STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN FARM BUREAU, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant-Cross-Appellee.

Supreme Court No. 165166

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.

BRIEF ON APPEAL OF APPELLANT-CROSS-APPELLEE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On May 31, 2023, this Court granted the Defendant-Appellant/Cross-Appellee Michigan Department of Environment, Great Lakes, and Energy (Department)'s leave to appeal the Court of Appeals' September 15, 2022 published decision upholding the Court of Claims' dismissal of Plaintiffs-Appellees/Cross-Appellants' (Industry) challenge to the 2020 National Pollutant Discharge Elimination System (NPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs) (referred to herein as the 2020 General Permit) while the contested case before Administrative Law Judge Daniel L. Pulter was pending. Accordingly, this Court has jurisdiction to hear this appeal under MCR 7.303(B)(1) and MCL 600.215(2). See also Const 1963, art 6, §4 (giving the Supreme Court plenary jurisdiction over the appellate process).

STATEMENT OF QUESTIONS PRESENTED

1. The NREPA authorizes judicial review of wastewater permits only after the conclusion of a contested case proceeding. Industry filed a petition for a contested case proceeding to challenge the 2020 General Permit, and while that administrative process was pending, filed for judicial review under MCL 24.264, arguing that new permit conditions were unlawfully promulgated rules. Can Industry use MCL 24.264 to challenge the 2020 General Permit?

   Appellant's answer: No.

   Appellees' answer: Yes.

   Trial court's answer: No.

   Court of Appeals' answer: Yes.

2. Under Part 31, anyone aggrieved by a permitting action may file a petition for a contested case, in accordance with the APA, including the procedures for contested cases laid out in MCL 24.271 through MCL 24.288. The Rule Review Provision authorizes challenges to rules unless the statute governing the agency provides an exclusive procedure or remedy. If permits are subject to challenge under section 64, does MCL 324.3112(5) provide an exclusive remedy for challenges to wastewater permits?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

3. The APA has separate definitions for rules and licenses and lays out separate pathways to challenge these two separate categories of final agency action. The Court of Appeals had no reason to reach this merits question when it was merely determining the scope (if any) of the Court of Claims' jurisdiction. But, assuming *arguendo* that the Court of Appeals had to decide whether the challenged permit conditions were "rules" or "licenses" under the APA, did it correctly decide that they were "rules" without also analyzing if they were "licenses"?

Appellant's answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	No.
Court of Appeals' answer:	Yes.

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 USC 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 USC 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.

Mich Admin Code, R 323.2189(2)(h) (incorporating 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. . ..

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.

INTRODUCTION

By law, and in accordance with age-old public trust obligations predating Michigan's statehood, the Department must safeguard Michigan's water resources for the People, who are entitled to clean water for swimming, fishing, and drinking. The Court of Appeals revived Industry's improper permit challenge by wrongly determining that the permit conditions were unpromulgated rules, creating a dangerous precedent allowing polluters to avoid permits that protect water quality without any fact-finding about their pollution. This harms the People and disrupts the orderly evidentiary process the Legislature created to challenge permits.

The only way to challenge permits is through the comprehensive contested case procedures set forth in MCL 324.3112(5) (Permit Challenge Provision). MCL 24.264 (Rule Review Provision), which applies to rules, does not apply. Allowing collateral attacks under the Rule Review Provision threatens judicial economy and efficiency. In addition, the Court of Appeals had a jurisdictional question and needed to review only the Permit Challenge Provision to determine the impropriety of Industry's second challenge to the 2020 General Permit. Despite the purely jurisdictional question before it, the Court of Appeals gratuitously reached the merits of the case and wrongly concluded that the permit conditions were rules.

This Court should uphold the Permit Challenge Provision as the exclusive procedure to challenge wastewater permits and vacate the Court of Appeals' erroneous ruling that the Rule Review Provision allows parallel, non-evidentiary judicial review. In the alternative, as previously briefed, this Court could determine that the Department has statutory authority to issue the 2020 General Permit.

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, while explicitly acknowledging 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). And when states set water quality standards more stringent than the federal floor, the Clean Water Act requires compliance with those more stringent standards. *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 requires permit writers to use scientific judgment to develop appropriate permit conditions that ensure authorized discharges maintain broadly applicable water quality standards. *Id*. at 351.

The water quality planning and assessment program, described 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 water quality standards, if the EPA approves them, they become "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 meet 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 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,* 503 US at 108.

Michigan Water Quality Standards

Pursuant to both Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq.* (Part 31), and section 303(c) of the Clean Water Act, 33 USC 1313(c), the Department promulgated water quality standards that ensure Michigan's 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 July 14, 2023); see also Attachment 1 (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 Industry's objection to permit conditions specific to TMDLs, (Appellant's App'x p 399), but it lacked a factual record so did not know how much and what type of pollutants were being discharged into watersheds subject to TMDLs, or when. (*Id.*)

Since at least 2010, the Department has included a permit condition in its CAFO general permit that requires permit holders located in certain TMDL watersheds to "evaluate operations and determine additional pollutant control measures." (Compare 2010 General Permit (Attachment 2, p 20) and 2015 General Permit (Attachment 3, p 20), with 2020 General Permit (Appellant's App'x p 219).) 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 thus did not review, that document.

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[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 July 14, 2023).

[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 July 14, 2023).

[4] See, supra, at n2.

NPDES Permits

Under section 402 of the Clean Water Act, all point sources must have NPDES permits. 33 USC 1342. The EPA may delegate the role of issuing NPDES permits to a state when the EPA determines that the state has adequate authority and ability to do so. 33 USC 1342(b). The Department implements Michigan's NPDES permit program under Part 31, its rules promulgated thereunder, which contain state water quality standards, Mich Admin Code, R 323.1041 *et seq.* (Part 4 Water Quality Standards), and other rules promulgated thereunder, which contain its requirements for issuing NPDES permits that safeguard those standards, Mich Admin Code, R 323.2101 *et seq*. (Part 21 Wastewater Discharge Rules.)

"[T]he 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 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 [a]chieve 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)).

The Department may issue NPDES permits as general permits or individual permits. Under the Part 21 Wastewater Discharge Rules, a general permit is defined as "a national permit issued authorizing a category of similar discharges." Mich Admin Code, R 323.2103(a). Though those rules do not define the term "individual permit," they do define the term "general permit," Mich Admin Code, R 323.2103(a), and authorize the Department to 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). Broadly speaking, general permits are a convenience to the regulated industry because it obviates the need to apply for individual permits. Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 Envtl L 1215, 1222 (2008).

CAFOs

Concentrated Animal Feeding Operations, or CAFOs, are industrial agricultural operations that manage large numbers of animals within a relatively small location. CAFOs have 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 from the production area is land applied. Mich Admin Code, R 323.2104(e); R 323.2103(f). The production area includes animal housing, waste containment structures that can hold millions of gallons of liquid waste, and raw materials storage (e.g., feed). 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 discharging pollutants into surface waters, CAFO production areas have many

potential discharge points. Most obviously at the production area, 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). Less obvious is potential runoff from animal housing and feed storage areas, which can run off to surface water if the production area is not properly engineered to route all wastewater to waste storage structures. 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); (Appellant's App'x p 201 (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, which all harms water quality. *Mich Farm Bureau v DEQ*, 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 term as the "land application area." The Department's definition of "land application area" includes land that CAFOs own, rent, or lease, as well as land subject to access agreements. Mich

Admin Code, R 323.2103(f).[5] Like the production area, the land application area presents a risk of water pollution through both surface runoff and infiltration through groundwater. 68 Fed Reg 7181, 7196 (February 12, 2003). Conservation practices such as vegetated buffers and setbacks reduce the risk of surface runoff reaching surface water. 68 Fed Reg 7211 (February 12, 2003). Relatedly, limiting the concentration of phosphorus that CAFOs may build up in fields reduces the amount of harmful phosphorus that can infiltrate through groundwater to surface water. *Id.*

There are just under 300 permitted CAFOs in Michigan that self-reported producing over 3.9 billion gallons of liquid waste in 2020.[6] When the Department began issuing NPDES permits to CAFOs in the early 2000s, there were under 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 CAFOs. 68 Fed Reg 7269 (February 12, 2003) (codified at 40 CFR 9, 122, 123, 412) (2003). Relevant here, those federal regulations include

[5] In this respect, the Department's definition is broader than the federal definition, which does not include land subject to access agreements. 40 CFR 412.2(e) (2003).

[6] EGLE, *Interactive map of regulated CAFOs*, available at https://egle.maps.arcgis.com/apps/webappviewer/index.html?id=0fae269e1c45485f876c99391403bd3e (accessed on July 14, 2023).

requirements for land application of CAFO waste, which the Department 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 intake structures, sinkholes, agricultural well heads, or other conduits to surface waters." 40 CFR 412.4(c)(5) (2003). As an alternative, a CAFO can instead maintain a 35-foot vegetated buffer. 40 CFR 412.4(c)(5)(i) (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 federal effluent limitation guidelines allow permitting authorities discretion in setting technical standards to minimize phosphorous and nitrogen runoff to surface waters. 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.") These guidelines also do not set mandatory winter requirements, allowing permitting authorities to exercise additional discretion in this area as well. (*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.[7] The EPA most recently inspected and approved this delegation in September 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 under Part 31 since 2006, MCL 324.3103(2), the agency has issued thousands of NPDES permits since then, including individual and general permits. The Part 21 Wastewater Discharge Rules, which were duly promulgated before the 2006 deadline, lay out a generally applicable NPDES permitting framework, with industry-specific requirements. Mich Admin Code, R 323.2196; Mich Admin Code R, 323.2189(2)(m).

[7] United States EPA, *NPDES State Program Authority*, available at https://www.epa.gov/npdes/npdes-state-program-authority (accessed on July 14, 2023).

Specific to CAFOs, the Part 21 Wastewater Discharge 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. 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); R 323.2189(2)(m). They also make clear that land application, including wintertime land application, is prohibited if it may result in CAFO waste reaching surface water. Mich Admin Code, R 323.2196(5)(a)(ix)(A). They also prohibit CAFOs from manifesting their waste to third parties who do not "properly" land apply it. Mich Admin Code, R 323.2196(5)(e)(v).

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 Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 552–553 (2008). 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 part of the general permitting process that ensures the Department reviews each CAFO's potential discharges before authorizing them under a general permit.

Administrative Review under NREPA

If a person is "aggrieved" by the Department's reissuance of a permit, he may seek a review of the Department's decision by requesting a contested case hearing under the Permit Challenge Provision. MCL 324.3112(5) (A person who is aggrieved by . . . the reissuance . . . 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 request a contested case hearing on the matter pursuant to the administrative procedures act[.]")

During a contested case proceeding, the ALJ hears the evidence, including technical documentary evidence and witness testimony, and determines if the permit was lawfully issued. MCL 324.1317(1). If any party is dissatisfied with the outcome, it can seek review by an environmental permit review panel under MCL 324.1317(1). While no additional evidence may be introduced during this second stage of administrative review, the panel "may adopt, remand, modify, or reverse" the tribunal's decision, which then becomes the final decision of the Department. MCL 324.1317(4). After the agency issues a final permit, whether through a

contested case, or through a contested case and additional panel review, it is subject to judicial review. *Id.*; Const 1963, art 6, § 28; MCL 24.301–306.

Specific to general NPDES permits, once the Department provides an individual polluter with authorization to discharge pursuant to a general permit, that authorization itself is also subject to challenge under MCL 324.3113(c) and Mich Admin Code, R 323.2192(c). Allowing two rounds of contested case proceedings on what is ostensibly the same permit makes sense because certificates of coverage contain individualized requirements. Permittees are not required to challenge a general permit before challenging their individual authorization to discharge; instead, they can wait until the Department rules on their specific application to discharge under a general permit before initiating a contested case.

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.[8] Any permitted 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)).

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

[8] See USEPA Agency Review Letter (Attachment 4.)

(fewer than half of Michigan's permitted CAFOs) filed a petition for a contested case hearing on May 26, 2020, challenging certain new conditions in the 2020 General Permit under the Permit Challenge Provision. Their petition began by claiming:

> This is a case of administrative overreach that arises out of MEGLE's imposition of novel and industry-altering set of rules on Michigan's CAFOs in excess of MEGLE's legislatively-delegated authority, contrary to governing federal and state laws, contrary to the United States and Michigan constitutions, without sufficient factual justification, and in an arbitrary and capricious manner.

(Attachment 5, Pet for a Contested Case Proceeding, ¶ 1.) They also claimed that the "newfangled conditions" had "minimal environmental benefit and have a dubious connection to protecting the quality of the waters of the State." (*Id.* at ¶ 2.)

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 (collectively, Intervenors) successfully moved to intervene in the contested case to support the Department. ALJ Pulter held a scheduling conference, and all parties agreed that filing motions for summary disposition before putting on testimony was unlikely to resolve the case.

During the contested case proceeding, Department experts spent hundreds of hours preparing and presenting testimony and exhibits demonstrating the importance of the 2020 General Permit's conditions and the need for additional, more stringent permit conditions related to manifesting, land application data collection, and production area groundwater monitoring. Undersigned counsel

submitted briefing demonstrating that Part 31 authorizes both the challenged conditions and the additional conditions the Department requested through the contested case proceeding. Intervenors presented evidence supporting the 2020 General Permit while also arguing that additional, more stringent requirements were necessary to safeguard water quality. In particular, the Intervenors sought a complete ban on wintertime spreading, additional requirements for manifesting CAFO waste, mandated use of the MPRA, prohibition on land application of liquid CAFO waste to tiled fields, mandated testing of tile drain discharges, and additional requirements for waste storage structures. Industry presented evidence challenging the 2020 General Permit and sought a new permit condition defining the term "operational control" with reference to a federal regulation expressly not incorporated into the Part 21 Wastewater Discharge Rules. The parties pre-filed direct and rebuttal testimony, and ALJ Pulter presided over two and a half weeks of testimony, including both cross- and redirect examination. In total, 29 witnesses presented testimony accompanied by well over 300 exhibits.

Approximately two and a half months after the contested case began, Michigan Farm Bureau led an overlapping, but not identical, group of parties in filing a complaint in the Court of Claims under the Rule Review Provision. (Appellant's App'x pp 103–235.) Their complaint included the same allegations brought in the contested case—including the claim that certain permit conditions were unlawfully promulgated rules—but was now styled as a complaint for declaratory judgment under the Rule Review Provision. They also cited documents

Industry later proffered, and the Department and Intervenors challenged, in the contested case. See, e.g., (Appellant's App'x p 167, ¶ ¶ 270, 271 citing *Nutrient Recommendations for Crop Fields in Michigan* to support Industry's contested assertion that allowing soil phosphorus to build up to 150 parts per million (ppm) protects surface water).

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 Industry had not exhausted its administrative remedies. In addition, 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." (Appellant's App'x p 250.) 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 a contested case. (Appellant's App'x p 007.) The Court of Claims stated, as an initial matter, "[t]he manner for seeking declaratory judgment under MCL 24.264 does not apply to the instant case." (Appellant's App'x p 021.)

Industry 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. But the record in the Court of Appeals was nonexistent.

After merits briefing concluded in the contested case, but before ALJ Pulter could issue his ruling, the Court of Appeals issued a published decision affirming the Court of Claims' decision to dismiss Industry's case for lack of jurisdiction and failure to exhaust administrative remedies. (Appellant's App'x p 395.) But instead of stopping there, the Court of Appeals turned to the merits. In doing so, the Court of Appeals decided that Industry had to file a request for a declaratory ruling with the Department under MCL 24.263. In addition, the Court of Appeals agreed with Industry that the new permit conditions should have been promulgated as rules (though there was no factual record to support this decision) and that a declaratory action under the Rule Review Provision could not proceed before a declaratory ruling request. *Mich Farm Bureau v Dep't of Environment, Great Lakes, and Energy*, __ Mich App __ (2022) (Docket No. 356088); slip op at 8.

The Court of Appeals began its opinion by stating that MCL 324.3106 authorized the Department to promulgate "numerous administrative rules[.]" *Id.* at __; slip op at 6. In addition to the CAFO-specific rule, Mich Admin Code, R 323.2196, the Court of Appeals also identified Mich Admin Code, R 323.2137 as one of those rules. *Id.* at __; slip op at 4, n3. However, the Court of Appeals failed to identify the related incorporated federal regulations. *Id.*; see also Mich Admin Code, R 323.2189(2)(h) (incorporating 40 CFR 122.44 (2005) (requiring states to include more stringent restrictions than federal requirements when necessary to achieve water quality standards); see also Mich Admin Code, R 323.2189(m) (incorporating 40 CFR 412 (2003) (federal requirements for CAFOs.))

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 Water Quality Standards were "minimum water quality requirements" promulgated, among other things, under Part 31); and see Mich Admin Code, R 323.1050 (standard for physical characteristics); R 323.1055 (standard for taste and odor); R 323.1060(2) (standard for nutrients); R 323.1062(1) and (2) (standards for pathogenic microorganisms); R 323.1064(1) and 323.1065(1) and (2) (standards for dissolved oxygen).

As a result of ignoring the rules that form the basis of the 2020 General Permit, the Court of Appeals concluded that the 2020 General Permit conditions were "rules" rather than "licenses" within the meaning of MCL 24.205(a). *Id.* at __; slip op at 8 (No discussion of the term "license" or MCL 24.205(a).) The Court of Appeals also stated, without analysis, that the pending contested case proceeding under the Permit Challenge Provision could proceed parallel to the challenge under the Rule Review Provision. *Id.* at __; slip op at 4. The Court of Appeals focused its analysis on Industry's argument that the challenged conditions were unlawfully promulgated rules, without regard for how its conclusion related to the ongoing contested case proceeding or the general structure of administrative review under the NREPA.

In its analysis of those 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. *Id.* at __; slip op at 6–8.[9] The Court of Appeals ignored both state and incorporated federal requirements that require the Department 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 R 323.2189(2)(h) (incorporating 40 CFR 122.44 (2005) by reference)).) The Court of Appeals also did not discuss the meaning of certain terms in Mich Admin Code, R 323.2196 and how they related to and authorized the challenged permit conditions. (*Id.* (failing to analyze terms like "proper agricultural utilization of nutrients" and "determine suitability for land application" in Mich Admin Code, R 323.2196(5)(a)(viii).)) 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 __; slip op at 8; but see *id.* at__; slip op at 2, listing all contested conditions.

The Court of Appeals also erred in citing the wrong provision in Part 31 related to administrative and judicial review of sewage disposal permits. *Id.* at __; slip op at 4, (citing MCL 324.3113 instead of MCL 324.3112(5).) The appellate court also cited the administrative rule regarding contested cases for *coverage* under general permits, which does not yet apply because the Department has not issued a

[9] The 2020 General Permit is included at Appellant's App'x pp 190–233, but neither the 2010 nor the 2015 General Permits are contained therein. They are both included as Attachments 2 and 3, respectively, for this Court's convenience.

single certificate of coverage under the challenged 2020 General Permit. *Id.*, (citing Mich Admin Code, R 323.2192(c)).

Within days, ALJ Pulter *sua sponte* ordered supplemental briefing on the effect of the Court of Appeals' decision on the contested case. In its brief, the Department argued that the Court of Appeals' reasoning about the lawfulness of the permit condition was dicta because the appellate court gratuitously opined on the merits, despite acknowledging its lack of jurisdiction. The Court of Appeals' reception of Industry's subsequent motion practice revealed that it did not view its reasoning as dicta, necessitating this appeal.

Next, Industry filed a motion for reconsideration in the Court of Appeals based in part on its argument that seeking a declaratory ruling would be futile. (Appellant's App'x p 423.) The Department concurred with the motion, but for different reasons. Specifically, the Department argued that the opinion conflicted with the plain language of the Administrative Procedures Act, MCL 24.201 *et seq*., (APA), which establishes contested case proceedings as the 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. (Appellant's App'x pp 432, 436–437.)

The Court of Appeals 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." (Appellant's App'x p 443.) The Court of Appeals also stated, without analysis, that the Department had not demonstrated "palpable error." (*Id.* at 444.)

Before the parties could seek a second round of supplemental briefing in the contested case proceeding, the Department sought this Court's leave to file this appeal. Shortly thereafter, Industry 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 that the new conditions of the 2020 General Permit are invalid administrative rules. On the same day of filing leave to seek appeal from this Court, the Department denied Industry's request because the agency is prohibited from issuing a declaratory ruling where "relevant facts necessary to issue a declaratory ruling are contested." Mich Admin Code, R 324.81. Industry then filed an appeal of that denial to the Court of Claims. (Attachment 6.)

Both that case and the pending contested case proceedings are stayed by stipulation while this Court determines this appeal.

STANDARD OF REVIEW

The standard of review of a lower court's grant of summary disposition pursuant to MCR 2.116(C)(8) is *de novo*. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672 (2006). Although this case was determined on a motion for summary disposition and appealed by Industry on that basis to the Court of Appeals, the court's opinion raised questions of law regarding how 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 2020 General Permit cannot be challenged by way of a declaratory judgment under the Rule Review Provision because the Permit Challenge Provision provides a more specific fact-driven procedure and allowing a collateral attack under the Rule Review Provision defeats judicial economy and efficiency.

Attacking a permit through a declaratory ruling under the Rule Review Provision is improper because a more specific and comprehensive procedure exists under the Permit Challenge Provision. Further, collaterally attacking a permit via a declaratory ruling under the Rule Review Provision would inhibit judicial economy and threaten inconsistent results between the proceedings.

A. The more specific procedure provided in the Permit Challenge Provision prevails over the general procedure in the Rule Review Provision.

As a general matter, there are three potential avenues to challenge final agency action: review under an express statutory procedure, review under the APA, or review under the Revised Judicature Act (RJA), MCL 600.101 *et seq*. *Hopkins v Mich Parole Bd*, 237 Mich App 629, 637–638 (1999). Where there is no express provision authorizing judicial review, a litigant may seek judicial review only under the APA or the RJA. *Teddy 23, LLC v Michigan Film Office*, 313 Mich App 557, 567

(2015). The opposite is also true—where there is an express provision authorizing judicial review, that express provision is the sole path to judicial review. *Jackson Community College v Mich Dep't of Treasury*, 241 Mich App 673, 682 (2000), citing, among other things, MCL 24.302 and MCL 600.631.

Here, there is an express statutory provision describing how to challenge wastewater permits like the 2020 General Permit. The NREPA lays out a clear path to judicial review. It starts with a contested case proceeding, MCL 324.1317(1), which is an extension of the initial permit 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 DEQ*, 306 Mich App 369, 379 (2014); see also *Kassab v Acho*, 150 Mich App 104, 111 (1986). The path includes an optional additional administrative review by the Environmental Permit Review Commission, MCL 324.1317(2). It ends at the circuit court when all administrative review is complete, MCL 324.1317(7). The APA explicitly acknowledges this statutory framework by stating that "the availability of other administrative remedies, and judicial review are controlled by . . . MCL 324.1315 and MCL 324.1317." MCL 24.288. Nothing in those statutory provisions authorizes parallel or preliminary judicial review. See also *Lakeshore Group v Michigan*, unpublished opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 341310), at 3, lv den 977 NW2d 789 (Mich, 2022), recon den 979 NW2d 330 (Mich, 2022) ("What a plaintiff cannot do, however, is challenge the

[Department's] permitting decision in a lawsuit without first going through the administrative review process.") (Attachment 7.)

If there is no express statutory pathway to judicial review, then a court has no subject-matter jurisdiction. For example, in a similar case, an environmental group sought to challenge a final order from the Department of Natural Resources for failure to comply with the NREPA, despite the absence of a statutory pathway. *Mich Bear Hunters Ass'n, Inc v Mich Natural Resource Comm,* 277 Mich App 512 (2008). In *Michigan Bear Hunters*, the Court of Appeals found that although the plaintiffs properly brought one claim to challenge a final order DNR issued under MCL 324.1701, the Court had no subject-matter jurisdiction over their second claim that the DNR failed to comply with MCL 324.40113a because that provision contained no express judicial review. *Id.* at 524–525. The Court of Appeals did not address whether the circuit court would have had subject-matter jurisdiction over the second claim under the APA or RJA, as the plaintiffs did not include either alternative avenue for judicial review in their complaint. *Id.* at 524.

B. A declaratory ruling under the Rule Review Provision would be an inadequate remedy because reviewing the validity of permit conditions is a fact-intensive process.

A contested case is an exhaustive evidentiary process intended to give an agency the opportunity to correct any errors. As a result, a contested case places the permit in a kind of limbo—final agency action that remains subject to change through the contested case proceeding. *Nat'l Wildlife Federation*, 306 Mich App 369. Judicial review before this process concludes would be fruitless because there

is no complete administrative record, as the contested case proceeding is an opportunity to expand the administrative record. *Id.* at 379.

This explains why the 2020 General Permit cannot be subject to declaratory judgment under the Rule Review Provision. Absent a record, a court is unable to grant declaratory relief. See *Kuhn v City of East Detroit*, 50 Mich App 502, 504 (1974) (holding that fundamental to a declaratory judgment proceeding "is the existence of a record.") Before declaratory relief can be granted, at a minimum, a plaintiff must plead and prove each fact entitling him to the judgment the party seeks. *Shavers v Kelley*, 402 Mich 554, 589 (1978); see also *Ravenna Ed Ass'n v Ravenna Pub Sch*, 70 Mich App 196, 200 (1976) (holding that it was an abuse of discretion to enter a declaratory judgment when the record revealed that no facts were proven because no testimony was taken by the trial court.).

Here, the Court of Appeals directed Industry to challenge the 2020 General Permit through a declaratory judgment under the Rule Review Provision. This opened the door for a fact-devoid ruling, like the Court of Appeals' own ruling. The Court of Appeals—without a complete administrative record—concluded that the 2020 General Permit conditions were unpromulgated rules. (Appellant's App'x pp 407, 443.) Plainly they are not, as explained in more detail below. The Court of Appeals attempted to resolve a complex, fact-intensive dispute without a factual record. Its scant analysis and wrong conclusion demonstrate why its holding that the Rule Review Provision can be used to challenge permits is wrong.

Determining whether a permit is lawful requires a factual record, which is why the Legislature dictated that permit challenges must begin with contested case proceedings before judicial review. ALJs receive evidence, make determinations about things like witness credibility, and ultimately issue orders including determinations of both fact and law. MCL 24.285 (describing what must be contained within final decisions and orders at the conclusion of contested case proceedings). Evidence regarding wastewater permits is typically of a technical nature, as the standard contested facts are either that a challenged permit is too permissive and authorizes excess pollution, or, as here, that a challenged permit is not permissive enough. See, e.g., *Nat'l Wildlife Federation*, 306 Mich App at 395 (opposing groundwater permit for being insufficiently protective of water resources). The purpose of a contested case proceeding is to resolve technical evidentiary disputes to determine whether the existing regulatory framework authorizes the permit, or whether changes must be made to it. Once a contested case proceeding is concluded and an ALJ has developed a record evaluating contested facts and legal disputes, his final decision, and the entire record it was based upon, may be appealed to circuit court.

In this case, Industry challenges permit conditions in the 2020 General Permit because it asserts that they are not necessary to protect Michigan's surface water from CAFO waste and exceed the Department's authority. Its claims mix fact and law; as a result, only a factfinder authorized to receive evidence and make factual determinations can completely analyze these claims and determine whether

the conditions are authorized under the Department's broad statutory mandate to "protect and conserve the water resources of the state" and to control pollution of surface or underground waters of the state, MCL 324.3103(1), and to take "all appropriate steps" to prevent water pollution including issuing permits to assure compliance with state standards. MCL 324.3106.

For example, Industry asserts that a new permit condition related to the use of both vegetated buffers and setbacks at land application areas near surface water is unnecessary to protect surface water. (Appellant's App'x pp 168–170.) Relatedly, Industry also believes it is entitled to apply CAFO waste to land application areas until the soil phosphorus levels build up to 150 ppm phosphorus, and that the permit condition restricting soil phosphorus levels is not necessary to protect surface water. (Appellant's App'x pp 167–168.) Resolving these intertwined factual and legal disputes requires the use of technical expert testimony about, among other things, what causes CAFO waste to travel from land application areas to surface water, and how the phosphorus in that waste travels underground to surface water. This dispute cannot be resolved merely by looking to the Part 21 Wastewater Discharge Rules without applying them to facts because those rules, among other things, mandate that stormwater discharges from land application areas are prohibited if they cause or contribute to water quality exceedances. Mich Admin Code, R 323.2196(5)(d). The Part 21 Wastewater Discharge Rules also mandate that the nutrients in CAFO waste be properly agriculturally utilized, i.e.,

used by growing crops and not discharged off fields into surface water. Mich Admin Code, R 323.2196(5)(a)(viii).

Industry also disputes the need for wintertime restrictions on land application of CAFO waste. (Appellant's App'x pp 159–164.) This mixed issue of fact and law cannot be resolved by determining that the Part 21 Wastewater Discharge Rules authorize wintertime spreading, as the Court of Appeals ostensibly did, because the Part 21 Wastewater Discharge Rules also prohibit land application, irrespective of time of year, if it "may enter waters of the state." Mich Admin Code, R 323.2196(5)(a)(ix)(A); but see *Mich Farm Bureau* at __; slip op at 11–13 (reciting portions of Mich Admin Code, R 323.2196(5) before concluding that they do not authorize the challenged permit conditions). In addition, the complaint alleges the conditions of the 2020 General Permit are "arbitrary and capricious," which necessarily requires analyzing those challenged conditions and the Department's scientific reasoning for including them in the permit. (Appellant's App'x p 179.) All of these questions must first be answered by ALJ Pulter in the contested case proceeding before judicial review.

The Court of Claims was correct when it determined "plaintiffs are essentially questioning the necessity and efficacy of certain matters included within the 2020 CAFO General Permit." (Appellant's App'x p 007.) It was also correct when it stated that "plaintiffs' complaint raises factual issues which should first be examined during the administrative process." (*Id.*) Challenges to wastewater permits must occur by contested case proceedings under the Permit Challenge

Provision and the Rule Review Provision does not authorize non-evidentiary judicial review of wastewater permits.

C. Allowing a collateral attack under the Rule Review Provision would defeat judicial economy and threaten inconsistency in judicial decisions.

Collateral attack means challenging the final decision in one proceeding in a second proceeding, instead of directly attacking it on appeal. *In re Application of Indiana Michigan Power Co to Increase Rates*, 329 Mich App 397, 406 (2019). Michigan courts typically forbid collateral attacks to protect judicial efficiency, which is achieved when people file one case and resolve it fully instead of filing multiple cases and seeking relief from different courts. *Zelasko v Charter Twp of Bloomfield,* __ Mich App __ (2023) (Docket No. 359002); slip op at 8. Collateral attacks by their very nature also present the risk of inconsistent results. *Petition of Briggs*, 51 Mich App 421, 432 (1974).

For purposes of this appeal, it is important to understand when a collateral attack is improper. An improper collateral attack does not occur when the first court or administrative tribunal had no subject-matter jurisdiction over the case in the first instance. *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 478 (2014). If the original forum determines that it lacks jurisdiction to hear a case, then it is appropriate to bring the case in another forum. But, so long as the original forum has jurisdiction, even when an agency in fact acts outside of its authority, collateral attacks are improper. *Id.* at 477.

An example outside the permitting context demonstrates that fact-intensive administrative review regularly plays out before judicial review and shows why collateral attacks in non-evidentiary proceedings are prohibited. *In re Harper*, 302 Mich App 349, 356 (2013) ("[W]hen an administrative scheme of relief exists[,] an individual must exhaust those remedies before a circuit court has jurisdiction.")

In *Harper*, the respondent was a woman whose child was removed from her custody by court order, causing the Department of Health and Human Services (DHHS) to list her on the central registry related to child protection. *Id.* at 351. Removal proceedings occur in circuit court, and they are distinct from central registry expungement proceedings, which first proceed by administrative review in front of DHHS and can then be appealed to circuit court. *Id.* at 353–356 (interpreting MCL 722.627). The next year, parallel to the pending judicial process of regaining custody of her child, respondent scheduled an administrative hearing with DHHS to begin the process of expunging her name from the registry in accordance with MCL 722.627. *Id.* at 356. She cancelled the administrative hearing and moved to have her name removed from the central registry during her permanency hearing in circuit court. *Id.* at 352, 356. The circuit court granted her request, removing her from the central registry "without factual findings and with a notable lack of focus on the minor child." *Id.* at 359.

On appeal, the Court of Appeals overturned her expungement from the central registry after determining that the circuit court had no jurisdiction to do so. *Id.* at 361. Notably, the Court of Appeals observed that the Legislature "created a

comprehensive statutory scheme for situations, like here, where an individual desires removal from the central registry." *Id.* at 355. The Court of Appeals went on to reason that "[a]llowing respondent to evade the department's role in this process would subvert the statutory scheme of MCL 722.627, which in turn would ignore the Legislature's intent." *Id.* at 356 (internal citation omitted). The Court of Appeals found that her decision to schedule, and cancel, her administrative hearing meant that she failed to exhaust available administrative remedies, rendering the matter premature for judicial review. *Id.* The Court of Appeals also noted that, "while it may have been more convenient for respondent to bypass the department and go to the trial court, convenience is inconsistent with the applicable statutory scheme." *Id.* at 360.

Here, the initial contested case proceeding has not yet resulted in a final decision and order. To allow a simultaneous declaratory judgment proceeding under the Rule Review Provision would present all the problems that collateral attacks carry—judicial inefficiency and possible inconsistent results. As in *Harper,* allowing a collateral attack here would "subvert the statutory scheme" of the Permit Challenge Provision. Industry sought a contested case proceeding and even began the administrative process of reviewing the Department's decision to issue the 2020 General Permit. But instead of exhausting that administrative process, Industry tried to obtain quick relief from the Court of Claims first. Although the Court of Claims correctly dismissed this case for lack of subject-matter jurisdiction, the Court of Appeals needlessly weighed in on the merits of Industry's challenge, which

were also presented before the original forum, erroneously finding that the challenged permit conditions were unlawfully promulgated rules, without a full factual record or an understanding of the regulatory framework. The *Harper* court explains why this is improper:

> Judicial review would be most efficient after a full factual record has been developed. While respondent contends that the trial court was fully cognizant of the facts of the case, that is not the same as being fully cognizant of the factual issues involved in the management of the central registry or reasons for removal, which is squarely within the department's purview. [*Harper*, 302 Mich App at 369.]

Allowing this second challenge to proceed without full administrative review sidesteps the Department's technical expertise and fails to give meaning to the legislative intent behind the Permit Challenge Provision. Further, it opens the door to inconsistent results. As a result, wastewater permits are only subject to challenge under the specific procedures laid out in the Permit Challenge Provision.

II. The Permit Challenge Provision provides an exclusive procedure to challenge wastewater permits because its specific evidentiary process conflicts with the record-less judicial review under the Rule Review Provision, and this interpretation is consistent with Part 31's mandate that the Department only issue permits that protect Michigan's water resources.

The Permit Challenge Provision provides the exclusive means for challenging wastewater permits because allowing declaratory judgment-type challenges under the Rule Review Provision would conflict with those procedures. Further, exclusivity is consistent with Part 31 of the NREPA's goals and EGLE's duty to protect Michigan's water resources. Even if both statutes authorize parallel review

of wastewater permits, the doctrine of primary jurisdiction mandates that the evidentiary contested case proceedings before the Department must go first.

A. The Permit Challenge Provision is the exclusive remedy to challenge wastewater permits because it includes fact-finding through a contested case, which cannot occur under the Rule Review Provision.

Under the APA, a party cannot seek a declaratory judgment challenging the validity or applicability of a rule when there is an "exclusive procedure or remedy" provided by a statute that governs the agency. MCL 24.264. Whether a statute provides an exclusive remedy is a matter of statutory interpretation. *Mich Deferred Presentment Servs Ass'n v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 334 (2010). Statutes on the same topic should be read together as one law *in pari materia*. *People v Mazur*, 497 Mich 302, 313 (2015). Where one statute provides a specific remedy and another provides a general remedy, if those remedies conflict, then the more specific remedy is the exclusive remedy. *Id.*

An exclusive procedure is unambiguous and means "limited to that which is designated." *Wolverine Power Coop v DEQ,* 285 Mich App 548, 561–562 (2009), quoting Random House Webster's College Dictionary (1997) (quotation marks omitted). When a party is aggrieved by an administrative decision, that party is required "to complain under the exclusive procedure set forth in regulation." *Kroon-Harris v State*, 477 Mich 988, 988 (2007). See, e.g., *Mooney v Unemployment Compensation Comm*, 336 Mich 344, 355 (1953) (recognizing that when the legislature created a specific procedure to administer unemployment compensation

and limited judicial review, that provision is "exclusive of any and all other possible methods of review.").

When the legislature provides an "exclusive remedy" in a statute, courts should honor that remedy. In *Szdlowski v Gen Motors Corp,* 397 Mich 356, 358 (1976), for example, plaintiff filed a wrongful death claim against her husband's employer. This Court determined that allowing the plaintiff to go to court on a common law negligence theory was "contrary to the intent of the legislature" in creating the Worker's Compensation Act. *Id.* The issues concerning injuries and whether they occurred in the course of employment were "exclusively within the purview" of the department, and the merits of the claim had to be first evaluated by the department. *Id.* at 359. As such, the Court indicated that the procedures for the case were statutorily determined and cautioned against any "shortcut or circumvention of those procedures." *Id.*

A statute need not state on its face that it is exclusive. If a statute does not unambiguously state that a remedy is the exclusive remedy, a court must turn to statutory interpretation to determine whether a remedy is exclusive. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312 (2002). In doing so, courts should read statutes in harmony with each other, and, if possible, avoid conflict. *Jennings v Southwood*, 446 Mich 125, 137 (1994), citing *Wayne Co v Fuller*, 250 Mich 227, 232–233 (1930). Statutes on the same topic should be read *in pari materia*, as one law, and if it is possible to read the two together without conflict, that is the proper

statutory interpretation. *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 652 (2014).

But when two statutes, read together, conflict, the more specific statute prevails. *Malcolm v City of East Detroit*, 437 Mich 132, 139 (1991). Two statutes irreconcilably conflict when their provisions cannot exist side by side. See, e.g., *People v Watkins*, 491 Mich 450, 496 (2012) (holding that MCL 768.27a, which allowed evidence that defendant committed another listed offense against a minor, irreconcilably conflicted with MRE 404(b)(1), when the former allowed what the latter precluded); see also *Mich Deferred Presentment Servs Assn*, 287 Mich App at 334 (comparing two statutes and finding conflict between related statutory provisions when one authorized treble damages plus costs and the other only authorized the cost of a check plus $25, without costs).

Although on its face the Permit Challenge Provision does not state that it is the exclusive remedy or procedure to challenge wastewater permits, this is not determinative. Assuming that the Rule Review Provision and the Permit Challenge Provision both allow challenges to permits like the 2020 General Permit, they irreconcilably conflict and cannot coexist because they lay out distinct forms of judicial review—one based on a factual record, and the other proceeding without fact-finding. As a result, as explained in more detail below, the more specific approach to challenging wastewater permits under the Permit Challenge Provision must prevail. *Mich Deferred Presentment Servs Assn*, 287 Mich App at 334.

Part 31 provides a specific avenue for evidentiary administrative review of permits. The Rule Review Provision, on the other hand, does not include factual development, providing only a general avenue for reviewing rules. Under the Permit Challenge Provision, a wastewater permit may only be challenged through a contested case proceeding, which is an opportunity for all parties to put on witness testimony and present evidence so that an ALJ may issue both findings of fact and conclusions of law. *Nat'l Wildlife Federation*, 306 Mich App at 373–379 (explaining that contested case proceedings provide for further fact-finding beyond the administrative record developed when a permit is first issued under Part 31); see also MCL 24.271 through MCL 24.288 (contested case procedures including, among other things, procedures specific to admitting evidence and receiving witness testimony.) At the conclusion of a contested case proceeding, the ALJ must issue findings of fact and conclusions of law. MCL 24.285. Those findings of fact and conclusions of law are then subject to judicial review in accordance with MCR 7.119(H). The purpose of that judicial review is twofold—(1) to determine whether the decision is supported by "competent, material, and substantial evidence on the whole record" and (2) to determine whether the decision itself violates state law, contains a material error of law, or was subject to an unlawful procedure that materially prejudiced a party. *Id.*

If the Rule Review Provision includes challenges to permits, as the Court of Appeals held, those challenges cannot proceed until first seeking, and being refused, a declaratory ruling from an agency under MCL 24.263. Because no hearing is

required when an agency determines a declaratory ruling, judicial review under the Rule Review Provision can only proceed *without* an administrative record. *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263 (1991) ("Where no hearing is required, it is not proper for the circuit court or this Court to review the evidentiary support of an administrative agency's determination.") The Rule Review Provision also explicitly authorizes judicial review when an agency merely fails to "expeditiously" respond to a request for a declaratory ruling, demonstrating that an agency need not create *any* record before judicial review can proceed. Moreover, the APA does not authorize trial courts to remand challenges under the Rule Review Provision to the agency to expand the record. See *Mich Ass'n of Home Builders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 499–501 (2008) (comparing the Rule Review Provision with provisions for contested case proceedings and concluding that judicial review under the Rule Review Provision is limited to the record and may not be remanded to the agency for fact-finding).

As a result, the two statutory provisions conflict, and the more specific provision requiring the adjudication of both factual findings and conclusions of law through an administrative hearing before judicial review must prevail. The Permit Challenge Provision is, therefore, the exclusive procedure and remedy for challenging wastewater permits, including the 2020 General Permit.

B. Finding that the Permit Challenge Provision is the exclusive remedy to challenge wastewater permits is consistent with the Department's responsibility to safeguard Michigan's water resources under Part 31.

Finding that the Permit Challenge Provision is the exclusive remedy to challenge wastewater permits is consistent with Part 31 as a whole. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179 (2003) ("[Statutory language] must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense."), quoting *Arrowhead Dev Co Road Comm*, 413 Mich 505, 516 (1982) (internal citation omitted). MCL 324.3106 "confer[s] upon the DEQ the responsibility of forestalling and rendering impossible any water pollution that [it] consider[s] to be unreasonable and against the public interest, even before such pollution ever occur[s]." See also *Mich Farm Bureau*, 292 Mich App at 135. Under Part 31, all discharges of waste and waste effluent to waters of the state are prohibited, unless authorized by permit. MCL 324.3112(1). Moreover, the Department must "issue permits that will assure compliance with state [water quality] standards." MCL 324.3106. The Department's rules, promulgated in accordance with MCL 324.3103(2), lay out requirements for those permits, including how to apply for them and what must be contained within them. Challenging those permits under the Permit Challenge Provision typically requires fact-intensive technical analysis to determine whether they are sufficiently stringent. See, e.g., *Nat'l Wildlife Federation,* 306 Mich App at 387–395 (analyzing

evidence and competing witness testimony to determine whether the permit application met the requirements of Part 31 and associated rules).

Because of the importance of safeguarding Michigan's water resources, as authorized under Part 31, and consistent with the public trust doctrine, it makes sense that the Legislature would only authorize challenges to wastewater permits that include the opportunity to thoroughly analyze whether those permits to pollute protect state water quality standards. Allowing judicial review without fact-finding would allow polluters to put forward legal arguments, absent any factual handle, resulting in sidestepping the fundamental purpose of Part 31 to safeguard Michigan's water resources.

This case lays bare the problem with this approach—the appellate court, without the benefit of the evidentiary record currently stayed before ALJ Pulter, or a thorough review of the applicable regulatory framework, determined that new permit conditions exceed the Department's lawful authority. As a result, Industry continues to excessively pollute Michigan's water resources, even though the Department determined over three years ago that the existing permit allowed pollution that was "unreasonable and against the public interest in view of the existing conditions" in the many waters of the state currently subject to, or in the process of becoming subject to, TMDLs. MCL 324.3106. In short, allowing judicial review of permits without fact gathering goes against the legislative intent behind Part 31, supporting a finding that the Permit Challenge Provision is the exclusive remedy to challenge wastewater permits.

C. Assuming *arguendo* that Industry may challenge wastewater permits under both the Permit Challenge Provision and the Rule Review Provision, the doctrine of primary jurisdiction directs that challenges under the Permit Challenge Provision must proceed first.

Under the doctrine of primary jurisdiction, when statutes authorize two pathways to challenge one type of agency action, the technical challenge requiring agency expertise should proceed first. *Attorney General v Diamond Mtg Co*, 414 Mich 603, 613 (1982). The United States Supreme Court explained the rationale behind this doctrine, which this Court has cited approvingly:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. [*Id.* at 612–613 (citing *Far East Conference v United States*, 342 US 570, 574–575 (1952).)]

This doctrine is particularly relevant for heavily regulated industries subject to a pervasive regulatory scheme. *Id.* at 614.

A case regarding an older version of Part 31, specifically the provision now titled MCL 324.3112(6) related to abating nuisances, is instructive. In that case, a citizen group filed a nuisance complaint against the City of Whitehall and the Whitehall Leather Company, seeking equitable relief from the improperly treated municipal and industrial waste they were discharging into White Lake. *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262, 268 (1970). At the time

the community group filed suit, the Department was in the process of negotiating settlements with the polluters that would require them to install wastewater treatment plants and obtain NPDES permits. The doctrine of primary jurisdiction counseled against allowing the community group's litigation against the polluters to proceed before the Department issued the permits, which would be subject to challenge. *Id.* at 271.

As the *White Hall* court previously determined, and the *Michigan Farm Bureau* court confirmed, Part 31 confirms upon the Department (and its predecessor agencies) "comprehensive powers . . . to regulate and prohibit pollution." *Id.* at 286; see also *Mich Farm Bureau*, 292 Mich App at 132. The Department's Part 4 Water Quality Standards, and the Part 21 Wastewater Discharge Rules and the federal standards they incorporate, include exceedingly specific detail about how the Department exercises those "broad powers" to safeguard Michigan's surface water from industrial pollution. *Mich Farm Bureau*, 292 Mich App at 132. As a result, even if the Legislature created two pathways to challenge wastewater permits, the administrative challenge under the Permit Challenge Provision should proceed first.

III. The Court of Appeals did not need to reach the merits of the case to determine it lacked jurisdiction, and in reaching the merits the appellate court wrongly concluded that the challenged permit conditions were "rules" subject to parallel challenge under both the Permit Challenge Provision and the Rule Review Provision.

The Court of Appeals did not need to decide whether the challenged permit conditions are "licenses" or "rules" because that was not a necessary component of

determining it lacked jurisdiction. Once the appellate court decided it lacked jurisdiction, it had to stop there. But it went on to wrongly conclude that the 2020 General Permit conditions were "rules" subject to declaratory judgment under the Rule Review Provision.

A. Once the Court of Appeals determined that the Court of Claims had no subject-matter jurisdiction—a decision not based on the merits—it could not reach the merits of the case.

The question before the Court of Appeals was whether the Court of Claims properly dismissed Industry's challenge for lack of subject-matter jurisdiction. Once it decided it lacked jurisdiction, it should have stopped.

It is no accident that the court rules require briefs to begin with a jurisdictional section. See MCR 7.212(C)(4). A court lacking jurisdiction may not address the merits of a case. See, e.g., *Miller v Allstate Ins Co*, 481 Mich 601, 612 (2008) (affirming the lower court's grant of summary disposition but vacating the reasoning on the merits because defendant's lack of standing meant the Court of Appeals "should not have considered the merits of [the defendant's] claim."); see also *Grady v Wambach*, 339 Mich App 325, 335 (2021), appeal granted, 509 Mich 937 (2022), vacated, 986 NW2d 143 (Mich 2023), and appeal denied, 986 NW2d 143 (Mich 2023) (overturning the trial court's determination that a party had standing to bring the case and chiding it for prematurely reaching the merits).

Determining whether subject-matter jurisdiction exists can be a difficult endeavor, and appellate courts regularly overturn trial courts for failing to engage in that difficult analysis. See, e.g., *Jackson v Dir of Dep't of Corrections*, 329 Mich

App 422, 425–429 (2019) (overturning trial court's determination that it lacked subject-matter jurisdiction because, on close analysis, the prisoner's constitutional right to due process rendered the administrative review regarding confiscation of funds, which was facially *not* subject to judicial review, *subject* to judicial review); see also *City of Southfield v Shefa, LLC*, 340 Mich App 391, 416 (2022) (reversing trial court's grant of summary disposition for lack of subject-matter jurisdiction and directing trial court to determine whether federal bankruptcy law divested it of authority over any pending claims). Despite the complexities jurisdictional challenges present, this Court has been consistent in its position that this analysis must be done before turning to the merits.

For example, in *Schaaf v Forbes*, this Court denied the application for leave to appeal, ruling that the appellate court erred in reaching the merits of the case before the jurisdictional issue was resolved. 506 Mich 948, 948 (2020). As a result, this Court vacated the Court of Appeals' judgment, and remanded to determine whether the circuit court had jurisdiction. *Id.*, quoting *Bowie v Arder*, 441 Mich 23, 56 (1992) ("When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void.") (quotation marks omitted). After remand, the Court of Appeals thoroughly analyzed the jurisdictional issue, and only reached the merits of the case after confirming that the circuit court properly had subject-matter jurisdiction. *Schaaf v Forbes*, 338 Mich App 1, 11–15 (2021).

Indeed, the Chief Justice of this Court has previously expressed concern over "the boundaries of the appellate jurisdiction of the Court of Appeals," particularly when the court "considered an issue it expressly held it lacked the authority to consider." *Hart v State,* 506 Mich 857 (2020) (CLEMENT, J., concurring) (discussing, by way of example, *Pierce v Lansing*, 265 Mich App 174, 182 (2005)). In *Hart*, this Court vacated a prior order and denied application for leave to appeal. In the concurrence, Chief Justice CLEMENT opined on the Court of Appeals' jurisdiction, the differences between appeals of right and appeals by leave, and the importance of the Court of Appeals only exercising its statutory authority and not rendering portions of the court rules nugatory in the interest of judicial efficiency. (*Id.* at 286–292.) Her concurrence focused both on whether and how the Court of Appeals should treat an appeal regarding a decision of a lower court encompassing a final order subject to appeal, and a non-final order for which the appellant was statutorily required to seek leave to appeal. Crucially, Chief Justice CLEMENT's concurrence identified the importance of the Court of Appeals ruling only on cases for which it had express statutory authority because "the Court of Appeals' jurisdiction is purely a function of the statutory grant of authority." *Id.* at 292.

Here, the Court of Appeals correctly determined it lacked jurisdiction. (Appellant's App'x pp 408, 443.) And that decision was based on factors completely separate from the merits of the case. (*Id.* at 407.) Nonetheless, the appellate court determined the merits of the case. In doing so, it made several errors in concluding

that a declaratory judgment claim under the Rule Review Provision was a remedy available to Industry.

B. After improperly turning to the merits, the Court of Appeals wrongly decided that the 2020 General Permit conditions were "rules" and not "licenses."

The Court of Appeals should not have reached the merits of this case. This Court should vacate its analysis and uphold the Court of Claims' reasoning instead. In the alternative, if this Court reaches the merits of whether the 2020 General Permit conditions are rules or licenses, then it should find that the Court of Appeals got it wrong—the permit conditions are licenses, not rules.

According to the appellate court, it made a "close analysis" of the permit conditions at issue. *Mich Farm Bureau*, __ Mich App __; slip op at 8. It concluded the 2020 General Permit conditions were "rules." *Id.* But it had no administrative record, including factual findings to properly analyze the general permit conditions. It also cited the wrong statutory provision because it was not "fully cognizant of the factual issues involved" in wastewater permitting. *In re Harper*, 302 Mich App at 359.

Because the Court of Appeals lacked a factual record, it failed to ask the basic question of whether the challenged permit conditions were "licenses" subject to administrative and judicial review under MCL 24.291. *Mich Farm Bureau*, __ Mich App __; slip op at 6 (no mention of the word "license" or MCL 24.205(a).) A targeted analysis of Part 31 and the APA reveals that the challenged permit conditions are licenses, not rules.

1. The 2020 General Permit is a "license" under 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). 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 APA defines the term "license" as "the whole or part of an agency permit . . . required by law." MCL 24.205(a). The APA further explains that "[w]hen licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply." MCL 24.291. Part 31 permitting must be preceded by notice and an opportunity for a hearing. Mich Admin Code, R 323.2117 and R 323.2130. Though the APA does not define the term "permit," its provisions specific to contested cases reference MCL 324.1301(g). MCL 24.288. That referenced subsection of the NREPA defines the term "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). Reading the APA completely, and following its references to the NREPA, the language makes

clear that permits issued under the NREPA are "licenses" within the meaning of MCL 24.205(a). *Ally Fin Inc v State Treasurer,* 502 Mich 484, 493 (2018).

In addition to the APA's definition of license, the courts have determined that permits are licenses because the definition of license is broad and "evidences a legislative intent to include practically any form of permission required by law." *Bois Blanc Island Twp v Natural Resources Comm*, 158 Mich App 239, 242 (1987) (concluding that the plaintiffs needed written permission to operate the sanitary landfill, so the permits were "equivalent to licenses with the meaning of the APA," and as such, plaintiffs were entitled to a contested case.) In fact, this Court defined license as "permission by competent authority to do an act which, without such permission, would be illegal." *Westland Convalescent Ctr v Blue Cross & Blue Shield of Mich*, 414 Mich. 247, 272 (1982). Because no one may discharge pollutants to waters of the state without a permit, a wastewater discharge permit is undeniably a license. MCL 324.3109(1) and MCL 324.3112(1).

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 under MCL 24.265) and permitting (the Environmental Permit Review Commission under MCL 324.1313(1)). These two bodies perform distinct roles, reflecting the different processes the Legislature intended the Department to follow when promulgating rules, distinct from issuing permits.

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).

2. The 2020 General Permit is not a rule because it is not generally applicable as 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. *Mich Farm Bureau*, __ Mich App __; slip op at 8. For standards to be generally applicable, they must apply to all similarly situated entities with equal force. See, e.g., *AFSCME 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. *Mich Farm Bureau,* __ Mich App __; slip op at 8. In *Sierra Club*, the Court of Appeals held that the Department was not administering the CAFO permitting program in accordance with the Clean Water Act because it was 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.*

In this case, most of the challenged permit conditions relate to what may be included within each permittee's individual CNMP. (Appellant's App'x pp 158–159); see also Mich Admin Code, R 323.2196(5)(e) (minimum regulatory requirements for contents of each CNMP.) 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 Court of Appeals wrongly determined that the challenged permit conditions are generally applicable, even though each CAFO must first develop individual effluent

limitations in accordance with requirements laid out in Mich Admin Code, R 323.5196(5)(a).

3. Even if 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,* 260 Mich App 54, 82 (2003), 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. 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 *Greenfield Const Co Inc v Mich Dep't of State Hwys*, the defendant alleged there was no subject-matter jurisdiction because the Standard Specifications for Highway Construction were not rules subject to review under the APA. 402 Mich 172, 186 (1978). This Court agreed, determining that the Standard Specifications for Highway Construction included an allocation of duties between the contractor and the state, payment terms, and "technical details touching almost every conceivable aspect of highway construction work for which the State of Michigan might contract." *Id.* at 190. As such, they 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." *Id.* at 191.

Similarly, in *Mich Trucking Ass'n v Mich Pub Serv Comm'n*, 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 *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 Department already promulgated applicable regulations under its statutory authority to protect the waters of the state and to issue permits to protect Michigan's water resources, complete with requirements for permits that depend upon the ever-changing science involved in water quality and advancements in data gathering. MCL 324.3106. The 2020 General Permit reflects the Department's exercise of its permissive authority under MCL 324.3106, in accordance with those duly promulgated rules. The conditions involved in permitting must adapt to changing environmental circumstances and are subject to further refinement in the contested case process before issuing a final permit. Even Industry acknowledges that the Department's decision "to employ a General Permit is a 'decision . . . to exercise . . . a permissive statutory power.'" (Appellant's App'x p 083, quoting MCL

24.207.) It still claims, however, that "new substantive standards" in the 2020 General Permit are outside that permissive power. (*Id.*) It is wrong.

The Part 4 Water Quality Standards set out a baseline against which all proposed pollution is considered, to ensure that the Department safeguards Michigan's water resources in accordance with common law, the state constitution, and legislative directive through Part 31. The Part 21 Wastewater Discharge Rules include requirements specific to all permits for all industries, including "[a]ny other more stringent limitation deemed necessary by the [D]epartment to meet applicable water quality standards . . . [or] to meet [TMDLs]." Mich Admin Code, R 323.2137(d). Those rules also incorporate federal regulations, including the federal requirement that state permits include more stringent conditions when necessary to safeguard water quality. Mich Admin Code, R 323.2189(2)(h) (incorporating 40 CFR 122.44 (2005) by reference.) The Part 21 Wastewater Discharge Rules include state-specific requirements for CAFOs as well as incorporated federal regulations. Mich Admin Code, R 323.2196 (state requirements), Mich Admin Code, R 323.2189(2)(c) (incorporating 40 CFR 122.21 (2005), containing requirements for information about waste CAFOs must provide when submitting NPDES applications), and Mich Admin Code, R 323.2189(2)(m) (incorporating 40 CFR 412 (2003), containing effluent limitation guidelines for CAFOs)).

These requirements, read in concert with the Part 4 Water Quality Standards, tend towards prohibiting pollution, not permitting limitless waste disposal. Although the Part 21 Wastewater Discharge Rules ostensibly authorize

land application, even during wintertime, and manifesting CAFO waste to third parties for disposal, they plainly prohibit those practices when necessary to prevent water pollution:

- "[CAFO waste] shall not be land-applied on ground that is flooded, saturated with water, frozen, or snow-covered where the [CAFO waste] may enter waters of the state." Mich Admin Code 323.2196(5)(a)(ix)(A);

- "Storm water discharges from land areas under the control of a CAFO where [CAFO waste] has been applied . . . [that] do not cause or contribute to a violation of water quality standards, are in compliance with this rule[.]" Mich Admin Code, R 323.2196(5)(d);

- "[CAFOs] shall not sell, give away, or otherwise transfer [CAFO waste] to a recipient if any of the following occurs: . . . (B) [t]he returned manifest indicates improper land application, use, or disposal . . . (D) [t]he recipient fails or refuses to provide accurate information on the manifest in a timely manner." Mich Admin Code, R 323.2196(5)(e)(v).

The 2020 General Permit is consistent with these rules, even though the Court of Appeals never should have reached that question because it lacked subject-matter jurisdiction over this case. These rules authorize even more stringent conditions than those found in the 2020 General Permit, if water quality data demonstrates that discharges from this industry continue to cause and contribute to water quality exceedances. That is how this complex regulatory program works—the Department issues permits that safeguard water quality, but if water quality does not improve, the Department must issue more stringent permits until it does. 33 USC 1311(b)(1)(C).

Moreover, if the Department had to initiate rulemaking for every condition in the many permits it issues, renewing NPDES permits every five years via

rulemaking "would make it impossible" to timely reissue permits. *Mich Trucking Ass'n*, 225 Mich App at 430. This is similar to *Michigan Trucking,* which held 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. *Id.*; see also, e.g., *Maple Leaf Farms, Inc v Wisconsin, Dep't of Natural Resources*, 633 NW2d 720, 730 (Wis, 2001) ("[A] situation where permit writers could include in permits only restatements of the precise language contained in the administrative code . . . would make the issuance of permits an untimely, cumbersome and inflexible exercise that would not benefit permit holders at all.") Thus, the 2020 General Permit is excluded from the definition of "rule" in the APA because it represents the Department's decision to "exercise a permissive statutory power" under MCL 24.207(j)—issuing a wastewater permit for CAFOs in accordance with the Part 21 Wastewater Discharge Rules, with reference to the Part 4 Water Quality Standards.

4. The 2020 General Permit conditions cannot be rules because the Department presently lacks rulemaking authority under Part 31, and requiring it to promulgate rules every time it changed a permit condition would effectively override its legislative mandate to protect waters of the state.

The Court of Appeals' 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. *Mich Farm Bureau,* __ Mich App __; slip op at 8. But in this case, the Department could not have issued the challenged

permit conditions as rules because the Legislature removed its rulemaking authority under Part 31 nearly two decades ago. MCL 324.3103(2).

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 Ed*, 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, specified requirements for teacher certification and curriculum, and explained when the Department 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 Compensation, 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.

The same logic applies here. The Department has lacked rulemaking authority under Part 31 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.*; R 323.2101 *et seq*. The purpose of the Part 21 Wastewater Discharge 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 under Part 31. *Farris v McKaig*, 324 Mich App 349, 363 (2018), quoting *Malcolm v 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) (citation 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 Wastewater Discharge 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 under existing rules, speaks volumes.

Now, the Court of Appeals decision places the Department in a conundrum. According to the Court of Appeals, the Department must promulgate a new rule every time it wants to issue a permit that does not mirror the previous permit. This is apparently true even if, based on water quality data, the Department needs to issue a more stringent permit to "assure compliance with state [water quality] standards." MCL 324.3106. But the Department presently lacks rulemaking authority under Part 31, so it cannot issue new permits. MCL 324.3106 further mandates that the Department "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 324.3106. Without a permitting program that responds to changing water quality data, what steps may the agency take? Resorting to civil and criminal enforcement is insufficient because the Department does not *prevent* pollution through enforcement, it *responds* to it. The Court of Appeals' decision makes it impossible for the Department to meet its statutory mandate to prevent pollution and safeguard Michigan's water resources for the People.

5. The Court of Appeals' erroneous determination that the 2020 General Permit is a rule results in inadequate, unlimited judicial review.

The Court of Appeals' conclusion that the 2020 General Permit is a rule establishes a precedent that wastewater permits may be challenged at any time,

without any evidence. This is inconsistent with the APA, which mandates that licenses may only be challenged via administrative proceedings. As briefed *supra* in I.B, the Rule Review Provision does not authorize the fact-finding and evidentiary determination necessary to adequately examine whether wastewater permit conditions comport with the extensive regulations under which the Department issues them. Administrative challenges to rules (requests for declaratory rulings) do not include evidence gathering but are instead predicated on "an actual state of facts." MCL 24.263.

Moreover, the Court of Appeals' determination that the 2020 General Permit is a "rule" under the APA, without analysis of whether it is a license, ignored the implications in allowing parallel administrative review under the Rule Review Provision and the Permit Challenge Provision. For example, the Court did not inquire into, nor address, why the Legislature would create a limitless opportunity for judicial review of permits as rules under the Rule Review Provision, even though there are clear time limits for challenging them as licenses. First, aggrieved parties must file a contested case petition under the Permit Challenge Provision (60 days), then seek intermediary administrative review under MCL 324.1317(2) (21 days), and finally seek judicial review of the final agency action under MCL 24.302(1) (60 days). Refusing to engage in this thorny analysis eliminates finality in permitting decisions, as any aggrieved person could challenge a permit *at any time* under the Rule Review Provision, even if they were time-barred from filing a contested case petition under the Permit Challenge Provision. As this Court has previously

explained, allowing unlimited review of permitting decisions "render[s] the permitting process a useless exercise." *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 523 (2004). The Court of Appeals' wrong reasoning leads to the wrong result.

CONCLUSION AND RELIEF REQUESTED

After properly challenging the 2020 General Permit by filing a petition for a contested case proceeding under the Permit Challenge Provision, well before that proceeding concluded, Industry filed a second lawsuit in the Court of Claims under the Rule Review Provision. The Court of Claims properly granted the Department's motion to dismiss that case, which should have ended the unlawful proceeding. Instead, by reaching the merits at the jurisdictional stage and wrongly concluding that the challenged permit conditions are unpromulgated rules, the Court of Appeals gave Industry an end-run around having to prove its case in a thorough evidentiary proceeding. This has serious ramifications for the Department's ability to protect Michigan's water resources.

The only way to challenge permits is through the specific procedure laid out in the NREPA—a contested case proceeding under the Permit Challenge Provision. The Rule Review Provision is not an avenue to challenge a permit. Permits cannot be challenged under the Rule Review Provision because the Permit Challenge Provision provides an exclusive remedy to challenge wastewater permits. Even if the Rule Review Provision could be used to launch parallel challenges to wastewater permits, the doctrine of primary jurisdiction dictates that the contested

case proceeding go first. As a result, the Court of Appeals had only to look to the Permit Challenge Provision to conclude that the Court of Claims rightly determined it had no subject-matter jurisdiction over Industry's challenge. It was not permitted to reach the merits. Even so, had it properly reviewed the NREPA and the APA, it should have concluded that the 2020 General Permit is a license, not a rule. Instead, the Court of Appeals wrongly determined that it is a rule, even though it cannot be a rule because it is not generally applicable, it is within the agency's discretion to exercise a permissive statutory authority, and the Department presently lacks rulemaking authority under Part 31. This erroneous conclusion authorizes inadequate and untimely judicial review of wastewater permits.

For these reasons, this Court should vacate the reasoning of the Court of Appeals, determine that the exclusive remedy to challenge a wastewater permit is by a contested case proceeding under the Permit Challenge Provision, and allow the stayed administrative proceeding to continue. In the alternative, as briefed in the Department's Application for Leave, this Court should determine that the challenged permit conditions are within the Department's lawful authority.

Respectfully submitted,

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