport sediment, while protecting the Drain from excessive or threatening erosion." He opined that if the erosion that occurred in 2021 was like what Burton saw in 2023, "then the Commissioner's method of addressing that erosion in the areas at issue in this lawsuit was reasonable and the most appropriate way to stabilize the banks."

Plaintiffs' second expert, Stuart Kogge, disagreed with Chamberlin's conclusions, including about how the work affected the habitat and biological diversity near the Tanner Creek Drain. Plaintiffs have also submitted evidence supporting that previous Drain Commissioners have approved similar maintenance and repair work going back about 100 years. The parties dispute the weight of that evidence, but the weight of the evidence would be a matter for trial. See *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

The competing factual and expert testimony regarding whether the Drain Commissioner took appropriate steps to remedy the issues with the Tanner Creek Drain and whether the measures expanded the footprint of the Drain are genuine issues of material of fact that bear on whether the work was performed on reasonable terms for purposes of MCL 324.35306(1). If the work was not performed in compliance with MCL 324.35306(1), then plaintiffs would be in violation of Part 353, as EGLE alleges in its counterclaim. Accordingly, the Court DENIES EGLE's motion for

summary disposition of Count II of the complaint and DENIES plaintiffs' motion for summary disposition of EGLE's counterclaim.

III. CONCLUSION

For the reasons discussed, IT IS ORDERED that EGLE'S August 4, 2023 motion for summary disposition for failure to exhaust administrative remedies is DENIED. Plaintiffs' countermotion under MCR 2.116(I)(2) is GRANTED to the extent that plaintiffs request that this Court declare it has subject-matter jurisdiction.

IT IS FURTHER ORDERED that EGLE's October 9, 2023 motion for partial summary disposition of Count I of the complaint is GRANTED. Count I of the complaint is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Berrien County Drain Commissioner's October 23, 2023 motion for partial summary disposition of the counterclaim is DENIED.

IT IS FURTHER ORDERED that Berrien County Drain Commissioner's February 21, 2024 motion for summary disposition of the counterclaim is DENIED. EGLE's countermotion under MCR 2.116(I)(2) is DENIED.

IT IS FURTHER ORDERED that EGLE's February 21, 2024 motion for summary disposition is DENIED. Plaintiffs' countermotion under MCR 2.116(I)(2) is DENIED.

This is not a final order that dispenses with the final claim or closes the case.

Date: May 23, 2024

James Robert Redford
Judge, Court of Claims