STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re, Implementing Provisions of Public Act 233 of 2023	MPSC Case No. U-21547
ALMER CHARTER TOWNSHIP, et al,	Court of Appeals No. 373259

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.
/

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

BRIEF OF APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION

ORAL ARGUMENT REQUESTED

Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
Assistant Attorneys General
Attorneys for Appellee
Michigan Public Service Commission
Public Service Division
7109 W. Saginaw Hwy.
Lansing, MI 48917
(517) 284-8140

Dated: February 7, 2025

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

STATEMENT OF JURISDICTION

Appellee, the Michigan Public Service Commission ("Commission") asserts that the appellant local units' ("Appellants"), Statement of Basis of Jurisdiction is incomplete to the extent this Court finds the lack of ripeness in this case is a jurisdictional issue. As shown below, this claim is not yet ripe for judicial review. The Commission acknowledges that the precise connection between ripeness and jurisdiction in Michigan is uncertain. See *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 430, (2010) (CORRIGAN, J., dissenting); *Citizens Protecting Michigan's Const v Sec'y of State*, 280 Mich App 273, 282 (2008), aff'd in part, appeal denied in part by *Citizens Protecting Michigan's Const v Sec'y of State,* 482 Mich 960 (2008). The Commission also recognizes that this Court, in dicta, has discussed jurisdiction and ripeness as distinct concepts. *Citizens Protecting Michigan's Const*, 280 Mich App at 282. In an unpublished decision, this Court has pointed to this dicta in support of an order denying a motion by the Commission to dismiss a different case for lack of ripeness. *In re Reliability Plans of Electric Utilities for 2017-2021*, unpublished order of the Court of Appeals, entered November 15, 2017 (Docket Nos. 340600; 340607) (Attached as Appendix A to this Brief). However, as recently as 2023, an unpublished opinion of this Court indicated this issue may not be fully resolved, explaining that "it has not been established in Michigan whether lack of ripeness divests a court of its subject matter jurisdiction." *Gillman v Dep't of Tech, Mgmt, & Budget*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 2023 (Docket No. 362504) p 5 (Attached as Appendix B to this Brief).

The Commission asserts that a finding that lack of ripeness divests this Court of jurisdiction is consistent with the explanation that the ripeness doctrine "is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *King v Michigan State Police Dept*, 303 Mich App 162, 188 (2013) (quoting *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615 (2008). A finding that the lack of ripeness in this case is a matter of jurisdiction is also consistent with at least one of the two sources of the ripeness doctrine in federal courts – the Article III limitations on judicial power. *Nat'l Park Hosp Ass'n v Dep't of Interior*, 538 US 803, 808 (2003) ("The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.") (quotation marks and citations omitted). The Commission recognizes that this federal precedent is not binding on this Court and that there are differences between the way Michigan and Federal courts treat justiciability doctrines such as standing. *Id.*; *Lansing Sch Educ Ass'n*, 487 Mich at 430 (CORRIGAN, J., dissenting).[1] However, the federal precedent on ripeness may be instructive here.

To the extent this Court finds that a lack of ripeness divests the Court of subject matter jurisdiction, there is no jurisdiction where Appellants claims are not ripe. Even if this Court does not find that lack of ripeness is a sufficient basis to divest the Court of jurisdiction, the Commission maintains that this case is not ripe

[1] See Footnote 5 below for further discussion on Michigan courts' treatment of these justiciability doctrines.

and asserts that a lack of ripeness is a basis for deciding the matter in favor of the Commission on the merits, as articulated below.

If the lack of ripeness does not divest this Court of jurisdiction, then the Commission agrees that MCL 462.26(1) provides the Court jurisdiction to review the Commission's October 10, 2024, Order in MPSC Case No. U-21547.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Claims premised on contingent future events are not ripe for appellate review. No applications had been filed with the Commission pursuant to Public Act 233 of 2023 at the time this appeal was filed and no actual injury had, therefore, been sustained. Is this appeal ripe for appellate review?

Appellants' answer:	Yes.
Appellee's answer:	No.
Intervening Appellees' Presumed Answer	No.

2. To prevail, Appellants must show by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. The Commission's interpretations in its October 10, 2025 order were reasonable and necessary for the implementation of the statute. Did Appellants show that the challenged order was unlawful or unreasonable?

Appellants' answer:	Yes.
Appellee's answer:	No.
Intervening Appellees' Presumed Answer	No.

3. Rules requiring the rulemaking procedures prescribed by the Administrative Procedures Act do not include actions and materials explicitly excluded under statute. The portions of the Commission's October 10, 2025, order challenged in this appeal are interpretative statements that are not appropriate for the rulemaking process. Did the Commission act unlawfully when issuing these interpretive statements through an order?

Appellants' answer:	Yes.
Appellee's answer:	No.
Intervening Appellees' Presumed Answer	No.

STATUTES INVOLVED

MCL 125.3209

> Except as otherwise provided under this act, a township that has enacted a zoning ordinance under this act is not subject to an ordinance, rule, or regulation adopted by a county under this act.

MCL 24.207(f), (h), (j)

> "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:
>
> * * *
>
> (f) A determination, decision, or order in a contested case.
>
> * * *
>
> (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.
>
> * * *
>
> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.
>
> * * *

MCL 460.1221(a), (f), (i), (j), (n), (p), (w), (x)

> (a) "Affected local unit" means a unit of local government in which all or part of a proposed energy facility will be located.
>
> * * *
>
> (f) "Compatible renewable energy ordinance" means an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8). A local unit of government is considered

not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction.

* * *

(i) "Energy facility" means an energy storage facility, solar energy facility, or wind energy facility. An energy facility may be located on more than 1 parcel of property, including noncontiguous parcels, but shares a single point of interconnection to the grid.

(j) "Energy storage facility" means a system that absorbs, stores, and discharges electricity. Energy storage facility does not include either of the following:

* * *

(n) "Local unit of government" or "local unit" means a county, township, city, or village.

* * *

(p) "Nameplate capacity" means the designed full-load sustained generating output of an energy facility. Nameplate capacity shall be determined by reference to the sustained output of an energy facility even if components of the energy facility are located on different parcels, whether contiguous or noncontiguous.

* * *

(w) "Solar energy facility" means a system that captures and converts solar energy into electricity, for the purpose of sale or for use in locations other than solely the solar energy facility property. Solar energy facility includes, but is not limited to, the following equipment and facilities to be constructed by an electric provider or independent power producer: photovoltaic solar panels; solar inverters; access roads; distribution, collection, and feeder lines; wires and cables; conduit; footings; foundations; towers; poles; crossarms; guy lines and anchors; substations; interconnection or switching facilities; circuit breakers and transformers; energy storage facilities; overhead and underground control; communications and radio relay systems and telecommunications equipment; utility lines and installations; generation tie lines; solar monitoring stations; and accessory equipment and structures.

(x) "Wind energy facility" means a system that captures and converts wind into electricity, for the purpose of sale or for use in locations other than solely

the wind energy facility property. Wind energy facility includes, but is not limited to, the following equipment and facilities to be constructed by an electric provider or independent power producer: wind towers; wind turbines; access roads; distribution, collection, and feeder lines; wires and cables; conduit; footings; foundations; towers; poles; crossarms; guy lines and anchors; substations; interconnection or switching facilities; circuit breakers and transformers; energy storage facilities; overhead and underground control; communications and radio relay systems and telecommunications equipment; monitoring and recording equipment and facilities; erosion control facilities; utility lines and installations; generation tie lines; ancillary buildings; wind monitoring stations; and accessory equipment and structures.

* * *

MCL 460.1222(1)–(2)

(1) This part applies to all of the following:

(a) Any solar energy facility with a nameplate capacity of 50 megawatts or more.

(b) Any wind energy facility with a nameplate capacity of 100 megawatts or more.

(c) Any energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more.

(2) Before beginning construction of an energy facility, an electric provider or independent power producer may, pursuant to this part, obtain a certificate for that energy facility from the commission. A local unit of government exercising zoning jurisdiction may request the commission to require an electric provider or independent power producer that proposes to construct an energy facility in that local unit to obtain a certificate for that energy facility from the commission. To obtain a certificate for an energy facility, an electric provider or IPP must comply with the requirements of sections 223 and 224, and then submit to the commission an application as described in section 225.

* * *

MCL 460.1223(1)–(3), (5)

MCL 460.1223 is attached as Appendix C to this brief

MCL 460.1224(1)

> (1) A site plan required under section 223 or 225 shall meet application filing requirements established by commission rule or order to maintain consistency between applications. The site plan shall include the following:
>
> (a) The location and a description of the energy facility.
>
> (b) A description of the anticipated effects of the energy facility on the environment, natural resources, and solid waste disposal capacity, which may include records of consultation with relevant state, tribal, and federal agencies.

(c) Additional information required by commission rule or order that directly relates to the site plan.

MCL 460.1226

> *MCL 460.1226 is attached as Appendix D to this brief.*

MCL 460.1231(3), (5)

> * * *
>
> (3) If a certificate is issued, the certificate and this part preempt a local policy, practice, regulation, rule, or other ordinance that prohibits, regulates, or imposes additional or more restrictive requirements than those specified in the commission's certificate.
>
> * * *
>
> (5) Except as provided in this section, this part does not exempt an electric provider or IPP to whom a certificate is issued from obtaining any other permit, license, or permission to engage in the construction or operation of an energy facility that is required by federal law, any other law of this state, including, but not limited to, the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, any rule promulgated under a law of this state, or a local ordinance.

INTRODUCTION

This appeal faces many obstacles to sound reason, and each time one of these obstacles appears, Appellants default to a provocative but ultimately erroneous and unsupported claim–that the Commission rewrote or redefined Public Act 233 of 2023 ("Act 233"). Appellants fail to acknowledge the Commission's clear authority and obligation to interpret the statutes that it administers. This appeal is not a serious dispute of the Commission's authority, but largely an expression of dissatisfaction with the contents of Act 233 framed as a challenge to the Commission's rightful and lawful efforts to provide needed interpretive guidance for implementing Act 233. In providing this interpretive guidance, the Commission afforded interested parties critical information about how Act 233 should be administered when applications are filed under the statute.

This case is not yet ripe for judicial review. There has been no contested case conducted under Act 233. No testimony, briefs, or motions have been filed at the Commission regarding the topics Appellants seek to challenge here. And most importantly, no actual injury has occurred at this time. The contested case process that each Act 233 application will go through provides ample procedural opportunities for parties to challenge the Commission's determinations and any alleged injuries. It is inappropriate to ask this Court to evaluate these hypothetical and contingent claims prematurely and without the benefit of the appropriate procedure.

Beyond the ripeness issues with this appeal, Appellants' substantive arguments are sweeping, unsupported, and ultimately incorrect. The Commission

reasonably and lawfully exercised its authority to interpret Act 233 with respect to the terms "compatible renewable energy ordinance" ("CREO") and "affected local unit." Likewise, its use of the term "hybrid facility" was a reasonable and lawful articulation of the statute's plain meaning and intent. Appellants' repeated attempts to frame these interpretations as rewriting the statute fall apart under any scrutiny. Appellants never articulate the difference between rewriting and interpreting, nor do they fully acknowledge the underlying interpretations they seek to challenge. This effort falls well short of their burden of proof.

Likewise, the Appellants' challenge to the Commission's authority to provide interpretive statements and to exercise a permissive statutory power under the Administrative Procedures Act of 1969, MCL 24.201 *et al.* ("APA") must fail. The thrust of Appellants' arguments depends on the Commission's actions falling within the statutory definition of the term "rule" under the APA. Appellants' arguments fail to recognize the numerous exceptions to the APA rulemaking process and the established case law that situates the Commission well within its statutory authority to interpret Act 233 and act under the permissive powers provided by that statute.

Given the posture of this appeal, the actual effect of Appellants' requested relief is unclear. What is clear is that it is not the time to ask this Court to review these Act 233 interpretations. Appellants have not shown that these interpretations are unreasonable or unlawful. Substituting this Court's judgement

for that of the Commission before any application is filed would be premature. The Commission respectfully requests that this Court deny Appellants' requested relief.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Commission provides this counter-statement of facts for the purpose of selectively responding to inaccurate or incomplete statements made in Appellants' Brief on Appeal (Appellants' Brief). For the purposes of this Brief, the Commission will rely on the statement of facts in Appellants' Brief where not otherwise addressed. On November 28, 2023, Governor Gretchen Whitmer signed Act 233 into law, which amended Public Act 295 of 2008. Act 233 prescribed the powers and duties of the Commission to provide certification before the construction of certain wind, solar, and energy storage facilities.

A. Act 233 provides discretion to electric providers and independent power producers to seek wind, solar, and storage certification and for local units of government to require a siting certificate.

Sections 222 (1) and (2) of Act 233 provide that before beginning construction of an energy facility with qualifying nameplate capacity "an electric provider or independent power producer may. . . obtain a certificate for that energy facility from the commission." MCL 460.1222(2). Act 233 does not mandate that developers[2] obtain a certificate from the Commission to site an energy facility. As stated in a footnote by Appellants, "[e]ven if a proposed project meets the threshold capacity requirements of [Section] 222(1), the developer may choose to submit their

[2] Like Appellants' Brief, this Brief uses the terms "developers" or "applicants" to generally refer to the electric providers or independent power producers seeking to site energy facilities. (See Appellants' Brief, p 3, n 3.)

application only to appropriate local units and seek local zoning approval, regardless of whether the local units have CREOs." (Appellants' Brief, p 3, n 4.)

Act 233 also provides that "[a] local unit of government exercising zoning jurisdiction may request the commission to require an electric provider or independent power producer that proposes to construct an energy facility in that local unit to obtain a certificate for that energy facility from the commission." MCL 460.1222(2). A developer can come to the Commission for a certificate at the request of an affected local unit.

Section 223(3) of Act 233 further requires that a developer must file for approval with each affected local unit if it is notified that each affected local unit has a compatible renewable energy ordinance (CREO). MCL 460.1223(3). The statutory exceptions to this section include three procedural paths that allow a developer to come to the Commission despite an affected local unit stating it has a CREO. A developer can submit an application to the Commission for a certificate after being notified that an affected local unit has a CREO if: (1) an affected local unit fails to timely approve or deny an application; (2) an application with an affected local unit complies with the statutory requirements of Section 226(8) of Act 233 but is nonetheless denied; or (3) if an affected local unit amends its zoning ordinance after notifying a developer that it has a CREO and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those outlined in Section 226(8) of Act 233. See MCL 460.1223(3)(c). Even under these limited circumstances, the decision to seek a

certificate from the Commission remains at the discretion of either the developer or an affected local unit.

Act 233 does not create "exemptions to local zoning regulations" but provides an alternate, discretionary path to wind, solar, and storage siting certification. (Appellants' Brief, p 2.) The circumstances under which a developer may seek a certificate from the Commission are enumerated and well defined by the statute. An affected local unit of government exercising zoning jurisdiction with a CREO may also request the Commission require a developer obtain a certificate from the Commission.

B. The Commission analyzed principles of statutory construction when interpreting terms in Act 233, including affected local unit.

Section 223 of Act 233 requires the developer hold a public meeting in each affected local unit with proper notice as outlined in that section. See MCL 460.1223(1). Under Section 221 of Act 233, "'[a]ffected local unit' means a unit of local government in which all or part of a proposed energy facility will be located." MCL 460.1221(a). Under the same section, "local unit of government" or "local unit" means "a county, township, city, or village." MCL 460.1221(n). Public Act 110 of 2006, the Michigan Zoning Enabling Act ("MZEA"), provides that "a township that has enacted a zoning ordinance under this act is not subject to an ordinance, rule, or regulation adopted by a county under this act." MCL 125.3209. As stated on page 2 of Appellants' Brief, Act 234 of 2023, signed into law simultaneously with Act 233,

amended the MZEA to state that a zoning ordinance is subject to "Part 8 of the clean and renewable energy and energy waste reduction act, 2008 PA 295, MCL 460.1221 to 460.1232." MCL 125.3205(1)(d).

On October 10, 2024, the Commission published an order in Case No. U-21547 (October 10 Order) in which the Commission determined that it is "impossible for a county to have an applicable CREO if a township has enacted a CREO." (MPSC Case No. U-21547, 10/10/2024 Order, pp 6-7, F# 0025.)[3] As such, the Commission interpreted Act 233 to be read in harmony with the Michigan Zoning Enabling Act and restricted the term "affected local unit" to mean "only those local units of government that exercise zoning jurisdiction." (*Id*. at 9.) The Commission found that "all the circumstances that trigger the Commission's limited authority to site energy facilities necessarily require a local unit of government to exercise zoning jurisdiction." (*Id*. at 10.) The Commission went on to state that "although the statutory definition of [affected local unit] does not reference zoning jurisdiction, reading the term in light of the entire context of Act 233's statutory scheme to provide a limited transfer of siting authority to the Commission reveals that such a restriction is not only reasonable, but necessary." (*Id*.) The Commission

[3] The record in this matter appears in the MPSC's electronic docket found at https://mi-psc.my.site.com/s/case/5008y000009kJfbAAE/in-the-matter-on-thecommissions-own-motion-to-open-a-docket-to-implement-the-provisions-of-public233-of-2023. "F# 0025" is the filing number where the cited order can be found on the e-docket. The Commission has included the F# consistent with MCR 7.212(J)(1)(f).

found that an affected local unit under Act 233 means only those local units of government that exercise zoning jurisdiction. (*Id.*)

Section 223(2) of Act 233 requires that a developer "planning to construct an energy facility shall offer in writing to meet with the chief elected official of each affected local unit . . . ." MCL 460.1223(2). Appellants state that "[a]fter the developer offers to meet with the chief elected official(s), the [affected local units] have a choice: they may decline or accept the offer to meet." (Appellants' Brief, p 4.) The statutory language provides a requirement for developers to offer to meet with each chief elected official of an affected local unit. Appellants' statement that the chief elected officials have the discretion to meet with a developer has no basis in the statutory language of Act 233.

Appellants also state that once an affected local unit notifies a developer that it has a CREO, "the developer *must* submit their application to the [affected local unit], not the PSC, and comply with the [affected local unit]'s CREO to obtain approval." (*Id.* (emphasis in original).) As outlined above, there are three paths that may bring a siting case before the Commission even if an affected local unit notifies a developer that it has a CREO and the developer files with the affected local unit first. Appellants' statement, and added emphasis, fail to recognize these explicit exceptions.

In their Statement of Facts, Appellants also comment on Section 223(5) of Act 233, which states that "[i]f the commission approves an applicant for a certificate submitted under subsection (3)(c), the local unit of government is considered to no

longer have a compatible renewable energy ordinance, unless the commission finds that the local unit of government's denial of the application was reasonably related to the applicant's failure to provide information required by subsection (3)(a)." MCL 460.1223(5). Appellants argue that "once the [Commission] approves a certificate, in most situations the [affected local unit] is forever cut out of the decision-making process involving qualifying projects." (Appellants' Brief, p 8.) This statement is incomplete and misleading. It fails to attribute post-certificate consequences to Section 223(5) and to acknowledge that facilities can continue to be sited outside of the Act 233 context. (See Appellants' Brief, p 3, n 4.) It also fails to acknowledge the Commission's October 10 Order makes no attempt to undermine an affected local unit's authority to amend its ordinances and that any project could be constructed through the local siting process, regardless of the ordinance's CREO status.

While Act 233 does permit the Commission to place construction-related conditions on a certificate, (MPSC Case No. U-21547, 10/10/2024 Order, p 63, F# 0025,) "the Commission's issuance of a certificate does not exempt an electric provider or IPP from obtaining any other permit, license, or permission to engage in the construction or operation of an energy facility that is required by federal law, any other state law or rule, or a local ordinance." (*Id*. at 64 (citing MCL 460.1231(5).) Appellants' broad statement is neither complete nor grounded in the statutory language of Act 233. The Commission will address the arguments related to these topics below.

C. The Commission provided application filing instructions and procedures.

Act 233 granted the Commission authorities which Appellants failed to include in a complete manner in their Statement of Facts. (See Appellants' Brief, pp 9-10.) Act 233 states that "the commission has only those powers and duties granted to the commission under this part." MCL 460.1230(1). Appellants state that Act 233 gives the Commission only specific powers as outlined in their Statement of Facts. The Commission generally agrees.

However, Appellants provided an abbreviated list of the duties assigned to the Commission that does not fully capture the extent of the Commission's powers. Most notably for the purposes of this appeal, Section 224(1) explicitly grants the Commission the power to establish application filing requirements "by commission rule or order to maintain consistency between applications." MCL 460.1224(1). This language is omitted from the Appellants' Statement of Facts.

As stated in Appellants' Brief, on February 8, 2024, the Commission opened a docket on its own motion (February 8 Order) to implement Act 233. In its February 8 Order, the Commission directed the Michigan Public Service Commission Staff to "file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in this docket by June 21, 2024." (MPSC Case No. U-21547, 2/8/2024 Order, p 3, F# 0001.)

As the Commission-adopted Application Filing Instructions and Procedures state "[t]hese instructions have been developed to assist the applicant with the entire process associated with obtaining and complying with a Certificate." (MPSC

Case No. U-21547, 10/21/2024 Errata, p 1, F# 0026.) Act 233 grants the Commission authority to establish application filing requirements by order.

Appellants state that "the PSC drafted application instructions and procedures and a public comment process proceeded as outlined in the February 8 Order." (Appellants' Brief, p 11.) The Commission speaks through its orders. *In re Application of Mich Gas Utils Corp per Order U-14292*, unpublished per curiam opinion of the Court of Appeals, issued Jan 24, 2013 (Docket No. 301103), p 9 ("The principle that a court speaks through its orders, *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987), applies as well to the PSC.") (Attached as Appendix E to this Brief.)[4] The draft application instructions and procedures put forth for public comment were drafted by Michigan Public Service Commission Staff. (MPSC Case No. U-21547, 10/10/2024 Order, pp 2–4, F# 0025.) The Commission corrects Appellants' Statement of Facts to the extent it implies the Commission, and not Staff, prepared the draft version or engaged in the public comment process.

[4] The Commission cites this unpublished, and therefore non-binding, opinion for the limited purpose of demonstrating a prior instance in which this Court has recognized the accepted principle that the Commission speaks through its orders. The Commission is not aware of a published opinion addressing this principle.

STANDARD OF REVIEW

As Appellants acknowledge, Section 26 of the Railroad Act places a heavy burden of proof on an appellant to show by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. MCL 462.26(8); *Antrim Resources v Michigan Pub Serv Comm'n*, 179 Mich App 603, 619–620 (1989); (Appellants' Brief, p 15.) The Michigan Supreme Court has explained how difficult it is to show that an order is unlawful or unreasonable. The Court explained that to find a Commission order unlawful "there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion." *In re MCI Telecom Complaint*, 460 Mich 396, 427 (1999) (citation and quotation omitted). Likewise, "[t]he hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.*

While an appellant always has the burden of proving that a Commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating an appellant's arguments depending on the nature of the agency decision involved.

In matters of administrative expertise, this Court gives due deference to the Commission and "is not to substitute its judgement for that of the [Commission]." *Att'y Gen v Michigan Pub Serv Comm'n*, 237 Mich App 82, 88 (1999); see also *Residential Ratepayer Consortium v Michigan Pub Serv Comm'n*, 239 Mich App 1, 3 (1999). In fact, this Court has a long history of affirming Commission orders in

deference to the Commission's administrative expertise. See *Att'y Gen v Michigan Pub Serv Comm'n*, 249 Mich App 424, 433 (2002).

The standard of review for the Commission's legal interpretations is less deferential, but the Commission's interpretations, which it unquestionably has the authority to make, are nonetheless respected. *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich 97, 119 (2020) ("The MPSC has the authority to interpret the statutes it administers and enforces.") Although courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation, courts give "most respectful consideration" to an administrative agency's interpretation of a statute that it administers, and courts do not overturn that interpretation without "cogent reasons." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93 (2008). Subsequent to the Michigan Supreme Court articulating this standard in *Rovas,* the Court indicated that, as long as an agency's "interpretation does not conflict with the Legislature's intent as expressed in the language of the statute at issue, there are no such cogent reasons to overrule it." *Younkin v Zimmer*, 497 Mich 7, 10 (2014) (citation and quotation marks omitted).

ARGUMENT

I. This case is not ripe for review by this Court.

This Court has explained that "[t]he doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *King*, 303 Mich App at 188 (quoting *City of Huntington*

Woods, 279 Mich App at 615). Claims premised on contingent future events are not ripe for appellate review. *Id.* The timing of an action is the primary focus of a ripeness review. *City of Huntington Woods*, 279 Mich App at 616.[5] In a concurring opinion for the Michigan Supreme Court discussing specifically how ripeness develops after a suit is brought, Justice Kelly indicated ripeness arguably should be considered from the time a plaintiff brings suit, while also recognizing the lack of clear binding state precedent on the topic. *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306, 349 (2004) (Kelly, J., concurring). Notably Judge Corrigan, writing for the Court, remanded the issue that became ripe after the case had last been considered by a lower court. *Id.* at 336.

This Court has explained that the ripeness analysis asks whether a claim is sufficiently mature to warrant judicial intervention. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich App 207, 218 (2018), rev'd on other grounds by *In re Reliability Plans of Elec Utilities for 2017-2021,* 505 Mich at 97. The Court must "balance any uncertainty about whether a party will actually suffer future injury against the potential hardship of denying anticipatory relief" in making that

---

[5] As acknowledged in the Commission's Answer in Opposition to Appellants' Motion for Preliminary Injunction, the Michigan Supreme Court opted for a more "limited, prudential approach" to standing since 2010. *Lansing Sch Educ Ass'n*, 487 Mich at 353. The dissent in *Lansing Sch Educ Ass'n* questioned whether the case would undermine the related mootness and ripeness doctrines. *Id.* at 430 (Corrigan, J., dissenting, joined by Young and Markman, JJ.). Yet, the Commission is aware of no case undermining or invalidating the ripeness doctrine on this basis, and this Court has continued to cite cases such as *City of Huntington Woods* to evaluate the ripeness doctrine. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich at 217.

assessment. *Id.* at 218. At the same time, the ripeness doctrine still requires "that an actual injury be sustained." *Id.* at 217. In a previous appeal from a separate Commission proceeding, this Court rejected arguments that a challenge to a Commission order regarding a local clearing requirement (a requirement on all electric providers to obtain a certain amount of their capacity within a certain geographical area)[6] was not ripe until the Commission actually imposed the requirement. *Id.* Contrary to the Commission's arguments, the Court found that the Commission had done more than merely announce its authority to implement a local clearing requirement on certain electric suppliers. It found that the Commission had announced its decision to assert that authority. *Id.* at 218–219. In other words, the Commission had decided to impose an affirmative obligation on the electric providers. The Court explained that it would find issues ripe "when it is a 'threshold determination,' the resolution of which is not dependent on any further decision by the [Commission]." *Id.* at 218.

At the time of filing the instant appeal, no injury had occurred yet. The underlying law was not effective until November 29, 2024. MPSC Case No. U-21547, 10/10/2024 Order, p 1, F # 0025; (Appellants' Brief, p 2.) As such, there were no applications for energy facility certificates filed at the time of this appeal

[6] MCL 460.6w(12)(d) (" 'Local clearing requirement' means the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8).")

and the Commission had not imposed any of the interpretations it described in its October 10 Order. Additionally, nothing in Act 233 prohibits the continued siting of energy facility projects through the local process, MCL 460.1221, *et seq*., and Act 233 explicitly contemplates the continued processing of project applications at the local level even after the effective date of Act 233. MCL 460.1223(3). None of the Appellants, therefore, could be certain that a developer would submit an application for an energy facility to the Commission for a project located within their jurisdiction, let alone that they will be injured by the guidance issued in the Commission's October 10 Order.

Because none of the Appellants can demonstrate an actual injury from the October 10 Order, this appeal is one that seeks adjudication of a hypothetical claim that is contingent on several future events. At a minimum, any claim would require the filing of an application at the Commission for a project impacting one of the named Appellants.

Appellants will have an opportunity to present their arguments against the interpretations in the Commission's October 10 Order when a contested case is filed. The procedures governing the contested cases that will accompany any application provide for a robust opportunity to do so. See MCL 24.281 (opportunity to file exceptions to a proposal for decision); MCL 24.287 (opportunity to request rehearing); MCL 24.301 (opportunity for judicial review of administrative decisions); MCL 24.304(1) (opportunity to request a stay); MCL 462.26 (opportunity to file certain appeals of Commission decisions by right to Court of Appeal). Yet, as

this Court has explained, the timing of a claim should be the primary focus of a ripeness analysis, and it is simply not time for this Court to evaluate these arguments.

The ripeness deficiencies that this appeal suffers from are distinguishable from those raised by the Commission in the local clearing requirement case described above. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich App at 217–220. While one might argue that the Commission has declared its intent on how it plans to administer the applicable statutes in both cases, there are crucial distinctions. First, the local clearing requirement is a requirement that is applied to all relevant providers. No matter the specific circumstances surrounding an individual provider, the provider would be subject to the requirement if it serves Michigan customers. In the instant case, the Commission certificate process is optional for the applicants, not mandatory. MCL 460.1222(2). Second, the Commission's local clearing requirement decision asserted that it would impose an affirmative obligation on electric providers. Here, Appellants' challenge the Commission's lawful interpretation of a statute the Commission is obligated to administer. (See Sections II and III. A of this Brief.) None of these interpretations, on their own, seek to impose mandatory requirements. Third, the Commission will evaluate any certificate application under Act 233 through a contested case in which the parties will have ample opportunity to present their arguments and appeal, the decisions of the Commission.

Appellants attempt to claim their appeal is now ripe because local units of government have started receiving offers to meet pursuant to the pre-application requirements of MCL 460.1223(2). (Appellants' Brief, pp 14, 24.) These developments do not demonstrate that the October 10 Order has been applied or that an actual injury has occurred. This argument is flawed for multiple reasons. First, as this Court has noted, "the timing of the action" is the primary focus of the ripeness analysis. *Michigan Chiropractic Council v Comm'r of Off of Fin & Ins Servs*, 475 Mich 363, 379 (2006), overruled on other grounds by *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; see also *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553 (2017). At the time of this appeal there were no applications for certificates under Act 233 filed with the Commission. Appellants' attempts to justify their Claim of Appeal with correspondence received after filing the appeal should not be persuasive. (See Appellants' Brief, pp 14-15; Exhibits G and J.)

Second, the fact that local units of government have received indications that developers are working towards possibly filing applications pursuant to Act 233 does not necessarily mean that all such applications will come to fruition. Such developers are still subject to the pre-application requirements of Act 233 and may still site projects outside of the Act 233 process. Moreover, if such applications are actually filed with the Commission, there are sufficient, and more appropriate, procedural measures in place to allow parties to present their legal arguments and

challenge the Commission's interpretation of Act 233 if and when the Commission actually applies those interpretations.

Because Appellants based this appeal on hypothetical claims contingent on future events, it is not ripe for judicial review. Appellants should not ask this Court to decide these issues based on interpretative guidance before an actual injury has been alleged and is raised in a procedurally appropriate manner. Only then, when there is a record and final Commission determination applied to specific facts, should this Court be obligated to address Appellants' arguments. For these reasons, this Court should find that Appellants' claims are not ripe for adjudication.

II. Appellants failed to show that the challenged Commission interpretations are unreasonable or unlawful.

The Commission's authority to interpret the statutes it administers is an established legal principle that Appellants fail to fully acknowledge. This Court has left no doubt over the Commission's authority. *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich at 119. This proposition should be neither surprising nor controversial. Commission interpretation of the statutes it administers is a routine aspect of the Commission's responsibilities. See *In re Complaint of Rovas Against SBC Michigan*, 482 Mich at 93; *Att'y Gen v Michigan Pub Serv Comm'n,* 206 Mich App 290, 298 (1994). The standard of review for such interpretations, which Appellants themselves articulate, also inherently recognizes the Commission has a role to play in statutory interpretation. (Appellants' Brief, p 16); *In re Michigan Consol Gas Co to Increase Rates Application*, 293 Mich App 360,

365 (2011) ("A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference.") This standard not only recognizes the Commission's authority to make such interpretations but grants those interpretations respectful consideration.

Despite this clear authority, Appellants' Brief repeats allegations throughout its Statement of Facts and Argument sections that the October 10 Order impermissibly "redefines" or "rewrites" the provisions of Act 233. (Appellants' Brief, pp 1, 13–14, 17–18, 20, 23–24, 26–27, 32–34.) Appellants' Brief fails to acknowledge, let alone distinguish, this Court's precedent clearly establishing the Commission's authority to interpret Act 233 when presenting these arguments. Appellants appear to vaguely concede some interpretation authority exists when discussing their erroneous arguments that the Commission violated the APA by not engaging in the rulemaking process. (See Appellants' Brief, p 32.) But even then, Appellants make no attempt to describe or point to any authority explaining what distinguishes interpretations from "rewriting" or "redefining" the statute.[7] This

[7] Interestingly, Appellants accuse the Commission's anticipated APA arguments as being circular. (Appellants' Brief, p 30.) Yet, the entire explanation of why the Commission's order constitutes rewriting Act 233, rather than interpreting it, appears to be the following: "So, the inquiry here must begin with the PSC's authority. While an administrative agency may act to interpret a statute or to exercise a permissive statutory power, MCL 24.207(h) and (j), the PSC did not merely 'interpret' PA 233, and it does not possess permissive statutory power to rewrite sections of PA 233." (*Id*. at 32.) The Commission submits that it is this argument that falls victim to a logical fallacy, not the Commission's supported and correct assertion that the APA rulemaking process is not appropriate for interpretative statements. See Section III of this Brief.

failure is particularly surprising given that Appellants are aware of the precedent, since the Commission included this authority in its Answer in Opposition to Appellants' Motion for Preliminary Injunction.[8] (Commission's Answer in Opposition, pp 23–24. (Attached as Appendix F to this Brief.))

As demonstrated below, the Commission's October 10 Order was neither unlawful nor unreasonable. The interpretations Appellants challenge are both reasonable and consistent with necessary statutory construction and interpretation. The Court must, therefore, reject Appellants' arguments.

A. The Commission's interpretation of the term "compatible renewable energy ordinance" is both lawful and reasonable.

The Commission's interpretation of the term "CREO" is consistent with the plain meaning of the statutory language. The statute defines the term CREO as follows:

> [A]n ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8). A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction. [MCL 460.1221(f).]

The Commission did not "redefine" this term, as Appellants allege. (Appellants' Brief, p 26.) The Commission clearly relied on, and interpreted this term consistent

[8] Appellants' Motion for Preliminary Injunction, which this Court referred to as a motion for stay, was denied on January 14, 2025. *In re Implementing Provisions of Public Act 233 of 2023*, unpublished order of the Court of Appeals, entered January 14, 2025 (Docket No. 373259).

with, the statutory definition. (MPSC Case No. U-21547, 10/10/2024 Order, pp 12, 17–18, F # 0025.)

1. The Commission's CREO interpretation is consistent with the plain meaning of the statutory language.

The Commission's October 10 Order recognized that Act 233 requires a CREO to be "no more restrictive than the provisions included in section 226(8)." (*Id*. at 12, 18 (quoting MCL 460.1221(f)).) The term "restrictive" is not defined in the statute. Merriam-Webster defines "restrictive," in part, as "of or relating to restriction" or "serving or tending to restrict." "Restrictive," Merriam-Webster, https://www.merriam-webster.com/dictionary/restrictive (last visited Jan 30, 2024). The word "restriction" is further defined, in part, as "something that restricts: such as . . . a regulation that restricts or restrains." "Restriction," Merriam-Webster, https://www.merriam-webster.com/dictionary/restriction (last visited Jan 30, 2024). The word "restrict" is further defined as "to confine within bounds" or "to place under restrictions as to use or distribution." Restrict," Merriam-Webster, https://www.merriam-webster.com/dictionary/restrict (last visited Jan 30, 2024).[9]

[9] These definitions are consistent with those in other sources. Webster's New International Dictionary defines "restrictive," in part, as "serving or tending to restrict." *Webster's New International Dictionary, Second Unabridged Edition* (1966). The word "restriction" is further defined, in part, as "that which restricts; a limitation; a qualification; a regulation which restricts or restrains." *Id*. The word "restrict" is further defined as "[t]o restrain within bounds; to limit; to confine" and "to limit the free use of land." *Id*.

As these definitions demonstrate, the plain meaning of the CREO definition is an ordinance that does not impose restraining regulations or limitations on proposed energy facilities in addition to those found in MCL 460.1226(8). In other words, additional restrictions to those specified in MCL 460.1226(8) are inherently "more restrictive." This plain meaning is consistent with the Commission's determination.

2. The Commission's CREO interpretation is consistent with the legislative intent of the statute.

The Commission relied on the plain meaning of the CREO statutory definition, but it also noted that Act 233 provides further support that the Commission's interpretation is consistent with rules of statutory construction and interpretation, which is that laws are to be interpreted consistent with the legislative intent. (MPSC Case No. U-21547, 10/10/2024 Order, pp 17–18, F # 0025.) There are three instances when an application may come before the Commission after the affected local unit claiming to have a CREO assesses the project. MCL 460.1223(3)(c)(i)–(iii). Of particular note for the Commission's CREO interpretation are the instances when an application may be filed with the Commission if: 1) "[t]he application complies with the requirements of section 226(8), but an affected local unit denies the application" or 2) if an affected local unit amends its zoning ordinance after notifying the project developer that it has a CREO such that "the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in section

226(8)."[10] MCL 460.1223(3)(c)(ii), (iii). Both of these provisions demonstrate the Legislature's intent that applications filed pursuant to a CREO should only be evaluated based on those requirements identified in MCL 460.1226(8) and no additional requirements.

Appellants' Brief makes little attempt to refute, or even address, these explanations from the Commission's October 10 Order. Nor does Appellants' Brief contain a meaningful discussion or analysis of the statutory definition of a CREO in MCL 460.1221(f). Appellants once again rely heavily on broad statements and arguments that "[t]he language of the statute as a whole and of § 226(8), in particular, demonstrates the Legislature's intent that CREOs may contain additional, but not more restrictive, regulations." (Appellants' Brief, p 25.) However, examination of these arguments reveals the statute, as a whole, supports the Commission's interpretation.

3. Reading the CREO definition in the broader context, as Appellants suggest, supports the Commission's CREO interpretation.

Appellants claim that "PA 233, as PA 234 suggests, must be read in context with the MZEA." (Appellants' Brief, p 24.) As a general statement, the Commission does not disagree.[11] However, Appellants erroneously claim that because provisions of the MZEA demonstrate that the Legislature knows how to restrict zoning

---

[10] An applicant may also file with the Commission in this instance if the affected local unit fails to timely approve or deny and application. MCL 460.1223(3)(c)(i).

[11] See Section II.B. of this Brief.

authority, the Commission's interpretation of the CREO definition is necessarily too narrow. (*Id.*)

First, Act 233 undoubtably, and explicitly, restricts local zoning authority under certain conditions. Appellants' claim that Act 233 does not limit local zoning authority in the way that the MZEA examples provided in their brief do.[12] Appellants even argue that MCL 460.1231(5) constitutes the Legislature's expressed intent that certificate recipients comply with local ordinances. (Appellants' Brief, p 25.) This argument misstates the statutory provision and is otherwise incomplete. MCL 460.1231(3) states:

> If a certificate is issued, the certificate and this part preempt a local policy, practice, regulation, rule, or other ordinance that prohibits, regulates, or imposes additional or more restrictive requirements than those specified in the commission's certificate. [MCL 460.1231(3)]

---

[12] It is also worth noting that Appellants' Statement of Facts includes an incomplete quote from a legislative hearing that might lead the reader to interpret the quote as support for Appellants' proposition that a local unit can impose whatever additional requirements it wishes through a CREO. (See Appellants' Brief, p 4.) Putting aside that one legislator's statements in a hearing cannot supplant the statutory language, see *People v Gardner*, 482 Mich 41, 50–51 (2008), two things are clear from the entire quote. First, nothing in the full quote states that a local unit can impose additional restrictions in a CREO from those found in MCL 460.1226(8). Second, the statement is explicitly discussing the MCL 460.1223(3) local application process as a launch point providing opportunity for continued negotiations and for an affected local unit and developer to "reach an agreement" to site projects outside of the Act 233 context. It cannot reasonably be read as support for Appellants' preferred interpretation of the CREO definition. Senate Committee on the Energy and Environment, Hearing, November 11, 2023, at 6:40, https://cloud.castus.tv/vod/misenate/video/654a810ef6b51700084a0c94?page=HOME (accessed January 24, 2025).

Notably, Appellants address this section of the statute in their Statement of Facts but not in their argument that Act 233 did not limit local zoning authority. (Appellants' Brief, pp 11, 25.) Nor does Appellants' assertion regarding MCL 460.1231(5) recognize that subsection (5) states that it is only applicable "[e]xcept as provided in [Section 231]." (Appellants' Brief, p 25); MCL 460.1231(5). This introductory caveat means that between MCL 460.1231(3) and MCL 460.1231(5), MCL 460.1231(3) is controlling. In other words, despite MCL 460.1231(5), Act 233 unquestionably limits local zoning authority when that local authority "prohibits, regulates, or imposes additional or more restrictive requirements than those specified in the commission's certificate." MCL 460.1231(3).

Appellants' argument that Act 233 does not limit local zoning authority also fails when considered in the context of the CREO definition more specifically. As Section 221(f) of Act 233 states, a CREO may be "no more restrictive than the provisions included in [MCL 460.1226(8)]." MCL 460.1221(f). As discussed above, additional restrictions are inherently more restrictive. Moreover, there can certainly be no question that prohibitions on siting energy facilities in certain areas, which Appellants suggest are permissible in a CREO, are more restrictive than locational setback requirements of MCL 460.1226(8). (See Appellants' Brief, p 25.)

Appellants claims that the Commission's interpretations are inconsistent with the plain meaning of Act 233, when read as a whole, are incorrect. These arguments splice the language of Act 233 to satisfy their narrow interests instead of giving the statutory language the plain meaning it should be afforded.

Appellants point to the fact that MCL 460.1226(8) specifies what constitutes "an unreasonable threat to public health or safety" and that MCL 460.1223(3)(a) requires information in addition to the requirements of MCL 460.1226(8) in an application to an affected local unit.[13] (Appellants' Brief, p 25.) Based on these provisions, Appellants claim the Commission's interpretation of CREO is illogical because it would preclude an affected local unit from rejecting an application based on this additional information. (*Id.* at 25–26.) Appellants' Brief fails to acknowledge several statutory provisions that undermine this argument.

The fact that the Legislature ensured that an applicant would give the affected local unit additional information regarding a proposed project does not undermine the plain meaning of the CREO definition in MCL 460.1221(f). It is not illogical that this information might be important to the affected local unit even if it could not form the basis of a CREO-based determination, especially in light of Act 233's other transparency-focused provisions. See MCL 460.1223; MCL 460.1226(2). Second, the fact that MCL 460.1226(8) details what is an unreasonable risk to

[13] Appellants claim that "the Order's limiting definition of CREO would render an Appellant's ordinance that requires a fire response plan for a solar energy system incompatible with PA 233—only for the developer to be required to submit such a plan to the PSC anyway." (Appellants' Brief, p 20.) This is a complaint about Act 233, not the October 10 Order. As shown in this brief, even assuming for the sake of argument that such provisions were permissible in a CREO, MCL 460.1223(3)(c)(ii) leaves no doubt that an applicant could bring a project denied by a local unit on the basis of such requirement to the Commission. In such instance, if the Commission approved a certificate, the local unit would no longer be considered to have a CREO. MCL 460.1223(5). Therefore, it is Act 233, not the Commission order, that creates the asymmetry between local and Commission processes that Appellants take issue with.

public health or safety does nothing to establish that the Legislature did not intend for these to be the bounds of a CREO. Third, this argument fails to recognize that the statute explicitly and unambiguously states that a developer can bring any application that meets the requirements of MCL 460.1226(8) before the Commission if denied by an affected local unit. MCL 460.1223(3)(c)(ii).

It is, in fact, Appellants' arguments that are illogical. The statute clearly states a developer can bring any application complying with the restrictions of MCL 460.1226(8) to the Commission if denied by the affected local unit. (MPSC Case No. U-21547, 10/10/2024 Order, pp 17–18, F # 0025 (citing MCL 460.1223(3)(c)(ii)).) Pursuant to Appellants' interpretation, an affected local unit could institute additional restrictions other than those articulated in MCL 460.1226(8), deny the application for failure to meet these additional restrictions, and the developer could still apply to the Commission for approval. At that point, the developer would no longer be subject to the affected local units' additional restrictions. Furthermore, if the Commission approved the application, the affected local unit would be "considered to no longer have a [CREO]" because the affected local unit's denial was not premised on incompleteness. MCL 460.1223(5). This absurd result,[14] together with the plain language of MCL 460.1221(f) and the other provisions discussed in

[14] As discussed above, this Court has explained that in "construing a statute, absurd or unreasonable results are to be avoided wherever possible." *In re Procedure & Format for Filing Tariffs Under Michigan Telecom Act*, 210 Mich App at 541.

the Commission's order, demonstrate that the Legislature intended to limit the term "CREO" consistent with the Commission's interpretation.

4. Appellants' attempted application of precedent to their CREO interpretation arguments are meritless.

Appellants claim that the Commission's interpretation of a CREO under Act 233 is analogous to *In re Procedure & Format for Filing Tariffs Under Michigan Telecom Act*, 210 Mich App 533, 551 (1995). They argue the Commission rewrote the CREO definition in the instant case and that this is similar to the Court's determination regarding the definition of "access service" in the telecommunications case.[15] (Appellants' Brief, p 20.) Putting aside that this Court's 1995 opinion said nothing of the Commission "rewriting" the underlying telecommunications statute, the comparison to the "access service" holding is inapposite. In the *Procedures & Format* case, this Court found that the Legislature had defined a component of that

[15] It is worth noting that, in attempting to make this comparison to the *Procedure & Format* case, Appellants' brief makes a clear error that misrepresents the Commission order by claiming that the Commission admitted it was "adopt[ing] narrower definitions of terms already defined by the Legislature in [Public Act] 233." (Appellants' Brief, p 19.) This statement indicates that the Commission admits its definitions are narrower than the statutory definition. This is neither accurate nor consistent with the portion of the October 10 Order quoted as supposed support for the assertion. (*Id.* at n 11 ("With respect to the competing viewpoints expressed in the comments, the Commission agrees that a narrow definition for a CREO is appropriate") (quoting MPSC Case No. U-21547, 10/10/2024 Order, p 17, F # 0025).) This provision expressly and clearly indicates the Commission found that, when comparing the interpretations expressed by commenters, the comments articulating a narrower construction of CREO were consistent with the plain language of the statute. (MPSC Case No. U-21547, 10/10/2024 Order, p 17, F # 0025).

phrase–"access"–which it used interchangeably with the term "access service." *In re Procedure & Format for Filing Tariffs Under Michigan Telecom Act*, 210 Mich App at 548–549.

Act 233 does not define any subcomponent of the term compatible renewable energy ordinance or CREO, let alone a subcomponent that is used by the Legislature interchangeably. With that matter of statutory construction clearly irrelevant to the CREO definition, all that might be gleamed from the *Procedures & Format* case are the specific interpretations of the telecommunications terminology, which are unrelated to the energy facility terms at issue in this case. In short, there is little overlap between the *Procedures & Format* case and the one presently before this Court.

What is of note from the *Procedures & Format* opinion is that this Court found: 1) the Commission had the inherent powers to carry out its express statutory duties, including the power to interpret which services were regulated under the underlying statute; 2) the Commission's interpretations were not subject to the rulemaking requirements of the APA;[16] and 3) that in "construing a statute, absurd or unreasonable results are to be avoided wherever possible." *Id.* at 541. As discussed throughout this brief, all three of these principles support rejecting Appellants' arguments.

[16] See Section III of this Brief.

Appellants' attempt to point to *DeRuiter v Byron Twp* is perhaps even less convincing. Appellants baldly claim that "looking to preemption jurisprudence is helpful" in evaluating the CREO definition. (Appellants' Brief, pp 26–27.) It is not. *DeRuiter* has seemingly no significance for the case at hand, and it is certainly incorrect to claim, as Appellants do, that the Commission's interpretations "run[] afoul of Michigan's preemption jurisprudence." (*Id.*) This is not a preemption case. As such, the Commission's interpretations can do no such thing.

In *DeRuiter*, the Court decided whether a local zoning ordinance conflicted with the provisions of the Michigan Medical Marihuana Act and was, thereby, implicitly preempted. *DeRuiter v Twp of Byron*, 505 Mich 130, 134–135 (2020). While the Court addressed a provision of the statute prohibiting penalization of patients and primary caregivers in compliance with the Michigan Medical Marihuana Act, it did not deal with any provision analogous to MCL 460.1221(f) stating that local ordinances could be "no more restrictive" than the state statute. *Id.* at 138.

The present case is wholly distinguishable from *DeRuiter*. First, there is no preemption at issue in this case. Nothing in Act 233 or the Commission's October 10 Order preempts affected local units from enacting ordinances that do not constitute CREOs. The October 10 Order instead provides guidance regarding the interpretation of when those ordinances meet the statutory definition of a CREO. (MPSC Case No. U-21547, 10/10/2024 Order, pp 12, 17–18, F # 0025.) Second, to the extent the concept of preemption could be informative for this case, an implied

preemption case like *DeRuiter* would certainly not be the appropriate case to look to. Here, the statute explicitly states that a CREO may be "no more restrictive than the provisions included in section 226(8)." MCL 460.1221(f).

Appellants also seek to rely on *Consumers Power Co v Michigan Pub Serv Comm'n*, 460 Mich 148 (1999), claiming that they "anticipate that Appellees will argue that the Order reasonably provides clarity necessary to promote the State's renewable energy policies and to reduce the costs of applying for siting approval either through a local municipality or the PSC." (Appellants' Brief, p 18.) Appellants anticipate incorrectly.[17] The Commission was tasked with administering Act 233. Any policy or cost considerations that are a byproduct of the Commission's interpretation are irrelevant to whether the Commission acted unlawfully or unreasonably. Appellants' reliance on this case is misplaced. First, unlike the arguments addressed in *Consumers Power Co*, the interpretations challenged in the instant case are not premised on their economic or public policy merits. *Consumers Power Co*, 460 Mich at 131. As a reading of the October 10 order clearly demonstrates, the interpretations are premised on the statutory language and sound principles of statutory construction. Second, *Consumers Power Co* addresses the Commission's authority to compel a regulated utility to provide a

[17] This miscalculation is surprising, given that the Commission responded to these arguments earlier in this proceeding. (See Commission's Answer in Opposition, pp 37–38.)

specific service. *Id.* at 132. The holding does nothing to question the Commission's authority to interpret the statutes it is obligated to administer.

Appellants have failed to meet their burden to establish that the Commission acted unreasonably or unlawfully when interpreting Act 233's CREO definition. In fact, the Commission clearly and thoroughly articulated why its interpretation is consistent with the plain language of the statute. This Court should reject Appellants' arguments to the contrary.

B. The Commission's interpretation of the term "affected local unit" is both lawful and reasonable.

Appellants failed to demonstrate that the Commission's interpretation regarding what constitutes an affected local unit is unlawful or unreasonable. Appellants' attempts to argue otherwise suffer many of the same fatal flaws discussed above regarding their challenge of the Commission's CREO interpretation. Yet, the Commission rightfully explained why such interpretation was necessary and consistent with the overall statutory scheme of Act 233.

An affected local unit is defined by the statute to mean "a unit of local government in which all or part of a proposed energy facility will be located." MCL 460.1221(a). A "local unit of government" or "local unit" is, in turn, defined as "a county, township, city, or village." MCL 460.1221(n). MCL 460.1222(2) generally allows developers to apply to the Commission for a certificate for qualifying projects. Yet, there is a key mechanism in the statute that allows initial siting determinations to remain at the local level. MCL 460.1223(3) requires developers to

first apply for siting with the affected local unit if the chief elected official in each affected local unit notifies the developer, within 30 days following a meeting with that developer, that the affected local unit has a CREO. MCL 460.1223(3). If the chief elected official confirms its affected local unit has a CREO, the developer must apply for approval through the affected local unit's local processes. *Id.*

There is, however, a feature of zoning authority that must be considered when determining if a local unit is even able to enact an ordinance that could constitute a CREO. Under the MZEA, the zoning jurisdiction of a county does not include areas subject to a township zoning ordinance. MCL 125.3102(x); MCL 125.3209. When a township exercises zoning jurisdiction, its ordinances supplant any attempt by the County to exercise zoning jurisdiction in the township. *Id.* It is, therefore, impossible under the MZEA for a county and township to each have an enforceable CREO in the same location. They could never both represent that they "each" have CREOs governing a potential project.

It is an established principle of statutory interpretation that the words of a statute should not be "construed in [a] void, but should be read together to harmonize [their] meaning, giving effect to the act as a whole." *Honigman Miller Schwartz and Cohn LLP v City of Detroit*, 505 Mich 284, 307 (2020) (quoting *General Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 255 (1976)). Furthermore, as the Commission noted in its October 10 Order, "[a] statute should be interpreted in light of the overall statutory scheme, and [a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something

substantially different when read in context." (MPSC Case No. U-21547, 10/10/2024 Order, p 10, F # 0025 (quoting *Honigman Miller Schwartz and Cohn LLP*, 505 Mich at 307 (quotation marks omitted)).) Appellants themselves have acknowledged, albeit in support of a different and erroneous argument, that "PA 233, as PA 234 suggests, must be read in context with the MZEA." (Appellants' Brief, p 24.)

Given the structure that the MZEA creates for zoning jurisdiction between various levels of local government, the Commission rightfully determined that interpreting the term "affected local unit" in a void, as a purely geographical term, was not reasonable. Harmonizing the term "affected local unit" with the overall statutory structure is necessary for the requirements under MCL 460.1223(3), which allow initial siting proceedings to remain under a local process, to have any meaningful effect. In such instances, reading the statute to give effect to the entire Act is appropriate and necessary.

The Commission, therefore, examined the statutory language and recognized that Act 233 transfers authority to site energy facilities to the Commission under four limited circumstances. (MPSC Case No. U-21547, 10/10/2024 Order, p 9, F # 0025.) These include when:

(1) "a local unit of government exercising zoning jurisdiction" requests the Commission require a developer to obtain a certificate from the Commission, MCL 460.1222(2);

(2) an affected local unit fails to approve or deny an application under the local siting process within 120 days, MCL 460.1223(3)(b), (c)(i);

(3) an affected local unit, under the local siting process, denies an application that complies with Section 226(8) of Act 233, MCL 460.1223(3)(c)(ii); and

(4) an affected local unit amends its zoning ordinance after its chief elected official notifies the developer that the affected local unit has a CREO, and the amendment imposes additional requirements that are more restrictive than those outlined in Section 226(8) of Act 233. MCL 460.1223(3)(c)(iii).

The Commission further recognized that an affected local unit "is considered not to have a [CREO] if it has a moratorium on the development of energy facilities in effect within its jurisdiction." (MPSC Case No. U-21547, 10/10/2024 Order, p 9, F # 0025 (quoting MCL 460.1221(f)).)

The Commission explained that all of the instances providing the Commission authority to site an energy facility under Act 233 "necessarily require a local unit of government to exercise zoning jurisdiction." (*Id.* at 10.) Not only does this demonstrate the Legislature's intent that the term affected local unit be read to apply only to those entities exercising zoning jurisdiction, but the Commission explains that such interpretation is necessary. (*Id.*) Given that Act 233's structure demands interpretation to harmonize provisions that are otherwise incompatible, the Commission did not act unlawfully or unreasonably in its interpretation.

Like their arguments regarding the definition of the term "CREO," Appellants' Brief once again makes no real attempt to engage with the Commission's analysis interpreting the term "affected local unit."[18] Appellants' Brief does not mention the *Honigman Miller Schwartz and Cohn* case to which the Commission cited. Appellants make no attempt to discuss or contradict the four limited circumstances the Commission identified, under which Act 233 grants the Commission authority to site projects. (See *Id.* at 9.) Regarding the Commission's analysis, Appellants merely state "the Order describes this as a transfer of siting authority that depends on the exercise of local zoning jurisdiction." (Appellants' Brief, p 20.)

Far from contradicting the basis of the Commission's interpretation, Appellants' simply point out various portions of Act 233 that use the term "affected local unit" and describe the rights and benefits the statute affords affected local units. (*Id.* at 20–22.) Appellants claim that not all of these rights and benefits are related to zoning jurisdiction. (*Id.*) This claim is neither compelling nor pertinent. For example, Appellants indicate that the right to receive one-time grant funds to intervene in an Act 233 contested case is unrelated to exercising zoning jurisdiction because even those local units that do not exercise zooming jurisdiction may be interested in intervening and receiving funds to do so. (*Id.* at 21.) The notion that

[18] This failure has persisted from the motion stage of this proceeding up through the present briefing stage. (See Appellants' Brief in Support of Motion for Preliminary Injunction, pp 25–26; Commission's Answer in Opposition to Appellants' Motion for Preliminary Injunction, p 42; Appellants' Brief, pp 20–22).

the Legislature intended to provide these rights and benefits to any interested local unit is unsupported. In fact, based on the overall structure of the legislation, it appears more likely that the Legislature intended to preserve these rights for those local units who were actually exercising some control over siting such projects before Act 233 was enacted.

More importantly, however, is the fact that Appellants' recitation of affected local unit rights and benefits does not actually contradict the Commission's interpretation. Certainly, there is no attempt to reconcile the fact that some interpretation is necessary to harmonize zoning jurisdiction under the MZEA with the requirements of MCL 460.1223(3). Appellants have the burden in this case but make no attempt address this obvious flaw with their proposal to simply look to the statutory definition, let alone provide what a reasonable interpretation resolving this potential disharmony might be. (Appellants' Brief, p 23.)

Appellants also once again rely on broad claims that the Commission is not authorized by Act 233 to "redefine" the term "affected local unit." (See Appellants' Brief, pp 20–26.) Those unsupported assertions, which fail to recognize the Commission's authority to interpret the statutes it administers, are no more convincing here than they are with respect to the Commission's CREO interpretation. (See Section II.A of this Brief.)

Appellants have not met their burden to establish that the Commission's interpretation of the term "affected local unit" is unlawful or unreasonable. The Commission thoroughly articulated why that interpretation was necessary and

consistent with the entire statutory scheme of Act 233. Appellants mainly point to reasons they wish it was not. The Commission acted lawfully and reasonably in issuing this interpretation and Appellants' have failed to demonstrate otherwise.

C. The Commission's use of the term "hybrid facility" is both lawful and reasonable.

The Commission's use of the term "hybrid facility" merely gives a name to a concept articulated in, and consistent with, the statute itself. Appellants fail to demonstrate that this interpretation is unlawful or unreasonable. Appellants' Brief minimizes the statutory language the Commission relied on and relies almost entirely on public comments from the Commission proceeding below, which provide no statutory or other legal support for their preferred outcome.

As Appellants admit, Act 233's definitions explicitly provide that an "energy storage facility" can be a component of a "solar energy facility" or "wind energy facility." (Appellants' Brief, p 22.); MCL 460.1221(w), (x). This admission should be the end of the analysis, at least with respect to hybrid facilities that include energy storage facilities and either wind or solar energy facilities.

The capacity thresholds for Commission siting merely state the minimum nameplate capacity that solar, wind, and energy storage facilities must have to apply to the Commission. MCL 460.1222(1). The definitions of "solar energy

facility" and "wind energy facility" are broad.[19] In using the term "hybrid facility" the Commission simply gave a name to a concept articulated in the statute–that energy facilities can be comprised of multiple technologies. *Compare* (MPSC Case No. U-21547, 10/10/2024 Order, pp 5–6, F # 0025) *with* MCL 460.1221(w), (x). The threshold capacity for such facilities would necessarily contemplate all parts of the energy facility, including the incorporated energy storage facility or other technology type. See MCL 460.1222(1). Despite unsupported assertions by the Appellants to the contrary, there is no statutory authority to carve out portions of the facility's capacity that do not count towards the MCL 460.1222(1) capacity thresholds. The Commission appropriately found that hybrid facilities should be considered wholistically when determining whether they have met the statutory capacity thresholds. (MPSC Case No. U-21547, 10/10/2024 Order, pp 4–6, F # 0025.) Though not the basis of the Commission's determination, the October 10 Order also notes that its use of the term hybrid facilities and the capacity thresholds is consistent with the Michigan Department of Environment, Great

[19] See *e.g.* MCL 460.1221(w) (" 'Solar energy facility' means a system that captures and converts solar energy into electricity, for the purpose of sale or for use in locations other than solely the solar energy facility property. Solar energy facility **includes, but is not limited to**, the following equipment and facilities to be constructed by an electric provider or independent power producer: photovoltaic solar panels; solar inverters; access roads; distribution, collection, and feeder lines; wires and cables; conduit; footings; foundations; towers; poles; crossarms; guy lines and anchors; substations; interconnection or switching facilities; circuit breakers and transformers; **energy storage facilities**; overhead and underground control; communications and radio relay systems and telecommunications equipment; utility lines and installations; generation tie lines; solar monitoring stations; and accessory equipment and structures.") (emphasis added).

Lakes, and Energy's eligibility requirements for the Renewables Ready Communities Award grant structure. (*Id*. at 6, n 6.)

The main thrust of Appellants' argument against the Commission's use of the term "hybrid facility" is a block quote from comments filed in the underlying Commission proceeding.[20] (Appellants' Brief, p 22.) The quote included in Appellants' Brief indicates, without support other than the presumed preference of the commenter, that the inclusion of energy storage facilities in the definition of wind and solar energy facilities exempts those energy storage portions from the nameplate capacity thresholds altogether–with the energy storage portions neither required to meet, nor contributing to, the nameplate capacity thresholds. (*Id*.) Appellants provide no statutory basis for this interpretation. There is none.

Appellants' claim that the Commission's use of the term "hybrid facility" was an attempt to "expand[] its own authority over smaller projects" is belied by the actual interpretation. (Appellants' Brief, p 23.) The Commission's interpretation requires a hybrid project comply with the highest capacity threshold applicable to a technology type within the project. MPSC Case No. U-21547, 10/21/2024 Errata, pp 2–3, F # 0026.) The statute provides that any solar or energy storage facility must

[20] Related to the Commission's ripeness arguments above, it is worth noting that Appellants are forced to point to public comments such as these because there has yet to be an application or contested case addressing any application, let alone one that examines a hybrid facility. Because of this, no party has briefed these issues before the Commission. This is one of the consequences of asking this Court to prematurely evaluate this interpretative guidance without the benefit of the appropriate process.

have a nameplate capacity of 50 megawatts ("MW") or more to qualify for a certificate under Act 233. MCL 460.1222(1). A wind energy facility must have a nameplate capacity of 100MW or more to qualify. The Commission-adopted Application Filing Instructions and Procedures state "Wind facilities, including hybrid or co-located facilities comprised of wind with solar and/or storage having a nameplate capacity of 100 MW or more." (MPSC Case No. U-21547, 10/21/2024 Errata, p 3, F# 0026.) Therefore, for example, project facility containing both wind and energy storage elements could not qualify under the 50 MW nameplate capacity threshold for energy storage facilities. Rather it would be required to meet the 100 MW threshold for wind energy facilities. The notion that the Commission is seeking to expand its authority, and by implication undermine the statutory thresholds, is clearly not support by this reasonable, measured, and statutory-based approach.

The Commission considered and disagreed with the comments quoted by Appellants in the October 10 Order. (MPSC Case No. U-21547, 10/10/2024 Order, p 5, F # 0025.) Instead, the Commission rightfully relied on the statute's broad energy facility definitions that recognize and incorporate multiple technologies in a single facility, as well as the nameplate capacity requirements, which do not provide for the sort of picking and choosing Appellants' Brief would have the Commission do. (See Appellants' Brief, pp 22–23.) For these reasons, as well as the reasons explained in the preceding sections of this brief (see Sections II.A – II.B of this Brief), the Court should find that Appellants have not demonstrated that the Commission use of the term "hybrid facility" was unreasonable or unlawful.

D. The October 10 Order does not unlawfully modify the statutory timelines.

The Commission accurately described the 30-day statutory deadline imposed by MCL 460.1223(3) on an affected local unit that has met with a developer. (MPSC Case No. U-21547, 10/10/2024 Order, p 6, F # 0025 ("Additionally, Section 223(3) of Act 233 requires, in part, that the chief elected official (CEO) in each ALU to notify an electric provider or IPP, within 30 days following a meeting with that electric provider or IPP, if the ALU has a CREO.")) Pursuant to the statute, the affected local unit has 30 days to confirm whether it has a CREO. In addition, the Commission also reasonably recognized the affected local unit's statutorily-derived affirmative duty to notify a developer of a CREO, as well as the statutory requirement that an affected local unit process applications in a timely matter or risk a developer being able to file with the Commission. In doing so, the Commission found that a developer could proceed as if there was no CREO if the affected local unit did not respond to the request to meet within 30 days. (*Id.* at 11–12); MCL 460.1223(3); MCL 460.1223(3)(c)(i). In their Statement of Facts, Appellants argue that this latter interpretation is either an intentional illegal act of rewriting the legislation or a "sloppy," "haphazard," or "careless accident." (Appellants' Brief, p 14.) It is none of these. It is a reasonable interpretation of the requirement for timely action on the part of affected local units.

MCL 460.1223(3) clearly requires a chief elected official to make an indication regarding the affected local unit's CREO status. Put another way, MCL 460.1223(3), which limits a developer's ability to seek a certificate from the

Commission under MCL 460.1222(2) if the affected local unit provides post-meeting notification that it has a CREO, is not triggered if the affected local unit does not engage in the MCL 460.1223(3) process. The Commission's interpretation of the statutory timeline is, therefore, consistent with the plain meaning of the statute and reasonable. The fact that the 30-day timeline for an affected local unit's response to a request to meet is consistent with the timeline for an affected local unit of government's CREO response after a meeting is evidence of its reasonableness. (MPSC Case No. U-21547, 10/10/2024 Order, pp 11–12, F # 0025; see also Appellants' Brief, pp 14, 23–24.)

More puzzling and alarming than Appellants' erroneous claims about the Commission's findings is the subtle and unsupported indication that an affected local unit can indefinitely delay the Act 233 process by declining the offer to meet with the developer. (Appellants' Brief, pp 4, 9.) This is not the first time Appellants have made this unsupported insinuation. (Brief in Support of Appellants' Motion for Preliminary Injunction, pp 9, 14 (Attached as Appendix G to this Brief.) Yet, they have never provided statutory authority to support it. There is none. Importantly, when paired with Appellants' flawed argument that the Commission cannot interpret the statute to require a timely response to a developer's request to meet, Appellants would apparently have this Court authorize local units of government to indefinitely delay any application under Act 233 by simply declining to meet with a developer. There is no legal basis for this interpretation. Appellants'

position is also contradicted by MCL 460.1223(3)(c)(i) and it runs directly contrary to the purpose and structure of Act 233. See MCL 460.1222(2).

The Commission acted reasonably and lawfully when interpreting the statutory timelines in Act 233. The Commission's finding that a developer can file a petition if an affected local unit does not respond to a request to meet within 30 days is also a reasonable and lawful interpretation of the statute. Any arguments attempting to undermine the structure of Act 233 and clear legislative intent are unsupported and must be rejected.

III. The Commission acted under well-established exceptions to the rulemaking process of the Administrative Procedures Act.

The Commission agrees with the Appellants' contention that an agency is generally obligated to employ formal rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority" but rather, "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 404 (1998); (see also Appellants' Brief, p 28). The Commission also agrees that under the APA, a rule is "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." MCL 24.207; (see also Appellants' Brief, p 28.) Neither of these principles are dispositive of the issue at hand nor do they validate

Appellants' arguments that the Commission must have engaged in APA rulemaking to issue the guidance of its October 10 Order.

Appellants' arguments primarily focus on a singular exception to the rulemaking process under the APA, for "[a] determination, decision, or order in a contested case." (Appellants' Brief, p 28); MCL 24.207(f). The Commission has never claimed that the October 10 Order arose from a contested case. The Commission docketed Case No. U-21547 on its own motion. (MPSC Case No. U-21547, 2/8/2024 Order, pp 1–3, F# 0001.) The case did not involve any named party or disputed set of facts. Michigan Public Service Commission Case No. U-21547 was neither established nor conducted as a contested case proceeding. *Id.* Appellants concede that that the Commission opened this docket on its own motion then opine that because this case would not fall under contested case exception to the APA, it must be a rule and subject to the rulemaking process. (Appellants' Brief, pp 28–29.) This argument is both conclusory and inaccurate.

The Appellants' Brief continues to rely on the affirmative argument that because the Commission's October 10 Order was not part of a contested case, it must be a rule under the APA. The Appellants go so far as to argue that because no public hearing was held, the Commission could not proceed by order under Section 232(6) of the APA. (Appellants' Brief, p 32.) The Commission's express authority to proceed by order will be addressed further below.

Only in apparent response to the arguments raised in the Commission's Answer in Opposition to Appellants' Motion for Preliminary Injunction do

Appellants acknowledge any of the other enumerated exceptions that make the Commission's order distinct from an APA rule. (Appellants' Brief, pp 30, 32.) The Michigan Supreme Court has made clear that "[a]n executive agency's power derives from statute. Yet an agency has the authority to interpret the statutes it administers and enforces." *O'Halloran v Sec'y of State*, ____ Mich ____ (2024) (Docket Nos. 166424 and 166425), slip op at 17 (internal citations omitted) (Attached as Appendix H to this Brief). The Michigan Supreme Court has confirmed this authority with respect to the Commission explicitly. See *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich at 119. ("The MPSC has the authority to interpret the statutes it administers and enforces.")

The APA provides eighteen exceptions from the definition of a rule—two of which are of particular importance with respect to the Commission's implementation of Act 233. The rulemaking process does not apply to interpretive statements made by the Commission or instances where the Commission chooses to exercise a permissive statutory authority. These two administrative practices are explicitly excluded from the rulemaking process under the APA. MCL 24.207 (h) and (j). Appellants argue that exceptions to the APA should be construed narrowly as to reflect the APA's preference for policy determinations pursuant to rules. (Appellants' Brief, p 30.) However, Appellants fail to meet their burden to show that the Commission acted unlawfully or unreasonably. As demonstrated below, the Commission acted squarely within the well-established exceptions to the definition of a rule in administering Act 233.

A. The Commission acted within its authority under the APA to provide interpretive statements.

The Commission acted within its authority under Section 7(h) of the APA to provide interpretive statements, guidelines, and explanatory materials through its October 10 Order. Section 7(h) of the APA states that the definition of the term "rule" does not include "[a] form with instructions, an interpretive statement, a guideline . . . or other material that itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h).

The Michigan Supreme Court has provided guidance on what constitutes an interpretive statement. The Michigan Supreme Court has recently stated that "[a]n interpretive statement, for instance, in itself lacks the force and effect of law because it is the underlying statute that determines how an entity must act, i.e., that alters rights or imposes obligations." *Michigan Farm Bureau v Dep't of Env't, Great Lakes, & Energy*, ____ Mich ____ (2024) (Docket No. 165166); slip op at 33 (citing *Clonlara, Inc v State Bd of Ed,* 442 Mich at 245 (1993)) (Attached as Appendix I to this Brief). The Michigan Supreme Court articulated that "statements explaining how an agency plans to exercise a discretionary power are usually considered to lack the force and effect of law" and "statements announcing a policy the agency plans to establish in future adjudications generally lack the force and effect of law." *Id.* at 34.

Here, it is Act 233, and not the Commission's October 10 Order, that imposes siting obligations on the Commission and the parameters of affected local units of government, CREOs, and project eligibility. It is Act 233 which has the force and

effect of law. The Commission's interpretative statements do not bind an administrative law judge to sanction an entity in an enforcement action or bind a court in judicial review. See *Michigan Farm Bureau*, slip op at 33. To the extent that Appellants disagree with the directives of the statute, those complaints are properly addressed with the legislature. To the extent Appellants disagree with the interpretations of the Commission, those complaints are properly addressed through a contested case proceeding applying the terms of Act 233.

Appellants make little attempt to satisfy their burden to show the Commission's October 10 Order fails to qualify for the interpretative statement exception of the APA. Appellants argue, without more support than a conclusory statement, that the Commission's interpretive statements have the force and effect of law. As the Michigan Supreme Court has determined, and Appellants have acknowledged, "[i]f an agency statement (1) merely explains what the agency believes an ambiguous provision of a statute . . . or (2) explains what factors will be considered and what goals will be pursued when an agency exercises a discretionary power . . . the statement will generally not be considered to alter rights, impose obligations, or have a present, binding effect." *Michigan Farm Bureau,* slip op at 37 (citing *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 245 n 30); (Appellants' Brief, pp 30—31.)

Further, as the Michigan Supreme Court has stated, and Appellants acknowledge in their Brief:

> [I]nterpretive rules[21] are, basically, those that interpret and apply the provisions of the statute under which the agency operates. No sanction attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets. . . . [Interpretive Rules] state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.
>
> ***
>
> If the rule represents something more than an agency's opinion as to what the statute requires—if the legislature has delegated a measure of legislative power to agency and has provided a statutory sanction for violation of such rules as the agency may adopt—then the rule may properly be described as legislative. [*O'Halloran*, slip op at 18—19.]

This Court has rejected the argument that a "policy constituted a rule because it altered the status quo and substantially affected the rights of the general public." *Faircloth*, 232 Mich App at 403. This Court has further stated that "where an agency policy interprets or explains a statute or rule, the agency need not promulgate it as a rule even if it has a substantial effect on the rights of a class of people because an interpretive statement is not, by definition, a rule under the APA." *Id.* at 404 (citing *Michigan Farm Bureau v Bureau of Workman's Compensation, Dep't of Labor*, 408 Mich at 148 (1980)).

---

[21] In *O'Halloran*, the Michigan Supreme Court uses the phrase "interpretive rules" to describe policy statements that give guidance but do not have the force of law under Section 207(h) of the APA. See *O'Halloran*, slip op at 18 (stating, "[w]hen a statute does not require rulemaking for its interpretation, an agency may choose to issue 'interpretive rules,' which would fall under the MCL 24.207(h) rulemaking exception as policy statements that give guidance but do not have the force and effect of law." *O'Halloran*, slip op at 18 (citing *Clonlara*, 442 Mich at 239).

In the case at hand, a rulemaking proceeding was unnecessary with respect to the Commission's interpretations of the terms "CREO," "affected local unit," and "hybrid facility," as the Commission was not developing a regulation or policy with the force of law. As is demonstrated by the arguments presented in this case and the comments presented below, there is clear ambiguity in need of interpretation in Act 233. The Commission explained through its October 10 Order what it interpreted to be multiple ambiguities[22] present in Act 233. In providing these definitions, the Commission explained to affected local units, developers, and anyone else with an interest, how it was interpreting the Act it is obligated to implement. These statements do not alter rights, impose obligations, or have a present, binding effect. As decided in *Michigan Farm Bureau*, they cannot, therefore, have the force of law to be considered rules under Section 7(h) of the APA.

As decided in *Faircloth*, even if the interpretive statements provided by the Commission altered the status quo or affected the rights of a class of people, they are explicitly excluded from the definition of a rule under the APA. It would have

---

[22] The Commission's October 10 Order summarizes the breadth of perspectives considered in the development of the Commission's order guidance and Application Filing Instructions and Procedures. As stated in that order, "all comments were considered by the Staff and the Commission in the development of the filing requirements . . . ." (MPSC Case No. U-21547, 10/10/2024 Order, p 3, F# 0025.) The Commission's discussion makes plain the need for established interpretations to maintain consistency between applications and clarify ambiguities present in the underlying law. The discussion of applicability of Act 233 can be found on pages 4–6 of the underlying order. The discussion of the various interpretations of ALU can be found on pages 6–10. The discussion of proposed interpretations of CREO can be found on pages 12–29 of the underlying order. The order, in full, was presented by Appellants as Exhibit A to their Brief.

been inappropriate for the Commission to file a request for rulemaking with the Michigan Office of Administrative Hearings and Rules for these interpretations, as rules developed under the APA do not include interpretive statements, guidelines, or explanatory materials.

This Court has explained that "[i]n order for an agency regulation, statement, standard, policy, ruling or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory." *O'Halloran v Sec'y of State*, ____ Mich App ____ (2023) (Docket Nos. 363503 and 363505), slip op at 7–8 (Attached as Appendix J to this Brief) (quoting *Danse Corp v Madison Hts,* 466 Mich 175, 181 (2002)) vacated in part and rev'd in part on other grounds by *O'Halloran*, ____ Mich at ____, slip op at 5. As the Commission has shown above, the Commission's interpretive statements regarding "hybrid facilities," "ALUs," and "CREO" do not fall under the definition of a rule, they do not have the force of law, and they fall within the APA's articulated exception for interpretive statements and guidelines. These statements must, therefore, be considered explanatory.

B. The Commission was expressly authorized by Act 233 to establish filing requirements by order.

The Commission acted within its statutory authority pursuant to Section 7(j) of the APA and Section 224(1) of Act 233 by adopting its Application Filing Instructions and Procedures by order. This Court has stated that "Subsection 7(j) excepts administrative action from the APA's definition of the term "rule" when the

Legislature has either explicitly or implicitly authorized the action in question." *O'Halloran*, ____ Mich App at ____, slip op at 7–8 (quoting *By Lo Oil*, 267 Mich App at 47 (2005)) vacated in part and rev'd in part on other grounds by *O'Halloran*, ____ Mich at ____.

The Commission agrees with the Appellants' assertion that the Commission is a creature of statute which "derives its authority from the underlying statutes and possesses no common-law powers." *In re Pub Serv Comm'n for Transactions Between Affiliates*, 252 Mich App 254, 263 (2002). This notion is ubiquitous and uncontroversial. Yet, the Appellants fail to acknowledge in any meaningful capacity that rules, as defined by the APA do not include a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). The Appellants depend on the rationale throughout their brief that because local interests are affected by the filing requirements published by the Commission, the requirements must have been promulgated through a rulemaking process. This is incorrect.

As Appellants state, Act 233 permits the Commission to establish application filing requirements. Act 233 authorized the Commission to establish application filing requirements by order. Specifically, Section 224(1) of Act 233 states "[a] site plan required under section 223 or 225 **shall meet application filing requirements established by commission rule or order** to maintain consistency between applications." MCL 460.1224(1) (emphasis added). Act 233 provides the permissive statutory power for the Commission to provide filing

requirements by either rule or order. The Commission's decision to exercise its permissive statutory power to develop application filing requirements by order is addressed in the APA. MCL 24.207(j).

The Court of Appeals has provided that when a statute directly and explicitly authorizes the Commission to implement the law, either by rule or order, and the Commission is acting under an exercise of permissive statutory authority, it is exempted from formal adoption and promulgation under the APA. *Michigan Trucking Ass'n v Michigan Pub Serv Comm'n*, 225 Mich App at 430 (1997). Act 233 provided authority for the Commission to establish application filing requirements by order.

Appellants attempt to rely on the authority of *Michigan Farm Bureau* to argue that the Commission has no discretion in issuing a siting certificate under Section 226(7) of Act 233. (Appellants' Brief, p 33.) Putting aside Appellants' failure to even acknowledge the Commission's discretion to impose conditions on Act 233 certificates, which appear to parallel the discretionary conditions addressed in *Michigan Farm Bureau*,[23] their arguments once again conflate the October 10 Order with the eventual contested cases that will be held pursuant to Act 233. There is not a siting certificate at issue in this case. The Commission has yet to review any applications for siting certificates. In its October 10 Order, the Commission

[23] MCL 460.1226(6) ("The commission **may condition** its grant of the application on the applicant taking additional reasonable action related to the impacts of the proposed energy facility, including, but not limited to, the following . . . .) (emphasis added).

exercised its discretion to establish application filing requirements by order which was an exercise of permissive statutory authority under Section 7(j) of the APA. Any arguments on whether the Commission has the discretion to issue a certificate are premature. The Commission was expressly authorized by statute to establish application filing requirements by order.

Sections 7(j) and 7(h) of the APA provide well-established exceptions to the term "rule" and, thereby, the rulemaking process of the APA. While Appellants argue that exceptions to the APA should be construed narrowly, they fail to meet their burden of showing the Commission acted unlawfully or unreasonably by acting within those well-defined exceptions in interpreting and administering Act 233. The Appellants' distaste for the underlying statute that the Commission implemented through its October 10 Order does not justify overturning a reasonable interpretation of the contents therein. Neither the Commission's interpretive guidelines nor the Commission's exercise of a permissive authority require the agency to engage in a rulemaking proceeding.

CONCLUSION AND RELIEF REQUESTED

Appellants are clearly dissatisfied with the passage of Act 233 and have attempted to address some of this dissatisfaction through this appeal. Unfortunately, this is neither the appropriate time nor procedural posture to raise these arguments. The Commission's interpretive guidance was both lawful and reasonable. The Commission correctly recognized the need for these interpretations and the benefits to all interested parties in having a sense of these interpretations

before contested cases under Act 233 were initiated. It is through these contested cases that Appellants should properly challenge interpretations they disagree with. To the extent they present the arguments raised in this appeal, they are likely to fail.

The Michigan Public Service Commission respectfully requests that this Court affirm the Commission's October 10, 2024, order. The Commission's order was lawful and reasonable, and Appellants failed to meet their burden to show otherwise.

Respectfully submitted,

/s/ Nicholas Q. Taylor
Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
Assistant Attorneys General
Attorneys for Appellee
Michigan Public Service Commission
Public Service Division
7109 W. Saginaw Hwy.
Lansing, MI 48917
(517) 284-8140
taylorn10@michigan.gov
stirlinga1@michigan.gov

Dated: February 7, 2025

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.212(B)(1), (3) because, excluding the part of the document exempted, this **merits brief** contains no more than 16,000 words. This document contains 14,268 words.

/s/ Nicholas Q. Taylor
Nicholas Q. Taylor (P81020)
Assistant Attorney General
Attorneys for Appellee
Michigan Public Service Commission
Public Service Division
7109 W. Saginaw Hwy.
Lansing, MI 48917
(517) 284-8140
taylorn10@michigan.gov

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re, Implementing Provisions of Public Act 233 of 2023	MPSC Case No. U-21547
ALMER CHARTER TOWNSHIP, et al,	Court of Appeals No. 373259

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.
/

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

APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION'S BRIEF

INDEX OF APPENDICES

Appendix	**Description**
A	*In re Reliability Plans of Electric Utilities for 2017-2021*, unpublished order of the Court of Appeals, entered November 15, 2017 (Docket Nos. 340600; 340607)
B	*Gillman v Dep't of Tech, Mgmt, & Budget*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 2023 (Docket No. 362504)
C	MCL 460.1223

D	MCL 460.1226
E	*In re Mich Gas Utils Corp per Order U-14292*, unpublished per curiam opinion of the Court of Appeals, issued Jan 24, 2013 (Docket No. 301103)
F	Commission's Answer in Opposition to Appellants' Motion for Preliminary Injunction
G	Brief in Support of Appellants' Motion for Preliminary Injunction
H	*O'Halloran v Sec'y of State*, ____ Mich ____ (2024) (Docket Nos. 166424 and 166425)
I	*Mich Farm Bureau v Dep't of Env't, Great Lakes, & Energy*, ____ Mich ____ (2024)
J	*O'Halloran v Sec'y of State*, ____ Mich App ____ (2023) (Docket Nos. 363503 and 363505)

APPENDIX A

Court of Appeals, State of Michigan

ORDER

In re Reliability Plans of Electric Utilities for 2017-2021

Docket Nos. 340600; 340607

LC No. 00-018197

Amy Ronayne Krause
Presiding Judge

Patrick M. Meter

Brock A. Swartzle
Judges

The motion for immediate consideration of the motion to dismiss the appeal in Docket Number 340600 is GRANTED.

The motion to dismiss the appeal in Docket Number 340600 for lack of jurisdiction is DENIED. Appellee Michigan Public Service Commission (MPSC) has not established that its arguments as to ripeness regard this Court's jurisdiction over the appeal. The language in *King v Dep't of State Police*, 303 Mich App 162, 188; 841 NW2d 914 (2013), cited by the MPSC with regard to ripeness involved this Court's review of a trial court decision to deny a motion for summary disposition, and, thus, did not address whether the ripeness of an appeal is a matter that concerns this Court's jurisdiction over the appeal. Further, in *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008), this Court, albeit in dicta, expressed that ripeness and jurisdiction are distinct issues.

The motion to expedite the appeal in Docket Number 340600 is GRANTED TO THE EXTENT specified in this order. Also, on the Court's own motion, the appeals in Docket Numbers 340600 and 340607 are CONSOLIDATED, and the appeal in Docket Number 340607 is also EXPEDITED. The standard briefing periods under the court rules apply to both appeals but no extension of time shall be allowed except on a motion showing good cause. Further, after briefing in both appeals is completed, the Clerk's Office shall submit these consolidated appeals on the next available case call.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 15 2017
Date

Chief Clerk

APPENDIX B

2023 WL 6324194
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jason GILLMAN, Jr., Plaintiff-Appellant,
v.
DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET, Defendant-Appellee.

No. 362504
|
September 28, 2023

Court of Claims, LC No. 22-000037-MZ

Before: Hood, P.J., and Feeney and Maldonado, JJ.

Opinion

Per Curiam.

***1** Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(4) (lack of subject matter jurisdiction). We affirm.

I. BACKGROUND

The facts of this case are simple and undisputed. On March 7, 2022, plaintiff e-mailed a FOIA request to defendant requesting copies of "[r]etention and disposal schedules for state agencies" as well as "[r]ecords related to the process of creation and approval of retention and disposal schedules for state agencies." Plaintiff followed the procedures laid out by defendant on its website, but defendant never responded to plaintiff's e-mail. Plaintiff did not contact defendant to follow up on his e-mail regarding the request for records; instead, he sued them. On March 22, 2022, plaintiff filed a complaint in the Court of Claims alleging wrongful denial of a records request and seeking attorney fees, costs, punitive damages, and fines.

On April 18, 2022, defendant's FOIA coordinator wrote a letter to plaintiff stating that she had been informed by defendant's legal counsel that a FOIA request was attached to his complaint but that defendant never actually received a FOIA request from plaintiff. Nevertheless, "in the spirit of cooperation and to avoid unnecessary litigation," defendant processed the request that was attached to the complaint. Part one plaintiff's request was granted and defendant provided "copies of the 13 General Schedules for State of Michigan Agencies." Part two of plaintiff's request, however, was denied because defendant concluded that the records were not sufficiently described for defendant to locate responsive records, but "[i]n an effort to be of assistance," defendant provided a link to a website that "provides information on records management."

Plaintiff was not satisfied. The same day as the above-described letter, counsel for defendant e-mailed plaintiff's attorney, Philip Ellison, explaining that it did not receive the request, informing him that it responded to the request once it learned of it, and requesting that he dismiss the lawsuit. In his reply, attorney Ellison "declined to dismiss the case," rejected defendant's "assertion that the FOIA request was not received," asserted that compliance with a request after an action is commenced does not spare the agency from its obligation to pay "attorneys' fees, costs, and disbursements," and insisted that defendant's conduct "mandates the FOIA penalties." Attorney Ellison likened this to an individual mailing a tax return late, noting that "the State assesses a penalty regardless of excuses." Thus, despite defendant's efforts to find an amicable resolution, the lawsuit proceeded.

In lieu of answering, defendant filed a motion seeking summary disposition on the basis that the Court of Claims lacked subject matter jurisdiction. Plaintiff's argument that jurisdiction existed was based on the premise that defendant denied his request by failing to respond to it, but defendant argued that this premise was wrong because it never actually received the request. Thus, there was no failure to respond, no denial, and no basis for jurisdiction. Kenneth Partridge, an employee for defendant's IT department, explained in an affidavit the steps that he conducted to recover the e-mail that had purportedly been sent to defendant by plaintiff. Partridge explained that he searched the department's mailbox "including online archives and 30 day deleted item storage" but that the search "returned zero responsive items, indicating no message from [plaintiff] was found anywhere in [defendant's] mailbox or archive." However, Partridge did eventually locate the e-mail:

> ***2** I performed a message trace using the Office 365 Exchange Admin Center portal and identified that one message from [plaintiff] to [defendant] was received by the Office 365 Exchange Online system on 3/7/2022 21:46 UTC. The message trace indicated that the message was automatically quarantined by the system rather than delivered to [defendant's mailbox]. Due to this, the message was never delivered to [defendant's e-mail address], including the Junk E-mail folder.

Plaintiff responded with a competing motion for summary disposition pursuant to MCR 2.116(I)(2) (nonmoving party entitled to summary disposition).

The Court of Claims determined that the record was sufficient for it to decide the competing motions for summary disposition without conducting a hearing, and it granted defendant's motion while denying plaintiff's motion. The court explained that it agreed with defendant that the request was never received by defendant:

> The scenario in this case is equivalent to e-mail delivery to a spam or junk e-mail folder, as contemplated in MCL 15.235(1). The Legislature contemplated that not all e-mail systems reliably deliver mail and that, in some instances, e-mailed FOIA requests may not reach their target. Thus, FOIA provides that if the e-mail is delivered to a spam or junk-mail folder, the request is not received until one day after the public body becomes aware of it. In fact, this situation is even more compelling because defendant never received the e-mail in the first place. The email did not go into defendant's spam or junk mailbox because defendant's server (Microsoft Office 365 Exchange) quarantined the e-mail before it ever arrived in any of defendant's mailboxes. The Court, therefore, concludes that the e-mail quarantine was the equivalent of delivery to a spam or junk e-mail folder.

The court also noted that plaintiff's arguments regarding the subsequent denial of part two of the request was irrelevant because plaintiff's lawsuit was based on the March 2022 failure to respond, not the April 2022 partial denial. The court explained that "FOIA only permits the Court to consider claims based on final decisions, and plaintiff's complaint is not based on a final decision of a public body." Therefore, the court concluded that defendant was entitled to summary disposition pursuant to MCR 2.116(C)(4).

This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *True Care Physical Therapy, PLLC v. Auto Club Group Ins Co*, —— Mich App ——, ——; —— N.W.2d —— (2023) (Docket No. 362094); slip op. at 3. Summary disposition is proper pursuant to MCR 2.116(C)(4) when, after considering the pleadings, depositions, admissions, and other documentary evidence, the court determines that it lacks jurisdiction over the subject matter of the case. *Id.* at 4.

This Court also reviews "de novo the interpretation and application of a statute ...." *Boyle v Gen Motors Corp*, 468 Mich. 226, 229, 661 N.W.2d 557 (2003). This Court reviews "de novo a circuit court's legal determinations in a FOIA case." *Bitterman v Village of Oakley*, 309 Mich App 53, 61, 868 N.W.2d 642 (2015). "The court's factual findings are reviewed for clear error if a party challenges the underlying facts supporting the court's decision. Discretionary determinations in a FOIA case are reviewed for an abuse of discretion. A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id.* (quotation marks and citations omitted).

***3** This Court reviews de novo issues of ripeness. *King v Mich State Police Dep't*, 303 Mich App 162, 188, 841 N.W.2d 914 (2013).

III. RELEVANT FOIA PROVISIONS

This case concerns application of Michigan's Freedom of Information Act, section 1 of which provides in relevant part:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2).]

Accordingly, under MCL 15.233(1), "upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body." " 'Public record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i).

FOIA provides certain procedures and responsive deadlines with which the relevant public body must comply when responding to a request made pursuant to this act. Section 5 provides in relevant part:

> (1) Except as provided in section 3, a person desiring to inspect or receive a copy of a public record shall make a written request for the public record to the FOIA coordinator of a public body. A written request made by facsimile, electronic mail, or other electronic transmission is not received by a public body's FOIA coordinator until 1 business day after the electronic transmission is made. However, if a written request is sent by electronic mail and delivered to the public body's spam or junk-mail folder, the request is not received until 1 day after the public body first becomes aware of the written request. The public body shall note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.
>
> (2) Unless otherwise agreed to in writing by the person making the request, a public body shall ... respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:
>
> (a) Granting the request.
>
> (b) Issuing a written notice to the requesting person denying the request.
>
> (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.
>
> (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.
>
> (3) Failure to respond to a request under subsection (2) constitutes a public body's final determination to deny the request if either of the following applies:
>
> ***4** (a) The failure was willful and intentional.
>
> (b) The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, electronic mail, or electronic mail attachment, or specifically included the words, characters, or abbreviations for "freedom of information", "information", "FOIA", "copy", or a recognizable misspelling of such, or appropriate legal code reference to this act, on the front of an envelope or in the subject line of an electronic mail, letter, or facsimile cover page. [MCL 15.235.]

Section 10 provides a procedure by which relief can be obtained by a party whose request for a public record was denied:

> (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

* * *

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function. [MCL 15.240.]

In sum, if a FOIA request is delivered via e-mail then it is deemed "received" by the public body the business day following the date the electronic transmission was made. MCL 15.235(1). However, if the e-mail was delivered to the entity's "spam or junk-mail folder" then it is not deemed "received" by the public body until the business day following the date that the entity became aware of the request. MCL 15.235(1). A public body generally must respond to a FOIA request within 5 business days of receiving it, and a failure to comply with this deadline is treated as a final determination to deny the request. MCL 15.235(2), (3). Finally, the right of a party to bring a civil action regarding a FOIA request is contingent upon there having been a final determination to deny the request. MCL 15.240(1)(a).

IV. APPLICATION

A. PLAIN MEANING

***5** Plaintiff argues that defendant made a final determination to deny plaintiff's request by failing to respond to the request after it was received. We disagree.

Resolution of this issue requires statutory interpretation. "The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *In re AGD*, 327 Mich App 332, 343, 933 N.W.2d 751 (2019). "The words used by the Legislature in writing a statute provide us with the most reliable evidence of the Legislature's intent." *Drew v Cass County*, 299 Mich App 495, 499, 830 N.W.2d 832 (2013).

> If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.... Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent." [*Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 418-419, 925 N.W.2d 897 (2018) (quotation marks and citation omitted).]

"Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indemnity*, 444 Mich. 638, 644, 513 N.W.2d 799 (1994). Courts should give the statute a reasonable construction that best accomplishes that purpose. *Id.* Interpreting courts may consider a variety of factors and apply principles of statutory construction but "should not abandon the canons of common sense." *Id.*

Pertinent to this case, MCL 15.235(1) addresses the possibility that a public body may not become aware that it received an e-mail because of automated e-mail sorting systems. By stating that the public body does not receive such a request until it actually becomes aware of it, this statute discourages implying knowledge of a FOIA request that was delivered to a public body's potentially unseen e-mail folders. Although the statute does not expressly refer to a quarantine process that diverts an e-mail entirely away from any inbox, we agree with the trial court that an automated system's sending an e-mail to a quarantine area is the equivalent of sending it to a "spam or junk-mail folder." This conclusion is bolstered by the fact that not all e-mail systems use the terms "spam" and "junk" for their alternative inboxes. For example, Gmail sorts seemingly unnecessary e-mails into folders designated for "Promotions" and "Social" in addition to its "Spam" folder. Thus, we conclude that this statutory provision represents a general intent to remedy situations in which messages are incidentally diverted away from a user's primary inbox and, therefore, not seen. [1]

Thus, the trial court did not err by treating the quarantined e-mail as equivalent to a "junk" or "spam" e-mail for the purposes of receipt by DTMB.

B. SUBJECT MATTER JURISDICTION

For the reasons discussed above, plaintiff's lawsuit was not ripe because it was initiated prior to a denial of plaintiff's request for public records. However, it has not been established in Michigan whether lack of ripeness divests a court of its subject matter jurisdiction. The Court of Claims, by granting summary disposition pursuant to MCR 2.116(C)(4), implicitly decided that it does. We decline to review the merits of this issue because, even if the Court of Claims did err, the error was harmless because summary disposition was nevertheless appropriate pursuant to MCR 2.116(C)(10) (no genuine issue of material fact).

***6** Summary disposition is properly granted pursuant to MCR 2.116(C)(4) when "[t]he court lacks jurisdiction of the subject matter." Subject-matter jurisdiction is the power of the court to decide the *type* of case—not the particular case before it. *Bowie v Arder*, 441 Mich. 23, 39, 490 N.W.2d 568 (1992). In contrast, the doctrine of ripeness "focuses on the *timing* of the action." *Mich Chiropractic Council v Comm'r of the Office of Fin and Ins Servs*, 475 Mich. 363, 379, 716 N.W.2d 561 (2006), overruled in part on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich. 349, 792 N.W.2d 686 (2010). A claim is not ripe when it rests on future contingent events. *King*, 303 Mich App at 188, 841 N.W.2d 914. When a claim is not ripe, the claim is not justiciable. *Mich Chiropractic Council*, 475 Mich. at 381, 716 N.W.2d 561.

MCL 15.240(1)(b) expressly provides that an action involving the denial of a FOIA request should be commenced within the Court of Claims when the action involves a state public body. In this case, the court did not directly rule that it lacked subject-matter jurisdiction, but this is a logical reading of the court's opinion. The court stated that summary disposition was proper under MCR 2.116(C)(4) when the trial court lacked subject-matter jurisdiction and then granted summary disposition pursuant to MCR 2.116(C)(4). However, its rationale was based on the timing of plaintiff's lawsuit. Therefore, the court's ruling was based on ripeness.

Whether a trial court properly grants summary disposition pursuant to MCR 2.116(C)(4) when plaintiff's claim is not ripe is an unresolved issue of Michigan law, but regardless, any error would have been harmless because summary disposition was warranted pursuant to Subrule (C)(10). This Court has recognized that there have been inconsistencies in this Court's decisions regarding whether summary disposition is properly granted under MCR 2.116(C)(4) when a party's claim is not ripe. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 543, 904 N.W.2d 192 (2017). However, "[e]ven if the trial court erroneously granted defendant's motion for summary disposition under Subrule (C)(4) on ripeness grounds, this Court will not reverse when summary disposition is nonetheless appropriate under a different subrule." *Id.* Although granting summary disposition on a different ground from the ground a party raised implicates the opposing party's right to due process if the party lacks notice and a meaningful opportunity to be heard on the specific issue on which the lower court based its decision, *Zelasko v. Bloomfield Charter Twp*, —— Mich App ——, ——; —— N.W.2d —— (Docket No. 359002); slip op. at 6, this concern is not present here because DTMB had also moved for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact), and the motion put plaintiff on notice that DTMB was arguing that his claim was untimely. Affirming on the basis that the lower court could have granted summary disposition pursuant to MCR 2.116(C)(10) does not implicate plaintiff's due-process rights in this case.

For the reasons discussed above, plaintiff did not have a valid FOIA claim because the issue was not ripe. If MCR 2.116(C)(4) was not an appropriate basis for granting summary disposition then summary disposition would nevertheless have been appropriate pursuant to MCR 2.116(C)(10). Therefore, any error was harmless.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2023 WL 6324194

Footnotes

1 Nevertheless, we invite the Legislature to provide additional guidance regarding what an agency's responsibility is when an email is quarantined.

End of Document

APPENDIX C

CLEAN AND RENEWABLE ENERGY AND ENERGY WASTE REDUCTION ACT (EXCERPT)
Act 295 of 2008

460.1223 Public meetings; site plan; application for approval; remedies upon denial.

Sec. 223. (1) An electric provider or independent power producer that, at its option or as required by the commission, proposes to obtain a certificate for and construct an energy facility shall hold a public meeting in each affected local unit. At least 30 days before a meeting, the electric provider or IPP shall notify the clerk of the affected local unit in which a public meeting will be held of the time, date, location, and purpose of the meeting and provide a copy of the site plan as described in section 224 or the address of an internet site where a site plan for the energy facility is available for review. At least 14 days before the meeting, the electric provider or IPP shall publish notice of the meeting in a newspaper of general circulation in the affected local unit or in a comparable digital alternative. The notice shall include a copy of the site plan or the address of an internet site where the site plan is available for review. The commission shall further prescribe the format and content of the notice. For the purposes of this subsection, a public meeting held in a township is considered to be held in each village located within the township.

(2) At least 60 days before a public meeting held under subsection (1), the electric provider or IPP planning to construct an energy facility shall offer in writing to meet with the chief elected official of each affected local unit, or the chief elected official's designee, to discuss the site plan.

(3) If, within 30 days following a meeting described in subsection (2), the chief elected official of each affected local unit notifies the electric provider or IPP planning to construct the energy facility that the affected local unit has a compatible renewable energy ordinance, then the electric provider or IPP shall file for approval with each affected local unit, subject to all of the following:

(a) An application submitted under this subsection shall comply with the requirements of section 225(1), except for section 225(1)(j) and (s). An affected local unit may require other information necessary to determine compliance with the compatible renewable energy ordinance.

(b) A local unit of government with which an application is filed under this subsection shall approve or deny the application within 120 days after receiving the application. The applicant and local unit of government may jointly agree to extend this deadline by up to 120 days.

(c) The electric provider or IPP may submit its application to the commission if any of the following apply:

(*i*) An affected local unit fails to timely approve or deny an application.

(*ii*) The application complies with the requirements of section 226(8), but an affected local unit denies the application.

(*iii*) An affected local unit amends its zoning ordinance after the chief elected official notifies the electric provider or IPP that it has a compatible renewable energy ordinance, and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in section 226(8).

(d) An electric provider or IPP that submits an application to the commission pursuant to this subsection is not required to comply with subsection (1) or section 226(1), or the requirement to submit a summary of community outreach and education efforts pursuant to section 225(1)(j).

(4) If a local unit of government approves an application pursuant to subsection (3), construction of the proposed energy facility must begin within 5 years after the date the permit is granted and any challenges to the grant of the permit are concluded. The local unit of government may extend this timeline at the request of the electric provider or IPP without requiring a new application. The local unit shall not revoke a permit issued under subsection (3) except for material noncompliance with the permit by the electric provider or IPP.

(5) If the commission approves an applicant for a certificate submitted under subsection (3)(c), the local unit of government is considered to no longer have a compatible renewable energy ordinance, unless the commission finds that the local unit of government's denial of the application was reasonably related to the applicant's failure to provide information required by subsection (3)(a).

(6) Nothing in this section shall be construed to limit remedies available to an applicant to appeal a denial by a local unit of government under any other law of this State.

History: Add. 2023, Act 233, Eff. Nov. 29, 2024.

APPENDIX D

CLEAN AND RENEWABLE ENERGY AND ENERGY WASTE REDUCTION ACT (EXCERPT)
Act 295 of 2008

460.1226 One-time grant to affected local unit; local intervenor compensation fund; proceedings; fees; issuance of certificate; commencement requirements.

Sec. 226. (1) Upon filing an application with the commission, the applicant shall make a 1-time grant to each affected local unit for an amount determined by the commission but not more than $75,000.00 per affected local unit and not more than $150,000.00 in total. Each affected local unit shall deposit the grant in a local intervenor compensation fund to be used to cover costs associated with participation in the contested case proceeding on the application for a certificate.

(2) Upon filing an application with the commission, the applicant shall provide notice of the opportunity to comment on the application in a form and manner prescribed by the commission. The notice shall be published in a newspaper of general circulation in each affected local unit or a comparable digital alternative. The notice shall be written in plain, nontechnical, and easily understood terms and shall contain a title that includes the name of the applicant and the words "NOTICE OF INTENT TO CONSTRUCT _____ FACILITY", with the words "WIND ENERGY", "SOLAR ENERGY", or "ENERGY STORAGE", as applicable, entered in the blank space. The commission shall further prescribe the format and contents of the notice.

(3) The commission shall conduct a proceeding on the application for a certificate as a contested case under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. An affected local unit, participating property owner, or nonparticipating property owner may intervene by right.

(4) The commission may assess reasonable application fees to the applicant to cover the commission's administrative costs in processing the application, including costs for consultants to assist the commission in evaluating issues raised by the application. The commission may retain consultants to assist the commission in evaluating issues raised by the application and may require the applicant to pay the cost of the services.

(5) The commission shall grant the application and issue a certificate or deny the application not later than 1 year after a complete application is filed.

(6) In evaluating the application, the commission shall consider the feasible alternative developed locations described under section 225(1)(n), if applicable, and the impact of the proposed facility on local land use, including the percentage of land within the local unit of government dedicated to energy generation. The commission may condition its grant of the application on the applicant taking additional reasonable action related to the impacts of the proposed energy facility, including, but not limited to, the following:

(a) Establishing and maintaining for the life of the facility vegetative ground cover. This subdivision does not apply to an application for an energy facility that is proposed to be located entirely on brownfield land.

(b) Meeting or exceeding pollinator standards throughout the lifetime of the facility, as established by the "Michigan Pollinator Habitat Planning Scorecard for Solar Sites" developed by the Michigan State University Department of Entomology in effect on the effective date of the amendatory act that added this section or any applicable successor standards approved by the commission as reasonable and consistent with the purposes of this subdivision. Seed mix used to establish pollinator plantings shall not include invasive species as identified by the Midwest Invasive Species Information Network, led by researchers at the Michigan State University Department of Entomology and supporting regional partners. This subdivision does not apply to an application for an energy facility that is proposed to be located entirely on brownfield land.

(c) Providing for community improvements in the affected local unit.

(d) Making a good-faith effort to maintain and provide proper care of the property where the energy facility is proposed to be located during construction and operation of the facility.

(7) The commission shall grant the application and issue a certificate if it determines all of the following:

(a) The public benefits of the proposed energy facility justify its construction. For the purposes of this subdivision, public benefits include, but are not limited to, expected tax revenue paid by the energy facility to local taxing districts, payments to owners of participating property, community benefits agreements, local job creation, and any contributions to meeting identified energy, capacity, reliability, or resource adequacy needs of this state. In determining any contributions to meeting identified energy, capacity, reliability, or resource adequacy needs of this state, the commission may consider approved integrated resource plans under section 6t of 1939 PA 3, MCL 460.6t, renewable energy plans, annual electric provider capacity demonstrations under section 6w of 1939 PA 3, MCL 460.6w, or other proceedings before the commission, at the applicable regional transmission organization, or before the Federal Energy Regulatory Commission, as determined relevant by the commission.

(b) The energy facility complies with the standard in section 1705(2) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.1705.

(c) The applicant has considered and addressed impacts to the environment and natural resources, including, but not limited to, sensitive habitats and waterways, wetlands and floodplains, wildlife corridors, parks, historic and cultural sites, and threatened or endangered species.

(d) The applicant has met the conditions established in section 227.

(e) All of the following apply:

(*i*) The installation, construction, or construction maintenance of the energy facility will use apprenticeship programs registered and in good standing with the United States Department of Labor under the national apprenticeship act, 29 USC 50 to 50c.

(*ii*) The workers employed for the construction or construction maintenance of the energy facility will be paid a minimum wage standard not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed as determined under 2023 PA 10, MCL 408.1101 to 408.1126, or 40 USC 3141 to 3148, whichever provides the higher wage and fringe benefit rates.

(*iii*) To the extent permitted by law, the entities performing the construction or construction maintenance work will enter into a project labor agreement or operate under a collective bargaining agreement for the work to be performed.

(f) The proposed energy facility will not unreasonably diminish farmland, including, but not limited to, prime farmland and, to the extent that evidence of such farmland is available in the evidentiary record, farmland dedicated to the cultivation of specialty crops.

(g) The proposed energy facility does not present an unreasonable threat to public health or safety.

(8) An energy facility meets the requirements of subsection (7)(g) if it will comply with the following standards, as applicable:

(a) For a solar energy facility, all of the following:

(*i*) The following minimum setback requirements, with setback distances measured from the nearest edge of the perimeter fencing of the facility:

Setback Description	Setback Distance
Occupied community buildings and dwellings on nonparticipating properties	300 feet from the nearest point on the outer wall
Public road right-of-way	50 feet measured from the nearest edge of a public road right-of-way
Nonparticipating parties	50 feet measured from the nearest shared property line

(*ii*) Fencing for the solar energy facility complies with the latest version of the National Electric Code as of the effective date of the amendatory act that added this section or any applicable successor standard approved by the commission as reasonable and consistent with the purposes of this subsection.

(*iii*) Solar panel components do not exceed a maximum height of 25 feet above ground when the arrays are at full tilt.

(*iv*) The solar energy facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling shall use the A-weighted scale as designed by the American National Standards Institute.

(*v*) The solar energy facility will implement dark sky-friendly lighting solutions.

(*vi*) The solar energy facility will comply with any more stringent requirements adopted by the commission. Before adopting such requirements, the commission must determine that the requirements are necessary for compliance with state or federal environmental regulations.

(b) For a wind energy facility, all of the following:

(*i*) The following minimum setback distances, measured from the center of the base of the wind tower:

Setback Description	Setback Distance
Occupied community buildings and residences on nonparticipating properties	2.1 times the maximum blade tip height to the nearest point on the outside wall of the structure
Residences and other structures on participating properties	1.1 times the maximum blade tip height to the nearest point on the outside wall of the structure
Nonparticipating property lines	1.1 times the maximum blade tip height
Public road right-of-way	1.1 times the maximum blade tip height to the center line of the public road right-of-way
Overhead communication and electric transmission, not including utility service lines to individual houses or outbuildings	1.1 times the maximum blade tip height to the center line of the easement containing the overhead line

(*ii*) Each wind tower is sited such that any occupied community building or nonparticipating residence will not experience more than 30 hours per year of shadow flicker under planned operating conditions as indicated

by industry standard computer modeling.

(*iii*) Each wind tower blade tip does not exceed the height allowed under a Determination of No Hazard to Air Navigation by the Federal Aviation Administration under 14 CFR part 77.

(*iv*) The wind energy facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling shall use the A-weighted scale as designed by the American National Standards Institute.

(*v*) The wind energy facility is equipped with a functioning light-mitigating technology. To allow proper conspicuity of a wind turbine at night during construction, a turbine may be lighted with temporary lighting until the permanent lighting configuration, including the light-mitigating technology, is implemented. The commission may grant a temporary exemption from the requirements of this subparagraph if installation of appropriate light-mitigating technology is not feasible. A request for a temporary exemption must be in writing and state all of the following:

(A) The purpose of the exemption.

(B) The proposed length of the exemption.

(C) A description of the light-mitigating technologies submitted to the Federal Aviation Administration.

(D) The technical or economic reason a light-mitigating technology is not feasible.

(E) Any other relevant information requested by the commission.

(*vi*) The wind energy facility meets any standards concerning radar interference, lighting, subject to subparagraph (*v*), or other relevant issues as determined by the commission.

(*vii*) The wind energy facility will comply with any more stringent requirements adopted by the commission. Before adopting such requirements, the commission must determine that the requirements are necessary for compliance with state or federal environmental regulations.

(c) For an energy storage facility, all of the following:

(*i*) The following minimum setback requirements, with setback distances measured from the nearest edge of the perimeter fencing of the facility:

Setback Description	Setback Distance
Occupied community buildings and dwellings on nonparticipating properties	300 feet from the nearest point on the outer wall
Public road right-of-way	50 feet measured from the nearest edge of a public road right-of-way
Nonparticipating parties	50 feet measured from the nearest shared property line

(*ii*) The energy storage facility complies with the version of NFPA 855 "Standard for the Installation of Stationary Energy Storage Systems" in effect on the effective date of the amendatory act that added this section or any applicable successor standard adopted by the commission as reasonable and consistent with the purposes of this subdivision.

(*iii*) The energy storage facility does not generate a maximum sound in excess of 55 average hourly decibels as modeled at the nearest outer wall of the nearest dwelling located on an adjacent nonparticipating property. Decibel modeling shall use the A-weighted scale as designed by the American National Standards Institute.

(*iv*) The energy storage facility will implement dark sky-friendly lighting solutions.

(*v*) The energy storage facility will comply with any more stringent requirements adopted by the commission. Before adopting such requirements, the commission must determine that the requirements are necessary for compliance with state or federal environmental regulations.

(9) The certificate shall identify the location of the energy facility and its nameplate capacity.

(10) If construction of an energy facility is not commenced within 5 years after the date that a certificate is issued, the certificate is invalid, but the electric provider or IPP may seek a new certificate for the proposed energy facility. If the certificate is appealed in proceedings before the commission or to a court of competent jurisdiction, the running of the 5-year period is tolled from the date of filing the appeal until 60 days after issuance of a final nonappealable decision. The commission may extend the 5-year period at the request of the applicant and upon a showing of good cause without requiring a new contested case proceeding.

History: Add. 2023, Act 233, Eff. Nov. 29, 2024.

APPENDIX E

STATE OF MICHIGAN

COURT OF APPEALS

In re Application of Mich Gas Utilities Corp Per Order U-14292

MICHIGAN GAS UTILITIES CORPORATION,

Petitioner-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and ATTORNEY GENERAL,

Appellees.

UNPUBLISHED
January 24, 2013

No. 301103
Public Service Commission
LC No. 00-015963

Before: SAWYER, P.J., and MARKEY and M.J. KELLY, JJ.

PER CURIAM.

Petitioner Michigan Gas Utilities Corporation (MGUC) appeals as of right from an order of the Michigan Public Service Commission (PSC) disallowing the recovery of certain claimed depreciation expenses. We reverse.

I. Underlying Facts and Proceedings

On April 1, 2006, MGUC, then known as WPS Michigan Utilities, purchased the assets of Aquila, Inc. These assets included mobile radios and mainframe computer equipment. Thereafter, WPS Michigan Utilities changed its name to MGUC and became a subsidiary of Integrys Energy Group, Inc.

In March 2006 MGUC filed an application in Case No. U-14830 for approval of changes to recordkeeping, accounting practices, and depreciation rates for certain accounts in connection with its operation of Aquila's natural gas assets. In an order entered on September 12, 2006, the PSC approved MGUC's proposed changes.

In 2006 and 2007 MGUC made the decision to provide laptop computers to its operations personnel to increase accuracy and efficiency. MGUC retired the mobile radios and mainframe computer equipment it acquired from Aquila, notwithstanding the fact that these assets had remaining useful life.

In June 2007 the PSC issued an order in Case No. U-14292 directing certain utilities, including MGUC, to file new depreciation cases in 2008 and 2009. On May 16, 2008, MGUC filed an application in Case No. U-15550 requesting approval of revised depreciation rates and practices. The parties reached a settlement agreement under which the parties determined that MGUC's existing depreciation rates and practices would not change at that time, and that MGUC would file a new depreciation case.

On July 30, 2009, MGUC filed an application in the instant case seeking accounting approval of proposed depreciation rates and practices. The Proposal for Decision identified three disputed areas: (1) remaining life estimates to be used in determining rates of depreciation; (2) net salvage costs, i.e., the treatment of costs associated with the retirement of assets; and (3) the request by MGUC to adopt amortization for certain plant accounts. MGUC sought to amortize and collect over a five-year period a depreciation reserve of $2.5 million.[1] The ALJ recommended that the PSC deny MGUC's request to amortize the accounts at this time and allow MGUC to seek the undepreciated amounts related to the retired communications equipment in its next rate case. Only the ALJ's recommendation on the amortization issue prompted the filing of exceptions.

The PSC issued an order disallowing recovery of the reserve deficiency associated with the early retirement of the communications assets. The PSC noted that auditing data showed that more than 90% of the mobile radio equipment was in service by the end of 2001, and that MGUC's depreciation order in effect at that time required MGUC to give the PSC advance notice of the retirement. The PSC noted that such advance notice language was "boilerplate in depreciation rate cases[.]" The PSC concluded:

> The magnitude of the depreciation reserve sought in this proceeding takes this out of the category of a routine replacement or retirement, and into the category of one for which the company should have given the Commission advance notice. The Commission finds that the request to increase the reserve deficiency to account for the early retirement of these communications assets should be denied. With that exception, the Commission finds that the remainder of the PDF is well-reasoned and thorough, and adopts the findings and recommendations therein, along with the rates set out in Attachment 1 to this order.

The PSC ordered MGUC to implement revised depreciation rates set out in an attachment to the order, and directed MGUC to file a new depreciation case and study.

II. Standard of Review

[1] When property is retired the full cost of the property, less the net salvage value, is charged to the depreciation reserve. At the time MGUC purchased Aquila's assets the reserve deficiency was estimated to be approximately $180,000. The increase of the reserve to $2.5 million occurred due to MGUC's retirement of communications assets that still had a remaining useful life.

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it arbitrary, capricious, or not supported by the evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

We give due deference to the PSC's administrative expertise, and we will not substitute our judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and we will not overrule that construction absent cogent reasons. If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent, and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. However, the construction given to a statute by the PSC is not binding on us. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103-109; 754 NW2d 259 (2008). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. Analysis

On appeal, MGUC first argues that the PSC's order is unlawful and unreasonable because the PSC's denial of MGUC's request to recover the depreciation reserve deficiency on the ground that MGUC failed to notify the Commission in advance of its decision to retire early the communications and mainframe equipment was not supported by any statute or rule. We agree.

The PSC noted that in excess of 90% of the mobile radio equipment retired was in use by the end of 2001, and observed that MGUC's depreciation order in effect at that time in Case No. U-12395 required MGUC to give the Commission advance notice of retirement of assets during the period in which the depreciation rates were in effect. However, that order ceased to be effective prior to retirement of the assets in 2006 and 2007. The PSC approved revised depreciation rates for MGUC in an order issued on March 12, 2003, in Case No. U-13393. That order, and the settlement agreement it approved, did not contain a provision requiring MGUC of the early retirement of assets.

The PSC has only those powers conferred on it by statute. These statutes must be strictly construed, and the PSC may exercise power only if it is conferred by clear and unmistakable statutory language. *In re Application of Consumers Energy Co*, 279 Mich App 180, 190; 756 NW2d 253 (2008).

In *In re Application of Consumers Energy Co for Authority to Implement a Gas Cost Recovery Plan and Factors*, 278 Mich App 547; 753 NW2d 287 (2008), this Court stated:

> The PSC has broad authority to set just and reasonable rates and may, in the exercise of its discretion, determine what factors are relevant in a particular case. The PSC is not bound by any particular ratemaking method and can make pragmatic adjustments in order to respond to the particular circumstances of any given case. [*Id*. at 563 (internal citations omitted).]

The PSC primarily relied on the advance notice provision in the settlement agreement approved by the order in Case No. U-12395 to deny MGUC's request to recover the reserve deficiency. However, that clause applied specifically to the period in which the depreciation rates established by the agreement were in effect. The depreciation rates established by the settlement agreement approved in the September 7, 2001, order in Case No. U-12395 were no longer in effect when MGUC retired the assets at issue.

The PSC correctly observed that MGUC did not seek to recover the reserve deficiency in Case No. U-14830, which dealt with certain accounting and depreciation changes associated with the acquisition of Aquila, or in Case Nos. U-15549 and U-15990, MGUC's latest general rate cases. However, MGUC filed Case No. U-14830 on March 20, 2006, apparently before all the assets at issue had been retired. Moreover, MGUC filed Case Nos. U-15549 and U-15990 after the PSC issued an order in Case No. U-14292 instructing it and other utilities to file a depreciation rate case.

The PSC has wide discretion in matters of ratemaking. *In re Application of Consumers Energy Co*, 278 Mich App at 563. The PSC reasoned that the magnitude of the recovery sought made this case one in which MGUC should have given the Commission advance notice that the assets were to be retired. However, the PSC's conclusion that MGUC was required to give advance notice of the retirement of the assets at issue when MGUC was under no order to do so constituted an abuse of discretion in the exercise of its judgment, and thus was unlawful. *In re MCI Telecom Complaint*, 460 Mich at 427.[2]

[2] MGUC's assertion that the PSC could not enforce an advance notice requirement because it was not properly promulgated as a rule is without merit. A "rule" is "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[.]" MCL 24.207(a). The PSC must promulgate rules "for the conduct of its business and the proper discharge of its functions hereunder, and all persons dealing with the commission or interested in any matter or proceedings before it shall be bound by such rules and regulations." MCL 460.55. The PSC's assertion that MGUC should have given the Commission advance notice of retirement of the assets was not the adoption of a policy of "general applicability[.]" MCL 24.207(a). The PSC's decision applied only to MGUC, and did not adopt a requirement for future cases. Cf. *In re Public Serv Comm Guidelines*, 254 Mich App at 266-268 (adoption of guidelines for transactions between regulated utilities and

Finally, MGUC argues that the PSC's decision was arbitrary and capricious, and thus unreasonable, because the PSC based its decision to deny MGUC's request to recover the reserve deficiency on language that did not appear in the orders applicable to MGUC. We agree.

A decision is unreasonable if it is arbitrary or capricious. *Associated Truck Lines, Inc*, 377 Mich at 279. A decision is arbitrary if was without adequate determining principle, was arrived at through an exercise of will or caprice, was without consideration or adjustment with reference to principles, circumstances, or significance, or was decisive but unreasoned. A decision is capricious if it was subject to sudden change, or was freakish or whimsical. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 63-64; 678 NW2d 444 (2003).

The PSC concluded that MGUC should have adhered to an advance notice provision that was not contained in the orders to which MGUC was subject. MGUC had no notice that the PSC would conclude that the provision was applicable in this case. Moreover, the PSC did not conclude that it would have denied the request had it been given advance notice of the retirement of the assets at issue. Under the circumstances, the PSC's decision to deny the MGUC's request to recover the reserve deficiency was arbitrary.

We reverse.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly

nonregulated affiliates did not comport with rulemaking procedures). The PSC's assertion that an advance notice provision is "boilerplate" language in depreciation cases is puzzling in light of the demonstrated absence of such language in various decisions, but the PSC's citation of the advance notice provision did not violate rulemaking procedures.

Similarly, MGUC's argument that the PSC improperly attempted to amend its prior orders to require MGUC to provide advance notice of the retirement of certain assets is without merit. The principle that a court speaks through its orders, *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987), applies as well to the PSC. The PSC cannot correct a prior order unless doing so would not injure a party to which the order applied. See *G & A Truck Line, Inc v Public Serv Comm*, 377 Mich 300, 307; 60 NW2d 285 (1953). The PSC did not specifically seek to amend the orders applicable to MGUC, i.e., those in Case Nos. U-13393 and U-14830.

APPENDIX F

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re, Implementing Provisions of Public Act 233 of 2023	MPSC Case No. U-21547
ALMER CHARTER TOWNSHIP, et al,	Court of Appeals No. 373259

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.
/

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

APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION'S ANSWER IN OPPOSITION TO APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

Respectfully submitted,

Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
Assistant Attorneys General
Attorneys for Appellee
Michigan Public Service Commission
Public Service Division
7109 W. Saginaw Hwy.
Lansing, MI 48917
(517) 284-8140

Dated: December 2, 2024

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION

Extraordinary relief requires extraordinary justification. Yet, Appellants' Motion for Preliminary Injunction asks this Court to grant immediate relief from valid interpretations of a valid Michigan law without providing even ordinary justification. Michigan caselaw is clear that any movant faces a heavy burden if it is to successfully request a preliminary injunction. Appellants' motion cannot meet this burden because of the procedural and interpretive deficiencies in both the motion and the underlying appeal. Even still, one would expect any attempt at meeting this heavy burden to at least engage in meaningful examination of the law and interpretations it seeks to enjoin. Appellants' motion fails at even this most basic task. As the Appellants' motion fails to justify the extraordinary remedy it seeks, it should be denied.

On November 8, 2024, several of the above-named townships and counties (Appellants) filed a Claim of Appeal in this case. Four days later, on November 12, 2024, Appellants filed an Amended Claim of Appeal naming additional appellants. On November 22, 2024, Appellants filed a Motion for Preliminary Injunction and a Motion for Immediate Consideration.[1] Pursuant to the deadline set by this Court,

[1] The Commission notes that, while it does not concede any of the statements or arguments raised in Appellants' Motion for Immediate Consideration, this Answer focuses its response on Appellants' Motion for Preliminary Injunction. Furthermore, the Motion for Immediate Consideration specifies that it pertains to Appellants' Motion for Preliminary Injunction & Brief in Support only. (Appellants' Motion for Immediate Consideration of Motion for Preliminary Injunction & Brief in Support, pp 1–3.) It does not purport to, nor does the Commission understand it to, make any arguments regarding the procedures governing the underlying appeal.

the Commission files the following Answer, which demonstrates that Appellants have not met their burden and that this Court should deny their request for a preliminary injunction.

COUNTER-STATEMENT OF FACTS

The Michigan Public Service Commission (Commission) provides this counter-statement of facts for the purpose of selectively responding to inaccurate or incomplete statements made in Appellants' Statement of Facts in its Brief in Support of its Motion for Preliminary Injunction (Appellants' Brief in Support). For the purposes of this Answer, the Commission will rely on the statement of facts in Appellants' Brief in Support where not otherwise addressed.

On November 28, 2023, Governor Gretchen Whitmer signed Public Act 233 of 2023 (Act 233) into law, which amended Public Act 295 of 2008 (Act 295). Act 233 prescribed the powers and duties of the Commission to provide certification before the construction of certain wind, solar, and energy storage facilities.

A. Act 233 provides discretion to electric providers and independent power producers to seek wind, solar, and storage certification and for local units of government to require a siting certificate.

Sections 222 (1) and (2) of Act 233 provide that before beginning construction of an energy facility with qualifying nameplate capacity "an electric provider or independent power producer may. . . obtain a certificate for that energy facility from

the commission." MCL 460.1222(2). Act 233 does not mandate that developers[2] obtain a certificate from the Commission to site an energy facility. As stated in a footnote by Appellants, "[e]ven if a proposed project meets the threshold capacity requirements of [Section] 222(1), the developer may choose to submit their application only to appropriate local units and seek local zoning approval regardless of whether the local units have CREOs." (Appellants' Brief in Support, p 9, n 5.)

Act 233 also provides that "[a] local unit of government exercising zoning jurisdiction may request the commission to require an electric provider or independent power producer that proposes to construct an energy facility in that local unit to obtain a certificate for that energy facility from the commission." MCL 460.1222(2). A developer can come to the Commission for a certificate at the request of an affected local unit.

Section 223(3) of Act 233 further requires that a developer must file for approval with each affected local unit if it is notified that each affected local unit has a compatible renewable energy ordinance (CREO). MCL 460.1223(3). The statutory exceptions to this section include three procedural paths that allow a developer to come to the Commission despite an affected local unit stating it has a CREO. A developer can submit an application to the Commission for a certificate after being notified that an affected local unit has a CREO if: (1) an affected local

[2] Like Appellants' Brief in Support, this Answer uses the terms "developers" or "applicants" to generally refer to the electric providers or independent power producers seeking to site energy facilities. (*See* Appellants' Brief in Support, p 9, n 4.)

unit fails to timely approve or deny an application; (2) an application with an affected local unit complies with the statutory requirements of Section 226(8) of Act 233 but is nonetheless denied; or (3) if an affected local unit amends its zoning ordinance after notifying a developer that it has a CREO and the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those outlined in Section 226(8) of Act 233. *See* MCL 460.1223(3). Even under these limited circumstances, the decision to seek a certificate from the Commission remains at the discretion of either the developer or an affected local unit.

Act 233 does not create "exemptions to local zoning regulations" but provides an alternate, discretionary path to wind, solar, and storage siting certification. (*See* Appellants' Brief in Support, pp 2, 8.) The circumstances under which a developer may seek a certificate from the Commission are enumerated and well defined by the statute. An affected local unit of government exercising zoning jurisdiction with a CREO may also request the Commission require a developer obtain a certificate from the Commission.

B. The Commission analyzed principles of statutory construction when interpreting terms in Act 233, including affected local unit.

Section 223 of Act 233 requires the developer hold a public meeting in each affected local unit with proper notice as outlined in that section. *See* MCL 460.1223(1). Under Section 221 of Act 233, " '[a]ffected local unit' means a unit of local government in which all or part of a proposed energy facility will be located."

MCL 460.1221(a). Under the same section, "local unit of government" or "local unit" means "a county, township, city, or village." MCL 460.1221(n).

Public Act 110 of 2006 (Act 110), the Michigan Zoning Enabling Act, provides that "a township that has enacted a zoning ordinance under this act is not subject to an ordinance, rule, or regulation adopted by a county under this act." MCL 125.3209. As stated in Appellants' Brief in Support, (Appellants' Brief in Support, p 8,) Act 234 of 2023, signed into law simultaneously with Act 233, amended Act 110 to state that a zoning ordinance is subject to "Part 8 of the clean and renewable energy and energy waste reduction act, 2008 PA 295, MCL 460.1221 to 460.1232." MCL 125.3205.

On October 10, 2024, the Commission published an order in Case No. U-21547 (October 10th Order) in which the Commission determined that it is "impossible for a county to have an applicable CREO if a township has enacted a CREO." (MPSC Case No. U-21547, 10/10/2024 Order, p 6, F# 0025.)[3] As such, the Commission stated it was interpreting Act 233 to be read in harmony with the Michigan Zoning Enabling Act and restricted the term "affected local unit" to mean "only those local units of government that exercise zoning jurisdiction." *Id*. at 9. The Commission found that "all the circumstances that trigger the Commission's

[3] The record in this matter appears in the MPSC's electronic docket found at https://mi-psc.my.site.com/s/case/5008y000009kJfbAAE/in-the-matter-on-the-commissions-own-motion-to-open-a-docket-to-implement-the-provisions-of-public-233-of-2023. "F# 0025" is the filing number where the cited order can be found on the e-docket. The Commission has included the F# consistent with MCR 7.212(J)(1)(f).

limited authority to site energy facilities necessarily require a local unit of government to exercise zoning jurisdiction." *Id.* at 10. The Commission went on to state that "although the statutory definition of [affected local unit] does not reference zoning jurisdiction, reading the term in light of the entire context of Act 233's statutory scheme to provide a limited transfer of siting authority to the Commission reveals that such a restriction is not only reasonable, but necessary." *Id.* The Commission found that an affected local unit under Act 233 means only those local units of government that exercise zoning jurisdiction. *Id.*

Section 223(2) of Act 233 requires that a developer "planning to construct an energy facility shall offer in writing to meet with the chief elected official of each affected local unit . . . ." MCL 460.1223(2). Appellants state that "[a]fter the developer offers to meet with the chief elected official(s), the [affected local units] have a choice: they may decline or accept the offer." (Appellants' Brief in Support, p 9.) The statutory language provides a requirement for developers to offer to meet with each chief elected official of an affected local unit. Appellants' statement that the chief elected officials have the discretion to meet with a developer has no basis in the statutory language of Act 233.

Appellants also state that once an affected local unit notifies a developer that it has a CREO, "the developer *must* submit their application to the [affected local unit], not the PSC, and comply with the [affected local unit]'s CREO to obtain approval." *Id.* at 10. As outlined above, there are three paths that may bring a siting case before the Commission even if an affected local unit notifies a developer

that it has a CREO and the developer files with the affected local unit first. Appellants' statement, and added emphasis, fail to recognize these explicit exceptions.

In their Statement of Facts, Appellants also comment on Section 223(5) of Act 233 which states that "[i]f the Commission approves an applicant for a certificate submitted under subsection (3)(c), the local unit of government is considered to no longer have a compatible renewable energy ordinance, unless the commission finds that the local unit of government's denial of the application was reasonably related to the applicant's failure to provide information required by subsection (3)(a)." MCL 460.1223(5). Appellants argue that "once the [Commission] approves a certificate, in most situations the [affected local unit] is forever cut out of the decision-making process involving qualifying projects." (Appellants' Brief in Support, p 14.) This statement is incomplete and misleading. It fails to attribute post-certificate consequences to Section 223(5) and to acknowledge that facilities can continue to be sited outside of the PA 233 context. (*See* Appellants' Brief in Support, p 9, n 5.) It also fails to acknowledge the Commission's October 10 Order makes no attempt to undermine an affected local unit's authority to amend its ordinances and that any project could be constructed through the local siting process, regardless of the ordinance's CREO status.

While Act 233 does permit the Commission to place construction-related conditions on a certificate, (MPSC Case No. U-21547, 10/10/2024 Order, p 63, F# 0025,) it "does not exempt an electric provider or IPP from obtaining any other

permit, license, or permission to engage in the construction or operation of an energy facility that is required by federal law, any other state law or rule, or a local ordinance." (*Id.* at 64 (citing MCL 460.1231(5).) Appellants' broad statement is neither complete nor grounded in the statutory language of Act 233. The Commission will address the arguments related to these topics below.

C. The Commission provided application filing instructions and procedures.

Act 233 granted the Commission authorities which Appellants failed to include in a complete manner in their Statement of Facts. (*See* Appellants' Brief in Support, p 15.) Act 233 states that "the commission has only those powers and duties granted to the commission under this part." MCL 460.1230(1). Appellants state that Act 233 gives the Commission only specific powers as outlined in their Statement of Facts. The Commission agrees.

However, Appellants provided an abbreviated list of the duties assigned to the Commission that does not fully capture the extent of the Commission's powers. Most notably for the purposes of this motion, Section 224(1) explicitly grants the Commission the power to establish application filing requirements "**by commission rule or order to maintain consistency between applications**." MCL 460.1224(1) (emphasis added).

As stated in Appellants' Brief in Support, on February 8, 2024, the Commission opened a docket on its own motion (February 8th Order) to implement Act 233. In its February 8th Order, the Commission directed the Michigan Public

Service Commission Staff to "file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in this docket by June 21, 2024." (MPSC Case No. U-21547, 2/8/2024 Order, p 3, F# 0001.)

As the Commission-adopted Filing Instructions and Procedures state "[t]hese instructions have been developed to assist the applicant with the entire process associated with obtaining and complying with a Certificate." (MPSC Case No. U-21547, 10/21/2024 Errata, p 1, F# 0026.) Act 233 grants the Commission authority to establish application filing requirements by order.

Appellants state that "the PSC drafted application instructions and procedures, and a public comment process proceeded as outlined in the February 8 Order." (Appellants' Brief in Support, p 17.) The Commission speaks through its orders. *In re Mich Gas Utils Corp per Order U-14292*, unpublished per curiam opinion of the Court of Appeals, issued Jan 24, 2013 (Docket No. 301103), p 9 ("The principle that a court speaks through its orders, *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987), applies as well to the PSC.") (Attached as Appendix A to this Answer.)[4] The draft application instructions and procedures put forth for public comment were drafted by Michigan Public Service Commission Staff. (MPSC Case No. U-21547, 10/10/2024 Order, pp 2–4, F# 0025.) The Commission corrects

[4] The Commission cites this unpublished, and therefore non-binding, opinion for the limited purpose of demonstrating a prior instance in which this Court has recognized the accepted principle that the Commission speaks through its orders. The Commission is not aware of a published opinion addressing this principle.

Appellants' Statement of Facts to the extent it implies the Commission, and not Staff, prepared the draft version or engaged in the public comment process.

ARGUMENT

I. Appellants' motion, which seeks to stay the Commission's October 10th Order pending this appeal, is improper under MCR 7.209.

Rule 7.209(A)(2) of the Michigan Court Rules states that a motion for "a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court." MCR 7.209(A)(2). Appellants' Motion for Preliminary Injunction, in effect, seeks to stay the Commission's October 10th Order with respect to the challenged interpretations. (Appellants' Brief in Support, p 35 ("Appellants respectfully request that the Court issue an order preliminarily enjoining the enforcement of the PSC's October 10, 2024 Order while this Appeal remains pending.")) The Court has described Appellants' motion as a motion for a stay on its Case Information page. One Court of Justice, *COA 373259 Case Information*, https://www.courts.michigan.gov/c/courts/coa/case/373259 (last visited on Nov 30, 2024).

Because Appellants have not filed a motion to stay the October 10 Order with the Commission, moved to waive the requirements of MCR 7.209(A)(2), or otherwise demonstrated why this rule should not be applied, their motion should be denied.

II. Even if Appellants' motion was procedurally proper, this Court should deny Appellants' Motion for Preliminary Injunction because it cannot satisfy the standard for granting such relief.

A. Standard of Review

The standard for a preliminary injunction requires the moving party to justify relief under a four-part analysis: (1) whether the moving party will face irreparable harm; (2) whether the moving party is likely to prevail on the merits; (3) whether the harm to the moving party, if any, outweighs the harm it would cause to the adverse party; and (4) whether there will be harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n, IAFF Loc 344 v City of Detroit*, 482 Mich 18, 34 (2008); *State Emps Ass'n v Dep't of Mental Health*, 421 Mich 152, 158 (1984).

The Michigan Supreme Court has also explained that "[t]his inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant," *State Emps Ass'n*, 421 Mich at 158, and that "[i]njunctive relief is an extraordinary remedy that issues only when justice requires." *Pontiac Fire Fighters Union Loc 376 v City of Pontiac*, 482 Mich 1, 8 (2008) (quoting *Kernen v Homestead Dev Co*, 232 Mich App 503, 509 (1998)). The moving party bears the burden of proving that these elements favor issuance of a preliminary injunction. *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 648 (2012).

B. Appellants failed to establish any of the four elements in support of issuing a preliminary injunction in this case.

Fatal not only to Appellants' motion, but also their underlying appeal, is the fact that this case presents, at most, a hypothetical injury to the various appellants. Act 233 was neither in effect on November 8, 2024, nor November 22, 2024, the dates the appeal and Appellants' Motion for Preliminary Injunction were respectively filed. (*See* Appellants' Brief in Support, p 19 ("PA 233 takes effect on November 29, 2024.").) As such, no application for a certificate pursuant to Act 233 had been filed. To this date, no Appellant can point to an application for a siting certificate filed under Act 233. There are none. This lack of actual injury weighs against Appellants for three of the four preliminary injunction factors. Appellants cannot demonstrate any actual harm caused by an interpretation of such law, let alone one that is irreparable. Nor can Appellants demonstrate that any such harm outweighs the harm to the Commission or the public interest. Yet, the Commission and the public interest will suffer real harms if a preliminary injunction is granted. In addition, and as shown below, Appellants have failed to demonstrate that they are likely to prevail on the merits of the underlying appeal. Because Appellants have failed to demonstrate that relief is warranted under any of the four factors, the Commission requests this Court deny the Appellants' Motion for Preliminary Injunction.

1. Appellants cannot demonstrate any irreparable harm in this case.

Appellants cannot demonstrate that failure to issue a preliminary injunction presents any harm to the individual Appellants, let alone that such harm is irreparable. For this reason alone, their request for a preliminary injunction should be denied.

A moving party seeking a preliminary injunction must make a threshold showing that it will suffer irreparable harm absent the injunction. *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8–9; *Michigan Coal of State Emp Unions v Michigan Civ Serv Comm'n*, 465 Mich 212, 213 (2001). The Michigan Supreme Court has described this as "an indispensable requirement to obtain a preliminary injunction," *Michigan Coal of State Emp Unions*, 465 Mich at 225–226, and this Court has recognized that other factors of the preliminary injunction analysis need not be considered unless the movant can establish irreparable harm. *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148–149, 155 (2011) ("While we conclude that the lack of evidence of a particularized injury alone provides support for defendant's argument that the preliminary injunction should be reversed, we also find merit to defendant's challenges to other relevant factors."); *see also Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8–13; *see also Michigan Coal of State Emp Unions*, 465 Mich at 213.

To satisfy this necessary condition, the moving party must make a "particularized showing of irreparable harm." *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8–9. Such injuries must be "both certain and great" and must be based

on actual injuries rather than theoretical ones. *Slis v State*, 332 Mich App 312, 361 (2020) (quoting *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998)). It is not necessary that the injury has already occurred, but the moving party must show that it will suffer the irreparable harm without the injunction. *Michigan Coal of State Emp Unions*, 465 Mich at 228.[5] As the Michigan Supreme Court has explained, "[t]he mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 9. Moreover, this Court has explained that "[e]conomic injuries are not irreparable because they can be remedied by damages at law." *Slis*, 332 Mich App at 361 (quoting *Thermatool Corp*, 227 Mich App at 377).

An irreparable injury does not exist, and a preliminary injunction should not be issued, when an adequate legal remedy is available to the moving party. *Pontiac Fire Fighters Union Loc 376*, 482 Mich at 8. In this way, the court considers a

[5] The Commission notes that, in cases addressing ratemaking in which "it was asserted that the commission had erred in making factual determinations in setting rates" and in which a preliminary injunction was sought, the Michigan Supreme Court has stated "the circuit court must find probable cause to believe that the commission had erred in setting rates and must be able to state with 'preliminary certainty' how the commission had erred. A temporary injunction may not issue unless there is a clear showing of irreparable harm and of likelihood of prevailing on the merits." *Consumers Power Co v Michigan Pub Serv Comm'n*, 415 Mich 134, 153 (1982); *see also Michigan Consol Gas Co v Michigan Pub Serv Comm'n,* 389 Mich 624, 640 (1973)). Those cases also noted the prohibition on retroactive ratemaking that would prevent the issuance of a refund of "money properly collected under a prior commission order," which complicates the ability to remedy an erroneous ratemaking decision. *Consumers Power Co*, 415 Mich at 144, n 1; *Michigan Consol Gas Co,* 389 Mich at 640. The immediate case is not an appeal from a Commission order setting rates and, therefore, does not implicate the retroactive ratemaking doctrine.

motion for a preliminary injunction in light of the circumstances affecting, and alternatives available to, the moving party. *Michigan AFSCME Council 25*, 293 Mich App at 148–149. It is the moving party's responsibility to show that these circumstances "demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Slis*, 332 Mich App at 361 (quoting *Thermatool Corp*, 227 Mich App at 377).

Here, Appellants seek injunctive relief from a Commission order providing "guidance on the implementation of Act 233." (MPSC Case No. U-21547, 10/10/2024 Order, p 4, F# 0025.) At this time, there have been no applications for certificates filed pursuant to Act 233. None of the Appellants know whether an application impacting their respective jurisdictions will be filed under Act 233 or how the Commission's October 10 Order will impact any such application. Put simply, the harms alleged by Appellants are hypothetical. Appellants have not presented a particularized showing of irreparable harm. At this stage, any harm Appellants allege amounts to mere apprehension of potential injury in the future that could only come to pass if an application impacting a particular Appellant is filed, if at all.

Assuming actual harm was demonstratable at this stage, Appellants' motion would still not satisfy their burden to demonstrate irreparable harm. There are alternative legal remedies available if an application is, in fact, filed that impacts an Appellant. Under Act 233, the Commission must evaluate all applications through a contested case pursuant to the Public Act 306 of 1969, the Administrative

Procedures Act (APA). MCL 460.1226(3). Act 233 specifies certain interested parties' ability to intervene in the contested cases, *Id.*, and the APA, applicable statutes, and the relevant Administrative Hearing Rules establish the administrative and legal processes. MCL 24.201, *et seq*., MCL 462.26; Mich Admin Code R 792.10101–792.10137, 792.10401–792.10448. In short, there exists a robust legal framework to challenge and appeal Commission determinations stemming from contested cases. *See* MCL 24.281 (opportunity to file exceptions to a proposal for decision); MCL 24.287 (opportunity to requests for rehearing); MCL 24.301 (opportunity for judicial review of administrative decisions); MCL 24.304(1) (opportunity to request a stay); MCL 462.26 (opportunity to file certain appeals of Commission decisions by right to Court of Appeal). Until a case exists and an actual injury is presented, a motion for preliminary injunction, as well as this appeal in general, is premature.

While Appellants purport to address the irreparable nature of the alleged harm, they do so largely with conclusory statements. The analysis also appears to take issue with certain features of Act 233 itself, rather than the October 10th Order, and fails to adequately discuss alternative remedies available to a local unit of government if an application is actually filed for a project in an affected local unit.

Appellants claim:

> The impending harm is not speculative: several Appellants have been approached by developers who intend to place such facilities in Appellants' jurisdictions or are already in the process of applying for zoning approval from Appellants with the underlying threat to apply

> the PSC under the October 10 Order. [Appellants' Brief in Support, p 30.]

Appellants go on to describe one potential wind energy facility in Fremont Township that was denied siting at the local level because it violated the noise restrictions of the Township's zoning ordinance. (*Id.* at 31.) Appellants claim:

> Now, under the Order's limited definition of a "CREO," on November 29, the developer could start the [Act] 233 process and send the required offer to meet with the chief elected official of the [affected local units] and attempt to bypass altogether the regulatory framework established by the Township under [Act] 233. [*Id.*]

This describes the apprehension of an uncertain future injury contingent on future events, which is not an appropriate basis for preliminary injunction. This is not to say that Fremont Township may never have the opportunity to present these arguments. It is merely that an assertion of an irreparable harm before an application is filed pursuant to Act 233 is premature and inconsistent with the preliminary injunction standard.

Regarding the specific example described above and in Appellants' Brief in Support, Fremont Township, individually, may have an opportunity to present these arguments when a particularized showing of a great and certain harm can be made. This is because there are, in fact, alternative and adequate legal remedies available to the Township in that instance. As discussed above, the contested case process includes a legal framework to challenge and appeal Commission determinations. However, Appellants do not address these alternative remedies, despite their importance in the preliminary injunction jurisprudence. The most extensive examination of these alternatives appears to be the blanket statement

that "once the PSC approves a project that, under the plain language of [Act] 233, should have gone through Appellants for approval, a future invalidation of the Order through this Appeal or otherwise would be too late." (Appellants' Brief in Support, p 33.) Presumably the word "otherwise" here is meant to encompass all of the rights and procedures to contest and appeal Commission determinations if an actual application is filed. *See* MCL 24.281, 287, 301, 304(1); MCL 462.26. However, it is unclear because Appellants' Brief in Support does not specifically acknowledge any of those rights and procedures.

Appellants go on to claim that once a certificate is issued, a developer could begin construction and vest their interest in the land use. (Appellants' Brief in Support, p 33.) Appellants provide no explanation for why a motion for preliminary injunction, like the one filed in this case, only with the potential ability to identify and address a particularized and alleged harm, could not prevent such an occurrence. Appellants failure to address the alternative adequate remedies is a fatal flaw in their claim of irreparable harm.

Demonstrating an irreparable harm is a fundamental and necessary showing if a movant is to be successful in obtaining a preliminary injunction. Appellants have not demonstrated an irreparable harm here. Given that no applications have been filed under Act 233, Appellants cannot make a particularized showing of a harm that is both certain and great. Furthermore, there are adequate alternative remedies available that Appellants have failed to address, yet which preclude the

extraordinary remedy they seek. Without a particularized showing of irreparable harm, this Court should deny Appellants' Motion for Preliminary Injunction.

2. Appellants are unlikely to prevail on the merits of this case.

In order to be granted a preliminary injunction, the moving party must demonstrate that it not only can prevail on the merits of the case, but that it will likely do so. *State Emps Ass'n*, 421 Mich at 157–158. This does not require the moving party's rights to be "clearly established" or that the court find the moving party is entitled to ultimately prevail, but due to the extraordinary nature of a preliminary injunction, the burden is on the moving party to demonstrate a likelihood that it will succeed in the underlying case. *Niedzialek v Journeymen Barbers, Hairdressers & Cosmetologists' Int'l Union of Am, Loc No 552 (A.F.L.)*, 331 Mich 296, 301–302 (1951); *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859 (2006). The Michigan Supreme Court has indicated that failure to meet this burden is grounds for denying a motion for preliminary injunction. *See Northern Warehousing, Inc*, 475 Mich 859; *Scott v Michigan Dir of Elections*, 490 Mich 888 (2011); *contra Johnson v Michigan Minority Purchasing Council,* 341 Mich App 1, 25 (2022) (affirming a preliminary injunction where most of plaintiff's claims are unlikely to prevail out of deference to the Circuit Court's grant of this extraordinary remedy.)

a. Appellants are unlikely to prevail on the merits of any of their claims because this case is not yet ripe for adjudication.

Appellants' claims are not yet ripe for review. This Court has explained that "[t]he doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *King v Michigan State Police Dept*, 303 Mich App 162, 188 (2013) (quoting *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615 (2008)). If a claim is premised on contingent future events, it is not ripe for appellate review. *Id.* For this reason, the timing of an appeal is the primary focus of a ripeness review. *City of Huntington Woods*, 279 Mich App at 616.[6]

This Court has further explained that the ripeness analysis asks whether a claim is sufficiently mature to warrant judicial intervention. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich App 207, 218 (2018), rev'd on other grounds, 505 Mich 97 (2020). The Court explained that it must "balance any uncertainty about whether a party will actually suffer future injury against the potential hardship of denying anticipatory relief" in making that assessment." *Id. 218.* At the same time, the ripeness doctrine still requires "that an actual injury be

[6] Since 2010, the Michigan Supreme Court opted for a more "limited, prudential approach" to standing. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 353 (2010). The dissent in *Lansing Sch Educ Ass'n* questioned whether the case would undermine the related mootness and ripeness doctrines. *Id.* at 460 (Corrigan, J., dissenting, joined by Young and Markman, JJ.). Yet, the Commission is aware of no case undermining or invalidating the ripeness doctrine on this basis, and this Court has continued to cite cases such as *City of Huntington Woods* to evaluate the ripeness doctrine. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich at 217.

sustained." *Id.* at 217. In *In re Reliability Plans of Elec Utilities for 2017-2021*, this Court rejected arguments from the Commission that a claim challenging an order regarding a local clearing requirement (a requirement on all electric providers to obtain a certain amount of their capacity within a certain geographical area)[7] was not yet ripe until the Commission actually imposed the local clearing requirement. *Id.* Contrary to the Commission's arguments, the Court found that the Commission had done more than merely announcing it had authority to implement a local clearing requirement on certain electric suppliers. It found that the Commission had announced its decision to assert that authority. *Id.* at 218–219. In other words, the Commission had decided to impose an affirmative obligation on the electric providers. The Court explained that it would find the issue ripe "when it is a 'threshold determination,' the resolution of which is not dependent on any further decision by the [Commission]." *Id.* at 218.

At the time of filing the instant appeal, no injury had occurred yet. The underlying law was not effective until November 29, 2024. (MPSC Case No. U-21547, 10/10/2024 Order, p 1, F# 0025; Appellants' Brief in Support, p 19.) As such, there were no applications for energy facility certificates filed at the time of this appeal, and no such applications have been filed even at this time. Nothing in Act 233 prohibits the continued siting of energy facility projects through the local

[7] MCL 460.6w(12)(d) ("'Local clearing requirement' means the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)."

process, MCL 460.1221, *et seq*., and Act 233 explicitly contemplates the continued processing of project applications at the local level even after the effective date of Act 233. MCL 460.1223(3); (*see also* Appellants' Brief in Support, p 9, n 5.) None of the Appellants, therefore, can be certain that an energy facility application will be submitted to the Commission for a project located within their jurisdiction, let alone that they will be injured by the guidance issued in the Commission's October 10th Order.

Because none of the Appellants can demonstrate an actual injury, this appeal is one that seeks adjudication of a hypothetical claim that is contingent on several future events, not least of which is the filing of an application at the Commission for a project impacting the specific Appellants. This is not to say that none of the Appellants will eventually have an opportunity to present their arguments against the interpretations in the Commission's October 10 Order. As discussed above, the procedures governing the contested cases that will accompany any application provide for a robust opportunity to do so. Yet, as this Court has explained, the timing of a claim should be the primary focus of a ripeness analysis, and it is simply not time for this Court to evaluate these arguments.

These ripeness deficiencies are distinguishable from those raised by the Commission in the local clearing requirement case described above. *In re Reliability Plans of Elec Utilities for 2017-2021*, 325 Mich App at 217–220. While one might argue that the Commission has declared its intent on how it plans to administer the applicable statutes in both cases, there are crucial distinctions. The

local clearing requirement is one that applied to all relevant providers. No matter the specific circumstances surrounding an individual provider, the provider would be subject to the requirement if it provided service to Michigan customers. In the instant case, the Commission certificate process is optional, not mandatory. MCL 460.1222(2). Furthermore, the Commission's local clearing requirement decision asserted that it would impose an affirmative obligation on electric providers. Here, Appellants' challenge the Commission's lawful interpretation of a statute it is obligated to administer. (*See* Section III.B.2.b.i of this Answer.) None of these interpretations, on their own, impose an affirmative obligation.

Because this appeal is premised on hypothetical claims contingent on future events, it is not ripe for judicial review. This Court should not be made to decide these issues before an actual injury has been sustained. This flaw in Appellants' case demonstrates that they are unlikely to prevail on the merits. Therefore, the requested preliminary injunction should be denied.

b. Appellants are unlikely to prevail on their claim that the Commission exceeded its authority to interpret Act 233.

Commission interpretation of the statutes it administers is a routine aspect of the Commission's responsibilities. *See In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93 (2008); *Att'y Gen v Michigan Pub Serv Comm'n,* 206 Mich App 290, 298 (1994). The Commission's authority to make these interpretations is not controversial. *In re Reliability Plans of Elec Utils For 2017-2021*, 505 Mich 97, 119 (2020) ("The MPSC has the authority to interpret the

statutes it administers and enforces."). The standard of review for such interpretation or construction, which Appellants themselves articulate, also recognizes the Commission has a role to play in statutory interpretation. (Appellants' Brief in Support, pp 22–23); *In re Michigan Consol. Gas Co to Increase Rates Application*, 293 Mich App 360, 365 (2011) ("A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference."). While this standard is less deferential than the one this Court gives to the Commission's administrative expertise, *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich App 204, 211 (2015), the standard nonetheless recognizes the Commission's authority to make such interpretations and even grants those interpretations respectful consideration.

As the Michigan Supreme Court has recognized, although courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation, courts give "respectful consideration" to an administrative agency's interpretation of a statute that it administers, and courts do not overturn that interpretation without "cogent reasons." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich at 103. In fact, as long as an agency's "interpretation does not conflict with the Legislature's intent as expressed in the language of the statute at issue, there are no such cogent reasons to overrule it." *Younkin v Zimmer*, 497 Mich 7, 10 (2014) (citation and quotation marks omitted).

This Court has a history of affirming Commission orders in recognition of the Commission's administrative expertise. *See Attorney Gen v Michigan Pub Serv Comm'n*, 249 Mich App 424, 433 (2002). It has also made clear that the burden is significant for a party challenging the Commission's statutory interpretations. *Id.* ("[G]iven our historically deferential treatment of MPSC rulings, appellants have failed to overcome the heavy burden of demonstrating by clear and satisfactory evidence that the challenged dismissal orders were unlawful or unreasonable."). Appellants appear to acknowledge this heavy burden. (Appellants' Brief in Support, pp 22–23.)

Any statutory interpretation must center on ascertaining the legislative intent of the statute. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156 (2011). One can hardly dispute or overstate the importance of the plain language in this endeavor. *See Wilmore-Moody v Zakir*, 511 Mich 76, 82 (2023). The plain language constitutes the "most reliable evidence of that intent." *Id.* (quoting *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 410 (2022). One must first review the statutory language itself, giving the words therein the statutorily defined meaning or their ordinary meaning when no such definition exists. *Krohn*, 490 Mich at 156. The ordinary meaning of words should consider the context in which they are used and can be informed by dictionary definitions. *Id.*

Appellants' claim the Commission redefined key terms and concepts in violation of Act 233's clear intent and that Act 233 provides the Commission no authority to do so. (Motion for Preliminary Injunction, ¶ 5; Appellants' Brief in

Support, pp 28–29.) Not only does this argument mischaracterize routine statutory interpretation as redefinition, but it also appears to ignore the Commission's well-established ability and obligation to interpret the statutes it administers. Appellants' attempts to frame what are, in fact, interpretations entitled to respectful consideration as attempts to "redefine" and "rewrite" the statute lack support and are not likely to prevail on the merits. Not only are the Commission's interpretations consistent with the rules for statutory interpretation, but Appellants' arguments are even less likely to prevail when considering the respectful consideration this Court will give to the Commission's interpretations.

i. Appellants are unlikely to succeed on the merits of their claim that the Commission impermissibly provided guidance without engaging rulemaking procedures under the APA.

Appellants are unlikely to prevail on their claim that the Commission impermissibly provided guidance without engaging in the rulemaking process under the APA. The Commission acted well within its authority under Section 7(h) of the APA to provide interpretive statements, guidelines, and explanatory materials through its October 10th Order. MCL 24.207(h). It also acted within its statutory authority pursuant to Section 7(j) of the APA and Section 224(1) of Act 233 by adopting its Application Filing Instructions and Procedures.

Rules developed under the APA do not include interpretive statements, guidelines, or explanatory materials.

The Commission agrees with Appellants' contention that an agency is generally obligated to employ formal rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority" but rather, "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 404 (1998); (*see also* Appellants' Brief in Support, p 20.) The Commission also agrees that under the APA, a rule is "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." MCL 24.207; (*see also* Appellants' Brief in Support, p 21.) Yet, none of these principles solely validate Appellants' arguments that the Commission must engage in APA rulemaking to implement the provisions of Act 233.

"An executive agency's power derives from statute. Yet an agency has the authority to interpret the statutes it administers and enforces." *O'Halloran v Sec'y of State*, ____ Mich ____ (2024) (Docket Nos. 166424 and 166425), slip op at 8 (internal citations omitted) (Attached as Appendix B to this Answer). The Michigan Supreme Court has confirmed this authority with respect to the Commission explicitly. *See In re Reliability Plans of Elec. Utils. For 2017-2021*, 505 Mich 97, 119

("The MPSC has the authority to interpret the statutes it administers and enforces.")

Appellants' arguments recognize one exception to the rulemaking process under the APA, for "[a] determination, decision, or order in a contested case." MCL 24.207(f). The Commission does not claim here that the October 10 Order arose from a contested case. The Commission docketed Case No. U-21547 on its own motion. (MPSC Case No. U-21547, 2/8/2024 Order, pp 1–3, F# 0001.) The case did not involve any named party or disputed set of facts. Michigan Public Service Commission Case No. U-21547 was neither established nor conducted as a contested case proceeding. (*Id.*)

However, Appellants' Brief in Support fails to address, or even mention, any of the other enumerated exceptions to the rulemaking process. In particular, Appellants omit the language of the APA stating that rules do not include any of the following: "[a] form with instructions, an interpretive statement, a guideline . . . or other material that itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h).

The Michigan Supreme Court and this Court have provided guidance on what constitutes an interpretive statement in comparison to a rule that must be promulgated under the APA. The Michigan Supreme Court has recently stated that "[a]n interpretive statement, for instance, in itself lacks the force and effect of law because it is the underlying statute that determines how an entity must act, i.e., that alters rights or imposes obligations." *Mich Farm Bureau v Dep't of Env't, Great*

Lakes, & Energy, ____ Mich ____ (2024) (Docket No. 165166); slip op at 13 (citing *Clonlara, Inc v State Bd of Ed,* 442 Mich 230 (1993)) (Attached as Appendix C to this Answer). Here, Act 233 determines that an application submitted under Part 8 of Act 233 must comply with the statutory requirements outlined therein. The Commission's interpretative statements regarding the terms of Act 233 do not impose obligations on affected local units, electric providers, or IPPs. Nor do they bind an administrative law judge to sanction an entity in an enforcement action or a court in judicial review. *Mich Farm Bureau*, slip op at 13.

The Michigan Supreme Court articulated that "statements explaining how an agency plans to exercise a discretionary power are usually considered to lack the force and effect of law" and "statements announcing a policy the agency plans to establish in future adjudications generally lack the force and effect of law." *Id. a*t 14.

The Court of Appeals has rejected the argument that a "policy constituted a rule because it altered the status quo and substantially affected the rights of the general public." *Faircloth*, 232 Mich App at 403. The Court of Appeals has further stated that "where an agency policy interprets or explains a statute or rule, the agency need not promulgate it as a rule even if it has a substantial effect on the rights of a class of people because an interpretive statement is not, by definition, a rule under the APA." *Id.*at 404 (citing *Michigan Farm Bureau v Bureau of Workman's Compensation, Dep't of Labor*, 408 Mich 141, 148 (1980)).

In the case at hand, a rulemaking proceeding was unnecessary with respect to the Commission's interpretations of the terms "CREO", "affected local unit", and "hybrid facility," as the Commission was not developing a regulation or policy with the force of law. Even if the interpretive statements provided by the Commission altered the status quo or affected the rights of a class of people, they are explicitly excluded from the definition of a rule under the APA. It would have been inappropriate for the Commission to file a request for rulemaking with the Michigan Office of Hearings and Rules for these interpretations, as rules developed under the APA do not include interpretive statements, guidelines, or explanatory materials. For the reasons outlined above, the Appellants are unlikely to succeed on the merits of their argument that the Commission impermissibly provided interpretive statements without engaging in rulemaking procedures under the APA.

The Commission was expressly authorized to establish filing requirements in an order by Act 233.

As stated by Appellants, the Michigan Court of Appeals has explained that "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *In re Pub Serv Comm'n for Transactions Between Affiliates,* 252 Mich App 254, 263(2002). Yet, the Appellants failed to acknowledge in any capacity in their Brief in Support that rules, as defined by the APA do not include a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j).

Act 233 authorized the Commission to establish application filing requirements by order. Specifically, Section 224(1) of Act 233 states "[a] site plan required under section 223 or 225 shall meet application filing requirements established by commission rule or order to maintain consistency between applications." MCL 460.1224(1). Act 233 provides the permissive statutory power for the Commission to provide filing requirements by either rule or order. The Commission's decision to exercise its permissive statutory power to develop application filing requirements by order is addressed in the APA.

The Court of Appeals has provided that when a statute directly and explicitly authorizes the Commission to implement the law, either by rule or order, and the Commission is acting under an exercise of permissive statutory authority, it is exempted from formal adoption and promulgation under the APA. *Michigan Trucking Ass'n v Michigan PSC*, 225 Mich App 424, 430 (1997).

Act 233 provided authority for the Commission to establish application filing requirements by order. The Commission was expressly authorized by statute to establish application filing requirements by order. Any argument by Appellants to the contrary is unlike to succeed on the merits.

ii. Appellants are unlikely to prevail in their challenge to the Commission's interpretation of the term "CREO".

The Commission's interpretation of the term "CREO" is consistent with the statutory language. The statute defines the term CREO as follows:

> [A]n ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8). A local unit of government is considered not to have a compatible renewable energy ordinance if it has a moratorium on the development of energy facilities in effect within its jurisdiction. [MCL 460.1221(f).]

Contrary to Appellants' assertion that the Commission "redefined" this term, (Appellants' Brief in Support, p 28,) the Commission plainly relied on and interpreted this term consistent with the statutory definition. (MPSC Case No. U-21547, 10/10/2024 Order, pp 12, 17–18, F# 0025.)

The Commission recognized that the statute requires a CREO be "no more restrictive than the provisions included in section 226(8)." (*Id*. at 12, 18 (quoting MCL 460.1221(f)).) The term "restrictive" is not defined in the statute. Merriam-Webster defines "restrictive," in part, as "of or relating to restriction" or "serving or tending to restrict." "Restrictive," Merriam-Webster, https://www.merriam-webster.com/dictionary/restrictive (last visited Nov 30, 2024). The word "restriction" is further defined, in part, as "something that restricts: such as . . . a regulation that restricts or restrains." "Restriction," Merriam-Webster, https://www.merriam-webster.com/dictionary/restriction (last visited Nov 30, 2024). The word "restrict" is further defined as "to confine within bounds" or "to place under restrictions as to

use or distribution." Restrict," Merriam-Webster, https://www.merriam-webster.com/dictionary/restrict (last visited Nov 30, 2024).[8]

The plain meaning of the CREO definition, therefore, is an ordinance that does not impose restraining regulations or limitations on proposed energy facilities in addition to those found in MCL 460.1226(8). In other words, additional restrictions to those specified in MCL 460.1226(8) are inherently "more restrictive." This plain meaning is consistent with the Commission's determination.

The Commission relied on the plain language of the CREO statutory definition, but it also noted that Act 233 provides further support that the Commission's interpretation achieves the ultimate goal of statutory interpretation, which is that it is consistent with the legislative intent. (MPSC Case No. U-21547, 10/10/2024 Order, pp 17–18, F# 0025.) As discussed above, there are three instances when an application may come before the Commission after being assessed by an affected local unit claiming to have a CREO. MCL 460.1223(3)(c)(ii)–(iii). Of particular note for the Commission's CREO interpretation are the instances when an application may be filed with the Commission if: 1) "[t]he application complies with the requirements of section 226(8), but an affected local unit denies the application" or 2) if an affected local

[8] These definitions are consistent with those in other sources. Webster's New International Dictionary defines "restrictive," in part, as "serving or tending to restrict." *Webster's New International Dictionary, Second Unabridged Edition* (1966). The word "restriction" is further defined, in part, as "that which restricts; a limitation; a qualification; a regulation which restricts or restrains." *Id.* The word "restrict" is further defined as "[t]o restrain within bounds; to limit; to confine" and "to limit the free use of land." *Id.*

unit amends its zoning ordinance after notifying the project developer that it has a CREO such that "the amendment imposes additional requirements on the development of energy facilities that are more restrictive than those in section 226(8)."[9] MCL 460.1223(3)(c)(ii), (iii). Both of these provisions demonstrate the Legislature's intent that applications filed pursuant to a CREO should only be evaluated based on those requirements identified in MCL 460.1226(8) and no additional requirements.

Appellants' Brief in Support does not attempt to refute, or even address, these explanations from the Commission's October 10th Order. Nor does Appellants' Brief in Support contain a meaningful discussion or analysis of the statutory definition of a CREO in MCL 460.1221(f). Appellants primarily rely on broad statements and arguments that "[t]he language of the statute as a whole and of § 226(8), in particular, demonstrates the Legislature's intent that CREOs may contain additional, but not more restrictive, regulations." (Appellants' Brief in Support, pp 27–28.) However, examination of these arguments reveals that the statute, as a whole, supports the Commission's interpretation.

Appellants point to the fact that MCL 460.1226(8) specifies what constitutes "an unreasonable [threat] to public health or safety" and that MCL 460.1223(3)(a) requires information in addition to the requirements of MCL 460.1226(8) in an application to an affected local unit. (Appellants' Brief in Support, p 28.) Based on

[9] An application may also be filed at the Commission in this instance if the affected local unit fails to timely approve or deny and application. MCL 460.1223(3)(c)(i).

these provisions, Appellants claim the Commission's interpretation is illogical because it would preclude an affected local unit from rejecting an application based on this additional information. (*Id.*) Appellants' Brief in Support fails to acknowledge several statutory provisions that undermine this argument.

The fact that the Legislature ensured that an applicant would give the affected local unit additional information regarding a proposed project does not undermine the plain meaning of the CREO definition in MCL 460.1221(f). It is not illogical that this information might be important to the affected local unit, especially in light of Act 233's other transparency-focused provisions. *See* MCL 460.1223; MCL 460.1226(2). Second, the fact that MCL 460.1226(8) details what is an unreasonable risk to public health or safety does nothing to establish that the Legislature did not intend for these to be the bounds of a CREO. Finally, this argument fails to recognize that the statute explicitly and unambiguously states that a developer can bring any application that meets the requirements of MCL 460.1226(8) before the Commission if denied by an affected local unit. MCL 460.1223(3)(c)(ii).

Despite Appellants' claims to the contrary, it is in fact their argument that is illogical. As discussed above, the Commission recognized that the statute clearly states a developer can bring any application complying with the restrictions of MCL 460.1226(8) to the Commission if denied by the affected local unit. (MPSC Case No. U-21547, 10/10/2024 Order, pp 17–18, F# 0025 (citing MCL 460.1223(3)(c)(ii)).) Pursuant to Appellants' interpretation, an affected local unit could institute

additional restrictions other than those articulated in MCL 460.1226(8), deny the application pursuant to such additional restrictions, and then the developer could still apply to the Commission for approval where it would no longer be subject to such additional restrictions. Furthermore, if the Commission approved the application, the affected local unit would be "considered to no longer have a [CREO]," as long as the affected local unit denial was not premised on incompleteness. MCL 460.1223(5). This absurd result, together with the plain language of MCL 460.1221(f) and the other provisions discussed in the Commission's order, demonstrate that the Legislature intended to limit the term "CREO" consistent with the Commission's interpretation.

Appellants point to *DeRuiter v Byron Twp* in an attempt to support their assertion that the Commission cannot "redefine" the term CREO. (Appellants' Brief in Support, pp 28–29.) Yet, they fail to note that *DeRuiter* explicitly dealt with the concept of implied conflict preemption of local authority. *DeRuiter v Twp of Byron*, 505 Mich 130, 140 (2020). In that case, the Court decided whether a local zoning ordinance conflicted with the provisions of the Michigan Medical Marihuana Act and was, thereby, implicitly preempted. *Id.* at 134–135, 140. While the Court addressed a provision of the statute prohibiting penalization of patients and primary caregivers in compliance with the Michigan Medical Marihuana Act, it did not deal with any provision analogous to MCL 460.1221(f) stating that local ordinances could be "no more restrictive" than the state statute. *Id.* at 138.

The present case is wholly distinguishable from *DeRuiter*. First, there is no preemption at issue in this case. Nothing in Act 233 or the Commission's October 10th Order preempts affected local units from enacting ordinances that do not constitute a CREO. The October 10 Order instead provides guidance regarding the interpretation of when those ordinances meet the statutory definition of a CREO. (MPSC Case No. U-21547, 10/10/2024 Order, pp 12, 17–18, F# 0025.) Furthermore, to the extent the concept of preemption could be informative for this case, an implied preemption case like *DeRuiter* would certainly not be the appropriate case to look to. Here, the statute explicitly states that a CREO may be "no more restrictive than the provisions included in section 226(8)." MCL 460.1221(f).

Appellants also seek to rely on *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148 (1999) to argue that the Commission impermissibly relied on public policy reasons to "redefine" key terms in the statute, including CREO. (Appellants' Brief in Support, p 26.) This argument is again presented without examining the actual analysis presented in the October 10th Order and discussed throughout this Answer. More importantly, Appellants' reliance on this case is misplaced. First, *Consumers Power Co* addresses the Commission's authority to compel a regulated utility to provide a specific service. *Consumers Power Co*, 460 Mich at 132. The holding does nothing to question the Commission's authority to interpret the statutes it is obligated to administer. Second, unlike the arguments addressed in *Consumers Power Co*, the interpretations challenged in the instant case are not premised on their economic or public policy merits. *Id.* at 131. As a reading of the

October 10th order clearly demonstrates, the interpretations are premised on the statutory language and sound principles of statutory construction.

Appellants have failed to meet their burden to establish that they are likely to prevail on the merits of their CREO arguments. The Commission clearly and thoroughly articulated why its interpretation is consistent with the plain language of the statute. Appellants failed to fully engage with that explanation, let alone show their ability to successfully demonstrate that it was unlawful or unreasonable.

iii. Appellants are unlikely to prevail in their challenge to the Commission's interpretation of the term "affected local unit."

Appellants failed to demonstrate that their challenge to the Commission's interpretation of what constitutes an affected local unit will likely show that the Commission's order was unlawful or unreasonable. This attempt suffers many of the same fatal flaws discussed above regarding Appellants' challenge of the Commission's CREO interpretation.

An affected local unit is defined by the statute to mean "a unit of local government in which all or part of a proposed energy facility will be located." MCL 460.1221(a). A "local unit of government" or "local unit" is, in turn, defined as "a county, township, city or village." MCL 460.1221(n). MCL 460.1223(3) requires developers apply for siting with the affected local unit if the chief elected official in each affected local unit notifies the developer, within 30 days following a meeting with that developer, that it has a CREO. MCL 460.1223(3). If the chief elected official confirms its affected local unit has a CREO, the developer must apply for

approval through the affected local unit's local processes. *Id*. Yet, under the Michigan Zoning Enabling Act, the zoning jurisdiction of a county does not include areas subject to a township zoning ordinance. MCL 125.3102(x); MCL 125.3209. It is, therefore, impossible under the Michigan Zoning Enabling Act for a county and township, for example, to each have an enforceable CREO in the same location and to represent the same to a potential developer.

It is an established principle of statutory interpretation that the words of a statute should not be "construed in [a] void, but should be read together to harmonize [their] meaning, giving effect to the act as a whole." *Honigman Miller Schwartz* and *Cohn LLP v City of Detroit*, 505 Mich 284, 307 (2020) (quoting *General Motors Corp v Erves* (On Rehearing), 399 Mich 241, 255 (1976)). Furthermore, as the Commission noted in its October 10th Order, "[a] statute should be interpreted in light of the overall statutory scheme, and [a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." (MPSC Case No. U-21547, 10/10/2024 Order, p 10, F# 0025 (quoting *Honigman Miller Schwartz* and *Cohn LLP*, 505 Mich at 307 (quotation marks omitted)).)

Given the structure of zoning jurisdiction between various levels of local government such as counties, townships, and villages, the Commission rightfully determined that interpreting the term affected local unit in a void and in purely geographical terms, could not be compatible with the requirements under MCL

460.1223(3) to permit proceedings under a local process. In such instances, reading the statute to give effect to the entire Act is appropriate and necessary.

The Commission, therefore, examined the statutory language and recognized that Act 233 transfers authority to site energy facilities under four limited circumstances. (MPSC Case No. U-21547, 10/10/2024 Order, p 9, F# 0025.) These include when:

> (1) "a local unit of government exercising zoning jurisdiction" requests the Commission require a developer to obtain a certificate from the Commission, MCL 460.1222(2);
>
> (2) an affected local unit fails to approve or deny an application under the local siting process within 120 days, MCL 460.1223(3)(b), (c)(i);
>
> (3) an affected local unit, under the local siting process, denies an application that complies with Section 226(8) of Act 233, MCL 460.1223(c)(ii); and
>
> (4) an affected local unit amends its zoning ordinance after its chief elected official notifies the developer that the affected local unit has a CREO, and the amendment imposes additional requirements that are more restrictive than those outlined in Section 226(8) of Act 233. MCL 460.1223(c)(iii).

The Commission further recognized that an affected local unit " 'is considered not to have a [CREO] if it has a moratorium on the development of energy facilities in

effect within its jurisdiction.' " (MPSC Case No. U-21547, 10/10/2024 Order, p 9, F# 0025 (quoting MCL 460.1221(f)).)

The Commission explained that all of the instances providing the Commission authority to site an energy facility under Act 233 "necessarily require a local unit of government to exercise zoning jurisdiction." *(Id.* at 10.) This structure indicates the Legislature's intent that the term affected local unit be read to apply only to those entities exercising zoning jurisdiction. Given that Act 233's structure demands interpretation to harmonize provisions that are otherwise incompatible, the Commission did not act unlawfully or unreasonably in its interpretation.

Like with respect to their arguments regarding the definition of the term "CREO," Appellants make no real attempt to engage with the Commission's analysis. They once again rely on broad claims that the Commission is not authorized by Act 233 to "redefine" or "rewrite" the statue without recognizing the valid exercise of statutory interpretation recognized by their own standard of review analysis. (*See* Section III.B.2.b of this Answer.)

One attempt Appellants do make to take issue with the Commission's interpretation of the term affected local unit, as well as the other interpretations Appellants disagree with, is a section incorrectly claiming that the Commission allowed "[i]ndustry comments and policy reasons" to "reshape the Legislature's intent." (Appellants' Brief in Support, pp 25–26.) This section contains hyperbolic accusations. What this section does not contain is a complete presentation of the full breadth of comments the Commission addressed, which were submitted by a

diverse set of entities, including potential developers, landowners, local units of government, environmental advocacy organizations, labor organizations, and academic institutions, (*see* MPSC Case No. U-21547, 10/10/2024 Order, 2–3, F# 0025); support for the notion that it is impermissible for the Commission to have sought input from this diverse set of commenters; or an explanation of how Appellants' accusations inform the four-factor preliminary injunction standard.

Appellants have not met their burden to establish that they are likely to prevail on the merits of their affected local unit arguments. While Appellants need not "clearly establish[]" each of their claims to be successful, based on Michigan law, they must surely do more with respect to their challenge to the Commission's affected local unit interpretation to justify the extraordinary remedy that is a preliminary injunction. The Commission acted lawfully and reasonably in issuing this interpretation and Appellants' have failed to demonstrate otherwise.

iv. Appellants are unlikely to prevail in their challenge to the Commission's use of the term "hybrid facility".

Appellants' fail to meet their burden to demonstrate the likelihood that they will successfully challenge the Commission's use of the term "hybrid facility" because they fail to address the statutory language the Commission addressed in articulating this concept. Appellants' Brief in Support lacks any discussion of the statutory language that the Commission evaluated when using this term in relation to the capacity thresholds necessary for Commission jurisdiction.

As Appellants have previously acknowledged, Act 233's definitions explicitly provide that an "energy storage facility" can be a component of a "solar energy facility" or "wind energy facility." (Amended Claim of Appeal, p 7.); MCL 460.1221(w), (x). These definitions are broad.[10] In using the term "hybrid facility" the Commission simply gave a name to a concept articulated in the statute – that energy facilities can be comprised of multiple technologies. *Compare* (MPSC Case No. U-21547, 10/10/2024 Order, pp 5–6, F# 0025) *with* MCL 460.1221(w), (x). The threshold capacity for such facilities would necessarily contemplate all parts of the energy facility, including the incorporated energy storage facility. *See* MCL 460.1222(1). The Commission appropriately found that hybrid facilities should be considered wholistically when determining whether they have met the statutory capacity thresholds. (MPSC Case No. U-21547, 10/10/2024 Order, pp 4–6, F# 0025.) Though not the basis of the Commission's determination, the October 10th Order also notes that its use of the term hybrid facilities and the capacity thresholds is consistent with the Michigan Department of Environment, Great Lakes, and

[10] *See e.g.* MCL 460.1221(w) (" 'Solar energy facility' means a system that captures and converts solar energy into electricity, for the purpose of sale or for use in locations other than solely the solar energy facility property. Solar energy facility **includes, but is not limited to**, the following equipment and facilities to be constructed by an electric provider or independent power producer: photovoltaic solar panels; solar inverters; access roads; distribution, collection, and feeder lines; wires and cables; conduit; footings; foundations; towers; poles; crossarms; guy lines and anchors; substations; interconnection or switching facilities; circuit breakers and transformers; **energy storage facilities**; overhead and underground control; communications and radio relay systems and telecommunications equipment; utility lines and installations; generation tie lines; solar monitoring stations; and accessory equipment and structures.") (emphasis added).

Energy's eligibility requirements for the Renewables Ready Communities Award grant structure. (*Id.* at 6, n 6.)

Like their treatment of the other interpretations Appellants seek to challenge, they once again failed to engage with the analysis in the October 10th order or demonstrate why the Commission's use of the term "hybrid facility" is unlawful or unreasonable. For this reason, and the reasons articulated above with respect to the interpretation of CREO and affected local unit, which the Commission incorporates here by reference, the Court should find that Appellants have not met their burden to demonstrate they are likely to prevail on the merits of this argument.

3. Any harm alleged by Appellants is outweighed by the harm to the Commission if it were prevented from fulfilling its statutory obligation to administer Act 233.

In deciding whether to grant a motion for preliminary injunction, the Court examines whether the harm to the moving party, if any, outweighs the harm the injunction would cause to the adverse party. *State Emps Ass'n*, 421 Mich at 157. This Court has previously stopped short of examining the relative harm between the moving and opposing party where the moving party demonstrated no irreparable harm. *Hammel*, 297 Mich App at 653.

As explained above, Appellants have failed to demonstrate that failure to issue a preliminary injunction will cause any harm to the individual Appellants, let alone any irreparable harm. Therefore, there is no need for this Court to weigh the respective harms to Appellants versus those that the Commission will face if a

preliminary injunction is granted. Even still, a preliminary injunction in this case would harm the Commission.

The Commission is authorized and required to implement Act 233. *See* MCL 460.1226. The Commission and its Staff have invested significant public time and resources in preparing for implementation of Act 233. (*See* MPSC Case No. U-21547, 10/10/2024 Order, pp 1–4, F# 0025.) To prevent the full implementation of this lawful legislation cannot be justified by the speculative harms alleged for which there are adequate alternative remedies.

Appellants claim that a preliminary injunction will not harm the Commission because it will "in no way undercut the PSC's authority to approve energy facilities that wish to be located in municipalities that do not have a CREO–as defined by [Act] 233." (Appellants' Brief in Support, p 33.) The obvious shortfall of this argument is that it ignores the impact on the Commission's ability to administer aspects of Act 233 that apply to situations in which an affected local unit claims to have a CREO. *See* MCL 460.1223(3)(c).

There are real harms that could result from a preliminary injunction at this premature stage. When compared to the harms alleged by Appellants, the balance clearly favors denying Appellants' Motion for Preliminary Injunction.

4. The requested injunction, if granted, would harm the public interest by preventing the implementation of a statutorily mandated Commission function.

Even more important than the potential harms to the Commission are the potential harms to the public interest that would result from granting Appellants'

requested preliminary injunction. Harms to the public interest arising from the granting of a preliminary injunction weigh against granting such relief. *State Emps Ass'n*, 421 Mich at 157.

Putting aside the inherent public interest in not delaying implementation of a valid statute without the requisite showing for such extraordinary relief, the requested preliminary injunction would harm the public interest in other practical ways. For example, a preliminary injunction would harm landowners and developers seeking to site an energy facility on their property pursuant to the Act 233 process.

Act 233 does not confer any powers of eminent domain. MCL 460.1230(4). All owners of land on which relevant projects will be sited are, therefore, willing participants who have decided to site a facility on their property. (*See* MPSC Case No. U-21547, 10/21/2024 Errata, p 2, n 1, F# 0026.) Issuance of a preliminary injunction at this stage would harm these landowners' rights to make use of their land in the way they see fit pursuant to a valid Michigan law.

For these reasons, issuance of the requested preliminary injunction would harm the public interest. This harm supports denial of Appellants' motion.

CONCLUSION

Appellants' Motion for Preliminary Injunction is not appropriate in this case. Not only does the motion suffer from fatal procedural flaws, but it also fails to meaningfully address the Commission interpretations it takes issue with. Appellants have not met the heavy burden for demonstrating that the extraordinary relief of a preliminary injunction is appropriate. Granting such relief at this time would needlessly delay the implementation of a valid Michigan law. The Commission respectfully requests that this Honorable Court deny the Motion for Preliminary Injunction. The MPSC further requests that this Honorable Court grant additional relief it deems appropriate and just.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMMISSION

/s/ Nicholas Q. Taylor
Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
Assistant Attorneys General
Attorneys for Appellee
Michigan Public Service Commission
Public Service Division
7109 W. Saginaw Hwy., 3rd Floor
Lansing, MI 48917
Telephone: (517) 284-8140
taylorn10@michigan.gov
stirlinga1@michigan.gov

DATED: December 2, 2024

Word Count Statement

This Answer in Opposition to Appellants' Motion for Preliminary Injunction contains 12,734 words.

Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
Assistant Attorneys General
Attorneys for Appellee
Michigan Public Service Commission
Public Service Division
7109 W. Saginaw Hwy., 3rd Floor
Lansing, MI 48917
Telephone: (517) 284-8140

APPENDIX G

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the matter, on the Commission's own motion, to open a docket to implement the provisions of Public Act 233 of 2023	PSC Case No. U-21547

ALMER CHARTER TOWNSHIP, et al.

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

Court of Appeals No. 373259

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
FOSTER, SWIFT, COLLINS & SMITH, PC
Attorneys for Appellants
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200
mhomier@fosterswift.com
lgenovich@fosterswift.com
labdoo@fosterswift.com

Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
ASSISTANT ATTORNEYS GENERAL – PUBLIC SERVICE DIVISION
Attorneys for Appellee
7109 W. Saginaw Highway, 3rd Floor
Lansing, MI 48917
(517) 284-8140
taylorn10@michigan.gov
stirlinga1@michigan.gov

Appellants' Motion for Preliminary Injunction

Appellants, through their attorneys, FOSTER SWIFT COLLINS & SMITH, PC, move the Court under MCL 462.26(4) to issue a preliminary injunction against Appellee Michigan Public Service Commission (the "PSC"). Specifically, Appellants request the Court enjoin Appellee from

enforcing its October 10, 2024, order in PSC Case No. U-21547 pending the outcome of this Appeal for the following reasons and those outlined in the attached brief in support:

1. On November 8, 2023, the Michigan Legislature passed Public Act 233 of 2023 ("PA 233"). PA 233 takes effect on November 29, 2024.

2. Under limited circumstances, PA 233 creates exemptions to local zoning regulations for utility-scale alternative energy projects[1] and authorizes the PSC to review and approve certain applications for certificates for energy facilities.

3. PA 233 adds a new Part 8 to the Clean and Renewable Energy and Energy Waste Reduction Act, Act 295 of 2008.

4. Section 230 of PA 233 limits the PSC's jurisdiction to the powers and authorities granted to it under Part 8.

5. On October 10, 2024, the PSC issued an order in PSC Case No. U-21547 ("Order"), in which the PSC redefined key terms in PA 233 and expanded its own authority to approve applications for projects not covered by PA 233.

6. On November 8, 2024, Appellants timely appealed the Order.

7. On November 12, 2024, Appellants timely filed an amended appeal which added several additional Appellants.

8. Appellants seek an order preliminarily enjoining the Order from taking effect pending the outcome of this appeal.

9. Absent the requested preliminary injunction, Appellants will be imminently and irreparably harmed by the loss of local control over zoning decisions regarding utility-scale

[1] Many ordinances refer to energy facilities designed to provide power to the electric grid (instead of for on-site use) as "utility-scale" systems.

energy facilities in excess of the requirements of PA 233. The PSC would not be irreparably harmed by the issuance of a preliminary injunction.

10. The balance of the equities heavily favors issuing the injunction.

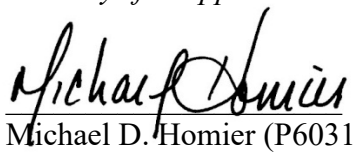
11. The public interest heavily favors issuing the injunction.

Accordingly, for these reasons and the reasons set forth in the accompanying Brief, Appellants respectfully request that the Court issue an order preliminarily enjoining the enforcement of the PSC's October 10, 2024 Order while this appeal remains pending.

Respectfully submitted,

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Appellants

Dated: November 22, 2024

By: 

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the matter, on the Commission's own motion, to open a docket to implement the provisions of Public Act 233 of 2023	PSC Case No. U-21547

ALMER CHARTER TOWNSHIP, et al.

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

Court of Appeals No. 373259

APPELLANTS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
FOSTER, SWIFT, COLLINS & SMITH, PC
Attorneys for Appellants
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200
mhomier@fosterswift.com
lgenovich@fosterswift.com
labdoo@fosterswift.com

Nicholas Q. Taylor (P81020)
Anna B. Stirling (P84919)
ASSISTANT ATTORNEYS GENERAL – PUBLIC SERVICE DIVISION
Attorneys for Appellee
7109 W. Saginaw Highway, 3rd Floor
Lansing, MI 48917
(517) 284-8140
taylorn10@michigan.gov
stirlinga1@michigan.gov

Brief in Support of Appellants' Motion for Preliminary Injunction

Table of Contents

Table of Authorities

Cases

Statutes

Introduction

This appeal arises out of the Michigan Public Service Commission's Order issued October 10, 2024, in PSC Case No. U-21547. The Order purports to establish instructions and procedures for certificate applications for renewal energy development projects, but in fact it ventures into rulemaking in violation of the Administrative Procedures Act and rewrites key statutory definitions of PA 233 of 2023. The Order undermines the authority of local communities, including Appellants, to regulate the siting of utility-scale renewable energy projects as permitted by PA 233.

PA 233 allows developers of utility-scale renewable energy development projects to bypass local approval processes and instead obtain project approval from the PSC unless the local municipality has adopted a "compatible renewable energy ordinance" (CREO) that meets specific minimum standards outlined in PA 233. A municipality with a CREO retains the power to regulate certain aspects of the project that are not covered by PA 233, such as the project's location, insurance requirements, and decommissioning procedures, among other things.

The PSC's Order, however, adopts a "narrow definition" of CREO and holds that "a CREO may only contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of [PA] 233 and *may not contain additional requirements*." (**Order,** 17-18, emphasis added.) The Order further creates a new category of facilities not contemplated by PA 233 (so-called "hybrid energy facilities") and narrows the definition of "affected local units" to communities with zoning, even though PA 233 contains no such restriction.

The PSC does not have the power to rewrite PA 233, and in doing so through the Order, the PSC has overstepped its limited authority. Its actions, if left unchecked, will irreparably harm Appellants and divest Michigan's municipalities of the local control that PA 233 and the Michigan

Zoning Enabling Act, PA 110 of 2006, are meant to preserve. For the reasons below, Appellants respectfully request this Court enjoin the PSC from enforcing the Order pending this appeal.

Statement of Facts

What is PA 233?

In late 2023, the Michigan Legislature passed and the Governor signed Public Act 233 of 2023 ("PA 233"), which takes effect November 29, 2024, and Public Act 234 of 2023 ("PA 234"). PA 233 adds a new Part 8 to the Clean and Renewable Energy and Energy Waste Reduction Act, Act 295 of 2008. PA 234 amends Section 205 of the MZEA, to provide that local zoning ordinances are subject to the new Part 8.

Part 8 establishes exemptions to local zoning regulations for utility-scale renewable energy projects. Specifically, energy storage facilities, solar energy facilities, and wind energy facilities that meet threshold power capacity requirements may be authorized by the PSC, rather than by the municipality in which the facility is located, but only under limited circumstances like if the municipality does not have a "compatible renewable energy ordinance," or "CREO." A CREO is defined by PA 233 as "an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8)." § 221(f).[2] A "local unit of government is considered to not have a [CREO] if it has a moratorium on the development of energy facilities in effect within its jurisdiction." *Id.*[3]

In local units of government where a CREO is not in effect, the PSC may only review and consider applications for the following proposed facilities:

[2] References to PA 233 will simply cite to the relevant section.
[3] Moratoriums are temporary ordinances "used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy." Moratoriums "are an essential tool of successful development." *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 341; 122 S Ct 1465; 152 L Ed 2d 517 (2002).

a. Any solar facility with a nameplate capacity of 50 megawatts or more.

b. Any wind facility with a nameplate capacity of 100 megawatts or more.

c. Any energy storage facility with a nameplate capacity of 50 megawatts or more and an energy discharge capability of 200 megawatt hours or more. [§ 221(1).]

The Process Under PA 233

Under PA 233, a developer[4] of a proposed project that meets the threshold nameplate capacity requirements may, under limited circumstances, seek a certificate from the PSC.[5] A developer of a wind, solar, or energy storage facility must first perform a series of tasks in each "affected local unit" or "ALU." "Affected local unit" is defined by PA 233 to mean "a unit of local government in which all or part of a proposed energy facility will be located." § 221(a). A "local unit of government" or "local unit" "means a county, township, city, or village." § 221(n).

Specifically, the developer must schedule and hold a public meeting in each ALU. § 223. Such meeting must be properly noticed by the developer. *Id*. For example, at least 30 days before the meeting, the developer must provide written notice of the meeting to the clerk of the ALU and provide the clerk with the site plan (or a way to access it electronically). § 223(1).

Additionally, at least 60 days before the public meeting, the developer must offer to meet with the chief elected official of each ALU to discuss the site plan. § 223(2). After the developer offers to meet with the chief elected official(s), the ALUs have a choice: they may decline or accept the offer to meet. If the ALU meets with the developer, a 30-day window opens during which the local unit may inform the developer that it has a CREO. § 223(3). Once the ALU

[4] PA 233 at times refers to "independent power producers, "IPPs," and "electric providers" to describe different categories of electric providers. For simplicity, Appellants will refer to all electric providers and producers as "developers," or "applicants" when appropriate. A developer becomes an "applicant" when it submits an application to the PSC. See § 221(c), 226(5).

[5] Even if a proposed project meets the threshold capacity requirements of § 222(1), the developer may choose to submit their application only to appropriate local units and seek local zoning approval, regardless of whether the local units have CREOs.

provides this notice, the developer *must* submit their application to the ALU, not the PSC, and comply with the ALU's CREO to obtain approval. *Id*.

As PA 233's co-sponsor stated during a legislative hearing, "[f]or those municipalities that want to be more involved in the [permitting] process they now have the opportunity to come up with their own local permitting process, which must mirror tenets of the state process."[6]

Once an application is submitted to an ALU, the ALU has 120 days to approve or deny the application. § 223(3)(b). An application submitted to an ALU must comply with § 225(1), except for § 225(1)(j) and (s), and an ALU "may require other information necessary to determine compliance with the" CREO. §223(3)(a). Mandatory information under §225(1) includes, for example, a soil and economic survey report; a stormwater assessment; if the proposed site is undeveloped, a description of feasible alternative developed locations; a fire response and emergency response plan; and a decommissioning plan.

In limited circumstances, the developer may still submit its application to the PSC. Those circumstances are: (1) if the ALU does not approve or deny the application within 120 days; (2) if, after the chief elected official of the ALU notifies the developer that the ALU has a CREO, the ALU adopts an amended ordinance that "imposes additional requirements on the development of energy facilities that are more restrictive than those in [S]ection 226(8);" or (3) if "[t]he application complies with the requirements of Section 226(8), but the local unit denies the application." § 223(3)(c). If a proposed project includes multiple ALUs, the developer may also proceed to the PSC if just one ALU does not send notice that it has a CREO. See § 223(3).[7]

[6] Senate Committee on the Energy and Environment, Hearing, November 11, 2023, at 6:40, https://cloud.castus.tv/vod/misenate/video/654a810ef6b51700084a0c94?page=HOME (accessed November 22, 2024).

[7] "If, within 30 days following a meeting described in subsection (2), the chief elected official of each affected local unit notifies the electric provider or IPP planning to construct the energy facility that the affected local unit has a compatible renewable energy ordinance, then the electric provider or IPP shall file for approval with each affected local unit. . ."

When a developer files an application with the PSC, ALUs receive funds from the applicant to help cover the costs of intervention before the PSC. "Upon filing an application with the [PSC], the applicant shall make a 1-time grant to each affected local unit for an amount determined by the [PSC] but not more than $75,000.00 per affected local unit and not more than $150,000.00 in total." § 226(1). "Each affected local unit shall deposit the grant in a local intervenor compensation fund to be used to cover costs associated with participation in the contested case proceeding on the application for a certificate." *Id*.

ALUs also benefit from "host community agreements." Under § 227(1), an applicant before the PSC must "enter into a host community agreement with each affected local unit." Such an agreement must provide that the facility owner will pay the ALU $2,000 per megawatt of nameplate capacity located within the ALU. *Id*. The payment must "be used as determined by the affected local unit for police, fire, public safety, or other infrastructure, or for other projects as agreed to by the local unit and the applicant." *Id*.[8]

An application to the PSC (just like an application to an ALU) must include the several categories of information listed in § 225(1). Again, mandatory information includes, for example, a soil and economic survey report; a stormwater assessment; if the proposed site is undeveloped, a description of feasible alternative developed locations; a fire response and emergency response plan; and a decommissioning plan. *Id*.

To review an application, the PSC must conduct a contested case proceeding. § 226(3). ALUs and both participating and nonparticipating property owners may intervene in that proceeding by right. *Id*. When evaluating an application, the PSC must consider the feasible

[8] If an ALU and an applicant fail to enter to enter into a host community agreement, after good-faith negotiations, the applicant may choose to enter into a "community benefits agreement" and direct at least $2,000 per megawatt of nameplate capacity to community-based organizations. § 227(2). In short, a provider must grant the $2,000 per megawatt of nameplate capacity to either the ALU or community-based organizations in each ALU.

alternative developed locations described in the application and the impact of the proposed facility on local land use, including the percentage of land within the ALU dedicated to energy generation. § 226(6). The PSC may also condition a certificate on the applicant taking additional reasonable action related to the impacts of the proposed energy facility, including, but not limited to: establishing and maintaining for the life of the facility vegetative ground cover; meeting or exceeding pollinator standards throughout the lifetime of the facility; providing for community improvements in the ALU; and making a good-faith effort to maintain and take proper care of the property where the energy facility is proposed to be located during construction and operation of the facility. § 226(6)(a)–(d).

Then, much like a local planning commission is required to do under a local zoning ordinance, if the application and site plan meet specific requirements, the PSC must grant the application. § 226(7). Specifically:

> The [PSC] shall grant the application and issue a certificate if it determines all of the following:
>
> (a) The public benefits of the proposed energy facility justify its construction. For the purposes of this subdivision, public benefits include, but are not limited to, expected tax revenue paid by the energy facility to local taxing districts, payments to owners of participating property, community benefits agreements, local job creation, and any contributions to meeting identified energy, capacity, reliability, or resource adequacy needs of this state. In determining any contributions to meeting identified energy, capacity, reliability, or resource adequacy needs of this state, the commission may consider approved integrated resource plans under section 6t of 1939 PA 3, MCL 460.6t, renewable energy plans, annual electric provider capacity demonstrations under section 6w of 1939 PA 3, MCL 460.6w, or other proceedings before the commission, at the applicable regional transmission organization, or before the Federal Energy Regulatory Commission, as determined relevant by the commission.

(b) The energy facility complies with the standard in section 1705(2) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.1705.

(c) The applicant has considered and addressed impacts to the environment and natural resources, including, but not limited to, sensitive habitats and waterways, wetlands and floodplains, wildlife corridors, parks, historic and cultural sites, and threatened or endangered species.

(d) The applicant has met the conditions established in section 227.

(e) All of the following apply:

(i) The installation, construction, or construction maintenance of the energy facility will use apprenticeship programs registered and in good standing with the United States Department of Labor under the national apprenticeship act, 29 USC 50 to 50c.

(ii) The workers employed for the construction or construction maintenance of the energy facility will be paid a minimum wage standard not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed as determined under 2023 PA 10, MCL 408.1101 to 408.1126, or 40 USC 3141 to 3148, whichever provides the higher wage and fringe benefit rates.

(iii) To the extent permitted by law, the entities performing the construction or construction maintenance work will enter into a project labor agreement or operate under a collective bargaining agreement for the work to be performed.

(f) The proposed energy facility will not unreasonably diminish farmland, including, but not limited to, prime farmland and, to the extent that evidence of such farmland is available in the evidentiary record, farmland dedicated to the cultivation of specialty crops.

(g) The proposed energy facility does not present an unreasonable threat to public health or safety. [*Id*.]

Regarding § 226(7)(g) specifically, the Legislature defined what "an unreasonable threat to public health or safety" is for qualifying facilities. Section 226(8) states that "[t]he proposed energy facility meets the requirements of subsection (7)(g) if it will comply with the following

standards. . .” Those standards are specific requirements for things like setbacks, fencing, noise, blade tip height for wind energy facilities, and dark sky lighting solutions.

If the PSC approves a certificate submitted under § 223(3)(c), “the local unit of government is considered to no longer have a [CREO], unless the [PSC] finds that the local unit of government’s denial was reasonably related to the applicant’s failure to provide” specific required information under § 223(3)(a). § 223(5). In other words, once the PSC approves a certificate, in most situations the ALU is forever cut out of the decision-making process involving qualifying projects.

This process is also summarized in the table below:

<table>
<tr><td colspan="2">Initial Local Unit Contact:
Applicant must “offer in writing to meet with the chief elected official of each affected local unit . . . to discuss the site plan.”</td></tr>
<tr><td colspan="2">Meeting with Local Unit Chief Elected Official:
Applicant meets with chief elected official to discuss site plan (unless local unit declines)
Local unit must provide notice of compatible ordinance <u>within 30 days</u> after this meeting.</td></tr>
<tr><td colspan="2">Next Step (Depending on ALU Action/Compatible Renewable Energy Ordinance)</td></tr>
<tr><td>No notice of CREO from within 30 days (PSC route)</td><td>Notice of CREO from local unit local unit within 30 days (local route)</td></tr>
<tr><td>Applicant must notify Clerk that a public meeting will be held in the local unit and provide site plan (at least 30 days before public meeting)</td><td>Applicant must file application for approval with local unit, pursuant to compatible ordinance</td></tr>
<tr><td>Applicant must publish notice of the public meeting (at least 14 days before public meeting)</td><td>Local unit must approve or deny application within 120 days (can be extended another 120 days with consent from provider)</td></tr>
<tr><td>Public meeting is held in local unit</td><td>Applicant can still go to the PSC if:
Local unit fails to timely approve or deny the application
The application complies with statute [226(8)] but local unit denies it
Local unit amends ordinance so that it is no longer compatible</td></tr>
</table>

	• Any individual affected local unit does not send notice of a CREO PSC's review is whether the applicant supplied all required information to the local unit, and the PSC must grant a certificate if the application meets the requirements of § 226.

PA 233's grant of authority to the PSC

PA 233 grants limited powers and duties to the PSC. To administer PA 233, the PSC has only those powers that are granted to it by PA 233. § 230(1). PA 233 gives the PSC only the following specific powers:

a. prescribe the format and content of the notice required for certain public meetings. § 223(1).

b. establish application filing requirements. § 224(1).

c. reasonably require information to be contained in an application. § 225(s).

d. conduct proceedings on applications. § 226(3).

e. assess reasonable application fees. § 226(4).

f. grant or deny applications and issue certificates. § 226(5).

g. issue orders to protect the confidentiality of certain information. § 228(2).

h. consolidate proceedings. § 230(2).

PA 233's Relationship with Other Laws

The Legislature made clear its intent regarding PA 233's relationship with other laws. PA 233 provides that, except in one circumstance, it controls in any conflict between it and any other law of this state. § 230(3).[9] As discussed above, PA 234 of 2023 expressly amended the MZEA so that the MZEA is subject to PA 233. But PA 233 also contains other qualifying language,

[9] "However, the electric transmission line certification acct, 1995 PA 30, MCL 460.561 to 460.575, controls in any conflict with" PA 233. § 230(3).

including both limits on its own reach and limits on local control. Regarding local control, PA 233 states that "[a] local ordinance shall not prohibit or regulate testing activities undertaken by [an electric provider or producer] for purposes of determining the suitability of a site for the placement of an energy facility." § 231(1). It also provides that "a zoning ordinance or limitation imposed after" an applicant applied to the PSC may "not be construed to limit or impair the construction, operation, or maintenance of the energy facility." § 231(2). It provides that "[i]f a certificate is issued, the certificate and [PA 233] preempt a local policy, practice, regulation, rule, or other ordinance that prohibits, regulates, or imposes additional or more restrictive requirements than those specified in the" certificate. § 231(3). Additionally, it provides that:

> this part does not exempt [a provider] to whom a certificate is issued from obtaining any other permit, license, or permission to engage in the construction or operation of an energy facility that is required by federal law, any other law of this state, including, but not limited to, the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, any rule promulgated under a law of this state, or a local ordinance. [§ 231(5).]

The PSC Opens a "Docket" on its Own Motion

On February 8, 2024, the PSC opened a "docket," on its own motion, to implement PA 233. That day, it entered an order in that docket that stated the following:

> THEREFORE, IT IS ORDERED that:
>
> A. The Commission Staff shall engage with interested person in transparent open meetings, as described in this order.
>
> B. The Commission Staff shall file recommendations on application filing instructions, guidance relating to compatible renewable energy ordinances, and any other issues in this docket by June 21, 2024.
>
> C. Any interested person may file comments regarding the Commission Staff's recommendations in this docket. Comments shall be filed no later than 5:00 p.m. (Eastern time) on July 17, 2024, and reply comments shall be filed no later than 5:00 p.m. (Eastern time) on August 9, 2024. [February 8, 2024 Order, **Exhibit A**.]

Over the following few months, the PSC drafted application instructions and procedures and a public comment process proceeded as outlined in the February 8 Order.

Appellants' Work Toward Compatibility

Between the adoption of PA 233 and today, many Appellants adopted CREOs based on the statutory definition of that term in PA 233 (see, e.g., **Exhibit B**, White River Township Solar Ordinance; **Exhibit C**, Ida Township Wind Ordinance). Adopting CREOs is not a quick or simple process. CREOs are zoning ordinances, and approval must follow the process outlined in the MZEA. Many other Appellants are either in the process of adopting a CREO or intend to do so.

Zoning ordinance adoption formally begins with publishing notice at least 15 days before a planning commission holds a public hearing on the draft ordinance. MCL 125.3103(1). After the hearing, the planning commission may choose to recommend that the jurisdiction's legislative body either approve or deny the ordinance. MCL 125.3305, 3306. Then, in some jurisdictions, a 30-day window opens during which the county or regional planning commission may comment on the draft ordinance. MCL. 125.3307. After that 30-day window expires, the jurisdiction's legislative body may adopt the ordinance, but only following another hearing if one is requested or if it chooses to hold one. MCL 125.3401. The legislative body must then publish a notice of adoption. MCL 125.3401. If after the expiration of 7 days following the publishing of the notice of adoption no notice of intent to file a petition for referendum has been filed, the ordinance takes effect. MCL 125.3401(6). If a notice of intent is filed, the referendum petitioner has 30 days following publication to file an adequate petition. MCL 125.3402(2). If an adequate petition is filed, the ordinance cannot take effect until after the next regular election or after a special election called for the purpose of approval or rejection of the ordinance. MCL 125.3402(3)(c).

This process may take several months. Indeed, many Appellants have spent most of 2024 preparing, reviewing, and adopting CREOs. The public hearings regarding CREOs were

extensive and thorough, with several Appellants' planning commissions receiving public comment for several hours. At least two Appellants, Speaker and Fremont Townships, had their CREOs petitioned for referendums. In both Townships, voters overwhelmingly approved the CREOs. (**Exhibit D**.) The underlying rationale for Appellants adopting CREOs was to retain local control over qualifying projects. If they did not adopt CREOs, they would cede all control over the siting of qualifying facilities to the PSC as outlined in PA 233.

When drafting their CREOs, Appellants relied on PA 233's definition of what a CREO is. Many Appellants copied the plain language of § 226(8) of PA 233 related to the restrictions found therein, while continuing to exercise the zoning authority granted to them by the Legislature in adopting other requirements that do not conflict with that Subsection, such as locating PA 233 qualifying facilities in specific zoning districts.

The October 10, 2024 Order

Despite its limited authority under PA 233, on October 10, 2024, the PSC issued an order in Case Number U-21547 in which the PSC redefined statutory definitions of PA 233 and improperly expanded its authority to approve applications for projects not covered by PA 233. The PSC, in the Order, stated that a CREO "may *only* contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and *may not contain additional requirements* more restrictive than those specifically identified in that section." (**Order**, 18) (emphasis added). The PSC further added "hybrid facilities" to the list of alternative energy projects it has authority to approve. (**Order**, 4). Such facilities, which the PSC characterizes as combinations of wind, solar, or energy storage facilities that only together can meet the power capacity threshold of PA 233 for PSC authorization, are not defined or contemplated in PA 233. The Order also redefines "affected local unit" to include "only those local units of government that exercise zoning jurisdiction," or "a unit of local government

exercising zoning authority in which all or part of a proposed energy facility will be located." (**Order**, 10, 83).

In other words, the PSC has purported to both narrow the statutory definition of "CREO" such that Appellants' CREOs are no longer "compatible" and expand the types of projects that it can authorize, so that even municipalities with CREOs, as PA 233 defines them, will lose zoning control over smaller facilities that band together to be "hybrid facilities." Additionally, jurisdictions without "zoning authority," under the Order, such as Appellant Ogden Township, are cut out of the process entirely and deprived of the financial benefits provided for by the Legislature in PA 233.

PA 233 takes effect on November 29, 2024. Without a preliminary injunction against the Order, Appellants—who went to great lengths to comply with a state law with which many of them disagree—will nonetheless have incompatible ordinances and lose their limited control over the siting of these utility-scale projects in their own backyards.

Standard of Review

Appellants are entitled to a preliminary injunction pending the outcome of this Appeal. A preliminary injunction is "a form of equitable relief that has the objective of maintaining the status quo pending a final hearing concerning the parties' rights." *Slis v State*, 332 Mich App 312, 336; 956 NW2d 569 (2020). The party requesting "injunctive relief has the burden of establishing that a preliminary injunction should be issued[.]" MCR 3.310(A)(4). "[A] preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008).

Michigan courts take into account four factors when considering whether to issue a preliminary injunction: (1) whether the movant has demonstrated that irreparable harm will occur without the issuance of an injunction, (2) whether the movant is likely to prevail on the merits,

(3) whether the harm to the movant absent an injunction outweighs the harm an injunction would cause to the non-moving party, and (4) whether the public interest will be harmed if a preliminary injunction is issued. *Slis*, 332 Mich App at 336–337. "Importantly, the four factors governing consideration of injunctive relief are meant to simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *Johnson v Mich Minority Purchasing Council*, 341 Mich App 1, 25; 988 NW2d 800 (2022) (cleaned up).

Argument

I. Appellants are likely to prevail on the merits.

"It is not necessary that the [movant's] rights be clearly established, or that the court find [movant] is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, proper to be investigated in a court of equity, and in order to prevent irremedial injury to the [movant], before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the property and of the parties during the litigation." *Niedzialek v Journeymen Barbers, Hairdressers & Cosmetologists' Intern Union*, 331 Mich 296, 302; 49 NW2d 273 (1951) (cleaned up).

The Appeal makes two basic claims: (1) that the PSC did not comply with the required rulemaking procedures of the Administrative Procedures Act, MCL 24.201 *et seq*. (the "APA"), and (2) that the PSC exceeded its limited authority pursuant to PA 233. Appellants are likely to prevail on the merits of both aspects of the Appeal.

A. Appellants are likely to succeed on the merits of the Appeal under the APA.

An agency is obligated to employ formal APA rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 404; 591 NW2d 314 (1998). Under the APA,

a rule is "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." MCL 24.207. The PSC is required to promulgate rules to the extent it intends to make its policies binding on all persons dealing with it or interested in any matter or proceedings pending before it. *In re Pub Serv Comm'n for Transactions Between Affiliates*, 252 Mich App 254, 264; 652 NW2d 1 (2002).

Although there is an exception to the above-quoted definition for "[a] determination, decision, or order in a contested case," **the Order does not arise from a contested case**. A "contested case" is a "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." MCL 24.203(3).

> The typical contested case proceeding involves an individual named party and a disputed set of facts—e.g., a license denial, a denial of benefits, or a statutory violation—from which results an agency order that adjudicates the specific factual dispute and operates retroactively to bind the agency and the named party. *[In re Pub Serv Comm'n*, 252 Mich App at 267.]

This Court has explained that "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *Id*. at 263. It has also "note[d] that the PSC must promulgate rules for the conduct of its business and the proper discharge of its functions to the extent it intends to make its policies binding on all persons dealing with the commission or interested in any matter or proceeding pending before it." *Id*. at 264 (cleaned up). The Order arose from PSC Case Number U-21547, "In the matter, on the Commission's own motion, to open a docket to implement the provisions of Public 233 of 2023." There were no named parties and there was no evidentiary hearing. The Order binds all persons

and entities dealing with the PSC in any proceeding initiated under PA 233. In short, the Order is simply a rule under another name and is subject to the rulemaking process. See *id*. Additionally, before initiating rulemaking, an agency must file with the Michigan Office of Administrative Hearings and Rules ("MOAHR") a request for rulemaking in a format prescribed by MOAHR. MCL 24.239(1). The PSC did not file such a request before issuing the Order. Therefore, the PSC violated the APA by issuing a rule without abiding by the APA's process for lawful rulemaking. Appellants are likely to succeed on the merits of the Appeal regarding the APA.

B. Appellants are likely to succeed on the merits of the appeal with regard to PA 233.

"An agency rule is substantively invalid when the subject matter of the rule falls outside of or goes beyond the parameters of the enabling statute, when the rule does not comply with the intent of the Legislature, or when the rule is arbitrary or capricious." *Slis*, 332 Mich App at 340; see also *Ins Inst of Mich v Commr, Fin & Ins Servs, Dept of Labor & Econ Growth*, 486 Mich 370, 385; 785 NW2d 67 (2010). While an agency's construction of a statute "is entitled to respectful consideration," a "court's ultimate concern is a proper construction of the plain language of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). "[T]he agency's interpretation cannot conflict with the plain meaning of the statute." *Id*.

1. Michigan law limits the PSC's authority.

"The standard of review applicable to orders of the Commission is narrow and well defined." *In re Michigan Cable Telecommunications Ass'n Complaint*, 239 Mich App 686, 689; 609 NW2d 854 (2000). Under MCL 462.25, "[a]ll rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until found otherwise[.]" "[T]he burden of proof shall be upon the appellant to show by clear and satisfactory

evidence that the order of the commission complained of is unlawful or unreasonable." MCL 462.26(8).

"The PSC's determination regarding the scope of its authority is one of law," which this Court reviews de novo. See *Consumers Power Co v Pub Serv Comm'n*, 460 Mich 148, 157; 596 NW2d 126 (1999). "In construing the statutes empowering the PSC," Michigan courts do "not weigh the economic and public policy factors that underlie the action taken by the PSC." *Id*. at 156. As our Supreme Court has explained generally, "the power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Id*. at 155 (cleaned up). It "strictly construes the statutes which confer power on the PSC." *Id*. Although "respectful consideration" is given to the PSC's construction of a statute it is empowered to execute and a court must have "cogent reasons" to overturn the PSC's interpretation, appellate courts should on de novo review give no greater consideration to the PSC's judgment than it would that of a circuit court judge. *In re Complaint of Rovas*, 482 Mich at 108. "Respectful consideration is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions." *Id*. (cleaned up).[10]

PA 233 expressly grants the PSC limited authority in administering its provisions. As discussed above, "[t]he PSC, as a creature of statute, derives its authority from the underlying statutes and possesses no common-law powers." *In re Public Service Comm'n*, 252 Mich App at 263. Under PA 233, the PSC may only do the following:

1. Prescribe the format and content of the notice required for certain public meetings. § 223(1).

[10] Our Supreme Court never adopted the now-defunct federal framework commonly known as "*Chevron* Deference." The Court explained that "the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles. . .by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government. For these reasons, we decline to import the [now defunct] federal regime into Michigan's jurisprudence." *In re Complaint of Rovas*, 482 Mich at 111.

2. Establish application filing requirements. § 224(1).

3. Reasonably require information to be contained in an application. § 225(s).

4. Conduct proceedings on applications. § 226(3).

5. Assess reasonable application fees. § 226(4).

6. Grant or deny applications and issue certificates. § 226(5).

7. Issue orders to protect the confidentiality of certain information. § 228(2).

8. Consolidate proceedings. § 230(2).

As this Court has explained,

> The language of the statute expresses the legislative intent. The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.* We may not speculate regarding the intent of the Legislature beyond the words expressed in the statute. Once the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction. Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there. The omission of a provision should be construed as intentional. It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws. [*GMAC, LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009).]

In § 230 of PA 233, the Legislature unequivocally stated that "[i]n administering this part, the commission has only those powers and duties granted to the commission under this part." Nowhere in PA 233 is the PSC authorized to expand the types of alternative energy facilities over which it has siting authority. Nor does PA 233 permit the PSC to redefine terms in PA 233 that the Legislature has already clearly defined. Yet the Order purports to do both by adding "hybrid facilities" to the explicit and limited list of solar, wind, and energy storage facilities to which PA

233 applies and by limiting and changing the definitions of "compatible renewable energy ordinance" and "affected local unit" in ways which further strip Appellants and all municipalities of their zoning and police powers.

2. Industry comments and policy reasons cannot reshape the Legislature's intent.

Prior to the issuance of the Order, leaders in the energy industry submitted comments to the PSC urging the PSC to limit "affected local unit" to only include units of governments that exercise zoning jurisdiction. These organizations believe that any other interpretation "would be inconsistent with the purpose of" PA 233. (Order, 7). For example, Great Lakes Renewable Energy Association encouraged the PSC to "simply defin[e] an 'ALU' as the local unit of government with zoning jurisdiction[.]" (Filing #U-21547-0070-CC, p 2; **Exhibit G**). Notably, the Michigan Conservative Energy Forum commented that limiting the definition of "affected local unit" would better reflect the legislative intent of PA 233. (Filing #U-21547-0094-CC, p 4; **Exhibit H**). The Michigan Conservative Energy Forum also commented that doing so would "best position[]" the PSC to carry out "its assigned mission[.]" *Id*. The PSC, in the Order, agreed with those comments and that "the term ALU should be restricted[.]" (**Order**, 9.) But it is not the PSC's role to determine how legislation *should* have been written; rather, the PSC must administer the law as it *is* written by the Legislature.

The pressure for the PSC to cave to the energy industry and act unlawfully is demonstrated by the public comments themselves. For example, DTE Electric argued, admitting its position was contrary to law, that the plain language of PA 233 "expressly states that the requirements of a CREO can be 'no more restrictive than the provisions included in Section 226(8)[,]' " but that the PSC should specify that "a local ordinance cannot contain *any* requirements or restrictions of those listed in Section 226(8)[.]" (Filing #U-21547-0013, p 2 (emphasis in original) (**Exhibit I**)). On this issue, the Michigan Conservative Energy Forum agrees with Appellants that:

> a local ordinance addressing energy projects comprised only of the limited specifications in PA 233, Section 226 (8) would be inadequate and irresponsible given the normal obligations local officials have under the MZEA to assure that development in their community is safe and appropriate. Verification for this assertion is found in the many other elements of energy projects that PA 233 directs the Commission to consider when an application is adjudicated (e.g. environmental impacts, ground cover, visual screening, drainage, agriculture land use, etc.). [**Exhibit H**.]

DTE Electric then turned to scare tactics by warning the PSC that if it did not limit the scope of "CREO," then "CREO-related disputes will proliferate, which will lead to permitting delays, added costs, and burdensome and avoidable litigation" for developers, affected local units, and the PSC. *Id*. But fear of delays, costs, and litigation does not give the PSC permission to ignore the plain language of PA 233 or overstep its limited authority in administering PA 233.

The PSC appears to believe that its need for clarity grants it additional powers to re-legislate PA 233: "the Commission notes that nearly all commenters that commented on [the CREO] issue agree that clarity and guidance are needed regarding the scope and definition of a CREO under Act 233." (**Order**, 17.) However, a need for clarity in legislation should and can only be addressed by the Legislature. An unelected administrative agency is not entitled to rewrite public law to make its job—and its supporters' jobs—easier. Public policy reasons for why the PSC may have seen fit to redefine key terms and create new defined terms are irrelevant to whether the PSC's action is unreasonable or unlawful. See *Consumers Power Co*, 460 Mich at 156. More importantly, the Legislature's defined terms in PA 233 are clear and unambiguous and "clarifying" (or more aptly put, redefining) already defined terms was unreasonable and unlawful.

3. *The PSC's interpretation of PA 233 is unreasonable and unlawful in light of the statutory scheme.*

The decisions contained in the Order are well outside the scope of the PSC's authority granted by the Legislature under PA 233. The PSC's interpretation of PA 233—giving it broad

rulemaking authority—is well beyond the plain language of the statute. Therefore, the subject matter of the rule "goes beyond the parameters of the enabling statute" and is substantively invalid. *Slis*, 332 Mich App at 340. Moreover, the Order is unreasonable and unlawful when the entire statutory scheme is considered. Indeed, PA 233, as PA 234 suggests, must be read in context with the MZEA.

The Legislature knows how to limit local zoning authority: the MZEA limits local control over home occupations (MCL 125.3204); oil and gas wells and the extraction of natural resources (MCL 125.3205); amateur radio service station antenna structures (MCL 125.3205(a)); commemorative signs (MCL 125.3025(d)); and state licensed residential facilities, qualified residential treatment programs, family child care home, group child care homes, adult foster care small group or large group homes and facilities offering substance use disorder services (MCL 126.3206). In particular, the MZEA states that state-licensed residential facilities and qualified residential treatment programs that provide service for 10 or fewer individuals are residential, permitted uses in all residential zoning districts and are not subject to special use or conditional use permits. MCL 125.3206(1). Yet, PA 233 does no such thing and never expressly states that qualifying energy projects are permitted in any zoning district, or even any particular type of district (like commercial, agriculture, or industrial districts). Neither does PA 234. And the Legislature did not amend the MZEA to state that. So, at a minimum, there is no "clear and unmistakable language" granting the PSC authority to impose its narrow definition of CREO on Appellants. See *Consumers Power Co*, 460 Mich at 155.

Even in PA 233 itself, the Legislature expressed its intent that providers granted a certificate by the PSC must comply with local ordinances. § 231(5). The language of the statute as a whole and of § 226(8), in particular, demonstrates the Legislature's intent that CREOs may

contain additional, but not more restrictive, regulations. Section 226(8) explicitly relies on § 226(7)(g) to explain that a "proposed energy facility does not present an unreasonable threat to public health or safety" if it complies with the enumerated requirements of Subsection (8). Put another way, Subsection (8) merely defines what does not constitute "an unreasonable risk to public health or safety" as a matter of law. Read in context, Subsection 8, and Subdivision 7(g), are only a small piece of the total information required by an application presented to the PSC. The application must also contain the information described in § 226(6) and (7), and through §223(3)(a), most of the information described in §225(1). Section §223(3)(a) also requires an ALU to "require other information necessary to determine compliance with the" CREO.

By the PSC's logic, applications submitted to the PSC and to ALUs must contain the information required by §223(3)(a), §225(1), the rest of § 226, and the PSC must consider all pertinent categories of information described in that Section, but ALUs are prohibited from considering or reviewing the various categories of information required outside of § 226(8). This simply defies simple logic, and it would render §223(3)(a), among other provisions, nugatory and without a remedy to enforce them. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) ("Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory."). When § 226(8) is viewed in this light, not only does the Order add words to the definition of "CREO" already chosen by the Legislature, but the Order's interpretation also is an unreasonable and unlawful reading of the entire context of § 226, of PA 233, and of zoning law in general.

In other words, the PSC may not redefine CREO to mean that a local ordinance may contain no other restrictions than those found in §226(8) because such an action violates basic tenets of administrative law in Michigan, including precedent directly tied to the PSC. Again, the

PSC's authority is limited and it must rely on clear and unmistakable language when executing statutes it is charged to enforce. *Consumers Power Co*, 460 Mich at 155–157. PA 233 contains no clear and unmistakable language allowing it to redefine CREO, ALU, or to create new terms like "hybrid facilities."

Indeed, other statutory schemes shed light on these concepts, and a look to preemption jurisprudence is helpful. Our Supreme Court has long held that "an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the [state] statute." *DeRuiter v Byron Twp*, 505 Mich 130, 147; 949 NW2d 91 (2020). It has explained that "[t]he mere fact that the State, in the exercise of its police power, has made certain regulations does not prohibit a municipality from exacting additional requirements." *Id*. (cleaned up). "So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand." *Id*. (cleaned up). "The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription." *Id*. (cleaned up).

In *DeRuiter*, our Supreme Court analyzed whether MCL 333.26423(d) of the Michigan Medical Marihuana Act, which states that medical marijuana must be cultivated in an "enclosed, locked facility" preempted a local ordinance that restricted *where* such a facility could be located (including through zoning). *Id*. at 143–144. The Court held that the ordinance was not preempted, and that because the statute was silent as to where "enclosed, locked facilities" had to be located, local ordinances could regulate the "where."

Here, many Appellants have exercised their authority under the MZEA to determine where qualifying energy facilities may be located by copying the provisions of §226(8) into their CREOs

while also specifying the zoning districts where such facilities may be located. Like the statute at issue in *DeRuiter*, PA 233 is silent on the issue of "where." Accordingly, the PSC's redefining of CREO and ALU and the creation of hybrid facilities would run afoul of Michigan's preemption jurisprudence.

For the reasons stated above, the Order is unlawful and unreasonably further limits the power of municipalities to reasonably regulate land uses within their borders, well beyond what the Legislature intended. Appellants are likely to succeed on the merits of this Appeal.

II. Appellants will suffer irreparable harm without the issuance of an injunction.

The goal of a preliminary injunction is to preserve the status quo so that, on final hearing, the rights of the parties can be determined without injury to either. See *Pharm Research & Mfr of America v Dep't of Community Health*, 254 Mich App 397, 402; 657 NW2d 162 (2002). "In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical." *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998).

On November 29, when PA 233 and the Order take effect, Appellants will be irreparably harmed by the usurpation of their rights—granted by the Legislature—to retain local control over the siting of alternative energy facilities that are otherwise protected by PA 233 and Michigan law. The impending harm is not speculative: several Appellants have been approached by developers who intend to place such facilities in Appellants' jurisdictions or are already in the process of applying for zoning approval from Appellants with the underlying threat to apply the PSC under the October 10 Order.

For example, Appellant Fremont Township's Planning Commission denied an application for a utility-scale wind energy system because the application did not comply with the noise restrictions of the Fremont Township Zoning Ordinance. (**Exhibit E**). The Township's Zoning Board of Appeals recently denied the appeal from that decision. (**Exhibit F**). The project in question meets the nameplate capacity requirements for PA 233. The Township has adopted a CREO that will take effect on November 29, but the ordinance sites facilities, like every other proposed land use, in certain zoning districts within the Township. Now, under the Order's limited definition of a "CREO," on November 29, the developer could start the PA 233 process and send the required offer to meet with the chief elected official of the ALUs and attempt to bypass altogether the regulatory framework established by the Township under PA 233.

As discussed, after PA 233 was enacted, Appellants began developing CREOs. Many have enacted CREOs. Those Appellants with CREOs—based on state law and the Legislature's express intent—were assured that, after November 29, they would maintain authority over the siting of qualifying energy projects, subject to their ordinances being "no more restrictive than the provisions included in section 226(8)." If the Order is enforced, then those municipalities with PA 233 CREOs that have ***any*** additional requirements, like appropriate zoning districts to avoid adverse impacts on other land uses, minimum acreage for solar energy facilities, or landscaping screening to shield battery storage containers, will lose all zoning authority for these projects if a developer applies to the PSC even though none of those areas are regulated by PA 233. Pursuant to PA 233, when the chief elected official of an ALU sends notice that the municipality has a CREO, then the developer must go through the municipality's application process. But if an ALU denies an application even though "[t]he application complies with the requirements of section

226(8),” or if an ALU does not grant an application within 120 days, the developer may submit its application for a certificate to the PSC.

At this point, the definition of “CREO” and what it means to be “no more restrictive” than § 226(8) becomes immediately consequential. Even according to the PSC, a developer may only apply to the PSC if certain conditions are met, one of which is that a municipality denied an application that complies with § 226(8). (**Order**, 24.) Furthermore, § 223(5) implements a “one strike” policy, stating that, unless under one narrow circumstance, once the PSC approves an applicant for a certificate, the relevant municipality is considered to no longer have a CREO for the purposes of any future application “unless the commission finds that the local unit of government’s denial of the application was reasonably related to the applicant’s failure to provide information required by subsection (3)(a).” So, under the Order, the PSC has given itself authority to receive and approve an application and forever bar an Appellant from being deemed to have a CREO, based solely on the PSC’s unlawfully narrow definition of a CREO.

Moreover, the PSC has unilaterally determined that Appellants can be negatively impacted by other local units that do not follow the PSC’s definition of a CREO. In the Order, the PSC found “that when a project is located in multiple ALUs and one or more ALUs have CREOs, and one or more ALUs do not have CREOs, or after attempts to site the project in an ALU have failed, the Commission will review the entire proposed project, including the portions of the project that are located in an ALU that has a CREO.” (**Order**, 31.) The PSC found it “reasonable and appropriate for the Commission to review an entire project when the proposed energy facility spans multiple ALUs with zoning jurisdiction.” (**Order**, 30.) Based on these findings, all affected local units, Appellants and others, are subject to losing local siting authority if any other affected jurisdiction in a project does not immediately comply with the PSC’s rewriting of PA 233 (or is

unzoned). As discussed, amending a zoning ordinance is often a months-long process because of the requirements and procedures of the MZEA. But the PA 233 process can begin on November 29, less than two months after the PSC released its Order. Appellants do not have sufficient time to amend their ordinances to comply with the PSC's Order, even if the Order were lawful.[11]

Moreover, once the PSC approves a project that, under the plain language of PA 233, should have gone through Appellants for approval, a future invalidation of the Order through this Appeal or otherwise would be too late. With a certificate in hand, a developer could begin substantial construction and vest their interest in the land use, potentially making an Appellant liable for a Takings claim if proceedings ultimately invalidate the certificate and a special use permit is denied. See, e.g., *Dorman v Clinton Twp*, 269 Mich App 638, 649; 714 NW2d 350 (2006).

These scenarios are far from speculative. On November 29, developers will be able to start the process to obtain a PSC certificate, and Appellants, who followed the plain language of PA 233, will have the authority granted to them by the Legislature effectively stripped away by the PSC. Appellants have no adequate remedy at law if a development is approved by the PSC under the unlawful Order. The genie, as they say, cannot be put back in the bottle. Accordingly, Appellants will suffer irreparable harm if the Order takes effect while this Appeal is pending.

III. The harm to Appellants absent an injunction outweighs the harm an injunction would cause to the PSC, which is none.

The PSC will not be harmed by the issuance of an injunction. A preliminary injunction would in no way undercut the PSC's authority to approve energy facilities that wish to be located in municipalities that do not have a CREO—as defined by PA 233. But without an injunction,

[11] Further, this was during a general election for all members of township boards and county commissioners and in some instances, a majority of the township board or county commission are new members with limited experience.

Appellants will be irreparably harmed by the loss of local zoning control and the inability to exercise the zoning authority given to them under Michigan law. The PSC itself acknowledges that PA 233 has a "one strike" policy by which an Appellant can claim to have a CREO only until it denies or fails to timely make a decision on an application that is subsequently granted by the PSC. (**Order**, 24). At that point, the relevant Appellant would no longer be able to claim it has a CREO. If the Order stands while this Appeal is under consideration, then Appellants will be harmed by a premature and unlawful determination that their CREOs are not actually compatible. Moving forward, energy providers would no longer be subject to Appellants' processes or lawful zoning regulations. In contrast, the PSC's primary interest is the enforcement of political renewable energy goals that can still be pursued even if an injunction is issued. Because the PSC will suffer no harm by an injunction while Appellants will lose their statutory right to regulate certain land uses, the harm to Appellants outweighs any perceived harm to the PSC.

IV. The public interest will be served by a preliminary injunction.

The public interest lies in maintaining the status quo under PA 233 while this Appeal is pending. More broadly, holding administrative agencies to the limited authority they are granted by statute is in the public's interest. By preventing the enforcement of the Order until and unless this Court deems such Order authorized by law, a preliminary injunction will ensure that the executive branch does not unlawfully legislate. See *In re Complaint of Rovas*, 482 Mich at 111.

Additionally, the public interest will be served by a preliminary injunction because local governments will retain the control granted to them by the Legislature over the siting of alternative energy facilities. This includes local governments who comply with PA 233, either on their own terms or based on the Order, and yet would lose control over siting decisions because another municipality affected by a project does not have a CREO as defined by the Order.

Lastly, an injunction will not harm the public's interest in clean, renewable energy sources. Utility-scale renewable energy facilities may still proceed either through municipalities with CREOs or those without—just as PA 233 and the Legislature intended.

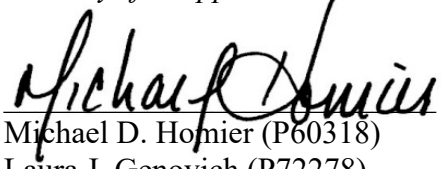
Conclusion

For the foregoing reasons, Appellants respectfully request that the Court issue an order preliminarily enjoining the enforcement of the PSC's October 10, 2024 Order while this Appeal remains pending.

Respectfully submitted,

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Appellants

Dated: November 22, 2024

By: 

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

WORD COUNT CERTIFICATION

This brief contains 9,435 words, in compliance with MCR 7.212(B).

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Appellants

Dated: November 22, 2024

By: 

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Leslie A. Abdoo (P78850)
1700 E. Beltline Ave. NE, Suite 200
Grand Rapids, MI 49525
(616) 726-2200

89561:00001:201011879-5

APPENDIX H

2024 WL 3976495
Only the Westlaw citation is currently available.
Supreme Court of Michigan.

Philip M. O'HALLORAN, M.D., Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider, Plaintiffs-Appellees,
v.
SECRETARY OF STATE and Director of the Bureau of Elections, Defendants-Appellants.
Richard DeVisser, Michigan Republican Party, and Republican National Committee, Plaintiffs-Appellees,
v.
Secretary of State and Director of the Bureau of Elections, Defendants-Appellants.

Nos. 166424 and 166425
|
Argued on application for leave to appeal June 18, 2024
|
Decided August 28, 2024

Synopsis

Background: Individual plaintiffs, Michigan Republican Party, and others brought actions against Secretary of State and Director of Michigan Bureau of Elections, seeking emergency injunction that would compel defendants to rescind election manual and reissue new guidance on basis that provisions of manual conflicted with Michigan Election Law or required promulgation under Administrative Procedures Act (APA). Actions were consolidated. Defendants moved for summary disposition. The Court of Claims, Swartzle, J., denied defendants' motions and granted in part plaintiffs' requests for relief, allowing defendants to choose between rescinding and revising manual. Defendants appealed. The Court of Appeals, 2023 WL 6931928, affirmed. Defendants appealed.

Holdings: The Supreme Court, Bolden, J., held that:

[1] Michigan Election Law did not preclude Secretary of State from requiring election challengers to use uniform credential form;

[2] manual provision relating to uniform credential form were not formal rule subject to APA rulemaking;

[3] manual provision generally prohibiting challengers from communicating with election inspectors who were not "challenger liaison" did not conflict with Election Law in context of polling places;

[4] such "challenger liaison" communication provision conflicted with Election Law in context of absent voter ballot processing facilities;

[5] manual provisions listing "permissible" and "impermissible" grounds for challenges did not conflict with Election Law;

[6] manual provision allowing election inspector to decline to record voter-eligibility challenge if challenger provided no permissible factual basis did not conflict with Election Law; and

[7] manual provision allowing election inspector to decline to record voter-eligibility challenge if inspector believed challenger's proffered explanation to be lacking or insufficient conflicted with Election Law.

Reversed in part, affirmed in part, and vacated in part.

Clement, C.J., filed opinion concurring in part and dissenting in part.

Zahra, J., filed opinion concurring in part and dissenting in part, in which Viviano, J., joined and Clement, C.J., joined in part.

Procedural Posture(s): On Appeal; Motion for Summary Disposition; Motion for Declaratory Judgment.

West Headnotes (37)

[1] Administrative Law and Procedure De novo review; plenary, free, or independent review

Whether an agency exceeds its scope of authority is a question of law that the Supreme Court reviews de novo.

[2] **Appeal and Error** Statutory or legislative law

The Supreme Court reviews questions of statutory interpretation de novo.

[3] **Administrative Law and Procedure** Statutory basis and limitation

The authority given to an agency by statute is a matter of statutory interpretation.

[4] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

The primary goal of statutory interpretation is to give effect to the legislative intent, which begins by examining the plain language of the statute.

[5] **Administrative Law and Procedure** Statutory basis and limitation

An executive agency's power derives from statute.

[6] **Administrative Law and Procedure** Power and authority of agency in general

An agency has the authority to interpret the statutes it administers and enforces.

[7] **Administrative Law and Procedure** Deference to Agency in General

Although an agency's interpretation of a statute is not binding on courts and may not conflict with the legislature's clearly expressed language, it is entitled to respectful consideration and should not be overturned absent cogent reasons for doing so.

[8] **Administrative Law and Procedure** Operation and Effect

Administrative Law and Procedure Force of law in general

An agency's formally promulgated rules are generally applicable and have the force and effect of law.

[9] **Administrative Law and Procedure** Nature, scope, and definitions in general

Not all agency actions or statutory interpretations constitute "rules" under the Administrative Procedures Act (APA). Mich. Comp. Laws Ann. § 24.207.

[10] **Administrative Law and Procedure** Duty to Make; Policymaking Mechanisms

Administrative Law and Procedure Interpretive rules and pronouncements

When a statute does not require rulemaking for its interpretation, an agency may choose to issue interpretive rules, which fall under the Administrative Procedures Act's (APA) exception to the rulemaking procedures for policy statements that give guidance but do not have the force and effect of law. Mich. Comp. Laws Ann. § 24.207(h).

[11] **Administrative Law and Procedure** Interpretive rules and pronouncements

An "interpretive rule" is any rule an agency issues without exercising delegated legislative power to make law through rules; interpretive rules are, basically, those that interpret and apply the provisions of the statute under which the agency operates.

[12] **Administrative Law and Procedure** Interpretive rules and pronouncements

No sanction attaches to the violation of an agency's interpretive rule as such; the sanction

attaches to the violation of the statute which the rule merely interprets.

[13] **Administrative Law and Procedure** 🔑 Interpretive rules and pronouncements

Administrative Law and Procedure 🔑 Effect on agency

Interpretive rules state an agency's interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.

[14] **Administrative Law and Procedure** 🔑 Legislative rules; substantive rules

If an agency rule interpreting a statute represents something more than the agency's opinion as to what the statute requires, that is, if the legislature has delegated a measure of legislative power to the agency and has provided a statutory sanction for violation of such rules as the agency may adopt, then the rule may properly be described as legislative.

[15] **Administrative Law and Procedure** 🔑 Interpretive rules and pronouncements

An agency's interpretive statement regarding a statute in itself lacks the force and effect of law because it is the underlying statute that determines how an entity must act, or in other words, that alters the rights or imposes obligations.

[16] **Administrative Law and Procedure** 🔑 Consistency with statute, statutory scheme, or legislative intent

An agency's interpretive statement that goes beyond the scope of the law it interprets may be challenged when it is in issue in a judicial proceeding.

[17] **Administrative Law and Procedure** 🔑 Consistency with statute, statutory scheme, or legislative intent

An agency's statutory interpretation that is not supported by the enabling act is an invalid interpretation, not a rule.

[18] **Election Law** 🔑 Challenges to Voters and Proceedings Thereon

The Michigan Election Law provision stating that, in order to be credentialed, an election challenger must possess authority signed by the appropriate individual within the credentialing organization, the written or printed name of the challenger, and the number of the precinct to which the challenger is assigned, thereby setting forth the three requirements which every credential must include, does not allow additional substantive requirements to be imposed. Mich. Comp. Laws Ann. § 168.732.

[19] **Election Law** 🔑 Challenges to Voters and Proceedings Thereon

Michigan Election Law provision requiring "authority" serving as an election challenger's credential to include signature of appropriate individual within credentialing organization or committee, written or printed name of challenger, and number of precinct to which challenger is assigned did not preclude Secretary of State from requiring challengers to submit such evidence on uniform credential form; statute was silent about form which credential could take, and Secretary of State, in issuing manual containing requirement at issue, merely mandated use of uniform credential form including all statutorily required information and no additional information, which fulfilled Secretary's statutory duty to "[p]rescribe and require uniform forms…for use in the conduct of elections." Mich. Comp. Laws Ann. §§ 168.31(1)(e), 168.732.

[20] **Election Law** Conduct of Election

The phrase "for use in the conduct of elections," within the meaning of the Michigan Election Law provision requiring the Secretary of State to "[p]rescribe and require uniform forms… for use in the conduct of elections," includes mandating the use of uniform forms that are deemed necessary or helpful to the act, manner, or process of carrying on a primary or general election. Mich. Comp. Laws Ann. § 168.31(1)(e).

[21] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of election manual issued by Secretary of State requiring all election challengers to use uniform form setting forth statutorily-required credential information did not constitute formal rule that Secretary was required to promulgate pursuant to Administrative Procedures Act (APA); form and its instructions for submitting statutorily-required evidence of credentials, which added no substantive requirement in order for challenger to be credentialed, did not fall within APA's definition of "rule," which excluded "form with instructions…that in itself does not have the force and effect of law but is merely explanatory." Mich. Comp. Laws Ann. §§ 24.207(h), 168.732.

[22] **Election Law** Challenges to Voters and Proceedings Thereon

The right of an election challenger, under the Michigan Election Law, to bring enumerated matters such as improper ballot handling to the attention of an election inspector does not grant a challenger the right to call such matters to the attention of any election inspector of their choosing but merely provides an opportunity to call such matters to the attention of at least one election inspector. Mich. Comp. Laws Ann. § 168.733(1)(e).

[23] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of election manual issued by Secretary of State which precluded challengers from communicating with election inspectors who were not "challenger liaison" unless otherwise instructed by challenger liaison or member of local clerk's staff, to the extent provision applied at polling places, did not conflict with Michigan Election Law provision authorizing challengers to bring specified matters, including improper ballot handling by voter or election inspector, to "an election inspector's attention"; under manual's plain terms, challenger liaisons at polling places were designated election inspectors, and manual merely prescribed method for ensuring challenges were uniformly received, processed, applied, and documented by designating election inspector to receive them. Mich. Comp. Laws Ann. § 168.733(1)(e).

[24] **Election Law** Review of absentee ballots

Provision of election-challenger manual issued by Secretary of State which precluded challengers from communicating with election inspectors who were not "challenger liaison" unless otherwise instructed by challenger liaison or member of local clerk's staff, to the extent provision applied at absent voter ballot processing facilities, did not conflict with Michigan Election Law provisions regarding receipt of "challenges"; Election Law was silent as to who was to receive any "challenges" explicitly identified as such by statute, and such "challenges" did not include enumerated issues, such as improper ballot handling by an elector or election inspector, which Election Law entitled challengers to bring "to an election inspector's attention." Mich. Comp. Laws Ann. §§ 168.727, 168.733.

[25] **Election Law** Review of absentee ballots

Provision of election-challenger manual issued by Secretary of State which precluded challengers from communicating with election inspectors who were not "challenger liaison"

unless otherwise instructed by challenger liaison or member of local clerk's staff, to the extent provision applied at absent voter ballot processing facilities, conflicted with Michigan Election Law provision authorizing challengers to bring specified matters, including improper ballot handling by voter or election inspector, to "an election inspector's attention"; manual stated that default challenger liaison at absent voter ballot processing facility was member of precinct clerk's staff, not election inspector. Mich. Comp. Laws Ann. § 168.733(1)(e).

[26] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of election-challenger manual issued by Secretary of State which precluded challengers from communicating with election inspectors who were not "challenger liaison" unless otherwise instructed constituted interpretative statement that was merely explanatory and lacked force and effect of law in itself, and thus, Secretary was not required to promulgate provision through rulemaking under Administrative Procedures Act (APA); Michigan Election Law permitted all challenges to be funneled to one particular election inspector, and manual did not require expulsion of challengers who violated such provision, but only allowed expulsion for repeated violations after warning, consistent with inspectors' statutory authority to maintain order and enforce obedience to their lawful commands. Mich. Comp. Laws Ann. §§ 24.207(h), 168.678, 168.727, 168.733.

[27] **Election Law** Powers and functions of election officers in general

The Secretary of State has the statutory authority to issue non-rule instructions that are binding on election workers. Mich. Comp. Laws Ann. § 168.765a(17).

[28] **Election Law** Challenges to Voters and Proceedings Thereon

The provision of the Michigan Election Law stating that "[a]ny evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board" does not supply the exclusive basis for expulsion of a challenger, and drinking of alcoholic beverages and disorderly conduct are not necessary or exclusive preconditions for expulsion. Mich. Comp. Laws Ann. § 168.733(3).

[29] **Election Law** Challenges to Voters and Proceedings Thereon

The statutory right of qualified election challengers "to be present" in a polling place is conditional on the statutory authority of election inspectors to maintain peace and enforce lawful commands. Mich. Comp. Laws Ann. §§ 168.678, 168.732.

[30] **Election Law** Challenges to Voters and Proceedings Thereon

Provisions of election-challenger manual issued by Secretary of State which listed permissible and impermissible reasons for voter-eligibility challenges did not conflict with Michigan Election Law provisions governing challenges, even though Election Law did not use terms "permissible" and "impermissible"; "permissible challenges" in manual were challenges on grounds that a person was not registered to vote, was less than 18 years of age, was not United States citizen, or did not meet residency requirement in location where they sought to vote, such grounds matched statutory requirements for "challenges" and voter eligibility, and it was reasonable to label all other grounds for challenges "impermissible." Mich. Comp. Laws Ann. §§ 168.492, 168.495(g), (i), 168.523, 168.727(1), 168.733(1)(c).

[31] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of election-challenger manual issued by Secretary of State which instructed election inspectors that they may decline to record a challenge if challenger failed to provide permissible factual basis for challenge or reason for their belief that challenged voter was ineligible to vote was consistent with statute requiring election inspector to make written report of challenges to "the right of anyone attempting to vote if the [challenger] knows or has good reason to suspect that individual is not a registered elector in that precinct"; requiring challenger to articulate some factual basis and explanation was reasonably related to ensuring that challenge was of a type that must be recorded and that challenger satisfied "knows or has good reason to suspect" standard. Mich. Comp. Laws Ann. § 168.727(1), (2)(b).

[32] **Election Law** Challenges to Voters and Proceedings Thereon

An election inspector cannot decline to record a challenge to a voter's eligibility to vote on the basis that the inspector believes the challenger's proffered explanation for believing that the challenged voter is ineligible to vote is lacking or insufficient; the statutory obligation for an election inspector to immediately make a written report of a challenge made under the statutory subsection applying where the challenger "knows or has good reason to suspect that [a person attempting to vote] is not a registered elector in that precinct" is activated when the challenge is made, not when the challenge is determined to be valid, and such a report is statutorily required to include "[a]ll election disparities or infractions complained of or believed to have occurred." Mich. Comp. Laws Ann. § 168.727(1), (2)(b).

[33] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of election-challenger manual issued by Secretary of State which instructed election inspectors that they "may deem the reason for the challenger's belief [that a challenged voter is ineligible to vote] impermissible [and therefore decline to record the challenge] if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect" violated Michigan Election Law's requirement for election inspectors to immediately record election challenges alleging voter ineligibility; requirement to make written record of such challenges applied immediately upon challenger providing prima facie factual basis for such a challenge and did not permit inspectors to first assess validity or merits of challenge. Mich. Comp. Laws Ann. § 168.727(1), (2)(b).

[34] **Election Law** Challenges to Voters and Proceedings Thereon

Provisions of election-challenger manual issued by Secretary of State that categorized voter-eligibility challenges as permissible or impermissible, required election inspectors to record only permissible challenges, and allowed election inspectors to decline to record challenge if challenger failed to provide permissible factual basis for challenge or explanation as to such factual basis were interpretive statements that were consistent with Michigan Election Law and lacked force and effect of law in and of themselves, and thus, Secretary was not required to promulgate provisions as formal rules under Administrative Procedures Act (APA), where manual did not mandate expulsion for any violation of such provisions, and provisions merely provided guidance regarding Election Law. Mich. Comp. Laws Ann. §§ 24.207(h), 168.678, 168.727(1), (2)(b), 168.733(3).

[35] **Appeal and Error** Review Unnecessary or Ineffectual

Issue of whether provision of election manual issued by Secretary of State prohibiting presence of "electronic devices capable of sending or receiving information" in absent voter ballot processing facility during ballot processing until close of polls on Election Day conflicted with corresponding provisions of Michigan Election

Law was mooted by legislature's amendment to Election Law so as to effectively permit possession and limited use of such devices in absent voter ballot counting facilities and by Secretary's removal of manual's complete prohibition on electronic devices in response to amendment; any decision by Supreme Court regarding validity of electronic-device prohibition in prior version of manual would have no legal effect. Mich. Comp. Laws Ann. § 168.765a.

[36] Action Moot, hypothetical or abstract questions

A "moot issue" is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then-existing controversy.

[37] Appeal and Error Reversal

Once the Supreme Court determines that an issue is moot, it must weigh the conditions and circumstances of the particular issue in determining whether to apply its general custom of vacating lower-court judgments on moot issues.

BEFORE THE ENTIRE BENCH

OPINION

Bolden, J.

***1** In May 2022, the Secretary of State issued updates to a manual titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" in order to provide instructions and guidance for election challengers and poll watchers. Two separate, since-consolidated lawsuits were filed by different sets of plaintiffs to challenge several provisions in the May 2022 manual update. In particular, the complaints asserted that either the challenged provisions were contrary to the Michigan Election Law, MCL 168.1 *et seq.*, or that the challenged provisions transformed the manual into an administrative rule that needed to be promulgated through the formal process outlined in the Administrative Procedures Act (APA), MCL 24.201 *et seq.* The Court of Appeals affirmed the Court of Claims and held that the challenged provisions were either contrary to the Michigan Election Law or were regulations that must be promulgated as rules by following formal APA processes. *O'Halloran v Secretary of State*, —— Mich App ——, ——; —— NW3d ——, 2023 WL 6931928 (October 19, 2023) (Docket Nos. 363503 and 363505); amended slip op. at 14. We reverse in part, affirm in part, and vacate in part.

I. FACTS AND PROCEDURAL HISTORY

Since at least October 2004, the Secretary of State has published to its public website a manual with the name "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers." See *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 2. The May 2022 update is the subject of this opinion. See Michigan Bureau of Elections, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022).[1] As noted by the Court of Appeals, the purpose of the May 2022 manual is " 'to familiarize election challengers, poll watchers, election inspectors, and members of the public with the rights and duties of election challengers and poll watchers in Michigan.' " *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 2 n 2, quoting the manual, p. 1. The manual has been updated several times over the years. *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 2. This version was used as a guide beginning with the August 2022 primary election.[2] Before the 2022 general election, two lawsuits were filed in the Court of Claims, challenging several provisions in the manual. These lawsuits are now the subject of this opinion.

***2** The first complaint was filed on September 29, 2022, by plaintiffs Philip M. O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (collectively, the O'Halloran plaintiffs). The O'Halloran plaintiffs sued the Secretary of State, Jocelyn Benson, and Jonathan Brater, the Director of the Michigan Bureau of Elections, in their official capacities, seeking an emergency injunction that would compel defendants to rescind the manual and reissue

new guidance. The O'Halloran plaintiffs complained that the challenged provisions conflicted with the Michigan Election Law or required APA promulgation. They argued that the relief they were seeking was warranted to prevent further propagation of the allegedly improper guidance for training future election inspectors and challengers.

One day later, on September 30, 2022, plaintiffs Richard DeVisser, the Michigan Republican Party, and the Republican National Committee (collectively, the DeVisser plaintiffs), filed a separate legal challenge against the same defendants. The DeVisser plaintiffs sought emergency declaratory relief under MCR 2.605(D), asking the court to declare that the manual was inconsistent with the Michigan Election Law and was unenforceable and that it amounted to promulgated rules that were not promulgated through the APA. They also sought an injunction against implementing the manual and an injunction ordering defendants to rescind the manual and reissue a prior version.

The Court of Claims considered the two complaints and consolidated the cases. Defendants moved for summary disposition under MCR 2.116(C)(4), (8), and (10). Without hearing oral argument, the Court of Claims issued an opinion and order. In the opinion, the Court of Claims denied defendants' motions and granted plaintiffs' requests for relief in part. As explained by the Court of Appeals, the Court of Claims identified five specific challenged areas within the manual that entitled plaintiffs to relief. *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 4. [3]

The first area of the manual that the Court of Claims found to be invalid is the provision titled "Form of Challenger Credential." See *id.* at ——, —— N.W.3d ——; amended slip op. at 4, 8-10 (discussing the Court of Claims opinion and order). The manual describes this requirement, in pertinent part, as follows:

> Under Michigan law, each challenger present at a polling place or an absent voter ballot processing facility must possess an authority signed by the chairman or presiding officer of the organization sponsoring the challenger. This authority, also known as the *Michigan Challenger Credential Card*, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger. The credential may not be displayed or shown to voters.
>
> A credential form may be digital and may be presented on a phone or other electronic device. If a challenger uses a digital credential, the credential must include all of the information required on the template credential form promulgated by the Secretary of State. A digital credential should not include any information or graphics that are not included or requested on the template credential form. If a challenger using a digital credential is serving in an absent voter ballot processing facility on Election Day, the challenger must display the credential to the appropriate election official, gain approval to enter the facility, and then store the device in a place outside of the absent voter ballot processing facility. [The manual, pp. 4-5.]

***3** The second area of the manual that the Court of Claims found to be invalid is the "Challenger Liaison" provision. See *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 4, 10-11 (discussing the Court of Claims opinion and order). The manual describes this requirement, in pertinent part, as follows:

> Every polling place or absent voter ballot processing facility should have an election inspector designated as the challenger liaison. Unless otherwise specified by the local clerk, the challenger liaison at a polling place is the precinct chairperson. The challenger liaison or precinct chairperson may designate one or more additional election inspectors to serve as challenger liaison, or as the challenger liaison's designees, at any time. Unless otherwise specified by the local clerk, the challenger liaison at an absent voter ballot processing facility is the most senior member of the clerk's staff present, or, if no members of the clerk's staff are present, the challenger liaison is the chairperson of the facility. Unless otherwise specified by the local clerk, the challenger liaison at the clerk's office is the most senior member of the clerk's staff present.
>
> **Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff.** [The manual, pp. 5-6.]

The third area of the manual that the Court of Claims found to be invalid is the distinction between impermissible and permissible challenges and the requirement to record in the poll book only permissible challenges. See *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 4, 11-13 (discussing the Court of Claims opinion and order). The manual describes these requirements in two sections titled "Adjudicating and Recording Challenges" and "Challenges to a Voter's Eligibility." In pertinent part, these provisions state:

> There are three categories of challenges: impermissible challenges, rejected challenges, and accepted challenges. The challenger liaison is responsible for adjudicating each challenge by categorizing each challenge and determining what, if any, action should be taken in response to the challenge.
>
> *Impermissible Challenges*
>
> Impermissible challenges are challenges that are made on improper grounds. Because the challenge is impermissible, the challenger liaison does not evaluate the challenge to accept it or reject it. Impermissible challenges are:
>
> • Challenges made to something other than a voter's eligibility or an election process;
>
> • Challenges made without a sufficient basis, as explained below; and
>
> • Challenges made for a prohibited reason.
>
> **Election inspectors are not required to record an impermissible challenge in the poll book.** If it is possible to make a note without slowing down the voting or absent voter ballot tabulation process, the election inspector is encouraged to note the content of an impermissible challenge in the poll book, as well as any warning given to the challenger making that impermissible challenge. If the challenger makes multiple impermissible challenges, the election inspector is likewise encouraged to note the general basis of those challenges and the approximate number of challenges, if the election inspector can make that note without slowing down the election process. In all circumstances, however, the election inspector should prioritize the orderly and regular administration of the election process over noting an impermissible challenge.
>
> ***4 Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.**
>
> *Rejected Challenges*
>
> Rejected challenges are challenges which are not impermissible, but which the challenger liaison does not accept. Whether a challenge is permissible but rejected is a context-specific determination that depends on the type of challenge being made. The process for determining whether a challenge to an election process or a voter's eligibility is rejected is set out below in the relevant sections. If a challenge is permissible but rejected, the following information must be included in the poll book:
>
> • The challenger's name;
>
> • The time of the challenge;
>
> • The substance of the challenge; and
>
> • The reason why the challenge was rejected.
>
> *Accepted Challenges*
>
> Accepted challenges are challenges which are permissible and which the challenger liaison deems correct. If a challenge is accepted, the following information must be included in the poll book:
>
> • The challenger's name;
>
> • The time of the challenge;
>
> • The substance of the challenge; and
>
> • The actions taken by the election inspectors in response to the challenge.
>
> * * *
>
> A challenger may make a challenge to a voter's eligibility to cast a ballot only if the challenger has a good reason to believe that the person in question is not a registered voter. There are four reasons that a challenger may challenge a voter's eligibility; **a challenge made for any other reason than those listed below is impermissible.** The four permissible reasons to challenge a voter's eligibility are:
>
> 1. The person is not registered to vote;
>
> 2. The person is less than 18 years of age;
>
> 3. The person is not a United States citizen; or

4. The person has not lived in the city or township in which they are attempting to vote for 30 or more days prior to the election.

The challenger must cite one of the four listed permissible reasons that the challenger believes the person is not a registered voter, and the challenger must **explain the reason the challenger holds that belief.** If the challenger does not cite one of the four permitted reasons to challenge this voter's eligibility, or cannot provide support for the challenge, the challenge is impermissible.

A challenger may challenge a voter's eligibility only by making a challenge to the challenger liaison or the challenger liaison's designee. **The challenger must make the challenge in a discrete manner not intended to embarrass the challenged voter, intimidate other voters, or otherwise disrupt the election process.** An election inspector will warn a challenger who violates any of these prohibitions; if a challenger repeatedly violates any of these prohibitions, the challenger may be ejected from the polling place.

Impermissible Challenge to Voter's Eligibility: Improper Reason for Challenge

A challenger may not challenge a voter's eligibility for any reason other than the four reasons above. Any challenge made for a reason other than those four reasons is impermissible and should not be considered by the challenger liaison or recorded by the election inspectors. Improper reasons for making a challenge to a voter's eligibility include, but are not limited to, the following:

***5** • the voter's race or ethnic background;

• the voter's sexual orientation or gender identity;

• the voter's physical or mental disability;

• the voter's inability to read, write, or speak English;

• the voter's need for assistance in the voting process;

• the voter's manner of dress;

• the voter's support for or opposition to a candidate, political party, or ballot question;

• the appearance or the challenger's impression of any of the above traits; or

• any other characteristic or appearance of a characteristic that is not relevant to a person's qualification to cast a ballot.

Impermissible Challenge to Voter's Eligibility: Non-Specific Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot specify under which of the four permissible reasons the challenger believes the voter to be ineligible to vote, or if the challenger refuses to provide a reason for the challenge to the voter's eligibility.

Impermissible Challenge to Voter's Eligibility: No Explanation for Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot provide a reason for their belief that the voter is ineligible to vote. For example, a challenger cannot simply state that they believe a voter to be ineligible because of their age or citizenship status; the challenger must explain why they believe the voter to be underage or why they believe the voted is not a United States citizen. The challenger liaison may deem the reason for the challenger's belief impermissible if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect. [The manual, pp. 10-13.]

The fourth area of the manual that the Court of Claims found to be invalid was titled "Challengers at Absent Voter Ballot Processing Facilities." In relevant part, the provision provided a restriction that "[n]o electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day." *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 4, 13-14 (discussing the Court of Claims' opinion and order); see also the manual, p. 9. Violating this provision could have resulted in ejection from the facility. The manual, p. 9.

After finding that these components of the manual were contrary to the Michigan Election Law, the Court of Claims gave defendants a choice among a few options for remedying the issues. See *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 14-15 (affirming the

options given by the Court of Claims). The choices were to either (1) rescind the manual in its entirety, or (2) revise the manual in either its then-current version or revise a previous version to comply with the Court of Claims opinion. *Id.* at ——, —— N.W.3d ——; amended slip op. at 14-15 (affirming the options given by the Court of Claims).

***6** Defendants appealed. Before the Court of Appeals opined on the merits, defendants sought leave to appeal in this Court, seeking to bypass the Court of Appeals as well as a stay of the Court of Claims opinion and order pending the conclusion of this appeal.[4] We stayed the Court of Claims opinion and order, and any decision of the Court of Appeals in these cases, "pending the appeal period for the filing of an application for leave to appeal in this Court[.]" *O'Halloran v Secretary of State*, 510 Mich 970, 970, 981 N.W.2d 149 (2022); *DeVisser v Secretary of State*, 510 Mich 994, 994, 980 N.W.2d 709 (2022). The cases then remained with the Court of Appeals, which affirmed. See *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 2, 14-15.

Defendants sought leave to appeal in this Court. In their application, defendants continued to argue for relief from the Court of Appeals' holdings as to the credential form, challenger liaison, permissible challenge, and electronic device instructions. We ordered oral argument on the application, directing the parties to address

> whether: (1) the challenged provisions of the election procedure manual issued by the Secretary of State are consistent with Michigan Election Law, MCL 168.1 *et seq.*; and (2) even if authorized by statute, the Secretary of State was required to promulgate the challenged provisions as formal rules under the [APA]. [*O'Halloran v Secretary of State*, —— Mich ——, ——; 6 NW3d 397 (2024).]

We now resolve the appeal.

II. LEGAL BACKGROUND

A. STANDARD OF REVIEW

[1] **[2]** Whether an agency exceeds its scope of authority is a question of law that we review de novo. *In re Reliability Plans of Electric Utilities for 2017–2021*, 505 Mich. 97, 118, 949 N.W.2d 73 (2020), citing *Consumers Power Co. v Pub. Serv. Comm.*, 460 Mich. 148, 157, 596 N.W.2d 126 (1999). We also review de novo questions of statutory interpretation. *Woodman v Dep't of Corrections*, 511 Mich. 427, 440, 999 N.W.2d 463 (2023), citing *American Civil Liberties Union of Mich. v Calhoun Co. Sheriff's Office*, 509 Mich. 1, 8, 983 N.W.2d 300 (2022).

B. THE MICHIGAN ELECTION LAW

This case now concerns four challenged components of the manual. Both the DeVisser plaintiffs and the O'Halloran plaintiffs allege in their complaints that these components are contrary to the Michigan Election Law. To resolve the issues raised, we must look to the law itself.

[3] **[4]** The authority given to an agency by statute is a matter of statutory interpretation. *In re Reliability Plans of Electric Utilities for 2017–2021*, 505 Mich. at 119, 949 N.W.2d 73. The primary goal of statutory interpretation is to give effect to the legislative intent, which begins by examining the plain language of the statute. *Id.*

Under the Michigan Election Law, "the Secretary of State shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. In performance of their duties, the Legislature has designated several general responsibilities that the Secretary "shall do." MCL 168.31(1). As relevant to this opinion, these mandatory executive duties include: (1) subject to MCL 168.31(2), "issu[ing] instructions and promulgat[ing] rules pursuant to the" APA "for the conduct of elections and registrations in accordance with the laws of this state," MCL 168.31(1)(a); (2) "[a]dvis[ing] and direct[ing] local election officials as to the proper methods of conducting elections," MCL 168.31(1)(b); (3) publishing and furnishing before each state primary and general election "a manual of instructions" that includes "procedures and forms for processing challenges," MCL 168.31(1)(c); (4) "[p]rescrib[ing] and require[ing] uniform forms" that the Secretary "considers advisable for use in the conduct of

elections and registrations," MCL 168.31(1)(e); and (5) investigating and reporting "violations of election laws and regulations," MCL 168.31(1)(h). The duties that *must* be fulfilled through APA rulemaking are specified as the promulgation of rules "establishing uniform standards for state and local nominating, recall, and ballot question petition signatures." MCL 168.31(2). Although not unlimited, MCL 168.31(1) grants the Secretary of State a degree of discretion in choosing what process to use to fulfill her remaining duties. A separate requirement mandates that the Secretary of State "shall develop instructions consistent with [the Michigan Election Law] for the conduct of absent voter counting boards or combined absent voter counting boards" that are "binding on the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township." MCL 168.765a(17).

***7** The Michigan Election Law is also the sole source of legal authority for the appointment of election challengers. The general criteria for being a challenger includes being a "registered elector" of Michigan who is not a "candidate for nomination or election to an office" or an appointed election inspector for the election in which one seeks to be a challenger. MCL 168.730(2).[5] "[A] political party or an incorporated organization or organized committee of citizens ... interested in preserving the purity of elections and in guarding against the abuse of the elective franchise may designate challengers" at an election. MCL 168.730(1). "Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens [designating the challenger] ... shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept ...." MCL 168.732. The "authority" must include the "name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned." *Id*. Additionally, MCL 168.731(1) provides a way for "an incorporated organization or organized committee of interested citizens other than political party committees ... to appoint challengers at the election" by filing with the relevant authority "a statement setting forth the intention of the organization or committee to appoint challengers." The "statement" is required to "set forth the reasons why the organization or committee claims the right to appoint challengers, with a facsimile of the card to be used," and the statement must be "signed and sworn to by" designated officers of the organization or committee. *Id.*

The authority of election challengers is addressed in both MCL 168.727 and MCL 168.733. MCL 168.727(1) provides:

> An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book. *A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct.* An election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot. [MCL 168.727(1) (emphasis added).]

In addition, MCL 168.733(1) provides that election challengers may perform certain tasks:

> A challenger may do 1 or more of the following:
>
> (a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.
>
> (b) Observe the manner in which the duties of the election inspectors are being performed.
>
> (c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.
>
> (d) Challenge an election procedure that is not being properly performed.

(e) Bring to an election inspector's attention any of the following:

(*i*) Improper handling of a ballot by an elector or election inspector.

(*ii*) A violation of a regulation made by the board of election inspectors pursuant to section 742.

(*iii*) Campaigning being performed by an election inspector or other person in violation of section 744.

(*iv*) A violation of election law or other prescribed election procedure.

(f) Remain during the canvass of votes and until the statement of returns is duly signed and made.

(g) Examine without handling each ballot as it is being counted.

(h) Keep records of votes cast and other election procedures as the challenger desires.

(i) Observe the recording of absent voter ballots on voting machines.

When a challenge is made under MCL 168.727(1), "an election inspector shall immediately," among other things, "[m]ake a written report" that includes all disparities or infractions complained of or believed to have occurred, the name and time of the challenge, specified information about the challenged individual, and other information considered appropriate by the election inspector. MCL 168.727(2)(b). The written report shall be made part of the election record. MCL 168.727(c).

***8** The Michigan Election Law has built-in provisions for challengers and other individuals who violate its terms. For instance, an election challenger at a polling location "shall not make a challenge indiscriminately and without good cause," "shall not handle the poll books while observing election procedures or the ballots during the counting of ballots," and "shall not interfere with or unduly delay the work of the election inspectors." MCL 168.727(3). "An individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor." *Id.* Also, at a polling location or absent voter ballot processing facility, "[a]ny evidence of drinking of alcoholic beverages or disorderly conduct *is sufficient cause* for the expulsion of a challenger from the polling place or the counting board. The election inspectors and other election officials on duty shall protect a challenger in the discharge of his or her duties." MCL 168.733(3) (emphasis added). At either type of location, threatening or intimidating challengers while performing their duties under MCL 168.733(1) is prohibited, and "[a] challenger shall not threaten or intimidate an elector while the elector is entering the polling place, applying to vote, entering the voting compartment, voting, or leaving the polling place." MCL 168.733(4). The safeguards provided by MCL 168.678(3) and (4) are further supported by the legal designation that "[e]ach board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands ...." MCL 168.678.

C. FORMAL RULEMAKING AND INTERPRETIVE RULES

Both the DeVisser plaintiffs and the O'Halloran plaintiffs also argue that, even if the challenged provisions of the manual are not contrary to the Michigan Election Law, they amount to formal rules that were adopted without following formal rulemaking procedures. To decide these issues, we must consider whether the challenged components amount to formal administrative rules under Michigan law.

[5] **[6]** **[7]** An executive agency's power derives from statute. *Soap & Detergent Ass'n v Natural Resources Comm.*, 415 Mich. 728, 736, 330 N.W.2d 346 (1982). Yet an agency has the authority to interpret the statutes it administers and enforces. *Clonlara, Inc. v State Bd. of Ed.*, 442 Mich. 230, 240, 501 N.W.2d 88 (1993). Although an agency's interpretation of a statute is not binding on courts and may not conflict with the Legislature's clearly expressed language, it is entitled to respectful consideration and should not be overturned absent cogent reasons for doing so. *In re Complaint of Rovas Against SBC Mich*, 482 Mich. 90, 103, 754 N.W.2d 259 (2008).

[8] **[9]** The APA outlines a formal process that must be followed for an agency to promulgate a rule that has the force and effect of law. *Clonlara*, 442 Mich. at 239, 501 N.W.2d 88.[6] An agency's formally promulgated rules are generally applicable and have the force and effect of law, but not all agency actions or statutory interpretations constitute rules. The APA defines "[r]ule" as "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 ....” MCL 24.207. The APA creates several exceptions to the definition of a rule, including “[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.” MCL 24.207(h).

[10] [11] [12] [13] [14] [15] [16] [17] When a statute does not require rulemaking for its interpretation, an agency may choose to issue “interpretive rules,” which would fall under the MCL 24.207(h) rulemaking exception as policy statements that give guidance but do not have the force and effect of law. *Clonlara*, 442 Mich. at 239, 501 N.W.2d 88. “ ‘An interpretive rule is any rule an agency issues without exercising delegated legislative power to make law through rules.’ ” *Id*., quoting 2 Davis, Administrative Law (2d ed.), § 7:8, p. 36.

> ***9** “[I]nterpretive rules are, basically, those that interpret and apply the provisions of the statute under which the agency operates. No sanction attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets .... [Interpretive rules] state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.
>
> * * *
>
> If the rule represents something more than the agency's opinion as to what the statute requires—if the legislature has delegated a measure of legislative power to the agency, and has provided a statutory sanction for violation of such rules as the agency may adopt—then the rule may properly be described as legislative.” [*Clonlara*, 442 Mich. at 239, 501 N.W.2d 88 (alteration in *Clonlara*), quoting 1 Cooper, State Administrative Law, pp. 174-175.]

As this Court recently reaffirmed, an interpretative statement “in itself lacks the force and effect of law because it is the underlying statute that determines how an entity must act, i.e., that alters the rights or imposes obligations.” *Mich Farm Bureau v Dep't of Environment, Great Lakes, & Energy*, —— Mich ——, ——; —— NW2d ——, 2024 WL 3610196 (July 31, 2024) (Docket No. 165166); slip op. at 33, citing *Clonlara*, 442 Mich. at 245, 501 N.W.2d 88. And it is worth reiterating that “[a]n interpretive statement that goes beyond the scope of the law may be challenged when it is in issue in a judicial proceeding. An interpretation not supported by the enabling act is an invalid interpretation, not a rule.” *Clonlara*, 442 Mich. at 243, 501 N.W.2d 88.

Without dispute, the components of the manual at issue were not promulgated through the APA. This background of when agencies must promulgate formal rules through the APA is necessary for determining whether defendants are correct that the challenged components of the manual are not formal rules requiring conformity with the APA processes. With this legal background, we now look at each challenged component of the manual, in turn, to determine whether plaintiffs are correct that either the particular component is contrary to the Michigan Election Law or the component was a formal rule requiring promulgation through the APA.

III. APPLICATION

A. CHALLENGER CREDENTIAL FORM

[18] Both sets of plaintiffs argue that the manual unlawfully requires the use of a uniform form for challengers to demonstrate that they are credentialed as election challengers. The Court of Appeals affirmed the Court of Claims' holding that the challenger credential form was invalid as conflicting with the Michigan Election Law. *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 10. We disagree. The lower courts concluded that the Michigan Election Law “ ‘has set forth the exhaustive list of evidence for validating a credential, and if a purported credential includes the three items in MCL 168.732, then that purported credential fully complies ....’ ” *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 9 (approvingly quoting the Court of Claims' conclusion).

MCL 168.732 addresses a challenger's right to be present and provides:

> Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested

> in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

***10** **[19]** If all other statutory criteria are met, MCL 168.732 outlines three requirements that every challenger appointed under MCL 168.730 or MCL 168.731 must possess to be credentialed: (1) authority signed by the appropriate individual, as recognized by the statute; (2) the written or printed name of the challenger; and (3) the number of the precinct to which the challenger is assigned. MCL 168.732. Thus, we agree with the lower courts—there are three requirements that every credential must include, and no additional substantive requirements can be imposed. However, we disagree that this statute precludes requiring challengers to submit such evidence on a uniform form.

[20] MCL 168.732 contains an exhaustive list of requirements for the three things that must be included on the "authority" that serves as a credential for election challengers. But the statute is silent about what form the credential may take.[7] On its face, the manual explains that the challenger credential form must contain the statutory requirements and must be included on the uniform form provided by the Secretary of State. The manual, pp. 4-5. Nowhere does the manual purport to add any substantive requirements beyond those listed in MCL 168.732. Instead, the Secretary has merely mandated use of a uniform credential form that must include all, but no more than, the statutorily required information. Simply requiring use of a particular form does not alter what "evidence" is "sufficient" to become credentialed and therefore does not conflict with MCL 168.732. The lower courts conflated the required use of a form with a substantive requirement within that form. In so doing, the lower courts ignored the statutory requirement that the Secretary "[p]rescribe and require uniform forms ... for use in the conduct of elections ...." MCL 168.31(1)(e). The phrase "for use in the conduct of elections" is not defined in the Michigan Election Law, but it clearly includes mandating the use of uniform forms that are deemed necessary or helpful to the act, manner, or process of carrying on a primary or general election. Although both sets of plaintiffs challenge the use of a required uniform form, MCL 168.31(1)(e) could not more clearly provide the Secretary the authority to require challengers and their appointing organizations to use a uniform form. Doing so does not conflict with MCL 168.732 and is wholly within the Secretary's authority under MCL 168.31(1)(e).

[21] Nor are we persuaded that this component of the manual amounts to a formal rule requiring promulgation through the APA. Under the APA, a formal rule "does not include" a "form with instructions ... that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). This is a form that instructs challengers regarding how to submit the required evidence to be credentialed as a challenger. Moreover, this manual provision lacks the "force and effect of law" because, as discussed above, it adds no substantive requirement in order to be credentialed. If mandating the use of a form that an agency is explicitly authorized to create is all that is required to convert something into a rule, then the "form with instructions" exception under MCL 24.207(h) would be nugatory. We decline to accept such an interpretation. Accordingly, it falls squarely within the APA's formal rulemaking exception under MCL 24.207(h).

B. CHALLENGER LIAISON

***11** Next, we consider plaintiffs' challenges to a challenger liaison. The specific challenges arise from the manual's requirement that "[c]hallengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff." The manual, p. 6. The Court of Appeals affirmed the Court of Claims' conclusion that MCL 168.733(1) authorizes a challenger to bring one of several specified matters to the attention of "an election inspector" rather than a "challenger liaison," as the manual requires. *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 11.

[22] In other words, this issue requires us to determine whether a challenger may bring a challenge to "an election

inspector" or is entitled to bring an issue to "an[y] election inspector" of their choosing. We hold that the right of a challenger to bring certain issues to the attention of an election inspector under MCL 168.733(1)(e) does not grant a challenger the right to call matters to the attention of any election inspector of their choosing but merely provides an opportunity to call matters to the attention of at least one election inspector. Given that the challenger liaison at a polling place, under the manual's plain terms, is a designated election inspector, this provision is not contrary to the Michigan Election Law as applied to polling places. However, the manual is inconsistent with the Michigan Election Law to the extent it requires a challenger at an absent voter ballot processing facility to raise an issue under MCL 168.733(1)(e) *solely* to a challenger liaison who is *not* an election inspector.

The Court of Appeals conducted its analysis of this issue by focusing solely on MCL 168.733(1)(e) without considering other relevant provisions throughout the Michigan Election Law. MCL 168.727(1) outlines some circumstances in which "an election inspector" or a "registered elector of the precinct present in the polling place" may raise a challenge related to the conduct of an election at a polling place. This section does not explicitly specify to whom a challenger may speak, but rather merely provides the right to challenge. Given that MCL 168.727(2) requires an "election inspector" to record challenges brought under MCL 168.727(1), the provision contemplates that an election inspector will eventually receive any such challenge. But nothing in MCL 168.727 explicitly provides a challenger the right to speak directly to *any* election inspector, let alone the right to speak to *all* election inspectors.

MCL 168.733 describes a challenger's general rights and duties at both polling locations and absent voter ballot processing facilities. See MCL 168.733(2). Comparing these two statutes—MCL 168.733 and MCL 168.727—only MCL 168.733(1)(e) expresses the specific right to "[b]ring to an election inspector's attention" certain issues, none of which is characterized as "challenges."[8] That language does not accompany any "challenges" related to, for example, inspecting the names entered in the poll book, MCL 168.733(1)(a); observing the manner in which election inspectors are performing their duties, MCL 168.733(1)(b); challenging a person's voting rights if there is good reason to believe they are not a registered elector, MCL 168.733(1)(c); or challenging an election procedure as not being properly followed, MCL 168.733(1)(d). MCL 168.727 and MCL 168.733(1)(a) to (d) and (f) to (i) are silent regarding to whom "challenges" may be brought. The lower courts only considered the specific language of MCL 168.733(1)(e) and failed to recognize that the language "bring to an election inspector's attention" is only included in reference to a subset of a challenger's authority and not to any "challenges" explicitly identified as such in MCL 168.727 or MCL 168.733.

***12** One of the Secretary's general responsibilities requires her to publish and furnish a manual that includes procedures for processing challenges, MCL 168.31(1)(c), which certainly can encompass who among the election workers at a polling place or absent voter ballot processing facility may process challenges. While MCL 168.727 and MCL 168.733 create express rights for challengers to raise challenges, these statutory provisions are silent regarding to whom such challenges must be brought. Accordingly, nothing in the Michigan Election Law precludes the Secretary from providing instructions regarding to whom challengers must address the "challenges" listed in those statutes.

The decision to specify the proper method for processing challenges was within the Secretary's authority under the Michigan Election Law. See MCL 168.31(1)(a) and (c). As to the subset of issues that can be brought to the attention of an election inspector under MCL 168.733(1)(e), we disagree with the Court of Appeals' conclusion that "the statute explicitly authorizes challengers to communicate with any election inspector." *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 11. MCL 168.733(1)(e) states that challenges may be brought to "an" election inspector—not "any" election inspector, which the Court of Appeals claimed was the explicit language of the statute. The word "an" has multiple meanings. See *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich. 349, 368-369, 917 N.W.2d 603 (2018) (explaining that "[w]hether [the indefinite article] 'a' should be read as referring to a discrete item or as referring to one of many potential items depends on the context in which it is used. But, while the article may be susceptible to multiple meanings when read in isolation, we must select the meaning that makes the most sense when the statute is read as a whole").

Given the statute's silence regarding who will receive "challenges" under MCL 168.727 and MCL 168.733, and the Secretary's explicit authority to publish and furnish procedures for processing challenges, MCL 168.31(1)(c), we decline to read the phrase "an election inspector[ ]" in MCL 168.733(1)(e) as providing challengers the *right* to raise any

issue in that subsection to *any* election inspector. In other words, we do not read "an election inspector[ ]" in MCL 168.733(1)(e) as providing challengers the greater right to bring to *any* election inspector only the subset of issues that can be raised under MCL 168.733(1)(e). Rather, we read MCL 168.31(1)(c), MCL 168.727, and MCL 168.733 harmoniously to provide challengers the authority to make challenges or raise other issues regarding the proper conduct of elections, but not as providing them the right to raise such issues to *any* and *all* election inspectors serving at a particular location.

[23] As applied to polling places, the manual does not prohibit challengers from bringing matters to the attention of an election inspector; it merely prescribes a method for ensuring that the challenges are uniformly received, processed, applied, and documented by designating the election inspector who will receive them. Examining the phrase within the context of the Michigan Election Law, we agree with defendants that it was reasonable and consistent with MCL 168.733(1)(e) for the manual to instruct that the right to bring challenges to "an" election inspector at a polling place meant raising those challenges to a designated election inspector known as a challenger liaison rather than to "any election inspector of the challenger's choice."

[24] **[25]** However, the manual appears to state that the default challenger liaison at an absent voter ballot processing facility is a member of the precinct's clerk's staff who would not be an election inspector, and the Secretary admits in her briefing that challenger liaisons at absent voter ballot processing facilities are not election inspectors. See the manual, p. 5. As already noted, the statute is silent regarding who is to receive any "challenges" explicitly identified as such in MCL 168.727 and MCL 168.733, so there is nothing improper about requiring challengers to bring any "challenges" in those sections to a challenger liaison who is not also an election inspector. However, MCL 168.733(1)(e) provides challengers the right to bring the subset of issues listed in that section to at least one election inspector. Accordingly, the manual is inconsistent with the Michigan Election Law to the extent it prohibits challengers from raising issues listed in MCL 168.733(1)(e) to at least one election inspector who is serving at an absent voter ballot processing facility.

***13** **[26]** Further, like the credential form, except as already noted, the challenger-liaison provisions of the manual are consistent with the Michigan Election Law and do not require formal rulemaking because they fit squarely within an exception to the APA's rulemaking requirement under MCL 24.207(h). In relevant part, MCL 24.207(h) exempts from rulemaking an "interpretative statement" that "in itself does not have the force and effect of law but is merely explanatory." These manual provisions fit this rulemaking exemption because they fit within correct interpretations of Michigan law as permitting the funneling of all challenges to one particular election inspector identified as a "challenger liaison."

[27] **[28]** **[29]** Moreover, these interpretive rules do not have "the force and effect of law" as applied to challengers. [9] While the limitation on speaking with any election inspector other than one identified as the challenger liaison is stated in mandatory terms, the manual does not instruct that inspectors are *required* to expel challengers who violate that prohibition. Rather, an election inspector is to warn the challenger after a first violation, and if that challenger *repeatedly violates* the prohibition despite the warning, the election inspector *may*, in their discretion, eject that challenger. MCL 168.678 already provides election inspectors with the "full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any primary or election and during the canvass of the votes after the poll is closed." This authority is broad enough to provide election inspectors the discretionary authority to eject challengers under the circumstances provided in the manual if a challenger's repeated refusal to follow the election inspector's instructions becomes problematic. [10] Accordingly, because the manual's permissible provisions simply provide interpretive statements regarding how election inspectors should exercise their pre-existing discretionary authority under MCL 168.678 and MCL 168.733(3) and does not impose any new substantive requirement or limitation on challengers, it lacks the "force and effect of law." See MCL 24.207(h). Thus, these components are permissible and need not be promulgated as a rule through the APA.

C. PERMISSIBLE AND IMPERMISSIBLE CHALLENGES

We next consider plaintiffs' argument that the Secretary is without authority to categorize challenges as permissible or impermissible and that only permissible challenges need to be recorded. As previously discussed, the Secretary has the duty to "furnish ... a manual of instructions that includes ...

procedures and forms for processing challenges[.]" MCL 168.31(1)(c). Instructions to election officials regarding what challenges are authorized under law and when to record challenges fits within this authority if those instructions are consistent with the Michigan Election Law.

***14** We conclude that the Secretary has the authority to include in the manual most of the manual provisions regarding permissible and impermissible challenges without formal rulemaking. This nonexhaustive authority includes (1) a list of permissible and impermissible reasons for a voter-eligibility challenge that accurately reflects the statutory requirements for eligibility to vote [11] and (2) instructions that challenger liaisons need not record a voter-eligibility challenge if the challenger does not provide a permissible reason for the challenge or some explanation for the basis of their challenge. [12] However, the manual improperly states that "[t]he challenger liaison may deem the reason for the challenger's belief impermissible if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect." The manual, p. 13.

[30] We hold, first, that there is no conflict between the Michigan Election Law and the manual in terms of separating challenges into categories. Here, the manual creates distinct categories for challenges that are "permissible" and "impermissible." It is true that these words are not present in the statute; however, the words are just organizational terms used by the manual to explain statutory requirements. This is consistent with an agency document intended to interpret and explain the requirements of the Michigan Election Law without restating those statutes verbatim. See MCL 168.31(1)(a) and (c); MCL 24.207(h); *Clonlara*, 442 Mich. at 239-243, 501 N.W.2d 88.

Recall that there are four "permissible" voter-eligibility challenge types listed in the manual: (1) the person is not registered to vote, (2) the person is less than 18 years of age, (3) the person is not a United States citizen, and (4) the person has not lived in the voting district for at least 30 days before the election. The manual, pp. 11-12. These four types of challenges map directly onto the types of challenges listed in MCL 168.727(1) (explaining that "[a] registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in the precinct") and in MCL 168.733(1)(c) (stating that a challenger may "[c]hallenge the voting rights of a person who the challenger has good reason to believe is not a registered elector"). Various provisions of the Michigan Election Law support that these are the requirements for qualified and registered electors. An individual must be registered to vote and a citizen of the United States. MCL 168.492; MCL 168.523. Further, to be registered, the person must be at least 18 years old on the date of an election. MCL 168.492; MCL 168.495(g). Finally, a registered voter must demonstrate that the applicant has established residence in the voting district at least 30 days before the election in which they would like to vote. MCL 168.492; MCL 168.495(i). These are the simplest explanations possible for what would constitute a "qualified and registered elector." MCL 168.727(1); MCL 168.733(1)(c). Thus, attaching the label "permissible" challenge is well within the Secretary's authority under MCL 168.31(1)(a) and (c). [13]

***15** Given that the manual correctly identifies what qualifies as a statutorily permissible challenge, it is reasonable of the Secretary to label all other challenges as "impermissible challenges." The nonexhaustive list of impermissible challenges merely provides examples of the types of challenges that would fall outside the scope of a "permissible" challenge. Identifying such improper bases by using the term "impermissible challenge" is not contrary to the Michigan Election Law simply because the Michigan Election Law does not use those precise terms.

Moreover, we conclude that the manual properly instructs election inspectors that they may decline to record a challenge if a challenger fails to provide a permissible factual basis for a challenge or if the challenger fails to provide an explanation as to the factual basis for their challenge. The Michigan Election Law states that "[u]pon a challenge being made *under subsection (1)*, an election inspector *shall immediately*" take certain actions, including "[m]ake a written report" that includes specific listed information. MCL 168.727(2)(b) (emphasis added). That report must be made a part of the election record. MCL 168.727(2)(c). Notably, this mandatory reporting requirement applies only to challenges "under [MCL 168.727(1)]," MCL 168.727(2)(b), and not to any challenge that may be raised under MCL 168.733. [14] Given the limited scope of the mandatory recording requirement, an election inspector must have implicit authority to determine whether a challenge falls within the scope of challenges that must be recorded. Otherwise, the "under [MCL 168.727(1)]" limitation would be rendered superfluous.

[31] As a reminder, the sentence of MCL 168.727(1) that is relevant to voter-eligibility challenges provides, "A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector *knows or has good reason to suspect* that individual is *not a registered elector in that precinct.*" (Emphasis added.) As discussed, the manual's list of "permissible" and "impermissible" reasons for a voter-eligibility challenge tracks the statutory requirements for being a "registered elector." Because an election inspector has to determine whether a challenge falls within Subsection (1), i.e., whether it involves a challenge that an "individual is not a registered elector in that precinct," to determine whether the mandatory reporting obligation is triggered, we conclude that there is nothing improper about the manual instructing election officials that they need not record a challenge unless the challenger articulates a permissible factual basis for that challenge.

***16** **[32]** Defendants argue that the instructions not to record a challenge if a challenger "cannot provide a reason for their belief that the voter is ineligible to vote," or "if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect," the manual, p. 13, reflect the "knows or has good reason to suspect" requirement of MCL 168.727(1). In other words, because the reporting requirement only applies to a challenge under MCL 168.727(1), and MCL 168.727(1) contains the "knows or has good reason to suspect" requirement, an election inspector must first assess whether the challenger "knows or has good reason to suspect" before recording the challenge. We agree with defendants that it is permissible to instruct election inspectors to decline to record "if the challenger cannot provide a reason for their belief that the voter is ineligible to vote," the manual, p. 13, but conclude that an election inspector cannot decline to record on the basis that they believe the explanation provided is lacking or insufficient.

To explain why, it is necessary to turn back to MCL 168.727(2). MCL 168.727(2) requires that the election inspector "shall immediately" "[m]ake a written report" "[u]pon a challenge being made under [MCL 168.727(1)]." MCL 168.727(2)(b). The temporal immediacy requirement is activated when the challenge is made, not when the challenge is determined to be valid. Such an immediacy requirement would be undermined by requiring an election inspector to assess the validity of a challenge before recording it. Moreover, this written report must include, among other things, "[a]ll election disparities or infractions *complained of or believed to have occurred.*" MCL 168.727(2)(b)(*i*) (emphasis added). This further indicates that an election inspector is not to determine the validity of a challenge as a precondition to recording, but rather must record any applicable challenges "complained of or believed to have occurred." *Id.* In sum, while election inspectors have implicit authority to determine whether a challenge is one under MCL 168.727(1) such that they are required to report it, they cannot decline to report a challenge on the basis of their personal assessment of the validity or merit of the challenge.

[33] As applied to these manual provisions, we conclude that most of them properly instruct election inspectors regarding steps to ensure that challenges fall within the scope of the mandatory reporting requirement. Requiring a challenger to articulate a permissible factual basis for a challenge and provide *some* explanation regarding why the challenger holds that belief are reasonably related to ensuring it is a type of challenge that must be recorded (one related to voter eligibility) and that the person "knows or has good reason to suspect" one is not a registered elector, without requiring the election inspector to assess the validity of the challenge before determining whether to record it. However, the manual improperly instructs election inspectors that they "may deem the reason for the challenger's belief impermissible [and therefore decline to record the challenge] if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect." The manual, p. 13. This provision goes beyond instructing election inspectors to ensure that a challenge is the kind that must be recorded and instead requires them to assess the validity of a challenge as a precondition to recording it, which conflicts with the Michigan Election Law. It follows that to the extent the manual assigns the label "impermissible," and thus not subject to a recording requirement as a "challenge made without a sufficient basis" under MCL 168.727(1), this provision must be limited to a challenger's failure to provide a prima facie factual basis for a challenge and not an election inspector's assessment of the validity or merits of a challenge.

[34] For the reasons discussed in Part III(C) of this opinion, we conclude that the manual provisions that do not conflict with the Michigan Election Law fall within the exemption to rulemaking under MCL 24.207(h). The categories of challenges labeled as impermissible in the manual provide guidance as to legally invalid reasons to challenges by explaining what is prohibited by the Michigan Election Law

or the state or federal Constitutions. See *Clonlara*, 442 Mich. at 245, 501 N.W.2d 88 (stating that an interpretive rule does not have the force of law when an agency "must show violation of the statute, not violation of an interpretive rule," to enforce the requirement at issue). Like the challenger-liaison provisions discussed in Part III(B), the permissible provisions here are interpretive statements regarding the Michigan Election Law that lack the force and effect of law as applied to challengers; the manual does not mandate expulsion for any violation of these provisions but rather merely reflects the pre-existing discretionary authority of election inspectors to maintain peace and ensure compliance with lawful orders. See MCL 168.678; MCL 168.733(3).

D. PROHIBITION ON ELECTRONIC DEVICES

***17** As already discussed, the 2022 election manual provided, "No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day." The manual, p. 9; see also *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 4, 13-14. Although this challenge was appealed in this Court and remained a live controversy at the time of the Court of Appeals decision, we now consider the issue to be moot.

[35] **[36]** A moot issue "is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *League of Women Voters of Mich v Secretary of State*, 506 Mich. 561, 580, 957 N.W.2d 731 (2020) (quotation marks and citation omitted), quoting *Anway v Grand Rapids R. Co.*, 211 Mich. 592, 610, 179 N.W. 350 (1920). Since the complaint has been filed, the Legislature has amended MCL 168.765a to effectively permit the possession and limited use of electronic devices in absent voter ballot counting facilities. [15] Prior to this amendment, MCL 168.765a neither provided a right to possess electronic devices in such facilities nor explicitly prohibited the possession of electronic devices. [16] In response to that amendment, the Secretary removed the complete prohibition on electronic devices, and these challenged provisions are not contained in the 2024 version of the election manual. Thus, while the provisions were in the manual, there remains no legal effect that a decision from this Court can give to this issue because of intervening changes of statutory law and responsive actions by the Secretary.

[37] We customarily vacate lower-court judgments on moot issues. *League of Women Voters*, 506 Mich. at 588-589, 957 N.W.2d 731. Once we determine that an issue is moot, we must weigh the conditions and circumstances of the particular issue. *Id.* at 589, 957 N.W.2d 731. Here, the conditions that rendered the issue moot were beyond the control of any party to the lawsuit; it was a later-in-time legislative amendment that negated any legal effect a judicial decision may have. And we see no other equitable considerations that weigh against our general practice of vacating lower-court judgments on moot issues. In light of this determination, we vacate the portion of the Court of Appeals and Court of Claims opinions addressing the manual's prohibition on electronic devices in these facilities.

IV. CONCLUSION

***18** Plaintiffs raised several challenges to various components of the manual. The Court of Claims invalidated five components. Defendants appealed four, which the Court of Appeals affirmed and are now at issue in this Court. We vacate the portion of the lower-court opinions discussing the manual's bar on electronic devices within absent voter ballot processing facilities as rendered moot by statutory amendments. With regard to the remaining three challenged components, we hold that these provisions are lawful except to the extent that they (1) require a challenger at an absent voter ballot processing facility to raise an issue listed in MCL 168.733(1)(e) to a challenger liaison who is not also an election inspector at that facility and (2) provide that "[t]he challenger liaison may deem the reason for the challenger's belief impermissible [and therefore decline to record the challenge] if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect."

Richard H. Bernstein, Megan K. Cavanagh, Elizabeth M. Welch, JJ., concur.

Clement, C.J. (concurring in part and dissenting in part).
I respectfully dissent and join Justice ZAHRA's separate opinion to the extent that it concludes that the challenged

provisions from the Secretary of State's 2022 election manual are invalid because they conflict with the Michigan Election Law, MCL 168.1 *et seq.* See *Chrisdiana v Dep't of Community Health*, 278 Mich App 685, 689, 754 N.W.2d 533 (2008). Specifically, I agree with Justice ZAHRA that (1) the manual's requirement of a uniform challenger-credential form conflicts with the provision in MCL 168.732 that possessing a valid, signed authority is "sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept"; (2) the manual's establishment of a single challenger liaison to whom every challenger must direct their challenges conflicts with the direction in MCL 168.733(1)(e) that a challenger may raise specified issues with "*an* election inspector[ ]" [1] and is also inconsistent with the goals of party parity expressed elsewhere in the Michigan Election Law, see MCL 168.674(2); (3) the manual's direction that election inspectors record only what the manual identifies as permissible challenges conflicts with MCL 168.727(2)(b), which directs an election inspector to immediately record any challenge made under MCL 168.727(1); and (4) the manual's provision that election challengers may be removed for repeated impermissible challenges conflicts with a challenger's right to be present, MCL 168.732 (unless that conduct rises to the level of disorderly conduct, MCL 168.733(3)). [2] Because the conflicts between the manual's provisions and the Michigan Election Law are sufficient to render the provisions invalid, I do not join Justice ZAHRA's discussion whether the provisions at issue have the force and effect of law.

Zahra, J. (concurring in part and dissenting in part).

I. INTRODUCTION

For more than 20 years, the Secretary of State has issued and revised an election-procedure manual pursuant to MCL 168.31(c), which must "include[ ] specific instructions on assisting voters in casting their ballots, directions on the location of voting stations in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act." The content of the "manual," titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers," had never been challenged.

***19** Then, in May 2022, the Secretary of State issued a revision of the manual. The manual had last been revised in October 2020 and was 12 pages long. [1] The revisions to the manual primarily introduced substantial provisions relating to election challengers, accounting for the current 24-page manual in dispute. [2] Challengers comprise persons appointed by the local heads of the majority political parties or the heads of an incorporated organization or organized committee of interested citizens other than political-party committees. [3] Once credentialed, challengers have the statutory right to bring to an election inspector's attention the improper handling of a ballot by an elector or election inspector, violations of a regulation made by the board of election inspectors, campaigning being performed by an election inspector or other person, and more generally, a violation of election law or other prescribed election procedure. [4]

Relevant to these consolidated cases, the manual was revised to require that election challengers present their credentials on a form provided by the Secretary of State, to require that all challenges be presented to a single challenger liaison, and to provide this single challenger liaison discretion to disregard challenges declared impermissible by the manual.

Two groups of plaintiffs filed separate lawsuits in the Court of Claims in September 2022, challenging various provisions in the manual. Plaintiffs included election challengers for the November 2022 general election, two candidates for the Michigan Legislature, the Michigan Republican Party, and the Republican National Committee. Plaintiffs alleged that various provisions of the manual violate the Michigan Election Law, MCL 168.1 *et seq.*, and that the manual was published without the notice-and-comment requirements outlined in the Administrative Procedures Act (APA), MCL 24.201 *et seq.* The Court of Claims granted plaintiffs relief regarding the above-mentioned revisions in the 2022 manual.

Defendants filed applications for leave to appeal in the Court of Appeals as well as bypass applications for leave to appeal in this Court. On November 3, 2022, in lieu of granting leave to appeal, a majority of the Court stayed the effect of the opinion and order of the Court of Claims and any decision of the Court of Appeals, but otherwise declined to review the cases before review by the Court of Appeals. [5] On October 19, 2023, the Court of Appeals affirmed the Court of Claims in a published opinion. [6] Notwithstanding that both the Court of Claims and the Court of Appeals found that the revised manual issued by the Secretary of State was in violation of the Michigan Election Law, a majority of this Court continued the stay of the lower-court judgments and ordered expedited

oral argument on the application to address "whether (1) the challenged provisions of the election procedure manual issued by the Secretary of State are consistent with Michigan Election Law ...; and (2) even if authorized by statute, the Secretary of State was required to promulgate the challenged provisions as formal rules under the [APA]." [7]

***20** To date, the Secretary of State has not sought to promulgate the 2022 manual revisions as a formal administrative rule under the APA. Rather, the Secretary insists that the manual is not a rule that requires public discussion because it is simply an interpretive statement that does not have the force and effect of law but is merely explanatory. The Secretary's position, although curiously sanctioned by a majority of this Court, is difficult to comprehend. If the manual revisions are merely explanatory, challengers who possess a credential meeting the statutory requirements of MCL 168.732 [8] would not be turned away by a clerk when they arrive at their assigned precinct. [9] After all, MCL 168.732 plainly states that possessing valid, signed authority, alone, "shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept ...." If the manual revisions are merely explanatory, as argued by the Secretary and found by a majority of this Court, statutorily credentialed challengers would not be subject to expulsion by presenting a challenge to an election inspector as opposed to the designated challenger liaison.

The manual revisions, in addition to having the force of law, are inconsistent with the existing Michigan Election Law. MCL 168.733(1)(e) plainly states that an election challenger may "[b]ring to *an election inspector's* attention" certain improprieties in the conduct of elections. [10] The statute does not limit the challenger's ability to assert such improprieties to the person designated as the challenger liaison. That the Secretary's new rules are inconsistent with MCL 168.733(1)(e) is best demonstrated by the fact that, under the revised manual, the challenger liaisons at Absent Voter Ballot Processing Facilities (AVBPFs) are members of the local clerk's staff, not election inspectors. [11] Given that the statute expressly permits the challengers to communicate with an election inspector, the new rule clearly conflicts with the Michigan Election Law.

And, finally, if the manual revisions are merely explanatory, as decreed by this Court, challenges asserted by a credentialed election challenger would be recorded as expressly required by statute and not subject to the arbitrary whim of the newly designated challenger liaison who is vested by the Secretary's new rules with authority to deem a challenge "impermissible." The Secretary's revisions to the manual are, in fact, "rules" that must be followed—and followed without a trace of public discussion, accountability, or transparency.

Even more concerning, these de facto rules conflict with statutory law and restrict the statutory rights of all challengers and, to some extent, voters themselves. These consolidated cases arise within the context of a statutory framework that aspires to establish a bipartisan or multipartisan balance to maintain the integrity of the election process. Yet a majority of this Court entirely ignores this statutory framework in a way that instills doubt in the minds of many Michigan voters regarding the integrity of the election process. After all, is it not foreseeable that designating only a single partisan election inspector to serve as the lone challenger liaison in a precinct will raise partisan concerns? The fact remains that in many instances, the manual will *force* challengers to communicate with a challenger liaison who will not be affiliated with the challenger's political party or will be affiliated with an opposition political party.

***21** Yet a majority of the Court grants the Secretary of State carte blanche to publish these provisions of the manual under the guise of "procedure" while affording no weight to the substantive statutory rights of challengers and voters. The majority does so without the slightest concern that such unregulated authority will result in a lack of any public discourse, transparency, and accountability in establishing election requirements and procedures. For these reasons, as more fully developed below, I dissent. [12]

II. ANALYSIS

A. THE "MICHIGAN CHALLENGER CREDENTIAL CARD"

MCL 168.732 addresses a challenger's right "to be present inside the room where the ballot box is kept" and provides:

> Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens

> interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

As applied here, a challenger is granted the "*right* ... to be present inside the room where the ballot box is kept" by presenting "authority" [13] that (1) is signed by the recognized chairman of any political party, (2) contains the written or printed name of the challenger, and (3) contains the precinct number for the challenger's assigned precinct. [14] Such authority "shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept[.]" [15]

The Secretary of State relies on MCL 168.31 [16] to support the new rules regarding a challenger's right to be present. The revised manual provides, in pertinent part:

> Under Michigan law, each challenger present at a polling place or an absent voter ballot processing facility must possess an authority signed by the chairman or presiding officer of the organization sponsoring the challenger. This authority, also known as the *Michigan Challenger Credential Card*, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger. The credential may not be displayed or shown to voters.
>
> ***22** A credential form may be digital and may be presented on a phone or other electronic device. If a challenger uses a digital credential, the credential must include all of the information required on the template credential form promulgated by the Secretary of State. A digital credential should not include any information or graphics that are not included or requested on the template credential form. If a challenger using a digital credential is serving in an absent voter ballot processing facility on Election Day, the challenger must display the credential to the appropriate election official, gain approval to enter the facility, and then store the device in a place outside of the absent voter ballot processing facility. [17]

The first question is whether the manual's call for exclusive use of the Secretary's newly created "*Michigan Challenger Credential Card*" is within the Secretary of State's authority under MCL 168.31(1)(c), which specifically mandates that the Secretary of State publish and furnish a manual of instructions for use in every precinct before every primary and general election. MCL 168.31(1)(c) specifically provides that the manual include: (1) "specific instructions on assisting voters in casting their ballots," (2) "directions on the location of voting stations in polling places," (3) "procedures and forms for processing challenges," and (4) "procedures on prohibiting campaigning in the polling places as prescribed in this act."

Critical to understanding the Secretary's authority to impose challenger-certification requirements in the manual is MCL 168.732, which, as already noted, provides three requirements that "shall be sufficient evidence" of a challenger's right "to be present inside the room where the ballot box is kept ...." The manual properly instructs that "each challenger present at a polling place or an absent voter ballot processing facility must possess an *authority* signed by the chairman or presiding officer of the organization sponsoring the challenger." [18] This instruction would be consistent with MCL 168.732 if the instruction were based only upon the three substantive requirements that establish a challenger's credentials. But the manual strays from MCL 168.732 by claiming that "[t]his authority" refers to "*the Michigan Challenger Credential Card*," which "must be on a form promulgated by the Secretary of State." [19] And "[i]f the entire form is not completed, the credential is invalid

and the individual presenting the form cannot serve as a challenger."[20] But MCL 168.732 neither requires the newly created Michigan Challenger Credential Card nor does it mention any requirement that the "authority" be shown on "a form promulgated by the Secretary of State." The Legislature has exercised its plenary power to establish both the substance and process for credentialing challengers by enacting MCL 168.732, and nowhere does that statute suggest that a challenger's statutory credentials can be invalidated because they were not presented on a Michigan Challenger Credential Card. Thus, even if the Secretary of State had properly promulgated the requirement to use the Michigan Challenger Credential Card pursuant to the APA (which she did not), the validity of that administrative rule would be highly questionable because it would conflict with MCL 168.732.[21]

***23** For its part, MCL 168.31(1)(c) only provides the Secretary of State authority, in publishing the manual, to offer "procedures and forms for processing challenges[.]" But the Michigan Challenger Credential Card does not relate at all to "processing challenges." The Michigan Challenger Credential Card instead relates to a prospective challenger's credentials, which, if not established per the newly revised rules, precludes that person from functioning as a challenger. The requirement of a Michigan Challenger Credential Card has nothing to do with the Secretary's authority to outline procedures and draft forms for "processing challenges" and instead creates a threshold requirement, such that "[i]f the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger."[22] In other words, the credential-card requirement prevents a challenge from being processed at all. This distinction is reflected in the structure of the statute itself, with MCL 168.727 addressing the process for challenges while MCL 168.731 and MCL 168.732 address credentials for challengers. Thus, although MCL 168.31(1)(c) provides authority for the Secretary to require "procedures and forms for processing challenges," it provides no authority for the Secretary to require "procedures and forms for credentialing challengers."

In the absence of textual support from MCL 168.31(1)(c), a majority of this Court pivots to the Secretary of State's general power under MCL 168.31(1)(e) to "[p]rescribe and require uniform forms, notices, and supplies the Secretary of State considers advisable for use in the conduct of elections and registrations." The Secretary's position fares no better under this provision. First, it is questionable whether "the conduct of elections" includes the credentialing process, which is what the manual's Michigan Challenger Credential Card purports to govern. Rather, the credentialing process relates to a threshold question whether a challenger may even participate in "the conduct of elections." After all, the manual provides that "[i]f the entire form is not completed, the credential is invalid and the individual presenting the form *cannot serve* as a challenger."[23] Second, MCL 168.31(1)(c) relates to the Secretary's authority to promulgate the manual, and MCL 168.31(1)(e) does not. MCL 168.31(1)(c) is the more specific provision describing the extent of the Secretary's authority to do the exact action at issue, i.e., publish a manual. And MCL 168.31(1)(c) expressly permits some actions but conspicuously does not provide the Secretary the authority asserted here.[24] The issue in this case stems entirely from the manual, and MCL 168.31(1)(c) is the only provision specifically relating to the Secretary's authority to issue the manual. Thus, the authority provided to the Secretary under MCL 168.31(1)(e) cannot reasonably be interpreted to supplement the Secretary's authority under MCL 168.31(1)(c). Third, MCL 168.31(1)(c) is the only provision in MCL 168.31(1) that mentions challenges.[25] Given that MCL 168.31(1)(c) does not address a challenger's credentials, it strains reason to believe that the Legislature intended MCL 168.31(1)(e) to provide the Secretary authority to not only prescribe and require uniform forms to regulate a challenger's credentials, but to do so in a manual without complying with the APA's rulemaking procedures.[26] Again, MCL 168.732 provides that only three requirements "shall be sufficient."

***24** Also, the manual's Michigan Challenger Credential Card requirement applies to all challengers, not just to challengers appointed by political parties. That clearly contradicts MCL 168.731(1), which allows "an incorporated organization or organized committee of interested citizens other than political party committees ... the right to appoint challengers, with a facsimile of the card to be used[.]" Plainly, the provision does not contemplate a card that must previously be known to the clerk or state, such as the Michigan Challenger Credential Card, but a card that is "to be used."

As explained by Justice VIVIANO,

> it would make little sense for the nonpolitical-party challengers to use their own cards whereas political-party challengers cannot. Any distinction between MCL 168.731 and MCL 168.732 is not an invitation to the Secretary of State to use her authority under MCL 168.31(1) to add new requirements onto political-party challengers. Although she has the obligation to furnish a manual providing forms, nowhere does she have authority to make the use of those forms mandatory such that, even if a challenger satisfies all other statutory requirements, the challenger can be removed for failure to use the Secretary of State's preferred form. Indeed, as she admits, the Manual lacks the force of law—so how can it require outcomes different from those mandated by statute? [27]

In sum, MCL 168.732 provides the credentialing requirements that "shall be sufficient," and nothing in MCL 168.31 provides the Secretary of State power to impose additional requirements.

B. THE CHALLENGER LIAISON

The Secretary of State's 2022 revised manual imposes a new requirement that "[c]hallengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff." Before issuance of the Secretary's revised manual in 2022, challengers were allowed to directly communicate with election inspectors. Now, absent permission from the challenger liaison, "challengers must not communicate with election inspectors who are not the challenger liaison." [28]

Materially altering the 20-year practice of allowing challengers to directly communicate with election inspectors is not a matter of explanation, nor can it be characterized as instruction, clarification or guidance, or anything other than an enforceable rule. It is, therefore, a rule. [29] Indeed, the new requirement is premised on the acceptance of an interpretation of MCL 168.733(1)(e) that has never, before today, been accepted by our courts, let alone been subjected to review under the APA.

***25** A majority of this Court claims the challenger-liaison requirement does not have "the force and effect of law" as applied to challengers. But the majority confoundingly admits that "the limitation on speaking with any election inspector other than one identified as the challenger liaison is stated in mandatory terms[.]" The majority also admits that challengers who fail to comply with the challenger-liaison mandate may be expelled. Attempting to justify how this enforceable mandate is not a rule because it lacks "the force and effect of law," the majority highlights that "the manual does not instruct that inspectors are *required* to expel challengers who violate that prohibition." But the absence of one potential legal effect in the manual (i.e., automatic expulsion) for the violation of a mandatory term (i.e., the prohibition on speaking to anyone other than the challenger liaison) does not somehow negate the force and legal effect of that mandatory term.

The majority opinion then adds that expelling challengers is justified because "MCL 168.678 already provides election inspectors with the 'full authority to maintain peace, regularity and order at its polling place, and *to enforce obedience to their lawful commands* during any primary or election and during the canvass of the votes after the poll is closed.' " [30] This explanation does not hold water. If election inspectors are to demand "obedience to their *lawful* commands," they must presume the manual's challenger-liaison requirement has "*the force and effect of law*"; otherwise, the election inspector would not be issuing "*lawful* commands." Moreover, the general grant of authority under MCL 168.768 does not mean that any action the Secretary takes pursuant to that authority is not a rule. [31]

Further, the limitation at issue is in contradiction to the goal of party parity expressed elsewhere in the Michigan Election Law. MCL 168.674(1) requires that "the city and township board of election commissioners ... shall appoint for each election precinct and early voting site at least 3 election inspectors and as many more as in the board's opinion is required for the efficient, speedy, and proper conduct of the election." "The board of election commissioners shall appoint

at least 1 election inspector from each major political party and shall appoint an equal number, as nearly as possible, of election inspectors in each election precinct from each major political party."[32] And election-inspector applicants are required to indicate their "political party affiliation" on their application.[33] In this case, the Secretary of State, herself partisan, published a manual that purports to require local clerks, themselves partisan, to choose a single "challenger liaison," who may well be a partisan election inspector.

Even more egregious is that the Secretary of State's new rules allow a local clerk to designate as the challenger liaison members of their staff who are not election inspectors, which plainly conflicts with MCL 168.733(1)(e). The Secretary concedes that challenger liaisons at AVBPFs are also members of the local clerk's staff, not election inspectors. MCL 168.765a(2) provides that "the board of election commissioners shall appoint the election inspectors to absent voter counting boards not less than 21 days before the election at which the absent voter counting boards are to be used. [MCL 168.673a] and [MCL 168.674] apply to the appointment of election inspectors to absent voter counting boards under this section."[34] In *Hanlin v Saugatuck Twp*,[35] the Court of Appeals explained:

> ***26** These election inspectors are to be appointed by the city and township board of election commissioners. MCL 168.674. To be appointed an election inspector, a person shall file an application with a city, township, or village clerk in the county where the person wishes to serve as an election inspector. MCL 168.677(1). In addition, the person shall be a qualified voter, be of good reputation, and have sufficient education and clerical ability to perform the duties of the office. *Id.* A person shall not be appointed as an election inspector if the person or any member of the person's immediate family is a candidate for nomination or election or has been convicted of a felony or an election crime. MCL 168.677(3). Further, a person shall not be permitted to act as an election inspector if the person has not attended a school of instruction or passed an examination given by the election commission. *Id.*

The *Hanlin* Court rejected the assertion that "the township clerk nevertheless had the authority to act as an election inspector because, as the township clerk, she was the election official in charge of the election[.]"[36] The Court held that

> the Legislature has provided the precise manner in which persons may serve as election inspectors. When the Legislature has provided in MCL 168.677 the method by which a person may serve as an election inspector, a person may not ignore those requirements and serve as an election inspector without first being appointed by the board of election commissioners.[37]

The same is true here. The local clerk cannot simply appoint themselves or a member of their staff as an election inspector, let alone appoint them as a challenger liaison. And this makes abundant sense given that, after all, the election inspectors, who are to be selected in compliance with the partisan parity requirement, are there in large part to inspect and check the process and procedure of the clerks managing the elections. Identifying a member of the clerk's staff to be an election inspector or, more specifically, the challenger liaison, is akin to leaving the fox to guard the hen house. While the Court's majority acknowledges that the manual unlawfully "require[s] a challenger at an [AVBPF] to raise an issue listed in MCL 168.733(1)(e) to a challenger liaison who is not also an election inspector at that facility," the majority has nonetheless put blinders on to ignore the basic and undisputable fact that requiring a single challenger liaison will materially alter the balance built into this statutory structure, leaving roughly half the challengers without anyone who will listen—or at least leaving them with the impression that they are not being heard.

Along these same lines, MCL 168.733(1)(e) is clearly intended to give challengers an opportunity to raise concerns

about the integrity of the election process. There is no restrictive language suggesting that challengers cannot and should not raise an issue relating to any election inspector who is perceived to be improperly handling a ballot or violating an election law, regulation, or procedure. Yet if a challenger were to raise these issues regarding a challenger liaison's perceived misconduct, the challenger is restricted to raising these concerns to the very person who might have committed misconduct. Clearly, the Legislature did not intend that a single election inspector or clerk designee be granted sole authority to determine whether that very person made a mistake. Thus, limiting the ability of a challenger to address an issue with an election inspector who may be on sight and, instead, requiring all challengers to bring their concerns to a single challenger liaison changes the procedure set out in the statute. The lower courts' reasoning and conclusions on this point are eminently reasonable.

***27** Of greater concern, as noted by the Court of Claims,"[t]he authority to designate a 'challenger liaison' is absent from the Michigan Election Law—in fact, the very label appears nowhere in [the] statute." There is no statute, caselaw, or promulgated rule that supports the Secretary of State's desire to restrict the ability of challengers to communicate challenges or violations to election inspectors. And there is no authority allowing an election inspector or other person designated by a partisan clerk to possess some "special status" other than being named a chairperson.[38] The Michigan Election Law is clear. It simply does not allow for the Secretary to afford any particular election inspector authority beyond that of any other election inspector. Indeed, "[*e*]*ach* board of election inspectors *shall possess full authority* to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any primary or election and during the canvass of the votes after the poll is closed."[39]

Yet a majority of the Court ignores the above statutory structure and instead hangs its interpretative hat on the Secretary of State's preferred reading of a single statutory term. The majority asserts that under MCL 168.733(1)(e) "an election inspector" does not mean "any election inspector," as the lower courts concluded. But "[a]n" is an indefinite article that identifies a single, but not a specific, person or thing. As explained by the *Oxford English Dictionary*,[40] the term "a" is "[u]sed in an indefinite noun phrase referring to something not specifically identified (and, frequently, mentioned for the first time) but treated as one of a class: one, some, any (the oneness, or indefiniteness, being implied rather than asserted)."[41] The single but "not specific person or thing" here is an election inspector, of which there must be at least three at any given precinct. Thus, the majority's repeated observations that the statute "is silent regarding who is to receive any 'challenges' " simply means that the statute does not restrict the challenger's right as to which inspector the challenger can present challenges. But the manual undermines this common usage by reading "an election inspector" as referring to a "specific person or thing," namely, the designated challenger liaison of which there is only one per precinct. In other words, by designating a single person, who may or may not be an election inspector, as the person to whom challenges are to be presented, the Secretary converts the indefinite article into a definite article, which is the lone challenger liaison.

C. THE "IMPERMISSIBLE CHALLENGES" PROVISIONS

The Secretary of State correctly observes that the statutes only mandate recording challenges in three instances. These instances are described in MCL 168.727(1), which provides:

> [1] An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book. [2] A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct. [3] An election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter

> ballot or to have lost or destroyed the absent voter ballot.

***28** The third type of challenge has not been the subject of these proceedings and is mentioned only for completeness. The subsection's first challenge relates to voter qualifications, but it states, "An *election inspector* shall challenge an applicant ... if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct ...." [42] The second applicable challenge states, "A *registered elector* of the precinct *present in the polling place* may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct." [43] MCL 168.727(2) then provides as follows:

> Upon a challenge being made under subsection (1), an election inspector shall immediately do all of the following:
>
> (a) Identify as provided in [MCL 168.745] and [MCL 168.746] a ballot voted by the challenged individual, if any.
>
> (b) Make a written report including all of the following information:
>
> (*i*) All election disparities or infractions complained of or believed to have occurred.
>
> (*ii*) The name of the individual making the challenge.
>
> (*iii*) The time of the challenge.
>
> (*iv*) The name, telephone number, and address of the challenged individual.
>
> (*v*) Other information considered appropriate by the election inspector.
>
> (c) Retain the written report created under subdivision (b) and make it a part of the election record.
>
> (d) Inform a challenged elector of his or her rights under [MCL 168.729.]

By contrast, the 2022 revised manual modifies the standard for challenges that must be recorded by establishing "permissible" and "impermissible" challenges. It provides, in pertinent part:

> **Challenges to a Voter's Eligibility**
>
> A challenger may make a challenge to a voter's eligibility to cast a ballot only if the challenger has a good reason to believe that the person in question is not a registered voter. There are four reasons that a challenger may challenge a voter's eligibility; **a challenge made for any other reason than those listed below is impermissible.** The four permissible reasons to challenge a voter's eligibility are:
>
> 1. The person is not registered to vote;
>
> 2. The person is less than 18 years of age;
>
> 3. The person is not a United States citizen; or
>
> 4. The person has not lived in the city or township in which they are attempting to vote for 30 or more days prior to the election.
>
> The challenger must cite one of the four listed permissible reasons that the challenger believes the person is not a registered voter, and the challenger must **explain the reason the challenger holds that belief.** If the challenger does not cite one of the four permitted reasons to challenge this voter's eligibility, or cannot provide support for the challenge, the challenge is impermissible. [44]

The parties' arguments and the majority opinion focus on potential discrepancies between MCL 168.727(1) and the earlier mentioned statute, MCL 168.733(1)(c), which provides for a challenger's rights. But these arguments miss the point. In fact, under the Michigan Election Law, an elector or challenger is vested by statute with authority to bring a challenge that does not squarely fall within the discrete parameters labeled "permissible" challenges but may still provide a basis that implicates a voter's eligibility. There are myriad challenges that may or may not be, as the majority states, within "the scope of a challenge." For instance, a challenger may believe a voter had already voted in another precinct. [45] Yet that would be an impermissible challenge under the manual. Turning to categories of challenges that are permissible under the new manual, a challenger may reasonably believe that a voter is not of age. A challenger may suspect that a voter is not a United States citizen because they have previously seen the voter present a Permanent Resident Card yet not be aware the voter had later become a United States citizen. Of course, whether a "person has not lived in the city or township in which they are attempting to vote for 30 or more days prior to the election" [46] presents fertile ground for a plethora of challenges that may

not appear directly related to a "permissible" challenge. But the manual provides concrete and rigid requirements and provides the election inspector discretion to determine whether that challenge falls within the designated categories of permissible challenges. The guidance plainly allows for the dismissal of voter-registration challenges that are otherwise permitted under the Michigan Election Law.

***29** Nothing in MCL 168.727 purports to give election inspectors the discretion to determine sua sponte whether a challenge is permissible. In fact, I agree with the majority's conclusion that an election inspector cannot decline to record a challenge on the basis that they believe the explanation provided is lacking or insufficient on the following basis:

> MCL 168.727(2) requires that the election inspector, "shall immediately" "[m]ake a written report" "[u]pon a challenge being made under [MCL 168.727(1)]." MCL 168.727(2)(b). The temporal immediacy requirement is activated when the challenge is made, not when the challenge is determined to be valid. Such an immediacy requirement would be undermined by requiring an election inspector to assess the validity of a challenge before recording it. [47]

Yet I fail to see how this reasoning does not apply equally to all challenges, whether deemed permissible or impermissible under the manual. If a challenge does not fall within the specifically delineated categories of permitted challenges, it is not a permissible challenge under the plain terms of the new manual. Further, the manual improperly allows an inspector the power to eliminate any record of the challenge and, therefore, any opportunity to review this determination in the future.

I also conclude that the Secretary lacked authority to authorize the ejection of election challengers from the polling places and counting centers. The Michigan Election Law expressly provides for the removal of challengers in limited circumstances, and as the Court of Appeals concluded, Michigan law "does not authorize [the Secretary] to adopt a rule providing other reasons for expulsion." [48] For example, MCL 168.733(3) provides that "disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board." Accordingly, "unless the repeated 'impermissible' challenges rise to the level of disorderly conduct, ... there is no basis in law for the challenger's expulsion." [49] So while the Michigan Election Law does authorize the removal of challengers who are intoxicated or engage in "disorderly conduct," the law does not permit the Secretary to lower the statutory threshold of conduct necessary to remove a challenger from a place they otherwise have an express statutory right to remain. [50]

III. CONCLUSION

Contrary to the conclusions espoused in the majority opinion, the revised manual disseminated by the Secretary of State imposes on Michigan's election process duties and obligations found nowhere in the Michigan Election Law. Indeed, every lower-court judge has held that these revisions cannot be characterized as explanatory to elude public discussion of these provisions under the APA. While agreeing with the lower courts that three provisions of the revised manual are unlawful, a narrow majority of this Court endorses the remainder of the provisions of the revised 2022 manual despite the lack of transparency in which these revisions assumed the force and effect of law. This result will not instill confidence that the Michigan election process is fair, open, and transparent.

***30** In addition, every lower-court judge has held that these revisions conflict with the Michigan Election Law. I agree. The Secretary of State lacks authority to require a Michigan Challenger Credential Card, the absence of which now bars otherwise properly authorized election challengers from participating in upholding the integrity of the election process. Similarly, the Secretary's requirement that challengers lodge all election challenges through a single designated challenger liaison, who may or may not be an election inspector, unduly restricts the rights of election challengers to make challenges through any election inspector on site, as has been the practice for years prior to issuance of the revised manual. Finally, nothing in the Michigan Election Law permits the newly created challenger liaison to segregate challenges on the basis of the liaison's determination of whether the challenge has merit. For these reasons, I dissent from the majority opinion and would affirm the lower courts' decisions in full.

David F. Viviano, J. concurs and agrees.

All Citations

--- N.W.3d ----, 2024 WL 3976495

Footnotes

1 For the remainder of this opinion, the May 2022 update to "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" will be referred to, simply, as "the manual." The 2024 version of the manual is materially the same for the purposes of this case except for the removal of the provisions addressing possession of electronic devices, which is discussed later in this opinion. For that reason, we refer to provisions in the manual in the present tense, with the exception of the provisions addressing possession of electronic devices.

2 To the best of our knowledge, the August 2022 primary election was held without a challenge to the manual's provisions.

3 For readability purposes, when it is not necessary to identify the O'Halloran plaintiffs and the DeVisser plaintiffs separately, we refer to them collectively as "plaintiffs." Although the Court of Claims found in plaintiffs' favor for five challenges, the fifth challenge was to a bar on appointing challengers on Election Day. This issue was never appealed, and we do not address it in this opinion.

4 Before this Court granted the stay, the Court of Appeals consolidated the two cases. *O'Halloran v Secretary of State*, unpublished order of the Court of Appeals, entered October 31, 2022 (Docket Nos. 363503 and 363505).

5 MCL 167.730(2) clarifies that a "candidate for the office of delegate to a county convention may serve as a challenger in a precinct other than the 1 in which he or she is a candidate."

6 Although it is not essential to go into the details of the APA's processes because the agency did not enact formal rules here, the procedure is elaborate, time-consuming, and resource-intensive. For example, it requires public hearings, public participation, notice, approval by a joint legislative committee on rulemaking, and passage of time between each process. See *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs.*, 431 Mich. 172, 178, 428 N.W.2d 335 (1988).

7 MCL 168.730 and MCL 168.731 are also silent. MCL 168.731(1) provides that a nonpolitical party organization must submit a "facsimile of the card to be used" by the appointed challenger. But used in this context, a "facsimile" is merely "an exact copy." *Merriam-Webster's Collegiate Dictionary* (11th ed.). Thus, MCL 168.731(1) merely requires submission of an exact copy of the credential card to be used, but it does not prohibit the Secretary from mandating use of a uniform form and does not grant an organization the right to use its own form.

8 These issues include the "[i]mproper handling of a ballot by an elector or election inspector," "[a] violation of a regulation made by the board of election inspectors pursuant to [MCL 168.742]," "[c]ampaigning being performed by an election inspector or other person in violation of [MCL 168.744]," and "[a] violation of election law or other prescribed election procedure." MCL 168.733(1)(e)(*i*) to (*iv*).

9 We agree with the Court of Appeals that the Secretary has the authority "to issue binding non-rule instructions on election workers," *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 14, and plaintiffs do not contest that conclusion. See also MCL 168.765a(17). Accordingly, the question is whether this manual provision has the "force and effect of law" as applied to challengers.

10 We disagree with plaintiffs and the Court of Appeals that MCL 168.733(3) provides the exclusive basis for expulsion of a challenger. Notably, MCL 168.733(3) provides only that "[a]ny evidence of drinking of alcoholic beverages or disorderly conduct is *sufficient cause* for the expulsion of a challenger from the polling place or the counting board"; it does not state that these are necessary or exclusive preconditions for expulsion. And

while MCL 168.732 provides qualified challengers the "right ... to be present" in a polling place, we conclude this right is conditional on the authority of election inspectors to maintain peace and enforce lawful commands under MCL 168.678.

11 While the mandatory recording requirement applies to any challenge raised under MCL 168.727(1), the manual only distinguishes between "permissible" and "impermissible" challenges regarding challenges that one is not a registered elector of the precinct.

12 This opinion does not suggest that the Secretary may expand the list of impermissible challenges to include factors not provided for by statute. Rather, this opinion holds that as long as the phrase "impermissible challenges" merely provides guidance as to the types of challenges beyond the scope of those delineated in the statute, it presents mere agency guidance, which need not be promulgated formally through the APA.

13 Justice ZAHRA's dissent attempts to counter this conclusion with the assertion that

> under the Michigan election law an elector or challenger is vested by statute with authority to bring a challenge that does not squarely fall within the discrete parameters labeled "permissible" challenges but may still provide a basis that implicates a voter's eligibility. There are myriad challenges that may or may not be, as the majority states, within "the scope of a challenge.". For instance, a challenger may believe a voter had already voted in another precinct. *Post* at 24-25.

We are not persuaded. The sole example provided by Justice ZAHRA would fall within the scope of a challenge premised on someone not being a registered elector within the precinct. The period of residency within the precinct is inherent in the definition of "qualified elector," and "residence" is a requirement for voting under the Michigan Election Law. See MCL 168.10 (defining "qualified elector"); MCL 168.11 (defining "residence"); MCL 168.727(1) (stating that an election inspector must "challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector in the precinct" and that a registered elector of the precinct "present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct"); MCL 168.491 ("The inspectors of election at an election, primary election, or special election in this state shall not receive the vote of an individual whose name is not on the voter registration list generated from the qualified voter file for the precinct in which he or she offers to vote unless the individual meets the requirements of [MCL 168.523a], or the individual registered to vote in person at the city or township clerk's office in the city or township in which he or she resides during the 14 days before the day of an election or on the day of an election and the individual presents a voter registration receipt to the inspectors of election."); MCL 168.492 ("Each individual who has the following qualifications of an elector is entitled to register as an elector in the township or city in which he or she resides. The individual must be a citizen of the United States; not less than 17-½ years of age; a resident of this state; and a resident of the township or city."). The Michigan Election Law also requires registered electors to provide identifying information (or sign an affidavit if they do not have their identification) before being issued a ballot at a polling location, which can then be compared against the electronic poll book or qualified voter file by an election worker at the polling location. See MCL 168.523 (describing the process for verifying an elector's identity); MCL 168.509q (describing the information that must be included in a qualified voter file). MCL 168.668b (describing the requirements for cities and townships to use approved electronic poll book software that is derived from the qualified voter file). A person who somehow manages to double vote is subject to felony prosecution under state and federal law. See MCL 168.932a; 52 USC 10307(e).

14 For this reason, the lower courts erred by holding broadly that MCL 168.727(2) requires reporting of *all* challenges brought under MCL 168.733(1)(c). See *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 12-13. There is admittedly significant overlap between a voter-eligibility challenge under MCL 168.727(1) and challenges under MCL 168.733(1)(c) such that any challenge under the latter will often

also be under the former and therefore subject to mandatory reporting. Thus, as a matter of policy, it may be preferable to report all challenges brought under either subsection. But there are also circumstances in which a voting-rights challenge under MCL 168.733(1)(c) will not fall within the scope of MCL 168.727(1), and the statute does not *require* mandatory reporting for such challenges. For example, MCL 168.727(1) applies to a "registered elector of the precinct present in the polling place," whereas MCL 168.733(1)(c) applies to challenges from a "challenger" at both a polling place *and* a counting board, regardless of whether the challenger is also a "registered elector of the precinct."

15 Effective February 13, 2024, the Legislature amended MCL 168.765a to add Subsection 18, which provides as follows:

Except as otherwise provided in this subsection, an individual shall not photograph, or audio or video record, within an absent voter counting place. A county, city, or township clerk, or an assistant of that clerk, shall expel an individual from the absent voter counting place if that individual violates this subsection. This subsection does not apply to any of the following:

(a) An individual who photographs, or audio or video records, posted election results within an absent voter counting place.

(b) A county, city, or township clerk, or an employee, assistant, or consultant of that clerk, if the photographing, or audio or video recording, is done in the performance of that individual's official duties.

(c) If authorized by an individual in charge of an absent voter counting place, the news media that take wide-angled photographs or video from a distance that does not disclose the face of any marked ballot.

16 Former MCL 168.765a included provisions that (1) limited the communication of information regarding the process of tallying votes, see MCL 168.765a(9) and (10), as amended by 2020 PA 177, and (2) required challengers to take an oath not to photograph or audio/video record at the counting place, MCL 168.765a(9), as amended by 2020 PA 177.

1 Emphasis added.

2 Like Justice ZAHRA, I also agree with the majority that plaintiffs' challenge to the manual's provisions regarding the possession of electronic devices in an absent-voter-ballot-processing facility while absent-voter ballots are being processed until the close of polls on Election Day is moot. After the present litigation began, the Legislature amended MCL 168.765a to explicitly allow photography and videorecording under certain circumstances. The Secretary of State amended the manual in accordance with this change and, in so doing, removed the challenged electronic-device prohibition.

1 See Michigan Bureau of Elections, *The Appointment, Rights and Duties of Election Challengers and Poll Watchers* (September 2020), available at <https://mielections.csod.com/clientimg/mielections/MaterialSource/f82645e1-1ee1-461c-ac50-60cb3584f345_9_23_20_Challenger_Booklet.pdf> (accessed August 8, 2024) [https://perma.cc/59E7-CPVS].

2 See Michigan Bureau of Elections, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), attached as Exhibit C to the Secretary of State's February 24, 2023 Appellate Brief in the Court of Appeals.

3 MCL 168.730(1); MCL 168.731(1).

4 MCL 168.733(e).

5 *O'Halloran v Secretary of State*, 510 Mich 970, 981 N.W.2d 149 (2022); *DeVisser v Secretary of State*, 510 Mich 994, 980 N.W.2d 709 (2022). The majority's decision to grant the motion to stay was itself extraordinary because not only was the motion not even properly before the Court, it was decided without mention of any applicable legal standard or reasoning to support its decision to stay the case. See *O'Halloran*, 510 Mich. at 984-986, 981 N.W.2d 149 (VIVIANO, J., dissenting); *DeVisser*, 510 Mich at 1008-1010, 980 N.W.2d 709 (VIVIANO, J., dissenting).

6 *O'Halloran v Secretary of State*, —— Mich App ——; —— NW3d ——, 2023 WL 6931928 (October 19, 2023) (Docket Nos. 363503 and 363505).

7 *O'Halloran v Secretary of State*, —— Mich ——; 6 NW3d 397, 398 (2024).

8 As noted in the majority opinion, "MCL 168.732 outlines three requirements that every challenger appointed under MCL 168.730 or MCL 168.731 must possess to be credentialed: (1) authority signed by the appropriate individual, as recognized by the statute; (2) the written or printed name of the challenger; and (3) the number of the precinct to which the challenger is assigned."

9 Defendants do not refute that election officials in 2022 failed to honor a challenger's presentation of credentials in full compliance with the statutory requirements under MCL 168.732 simply because the credential was not on the Secretary's sanctioned form. This is strong evidence that the Secretary's new requirement violates the clear language of the statute.

10 Emphasis added.

11 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p. 5.

12 As concluded in the majority opinion, plaintiffs' challenge to the manual's provisions that prohibited the possession of electronic devices in an [AVBPF] while absent voter ballots are being processed until the close of polls on Election Day is moot. The Legislature has amended MCL 168.765a to effectively permit the possession and limited use of electronic devices in [AVBPFs]. I also agree with the conclusions in the majority opinion that the revised manual unlawfully "require[s] a challenger at an [AVBPF] to raise an issue listed in MCL 168.733(1)(e) to a challenger liaison who is not also an election inspector at that facility," see Part II(B) of this opinion, and that "an election inspector cannot decline to record [a challenge] on the basis that they believe the explanation provided is lacking or insufficient," see Part II(C) of this opinion. These three points represent the extent of my agreement with the Court's majority opinion.

13 Given that the statute later refers to evidence, "authority" here plainly means the source of "[t]he official right or permission to act, esp. to act legally on another's behalf[.]" *Black's Law Dictionary* (12th ed.).

14 MCL 168.732 (emphasis added).

15 *Id.*

16 MCL 168.31(1) provides as follows:

> The secretary of state shall do all of the following:
>
> (a) ... [I]issue instructions and promulgate rules pursuant to the [APA] for the conduct of elections and registrations in accordance with the laws of this state.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.

(c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots, directions on the location of voting stations in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act.

* * *

(e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.

17 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), pp. 4-5.

18 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p. 4 (emphasis added).

19 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p. 4.

20 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), pp. 4-5.

21 Notably, the state has done away with mandates for in-person identification for voting, and in a similar manner, the Legislature made a policy judgment to provide challengers broader access to polling locations to observe and confirm the legality of vote-counting processes. But now, the Secretary of State imposes novel mandates to restrict the access of observers to the electoral process. These limits find no basis in the relevant statute and amount to a revision by the Secretary of State of controlling policy decisions properly made by the Legislature. Just as this Court or some agency cannot replace the Legislature's policy decisions to substantially open up voting without identification, so also the Secretary cannot do the same for challengers simply because she is skeptical of their use or potential for abuse.

22 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), pp. 4-5.

23 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), pp. 4-5 (emphasis added).

24 See *Bradley v Saranac Community Sch.*, 455 Mich. 285, 298, 565 N.W.2d 650 (1997) ("This Court recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things.").

25 *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 27-28, 811 N.W.2d 98 (2011) ("Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law ... to effectuate the legislative purpose as found in harmonious statutes.") (quotation marks and citation omitted); *Robertson v DaimlerChrysler Corp*, 465 Mich. 732, 746, 641 N.W.2d 567 (2002) (explaining the presumption that language in a statute is not "superfluous, nugatory, and without independent effect") (quotation marks and citation omitted).

26 Of course, the Secretary of State may choose to offer challengers the option of using the Michigan Challenger Credential Card. The APA defines "guideline" as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7). If a challenger opts to use the Michigan Challenger Credential Card, the Secretary is bound to accept the Michigan Challenger Credential Card. But a challenger that opts not to use the Michigan Challenger Credential Card is not bound by the guideline and cannot be barred from the process merely for opting not to use the Secretary's preferred card.

27 *O'Halloran*, 510 Mich. at 987, 981 N.W.2d 149 (VIVIANO, J., dissenting); *DeVisser*, 510 Mich at 1012, 980 N.W.2d 709 (VIVIANO, J., dissenting).

28 Curiously, the revised manual states that challengers have the right to be treated with respect by election inspectors. Yet the manual also prohibits challengers from speaking with or interacting with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff. See *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p. 6.

29 See *Faircloth v Family Independence Agency*, 232 Mich App 391, 404, 591 N.W.2d 314 (1998) ("The policies are not interpretive statements because they do not merely interpret or explain the statute or rules from which the agency derives its authority. Rather, they establish the substantive standards implementing the program."). The "explanation" provided by an interpretive statement must be geared toward uncertain statutory language, where the implementing agency alerts the public to what it believes the statute means, i.e., the interpretation "reminds affected parties of *existing* duties" rather than "creat[ing] *new* law, rights or duties ...." *Tennessee Hosp. Ass'n v Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (quotation marks and citations omitted; emphasis added). See *Clonlara, Inc. v State Bd. of Ed.*, 442 Mich. 230, 241, 501 N.W.2d 88 (1993) ("[Interpretive rules] state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.") (quotation marks and citation omitted); *id.* at 243-244, 501 N.W.2d 88 ("Interpretive rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to *advise* the public of the agency's construction of the law it administers.") (quotation marks and citation omitted).

30 Emphasis added.

31 See MCL 24.207 (defining "rule" as including an agency action "that implements or applies law enforced or administered by the agency"); see also *United States v Two Hundred Thousand Dollars ($200,000) in US Currency*, 590 F Supp 866, 871 (SD Fla, 1984) ("That Form 4790 is a 'legislative' rule rather than an interpretative one or a general statement of policy is apparent from the fact that the form was clearly intended to implement the pertinent statute and the regulation; [5 USC] 551(4) of the [federal] APA distinguishes agency statements designed to *implement* a law from those designed to *interpret* it.") (citations omitted).

32 MCL 168.674(2).

33 MCL 168.677(2).

34 MCL 168.673a and MCL 168.674 are the provisions relating to the appoint of election inspectors generally.

35 *Hanlin v Saugatuck Twp*, 299 Mich App 233, 245, 829 N.W.2d 335 (2013).

36 *Id.* at 245-246, 829 N.W.2d 335.

37 *Id.* at 246, 829 N.W.2d 335.

38 MCL 168.674(2) provides that "[t]he board of election commissioners shall designate 1 appointed election inspector as chairperson," who has some additional administrative duties, such as signing a receipt for unused and spoiled ballots, see MCL 168.741, or receiving packages of absent voter ballots, see MCL 168.762.

39 MCL 168.678 (emphasis added).

40 Oxford English Dictionary online <https://www.oed.com/dictionary/a_adj> (rev 2008) (accessed August 20, 2024).

41 See, e.g., *McFadden v United States*, 576 U.S. 186, 191, 135 S Ct 2298, 192 L.Ed.2d 260 (2015) (explaining that "*a* controlled substance" refers to an "undefined or unspecified" controlled substance, rather than a specific and limited controlled substance) (quotation marks and citations omitted).

42 MCL 168.727(1) (emphasis added).

43 *Id.* (emphasis added).

44 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), pp. 11-12.

45 MCL 168.730(3) provides that "[a] challenger may be designated to serve in more than 1 precinct." Double voting is rare though sometimes happens. See Mauger, *Macomb County clerk reports 'possible double voting' by 4 individuals*, Detroit News (August 15, 2024), available at <https://www.detroitnews.com/story/news/politics/2024/08/15/macomb-county-clerk-reports-possible-double-voting-by-4-individuals/74818713007/> (accessed August 18, 2024) [https://perma.cc/HMX4-QYSL].

46 *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p. 12.

47 Alterations in original.

48 *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 13.

49 *O'Halloran*, —— Mich App at ——, —— N.W.3d ——; amended slip op. at 13.

50 See MCL 168.732 (stating that credentialed challengers have the "right ... to be present inside the room where the ballot box is kept").

APPENDIX I

2024 WL 3610196
Only the Westlaw citation is currently available.
Supreme Court of Michigan.

MICHIGAN FARM BUREAU, et al.,
Plaintiffs-Appellees/Cross-Appellants,
v.
DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,
Defendant-Appellant/Cross-Appellee.

Docket No. 165166
|
Calendar No. 3
|
Argued January 11, 2024
|
Decided July 31, 2024

Synopsis

Background: Farmers' associations and farms that were regulated as concentrated animal feeding operations (CAFO) brought declaratory judgment action against Department of Environment, Great Lakes, and Energy (EGLE), challenging validity of discretionary conditions set forth in a National Pollutant Discharge Elimination System (NPDES) general permit for CAFOs. The Court of Claims, Cynthia Diane Stephens, J., 2020 WL 8465996, granted EGLE's motion for summary disposition. Plaintiffs appealed. The Court of Appeals, 343 Mich.App. 293, 997 N.W.2d 467, affirmed. EGLE sought leave to appeal, which was granted, and plaintiffs filed a cross-application for leave to appeal, which was denied.

Holdings: The Supreme Court, Clement, C.J., held that:

[1] general permit and its discretionary conditions were not agency rules that could be challenged via a declaratory judgment action, but

[2] compliance with discretionary conditions could be obtained as an obligation of a certificate of coverage.

Affirmed in part and vacated in part.

Welch, J., filed concurring opinion.

Viviano, J., filed dissenting opinion, in which Zahra, J., agreed.

Procedural Posture(s): On Appeal; Motion for Summary Disposition.

West Headnotes (44)

[1] Environmental Law Discharge of pollutants

Under the Clean Water Act (CWA), "point sources" are prohibited from discharging any pollutants into navigable waters unless they have a valid National Pollutant Discharge Elimination System (NPDES) permit. Federal Water Pollution Control Act § 402, 33 U.S.C.A. § 1342.

1 Case that cites this headnote

[2] Environmental Law Conditions and limitations

A National Pollutant Discharge Elimination System (NPDES) permit does not allow a point source to discharge pollutants in any amount or in any manner the point source pleases; the NPDES permit includes conditions that restrict the manner in which a point source operates or restrict the quantity or concentrations of pollutants the point source may discharge, and those conditions usually are in the form of either effluent limitations or best-management practices. Federal Water Pollution Control Act §§ 301, 304, 402, 33 U.S.C.A. §§ 1311, 1314, 1342(a)(2); 40 C.F.R. § 122.44(k).

[3] Environmental Law Conditions and limitations

"Effluent limitations," as a condition of a National Pollutant Discharge Elimination System (NPDES) permit, are numerical limitations restricting the quantities, rates, and concentrations of specified substances which are discharged from point sources. Federal Water

Pollution Control Act §§ 301, 304, 402, 33 U.S.C.A. §§ 1311, 1314, 1342(a)(2).

[4] **Environmental Law** Conditions and limitations

"Best-management practices," as a condition of a National Pollutant Discharge Elimination System (NPDES) permit, are qualitative restrictions on the way a point source operates, including schedules of activities, prohibitions of certain practices, or requirements of certain maintenance procedures. Federal Water Pollution Control Act § 402, 33 U.S.C.A. § 1342(a)(2); 40 C.F.R. § 122.44(k).

[5] **Environmental Law** Water Quality Standards or Plans

"Water quality standards" that states are required to establish pursuant to the Clean Water Act (CWA) specify a maximum concentration of pollutants that may be present in water without impairing its suitability for a designated use, such as swimming or drinking. Federal Water Pollution Control Act §§ 303, 305, 33 U.S.C.A. §§ 1313, 1315; Mich. Admin. Code r. 323.1041 et seq.

[6] **Environmental Law** Conditions and limitations

Environmental Protection Agency (EPA) and Department of Environment, Great Lakes, and Energy (EGLE) rules require every National Pollutant Discharge Elimination System (NPDES) permit for concentrated animal feeding operations (CAFO) to include certain conditions, but federal and state law give EGLE discretion to include extra conditions in a permit that are more stringent than these conditions when EGLE decides those conditions are necessary to achieve applicable Part 4 water-quality standards or to comply with applicable laws and regulations. Federal Water Pollution Control Act §§ 301, 304, 402, 33 U.S.C.A. §§ 1311, 1314, 1342(a)(2); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2196(5).

[7] **Administrative Law and Procedure** Procedure for Adoption

Because a rule alters rights or imposes obligations on society or an open-ended class, the state Administrative Procedures Act (APA) prescribes an elaborate procedure for rule promulgation. Mich. Comp. Laws Ann. § 24.231 et seq.

[8] **Administrative Law and Procedure** Procedure for Adoption

Procedures under the state Administrative Procedures Act (APA) for rule promulgation ensure that the various groups who will be affected by a rule may take part in the rulemaking process and that the agency carefully considers all possible consequences and implications before making a final decision. Mich. Comp. Laws Ann. § 24.231 et seq.

[9] **Environmental Law** Government entities, agencies, and officials

Department of Environment, Great Lakes, and Energy (EGLE) had appellate standing to challenge the judgment of Court of Appeals affirming the Court of Claims' dismissal, for lack of subject-matter jurisdiction, a declaratory judgment action challenging a general National Pollutant Discharge Elimination System (NPDES) permit that EGLE issued for concentrated animal feeding operations (CAFO), where the Court of Appeals' holding that the discretionary conditions in the NPDES permit were administrative rules might have hindered EGLE's ability to fulfill its statutory duties under another part of the permit. Federal Water Pollution Control Act § 402, 33 U.S.C.A. § 1342(a)(2); Mich. Comp. Laws Ann. § 24.264; 40 C.F.R. § 122.41; Mich. Admin. Code r. 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

[10] **Appeal and Error** De novo review

Supreme Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. Mich. Ct. R. 2.116(C).

[11] **Appeal and Error** Subject-matter jurisdiction

Supreme Court reviews questions of subject-matter jurisdiction de novo.

[12] **Appeal and Error** Statutory or legislative law

Supreme Court reviews questions of statutory interpretation de novo.

[13] **Courts** Jurisdiction of Cause of Action

"Subject-matter jurisdiction" is a legal term of art that refers to the authority of the court to exercise judicial power over a class or category of cases.

[14] **Courts** Jurisdiction of Cause of Action

If a law specifies that a court has the power to adjudicate a class or category of cases and a case falls within that class or category, the court has subject-matter jurisdiction to hear the case, even if the facts of the case do not entitle the plaintiff to relief.

[15] **Courts** Time of making objection

Courts Determination of questions of jurisdiction in general

Because subject-matter jurisdiction is a prerequisite for a court to hear and decide a claim, the court may consider it sua sponte at any time.

[16] **Courts** Of cause of action or subject-matter

Parties cannot confer subject-matter jurisdiction by their conduct.

[17] **Courts** Waiver of Objections

Parties cannot waive a subject-matter-jurisdiction challenge by not raising it.

[18] **Administrative Law and Procedure** Nature and purpose

Courts are to exercise reasoned judgment before branding an exhaustion-of-administrative-remedies requirement jurisdictional, because harsh consequences attend the jurisdictional brand.

[19] **Administrative Law and Procedure** Exhaustion of Administrative Remedies

Administrative Law and Procedure Nature and purpose

If an exhaustion-of-administrative-remedies requirement is jurisdictional, a party's failure to comply with it can be raised at any point during the proceedings, and a court must dismiss the action for the party's failure to comply, even if the issue is raised for the first time on appeal.

[20] **Courts** Determination of questions of jurisdiction in general

A court has no discretion to fashion equitable exceptions to a rule concerning subject-matter jurisdiction or to otherwise excuse noncompliance with rule.

[21] **Courts** Of cause of action or subject-matter

Courts Waiver of Objections

Subject-matter jurisdiction cannot be conferred by consent or waiver.

[22] **Courts** Determination of questions of jurisdiction in general

Although a court without subject-matter jurisdiction has no power to decide the merits of a case, a court must necessarily consider the nature of the claim to decide whether it has subject-matter jurisdiction; in other words, the court must decide whether a particular case falls within the category or class of cases over which it has power to adjudicate the merits.

[23] **Administrative Law and Procedure** Force of law in general

Like the federal Administrative Procedure Act (APA) that distinguishes between legislative rules, which have the force and effect of law, and interpretive rules and general statements of policy, which do not, the state Administrative Procedures Act (APA) distinguishes between legislative rules and a form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law; however, unlike the federal APA, under the state APA, the latter are not considered rules at all. 5 U.S.C.A. § 551 et seq.; Mich. Comp. Laws Ann. § 24.207(h).

[24] **Administrative Law and Procedure** Nature, scope, and definitions in general

An agency action is a "rule" under the state Administrative Procedures Act (APA) only if it meets, at minimum, the following elements: (1) it is an agency regulation, statement, standard, policy, ruling, or instruction; (2) it is of general applicability; (3) it implements or applies law enforced or administered by the agency, or it prescribes the organization, procedure, or practice of the agency; and (4) it, in itself, has the force and effect of law. Mich. Comp. Laws Ann. § 24.207.

[25] **Declaratory Judgment** State officers and boards

Discretionary conditions in National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for concentrated animal feeding operations (CAFO) were an agency regulation, statement, standard, policy, ruling, or instruction, as required for the conditions to be rules under the state Administrative Procedures Act (APA) and thus subject to challenge via a declaratory judgment action in the Court of Claims. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 24.207, 24.264, 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

[26] **Declaratory Judgment** State officers and boards

Discretionary conditions in National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for concentrated animal feeding operations (CAFO) implemented the law enforced or administered by EGLE, as required for the conditions to be rules under the state Administrative Procedures Act (APA) and thus subject to challenge via a declaratory judgment action in the Court of Claims, where conditions gave effect to the Natural Resources and Environmental Protection Act (NREPA) requirement that EGLE include conditions in general permits that EGLE deemed necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 24.207, 24.264, 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

1 Case that cites this headnote

[27] **Declaratory Judgment** State officers and boards

Discretionary conditions in National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for concentrated animal feeding operations (CAFO) were of general applicability, as required for the conditions to be rules under the state Administrative Procedures Act (APA) and thus subject to challenge via a declaratory judgment action in the Court of Claims, where conditions were EGLE's initial determination of what conditions in addition to and more stringent than the mandatory conditions were necessary to achieve Part 4 water-quality standards for anything meeting the definition of a CAFO. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 24.207, 24.264, 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

[28] **Declaratory Judgment** State officers and boards

National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for concentrated animal feeding operations (CAFO), along with the discretionary conditions in permit, did not have the force and effect of law, and thus the permit and conditions were not "rules" under the state Administrative Procedures Act (APA) that could be challenged via a declaratory judgment action in the Court of Claims, even if EGLE followed the APA's rulemaking procedures to issue the general permit and discretionary conditions, where EGLE had no delegated power to make rules concerning NPDES permits issued to CAFOs. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 24.207, 24.264, 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

[29] **Administrative Law and Procedure** Policy statements; ad hoc rules

If the legislature has not delegated to an agency the power to make rules, a statement of general applicability issued by the agency cannot be considered a "rule" under the state Administrative Procedures Act (APA). Mich. Comp. Laws Ann. § 24.207.

[30] **Administrative Law and Procedure** Policy statements; other informal pronouncements

If an agency lacks rulemaking power, any statement of general applicability issued by the agency necessarily lacks the force and effect of law, and thus the statement is not a "rule" under state Administrative Procedures Act (APA), no matter if the agency has issued it following APA rulemaking procedures. Mich. Comp. Laws Ann. §§ 24.207, 24.231 et seq.

[31] **Administrative Law and Procedure** Policy statements; other informal pronouncements

Generally, an agency's statement of general applicability has the force and effect of law to be considered a "rule" under the state Administrative Procedures Act (APA) when the statement itself alters rights or imposes obligations and has a present binding effect on regulated entities, the agency, and the courts. Mich. Comp. Laws Ann. § 24.207.

1 Case that cites this headnote

[32] **Administrative Law and Procedure** Interpretive rules and pronouncements

An agency's interpretive statement lacks the force and effect of law to be considered a "rule" under the state Administrative Procedures Act

(APA), because it is the underlying statute that determines how an entity must act, i.e., that alters rights or imposes obligations. Mich. Comp. Laws Ann. § 24.207.

1 Case that cites this headnote

[33] **Administrative Law and Procedure** Interpretive rules and pronouncements

Even if a regulated entity does not comply with an agency's interpretive statement, the statement, as a non-rule, does not bind an administrative law judge (ALJ) to sanction the entity in an enforcement action, nor does the statement bind a court on judicial review under the state Administrative Procedures Act (APA). Mich. Comp. Laws Ann. §§ 24.207, 24.301.

[34] **Administrative Law and Procedure** Policy statements; other informal pronouncements

An agency's statement announcing a policy it plans to establish in future adjudications generally lacks the force and effect of law to be a "rule" under the state Administrative Procedures Act (APA). Mich. Comp. Laws Ann. § 24.207.

[35] **Administrative Law and Procedure** Interpretive rules and pronouncements

If an agency's statement (1) merely explains what the agency believes an ambiguous provision of a statute or agency rule means or (2) explains what factors will be considered and what goals will be pursued when an agency exercises a discretionary power or conducts an adjudication, the statement will generally not be considered to have the force and effect of law as a "rule" under the state Administrative Procedures Act (APA). Mich. Comp. Laws Ann. § 24.207.

[36] **Environmental Law** Conditions and limitations

A concentrated animal feeding operation (CAFO) could be required to comply with the discretionary conditions in National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for CAFOs if the CAFO applied for and received a certificate of coverage under the general permit, even though the general permit and its discretionary conditions lacked the force and effect of law as rules under the state Administrative Procedures Act (APA), where it was the certificate of coverage, not the general permit itself, that granted the rights and imposed obligations on a CAFO, and EGLE still had power under Natural Resources and Environmental Protection Act (NREPA) to alter rights and impose obligations on individual parties that applied for permits. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 24.207, 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

1 Case that cites this headnote

[37] **Environmental Law** Conditions and limitations

When a concentrated animal feeding operation (CAFO) applied for a certificate of coverage and agreed to comply with discretionary conditions in National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for CAFOs, EGLE could not act as though the CAFO was automatically entitled to a certificate of coverage; EGLE retained discretion to deny a certificate of coverage and process the CAFO's application as an individual permit. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

[38] **Environmental Law** Conditions and limitations

The permitting discretion of Department of Environment, Great Lakes, and Energy (EGLE) with respect to National Pollutant Discharge Elimination System (NPDES) permits for concentrated animal feeding operations (CAFO) was not limited by the fact that a NPDES general permit that EGLE issued for CAFOs, along with the permit's discretionary conditions, did not have the force and effect of law as rules under the state Administrative Procedures Act (APA). Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 24.207, 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

[39] **Environmental Law** Conditions and limitations

Discretionary conditions in National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for concentrated animal feeding operations (CAFO) were not decisive of whether a CAFO would receive a certificate of coverage under the general permit; EGLE had discretion to deny an application for a certificate of coverage when EGLE determined that the discretionary conditions were inappropriate as applied to the applicant. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

1 Case that cites this headnote

[40] **Declaratory Judgment** State officers and boards

National Pollutant Discharge Elimination System (NPDES) general permit that Department of Environment, Great Lakes, and Energy (EGLE) issued for concentrated animal feeding operations (CAFO), along with the discretionary conditions in permit, did not have the force and effect of law, as required for the permit and conditions to be rules under the state Administrative Procedures Act (APA) that could be challenged via a declaratory judgment action in the Court of Claims, even if most CAFOs would feel pressured to apply for a certificate of coverage under the general permit and the EGLE was likely to grant them a certificate of coverage, where the general permit and discretionary conditions could not grant rights or impose obligations on EGLE, CAFOs, or the courts. Federal Water Pollution Control Act §§ 303, 402, 33 U.S.C.A. §§ 1313, 1342(a)(2); Mich. Comp. Laws Ann. §§ 24.207, 24.264, 324.3103(2), 324.3106, 324.3113(2), 600.6419(1)(a); 40 C.F.R. §§ 122.41, 122.44(k); Mich. Admin. Code r. 323.2189(2)(m), 323.2191, 323.2196(5), 323.2196(5)(a)(ix).

[41] **Administrative Law and Procedure** Procedure for Adoption

Administrative Law and Procedure Policy statements; other informal pronouncements

When an agency has not been empowered to promulgate rules, policy statements issued by it need not be promulgated in accordance with the procedures of the state Administrative Procedures Act (APA), and do not have the force of law. Mich. Comp. Laws Ann. § 24.201 et seq.

[42] **Administrative Law and Procedure** Annulment, Vacatur, or Setting Aside of Administrative Decision

If an agency without rulemaking power fails to establish the soundness of the policy underlying its statement of general applicability, or the agency or administrative law judge (ALJ) wrongfully treats the statement as legally binding, any order applying or enforcing the

policy may be vacated on judicial review under the state Administrative Procedures Act (APA). Mich. Comp. Laws Ann. §§ 24.207, 24.231 et seq.

[43] Administrative Law and Procedure Policy statements; other informal pronouncements

If the legislature has not delegated to an agency the power to make rules with respect to the subject matter a statement or policy of general applicability, that statement or policy necessarily lacks the force and effect of law and so cannot be considered a "rule" under the state Administrative Procedures Act (APA). Mich. Comp. Laws Ann. § 24.207(h).

1 Case that cites this headnote

[44] Administrative Law and Procedure Policy statements; other informal pronouncements

A statement or policy of general applicability of an agency without delegated rulemaking authority cannot alter rights, impose obligations, or have a present binding effect on regulated entities, the agency, or the courts; it can be only (1) a statement explaining what the agency believes an ambiguous provision of a statute or agency rule means, i.e., an interpretive statement, or (2) a statement explaining what factors will be considered and what goals will be pursued when an agency exercises a discretionary power or conducts an adjudication. Mich. Comp. Laws Ann. § 24.207(h).

BEFORE THE ENTIRE BENCH

OPINION

Clement, C.J.

***1** Plaintiffs filed an original action for declaratory judgment in the Court of Claims under MCL 24.264, which allows a litigant to challenge the validity or applicability of an administrative agency "rule." Plaintiffs argue that new conditions in a 2020 general permit [1] issued by defendant, the Department of Environment, Great Lakes, and Energy (EGLE), pursuant to Part 31 of the Natural Resources and Environmental Protection Act (the NREPA), MCL 324.3101 to MCL 324.3134, are "rules" and that the conditions are invalid because EGLE did not process them in accordance with the rulemaking procedures in Michigan's Administrative Procedures Act (the APA), MCL 24.201 *et seq.* We hold that neither the general permit nor the challenged conditions in it are "rules" under the APA, and we therefore conclude that the Court of Claims lacked subject-matter jurisdiction under MCL 24.264. Accordingly, we affirm the judgment of the Court of Appeals but vacate that part of its opinion holding that the challenged general-permit conditions are rules.

I. BACKGROUND

[1] To understand this case, some background on a complicated regulatory process is in order. It starts with the Clean Water Act, 33 USC 1251 *et seq.* In furtherance of its goal to restore and maintain the integrity of our nation's water, see *Maui v Hawaii Wildlife Fund*, 590 U.S. 165, 170, 140 S Ct 1462, 206 L Ed 2d 640 (2020), the Clean Water Act sets up a permitting system known as the National Pollutant Discharge Elimination System (NPDES) program. See 33 USC 1342. Under the Clean Water Act, "point sources" are prohibited from discharging any pollutants into navigable waters unless they have a valid NPDES permit. See *Maui*, 590 U.S. at 171, 140 S.Ct. 1462. Point sources are "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged." 33 USC 1362(14) (emphasis added).

The plaintiffs in this case include the Michigan Farm Bureau (an agriculture-focused trade association), concentrated animal feeding operations (CAFOs), and the owners of CAFOs. CAFOs are large-scale agricultural operations that raise hundreds—or sometimes thousands—of animals in close confinement for slaughter or dairy. See *Waterkeeper Alliance, Inc v US Environmental Protection Agency*, 399 F.3d 486, 492-493 (2nd Cir. 2005); see also 40 CFR 122.32 (2023); Mich Admin Code, R 323.2102(i). These animals produce a lot of manure and wastewater: a single large CAFO

can produce "one and a half times more than the annual sanitary waste produced by the city of Philadelphia ...." [2] To dispose of all this manure and wastewater, CAFOs often apply it to nearby farm fields or pay to have it hauled to other locations. When properly applied, the nutrients in the manure —largely phosphorus and nitrogen—serve as fertilizer for crops. See Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 Envt'l L 1215, 1220 (2008). But when excessively or improperly applied, the nutrients and bacteria from the manure and wastewater can run off into navigable waters or leach into groundwater, impairing water quality. See *Waterkeeper Alliance, Inc*, 399 F.3d at 493-494. [3] This is why CAFOs are considered point sources under the Clean Water Act and, with few exceptions, must obtain NPDES permits before beginning operation and must renew permits as they expire to continue operating. See Mich Admin Code, R 323.2196(1) and (2); *Milwaukee v Illinois & Michigan*, 451 U.S. 304, 318, 101 S Ct 1784, 68 L Ed 2d 114 (1981) ("*Every* point source discharge is prohibited unless covered by a permit ...."). [4]

***2** In Michigan, EGLE administers the NPDES program. See *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 535, 747 N.W.2d 321 (2008) (noting that the Environmental Protection Agency [the EPA] delegated the power to administer the NPDES program within Michigan's borders to Michigan under 33 USC 1342); MCL 324.3101 *et seq.* (wherein Michigan's Legislature in turn delegated this authority to EGLE). Under its authority to administer the NPDES program, EGLE has promulgated rules that provide requirements for NPDES permits and the process by which they are issued. These are EGLE's Part 21 rules, which are derived from Part 31 of the NREPA. See Mich Admin Code, R 323.2101 *et seq.*

A. PERMIT CONDITIONS

[2] **[3]** **[4]** An NPDES permit from EGLE does not allow a point source to discharge pollutants in any amount or in any manner the point source pleases. An NPDES permit includes conditions that restrict the manner in which a point source operates or restrict the quantity or concentrations of pollutants the point source may discharge. See 33 USC 1342(a)(2). Usually, these conditions are in the form of either effluent limitations or best-management practices. [5] See *Waterkeeper Alliance, Inc*, 399 F.3d at 496-497. Effluent limitations are numerical limitations restricting "the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Arkansas v Oklahoma*, 503 U.S. 91, 101, 112 S Ct 1046, 117 L Ed 2d 239 (1992), citing 33 USC 1311 and 33 USC 1314. Best-management practices are qualitative restrictions on the way a point source operates, including schedules of activities, prohibitions of certain practices, or requirements of certain maintenance procedures. See *Waterkeeper Alliance, Inc*, 399 F.3d at 496.

There are certain conditions that every NPDES permit must include or that every NPDES permit issued to a certain category of point source must include. Agency rules issued by the EPA and EGLE list these conditions and require EGLE to include them in every specified permit. See, e.g., 40 CFR 122.41 (2023); Mich Admin Code, R 323.2196(5). [6] Notably, EPA rules list certain best-management practices for CAFOs and require EGLE to include these practices as conditions in every permit issued to a CAFO. See 40 CFR 122.42(e) (2023); 40 CFR 412.4(c) (2023). Relevant here, one of the best-management practices prohibits CAFOs from applying manure and wastewater closer than 100 feet to any surface waters or potential conduits to surface waters unless a CAFO puts a 35-foot-wide "vegetated buffer" between the area where the waste was applied and the surface waters or potential conduit. See 40 CFR 412.4(c)(5)(*i*). These EPA-established best-management practices are incorporated by reference in EGLE's Part 21 rules. See Mich Admin Code, R 323.2189(2)(m). EGLE has also promulgated a Part 21 rule requiring all CAFO permits to include certain best-management practices beyond the ones listed in the EPA rules. See Mich Admin Code, R 323.2196(5). Relevant here, the EGLE rules require CAFO permits to include restrictions on applying manure on water-saturated or snow-covered ground. See Mich Admin Code, R 323.2196(5)(a)(ix).

***3** **[5]** It is important to highlight that these EPA rules and EGLE rules create only a mandatory minimum set of conditions that every NPDES permit issued to a CAFO must contain. Both federal and state law give EGLE discretion to include conditions in an NPDES permit that are in addition to—or more stringent than—the conditions provided by the rules. Specifically, under 40 CFR 122.44(d)(1) (2023), EGLE must include conditions "in addition to or more stringent than" the conditions set forth in the EPA rules that EGLE deems "necessary to ... [a]chieve [applicable] water quality standards," in the relevant waterway. See also 33 USC 1313; *American Paper Institute, Inc. v US Environmental Protection Agency*, 302 US App DC 80, 83, 996 F.2d 346 (1993). These "water quality standards" are those that the Clean Water Act

requires states to establish to safeguard specified designated uses of water. See 33 USC 1313 through 33 USC 1315. EGLE previously promulgated these water-quality standards on January 13, 2006, and they are codified in Part 4 of the Michigan Administrative Rules governing water-resources protection. See Mich Admin Code, R 323.1041 *et seq.* [7]

Similarly, in various provisions, Part 31 of the NREPA requires EGLE to include any conditions in an NPDES permit that EGLE deems necessary to achieve applicable Part 4 water-quality standards or to comply with applicable laws and regulations. [8] In particular, MCL 324.3106 requires EGLE to ensure that any permit issued "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," and it allows EGLE to "set permit restrictions that will assure compliance with applicable federal law and regulations." One such applicable federal regulation is 40 CFR 122.44(d)(1) (2023), which, again, requires EGLE to include conditions "in addition to or more stringent than" the conditions set forth in the EPA rules that EGLE deems necessary to ensure a waterway receiving pollutants will meet Part 4 water-quality standards. Finally, MCL 324.3113(2) provides, "If a permit is granted, the department shall condition the permit upon such restrictions that the department considers necessary to adequately guard against unlawful uses of the waters of the state as are set forth in [MCL 324.3109]." [9]

[6] In sum, EPA and EGLE rules require every CAFO permit to include certain conditions, but federal and state law give EGLE discretion to include extra conditions in a permit that are more stringent than these conditions when EGLE decides those conditions are necessary to achieve applicable Part 4 water-quality standards or to comply with applicable laws and regulations. For ease of reference, we will refer to the former as "mandatory conditions" and the latter as "discretionary conditions."

B. THE INDIVIDUAL NPDES PERMITTING PROCESS

***4** In addition to the Part 21 EGLE rules requiring all NPDES permits issued to CAFOs to include certain best-management practices as conditions, see Mich Admin Code, R 323.2189(2)(m); Mich Admin Code, R 323.2196(5), EGLE also promulgated Part 21 rules establishing procedures for issuing NPDES permits. To start, a point source sends a permit application to EGLE. See Mich Admin Code, R 323.2115(1). After receiving the permit application, EGLE must make "preliminary determinations on the application, including a proposed determination to issue or deny" the permit. *Id.* If EGLE's preliminary determination is to issue the permit, EGLE must prepare a draft permit including (1) the mandatory conditions and (2) any discretionary conditions EGLE deems necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations. See Mich Admin Code, R 323.2115(2) and (3). [10]

Once EGLE has prepared a draft permit, EGLE must give public notice of the draft permit and any proposed discretionary conditions. See Mich Admin Code, R 323.2117; R 323.2118. For up to 30 days after EGLE publicly notices the draft permit, EGLE must allow interested persons to submit written comments about the draft permit. See Mich Admin Code, R 323.2119(1). EGLE must retain any written comments submitted and consider them when determining whether to issue or deny the permit. See Mich Admin Code, R 323.2119(2). Interested persons may also petition EGLE for a public hearing on the draft permit, and EGLE has discretion to hold a public hearing. See Mich Admin Code, R 323.2130(1). If EGLE exercises this discretion, it must give notice to the public. See Mich Admin Code, R 323.2130(2). [11]

After receiving comments and holding a public hearing (if EGLE decided to do so), EGLE must "make a final determination on the permit application" and either issue the permit or deny the permit. Mich Admin Code, R 323.2133(1). If EGLE's final determination "is not acceptable to the permittee, the applicant, or any other person," they may petition for a contested-case hearing under the APA. See MCL 324.3113(3); Mich Admin Code, R 323.2133(2). [12] After the contested-case hearing, an administrative law judge makes a final decision as to the permit. See MCL 324.1317(1). Once the administrative law judge makes a final decision, an aggrieved party may appeal to have a panel of the Environmental Permit Review Commission review the decision of the administrative law judge. [13] See MCL 324.1317. The Environmental Permit Review Commission may "adopt, remand, modify, or reverse" the administrative law judge's decision. See MCL 324.1317(4). After the Environmental Permit Review Commission issues a final decision, the final decision is subject to judicial review. See MCL 324.1317(4); see also MCL 324.3113(3); MCL 324.3112(5). Alternatively, if no party timely appeals the final decision of the administrative law judge to the Environmental

Permit Review Commission, then the administrative law judge's ruling becomes the final decision subject to "any applicable judicial review." MCL 324.1317(7).

C. GENERAL NPDES PERMITS

***5** Along with Part 21 rules setting up procedures for issuing individual NPDES permits, EGLE also promulgated a Part 21 rule allowing it to issue what is called a general permit. See Mich Admin Code, R 323.2191. A general permit covers a category of point sources, such as CAFOs, rather than a single point source. EGLE may issue a general permit for a category of point sources if EGLE determines: "(a) [t]he sources involve the same or substantially similar types of operations"; "(b) [t]he sources discharge the same types of wastes"; "(c) [t]he sources require the same effluent limitation or operating conditions"; and "(d) [t]he sources require the same or similar monitoring." Mich Admin Code, R 323.2191(1). EGLE has no legal obligation to use the general permitting process over the individual permitting process; general permits are effectively a tool of convenience for both the regulator and the regulated entities.

When issuing a general permit, EGLE follows the same procedures as described earlier. See Mich Admin Code, R 323.2191(2). That is, (1) EGLE must prepare a draft general permit in which EGLE includes the mandatory conditions and any discretionary conditions that EGLE deems necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations; (2) EGLE must give public notice of the draft general permit; and (3) EGLE must allow opportunity for public comment and must consider those comments before issuing a final draft of the general permit. As with an individual permit, after receiving public comment on the draft general permit, EGLE makes a final determination and either issues the general permit, issues the general permit with modifications, or declines to issue it.

And as with an individual permit, if EGLE's final determination "is not acceptable to the permittee, the applicant, or any other person," they may petition for a contested-case hearing under the APA. MCL 324.3113(3); Mich Admin Code, R 323.2133(2). Again, after an administrative law judge makes a final decision as to the general permit following a contested-case hearing, an aggrieved party may appeal to have a panel of the Environmental Permit Review Commission review the administrative law judge's decision. After the Environmental Permit Review Commission issues a final decision, the final decision is subject to judicial review, see MCL 324.1317(4), or judicial review of the administrative law judge's final decision may be sought directly if no party appeals to the Environmental Permit Review Commission, MCL 324.1317(7). If issued, general permits have a fixed term of not more than five years, see Mich Admin Code, R 323.2150, so every five years, EGLE must reissue a new general permit.

When a general permit is finalized, the category of point sources the permit covers does not automatically have coverage. Point sources within that category can apply to EGLE for coverage under the general permit. See Mich Admin Code, R 323.2192. If EGLE decides the applicant "meets the criteria for coverage under the general permit," EGLE issues a certificate of coverage and the point source may discharge pollutants in accordance with the mandatory and discretionary conditions in the general permit. See Mich Admin Code, R 323.2192(b). [14] If EGLE decides the discretionary conditions are not appropriate as applied to the applicant, EGLE may require the applicant to apply for an individual permit. See Mich Admin Code, R 323.2191(3). [15] In that case, EGLE will begin automatically processing the application for an individual permit. See EGLE, *NPDES Appendix to the Permit Application* (revised May 18, 2022), p. 5, available at <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Programs/WRD/NPDES/permit-application-appendix.pdf?rev=4575168e1ebf4b6b95721728a21b1383> (accessed July 28, 2024) [https://perma.cc/VT8J-MG6E]. Likewise, if an applicant believes that the general-permit conditions are inappropriate as applied to it, the applicant may apply for an individual permit from EGLE. See Mich Admin Code, R 323.2191(5). EGLE may deny the applicant an individual permit if it decides that the general permit is more appropriate. See *id.* If EGLE denies a permit applicant coverage under a general permit, denies a permit applicant an individual permit, or the discretionary conditions in an individual permit are unsatisfactory to the permit applicant, the permit applicant may petition for a contested-case hearing, and the same procedures discussed earlier apply. See Mich Admin Code, R 323.2192(c); MCL 324.3113(3).

***6** As this discussion shows, whether coverage is sought under an individual permit or a general permit, EGLE must make an individualized determination as to each point source seeking an NPDES permit. Even if a CAFO shows that it can

comply with all the conditions in a general permit, a CAFO is not automatically entitled to a certificate of coverage. EGLE may decide that different conditions than those in the general permit are necessary to achieve Part 4 water-quality standards or to comply with other applicable laws and regulations as applied to the particular CAFO. If EGLE so decides, it will process the CAFO's application as one for an individual permit.

D. PROCEDURAL HISTORY

Having decided that CAFOs involve the same or substantially similar types of operations, that they discharge the same types of wastes, that they require the same effluent limitations or operating conditions, and that they require the same or similar monitoring, EGLE first issued a general permit for CAFOs in 2005. As the 2005 general permit was approaching expiration, EGLE issued another general permit for CAFOs in 2010. There is no dispute that the 2010 general permit contained only the mandatory conditions, see 40 CFR 122.42(e) (2023); Mich Admin Code, R 323.2196(5); Mich Admin Code, R 323.2189(2)(m), but no discretionary conditions in addition to or more stringent than those conditions. Once the 2010 general permit expired five years later, EGLE issued a new general permit in 2015, which again included only the mandatory conditions.

Mich Admin Code, R 323.2196(2)(g) requires all current permit holders to submit an application to renew their permit not later than 180 days before its expiration. All CAFOs with coverage under the 2015 general permit applied for renewal by August 1, 2019. EGLE issued the draft 2020 general permit on October 30, 2019, and gave public notice of it per Mich Admin Code, R 323.2117 and R 323.2118. [16] Unlike the 2010 and 2015 general permits, in the draft 2020 general permit, EGLE included discretionary conditions in addition to or more stringent than the mandatory conditions. See 40 CFR 122.42(e) (2023); 40 CFR 412.4(c) (2023); Mich Admin Code, R 323.2196(5). EGLE deemed these discretionary conditions necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations. According to EGLE's Environmental Quality Specialist, Bruce Washburn, the 2015 general permit had been ineffective and CAFOs' land application of manure had impaired water quality between 2015 and 2020. [17]

As an example of one of the discretionary conditions included, the 2020 general permit included a condition presumptively banning land application of manure from January through March and prohibiting a CAFO from transferring manure to another entity from January through March. This was in addition to or more stringent than the mandatory conditions listed in EGLE's Part 21 rule; that rule only called for a condition restricting land application of manure on snow-covered ground. See Mich Admin Code, R 323.2196(5)(a)(*ix*). Also, the 2020 general permit included a discretionary condition prohibiting a CAFO from applying manure within 100 feet of surface waters or conduits to surface waters *and* requiring a CAFO to keep a 35-foot vegetated barrier between the application of manure and the surface waters or conduits to surface waters. This was in addition to or more stringent than the mandatory conditions listed in EGLE's Part 21 rule because EGLE's Part 21 rule only required a CAFO to keep a 35-foot vegetated barrier between surface waters or conduits to surface waters if a CAFO applied manure within 100 feet of the surface waters or conduits to surface waters. See Mich Admin Code, R 323.2189(2)(m) (incorporating by reference 40 CFR 412.4(c)(5)(*i*) (2023)).

***7** After EGLE gave public notice of the draft 2020 general permit on October 30, 2019, EGLE allowed for public comment on it until December 18, 2019. EGLE received written comments from the public on the draft general permit and held three public hearings in December 2019. After allowing for public comment, EGLE issued the final 2020 general permit on March 27, 2020, with an effective date of April 1, 2020. EGLE kept the discretionary conditions as proposed, and the 2020 general permit issued in March 2020.

Two months later, Michigan Farm Bureau, half a dozen other industry groups, and over 100 individual CAFOs that had applied for coverage under the 2020 general permit (collectively, petitioners) petitioned for a contested-case hearing under MCL 324.3112(5), challenging the discretionary conditions in the 2020 general permit. As a result, EGLE did not issue any notices of coverage under the 2020 general permit. All petitioners had their coverage under the 2015 general permit extended pending the conclusion of the contested-case hearing. See MCL 24.291(2).

[7] **[8]** In the contested-case hearing, petitioners challenged both the procedural and substantive validity of the discretionary conditions in the general permit. They argued that the conditions were procedurally invalid because they were actually "rules" under the APA and because EGLE had not processed them in compliance with the APA's

rulemaking procedures.[18] They also argued that the new discretionary permit conditions exceeded EGLE's statutory authority, were contrary to state and federal law regulating CAFOs, were unnecessary to achieve applicable Part 4 water-quality standards, were arbitrary and capricious, and were unconstitutional. Soon after petitioners petitioned for a contested-case hearing, several environmental groups —including 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; the Michigan League of Conservation Voters; and the Alliance for the Great Lakes—moved to intervene in the contested case to support EGLE. Parties pre-filed direct and rebuttal testimony, and the tribunal presided over two-and-a-half weeks of live testimony, including both cross- and redirect examination. In total, 29 witnesses presented testimony accompanied by more than 300 exhibits. The administrative law judge stayed the contested-case proceeding without issuing a final decision to await resolution of this appeal.

***8** Two-and-a-half months after the contested-case hearing was started, Michigan Farm Bureau led an overlapping, but not identical, group of parties (collectively, plaintiffs) in filing an original action for declaratory judgment under MCL 24.264 in the Court of Claims. In part, plaintiffs asked the court to declare that the discretionary conditions in the general permit were procedurally invalid because they were actually "rules" under the APA and because EGLE had not processed them in compliance with the APA's rulemaking procedures.[19] EGLE moved for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (8) (failure to state a claim), arguing that plaintiffs' declaratory-judgment action was subject to dismissal because plaintiffs had not yet exhausted their administrative remedies. EGLE asserted that the court would not have jurisdiction at least until an administrative law judge issued a final decision and order regarding the 2020 general permit at the end of the contested-case hearing.

The Court of Claims agreed with EGLE, concluding that plaintiffs' failure to exhaust administrative remedies by seeing the contested case to its end meant that the court lacked subject-matter jurisdiction under MCL 24.301.[20] Further, the court disagreed with plaintiffs that MCL 24.264 vested it with subject-matter jurisdiction to consider their challenge to the validity of the discretionary conditions in the general permit. The court reasoned that under *Jones v Dep't of Corrections*, 185 Mich App 134, 138, 460 N.W.2d 575 (1990), MCL 24.264 applies only to rules processed in compliance with the APA's rulemaking procedures. Because EGLE did not process the conditions in compliance with the APA's rulemaking procedures, the court held that plaintiffs could not seek a declaratory judgment by way of MCL 24.264 challenging the validity of those conditions.

On appeal, the Court of Appeals affirmed the Court of Claims' ultimate holding that the Court of Claims lacked subject-matter jurisdiction, but it held that plaintiffs could seek a declaratory judgment by way of MCL 24.264. *Mich. Farm Bureau v Dep't of Environment, Great Lakes, & Energy*, 343 Mich App 293, 314-315, 997 N.W.2d 467 (2022). In the Court of Appeals' view, the discretionary conditions in the general permit were "rules" under the APA merely because they were in addition to or more stringent than the previously promulgated mandatory minimum conditions. *Id.* at 312-313, 997 N.W.2d 467. The Court of Appeals acknowledged that the *Jones* panel had held that MCL 24.264 applied only to rules an agency processed following the APA's rulemaking procedures, but the Court of Appeals found this holding to be unpersuasive, nonbinding authority and declined to followed it. *Id.* at 308, 997 N.W.2d 467.[21] Although the Court of Appeals held that the challenged conditions were rules, the Court of Appeals ultimately affirmed the Court of Claims' holding that it lacked subject-matter jurisdiction. *Id.* at 314-315, 997 N.W.2d 467. The Court of Appeals noted that before plaintiffs could seek a declaratory judgment from the courts, MCL 24.264 required plaintiffs to first request a declaratory ruling from EGLE, and plaintiffs had not done so here. *Id.*

***9** **[9]** EGLE sought leave to appeal, arguing that the Court of Appeals erroneously concluded the challenged conditions were "rules" that could be challenged by way of declaratory judgment under MCL 24.264.[22] We granted EGLE's application for leave to appeal. *Mich Farm Bureau v Dep't of Environment, Great Lakes, & Energy*, 343 Mich.App. 293, 997 N.W.2d 467 (2023).[23] The core issue we must decide is whether the Court of Claims had subject-matter jurisdiction to hear plaintiffs' declaratory-judgment action under MCL 24.264.

II. SUBJECT-MATTER JURISDICTION

[10] **[11]** **[12]** We review de novo a trial court's decision to grant or deny a motion for summary disposition and questions

of subject-matter jurisdiction. See *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich. 327, 333, 901 N.W.2d 566 (2017). We also review de novo questions of statutory interpretation. See *McQueer v Perfect Fence Co*, 502 Mich. 276, 285-286, 917 N.W.2d 584 (2018).

[13] [14] [15] [16] [17] Subject-matter jurisdiction is a legal term of art. that refers to the authority of the court to exercise judicial power over a class or category of cases. See *People v Washington*, 508 Mich. 107, 121, 972 N.W.2d 767 (2021). If a law specifies that a court has the power to adjudicate a class or category of cases and a case falls within that class or category, the court has subject-matter jurisdiction to hear the case, even if the facts of the case do not entitle the plaintiff to relief. See *Winkler*, 500 Mich. at 341, 901 N.W.2d 566 ("The existence of subject matter jurisdiction turns not on the particular facts of the matter before the court, but on its general legal classification."). Because subject-matter jurisdiction is a prerequisite for a court to hear and decide a claim, the court may consider it sua sponte at any time, and parties cannot confer subject-matter jurisdiction by their conduct, nor can they waive a subject-matter-jurisdiction challenge by not raising it. See *Hillsdale Co. Senior Servs., Inc. v Hillsdale Co.*, 494 Mich. 46, 51 n 3, 832 N.W.2d 728 (2013).

[18] [19] [20] [21] There is no dispute here that MCL 24.264 delineates the class of cases over which the Court of Claims has subject-matter jurisdiction.[24] Broadly speaking, MCL 24.264 vests the court with subject-matter jurisdiction to declare an agency "rule" invalid or inapplicable before an agency actually enforces or applies the rule to a regulated entity. MCL 24.264 provides:

> ***10** *Unless an exclusive procedure or remedy is provided by a statute governing the agency*, the validity or applicability of a *rule*, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his or her principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. *An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.* This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

Simply put, a court has subject-matter jurisdiction to hear a declaratory-judgment action in which a party challenges the validity or applicability of an agency rule "[u]nless an exclusive procedure or remedy is provided by a statute governing the agency ...." MCL 24.264 further includes an exhaustion-of-administrative-remedies requirement: a party may not request a declaratory judgment unless the party "first request[s] the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously."[25]

***11 [22]** Although a court without subject-matter jurisdiction has no power to decide the merits of a case, a court must necessarily consider the "nature of the claim" to decide whether it has subject-matter jurisdiction. See *Parkwood Ltd. Dividend Housing Ass'n v State Housing Dev. Auth.*, 468 Mich. 763, 771, 664 N.W.2d 185 (2003). Put differently, a court must decide whether a particular case falls within the category or class of cases over which it has power to adjudicate the merits. See *Winkler*, 500 Mich. at 334, 901 N.W.2d 566. Again, MCL 24.264 gives a court power to adjudicate a declaratory-judgment action challenging the validity or applicability of an agency rule "[u]nless an exclusive procedure or remedy is provided by a statute governing the agency ...." So, to decide whether it had subject-matter jurisdiction under MCL 24.264, the Court of Claims needed first to consider whether plaintiffs' action was a declaratory judgment challenging the validity

of a rule—specifically, whether the discretionary conditions in the general permit were "rule[s]." Accord *Pacific Gas & Electric Co. v Fed. Power Comm.*, 164 US App DC 371, 374-375, 506 F.2d 33 (1974) (holding that, to decide whether the court had jurisdiction to review an agency action under a statute, the court needed to first decide whether the agency action was a "rule" under the federal APA). Accordingly, to determine whether the Court of Claims correctly concluded that it lacked subject-matter jurisdiction under MCL 24.264, we must decide whether the general permit or discretionary conditions were "rules."

III. RULES UNDER THE APA

A. LOWER COURTS' REASONING

On the question of whether these conditions are rules, we initially note that we are unpersuaded by the reasoning of the Court of Appeals. For its part, the Court of Appeals offered little explanation for why it considered the discretionary conditions in the general permit to be rules. In essence, the Court of Appeals concluded that the conditions were rules because they were in addition to and more stringent than the mandatory conditions. See Mich Admin Code, R 323.2196(5). But the Court of Appeals did not explain why this necessarily meant that the discretionary conditions were themselves rules. The Court of Appeals recited the general definition of "rule" in MCL 24.207 and noted that the term "rule" does not include "a 'decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected,' " but the Court of Appeals did not discuss how the conditions fall within this definition or outside of this exclusion. *Mich. Farm Bureau*, 343 Mich App at 308, 997 N.W.2d 467, quoting MCL 24.207(j).

B. APA'S DEFINITION OF A RULE

[23] Finding the reasoning of the Court of Appeals unpersuasive, we turn to the APA's definition of a rule. The APA generally defines a rule as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency ...." MCL 24.207; see also *American Federation of State, Co. & Muni. Employees v Dep't of Mental Health*, 452 Mich. 1, 8, 550 N.W.2d 190 (1996) (*AFSCME*). But along with many other exceptions to the definition of a "rule" under MCL 24.207, MCL 24.207(h) says that a "[r]ule does not include ... [a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." Hence, like the federal APA distinguishes between legislative rules (which have the force and effect of law) and interpretive rules and general statements of policy (which do not), see *Nat'l Mining Ass'n v McCarthy*, 411 US App DC 52, 60, 758 F.3d 243 (2014); *American Hosp Ass'n v Bowen*, 266 US App DC 190, 198, 834 F.2d 1037 (1987), the Michigan APA distinguishes between legislative rules and "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." Unlike under the federal APA, however, under the Michigan APA, the latter are not considered rules at all. See *Mich Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich. 141, 148, 289 N.W.2d 699 (1980) ("Hence, while under the Federal act a rule can be legislative or interpretative, under the Michigan act an 'interpretive statement' is *not*, by definition, a rule at all. It would seem, then, that rules which are 'legislative' under the Federal act would be analogous to 'rules' under our act.").

***12** **[24]** **[25]** **[26]** That said, an agency action is a "rule" under the Michigan APA only if it meets, at minimum, [26] the following elements: (1) it is an agency regulation, statement, standard, policy, ruling, or instruction; (2) it is of general applicability; (3) it implements or applies law enforced or administered by the agency, or it prescribes the organization, procedure, or practice of the agency; and (4) it, in itself, has the force and effect of law. There can be no serious debate that the discretionary conditions in the general permit satisfy the first and third elements. They are either an agency regulation, statement, standard, policy, ruling, or instruction. And they implement law enforced or administered by EGLE: they give effect to the NREPA requirement that EGLE include conditions in general permits that EGLE deems necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations. See MCL 324.3106; MCL 324.3113(2). Whether the conditions in the general permit satisfy Elements (2) or (4), however, calls for closer inspection.

[27] To begin, are the discretionary conditions of general applicability? EGLE argues that they are not, but we disagree.

Michigan courts have considered a statement to be of general applicability when it is capable of being applied to or is relevant to an open-ended class or category of entities or situations. See, e.g., *Hinderer v Dep't of Social Servs*, 95 Mich App 716, 725, 291 N.W.2d 672 (1980) (holding that a lag-budgeting system met this requirement because it affected recipients of benefits generally); see also *AFSCME*, 452 Mich. at 9-10, 550 N.W.2d 190 (observing that the guidelines at issue in that case directly applied to all who live and work in private group homes). In construing the phrase in the context of their own administrative procedures acts, other jurisdictions have defined the phrase along the same lines. [27] Applying this here, we conclude that discretionary conditions in the general permit are of general applicability. The conditions are capable of being applied to or are relevant to all CAFOs because they are EGLE's initial determination of what conditions in addition to and more stringent than the mandatory conditions are necessary to achieve Part 4 water-quality standards for anything meeting the definition of a CAFO. EGLE does not fashion the discretionary conditions in a general permit with an identifiable CAFO in mind, and so anytime a CAFO applies for permit coverage, the necessity of the discretionary conditions in the general permit will be relevant.

[28] **[29]** **[30]** Next, do the general permit or discretionary conditions have the force and effect of law? The answer to this question must be "no." Since December 31, 2006, Part 31 of the NREPA has empowered EGLE to make only rules concerning permits issued to oceangoing vessels engaging in port operations in Michigan. See MCL 324.3103(2) ("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 [MCL 324.3112(6)], the department shall not promulgate any additional rules under this part after December 31, 2006."); MCL 324.3112(6) (requiring oceangoing vessels engaging in port operations in Michigan to obtain a permit, which EGLE may issue only if the applicant can show that the oceangoing vessel complies with a federal regulation specifying ballast-water-management requirements or that the oceangoing vessel will use environmentally sound technology and methods approved by EGLE to prevent the discharge of aquatic nuisance species); MCL 324.3112(8) ("The department may promulgate rules to implement subsections (6) to (8)."). [28] EGLE otherwise has no power to make rules to carry out its duties under Part 31 of the NREPA, a point which EGLE concedes. EGLE, therefore, clearly has no power to make rules concerning NPDES permits issued to CAFOs. See MCL 324.3103(2). And as we held in *Clonlara*, if the Legislature has not delegated to an agency the power to make rules, a statement of general applicability issued by the agency cannot be considered a "rule"—either valid or invalid—under the Michigan APA. See *Clonlara, Inc. v State Bd. of Ed.*, 442 Mich. 230, 245-248, 501 N.W.2d 88 (1993). [29] This is because, if an agency lacks rulemaking power, any statement of general applicability issued by the agency necessarily lacks the force and effect of law, no matter if the agency has issued it following the APA's rulemaking procedures. See *id.* at 243, 501 N.W.2d 88 ("An interpretation not supported by the enabling act is an invalid interpretation, not a rule. Otherwise, 'wrong' interpretive statements might become rules with the force of law on the false premise that they were promulgated in accordance with the APA procedures."); see also *Batterton v Marshall*, 208 US App DC 321, 329, 648 F.2d 694 (1980) ("Although an agency empowered to enact legislative rules may choose to issue non-legislative statements, an agency without legislative rulemaking authority may issue only non-binding statements. Unlike legislative rules, non-binding agency statements carry no more weight on judicial review than their inherent persuasiveness commands.") (citations omitted). As a result, neither the general permit nor the discretionary conditions in it can have the force and effect of law, and so they cannot be "rules" under the Michigan APA. This would be true even if EGLE followed the APA's rulemaking procedures to issue the general permit and discretionary conditions. [30]

***13** In Justice VIVIANO's view, our holding from *Clonlara* does not apply here. As he sees it, our holding from *Clonlara* applies only when an agency has *no* power to make rules whatsoever. Here, he says, Part 31 of the NREPA gives EGLE at least some power to make rules. So according to Justice VIVIANO, whether Part 31 of the NREPA empowers EGLE to make rules related to NPDES permits issued to CAFOs is irrelevant to deciding whether the general permit or discretionary conditions have the force and effect of law. We disagree.

For starters, we did not suggest in *Clonlara* that its holding applies only if an agency has *no* rulemaking power. This Court in *Clonlara* noted that the School Code, MCL 380.1 *et seq.*, as enacted by 1976 PA 451, had empowered the Department of Education to make rules, see *Clonlara*, 442 Mich. at 246 n 31, 501 N.W.2d 88, but it was clear the Department of Education did not have the power to issue rules relating to the subject matter that the policy at issue in that case covered.

The policy at issue in *Clonlara* related to the nonpublic school act, MCL 388.551 *et seq.*, as enacted by 1921 PA 302, and the "Department of Education [was] not authorized, explicitly or implicitly, to promulgate rules relating to the nonpublic school act." *Id.* at 248, 501 N.W.2d 88. So while it is true that Part 31 of the NREPA does give EGLE some rulemaking power, like in *Clonlara*, it is beyond dispute that EGLE is not empowered to issue rules concerning the subject matter that the general permit and discretionary conditions cover—that is, NPDES permits issued to CAFOs. Because this is beyond dispute, it is clear that EGLE cannot give any statement of general applicability related to CAFO permits the force and effect of law, even if EGLE intends to do so or else follows the APA's rulemaking procedures before issuing them.

C. THE FORCE AND EFFECT OF LAW

Even so, this does not mean that EGLE cannot issue a general permit with discretionary conditions in addition to or more stringent than the mandatory conditions. Nor does it mean that those CAFOs that apply for and receive certificates of coverage under the general permit are not required to comply with the discretionary conditions. To explain why this is the case, a deeper dive into what it means for something to have the force and effect of law is in order.

1. LEGISLATIVE RULES VERSUS NONBINDING POLICY STATEMENTS

[31] **[32]** **[33]** Generally speaking, an agency statement of general applicability in itself has the force and effect of law—or is a legislative rule—when the statement itself alters rights or imposes obligations and has a "present binding effect" on regulated entities, the agency, and the courts. See, e.g., *Interstate Natural Gas Ass'n of America v Fed Energy Regulatory Comm*, 350 US App DC 366, 407, 285 F.3d 18 (2002); see also *American Hosp. Ass'n*, 266 US App DC at 198, 834 F.2d 1037 (observing that agency statements lacking the force and effect of law are those that "are not determinative of issues or rights addressed" and that do not "conclusively affect rights of private parties") (quotation marks and citation omitted); *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich. 172, 189, 428 N.W.2d 335 (1988) (holding that agencies are bound to follow their own rules). An interpretive statement, for instance, in itself lacks the force and effect of law because it is the underlying statute that determines how an entity must act, i.e., that alters rights or imposes obligations. See *Clonlara*, 442 Mich. at 245, 501 N.W.2d 88. Even if a regulated entity does not comply with the statement, the interpretive statement does not bind an administrative law judge to sanction an entity in an enforcement action, nor does it bind a court on judicial review. See *In re Complaint of Rovas Against SBC Mich*, 482 Mich. 90, 104-108, 754 N.W.2d 259 (2008) (holding that agency interpretations of statutes are entitled to respectful consideration and should not be overruled without cogent reasons but that agency interpretations are not binding on courts and cannot conflict with the Legislature's intent as expressed in the plain language of a statute).

***14** For similar reasons, statements explaining how an agency plans to exercise a discretionary power are usually considered to lack the force and effect of law.[31] See *Nat'l Mining Ass'n*, 411 US App DC at 61, 758 F.3d 243 (holding that an agency statement explaining how an agency will exercise its broad permitting discretion under some statute or rule is a general statement of policy under the federal APA and not a rule with the force of law). Consider the Court of Appeals' decision in *Kent Co. Aeronautics Bd. v Dep't of State Police*, 239 Mich App 563, 609 N.W.2d 593 (2000), aff'd sub nom *Byrne v Michigan*, 463 Mich. 652, 624 N.W.2d 906 (2001). There, the Legislature, in 1996 PA 538, had amended MCL 28.282 of the radio broadcasting stations act, MCL 28.281 *et seq.*, to provide the Department of State Police the power to construct the Michigan Public Safety Communications System, which would entail the construction of 181 new radio towers across Michigan. *Kent Co. Aeronautics Bd.*, 239 Mich App at 566-567, 574, 609 N.W.2d 593. The Legislature gave the department discretion to decide the site upon which to build each tower. Once the department selected a site, the local unit of government with zoning authority over the site had 30 days to either grant the department a special-use permit to build a tower or, if the local unit of government preferred that the department build on a different site, to " 'propose an equivalent site' " to the department. *Id.* at 574-575, 609 N.W.2d 593, quoting MCL 28.282(2), as amended by 1996 PA 538. If the local unit of government did not do either within 30 days, the Legislature allowed the department to build the tower despite any local zoning ordinance prohibiting construction of the tower. *Id.* Without following the APA's rulemaking procedures, the department issued "Equivalent Site Criteria" that explained what the State Police might consider a suitable equivalent site. *Id.* at 570, 583-584, 609 N.W.2d 593. This way, local units of government had some idea about what the department

would consider a suitable equivalent site if they wished to propose an alternative site to the department. *Id.* Because these Equivalent Site Criteria simply explained how the department planned to exercise its discretion to decide what constituted a suitable site, the Court of Appeals held that the criteria lacked the force and effect of law. *Id.* [32] The Equivalent Site Criteria did not bind the department and did not grant any right or impose any obligation on local units of government: even if a local unit of government proposed an alternative site that matched the Equivalent Site Criteria, the department was not bound to build on that site instead of its originally selected site. *Id.* The department still had discretion to reject a local unit of government's proposed alternative. *Id.*

[34] Finally, statements announcing a policy the agency plans to establish in future adjudications generally lack the force and effect of law. See, e.g., *Pacific Gas*, 164 US App DC at 376, 506 F.2d 33. *Pacific Gas* aptly illustrates this. During a natural-gas shortage, natural-gas-pipeline companies had to submit curtailment plans to the Federal Power Commission (the FPC) for approval, explaining which customers the pipeline company would deliver to first if demand exceeded supply. *Id.* at 373 n 7, 506 F.2d 33. Under the governing statute, the FPC would approve a pipeline company's plan only after an adjudicatory hearing and only after finding that the plan was just and reasonable under the circumstances. *Id.* at 374, 379, 506 F.2d 33; see also *Hercules Inc. v Fed. Power Comm.*, 552 F.2d 74, 77 (3rd Cir. 1977). At the adjudicatory hearing, customers with low priority under the plan would have an opportunity to contest the plan. *Pacific Gas*, 164 US App DC at 378, 506 F.2d 33. Without following the federal APA's rulemaking procedures, the FPC issued a statement announcing that it planned to show at adjudicatory hearings that curtailment plans giving priority to residential customers were just and reasonable. *Id.* at 374, 388, 506 F.2d 33. The United States Court of Appeals for the District of Columbia Circuit held that the statement lacked the force and effect of law because the statement itself did not alter rights or impose obligations: pipeline companies were free to submit a curtailment plan giving priority to other types of customers, and an administrative law judge would be free to approve that plan after an adjudicatory hearing. *Id.* at 378-379, 506 F.2d 33. Likewise, the statement itself did not deprive nonresidential customers of their contract rights to natural gas, as again, an administrative law judge would be free to approve curtailment plans giving priority to nonresidential customers. *Id.* If an administrative law judge did approve curtailment plans giving priority to residential customers, a court on judicial review would be free to reject the FPC's decisions if the agency did not provide reasoning or evidence sufficient to support them. *Id.* at 379, 506 F.2d 33.

***15** **[35]** In short, an agency statement of general applicability in itself has the force and effect of law when the statement itself alters rights or imposes obligations and has a present, binding effect on regulated entities, the agency, and the courts. If an agency statement (1) merely explains what the agency believes an ambiguous provision of a statute or agency rule means or (2) explains what factors will be considered and what goals will be pursued when an agency exercises a discretionary power or conducts an adjudication, the statement will generally not be considered to alter rights, impose obligations, or have a present, binding effect. See *Clonlara*, 442 Mich. at 245 n 30, 501 N.W.2d 88; Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L J 381, 383 (1985) ("For example, a policy statement might indicate what factors will be considered and what goals will be pursued when an agency conducts investigation, prosecution, legislative rulemaking, or formal or informal adjudication.").

2. APPLICATION

[36] With that in mind, when we say neither the general permit nor the discretionary conditions in it can have the force and effect of law, we mean that the general permit itself cannot grant any entity meeting the definition of a CAFO the right to discharge pollutants, nor can it require all CAFOs to operate in compliance with the discretionary conditions. [33] This does not mean, however, that a CAFO is not required to comply with the discretionary conditions in the general permit if the CAFO applies for and receives a certificate of coverage. That is because it is the certificate of coverage—not the general permit itself—that grants the rights and imposes obligations on the CAFO. [34] And even though EGLE lacks the power to alter rights or impose obligations by issuing a rule, Part 31 of the NREPA still empowers EGLE to alter rights and impose obligations on individual parties proceeding before it that apply for permits. See Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U Pa L Rev 1, 9 (1970) (noting that an administrative agency is generally a governmental authority that has the power to affect the rights of private parties through either adjudication or rulemaking).

An analogy illustrates the point. Say each CAFO were required to apply for an individual permit, and rather than issue a general permit, EGLE circulated a letter to all CAFOs

explaining that it tentatively planned to tell its permit writers to include the discretionary conditions at issue here in each individual permit issued to CAFOs. If EGLE then issued a CAFO an individual permit with those conditions, a CAFO could not argue in an enforcement proceeding that it had no obligation to comply with the conditions because the conditions were listed in a nonbinding letter. While it is true that EGLE could not bind CAFOs as a class through the letter itself, EGLE could undoubtedly bind the specific CAFO proceeding before it by issuing an individual permit to that CAFO. The same logic applies here. The general permit is functionally the same as the letter, and the certificate of coverage is functionally the same as the individual permit. The certificate of coverage is simply an individual permit that includes the discretionary conditions listed in the general permit. [35]

***16** When we say that the general permit and discretionary conditions cannot have the force and effect of law, then, we mean only this: that they can be only (1) a statement explaining what EGLE believes an ambiguous provision of the NREPA or one of EGLE's rules means, i.e., an interpretive statement, or (2) a statement explaining how EGLE plans to exercise its discretionary permitting power or a statement explaining what discretionary conditions EGLE plans to prove are necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations in adjudications involving a CAFO. [36] The general permit and discretionary conditions are not EGLE's attempt to discern the meaning of an ambiguous provision of Part 31 of the NREPA or one of EGLE's rules, [37] so they must fall into the latter category. Two points must therefore be emphasized.

[37] First and foremost, EGLE cannot act as though the general permit or the discretionary conditions constrain its permitting discretion in individual cases involving CAFOs. A CAFO must be allowed to apply for an individual permit with only the mandatory conditions, and EGLE must genuinely evaluate whether the discretionary conditions in the general permit or other discretionary conditions are necessary as applied to that particular CAFO. See *American Bus Ass'n v United States*, 201 US App DC 66, 70, 627 F.2d 525 (1980) (noting that, when deciding whether an agency statement is binding, courts consider "whether a purported policy statement genuinely leaves the agency and its decision-makers free to exercise discretion"). At the same time, when a CAFO applies for a certificate of coverage under the general permit, EGLE must retain discretion to decide whether the discretionary conditions in the general permit are necessary as applied to the particular CAFO. And again, EGLE must genuinely evaluate whether the discretionary conditions are necessary as applied to that particular CAFO. [38] There is nothing in the record to suggest that EGLE does not already genuinely exercise discretion each time a CAFO applies for NPDES permit coverage. EGLE's rules provide that, if an applicant believes that the discretionary conditions in the general permit are inappropriate as applied to it, the applicant may apply for an individual permit from EGLE, and EGLE may grant an individual permit if EGLE determines that to do so would be appropriate. See Mich Admin Code, R 323.2191(5). [39] The rules also provide that EGLE retains discretion to process an applicant's general-permit application as an application for an individual permit if EGLE decides that the discretionary conditions in the general permit are inappropriate as to the general-permit applicant. See Mich Admin Code, R323.2191(3). [40] And the 2020 general permit notifies applicants of these rules. [41] It says that "[EGLE] may require any person who is authorized to discharge by a [certificate of coverage] and this permit to apply for and obtain an individual NPDES permit if any of the following circumstances apply" and that "[a]ny person may request [EGLE] to take action pursuant to the provisions of Rule 2191 (Rule 323.2191 of the Michigan Administrative Code)." Permit No. MIG010000, p. 27. [42]

***17** **[38]** Second, this means that neither administrative law judges, the Environmental Permit Review Commission, nor the courts can treat the general permit and discretionary conditions as though they restrict EGLE's permitting discretion. So when EGLE issues a general permit and CAFOs with coverage under the prior general permit petition for a contested case, such as here, EGLE must carry its burden to prove that any discretionary conditions in the general permit are necessary to achieve Part 4 water-quality standards or to comply with applicable laws and regulations. And if EGLE denies a CAFO's individual-permit application because EGLE concludes that the discretionary general-permit conditions are more appropriate and the aggrieved CAFO petitions for a contested case, the administrative law judge and the Environmental Permit Review Commission must require EGLE to prove that the discretionary conditions in the general permit are necessary to achieve Part 4 water-quality standards or to comply with other applicable laws and regulations as applied to the particular CAFO. By the same token, if EGLE denies a CAFO's general-permit application, EGLE issues an individual permit, and the aggrieved CAFO

petitions for a contested case, again, the administrative law judge and the Environmental Permit Review Commission must require EGLE to prove that any discretionary conditions in the individual permit are necessary as applied to the CAFO. See *Pacific Gas*, 164 US App DC at 376, 506 F.2d 33 ("When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."). Finally, if an aggrieved party seeks judicial review, a court must ensure that EGLE sustained its burden of proof. See *id.* at 379, 506 F.2d 33 ("[T]he courts are in a position to police the [FPC]'s application of the policy and to insure that the [FPC] gives no greater effect to Order No. 467 than the order is entitled to as a general statement of policy.").

All in all, if the discretionary general-permit conditions have the force and effect of law, then like the conditions listed in Mich Admin Code, R 323.2196(5), EGLE would have no choice but to include them in every permit issued to a CAFO, individual or general. And CAFOs would not be able to contest the necessity of the conditions in administrative proceedings or on judicial review. In either case, an administrative law judge, the Environmental Permit Review Commission, and courts would be bound to give effect to them. See 1 Hickman & Pierce, Administrative Law Treatise (7th ed.), § 4.3.1, p. 535 ("A legislative rule can have the effect of eliminating what otherwise would be a party's right to a hearing to resolve contested issues of fact.").

3. RESPONSE TO DISSENT

[39] As a final matter, we respond to several points Justice VIVIANO makes in his dissent. First, primarily based on Mich Admin Code, R 323.2192(b) (requiring EGLE to "determine if the [applicant] meets the *criteria for coverage* under the general permit"), Justice VIVIANO believes the discretionary conditions in the general permit are decisive of whether a CAFO will receive a certificate of coverage. We agree that a CAFO applying for a certificate of coverage might have to show how it plans to comply with any discretionary conditions in the comprehensive nutrient management plan it submits along with its application. [43] But we disagree that this can or does control whether a CAFO will receive a certificate of coverage. As discussed earlier, EGLE's rules confirm that it has discretion to deny an application for a certificate of coverage when EGLE determines that the discretionary conditions are inappropriate as applied to the applicant. See Mich Admin Code, R 323.2192(b). So even if a CAFO shows that it can comply with any discretionary conditions in the general permit, this does not—nor could it—legally entitle the applicant to a certificate of coverage. Just like in *Kent Co* where the Department of State Police was not obligated to build on an alternative site when a local unit of government proposed an alternative site satisfying the Equivalent Site Criteria, so too EGLE is not obligated to issue a certificate of coverage because a CAFO shows how it plans to comply with the discretionary conditions in the general permit.

[40] **[41]** Second, Justice VIVIANO seems to believe that the general permit and discretionary conditions have the force and effect of law simply because of their practical effect on CAFOs. In reality, Justice VIVIANO suggests, most CAFOs apply for certificates of coverage under general permits, and EGLE will likely grant those CAFOs a certificate of coverage under the general permit. Yet even if Justice VIVIANO is correct that most CAFOs will feel pressured to apply for a certificate of coverage under the general permit and that EGLE is likely to grant them a certificate of coverage, this would not mean that the general permit or discretionary conditions have the force and effect of law. As we held in *Clonlara*, when the Legislature has not empowered an agency to make rules with respect to a particular subject matter, statements of general applicability on that subject matter do not have the force and effect of law even if they have a substantial effect on regulated parties. See *Clonlara*, 442 Mich. at 248-249, 501 N.W.2d 88. That is because these statements can in fact have no legal effect—they have no actual power to bind the agency, the public, or the courts, even if the agency issues the statement following the APA's rulemaking procedures. [44] The statement issued by the FPC in *Pacific Gas* might have induced natural-gas-pipeline companies to submit curtailment plans giving priority to residential customers, but the fact remained that the FPC had not finally approved any such plan, and so no nonresidential customers' contract rights had been altered yet. And in *Kent Co*, the Equivalent Site Criteria might have induced local units of government to propose alternative sites matching that criteria, but even if they did so, the fact remained that the Department of State Police was not bound to build on that site. Likewise, the general permit and discretionary conditions might induce CAFOs to apply for a certificate of coverage under the general permit, and EGLE might even be likely to grant it. But the fact remains that the general permit and discretionary conditions cannot grant rights or impose obligations on EGLE, CAFOs, or the courts.

***18** **[42]** Justice VIVIANO laments that our holding today means that agencies without rulemaking power will be able to take actions that have a substantial effect on people without public input or any court oversight. He insists that "agencies will be free to issue documents and take actions that look like a rule, sound like a rule, and have the practical effect of a rule without public input and without court oversight under the APA." This alarmism is unfounded. To begin, when an agency without rulemaking power issues a statement of general applicability, people affected by the statement will have a chance to challenge the soundness and applicability of the statement when the agency enforces or applies it in an individual case—both in agency proceedings and on judicial review. *Pacific Gas*, 164 US App DC at 376, 506 F.2d 33 (noting that, if a statement of general application has the force and effect of law, "[t]he underlying policy embodied in [it] is not generally subject to challenge before the agency"). So if an agency fails to establish the soundness of the policy underlying its statement, or the agency or administrative law judge wrongfully treats a statement as legally binding, any order applying or enforcing the policy may be vacated on judicial review. All said, even if an agency without rulemaking power may issue such a statement without following the APA's rulemaking procedures, it is not as if people affected by the statement have no opportunity to offer input before their rights and obligations are finally decided. And even if a person affected by the statement cannot file a declaratory-judgment action under MCL 24.264 to challenge the statement, it is not as if the regulated party has no other means for judicial review. Here, for example, though EGLE is not required to follow the APA's rulemaking procedures, plaintiffs and other CAFOs still have a full opportunity to challenge any discretionary permit conditions in a contested-case hearing. If it turns out that EGLE did not sustain its burden of proving the discretionary conditions are necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations, the administrative law judge or Environmental Permit Review Commission may strike the discretionary conditions from the general permit. If the administrative law judge or the Environmental Permit Review Commission wrongfully treats the discretionary conditions as legally binding, plaintiffs may seek judicial review, and a court may vacate the final order. [45] See MCL 24.306.

In fact, if agencies without rulemaking power were required to fully comply with the APA's rulemaking procedures based on the anticipated practical effect of an interpretive statement or other statement or policy of general applicability, it could in fact lead to less rather than more transparency. A statement or policy of general applicability issued by such an agency can never have the force and effect of law, even if the agency fully complies with the APA's rulemaking procedures. Thus, requiring an agency to follow these procedures would demand significant time and expense with minimal benefit from the agency's standpoint: the agency would still have to defend the validity of the statement in every case, and administrative law judges and courts would be free to not enforce or apply it. In this scenario, what incentive would agencies have to issue such statements or policies? They would likely opt not to issue them at all, leaving the regulated public in the dark about how the agency planned to exercise its enforcement or discretionary power. See Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 Admin L Rev 491, 502 (2016) (noting that, if agencies are required to comply with rulemaking procedures based on practical effect, "they will be encouraged to do one of two things: (1) maintain silence and hence fail to disclose relevant information to the public, perhaps by adopting enforcement practices that are never disclosed, or (2) issue a fuzzy policy statement, full of vagueness and qualifications"). This would ultimately harm the regulated public, as it would make it harder for them to plan their affairs accordingly. [46]

***19** Third, Justice VIVIANO says courts that have considered whether general permits are rules "have had little trouble concluding that general NPDES permits" are legislative rules, as if this Court's holding today is some type of aberration. Yet two of the decisions he cites are merely instances in which a court remarked in passing that NPDES general permits "are issued pursuant to administrative rulemaking procedures." See, e.g., *Natural Resources Defense Council v US Environmental Protection Agency*, 279 F.3d 1180, 1183 (9th Cir. 2002); *Alaska Community Action on Toxics v Aurora Energy Servs., LLC*, 765 F.3d 1169, 1172 (9th Cir. 2014) (" '[G]eneral permits are considered to be rulemakings ....' "), quoting EPA, *General Permit Program Guidance* (February 1988), p. 21, available at <https://www3.epa.gov/npdes/pubs/owm0465.pdf> (accessed June 6, 2024) [https://perma.cc/6F66-CNQC]. Neither of these cases considered whether the EPA had rulemaking authority over the subject matter at issue or whether the general permits otherwise had the force and effect of law. The passing remarks in these cases appear to just be an acknowledgment that NPDES general permits are issued after notice-and-comment proceedings that track notice-and-comment rulemaking requirements under 5 USC 553 of the federal

APA. See *Perez v Mtg. Bankers Ass'n*, 575 U.S. 92, 96, 135 S Ct 1199, 191 L Ed 2d 186 (2015) (describing federal APA notice-and-comment rulemaking procedures). Like EGLE, the EPA may issue NPDES permits only after giving public notice and an opportunity for public comment. See 33 USC 1342(j) (stating that "[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public"); 33 USC 1342(a)(1) (stating that the public must have an opportunity for a hearing before a permit application is finally approved).

The other decision he cites is *Nat'l Ass'n of Home Builders*, which comes a little closer to the mark but is clearly distinguishable from our case here. See *Nat'l Ass'n of Home Builders v US Army Corps of Engineers*, 368 US App DC 23, 417 F.3d 1272 (2005). There, the United States Court of Appeals for the District of Columbia Circuit held that general permits issued by the Army Corps of Engineers to allow discharge of dredged or fill material were legislative rules under the federal APA.[47] *Id.* at 35-36, 417 F.3d 1272. Those general permits were different from the general permits EGLE issues for CAFOs, however, because in most instances, the Army Corps of Engineers' general permits automatically gave parties the right to discharge dredged or fill material so long as they adhered to the conditions in the general permit. *Id.* at 26, 417 F.3d 1272 ("If the proposed discharge activity is covered by a general permit, the party may proceed without obtaining an individual permit or, in some cases, even without giving the Corps notice of the discharge."), citing 33 CFR 330.1(e)(1) ("In most cases, permittees may proceed with activities authorized by [nationwide general permits] without notifying the [district engineer]."); *New Hanover Twp. v US Army Corps of Engineers*, 992 F.2d 470, 471 (CA 3, 1993) (noting that a discharger may "simply operate under the [general] permit without informing the Corps in advance unless the [general] permit in question requires advance approval from the Corps"). By granting rights and imposing obligations, then, the general permits at issue in *Nat'l Ass'n of Home Builders* had the force and effect of law. As already discussed, general permits for CAFOs issued by EGLE do not and cannot automatically give CAFOs the right to discharge in accordance with the discretionary conditions in the general permit. A CAFO cannot just start discharging in accordance with those conditions. A CAFO must apply to EGLE for a certificate of coverage under the general permit, and even if the CAFO agrees to comply with the discretionary conditions in the general permit, EGLE is not bound to grant the CAFO the certificate of coverage.

IV. CONCLUSION

***20** **[43]** **[44]** Having reached the end of a lengthy discussion, we provide a recap of our holding today. If it is clear the Legislature has not delegated to an agency the power to make rules with respect to the subject matter a statement or policy of general applicability concerns, that statement or policy necessarily lacks the force and effect of law and so cannot be considered a "rule"—either valid or invalid—under the Michigan APA. See *Clonlara*, 442 Mich. at 245-248, 501 N.W.2d 88; MCL 24.207(h) (providing that "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory" is not a "rule"). The statement, therefore, cannot alter rights, impose obligations, or have a present binding effect on regulated entities, the agency, or the courts. It can be only (1) a statement explaining what the agency believes an ambiguous provision of a statute or agency rule means, i.e., an interpretive statement, or (2) a statement explaining what factors will be considered and what goals will be pursued when an agency exercises a discretionary power or conducts an adjudication.

Because it is beyond dispute that EGLE lacks the power to issue rules relating to NPDES permits issued to CAFOs, neither the general permit nor the discretionary conditions therein can have the force and effect of law, and so they cannot be "rules" as defined by the APA. They can be only a statement explaining how EGLE plans to exercise its discretionary permitting power or a statement explaining what conditions EGLE plans to prove are necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations in adjudications involving a CAFO. That means several things. First, the general permit itself cannot automatically grant anything meeting the definition of a CAFO the right to discharge under the conditions in the general permit. Second, during the instant contested case, EGLE must sustain its burden of proving that the discretionary conditions in the 2020 general permit are in fact necessary to achieve Part 4 water-quality standards or to comply with other applicable laws and regulations. Third, new CAFOs or CAFOs with expiring permit coverage must be allowed to apply for an individual permit with different discretionary conditions or no discretionary conditions, and EGLE must genuinely evaluate whether any discretionary conditions in the general permit are necessary as applied to that CAFO. If EGLE denies the

CAFO's application and the CAFO petitions for a contested case or later judicial review, EGLE must sustain its burden of proving that the discretionary conditions in the general permit are necessary. Fourth, when a new CAFO or a CAFO with expiring permit coverage applies for a certificate of coverage under the general permit, EGLE must genuinely evaluate whether any discretionary conditions in the general permit are necessary as to the CAFO and must retain discretion to process the CAFO's application as an individual permit with different discretionary conditions or no discretionary conditions. And again, if a CAFO petitions for a contested case thereafter, EGLE must sustain its burden of proving that the discretionary conditions in the general permit are necessary.

At bottom, neither the general permit nor the discretionary conditions in it are "rules" under the APA, and so the Court of Claims correctly concluded that it lacked subject-matter jurisdiction under MCL 24.264 to hear plaintiffs' declaratory-judgment action challenging their validity. We affirm the judgment of the Court of Appeals but vacate its holding that the discretionary conditions in the general permit are rules. Given our disposition, we need not address whether a contested-case proceeding under MCL 324.3112(5) and MCL 24.271 to MCL 24.288 is "an exclusive procedure or remedy ... provided by a statute governing the agency" under MCL 24.264.

Richard H. Bernstein, Megan K. Cavanagh, Elizabeth M. Welch (as to Parts I, II, III(A), III(B), and III(C)(1)), Kyra H. Bolden, JJ., concur.

Welch, J. (concurring).

***21** I agree with Chief Justice CLEMENT's analysis in part and join Parts I, II, III(A), III(B), and III(C)(1), and I concur in the judgment. Plaintiffs' declaratory action cannot move forward. However, I believe it may be unnecessary to decide, at this time, whether the challenged conditions in the 2020 general permit can be considered "rules" under MCL 24.207 of the Administrative Procedures Act (the APA), MCL 24.201 *et seq.* Plaintiffs' lawsuit was filed under MCL 24.264, which authorizes an action for declaratory judgment challenging "the validity or applicability of a rule" as that term is defined by the APA. But MCL 24.264 is inapplicable if "an exclusive procedure or remedy is provided by a statute governing the agency ...." The Natural Resources and Environmental Protection Act (the NREPA), MCL 324.101 *et seq.*, provides exclusive remedies and procedures for disputing defendant's exercise of its authority to issue National Pollutant Discharge Elimination System (NPDES) permits in two ways: (1) a contested case proceeding pursuant to MCL 324.3112 and MCL 324.3113, and (2) a petition for permit review pursuant to MCL 324.1315 and MCL 324.1317. Thus, whether the permit conditions are rules or not, any challenge to EGLE's actions under MCL 24.264 is prohibited given the exclusive remedies and procedures set forth by the NREPA. [1]

I. RELEVANT FACTS

Plaintiffs challenge new conditions that defendant Department of Environment, Great Lakes, and Energy (EGLE) added to the 2020 general permit that is applicable to concentrated animal feeding operations (CAFOs). These new conditions were adopted after an extensive period of public participation. CAFOs in Michigan were faced with the choice of seeking coverage under the 2020 general permit or applying for an individual permit. Most CAFOs, including those who are parties to this case, sought coverage under the 2020 general permit. At the same time, many of these same entities and individuals commenced a contested case proceeding under MCL 324.3112(5), challenging the validity and necessity of these new conditions. As noted in the majority opinion, that contested case proceeding has been stayed pending resolution of this lawsuit.

***22** This lawsuit, commenced under MCL 24.264 in the Court of Claims, was filed by many of the same individuals and entities who sought coverage under the 2020 general permit and is separate from the contested case proceeding summarized in the prior paragraph. Plaintiffs' theory in this lawsuit is that the new conditions in the 2020 general permit constitute "rules" of general applicability under MCL 24.207 that needed to be formally promulgated and that, therefore, they can seek direct judicial review under MCL 24.264 without first exhausting administrative remedies.

The Court of Claims disagreed with plaintiffs, concluding that their failure to exhaust their administrative remedies deprived the court of subject matter jurisdiction under MCL 24.301, and the court dismissed their case. The Court of Claims also concluded that *Jones v Dep't of Corrections*, 185 Mich App 134, 138, 460 N.W.2d 575 (1990), precluded plaintiffs' action under MCL 24.264 for reasons aptly described by the majority. The Court of Appeals, while technically affirming the Court of Claims, agreed with plaintiffs' theory that the challenged conditions constituted rules that needed to be

promulgated through the formal rulemaking process and thus noted that a declaratory action under MCL 24.264 could be refiled after certain pre-suit statutory requirements had been satisfied. *Mich. Farm Bureau v Dep't of Environment, Great Lakes, & Energy*, 343 Mich App 293, 296, 314-318, 997 N.W.2d 467 (2022). The Court of Appeals held that MCL 24.264 "does not impose further administrative-remedy-exhaustion requirements," *id.* at 314, 997 N.W.2d 467, beyond the requirement that a party "first request[ ] the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously," MCL 24.264.

This Court granted leave to appeal and requested briefing on the question decided by the Court of Appeals, but we also asked whether an exception built into MCL 24.264—"an exclusive procedure or remedy [that] is provided by a statute governing the agency"—precluded this case from moving forward. Although the majority does not address this alternative pathway, I write to explain why I believe it offers an equally satisfactory means of resolving the present dispute without deciding the "rule" question.

II. EXCLUSIVITY OF A PROCEDURE OR REMEDY

MCL 24.264 provides that:

> *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.... This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

The plain language of MCL 24.264 contemplates a difference between an *exclusive* remedy or procedure concerning the validity or applicability of a "rule" and the *availability* of other remedies or procedures in which the validity or applicability of a "rule" could be challenged. Whether a statutory remedy or procedure has been made exclusive is a question of statutory interpretation. A remedy or procedure is most often made exclusive through explicit statutory mandate. However, the exclusivity of a statutory remedy or procedure can also be inferred from the context and purpose of the overall legislative scheme.

***23** This Court has never interpreted the "exclusive procedure or remedy" language in MCL 24.264, but the Court of Appeals did in *Slis v Michigan*, 332 Mich App 312, 956 N.W.2d 569 (2020). The issue in *Slis* was whether the plaintiffs could successfully pursue an action for declaratory judgment under MCL 24.264 to challenge the validity or applicability of *emergency rules* prohibiting the sale of flavored nicotine vapor products that had been *promulgated* by the Department of Health and Human Services (DHHS) under MCL 24.248. *Id.* at 318, 340-342. *Slis* held that the declaratory action could proceed because there was "no exclusive procedure or remedy provided in a different statute governing the DHHS with respect to challenging the validity of a[n] [emergency] rule promulgated by the DHHS." *Id.* at 341, 956 N.W.2d 569. The panel further opined:

> We reject any contention that MCL 24.248—the statute authorizing the promulgation of an emergency rule—provides "an exclusive procedure or remedy" as that phrase is used in MCL 24.264. The "exclusive procedure or remedy" language of MCL 24.264 plainly and unambiguously pertains to a procedure or remedy related to challenging the validity of a rule, not just any procedure or remedy. Although MCL 24.248 sets forth the *exclusive procedure* to promulgate an emergency rule, it has no language with regard to allowing or disallowing

> the challenge of an emergency rule. [*Id.*]

The Court also noted that MCL 24.248 was not a statute specifically governing DHHS; this also weighed against it providing an exclusive remedy or procedure for purposes of MCL 24.264. *Id.* at 341-342, 956 N.W.2d 569.

This Court has discussed exclusivity requirements in other contexts. These include disputes over which court or tribunal has jurisdiction, as well as disputes concerning the exclusivity or exhaustion of administrative remedies. In the context of exhaustion of administrative remedies, the Court has held that " 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' " *Holman v Indus. Stamping & Mfg. Co.*, 344 Mich. 235, 260, 74 N.W.2d 322 (1955), quoting *Myers v Bethlehem Shipbuilding Corp*, 303 U.S. 41, 50-51, 58 S Ct 459, 82 L Ed 638 (1938). Administrative law principles also "dictate[ ] that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency." *Judges of 74th Judicial Dist. v Bay Co.*, 385 Mich. 710, 727, 190 N.W.2d 219 (1971). From this, and other considerations, "emanates the doctrine of exhaustion, by which the courts have declined to act in contravention of administrative agencies where the remedies available through administrative channels have not been pursued to completion." *Id.* at 728, 190 N.W.2d 219.

Michigan's general rule of exhausting administrative remedies is premised on the idea that "where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive." *Pompey v Gen. Motors Corp.*, 385 Mich. 537, 552, 189 N.W.2d 243 (1971). See also *Monroe Beverage Co, Inc v Stroh Brewery Co*, 454 Mich. 41, 45, 559 N.W.2d 297 (1997) (making the same point and holding that former MCL 436.30b(28) of the Liquor Control Act provided the exclusive remedy for a wholesaler against a supplier where there was no contractual agreement between the two as required by § 30b(28) to authorize a lawsuit for damages).

Whether a statutory remedy or procedure is exclusive requires consideration of both statutory text and the context in which a remedy or procedure exists. Sometimes the Legislature is clear when providing for exclusive remedies, such as with the Worker's Disability Compensation Act, MCL 418.101 *et seq.* See MCL 418.131(1) ("The right to the recovery of benefits as provided in this act *shall be the employee's exclusive remedy* against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort.") (emphasis added). There are also some environmental permitting statutes that use explicit language when describing whether judicial review is permitted following a contested case proceeding. See MCL 324.5506(14) (stating that following an administrative decision to grant or deny a permit to operate or install equipment that releases toxic fumes into the air, "[a] *petition for judicial review is the exclusive means* of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action") (emphasis added). Explicit statutory language is the simplest way for the Legislature to convey its intent for an exclusive remedy or procedure.

***24** This Court has also inferred exclusive remedies from less explicit statutory text. For example, in *Pompey*, 385 Mich. at 552-553, 189 N.W.2d 243, this Court acknowledged that

> where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive. Correlatively, a statutory remedy for enforcement of a common-law right is deemed only cumulative. [Citations omitted.]

Pompey noted "two important qualifications" to this rule of exclusivity: (1) where the statutory "remedy is plainly inadequate," and (2) where "contrary [legislative] intent clearly appears." *Id.* at 553 n 14, 189 N.W.2d 243. As a result, in an action concerning statutory civil rights claims, the Court rejected an argument that the Michigan Civil Rights Commission had exclusive jurisdiction over those claims because "the judicial remedies provision in [Const. 1963, art. 5, § 29] clearly intended no *displacement* of judicial remedies ...." *Pompey*, 385 Mich. at 559, 189 N.W.2d 243. But statutory remedies enacted for the enforcement of purely statutory rights are generally considered exclusive so long as the remedy is adequate and the Legislature has not clearly demonstrated a contrary intention. See *id.* at 552-553, 189 N.W.2d 243 & n 14; *Int'l Brotherhood of Electrical Workers,*

Local Union No 58 v McNulty, 214 Mich App 437, 445, 543 N.W.2d 25 (1995) ("As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive. However, an exception to this general rule provides that if the statutory remedy is plainly inadequate, a private cause of action can be inferred.") (citation omitted). This Court reaffirmed this principle of exclusivity with exceptions this term. See *Stegall v Resource Technology Corp.*, — Mich —, —; — N.W.2d —, 2024 WL 3503503 (2024) (Docket No. 165450); slip op. at 14 ("Accordingly, we take this opportunity to reaffirm the aforementioned caselaw and hold that the 'plainly inadequate' qualifier is consistent with Michigan jurisprudence and that courts must therefore conduct an inquiry into the adequacy of the remedy when addressing whether statutory remedies are exclusive or cumulative. Furthermore, we disavow *Lash* [*v Traverse City*, 479 Mich. 180, 735 N.W.2d 628 (2007),] to the extent that it disavows *Pompey*'s adequacy analysis as dictum."). [2]

Conversely, in *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich. 104, 252 N.W.2d 818 (1977), the Court examined the exclusivity of remedies for an illegal teachers' strike as set forth in MCL 423.206, as amended by 1965 PA 379, of the public employment relations act (PERA), MCL 423.201 *et seq.* The law provided:

> "*Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others*, and without the lawful approval of his superior, wilfully [sic] absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act." [The remainder of the provision describes the procedure and timeline for filing such a request as well as provides the right of judicial review in circuit court.] [*Lamphere Sch*, 400 Mich. at 112, 252 N.W.2d 818, quoting MCL 423.206, as amended by 1965 PA 379.]

***25** MCL 423.206, as amended by 1965 PA 379, provided detailed procedures for invoking the statute and explicitly provided for judicial review in the circuit court of a final agency decision finding a violation of law and imposing discipline. *Lamphere Sch*, 400 Mich. at 112, 252 N.W.2d 818. While the language of Section 6 of PERA (MCL 423.206, as amended by 1965 PA 379), did not explicitly state that PERA was a striking teacher's exclusive avenue for relief, the Court held that

> when we review the extensive enforcement procedures regarding illegal teachers' strikes as outlined in Section 6 of the PERA, we find that the act's careful wording does indeed provide for exclusive, after-the-fact statutory remedies as to both teachers *and* their federations for participation in such strikes[.]
>
> * * *
>
> It becomes evident that the full Court [in *Rockwell v Crestwood Sch. Dist. Bd. of Ed.*, 393 Mich 616; 393 Mich. 616, 227 N.W.2d 736 (1975),] recognized that a unitary procedure for the discipline of public employees who strike would be salutary and was intended by legislative enactment. Although a difference of interpretation existed in [*Rockwell*] regarding the priority of two conflicting statutes, the underlying intention of the Legislature to create exclusive remedies by statute is made apparent.
>
> Equitable relief, of course, always remains available via injunction. See the PERA § 16(h) and *Holland School District v Holland Education Association*, 380 Mich. 314, 157 N.W.2d 206 (1968). But the foregoing emphasized language of § 6 of the PERA reflects legislative intent that the statutorily permitted discipline-discharge should be the unitary and exclusive remedies available to public employers in dealing with illegal strikes by public employees in violation of the PERA's [MCL 423.202, as enacted by 1947 PA 336] strike prohibition. [*Lamphere Sch*, 400 Mich. at 111-112, 113-114, 252 N.W.2d 818.]

Statutory remedies or procedures for review of administrative decisions have also been deemed exclusive even when a statute contains arguably permissive statutory language. Courts have held that the permissive language does not open the door to further remedies when an explicit pathway for administrative or judicial review has been provided. For example, the Court of Appeals has long recognized that an administrative complaint procedure is the exclusive remedy for bringing statutory claims under the wage and fringe benefits act, MCL 408.471 *et seq.*, even though MCL 408.481(1) states that an "employee who believes that his or her employer has violated [the] act *may* file a written complaint with the department ...." (Emphasis added.) See also *Cork v Applebee's of Mich, Inc*, 239 Mich App 311, 317-319, 608 N.W.2d 62 (2000) (holding that the wage and

fringe benefits act "provides the exclusive remedy for that alleged violation" of statutory rights and that this remedy was cumulative as to the enforcement of common-law rights). The same conclusion has been reached in the context of contesting adverse zoning decisions. See *Krohn v Saginaw*, 175 Mich App 193, 195, 437 N.W.2d 260 (1988) (holding that an appeal was the exclusive means of contesting a zoning board decision where former MCL 125.585(11), as amended by 1986 PA 191, stated that a "person ... affected by the zoning ordinance *may* appeal to the circuit court") (emphasis added).

III. MICHIGAN'S NPDES PERMITTING PROGRAM

Parts I(A) to I(C) of the majority opinion provide a comprehensive explanation of the relevant NPDES permit conditions and the individual and general permitting process. For purposes of my opinion, it is important to recognize that most of the permitting process for both individual and general NPDES permits, including seeking a certificate of coverage under a general permit, is governed by promulgated administrative rules. Nobody disputes this. Nor does anyone dispute that the rights and duties created by the NPDES program are purely statutory and regulatory in nature.

***26** The new conditions required by the 2020 general permit that are at issue in this case have not been promulgated as administrative rules at the federal or state level. Plaintiffs claim that EGLE was required to promulgate them through the rulemaking process. The exception to the ability to seek a declaratory action under MCL 24.264 is triggered only by exclusive remedies or procedures found in a "statute governing the agency." It is therefore important to consider the NREPA—a key enabling statute for EGLE—and the remedies and procedures it provides for challenging agency actions and decisions during the NPDES permitting process.

Under the Clean Water Act, 33 USC 1251 *et seq.*, no person or entity subject to the act is allowed to discharge pollutants into navigable waters of the United States without first obtaining a permit authorizing the discharge. Michigan law provides for the same prohibition at a state level. See 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 [EGLE]."). The federal government has delegated to Michigan the power to exercise NPDES permitting authority that would normally be exercised by the Environmental Protection Agency, and Michigan has delegated that authority to EGLE. See 33 USC 1342; MCL 324.3101 *et seq.*; *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 535-536, 747 N.W.2d 321 (2008). In Michigan, the NPDES permitting program is governed by Part 31 of the NREPA, MCL 324.3101 *et seq.* As the majority acknowledges, much of the agency's NPDES permitting program was created by promulgated administrative rules—EGLE's Part 21 rules—but the entire program is subject to and derived from Part 31 of the NREPA. See Mich Admin Code, R 323.2101 *et seq.*

The NPDES permitting program covers CAFOs because such operations are a point source of water pollution. As the majority explains, NPDES permits must include conditions designed to restrict the quantity or condition of pollutants that are discharged while keeping in mind target water quality standards. See, e.g., 33 USC 1342(a)(2). Moreover, as the majority and dissent both acknowledge, the conditions at issue here are technically a part of the "comprehensive nutrient management plan" (CNMP) that is required by both state and federal regulations for CAFOs, and the CNMP is incorporated as part of an NPDES permit obtained by a CAFO. See *Sierra Club Mackinac Chapter*, 277 Mich App at 552-553, 747 N.W.2d 321; Mich Admin Code, R 323.2196(1)(b); 40 CFR 122.42(e) (2023). Some mandatory conditions or practices that must be included in all NPDES permits issued to CAFOs were promulgated by the federal government, see 40 CFR 122.41 (2023); 40 CFR 122.42(e) (2023); 40 CFR 412.4(c) (2023). The federal requirements were then incorporated by reference into Michigan's regulations through Mich Admin Code, R 323.2189(2)(m). In 2006, EGLE also promulgated certain practices and conditions that exceed the federal requirements. See Mich Admin Code, R 323.2196(5). [3]

***27** The Clean Water Act also requires public notice and an opportunity for a hearing before an NPDES permit is issued. See *Sierra Club Mackinac Chapter*, 277 Mich App at 553-554, 747 N.W.2d 321. The permitting process that EGLE has established through its promulgated rules reflects this and requires a period of public notice, comment, and agency review, as well as an opportunity to request a public hearing, on an NPDES permit—whether general or individual—before it is issued. See Mich Admin Code, R 323.2117; R 323.2118; R 323.2119; R 323.2191(2); R 323.2130(1) and (2).

For both general and individual NPDES permits, EGLE is required to make a final determination as to whether to issue a permit or, for CAFOs seeking coverage under a general permit, a certification of coverage. Mich Admin Code, R

323.2133(1) and (2); Mich Admin Code, R 323.2191(2). For a permit to discharge waste under MCL 324.3112(1), EGLE must "condition the continued validity of a permit upon the permittee's meeting the effluent requirements that [EGLE] considers necessary to prevent unlawful pollution by the dates that [EGLE] considers to be reasonable and necessary and to ensure compliance with applicable federal law." MCL 324.3112(3). For a permit regarding new or increased use of waters for waste or sewage disposal under MCL 324.3113, EGLE is required to "condition the permit upon such restrictions as [EGLE] considers necessary to adequately guard against unlawful uses of the waters of the state as are set forth in [MCL 324.3109]." MCL 324.3113(2).

A person dissatisfied with a final agency decision to issue or deny a permit [4] has the right to petition EGLE to challenge the decision in a contested case hearing conducted pursuant to the APA. See MCL 324.3112(5); [5] MCL 324.3113(3). [6] "In a contested case regarding a permit, an administrative law judge shall preside, make the final decision, and issue the final decision and order for the department." MCL 324.1317(1). Administrative rules remove any doubt that proceedings regarding a CAFO applicant's request for coverage under a general permit or an assertion that coverage under an individual permit is more appropriate must occur after the issuance of the general permit. But the decision to allow or deny coverage under the general permit itself is subject to a contested case review process in accordance with MCL 324.3113. [7] See Mich Admin Code, R 323.2192(c). [8] At all relevant times, the statutes also provided that the results of a contested case proceeding could be reviewed and modified by Michigan's environmental permit review commission and were also subject to judicial review, regardless of whether the commission is petitioned to intervene. See MCL 324.1317(4) and (7); [9] MCL 324.3112(5); MCL 324.3113(3).

***28** The Legislature has granted parties like CAFOs an entirely separate right to seek review by the environmental permit review commission [10] "before the permit has been approved or denied." MCL 324.1315(1). Such proceedings are separate and distinct from the contested case proceedings following a final permitting decision, as I have previously described. The director of EGLE has the discretion to attempt to resolve such petitions directly through negotiation, MCL 324.1315(1), but if this does not occur, the matter must be submitted to the environmental permit review commission to make a formal recommendation to the director of whether to approve or deny the permit, MCL 324.1315(1), (2), and (4) to (6). Although the director's decision on a recommendation from the commission is not immediately reviewable, it "may be included in an appeal to a final permit action." MCL 324.1315(6). If the director's decision is not appealed to the environmental permit review commission, EGLE's decision "regarding the approval or denial of a permit is [a] final permit action for purposes of any judicial review or other review allowed under" the NREPA, MCL 24.201 to MCL 24.328 (the second and third chapters of the APA), and MCL 600.631 (appeals of agency decisions to a circuit court). MCL 324.1315(6).

IV. APPLICATION

The preceding discussion demonstrates that the Legislature has adopted by statute extensive and *exclusive* procedures and remedies for parties interested in challenging EGLE's exercise of NPDES permitting authority at every step of the process. As previously noted, it is undisputed that the rights, duties, and obligations associated with the NPDES program are purely statutory and regulatory in nature. There is no indication in Part 31 of the NREPA that the Legislature intended these extensive procedures to exempt the agency's NPDES permitting program or allow for direct litigation against EGLE for exercising its permitting power as a bypass to the administrative review process. Accordingly, the presumption under Michigan law is that the statutory processes and procedures acknowledged by the NREPA are exclusive as to the enforcement of purely statutory and regulatory rights. See *Stegall*, —— Mich at ——, —— N.W.2d —— slip op. at 11-14; *Pompey*, 385 Mich. at 553, 189 N.W.2d 243; *Monroe Beverage Co*, 454 Mich. at 45, 559 N.W.2d 297; *Lamphere Sch*, 400 Mich. at 111-112, 113-114, 252 N.W.2d 818. And, consistent with this, EGLE has adopted administrative rules for contested case proceedings specific to the NPDES general permitting program. See Mich Admin Code, R 323.2192(c), citing MCL 324.3113.

CAFOs have multiple avenues to challenge an EGLE decision to deny or approve coverage under a general permit beyond the initial notice-and-comment-like proceedings that are mandated before a general permit is issued. [11] They can use the contested case proceeding process. See MCL 324.3112; MCL 324.3113. Or they can seek an additional internal review of a decision by the environmental permit review commission. MCL 324.1317. The outcomes of both avenues are subject to judicial review. See MCL 324.3112(5); MCL 324.3113(3); MCL 324.1315(6); MCL 324.1317(4) and (7).

And both avenues provide the exclusive remedy for NPDES general permit applicants, just as they do for those seeking individual NPDES permits.

While Part 31 of the NREPA does not explicitly refer to remedies or procedures as exclusive when discussing review through the contested case process or review by the environmental permit review commission, as noted earlier, this is not dispositive. A statutory remedy or process can still be exclusive even if the statute fails to explicitly state that it is the only avenue for relief. See MCL 324.3112(5); MCL 324.3113(3); MCL 324.1315(1); MCL 324.1317. Each of these statutes uses terminology such as "may seek review," and this makes sense given the context. Each of these provisions states that a permit applicant or aggrieved party has the right or option to seek review of an administrative decision through the agency and then later in court. It would make little sense for such a statute to say that a permit applicant or aggrieved party "shall seek review" because that would imply that the party is *obligated to file the petition or appeal.*

***29** As in *Pompey*, determining whether the statutory remedies or procedures laid out by Part 31 of the NREPA are exclusive requires a more nuanced and contextual approach. In the zoning context, it is well accepted that if local zoning ordinances provide an administrative method to seek review of an adverse decision, then that method must be used. See *Cummins v Robinson Twp*, 283 Mich App 677, 690-691, 770 N.W.2d 421 (2009); *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 200, 550 N.W.2d 867 (1996). Zoning statutes that say a person "may" appeal an adverse zoning decision to the circuit court have consistently been read as making such an appeal the exclusive mechanism for bringing the dispute before the judiciary. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 99-100, 693 N.W.2d 170 (2005) (discussing former MCL 125.293a(1), as enacted by 1978 PA 637, which stated that "a person having an interest affected by the zoning ordinance may appeal to the circuit court"); *Krohn*, 175 Mich App at 195, 437 N.W.2d 260. This requirement has generally been referred to as part of the requirement to exhaust administrative remedies. [12] See *Cummins*, 283 Mich App at 691, 770 N.W.2d 421; see also *Cork*, 239 Mich App at 317-319, 608 N.W.2d 62 (holding that the wage and fringe benefits act provides the exclusive process even though MCL 408.481(1) states that the employee "may file" a complaint with the agency).

When the relevant aspects of Part 31 of the NREPA are read in a holistic and contextual manner, it is clear that the Legislature intended all challenges to EGLE's exercise of NPDES permitting authority to be funneled through one of its established administrative pathways *before* the right to seek judicial review ripens. [13]

These pre-judicial review pathways include seeking review before an environmental permit review commission and seeking review by an administrative law judge in a contested case. In each of these administrative proceedings, the permittee can argue that aspects of the 2020 general permit are inapplicable or legally invalid for various reasons. This would include arguments that the newly imposed conditions on the 2020 general permit exceed EGLE's statutory or regulatory authority absent new formal rulemaking or that they are inconsistent with the NREPA or existing regulations. This is unlike the statutory scheme at issue in *Stegall*, —— Mich at ——, —— N.W.2d —— slip op. at 16-18, where the Legislature delegated to the agency significant discretion to decide whether to process a complaint that had been filed with the agency. That discretion was relevant to this Court's decision in *Stegall* holding that the statutory remedies were inadequate and thus nonexclusive. *Id.* Part 31 of the NREPA also grants EGLE no discretion to refuse to process and adjudicate a timely petition for a contested case or petition for review by the environmental permit review commission concerning the agency's NPDES permitting authority. The outcomes of such administrative proceedings are then subject to judicial review as to whether EGLE exceeded its statutory and regulatory authority.

***30** It would be illogical for the Legislature to create under Part 31 such a comprehensive process of administrative review that follows a period of public notice and opportunity for a hearing before a general NPDES permit can even be adopted if regulated entities were not required to use the administrative process. Moreover, EGLE has presented compelling arguments that it would be difficult to determine whether EGLE has, in fact, exceeded its legal authority absent the fact-intensive process provided for in a contested case. Because EGLE has express legal authority to impose conditions in NPDES permits necessary to achieve water quality standards, regardless of whether those conditions exceed existing regulations, each dispute is fact-specific. See 33 USC 1311(b)(1)(C); 40 CFR 122.44 (2023); MCL 324.3112(3); MCL 324.3113(2). See also MCL 324.1307(5) ("Approval of an application for a permit may be granted with conditions or modifications necessary to achieve compliance with the part or parts of this act under which the permit is issued.").

As this Court concluded in *Lamphere Sch*, 400 Mich. at 112, 252 N.W.2d 818, it is clear to me that the Legislature intended a contested case proceeding under MCL 324.3112 and MCL 324.3113 and petition for permit review under MCL 324.1315 and MCL 324.1317 to be the exclusive procedures or remedies for challenging EGLE's exercise of permitting authority under Part 31 of the NREPA. It is undisputed that the NREPA is a statute governing EGLE, and Part 31 is the source of EGLE's permitting authority under the NPDES program. Accordingly, even if I were to agree with Justice VIVIANO that the challenged conditions of the 2020 NPDES permit were "rules" for purposes of the APA, I would conclude that these statutory procedures and remedies represent the "exclusive procedure or remedy ... provided by a statute governing the agency" for challenging the "validity or applicability" of those conditions. MCL 24.264; see *Slis*, 332 Mich App at 341, 956 N.W.2d 569 (holding that a remedy or procedure must allow for a challenge to the validity or applicability of a "rule" to invoke the exception to MCL 24.264's applicability). [14]

V. CONCLUSION

***31** I agree with the majority that under *Clonlara, Inc. v State Bd. of Ed.*, 442 Mich. 230, 243, 245-248, 501 N.W.2d 88 (1993), the challenged conditions in the 2020 general permit cannot be considered "rules" because in 2020 EGLE lacked delegated rulemaking authority as to its NPDES program for CAFOs and thus the conditions, on their own, cannot have the force and effect of law. However, I would have preferred to avoid resolving this question until the now-stayed administrative proceedings concerning the same legal controversy had concluded. Instead, I believe the preferrable resolution would have been to recognize that the Legislature created a comprehensive and exclusive system of procedures and remedies for challenging EGLE's exercise of permitting authority under Part 31 of the NREPA. Because declaratory actions under MCL 24.264 are precluded if there is an exclusive remedy provided by a statute that governs EGLE, I would hold that this alone precluded plaintiffs' current action.

Viviano, J. (dissenting).

The majority incorrectly holds that the conditions in the 2020 National Pollutant Discharge Elimination System general permit (2020 GP) [1] governing discharges from concentrated animal feeding operations (CAFOs) issued by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) are not "rules" that must be promulgated in conformity with the Administrative Procedures Act (the APA), MCL 24.201 *et seq.*, and that since they are not rules, plaintiffs cannot challenge the validity of the general permit conditions in a declaratory-judgment action under MCL 24.264. I disagree with both conclusions and respectfully dissent for the reasons set forth in this opinion.

I. BACKGROUND

Under the federal Clean Water Act (the CWA), 33 USC 1251 *et seq.*, a CAFO may not discharge any pollutants into navigable waters unless it has obtained a permit from EGLE. [2] Those permits are governed by Part 31 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.* EGLE's authority to promulgate rules under Part 31 of NREPA was circumscribed by 2004 PA 91. See MCL 324.3103(2) ("[N]otwithstanding any rule-promulgation authority that is provided in this part, except for rules authorized under [MCL 324.3112(6)], the department shall not promulgate any additional rules under this part after December 31, 2006."). [3] Perhaps in anticipation of the rule moratorium, in 2005, EGLE's predecessor promulgated a rule setting forth detailed requirements that a CAFO must satisfy to be eligible for coverage under a CAFO NPDES permit. See Mich Admin Code, R 323.2196(5).

***32** As the Court of Appeals observed, in prior permitting cycles, the general permits governing CAFOs contained the conditions specified in the rule and "permitted what the rule permits." *Mich. Farm Bureau v Dep't of Environment, Great Lakes, & Energy*, 343 Mich App 293, 312, 997 N.W.2d 467 (2022). But in 2020, EGLE took a different tack and "included discretionary conditions in addition to or more stringent than the mandatory conditions." *Ante* at —— (opinion of the Court). Indeed, as the Court of Appeals observed after examining the 2020 general permit conditions:

> Close analysis of the new conditions indicates that they go beyond the scope of the promulgated rule, Mich Admin Code, R 323.2196. That which formerly was authorized by the promulgated rule and permitted under

> the 2010 and 2015 general permits is now barred by unpromulgated general-permit conditions. Accordingly, the new conditions expand the regulatory restrictions generally applicable to CAFOs that implement and apply the CWA and NREPA. [*Mich. Farm Bureau*, 343 Mich App at 313, 997 N.W.2d 467.]

This notion—i.e., that the 2020 general permit conditions prohibit certain activities that were previously allowed—does not appear to be in serious dispute. Indeed, the majority mints two new phrases to distinguish between permit conditions that are required by EGLE or federal regulations, coined "mandatory conditions," and those that are *more stringent* than and merely authorized by such regulations, coined "discretionary conditions." See *ante* at —— (opinion of the Court).[4] EGLE argues that the additional and more stringent conditions are necessary to comply with federal law.[5] Of course, compliance with federal mandates does not control whether the agency was required to go through basic APA rulemaking procedures to impose new regulatory requirements under state law.

II. THE 2020 GP FITS THE DEFINITION OF A "RULE" UNDER THE APA

***33** As noted at the outset, whether plaintiff can challenge the validity of the general permit conditions in a declaratory action under MCL 24.264 depends on whether those conditions are properly considered "rules" under the APA. I now turn to that inquiry.

The APA broadly defines "rule" to mean "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." MCL 24.207. The majority opinion adopts a four-element test for determining whether an agency action is a "rule," as follows:

> (1) it is an agency regulation, statement, standard, policy, ruling, or instruction; (2) it is of general applicability; (3) it implements or applies law enforced or administered by the agency, or it prescribes the organization, procedure, or practice of the agency; and (4) it, in itself, has the force and effect of law. [*Ante* at —— (opinion of the Court).][6]

The majority finds that the first three elements are easily satisfied in this case, and I agree—so there is little reason to discuss them further. The majority next concludes—erroneously in my view—that the general permit conditions do not have the force or effect of law.[7] Although it can sometimes be difficult to determine whether an agency action meets the definition of a "rule" under the APA, see *Nat'l Leased Housing Ass'n v United States*, 105 F.3d 1423, 1433 (CA Fed, 1997), it is not difficult in this case. Applying the factors that courts have identified to assist in determining whether an agency action has binding effect yields a clear answer: the 2020 GP is a rule.

A. THE AGENCY'S CHARACTERIZATION OF THE ACTION

***34** This Court has explained that, when distinguishing between "rules" and "interpretative statements," "[t]he crucial question is whether the agency intends to exercise delegated power to make rules having force of law, and the intent usually can best be found in what the agency says at the time of issuing the rules." *Mich Farm Bureau v Bureau of Workmen's Compensation, Dep't of Labor*, 408 Mich. 141, 150, 289 N.W.2d 699 (1980) (quotation marks and citation omitted). Similarly, the United States Court of Appeals for the DC Circuit has explained that "the agency's characterization of the [document]" is an important factor. See *Nat'l Mining Ass'n v McCarthy*, 411 US App DC 52, 61, 758 F.3d 243 (2014).[8]

This factor weighs heavily in favor of finding that the 2020 GP is a rule. To begin with, the 2020

GP is written in express terms of mandatory directives and prohibitions. The directives include, among other things, monitoring requirements, waste storage requirements, inspection requirements, and reporting requirements. And the 2020 GP prohibits CAFOs from land-applying manure for three months of the year, 2020 GP, § I.B.3.f.3, and from selling or transferring manure to another entity for those same three months, 2020 GP, § I.C.8. In addition, any farm field with soil-test phosphorus above a certain threshold cannot receive manure. See 2020 GP, § I.B.3.c.1.a. Finally, the 2020 GP starkly provides:

> All discharges authorized herein *shall be consistent with* the terms and conditions of this permit....
>
> It is *the duty of the permittee to comply* with all the terms and conditions of this permit. *Any noncompliance* with the Effluent Limitations, Special Conditions, or terms of this permit *constitutes a violation of the NREPA and/or the Federal Act* and *constitutes grounds for enforcement action*; for permit or Certificate of Coverage (COC) termination, revocation and reissuance, or modification; or denial of an application for permit or COC renewal. [2020 GP, § II.D.1 (emphasis added).]

The 2020 GP does not contain any disclaimers stating that these conditions are not legally binding. [9] Instead, it "reads like a ukase[;] [i]t commands, it requires, it orders, it dictates." *Appalachian Power Co v Environmental Protection Agency*, 341 US App DC 46, 54, 208 F.3d 1015 (2000); see also *Iowa League of Cities v Environmental Protection Agency*, 711 F.3d 844, 864 (CA 8, 2013) (" '[T]he mandatory language of a document alone can be sufficient to render it binding ....' "), quoting *Gen. Electric Co. v Environmental Protection Agency*, 351 US App DC 291, 297, 290 F.3d 377 (2002).

***35** The difference between the language in the 2020 GP and the language in agency actions or documents that courts have found not to be a rule under the APA is instructive. For example, in *Nat'l Mining Ass'n*, the document included "caveats," including that the document "does not impose legally binding requirements," that "[ran] throughout the document, and more to the point, the document [was] devoid of relevant commands." *Id.* at 61, 62, 208 F.3d 1015 (quotation marks and citation omitted).

More generally, it is notable that EGLE did not label the 2020 GP and has not described it as guidance, tentative, or otherwise nonbinding. [10] Indeed, EGLE has not even expressly argued *during this litigation* that the 2020 GP is not binding. This factor weighs heavily in favor of finding that the 2020 GP is a rule under the APA.

B. THE LEGAL EFFECT OF THE AGENCY ACTION

This Court has also made clear that in determining whether an agency action is a rule, we must focus our inquiry "on the 'actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule.' " *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs.*, 431 Mich. 172, 188, 428 N.W.2d 335 (1988), quoting *Schinzel v Dep't of Corrections*, 124 Mich App 217, 219, 333 N.W.2d 519 (1983). And the effect of an agency action is particularly relevant "where the agency establishes policies and procedures under a broad grant of authority to administer a program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 404, 591 N.W.2d 314 (1998), citing *American Federation of State, Co. & Muni. Employees v Dep't of Mental Health*, 452 Mich. 1, 9, 550 N.W.2d 190 (1996) (*AFSCME*). See also *Nat'l Mining Ass'n*, 411 US App DC at 61, 758 F.3d 243 (holding that the "most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities"). This factor, too, weighs in favor of finding that the 2020 GP is a rule.

***36** In addition to the commandments and directives that pervade the 2020 GP itself, EGLE's own regulations also treat the terms of the 2020 GP as having legal effect. EGLE has broad and express authority to regulate the discharge of waste and other pollutants into waters of this state. See MCL 324.3103(1) (general powers); 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."). Every CAFO is required to obtain a permit from EGLE before discharging any waste to waters of the state. See MCL 324.3112(1); see also Mich Admin Code, R 323.2106(1); R 323.2196(1). [11] Implementing that authority, Mich Admin Code, R 323.2192 governs "application requirements for coverage under general permits" that "shall be complied with[.]" Subsection (b) provides:

> Upon the receipt of an application for coverage under an existing general permit, the department shall determine

> if the discharge *meets the criteria for coverage under the general permit.* The issuance of a notice of coverage by the department which states that the discharge *meets the criteria initiates coverage by the general permit.* [Mich Admin Code, R 323.2192(b) (emphasis added).]

In other words, the 2020 GP sets the standards by which every CAFO applying for coverage under the general permit will be judged. See *ante* at —— (opinion of the Court) ("If EGLE decides the applicant 'meets the criteria for coverage under the general permit,' EGLE issues a certificate of coverage and the point source may discharge pollutants in accordance with the mandatory and discretionary conditions in the general permit."), quoting Mich Admin Code, R 323.2192(b). Indeed, EGLE's regulations define "general permit" as "a national permit issued *authorizing* a category of similar discharges." Mich Admin Code, R 323.2103(a) (emphasis added). [12] Thus, the legal effect of the 2020 GP is clear—it sets the standards that determine whether a CAFO can obtain coverage under the general permit.

As the majority recounts, in *AFSCME*, the Department of Mental Health issued guidelines that listed what terms and conditions every contract with a private group home operator had to include. See *AFSCME*, 452 Mich. at 6-8, 550 N.W.2d 190. The purported guidelines were held to be "rules" under the APA, in part because "many of the provisions in this standard form contract, and the changes to those provisions, go to the heart of the department's statutory mandate." *Id.* at 7-8, 550 N.W.2d 190. And in *Delta Co. v Dep't of Natural Resources*, 118 Mich App 458, 468, 325 N.W.2d 455 (1982), the Court of Appeals held that "the license was conditioned on compliance with 31 stipulations which were departmental guidelines and internal policies. Clearly, then, these guidelines were binding. Therefore, they effectively were rules under the guise of guidelines and policies." See also *Nat'l Mining Ass'n*, 411 US App DC at 60-61, 758 F.3d 243 ("An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule.").

***37** The same is true here—under EGLE's rules, the 2020 GP provides the terms and conditions that every applicant for coverage under the general permit must include. See Mich Admin Code, R 323.2192(b). [13] And those authorizations for coverage go to the very heart of the NPDES permitting program. See 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.").

***38** The majority's attempt to distinguish *AFSCME* and *Delta Co* is wholly unpersuasive. The majority distinguishes these cases by saying: "In contrast to *AFSCME* and *Delta Co*, here, there is nothing in the record to suggest that EGLE treats the general permit and conditions as though they restrict its permitting discretion." *Ante* at —— n 42 (opinion of the Court). Frankly, I am dumbfounded by this assertion. EGLE's own regulation clearly states that, "[u]pon the receipt of an application for coverage under an existing general permit, the department *shall determine if* the discharge meets the criteria for coverage *under the general permit.*" Mich Admin Code, R 323.2192(b) (emphasis added). [14] And, as to the creation of the general permit itself, Mich Admin Code, R 323.2191(1) provides that, "[u]pon a determination by the department that certain discharges are appropriately and adequately *controlled by a general permit*, the department may issue a general permit *to cover* a category of discharge." (Emphasis added.) Thus, the clear legal effect of the 2020 GP is that it sets the standards that EGLE applies when determining whether an application for coverage is approved. If there is nothing in the record to suggest that the 2020 GP restricts EGLE's permitting discretion, that is only because the parties already operate with that obvious understanding. [15]

Additionally, the federal courts of appeal have recognized the principle that, when regulated entities have " 'reasonably [been] led to believe that failure to conform will bring adverse consequences,' [that effect] tends to make the document binding as a practical matter" and therefore a "rule" under the APA. *Iowa League of Cities*, 711 F.3d at 864, quoting *Gen. Electric Co.*, 351 US App DC at 297, 290 F.3d 377 (first alteration by the *Iowa League of Cities* court). The language in the 2020 GP can lead to no other conclusion than that it has the force and effect of law—it indisputably sets forth the position it plans to follow in deciding whether to issue authorizations for coverage under the 2020 GP. See *Appalachian Power*, 341 US App DC at 53, 208 F.3d 1015 ("[W]hatever EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to

apply."). Moreover, once a CAFO obtains coverage under the 2020 GP, failure to comply with the conditions carries fines and penalties under MCL 324.3115, which strongly suggests that the 2020 GP is a rule. See *Mann Constr., Inc. v United States*, 27 F.4th 1138, 1144 (CA 6, 2022) ("[The agency action] creates new substantive duties, the violations of which prompt exposure to financial penalties and criminal sanctions. Those are hallmarks of a legislative ... rule.").

***39** This factor, too, shows that the 2020 GP conditions are rules under the APA.

C. THE AGENCY ACTION IS INCONSISTENT WITH EXISTING RULES

It is well established that "[a] policy directive cannot be considered an 'interpretive statement' of a rule if it is in fact inconsistent with the rule or contains provisions which go beyond the scope of the rule." *Jordan v Dep't of Corrections*, 165 Mich App 20, 27, 418 N.W.2d 914 (1987). See also *Coalition for Human Rights*, 431 Mich. at 189, 428 N.W.2d 335 ("The new procedures are not merely mechanical details for the conduct of hearings, but, rather, represent substantial changes in the detailed requirements for the conduct of fair hearings to determine claimants' rights under the Social Welfare Act and applicable federal law."); *Thompson v Dep't of Corrections*, 143 Mich App 29, 32, 371 N.W.2d 472 (1985) ("Of course, the directive could not be considered an 'interpretive statement' if it were inconsistent with the rules or contained provisions which went beyond the scope of the rules.") (citation omitted); *Schinzel*, 124 Mich App at 221, 333 N.W.2d 519 ("[T]he defendants' policy directive equating postage stamps, the importation, exportation, or possession of which is clearly not prohibited by law, with contraband cannot be deemed an interpretative statement of what 'contraband' means; it changes that term's very definition."); *Gen. Electric Co.*, 351 US App DC at 296-297, 290 F.3d 377 (" 'If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures.' "), quoting Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L J 1311, 1355 (1992).

Here, as noted above, it appears uncontested that the 2020 GP has conditions that are inconsistent with the existing rule for CAFO general permits, Mich Admin Code, R 323.2196, and contains provisions that go well beyond the scope of that rule. See *ante* at —— (opinion of the Court) (referring to such provisions as "discretionary conditions"). Indeed, as noted, plaintiffs have alleged that the new mandates imposed by EGLE will force regulated farms "to incur substantial costs and threaten the viability and continued operations of some farms." Because the 2020 GP makes substantial changes in the detailed requirements for coverage stated under the existing regulation, it is properly considered a rule.

D. THE AGENCY ACTION DOES NOT MERELY EXPLAIN WHAT THE STATUTE MEANS

When considering MCL 24.207(h), which the majority incorporates into its definition of a "rule" under the APA, courts in this state have distinguished between a "rule" and something that is "merely explanatory." See, e.g., *Faircloth*, 232 Mich App at 404, 591 N.W.2d 314 ("The policies are not interpretive statements because they do not merely interpret or explain the statute or rules from which the agency derives its authority. Rather, they establish the substantive standards implementing the program."). [16] The "explanation" must be geared toward uncertain statutory language, where the implementing agency alerts the public to what it believes the statute means, i.e., the interpretation "reminds affected parties of *existing* duties" rather than "creat[ing] *new* law, rights or duties." *Tenn. Hosp. Ass'n v Azar*, 908 F.3d 1029, 1042 (CA 6, 2018) (quotation marks and citation omitted; emphasis added). See *Clonlara, Inc. v State Bd. of Ed.*, 442 Mich. 230, 240-241, 501 N.W.2d 88 (1993) ("[I]nterpretive rules ... state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.") (quotation marks and citation omitted; alteration in original); *id.* at 243-244, 501 N.W.2d 88 ("Interpretive rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to *advise* the public of the agency's construction of the law it administers.") (quotation marks and citation omitted). [17]

***40** Here, by contrast, the 2020 GP is not "merely explanatory" and did not interpret any existing statutory or regulatory language; it instead created new "substantive standards implementing the [NPDES] program." See *Faircloth*, 232 Mich App at 404, 591 N.W.2d 314. The 2020

GP conditions represent a quasi-legislative decision that sets quantitative standards for a category of dischargers. Indeed, the majority agrees: "[G]eneral permit and discretionary conditions are not EGLE's attempt to discern the meaning of an ambiguous provision of Part 31 of the NREPA or one of EGLE's rules ...." *Ante* at —— (opinion of the Court). [18] Like the other factors, this one also weighs in favor of finding that the 2020 GP is a rule because it does not merely explain EGLE's interpretation of uncertain statutory language.

E. OTHER JURISDICTIONS CONSIDER GENERAL PERMITS TO BE RULES

Not surprisingly, courts that have addressed this question have had little trouble concluding that general NPDES permits are "rules" under the federal APA. As one court explained:

> Each [nationwide general permit] easily fits within the APA's definition of "rule." This is so because each [nationwide general permit], which authorizes a permittee to discharge ..., is a legal prescription of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA. As such, each [nationwide general permit] constitutes a rule: An "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." [*Nat'l Ass'n of Home Builders v US Army Corps of Engineers*, 368 US App DC 23, 35-36, 417 F.3d 1272 (2005) (citations omitted).]

See also *Alaska Community Action on Toxics v Aurora Energy Servs., LLC*, 765 F.3d 1169, 1172 (CA 9, 2014) (" '[G]eneral permits are considered to be rulemakings ....' "), quoting EPA, *General Permit Program Guidance* (February 1988), p. 21, available at <https://www3.epa.gov/npdes/pubs/owm0465.pdf> (accessed June 6, 2024) [https://perma.cc/6F66-CNQC].

The majority dismisses *Alaska Community Action* as simply "an acknowledgment that NPDES general permits are issued after notice-and-comment proceedings that track notice-and-comment rulemaking requirements under 5 USC 553 of the federal APA." *Ante* at —— (opinion of the Court). To be sure, that is *one part* of the court's discussion. See *Alaska Community Action*, 765 F.3d at 1172 (noting that "general permits 'are issued pursuant to administrative rulemaking procedures' "), quoting *Natural Resources Defense Council v US Environmental Protection Agency*, 279 F.3d 1180, 1183 (CA 9, 2002) (*NRDC*). But that is clearly not all that *Alaska Community Action* said. Rather, as quoted above, it says that general permits *are* rulemakings, i.e., they are rules. Indeed, the very page of the EPA Guidance document that *Alaska Community Action* quoted states, "Since general permits are considered to be rulemakings, *EPA's issuance and promulgation activities must be conducted in accordance with the Administrative Procedure Act* (APA) (5 U.S.C. 551, et seq.)." *General Permit Program Guidance*, p. 21 (emphasis added). That directly refutes the majority's speculation. Finally, *Alaska Community Action* expressly recognized the binding nature of the general permit upon issuance. See *Alaska Community Action*, 765 F.3d at 1171 ("Once a general permit has been issued, an entity seeking coverage generally must submit a 'notice of intent' to discharge *pursuant to the permit.*"), citing 40 CFR 122.28(b)(2) (emphasis added). [19] *NRDC* did the same. See *NRDC*, 279 F.3d at 1183. Thus, when read in context, those cases clearly considered an NPDES general permit to be a "rule" with binding effect upon issuance, not simply a nonbinding agency action that happened to go through procedures tracking the federal APA rulemaking requirements.

***41** The majority's attempt to distinguish *Home Builders* is also meritless. The majority points out that the general permits at issue in that case allowed some people to discharge without first applying for coverage. See *ante* at —— (opinion of the Court). Because the 2020 GP does not do the same thing, the majority concludes that it lacks the force and effect of law. But that conclusion rests on the flawed and unsupported proposition that the *only* way an agency action can have legal effect is to authorize a discharge. The majority simply ignores that the issuance of the 2020 GP carries a significant legal effect by setting the standards for what is necessary to obtain a certificate of coverage. Indeed, under the majority's reasoning, the general permits at issue in *Home Builders* would be "rules" for individuals that may discharge without first applying for coverage but would *not* be "rules" for anyone that must apply. I disagree with such a convoluted and unsupported interpretation of what constitutes a rule. [20] Moreover, that interpretation is refuted by clear logic:

> An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule. (*As to interpretive rules*, an agency action that merely

> interprets a prior statute or regulation, *and does not itself purport to impose new obligations or prohibitions or requirements* on regulated parties, is an interpretive rule.) [*Nat'l Mining Ass'n*, 411 US App DC at 60-61, 758 F.3d 243 (emphasis added).]

The 2020 GP is a rule because it imposes new legal obligations for any CAFO seeking coverage under the 2020 GP.

* * *

In sum, nothing in the 2020 GP states that it is intended as guidance, an interpretive statement, or some other unspecified nonbinding action. Instead, the 2020 GP commands, requires, orders, and dictates what a CAFO must do to obtain coverage under it. See *Appalachian Power*, 341 US App DC at 54, 208 F.3d 1015. EGLE's own regulations and historical practice treat the conditions as mandatory, denying coverage for applicants who do not meet them. The 2020 GP materially alters, rather than merely explains, existing regulatory standards governing CAFOs' discharging activities. If "rules is rules, no matter their gloss," *Nat'l Ass'n of Home Builders*, 368 US App DC at 36, 417 F.3d 1272 (quotation marks and citation omitted), then surely the 2020 GP—which lacks even the veneer of a nonbinding agency action—should be deemed a rule.

III. THE MAJORITY ERRS BY CHARACTERIZING THE 2020 GP AS A POLICY EGLE HOPES TO PROVE IS NECESSARY IN CONTESTED CASES

Rather than apply the widely recognized factors that courts use to determine whether an agency action is a "rule" under the APA, the majority charts its own course, leaving confusion in its wake. First, the majority expands this Court's holding in *Clonlara*. Unlike the nonpublic school act at issue in that case, see *Clonlara*, 442 Mich. at 237, Part 31, 501 N.W.2d 88 of NREPA clearly gives EGLE some rulemaking authority. See MCL 324.3103(2) ("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.") (emphasis added). So it is not as if EGLE has *no* rulemaking authority under Part 31 of NREPA, such that it could never issue a statement or policy of general applicability that has the force and effect of law. *Clonlara*, therefore, is not controlling. [21]

***42** Yet the majority expands *Clonlara* by bringing a merits question into the threshold jurisdictional issue of whether the action is a rule under the APA. Whether the 2020 GP conditions are within the scope of EGLE's Part 31 rulemaking power is a question on the merits—i.e., whether the 2020 GP conditions are substantively *valid* rules. See *Ins. Institute of Mich. v Comm'r of Office of Fin. & Ins. Servs.*, 486 Mich. 370, 385, 785 N.W.2d 67 (2010) (holding that when an agency is empowered to make rules, courts use a three-part test to determine the substantive validity of the rule: "(1) *whether the rule is within the matter covered by the enabling statute*; (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, when *[sic]* it is neither arbitrary nor capricious") (quotation marks and citation omitted, emphasis added, and alteration by the *Ins Institute of Mich* Court); *Slis v Michigan*, 332 Mich App 312, 340, 956 N.W.2d 569 (2020) (noting that "[a]n agency rule is substantively invalid when the subject matter of the rule falls outside of or goes beyond the parameters of the enabling statute"); see also MCL 24.232(7) ("A rule must not exceed the rule-making delegation contained in the statute authorizing the rule-making.").

The majority reframes and generalizes *Clonlara* by noting that the agency in *Clonlara* had some rulemaking authority, which the majority believes is analogous to this case and EGLE. See *ante* at —— (opinion of the Court). But, as the majority recognizes, *Clonlara* merely noted that the agency had rulemaking authority under *the School Code*, MCL 380.1 *et seq.*, as enacted by 1976 PA 451, while the policy at issue related to *the nonpublic school act*, MCL 388.551 *et seq.*, as enacted by 1921 PA 302, and the agency " '[was] not authorized, explicitly or implicitly, to promulgate rules relating to the nonpublic school act.' " *Ante* at ——, quoting *Clonlara*, 442 Mich. at 248, 501 N.W.2d 88. Indeed, *Clonlara* did not meaningfully discuss the School Code—the statute that provided the agency some rulemaking authority—until it addressed *the merits* of whether a separate agency policy was a valid interpretation of the School Code. See generally *Clonlara*, 442 Mich. at 248-252, 501 N.W.2d 88. The bottom line is that the majority opinion expands the holding of *Clonlara* without meaningful support.

Thus, properly understood and without the majority's expansion of *Clonlara*, the threshold question of *whether* an

agency action is a "rule" is controlled by *Clonlara* only when the agency has no rulemaking authority under the statute at issue. If the agency does not, then no action taken by that agency can be a "rule" under the APA. However, where the agency *does* have some rulemaking authority under the statute at issue, *Clonlara* does not apply. In that situation, the court must ask whether the agency action fits the definition of a rule. And, if so, then the merits question becomes whether that action is supported by the agency's rulemaking authority such that it is a *valid* rule. This case passes the threshold test for whether EGLE has any rulemaking authority under *Clonlara*, and for the reasons explained above, the 2020 GP is a rule. The majority's conflation of those two inquiries is no reason to expand *Clonlara*, especially given Justice RILEY's powerful dissent in that case. [22]

***43** In any event, to the extent *Clonlara* is binding, I note that the majority only follows half of the opinion. After *Clonlara* held that the agency action in that case was not a rule, it specifically addressed whether the procedures specified in the agency action were "valid interpretations of the law." *Clonlara*, 442 Mich. at 248, 501 N.W.2d 88. Ultimately, the Court held that parts of the procedures were valid, while others were not. *Id.* at 252, 501 N.W.2d 88. The majority fails to undertake the same type of analysis here or even remand this case for the trial court to do so. I note that, because it is undisputed that the terms of the 2020 GP go beyond what is currently required in any state or federal law, it appears to be invalid. See *id.* ("There is thus no requirement that public schools be in session 180 days. As a result, the board cannot base the 180-day school year requirement for home schools on an analogy to or comparability of public school requirements.").

Then, instead of confining itself to the arguments raised by the parties, the majority plucks a label to describe the 2020 GP that no party has used—from a case that no party has cited. The majority adopts the description in *Pacific Gas & Electric Co. v Fed. Power Comm.*, 164 US App DC 371, 506 F.2d 33 (1974), of the nonbinding policy guidance given by the agency in that case and describes the 2020 GP as a "statement[ ] announcing a policy [EGLE] plans to establish in future adjudications ...." *Ante* at —— (opinion of the Court). The majority also relies on *Kent Co. Aeronautics Bd. v Dep't of State Police*, 239 Mich App 563, 609 N.W.2d 593 (2000), when describing the 2020 GP as merely "explaining how [EGLE] plans to exercise a discretionary power ...." *Ante* at —— (opinion of the Court). [23] But EGLE has never described the 2020 GP conditions in that way and did not even cite *Pacific Gas* in its briefs or rely on *Kent Co* for that proposition. [24] As a result, the majority's suppositions about EGLE's unexpressed intentions, while creative, are utterly unfounded. [25] I also note that, because the majority grounds its holding that the 2020 GP is not a rule on the *Clonlara* decision, Part III(C) of the majority opinion is not binding on that issue because it merely explains the effect of that holding.

***44** Further, in trying to analogize the 2020 GP to an interpretive statement, see *ante* at —— – —— (opinion of the Court), the majority mischaracterizes the analysis and holding of *Pacific Gas*. The majority suggests that *Pacific Gas* turned on the mere opportunity for customers of a natural gas company to prove that, despite the agency's statement announcing which curtailment plans would be given priority, the company's curtailment plan was not reasonable under the circumstances. See *ante* at —— – —— (opinion of the Court). But *Pacific Gas* considered much more than that, most notably the language of the agency's statement itself. Indeed, the court extensively quoted the statement's repeated, explicit references to the fact that the statement did not provide a binding rule before an opportunity for a hearing. See *Pacific Gas*, 164 US App DC at 378-379, 506 F.2d 33.

Here, in contrast, the 2020 GP speaks exclusively in terms of immediate, mandatory obligations such as the one requiring that "[a]ll discharges authorized herein shall be consistent with the terms and conditions of this permit." See generally Part II of this opinion. And, unlike in *Pacific Gas*, EGLE has promulgated regulations that require each applicant seeking coverage under the 2020 GP to first demonstrate compliance with its terms and conditions. See Mich Admin Code, R 323.2192(b) ("Upon the receipt of an application for coverage under an existing general permit, the department shall determine if the discharge meets the criteria for coverage under the general permit."). The 2020 GP even provided a specific effective date upon which the 2020 GP would govern applications for coverage. The 2020 GP is not remotely similar to the agency statement at issue in *Pacific Gas*. Thus, *Pacific Gas* does not support the majority's creation of a blanket, extratextual exception to the definition of a "rule" under the APA.

Further, in *Pacific Gas*, the agency guidance specifically contemplated that the guidance was "intended only to state initial guidelines as a means of facilitating curtailment planning *and the adjudication of curtailment cases*." *Pacific Gas*, 164 US App DC at 378, 506 F.2d 33 (quotation marks and citation omitted; emphasis added). The 2020 GP says

nothing of the sort. While it does refer to an opportunity for a hearing, it does so in terms that suggest the general permit is final upon issuance. See 2020 GP, p. 1 ("After notice and opportunity for a hearing, this permit *may be modified, suspended, or revoked* in whole or in part *during its term* in accordance with applicable laws and rules.") (emphasis added); *id.* at 2, 550 N.W.2d 190 ("Any person *who is aggrieved* by this permit may file a sworn petition with [EGLE], setting forth the conditions of the permit which are being challenged and specifying the grounds for the challenge.") (emphasis added).[26] Thus, rather than suggest that the permit conditions are nonfinal or that EGLE merely hopes to prove they are necessary during a subsequent hearing, the 2020 GP's express language indicates that the conditions are binding and that CAFOs must comply with those terms when applying for coverage.[27] This case is distinguishable from *Pacific Gas* and, instead, is analogous to cases that have found an agency action to be a "rule" under the APA when the regulated entities have " 'reasonably [been] led to believe that failure to conform will bring adverse consequences ....' " *Iowa League of Cities*, 711 F.3d at 864, quoting *Gen. Electric Co.*, 351 US App DC at 297, 290 F.3d 377 (alteration by the *Iowa League of Cities* court).[28]

***45** The majority's treatment of *Kent Co* is also unfaithful to the actual holding in that case.[29] The majority cherry-picks the Court's observation that the site-selection criteria provided by the agency in that case "simply advise[d] a local governmental unit, by way of explanation, what will constitute an equivalent site for construction of a communications tower." *Kent Co.*, 239 Mich App at 583, 609 N.W.2d 593. But the majority fails to properly acknowledge that *Kent Co* turned more fundamentally on the Court's conclusion that the site criteria were "simply an intergovernmental communication that does not affect the rights of the public" and therefore were excluded from the definition of "rule" under MCL 24.207(g). *Id.*[30] The same cannot be said here—the 2020 GP speaks to the regulated entities, like plaintiffs, and establishes what they must do to obtain coverage under the 2020 GP. *Kent Co* is simply inapposite, which is likely why EGLE did not rely on it or even make the arguments upon which the majority bases its conclusion.[31]

Perhaps more fundamental—and more troubling—than the majority's mischaracterization of those cases is the majority's misunderstanding of the NPDES permitting process. Specifically, despite producing a 54-page opinion, the majority refuses to acknowledge the simple fact that the 2020 GP sets the standards for whether a CAFO's application for coverage will be approved. EGLE's own regulations could not be clearer: "Upon the receipt of an application for coverage under an existing general permit, the department shall determine if the discharge meets *the criteria for coverage under the general permit.*" Mich Admin Code, R 323.2192(b) (emphasis added). While the majority is correct that "it is the certificate of coverage—not the general permit itself—that grants the rights and imposes obligations on the CAFO," *ante* at —— (opinion of the Court), that simply ignores the regulatory directive that the 2020 GP controls whether EGLE will grant a certificate of coverage in the first place. The fact that site-specific factors for an applicant might lead to denial without modification does not change that directive. Similarly, the fact that an operator may be able to obtain an individual permit does nothing to change whether they receive approval for what they applied for—coverage under the 2020 GP. Apparently, the majority believes that nothing short of an all-encompassing directive, without any room for variation, is a rule under the APA.[32]

***46**

* * *

The confusion and contradictions in the new legal regime created by the majority opinion will have to be sorted out in this case and others for years to come. For example, the majority holds that EGLE cannot rely on the 2020 GP when reviewing applications for coverage. See *ante* at —— (opinion of the Court) ("EGLE cannot act as though the general permit or the discretionary conditions constrain its permitting discretion in individual cases involving CAFOs."). Thus, it would appear that EGLE must create a full record specific to each CAFO that applies for coverage under the 2020 GP or any future general permit.[33] In addition, the majority opinion does not address whether EGLE may impose additional or different requirements than those included in Mich Admin Code, R 323.2196, even if EGLE can otherwise justify the nonbinding requirements currently in the 2020 GP.

Finally, EGLE apparently cannot rely on any decision from a CAFO's contested case hearing to determine whether the conditions in that CAFO's certificate of coverage are appropriate for the next applicant. See *ante* at —— (opinion of the Court) ("[W]hen a CAFO applies for a certificate of coverage under the general permit, EGLE must retain discretion to decide whether the discretionary conditions in the general permit are necessary as applied to the particular

CAFO. And again, EGLE must genuinely evaluate whether the discretionary conditions are necessary as applied to that particular CAFO."). Thus, in effect, all permit applications will be treated as applications for an individual permit, spelling the end of EGLE's general permitting program. This outcome does not appear to be one that was even contemplated by EGLE or the regulated parties.

Given that historically over 92% of CAFOs have been covered by a general permit, the majority's erroneous decision will surely be to the financial detriment of CAFOs across the state, which will now be required to engage in an uncertain, laborious, and litigious individual permitting process. Indeed, the majority opinion sentences CAFOs (which cannot operate without a permit) to perpetual permitting litigation —including the litigation that will be necessary to parse the majority's convoluted and confusing opinion.

IV. CONCLUSION

***47** Under NREPA, the APA, and our caselaw interpreting those statutes, it is clear that the 2020 GP is a "rule" that may be challenged in a pre-enforcement declaratory-judgment action under MCL 24.264. The majority's attempt to label it as something else is unfounded and not persuasive. Therefore, I respectfully dissent and would instead affirm the Court of Appeals' principal holding that the 2020 GP is a rule. [34]

Brian K. Zahra, J., agrees.

All Citations

--- N.W.3d ----, 2024 WL 3610196

Footnotes

1 Michigan Department of Environment, Great Lakes, and Energy, *National Pollutant Discharge Elimination System Wastewater Discharge General Permit: Concentrated Animal Feeding Operations*, Permit No. MIG010000 (issued March 27, 2020), available at <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Programs/WRD/CAFO/MIG010000-General-Permit-2025.pdf?rev=a4d602d0165c41e096854abe036058f9> (accessed June 6, 2024) [https://perma.cc/6YEW-WSX6].

2 National Association of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities* (2010), p. 2, available at <https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf> (accessed April 3, 2024) [https://perma.cc/2LPY-CD2J].

3 Animal waste includes a number of potentially harmful pollutants, including

> (1) nutrients such as nitrogen and phosphorus; (2) organic matter; (3) solids, including the manure itself and other elements mixed with it such as spilled feed, bedding and litter materials, hair, feathers and animal corpses; (4) pathogens (disease-causing organisms such as bacteria and viruses); (5) salts; (6) trace elements such as arsenic; (7) odorous/volatile compounds such as carbon dioxide, methane, hydrogen sulfide, and ammonia; (8) antibiotics; and (9) pesticides and hormones. [*Waterkeeper Alliance, Inc*, 399 F.3d at 494, citing *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations*, 66 Fed Reg 2960, 2976-2979 (proposed January 12, 2001).]

4 A CAFO may operate without an NPDES permit, for instance, if EGLE finds that a CAFO has " 'no potential to discharge' pursuant to [Mich Admin Code, R 323.2196(4)]." See Mich Admin Code, R 323.2196(1)(b).

5 Specifically, 40 CFR 122.44(k) (2023) requires an NPDES permit to include best-management practices to control or abate discharge of pollutants when "[n]umeric effluent limitations are infeasible" or "[t]he practices

are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the [Clean Water Act]."

6 Technically speaking, the conditions are part of a CAFO's "comprehensive nutrient management plan," but the comprehensive nutrient management plan is considered part of a permit. See *Sierra Club Mackinac Chapter*, 277 Mich App at 552-553, 747 N.W.2d 321. And there is no dispute that once a CAFO receives an individual permit or certificate of coverage under a general permit, the CAFO is bound to follow the conditions. See MCL 324.3115.

7 Water-quality standards specify a maximum concentration of pollutants that may be present in water without impairing its suitability for a designated use, such as swimming or drinking. See *American Paper Institute, Inc*, 302 US App DC at 83, 996 F.2d 346. In pertinent part, EGLE's water-quality standards limit the amount of nutrients (including phosphorus), harmful microorganisms, and characteristics associated with excess nutrients. See Mich Admin Code, R 323.1060(1) and (2) (plant nutrients, including phosphorus); R 323.1062(1) and (2) (microorganisms); R 323.1050 (physical characteristics); R 323.1055 (taste- or odor-producing substances); R 323.1064(1) (dissolved oxygen in the Great Lakes, connecting waters, and inland streams); R 323.1065(1) and (2) (dissolved oxygen in inland lakes); and R 323.1043(z) (defining "dissolved oxygen").

8 Part 13 of the NREPA grants EGLE this power as well. See MCL 324.1307(5) ("Approval of an application for a permit may be granted with conditions or modifications necessary to achieve compliance with the part or parts of this act under which the permit is issued.").

9 In recognition of this authority granted by the NREPA, EGLE promulgated Mich Admin Code, R 323.2137(d), which provides that any NPDES permit issued by EGLE must contain conditions deemed necessary by EGLE to meet applicable Part 4 water-quality standards.

10 If EGLE's preliminary determination is to deny the permit, the applicant or other person may petition for a contested-case hearing, see MCL 324.3113(3), and the same process described in the next few paragraphs of this opinion applies.

11 These public-notice and public-comment requirements stem from the Clean Water Act's requiring public notice and an opportunity for a public hearing before an NPDES permit issues. See *Sierra Club Mackinac Chapter*, 277 Mich App at 553, 747 N.W.2d 321.

12 Broadly speaking, the contested-case procedures under the APA require that the parties to the contested case be given the opportunity to have an impartial decision-maker preside over a hearing, to present oral and written argument, to present evidence, and to cross-examine witnesses. See MCL 24.271 to MCL 24.288.

13 The Environmental Permit Review Commission is a 15-member commission appointed by the Governor; the commission is composed of persons who are not currently state employees and who have not worked for EGLE within the preceding three years. See MCL 324.1313(2) and (3). The commission is charged with advising the director of EGLE on disputes related to permits and permit applications. See MCL 324.1313(1).

14 Mich Admin Code, R 323.2192(b) refers to the certificate of coverage as a "notice of coverage." But Mich Admin Code, R 323.2196(1)(b) refers to it as a "certificate of coverage." The 2020 general permit does as well. See Permit No. MIG010000, p. 1. We therefore use the term "certificate of coverage."

15 Mich Admin Code, R 323.2191(3) provides:

> (3) The department may require any person who is authorized to make a discharge, by a general permit, to apply for and obtain an individual national permit if any of the following circumstances apply:

(a) The discharge is a significant contributor to pollution as determined by the department on a case-by-case basis.

(b) The discharger is not complying, or has not complied, with the conditions of the general permit.

(c) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of waste applicable to the point source discharge.

(d) Effluent standards and limitations are promulgated for point source discharges subject to the general permit.

(e) The department determines that the criteria under which the general permit was issued no longer apply. Any person may request the department to take action pursuant to the provisions of this subrule.

16 Although not required to do so, before publicly noticing the draft 2020 general permit, EGLE held three stakeholder meetings between March and June 2019 at which stakeholders were allowed to raise and discuss their concerns with the 2015 general permit and offer suggestions for the 2020 general permit.

17 Washburn explained that the mandatory conditions required by the EPA rules and EGLE rules did not ensure proper waste tracking, that CAFOs were applying more manure to the land in winter than necessary for crop production, and that some CAFOs were creating separate legal entities and transferring their waste to those entities to avoid responsibility for the waste. As a result, Washburn explained, since 2015, "additional water bodies [have been] listed as impaired ...."

18 Because a rule alters rights or imposes obligations on society or an open-ended class, the APA prescribes "an elaborate procedure for rule promulgation." *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich. 172, 177, 428 N.W.2d 335 (1988). This procedure is set forth in MCL 24.231 through MCL 24.264. Overall, that process requires an agency to obtain approval from what was then known as the Office of Regulatory Reinvention to promulgate a rule, see MCL 24.239; MCL 18.446, to give public notice of the proposed rule, see MCL 24.239a; MCL 24.241(1), to prepare a regulatory-impact statement and small-business-impact statement for the proposed rule, see MCL 24.245(3) and (4), to hold a public hearing at which the public may comment on the proposed rule, see MCL 24.241(1), and to obtain approval from the Legislature's joint committee on administrative rules, see MCL 24.245a. When EGLE proposes a rule, it must also obtain approval from the Environmental Rules Review Committee. See MCL 24.266. These procedures ensure that the various groups who will be affected by a rule may take part in the rulemaking process and that the agency carefully considers all possible consequences and implications before making a final decision. See *Detroit Base Coalition*, 431 Mich. at 189-190, 428 N.W.2d 335 (noting that the rulemaking procedures " 'are calculated to invite public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules, and make the rules readily accessible after adoption' "), quoting Bienenfeld, Michigan Administrative Law (1st ed.), § 4, p. 4-1. A rule is invalid if an agency does not process the rule "in compliance with [MCL 24.266], if applicable, [MCL 24.242], and in substantial compliance with [MCL 24.241(2), (3), (4), and (5)]." MCL 24.243(1).

19 Plaintiffs also asked the court to declare that (1) the discretionary conditions were substantively invalid because they were arbitrary and capricious, beyond EGLE's regulatory authority, and contrary to the intent of Part 31 of NREPA; (2) EGLE's incorporation of the conditions into the 2020 general permit was a violation of plaintiffs' constitutionally guaranteed procedural and substantive due-process rights; (3) EGLE's incorporation of the conditions constituted a violation of the Constitution's Separation of Powers Clause, and any statutory authority on which EGLE relied for such adoption violated the constitutional nondelegation doctrine; (4) EGLE's assertion of control over non-CAFOs went beyond its statutory authority, and its standard

for determining such authority was unconstitutionally void for vagueness; and (5) the permit condition requiring CAFOs to install 35-foot permanent vegetated buffer strips and the requirement to have 100-foot setbacks converted cropland acreage to nonfarmable land, which was an unconstitutional taking without just compensation in violation of U.S. Const., Am. V and Const. 1963, art. 10, § 2.

20 MCL 24.301 states:

> 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.

21 *Jones* was issued before November 1, 1990, and a panel of the Court of Appeals is not bound to follow a prior published decision of the Court of Appeals issued before November 1, 1990. MCR 7.215(J)(1).

22 At the same time, plaintiffs filed a cross-application for leave to appeal, challenging the Court of Appeals' conclusion that summary disposition was still warranted because, while MCL 24.264 would apply to their challenge, they did not first seek a declaratory ruling from EGLE about the validity of the discretionary conditions in the general permit. Because we conclude that the discretionary conditions are not rules, we deny plaintiffs' cross-application for leave to appeal.

23 In response to EGLE's application for leave to appeal, plaintiffs argued that EGLE lacked appellate standing to challenge the judgment of the Court of Appeals. We disagree. We have held that a party must be aggrieved by the actions of either the trial court or an appellate-court judgment to have appellate standing. See *League of Women Voters of Mich v Secretary of State*, 506 Mich. 561, 577-578, 957 N.W.2d 731 (2020), citing *Federated Ins. Co. v Oakland Co. Rd. Comm.*, 475 Mich. 286, 291-292, 715 N.W.2d 846 (2006). Although the Court of Appeals affirmed the Court of Claims' dismissal of plaintiffs' action for lack of jurisdiction, EGLE was aggrieved by the Court of Appeals' decision because the Court of Appeals' holding that the discretionary conditions in the general permit are rules might hinder EGLE's ability to fulfill its statutory duties under Part 31 of the NREPA.

24 Of course, MCL 24.264 refers to the circuit court, not the Court of Claims. But nothing in MCL 24.264 purports to confer exclusive jurisdiction on the circuit courts. Given that the circuit courts are not the exclusive forum for adjudicating these issues, if MCL 24.264 confers the circuit court with subject-matter jurisdiction, MCL 600.6419(1)(a) would operate to transfer that subject-matter jurisdiction to the Court of Claims. Under MCL 600.6419(1)(a), the Court of Claims has exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or *declaratory relief* or any demand for an extraordinary writ against the state or any of its departments or officers *notwithstanding another law that confers jurisdiction of the case in the circuit court.*" MCL 600.6419(1)(a) (emphasis added); see also *Telford v Michigan*, 327 Mich App 195, 198-201, 933 N.W.2d 347 (2019) (holding that this provision repealed contrary provisions addressing Headlee Amendment suits).

25 The Court of Appeals assumed that this exhaustion-of-administrative-remedies requirement was a jurisdictional prescription. Because we hold that the 2020 general-permit conditions are not rules under the APA, we need not decide today whether this assumption is correct. But we do question this assumption. The exhaustion-of-administrative-remedies requirement in MCL 24.264 is one that seems to "seek to promote the

orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel Henderson v Shinseki*, 562 U.S. 428, 435, 131 S Ct 1197, 179 L Ed 2d 159 (2011). So it might be more accurate to describe this requirement as a mandatory claims-processing rule. See *Santos-Zacaria v Garland*, 598 U.S. 411, 416-417, 143 S Ct 1103, 215 L Ed 2d 375 (2023) (noting that nonjurisdictional claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times" and that an administrative-exhaustion requirement is "a quintessential claim-processing rule") (quotation marks and citation omitted). Though we need not decide this today, we caution courts to exercise reasoned judgment before branding an exhaustion-of-administrative-remedies requirement jurisdictional, because "[h]arsh consequences attend the jurisdictional brand." See *Fort Bend Co v Davis*, 587 U.S. 541, 139 S Ct 1843, 1849, 204 L Ed 2d 116 (2019) (quotation marks and citation omitted); see also *Washington*, 508 Mich. at 118, 124, 972 N.W.2d 767 (noting the importance of distinguishing between the lack of subject-matter jurisdiction and the error in the exercise of jurisdiction, and noting the unfortunate practice among courts of using the term "jurisdiction" imprecisely). If a requirement is jurisdictional, a party's failure to comply with it can be raised at any point during the proceedings, and a court must dismiss the action for the party's failure to comply—even if the issue is raised for the first time on appeal. See *Lehman v Lehman*, 312 Mich. 102, 105-106, 19 N.W.2d 502 (1945); *In re Cody's Estate*, 293 Mich. 697, 701, 292 N.W. 535 (1940); *In re Estate of Fraser's*, 288 Mich. 392, 394, 285 N.W. 1 (1939). A court has no discretion to fashion equitable exceptions to a jurisdictional rule or to otherwise excuse noncompliance; subject-matter jurisdiction cannot be conferred by consent or waiver. See *Travelers Ins. Co. v Detroit Edison Co.*, 465 Mich. 185, 204, 631 N.W.2d 733 (2001).

26 Beyond MCL 24.207(h), MCL 24.207 includes a list of other administrative actions that are not rules. Because we conclude that neither the general permit nor the discretionary conditions are rules under MCL 24.207(h), we need not address whether they fall within any other agency action that MCL 24.207 lists as not being a "rule."

27 See, e.g., *Emergency Med. Care Facilities, PC v Div. .of Tenncare*, 671 S.W.3d 507, 514 (Tenn, 2023) (using dictionary definitions to define "general applicability"); *Blinzinger v Americana Healthcare Corp*, 466 N.E.2d 1371, 1375 (Ind App, 1984) (stating that rulemaking "is distinguished from the adjudicatory function in that the former embraces an element of generality, operating upon a class of individuals or situations whereas an adjudication operates upon a particular individual or circumstance"); *Northwest Pulp & Paper Ass'n v Dep't of Ecology*, 200 Wash 2d 666, 673, 520 P.3d 985 (2022) (en banc) (holding that an action is of general applicability if it applies uniformly to all members of a class); *N.C. Dep't of Environmental Quality v N.C. Farm Bureau Federation, Inc*, 291 N.C.App. 188, 895 S.E.2d 437, 442-443 (2023) (holding that a rule is generally applicable if it applies in most situations); *Nat'l Org. of Veterans' Advocates, Inc v Secretary of Veterans Affairs*, 981 F.3d 1360, 1374 (Fed Cir. 2020) (noting that a rule is generally applicable when it affects an "open-ended category" of people or entities).

28 Plaintiffs claim that Part 31 of the NREPA empowers EGLE to make rules necessary to comply with the Clean Water Act. See MCL 324.3103(3) ("The department may promulgate rules and take other actions as may be necessary to comply with the federal water pollution control act ...."). But MCL 324.3103(2) says "*notwithstanding any rule-promulgation authority that is provided in* [*Part 31*], except for rules authorized under [MCL 324.3112(6)], the department shall not promulgate any additional rules under this part after December 31, 2006." (Emphasis added.) The Legislature thus unequivocally said that EGLE cannot make rules to comply with the Clean Water Act after December 31, 2006, despite MCL 324.3103(3) saying that EGLE may promulgates rules to comply with the Clean Water Act. The Legislature's intent is clear given that MCL 324.3103 empowered EGLE to make rules necessary to comply with the Clean Water Act when the Legislature amended MCL 324.3103 in April 2004 to divest EGLE of rulemaking authority under Part 31 of

the NREPA "notwithstanding any rule-promulgating authority that is provided in [Part 31] ...." Compare MCL 324.3103, as enacted by 1994 PA 451, with MCL 324.3103, as amended by 2004 PA 91.

29 See also *Mich Farm Bureau*, 408 Mich. at 149, 289 N.W.2d 699 (" 'When an agency has no delegated power to make law through rulemaking, the rules it issues are necessarily interpretive.' "), quoting Davis, Administrative Law of the Seventies, Supplementing Administrative Law Treatise, § 5.03, pp. 147-148; *Nat'l Park Hospitality Ass'n v Dep't of Interior*, 538 U.S. 803, 809, 123 S Ct 2026, 155 L Ed 2d 1017 (2003) (considering an agency statement "to be nothing more than a 'general statemen[t] of policy' " where the agency had no delegated rulemaking authority) (citation omitted; alteration by the *Nat'l Park* Court); Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L J 1311, 1321-1323 (1992) (noting that when an agency lacks "delegated statutory authority to act with respect to the subject matter of the rule," statements of general applicability issued by the agency are "either interpretive rules (if they interpret specific statutory or regulatory language) or policy statements (if they do not)") (emphasis omitted).

30 Because it is clear based on our decision in *Clonlara* that the general permit and discretionary conditions must lack the force and effect of law due to EGLE's lack of rulemaking power, we need not address the Court of Claims' ruling that they were not rules, which was based on the Court of Appeals' decision in *Jones*. See *Jones*, 185 Mich App at 137, 460 N.W.2d 575 (holding that the plaintiff could maintain an action under MCL 24.264 only if the plaintiff "challenge[d] the validity or applicability of a rule which had been formally promulgated as a rule" under the APA's rulemaking procedures).

31 Under the federal APA, these are termed "general statements of policy."

32 Specifically, the Court of Appeals held that the Equivalent Site Criteria were either "[a]n intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public" under MCL 24.207(g), or "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory" under MCL 24.207(h). *Kent Co.*, 239 Mich App at 582-583, 609 N.W.2d 593. Justice VIVIANO says we "fail[ ] to properly acknowledge" that the Court of Appeals also concluded that the Equivalent Site Criteria fell within MCL 24.207(g). But it is clear the panel concluded that the Equivalent Site Criteria fell within Subsection (g) only because it found that the Equivalent Site Criteria lacked the force and effect of law. Indeed, it is difficult to imagine an instance in which an "intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public," would have the force and effect of law. Stated differently, it is difficult to imagine an instance when an agency statement would fall under the Subsection (g) exception but not the Subsection (h) exception.

33 Compare the general permit here with Mich Admin Code, R 323.2190(1), which provides that an entity automatically has permit coverage if certain conditions are met.

34 We thus agree with Justice VIVIANO that a CAFO with a certificate of coverage under the general permit may be fined or penalized pursuant to MCL 324.3115 for failing to comply with the discretionary conditions. But that does not suggest that the general permit and discretionary conditions themselves have the force and effect of law. It means only that the certificate of coverage has the force and effect of law.

35 Indeed, if we were to hold that EGLE cannot issue the general permit, all that would change is that CAFOs would have to apply for individual permits, and EGLE would exercise its discretion to impose the same challenged general-permit conditions in most individual CAFO permits.

36 We do not suggest that either the general permit or discretionary conditions are necessarily "guideline[s]" as that term is used under MCL 24.207(h) and defined by MCL 24.203(7) (" 'Guideline' means an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person."). The only issue before us now is whether the general permit or discretionary conditions are rules, and so we need not decide whether they meet the APA's definition of a guideline.

37 As noted earlier in this opinion, various provisions of Part 31 of the NREPA require EGLE to include any discretionary conditions in the permit that EGLE deems necessary to achieve applicable Part 4 water-quality standards or other applicable laws and regulations. See MCL 324.3106; MCL 324.3113(2). But the discretionary conditions EGLE includes under this statutory authority are not EGLE's explanation of what unclear or ambiguous provisions of the NREPA mean. See *Interpretive Rules*, 41 Duke L J at 1324 (contrasting interpretive rules with general statements of policy and noting that, unlike interpretive rules, general statements of policy "do not rest upon existing positive legislation that has tangible meaning. Neither Congress nor the agency, acting legislatively, has already made the law that the policy statements express. Thus these documents are looked upon as creating new policy, albeit not legally binding policy as the documents were not promulgated legislatively").

38 We do not suggest that "EGLE must create a full record specific to each CAFO that applies for coverage" under the 2020 general permit or any future general permit, as Justice VIVIANO claims. All we hold is that, when a CAFO applies for a certificate of coverage and agrees to comply with the discretionary conditions in the general permit, EGLE cannot act as though the CAFO is automatically entitled to a certificate of coverage. EGLE must retain discretion to deny a certificate of coverage and process the CAFO's application as an individual permit.

39 Mich Admin Code, R 323.2191(5) says:

> Any person having a discharge which is authorized, or proposing a discharge which may be authorized by a general permit, may request to be excluded from the coverage of the general permit and apply for an individual national permit. An application shall be submitted pursuant to these rules, with reasons supporting the request, to the department. The department may deny an application for an individual national permit if it determines that the general permit is more appropriate.

40 Mich Admin Code, R 323.2191(3) says:

> (3) The department may require any person who is authorized to make a discharge, by a general permit, to apply for and obtain an individual national permit if any of the following circumstances apply:
>
> (a) The discharge is a significant contributor to pollution as determined by the department on a case-by-case basis.
>
> (b) The discharger is not complying, or has not complied, with the conditions of the general permit.
>
> (c) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of waste applicable to the point source discharge.
>
> (d) Effluent standards and limitations are promulgated for point source discharges subject to the general permit.
>
> (e) The department determines that the criteria under which the general permit was issued no longer apply. Any person may request the department to take action pursuant to the provisions of this subrule.

41 We therefore disagree with Justice VIVIANO's suggestion that the 2020 general permit contains no disclaimer that the discretionary conditions therein are not legally binding.

42 This is what distinguishes this case from *AFSCME* and the Court of Appeals' decision in *Delta Co. v Dep't of Natural Resources*, 118 Mich App 458, 325 N.W.2d 455 (1982). *AFSCME* and *Delta Co* each dealt with instances in which an agency purported that a statement was nonbinding, but in practice, the agency treated the statement as binding. In *AFSCME*, the Department of Mental Health issued guidelines that listed what terms and conditions every contract with a private-group-home operator had to include. *AFSCME*, 452 Mich. at 6-8, 550 N.W.2d 190. While the guidelines purported to allow a private-group-home operator to negotiate different contract terms, "the record indicate[d] that, in reality, group home providers may only do business with the department if they agree to the standard form contract without modifications." *Id.* at 6, 550 N.W.2d 190. Because the Department of Mental Health effectively required every contract with a private-group-home operator to include the provided terms, then, we held that the guidelines had the force and effect of law and were rules. *Id.* at 10-11, 550 N.W.2d 190. Similarly, in *Delta Co*, the Court of Appeals held that the Department of Natural Resources' guidelines conditioning the issuance of solid-waste-disposal-area licenses on 31 conditions being met were rules because the guidelines "were binding." *Delta Co.*, 118 Mich App at 467-468, 325 N.W.2d 455. In contrast to *AFSCME* and *Delta Co*, here, there is nothing in the record to suggest that EGLE treats the general permit and conditions as though they restrict its permitting discretion. Not only that, in *AFSCME*, the Department of Mental Health unquestionably had the power to make rules with respect to the provision of care in private group homes. See *AFSCME*, 452 Mich. at 7-8, 550 N.W.2d 190. Put otherwise, unlike EGLE, the Department of Mental Health could give statements of general applicability the force and effect of law if it so intended. Even if EGLE intended to give the general permit or the discretionary conditions the force and effect of law here, it could not do so.

43 Along with their permit applications, CAFOs must submit comprehensive nutrient management plans. See Mich Admin Code, R 323.2196(5); *Sierra Club Mackinac Chapter*, 277 Mich App at 536, 539, 747 N.W.2d 321. Among other things, CAFOs may show in this plan how they intend to comply with the mandatory conditions and any discretionary conditions in the general permit. See Mich Admin Code, R 323.2196(5); *Sierra Club Mackinac Chapter*, 277 Mich App at 536, 539, 747 N.W.2d 321.

44 For that reason, we reject plaintiffs' and Justice VIVIANO's claim that EGLE was attempting to avoid the APA's rulemaking procedures in this case. Because EGLE lacks the power to make rules with respect to CAFO permits, the general permit and discretionary conditions could not have the force and effect of law even if EGLE followed the APA's rulemaking procedures to issue the general permit and discretionary conditions. As we said in *Clonlara*, when an "agency has not been empowered to promulgate rules, policy statements issued by it need not be promulgated in accordance with APA procedures and do not have the force of law." *Clonlara*, 442 Mich. at 239, 501 N.W.2d 88.

45 If the discretionary conditions had the force and effect of law like the mandatory conditions listed in Mich Admin Code, R 323.2196(5), a CAFO or CAFOs could not argue in a contested-case hearing that EGLE has not shown that the mandatory conditions are necessary to achieve Part 4 water-quality standards or other applicable laws or regulations. And CAFOs could not ask an administrative law judge or the Environmental Permit Review Commission to strike the mandatory conditions from the general permit or any individual permit on this basis.

46 See *Pacific Gas*, 164 US App DC at 379, 506 F.2d 33 ("In the absence of such a policy statement, the Commission could have proceeded on an ad hoc basis and tentatively approved curtailment plans filed under section 4 of the Act which the Commission found to be just and reasonable. In following such a course the only difference from the present situation would be that the Commission would be acting under a secret policy rather than under the publicized guidelines of Order No. 467."); Manning, *Nonlegislative Rules*, 72 Geo Wash L Rev 893, 914-915 (2004) ("Indeed, nonlegislative rules potentially allow agencies to supply often

far-flung staffs with needed direction and, equally important, to give the public valuable notice of anticipated policies."); Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin L Rev 631, 632 (2002) ("Guidance documents of general applicability are enormously important to members of the public who seek to plan their affairs to stay out of trouble and minimize transaction costs.").

47 It should also be highlighted that this holding is not unassailable. In fact, the federal APA seems to explicitly provide that, by definition, a general permit is not a rule. Section 551(6) of the federal APA makes clear that the categories of "rules" and "orders" are mutually exclusive, defining "order" as "a final disposition ... of an agency in a matter other than rule making but including licensing[.]" 5 USC 551(6). The same section says that the final disposition of an agency in the process of "licensing" is an "order." Section 551(9) defines "licensing" as including the "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license[.]" 5 USC 551(9). And § 551(8) defines "license" to "include[ ] ... an agency permit ...." 5 USC 551(8). Altogether, the federal APA categorizes a permit as an order, which—by the federal APA's definition—is not a rule.

1 Plaintiffs argue that the 2020 general permit conditions are "rules" under MCL 24.207 of the APA. However, the substance of plaintiffs' arguments seems to be that the new conditions either are not supported by the enabling statutes governing EGLE or are inconsistent with existing promulgated regulations. Under this Court's precedent, such an argument is better framed as a claim that the 2020 general permit conditions constitute an ultra vires action that improperly interprets and applies the NREPA or applicable regulations. Even if a contested provision is not a rule, the validity of an agency's interpretation can still be challenged in a legal proceeding when the interpretation is at issue. See *Clonlara, Inc. v State Bd. of Ed.*, 442 Mich. 230, 243, 501 N.W.2d 88 (1993) ("Clonlara and McConnell contend that the procedures go beyond the scope of the law and therefore are not interpretive statements under an exception set forth in [MCL 24.207(g), as amended by 1989 PA 288] of the APA. An interpretive statement that goes beyond the scope of the law may be challenged when it is in issue in a judicial proceeding. An interpretation not supported by the enabling act is an invalid interpretation, not a rule. Otherwise, 'wrong' interpretive statements might become rules with the force of law on the false premise that they were promulgated in accordance with the APA procedures. '[B]ecause a reviewing court disagrees with an agency interpretation does not render it legislative.' "), quoting *Wayne Twp. Metro. Sch. Dist. v Davila*, 969 F.2d 485, 494 (CA 7, 1992) (second alteration by the *Clonlara* Court).

2 For the purpose of resolving the appeal in *Stegall*, the Court also assumed but did not decide that both the federal and Michigan Occupational Safety and Health Acts created a new right or imposed a new duty not previously recognized under the common law while noting conflicts in existing caselaw on this point. *Stegall*, —— Mich at —— n 5, —— N.W.2d —— slip op. at 11 n 5.

3 Both federal and state law also require EGLE to impose stricter conditions or practices than what is provided for by formal regulations and rules if necessary to achieve applicable water quality standards. See 40 CFR 122.44(d)(1); Mich Admin Code, R 323.2189(2)(h); MCL 324.3113(2); MCL 324.3106. But as of December 31, 2006, the Legislature had rescinded the agency's rulemaking authority under Part 31 of the NREPA "except for rules authorized under [MCL 324.3112(6)]" and "as may be necessary to comply with the federal water pollution control act, 33 USC 1251 to 1387." MCL 324.3103(2) and (3). Neither of these provisions grants EGLE authority to promulgate rules regulating CAFOs under Part 31 of the NREPA. The rulemaking authority related to MCL 324.3112(6) concerns oceangoing vessels engaging in port operations in Michigan that are required to obtain a permit under Part 31 of the NREPA to prevent discharge of aquatic nuisance species. When the Legislature amended MCL 324.3103(2) in 2004 PA 91 to say, "notwithstanding any rule-promulgation authority that is provided in [Part 31], ... [EGLE] shall not promulgate any additional rules under this part after December 31, 2006," it negated EGLE's rulemaking authority under MCL 324.3103(3) after December 31, 2006. The Legislature has introduced bills that, if adopted, would repeal much of MCL

324.3103(2) and fully restore EGLE's rulemaking authority under Part 31 of the NREPA. See, e.g., 2023 SB 663; 2024 HB 5614.

4 MCL 324.1301(g) states that for purposes of MCL 324.1313 to MCL 324.1317—the provisions in Part 31 of the NREPA concerning contested case proceedings and review by the environmental permit review commission—the term "permit" means

> any permit or operating license that meets both of the following conditions:
>
> (*i*) The applicant for the permit or operating license is not this state or a political subdivision of this state.
>
> (*ii*) The permit or operating license is issued by the department of environmental quality under this act or the rules promulgated under this act.

5 "A person who is aggrieved by an *order of abatement* of [EGLE] or *by the reissuance, modification, suspension, or revocation of an existing permit* of [EGLE] executed pursuant to this section may file a sworn *petition with* [*EGLE*] *setting forth the grounds and reasons for the complaint and requesting a contested case hearing on the matter pursuant to the* [*APA*]*, MCL 24.201 to 24.328.* A petition filed more than 60 days after action on the order or permit may be rejected by [EGLE] as being untimely." MCL 324.3112(5) (emphasis added).

6 "If the permit or denial of a new or increased use is not acceptable to the permittee, *the applicant, or any other person, the permittee, the applicant, or other person may file a sworn petition with* [*EGLE*] *setting forth the grounds and reasons for the complaint and asking for a contested case hearing on the matter pursuant to the* [*APA*]*, MCL 24.201 to 24.328.* A petition filed more than 60 days after action on the permit application may be rejected by [EGLE] as being untimely." MCL 324.3113(3) (emphasis added).

7 Additionally, the 2020 general permit states the following on page two:

> **CONTESTED CASE INFORMATION**
>
> Any person who is aggrieved by this permit may file a sworn petition with the Michigan Administrative Hearing System within the Michigan Department of Licensing and Regulatory Affairs, c/o the Michigan Department of Environment, Great Lakes, and Energy, setting forth the conditions of the permit which are being challenged and specifying the grounds for the challenge. The Department of Licensing and Regulatory Affairs may reject any petition filed more than 60 days after issuance as being untimely. [*EGLE*, *National Pollutant Discharge Elimination System Wastewater Discharge General Permit: Concentrated Animal Feeding Operations*, Permit No. MIG010000 (issued March 27, 2020), p. 2, available at <https://www.michigan.gov//media/Project/Websites/egle/Documents/Programs/WRD/CAFO/MIG010000-General-Permit-2025.pdf?rev=a4d602d0165c41e096854abe036058f9> (accessed June 6, 2024) [https://perma.cc/6YEW-WSX6].]

8 "[EGLE] shall promptly report to [EGLE] each person having a discharge for which coverage by general permit has been initiated pursuant to the provisions of subdivision (b) of this rule. A person who is aggrieved by the coverage may file a sworn petition for a contested case hearing on the matter with [EGLE] in accordance with the provisions of section 3113 of part 31 of the act. A petition that is filed more than 60 days after coverage by the general permit is reported to [EGLE] may be rejected by [EGLE] as being untimely." Mich Admin Code, R 323.2192(c).

9 "An environmental permit panel may adopt, remand, modify, or reverse, in whole or in part, a final decision and order described in [MCL 324.1317(1)]. The panel shall issue an opinion that becomes the final decision of [EGLE] and is subject to judicial review as provided under the [APA], MCL 24.201 to 24.328, and other

applicable law." MCL 324.1317(4). Additionally, "[i]f no party timely appeals a final decision and order described in [MCL 324.1317(1)] to an environmental permit panel, the final decision and order is the final agency action for purposes of any applicable judicial review." MCL 324.1317(7).

10 The Legislature has introduced bills that, if adopted, would amend the NREPA and repeal the section that created the environmental permit review commission and the environmental science advisory board. See 2023 SB 393; 2023 SB 394.

11 EGLE has imposed on itself a fixed five-year term for general permits. See Mich Admin Code, R 323.2150.

12 Notably, the current Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, also uses permissive language when describing the ability to appeal a zoning board of appeals decision to the circuit court, even though that is the exclusive means (with some exceptions for constitutional claims and legislative rezoning decisions) of seeking review of a zoning board of appeals decision. See MCL 125.3605 ("The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court ...."); MCL 125.3606(1) ("Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court ....").

13 As already noted, the exclusivity of the process or right is often determined from the context in which the process or right is described in the relevant statute. See *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich. 349, 367-368, 917 N.W.2d 603 (2018) ("[W]e do not read statutory language in isolation and must construe its meaning in light of the context of its use.").

14 While not necessary to the resolution of this case, I note a significant point of potential confusion contained within the APA. The APA definition of a "rule," MCL 24.207, does not expressly exclude things or actions that constitute a "license" or "licensing," MCL 24.205(a) and (b), under the APA. A "license" is "the whole or part *of* an agency permit, certificate, approval, ... or similar form of permission required by law." MCL 24.205(a) (emphasis added). " 'Licensing' includes agency activity involving the grant, denial, renewal, suspension, ... or amendment of a license." MCL 24.205(b). The APA provides that "[w]hen licensing is required to be preceded by notice and an opportunity for hearing, the provisions of [the APA] governing a contested case apply." MCL 24.291(1). Once a party has "exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, ... the decision or order is subject to direct review by the courts as provided by law." MCL 24.301. Thus, the APA explicitly provides for contested case review of administrative decisions as to licenses and licensing. But the APA does not explicitly prohibit parties from filing an action under MCL 24.264 to argue that a licensing decision constitutes improper rulemaking. This is a potential source of confusion that the Legislature might wish to address.

Take, for example, the facts of this case. The NPDES permitting process, as set forth in Part 31 of the NREPA and EGLE's Part 21 rules, includes a requirement of notice and an opportunity for a hearing. An NPDES permit therefore seems to fit the definition of a license, and the process of issuing a permit or certificate of coverage would thus be licensing. Under MCL 24.291(1), one could easily assume that only the APA's contested case provision is applicable to the dispute because it involves a license and the licensing process. But as this litigation demonstrates, it is far from clear to litigants and the judiciary whether a challenge to a license or licensing process that allegedly crosses into the realm of rulemaking requires a different pathway under MCL 24.264.

1 Michigan Department of Environment, Great Lakes, and Energy, *National Pollutant Discharge Elimination System Wastewater Discharge General Permit: Concentrated Animal Feeding Operations*, Permit No. MIG010000 (issued March 27, 2020), p. 1, available at <https://www.michigan.gov//media/Project/Websites/egle/Documents/Programs/WRD/CAFO/

MIG010000-General-Permit-2025.pdf?rev=a4d602d0165c41e096854abe036058f9> (accessed June 6, 2024) [https://perma.cc/6YEW-WSX6].

2 As the majority notes, the Environmental Protection Agency (EPA) has approved EGLE as a permitting authority for purposes of issuing permits under § 402 of the Clean Water Act, 33 USC 1342, which are the permits at issue in this case. These permits are also known as National Pollutant Discharge Elimination System or NPDES permits. See *Nat'l Mining Ass'n v McCarthy*, 411 US App DC 52, 56, 758 F.3d 243 (2014).

3 The majority concludes that, because of this provision, EGLE does not have authority to "make rules concerning NPDES permits issued to CAFOs." *Ante* at —— (opinion of the Court). I clarify that, while the majority notes that EGLE concedes it does not have such authority, *ante* at —— (opinion of the Court), plaintiffs argue that EGLE does have that authority. I take no position on that disputed issue because, as explained below, it is not necessary to resolve this case. See note 21 of this opinion and surrounding text. Rather, I note this statutory history simply for context. I also note that bills have recently been introduced in the Legislature to repeal this provision in MCL 324.3103(2). See, e.g., 2023 SB 663; 2024 HB 5614. But no legislation has been enacted. Yet the majority opinion now provides the agency wide flexibility to impose new mandates through general permits under the guise of purportedly nonbinding requirements.

4 By using these rhetorical devices to describe certain conditions in the 2020 GP, the majority implicitly suggests that "discretionary conditions" do not impose any obligation on CAFOs and therefore are not rules because they do not have the force and effect of law. But the majority's framing of those conditions conflates whether EGLE has discretion *to create* those conditions with whether CAFOs have discretion *to comply with* those conditions when applying for coverage to discharge under the 2020 GP. To be clear, if an applicant does not demonstrate compliance with the terms of the 2020 GP, including any so-called "discretionary conditions," then EGLE may deny coverage under the 2020 GP. See Mich Admin Code, R 323.2192(b) ("Upon the receipt of an application for coverage under an existing general permit, the department shall determine if the discharge *meets the criteria for coverage under the general permit.* The issuance of a notice of coverage by the department which states that the discharge *meets the criteria initiates coverage by the general permit.*") (emphasis added). Thus, it bears emphasizing that, despite the majority's framing of these conditions, the majority does not say that EGLE has authority to impose these "discretionary conditions" through the 2020 GP or any other "rule." In fact, it holds just the opposite. See *ante* at —— (opinion of the Court) ("EGLE, therefore, clearly has no power to make rules concerning NPDES permits issued to CAFOs."); *ante* at —— (opinion of the Court) ("[N]either the general permit nor the discretionary conditions in it can have the force and effect of law ...."). With that understanding, the majority's observation that EGLE can "issue a general permit with discretionary conditions in addition to or more stringent than the mandatory conditions," *ante* at —— (opinion of the Court), means that EGLE can impose those conditions in a certificate of coverage, but not as a binding rule that applies generally to anyone who applies for coverage under the 2020 GP. I have serious doubts about that conclusion as well, for the reasons explained on page 25 of this opinion.

5 When a state has been delegated authority to administer the NPDES permitting program within its jurisdiction, as Michigan has been, federal law requires the state's NPDES permits to include additional or more-stringent requirements if they are necessary to, among other things, "[a]chieve water quality standards established under section 303 of the CWA ...." 40 CFR 122.44(d)(1) (2023); see also 33 USC 1342(b) and (c)(1). If Michigan fails to do so, and does not take sufficient corrective action, the federal government "shall withdraw approval of [the NPDES] program." 33 USC 1342(c)(3). Thus, while EGLE is correct that there is a federal requirement to impose—in certain circumstances—more-stringent conditions in certain permits, that is a duty the state imposed on itself when it decided to administer its own NPDES permitting program.

6 The first three elements come from the definition of "rule," but the fourth is derived from one of the exclusions. See MCL 24.207(h). Although it might seem odd to engraft language onto a statutory definition in this fashion, and although EGLE did not raise this argument in its briefs, I agree that the binding nature of the agency

action is an important consideration in determining whether an agency action is a rule. See, e.g., *Catawba Co. v Environmental Protection Agency*, 387 US App DC 20, 33, 571 F.3d 20 (2009) ("[W]hether an agency action is the type of action that must undergo notice and comment depends on 'whether the agency action binds private parties or the agency itself with the "force of law," '—that is, whether 'a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect.' ") (citations omitted).

7 It is noteworthy that the majority implicitly rejects EGLE's proffered description of its action as a "license" under the Michigan APA, even though the majority makes passing reference to the definition of "license" under the federal APA. See *ante* at —— n 47 (opinion of the Court). The majority also—rightly in my view—ignores EGLE's meritless argument that the general permit conditions are excluded from the definition of a rule under MCL 24.207(j) as "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." See *American Federation of State, Co. & Muni. Employees v Dep't of Mental Health*, 452 Mich. 1, 12, 550 N.W.2d 190 (1996) ("The error in this reasoning is that while the department has discretion regarding *whether* to contract for the provision of statutorily mandated services, once it chooses to do so, it cannot abdicate its responsibilities under the Mental Health Code and the APA and set the standards and policies that regulate the provision of such services without complying with the APA's procedural requirements."). Despite rejecting EGLE's arguments, the majority undertakes its own novel analysis to agree with EGLE that the 2020 GP is not a rule.

The majority declines to decide whether the trial court erred by relying on *Jones v Dep't of Corrections*, 185 Mich App 134, 137-138, 460 N.W.2d 575 (1990). See *ante* at —— n 30 (opinion of the Court). While I agree that resolution of that issue is not strictly necessary given the majority's conclusion that *Clonlara* alone controls the issue whether the 2020 GP is a rule under the APA, I question whether *Jones* was correctly decided. There, the Court of Appeals held that MCL 24.264 applies only to rules processed in compliance with the APA's rulemaking procedures. *Jones*, 185 Mich App at 137-138, 460 N.W.2d 575. But nothing in the APA's definition of "rule" provides that only agency actions processed in compliance with the APA's rulemaking procedures may be considered rules. See MCL 24.207. And if MCL 24.264 referred only to rules processed in compliance with the APA's rulemaking procedures, it would follow that a litigant could challenge only the substantive validity of a rule under MCL 24.264. Yet the word "validity" as used in the context of the APA clearly refers to more than just substantive validity—it includes procedural validity as well. After all, MCL 24.243(1) states that "a rule is not *valid* unless it is processed in compliance with [MCL 24.266], if applicable, [MCL 24.242], and in substantial compliance with [MCL 24.241(2), (3), (4), and (5)]." (Emphasis added.) See also *Slis v Michigan*, 332 Mich App 312, 340, 956 N.W.2d 569 (2020) (noting that MCL 24.264 allows a petitioner to challenge either the procedural or substantive validity of a rule).

8 The majority opinion relies, in part, on *Nat'l Mining Ass'n* and describes it as "holding that an agency statement explaining how an agency will exercise its broad permitting discretion under some statute or rule is a general statement of policy under the federal APA and not a rule with the force of law." *Ante* at —— (opinion of the Court). But the court immediately followed that part of its discussion by observing that "those general descriptions do not describe tidy categories and *are often of little help in particular cases.*" *Nat'l Mining Ass'n*, 411 US App DC at 61, 758 F.3d 243 (emphasis added). It continued, "So in distinguishing legislative rules from general statements of policy, our cases have focused on several factors," *id.*, including those discussed at some length in this opinion (and entirely neglected by the majority opinion).

9 The majority disagrees with my conclusion on this point, see *ante* at —— n 41 (opinion of the Court), based on a section of the 2020 GP that states "[a]ny person *who is aggrieved* by this permit may file a sworn petition with [EGLE], setting forth the conditions of the permit which are being challenged and specifying the grounds for the challenge," 2020 GP, p. 2 (emphasis added). But the majority fails to explain how anyone can be aggrieved by something that is not final and has no legal effect. Thus, I fail to see how the 2020 GP's reference

to contested case proceedings qualifies as a disclaimer of the 2020 GP's binding language. See also notes 26 and 27 of this opinion and the surrounding text.

10 Of course, even if EGLE had labeled the document as nonbinding, it is well established that when an agency action provides directives, the label that the agency assigns to the action "is not determinative of whether it is a rule or a guideline under the APA." *American Federation of State, Co. & Muni. Employees v Dep't of Mental Health*, 452 Mich. 1, 9, 550 N.W.2d 190 (1996) (*AFSCME*). This qualification is critical given the incentive within agencies to misapply labels and avoid the often-intensive public scrutiny involved in APA procedures. See Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L J 1311, 1363-1364 (1992) ("General knowledge of normal bureaucratic behavior permits us to postulate a basic general proposition about how nonlegislative guidance documents are administered by the agencies' own staffs, especially in the field: Staff members acting upon matters to which the guidance documents pertain will routinely and indeed automatically apply those documents, rather than considering their policy afresh before deciding whether to apply them. Staffers generally will not feel free to question the stated policies, and will not in practice do so. Staff members, including the most conscientious, have every incentive to act in this fashion."). Indeed, this Court has described the APA and its rulemaking procedures as "essential to the preservation of a democratic society" and as "a bulwark of liberty by ensuring that the law is promulgated by persons accountable directly to the people." *AFSCME*, 452 Mich. at 14, 550 N.W.2d 190 (quotation marks and citation omitted). See also *Azar v Allina Health Servs*, 587 U.S. 566, 575, 139 S Ct 1804, 204 L Ed 2d 139 (2019) ("Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. On the contrary, courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether [the federal APA procedures] apply.").

11 Failure to obtain or, once coverage under the 2020 GP is obtained, comply with a permit could lead to serious civil fines and criminal liability. See MCL 324.3114 (authorizing criminal complaints); MCL 324.3115 (authorizing a civil fine of up to $25,000 per day, per violation).

12 As the majority notes, the issuance of the 2020 GP itself does not *directly* authorize any CAFO to discharge. See *ante* at —— (opinion of the Court) ("When a general permit is finalized, the category of point sources the permit covers does not automatically have coverage."). Rather, the 2020 GP sets the standards to determine whether a CAFO can receive authorization through an application for coverage.

13 The fact that additional conditions, or variations to the conditions identified in the 2020 GP, might be imposed by part of a CAFO's "comprehensive nutrient management plan" (CNMP) when a CAFO applies for coverage under the 2020 GP does not change the fact that the blanket terms of the 2020 GP at least set the standard against which the CNMPs will be judged. See *Appalachian Power*, 341 US App DC at 53, 208 F.3d 1015 ("EPA may think that because the Guidance, in all its particulars, is subject to change, it is not binding and therefore not final action. There are suggestions in its brief to this effect. But all laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.") (citation omitted). Indeed, plaintiffs argue that nothing in a CNMP will change the three prohibitions with which they are most concerned, and EGLE did not refute that position in its briefs.

Moreover, while the majority touts individual permits as a viable alternative to applying for coverage under the 2020 GP, that does not change the practical or legal reality for anyone, like plaintiffs, seeking coverage under a general permit. See *Gen. Electric Co.*, 351 US App DC at 298, 290 F.3d 377 ("[E]ven though the Guidance Document gives applicants the option of calculating risk in either of two ways (assuming both are practical) it still requires them to conform to one or the other, that is, not to submit an application based upon a third way. And if an applicant does choose to calculate cancer and non-cancer risks separately, then it must consider the non-cancer risks specified in the Guidance Document. To the applicant reading

the Guidance Document the message is clear: in reviewing applications the Agency will not be open to considering approaches other than those prescribed in the Document."). And the agency retains ultimate authority to deny a request for an individual permit whenever the agency believes, in its view, that the general permit "is more appropriate." Mich Admin Code, R 323.2191(5). The available rules or statutes neither provide material limits on the agency's authority to mandate general permits nor do they establish any right, standard, or expectation that a regulated party can obtain an individual permit with reduced regulatory burdens as an alternative. Therefore, it is unsurprising that in plaintiffs' verified complaint they contend that, because EGLE "requires the vast majority of CAFOs to obtain coverage under its CAFO General Permit, the agency has broadly applied these mandates to the industry" and that the "challenged standards and mandates [in the 2020 GP] force Michigan's largest farms to incur substantial costs and threaten the viability and continued operations of some farms." See also *AFSCME*, 452 Mich. at 11, 550 N.W.2d 190 (describing the "choice" of entering into a negotiated contract with the state as "ludicrous" because " 'choosing' not to contract [with the state]" is "choos[ing] to go out of business").

14 The majority attempts to explain its logic by citing this same provision, emphasizing different words, and concluding that "criteria for coverage" does not control whether a CAFO will receive coverage under the 2020 GP. See *ante* at ——— – ——— (opinion of the Court). But then the majority inexplicably relies on the *very legal effect* that I have identified in this section to support that conclusion. See *ante* at ——— (opinion of the Court) ("[EGLE] has discretion *to deny an application for a certificate of coverage when EGLE determines that the discretionary conditions are inappropriate* as applied to the applicant."), citing Mich Admin Code, R 323.2192(b) (emphasis added). Thus, the majority appears to agree that these conditions can be relied upon to deny coverage under the 2020 GP, giving them obvious legal effect.

The majority even acknowledges that a CAFO seeking coverage under the 2020 GP "might have to show how it plans to comply with any discretionary conditions ...." *Ante* at ——— (opinion of the Court). The clearest example of this is one of the new "discretionary conditions" that plaintiffs challenge here, which requires all CAFOs to have a 35-foot-wide vegetated buffer between their point of discharge and any surface water. Without that buffer, EGLE can simply deny the CAFO's application for coverage under the 2020 GP. See Mich Admin Code, R 323.2192(b); Mich Admin Code, R 323.2191(1).

15 The majority's other attempt to distinguish *AFSCME* is based solely on the majority's conclusion that, under *Clonlara, Inc. v State Bd. of Ed.*, 442 Mich. 230, 501 N.W.2d 88 (1993), the 2020 GP is not a rule because EGLE does not have authority to promulgate rules concerning NPDES permits for CAFOs. See *ante* at ——— – ——— n 42 (opinion of the Court). But as explained below, *Clonlara* is not controlling. See note 21 of this opinion and the surrounding text.

16 See also *Clonlara*, 442 Mich. at 259, 501 N.W.2d 88 (RILEY, J., concurring in part and dissenting in part) ("When an agency 'does not merely interpret, but sets forth onto new substantive ground through rules that it will make binding, the agency must observe the legislative processes laid down by' the Legislature."), quoting *Interpretive Rules*, 41 Duke L J at 1314.

17 While *Clonlara* used the phrase "interpretive rules," this Court has explained elsewhere that, "while under the Federal [APA] a rule can be legislative or interpretative, under the Michigan [APA] an 'interpretive statement' is *not*, by definition, a rule at all." *Mich Farm Bureau*, 408 Mich. at 148, 289 N.W.2d 699. Thus, when *Clonlara* spoke of "interpretive rules," it was talking about "interpretive statements" in Michigan parlance, which are not "rules" at all. See *id.* at 149, 289 N.W.2d 699 ("[A]n analysis of the difference between 'legislative' and 'interpretative' rules under the Federal [APA] ... is relevant to our analysis of the difference between 'rules' and 'interpretive statements' under our state [APA.]").

18 The majority makes this observation after having erroneously concluded that the 2020 GP is not a rule under the APA, so the majority apparently finds EGLE's policymaking on this point irrelevant.

19 I note that this reflects similar provisions in EGLE's own regulations. See Mich Admin Code, R 323.2192(b); Mich Admin Code, R 323.2191(1).

20 Taken to its logical conclusion, the majority's position suggests that even if an agency has rulemaking authority and, in compliance with the APA, promulgates rules that establish specific criteria necessary to obtain coverage, not even those rules would have the force and effect of law because they do not, in themselves, authorize any discharge. See *ante* at —— (opinion of the Court) ("A CAFO cannot just start discharging in accordance with those conditions. A CAFO must apply to EGLE for a certificate of coverage under the general permit, and even if the CAFO agrees to comply with the discretionary conditions in the general permit, EGLE is not bound to grant the CAFO the certificate of coverage.").

21 This analysis is not affected by the majority's conclusion that EGLE does not have specific authority to make rules concerning NPDES permits issued to CAFOs. That is because the majority's conclusion does not change the fact that EGLE has at least some rulemaking authority under Part 31 of NREPA. Indeed, the authorities upon which the majority relies to argue that *Clonlara* applies here do not support the majority's approach. *Mich Farm Bureau* observed that "[w]hen an agency has *no* delegated power to make law through rulemaking, the rules it issues are necessarily interpretative" and that "what is essential to a *valid* Federal 'legislative rule' or Michigan 'rule' is: a reasonable exercise of legislatively delegated power, pursuant to proper procedure." *Mich Farm Bureau*, 408 Mich. at 149, 150, 289 N.W.2d 699 (quotation marks and citation omitted; emphasis added). The agency in *Nat'l Park Hospitality Ass'n v Dep't of Interior*, 538 U.S. 803, 123 S Ct 2026, 155 L Ed 2d 1017 (2003), had no authority to implement the underlying statute. See *id.* at 809, 123 S Ct 2026 ("[The agency] is not empowered to administer the [statute]."). Conversely, the agency in *Batterton v Marshall*, 208 US App DC 321, 648 F.2d 694 (1980), was found to have precisely the type of rulemaking authority required, *id.* at 332, 648 F.2d 694, so the court was not presented with the question of whether any other rulemaking authority would suffice.

22 Justice RILEY provided an extensive analysis rebutting the majority's position in *Clonlara* and explained further that

> [t]he majority incorrectly dismisses the real-world possibility that an agency without statutory authorization to promulgate rules may still attempt to issue a rule with the force of law without conforming to the APA. The majority permits the APA to be easily circumvented by an agency that enacts policies that are in effect binding and later claim that because it was not vested with rule-making power, its policy was valid as a proper interpretation of the law or, at most, a misinterpretation of the law. Meanwhile, the lives of thousands, if not millions, of citizens would have been dictated by purported nonrules promulgated by agencies without public participation and in contradiction to the will of the Legislature. Such unauthorized lawmaking not only violates the APA, but threatens the principles of republican government. [*Clonlara*, 442 Mich. at 260-261, 501 N.W.2d 88 (RILEY, J., concurring in part and dissenting in part).

By expanding *Clonlara* here, the majority appears dismissive of these very serious concerns. To put a finer point on it, by the majority's logic, any agency that acts outside of its rulemaking authority would be immune from challenge under MCL 24.264, which is limited to causes of action regarding "rules." Thus, agencies will be free to issue documents and take actions that look like a rule, sound like a rule, and have the practical effect of a rule without public input and without court oversight under the APA. Despite the warning provided by Justice RILEY and despite EGLE's clear attempt to avoid the APA in this case, the majority dismisses these concerns as unfounded alarmism. See *ante* at —— (opinion of the Court). But Justice RILEY and I are not alone in expressing these concerns. See note 10 of this opinion; see also *Interpretive Rules*, 41 Duke L J at 1317 ("Doubtless more costly yet is the tendency to overregulate that is nurtured when the practice

of making binding law by guidances, manuals, and memoranda is tolerated. If such nonlegislative actions can visit upon the public the same practical effects as legislative actions do, but are far easier to accomplish, agency heads (or, more frequently, subordinate officials) will be enticed into using them. Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, it eases its work greatly in several undesirable ways."). Particularly when considering an approval that is required for a regulated entity to lawfully operate, the majority opinion provides little solace in suggesting that the regulated community can simply wait until an agency attempts to enforce policies that are purportedly not rules and then challenge the policies in an adjudicatory hearing.

23 As noted above, the majority rightly ignores EGLE's meritless argument regarding the exception under MCL 24.207(j) to the definition of "rule" for an agency's decision "to exercise or not to exercise a permissive statutory power ...." See *AFSCME*, 452 Mich. at 12, 550 N.W.2d 190.

24 Although EGLE cited *Kent Co* in its brief, it did so only for the unremarkable proposition that statutes should be read according to their plain meaning.

25 There is reason to doubt whether the specific agency action at issue here—EGLE's issuance of the 2020 GP—is even subject to contested case proceedings. Relying on MCL 324.3113(3), the majority summarily finds that it is subject to those proceedings. See *ante* at —— (opinion of the Court). But the whole of MCL 324.3113 is specific to applications for a "new or increased use of waters," which does not seem to include the issuance (or reissuance) of the general permit for CAFOs here. Indeed, EGLE argues that the Court of Appeals erred by citing MCL 324.3113(3) as the basis for any contested case proceedings at this stage of the permitting process. EGLE instead argues that the 2020 GP is a "permit" that is subject to contested case proceedings under a different statute, MCL 324.3112(5). But there is reason to doubt that conclusion as well. MCL 324.3112 governs "application[s] for a permit," and each of its provisions appears specific to either an individual permit or application *for coverage under* a general permit, not the issuance of a general permit itself. The same is true of MCL 324.1301(g), which defines "permit" for purposes of various types of review under MCL 24.288 of the APA. If the 2020 GP is not subject to contested case proceedings, then there are two material consequences. First, that would severely undermine the majority's assertion that the 2020 GP is merely "announcing a policy the agency plans to establish in future adjudications ...." *Ante* at —— (opinion of the Court). And because the majority's conclusion that the 2020 GP is not binding turns on that point, it would undermine the majority's holding that the 2020 GP is not a rule. Second, it would mean that the contested case is not an available, much less "exclusive," procedure or remedy for purposes of MCL 24.264. Without such an exclusive remedy, plaintiffs would be able to proceed with their challenge to the 2020 GP in this case. As noted below, I would remand for the Court of Appeals to consider these issues further.

26 Indeed, in its recitation of facts, the majority recounts that "EGLE issued *the final* 2020 general permit on March 27, 2020, with an effective date of April 1, 2020." *Ante* at —— (opinion of the Court) (emphasis added).

27 Additionally, to the extent the 2020 GP is subject to contested case proceedings, the relevant statute provides that only "[a] person *who is aggrieved* by ... the reissuance[or] modification ... of an existing permit" may request a contested case hearing. See MCL 324.3112(5) (emphasis added). A person cannot be aggrieved by an agency action unless it is final and has binding effect on the person. See *Attorney General v Bd of State Canvassers*, 500 Mich. 907, 908 n 6, 887 N.W.2d 785 (2016) (ZAHRA and VIVIANO, JJ., concurring) (explaining that, to be "aggrieved," "a party must demonstrate that it has been harmed in some fashion"). Thus, the majority's argument that the 2020 GP is not final (and therefore not a binding rule) because it is subject to a contested case proceeding is inherently inconsistent with the underlying statute.

28 Not only do EGLE's regulations expressly require applicants to demonstrate compliance with the terms of the 2020 GP to obtain coverage under the general permit, but the practical reality is that it is infeasible for EGLE to provide an individual permit to each CAFO and that coverage under the 2020 GP is preferred by EGLE

and plaintiffs alike. See *Ohio Valley Environmental Coalition v Horinko*, 279 F Supp 2d 732, 758 (SD W Va, 2003) ("The benefit of the general permit process for individual dischargers is that approval is substantially quicker and less expensive than applying for an individual NPDES permit.").

29 Similarly, the majority's attempt to analogize *Nat'l Mining Ass'n*, see *ante* at —— (opinion of the Court), is not persuasive because that case is easily distinguishable. See Part II(A) and Part II(B) of this opinion.

30 The majority's attempt to refute my analysis falls utterly flat. Indeed, it *confirms* my analysis by explaining that "it is difficult to imagine an instance when an agency statement would fall under the [MCL 24.207](g) exception [regarding an agency action that is merely an intergovernmental communication] but not the [MCL 24.207](h) exception [regarding agency actions that are merely explanatory and do not have the force and effect of law]." *Ante* at —— n 32 (opinion of the Court). In other words, the site criteria's status as an intergovernmental communication drove the panel's analysis in *Kent Co*. The 2020 GP, of course, is not merely an intergovernmental communication. Rather, it sets the standards that private entities must satisfy to obtain a certificate of coverage. Thus, even to the extent the majority is correct that *Kent Co* turned on a conclusion that the site criteria did not have the force and effect of law, the 2020 GP in this case is distinguishable for the reasons discussed above. See generally Part II of this opinion.

31 As noted above, the majority rejected the specific arguments that EGLE presented.

32 The majority's hypothetical about a world where CAFOs are required to apply for an individual permit and EGLE "circulated a letter to all CAFOs explaining that it tentatively planned to tell its permit writers to include [certain] conditions," *ante* at —— (opinion of the Court), is completely inapposite. The 2020 GP does not merely explain what EGLE "tentatively planned" to require an applicant to demonstrate in order to obtain coverage under the 2020 GP. The 2020 GP itself, EGLE's own regulations, and EGLE's historical practice of reviewing applications for compliance with the 2020 GP clearly demonstrate that there is nothing tentative about the terms and conditions in that document. They determine whether a CAFO will receive a certificate of coverage. The majority suggests that I am merely concerned about the practical effect that the 2020 GP has on CAFOs. See *ante* at —— (opinion of the Court). While that is certainly part of my concern, my opinion is based primarily on the *legal* effects that flow from Mich Admin Code, R 323.2192(b) and Mich Admin Code, R 323.2191(1), which clearly impose a legal requirement for any CAFO seeking coverage under the 2020 GP to demonstrate compliance with the terms and conditions contained therein before EGLE will approve coverage.

33 The majority disagrees that its opinion carries such a requirement. See *ante* at —— n 38 (opinion of the Court). This disagreement is confusing for multiple reasons. First, it suggests that EGLE is not required to create a full record when deciding whether a particular CAFO is approved for coverage under a general permit. But a full record is fundamental to such adjudicative actions. Second, the majority says in no uncertain terms that "EGLE must genuinely evaluate whether the discretionary conditions are necessary as applied to that particular CAFO." *Ante* at —— (opinion of the Court). That sure sounds like EGLE must explain the basis for its decision to approve or deny a certificate of coverage based on a full record. Finally, the majority explains that it holds only "that, when a CAFO applies for a certificate of coverage and agrees to comply with the discretionary conditions in the general permit, EGLE cannot act as though the CAFO is automatically entitled to a certificate of coverage." *Ante* at —— n 38 (opinion of the Court). But that does not mean EGLE's decision need not be based on a full record.

34 However, I would vacate the portion of the Court of Appeals opinion affirming the dismissal of plaintiffs' action on the ground that "[t]his case could not be commenced in the trial court because plaintiffs failed to first seek a declaratory ruling from EGLE before filing their declaratory-judgment action, as required by MCL 24.264." *Mich. Farm Bureau*, 343 Mich App at 318, 997 N.W.2d 467. Plaintiffs indicate in their cross-appeal that they already requested a declaratory ruling from EGLE, and the agency denied their request. Therefore, plaintiffs have cured this defect by exhausting their administrative remedies, and the issue now appears to be moot.

See *League of Women Voters of Mich v Secretary of State*, 506 Mich. 561, 580, 957 N.W.2d 731 (2020) (holding, in part, that "a moot case is one which seeks to get a ... judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy") (quotation marks and citation omitted). Given my conclusion that the 2020 GP is a rule under the APA, I would remand this case to the Court of Appeals to determine (1) whether EGLE adequately preserved its argument that plaintiffs cannot challenge the validity of the 2020 GP under MCL 24.264 because "an exclusive procedure or remedy is provided by a statute governing the agency"; and (2) if so, whether plaintiffs' suit is barred under that provision.

APPENDIX J

2023 WL 6931928
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

Philip M. O'HALLORAN, M.D., Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider, Plaintiffs-Appellees,
v.
SECRETARY OF STATE and Director of the Bureau of Elections, Defendants-Appellants
Richard Devisser, Michigan Republican Party, and Republican National Committee, Plaintiffs-Appellees,
v.
Secretary of State and Director of the Bureau of Elections, Defendants-Appellants.

No. 363503, No. 363505
|
October 19, 2023, 9:15 a.m.

Synopsis

Background: Election challengers and legislative candidates brought action against the Secretary of State and Director of the Bureau of Elections, challenging provisions of manual published by defendants providing instructions to election challengers and poll challengers on grounds that provisions violated Election Law and that manual was promulgated without proper notice-and-comment requirements outlined in the Administrative Procedures Act (APA), and sought temporary restraining order (TRO) and preliminary injunction. Subsequently, another election challenger and state and national Republican political organizations filed suit against Secretary of State and Director challenging provisions of manual on same grounds and sought expedited declaratory relief. Following consolidation, the Court of Claims found in favor of plaintiffs. Defendants appealed.

Holdings: The Court of Appeals held that:

[1] manual did not fall under permissive statutory power exception to definition of a rule under APA, and thus defendants were not excused from following rulemaking requirements under APA on such basis;

[2] provision of manual creating a credentialing form was invalid absent promulgation of provision as a rule under APA;

[3] provision of manual related to creation of a "challenger liaison" violated Election Law and was thus invalid;

[4] provision of manual prohibiting election inspectors from recording impermissible challenges violated Election Law and was thus invalid;

[5] provision of manual permitting election inspectors to remove challengers for making repeated impermissible challenges was invalid; and

[6] provision of manual prohibiting electronic devices in absent voter ballot processing facility was invalid.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (18)

[1] **Administrative Law and Procedure** Force of law in general

While rule promulgated in accordance with Administrative Procedures Act (APA) has force of law, other pronouncements do not. Mich. Comp. Laws Ann. § 24.201 et seq.

[2] **Administrative Law and Procedure** Consistency with statute, statutory scheme, or legislative intent

Administrative rule cannot conflict with statute.

[3] **Declaratory Judgment** Scope and extent of review in general

Appeal from determination in favor of election challengers, legislative candidates, and political organizations in suit against Secretary of State and Director of the Bureau of

Elections seeking declaration that provisions of manual published by defendants providing instructions to election challengers and poll challengers violated Election Law and that manual was promulgated without proper notice-and-comment requirements outlined in the Administrative Procedures Act (APA) would be reviewed de novo, since case involved interpretation of a statute. Mich. Comp. Laws Ann. §§ 24.201 et seq., 168.1 et seq.

[4] **Election Law** Powers and duties of officers in general

Election Law Challenges to Voters and Proceedings Thereon

Constitutional amendment recognizing that right to vote includes the right to be free from impositions of unreasonable burdens in doing so did not obviate the need to review determination in favor of election challengers, legislative candidates, and political organizations in suit against Secretary of State and Director of the Bureau of Elections challenging provisions of manual published by defendants providing instructions to election challengers under Election Law and Administrative Procedures Act (APA); amendment did not add anything to existing authority concerning the extent to which Secretary of State was permitted to issue binding authority without recourse to APA rulemaking or otherwise call for reading the pertinent provisions of Election Law in a different light. Mich. Const. art. 2, § 4(1); Mich. Comp. Laws Ann. §§ 24.201 et seq., 168.1 et seq.

[5] **Constitutional Law** To Executive, in General

State constitution prohibits the legislature from delegating its lawmaking powers to the executive branch. Mich. Const. art. 3, § 2.

[6] **Constitutional Law** To Executive, in General

Essential purpose of the nondelegation doctrine, which prohibits legislature from delegating its lawmaking powers to the executive branch, is to protect the public from misuses of the delegated power. Mich. Const. art. 3, § 2.

[7] **Administrative Law and Procedure** Statutory basis and limitation

Constitutional Law To Executive, in General

Legislature may authorize administrative agency to exercise certain powers when fulfilling its legislatively created duties and responsibilities.

[8] **Constitutional Law** Standards for guidance

Constitutional Law Rule making

Test for determining whether legislature has properly authorized administrative agency action is whether legislature has prescribed standards as reasonably precise as the subject matter requires or permits when granting regulatory or rule-making authority to administrative agency.

[9] **Administrative Law and Procedure** Compliance with rulemaking procedures or other process

An agency's failure to follow the process outlined in the Administrative Procedure Act (APA) renders a rule invalid. Mich. Comp. Laws Ann. § 24.201 et seq.

[10] **Administrative Law and Procedure** Force of law in general

In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule under the Administrative Procedures Act (APA). Mich. Comp. Laws Ann. §§ 24.207, 24.226.

[11] **Administrative Law and Procedure** Operation and Effect

If agency regulation, statement, standard, policy, ruling, or instruction of general applicability does not fall under the definition of a properly promulgated rule under the Administrative Procedures Act (APA), it is merely explanatory. Mich. Comp. Laws Ann. §§ 24.207, 24.226.

[12] **Administrative Law and Procedure** Nature, scope, and definitions in general

In order to reflect preference under Administrative Procedures Act (APA) for policy determinations pursuant to rules, definition of a rule under the APA is to be broadly construed, while exceptions are to be narrowly construed. Mich. Comp. Laws Ann. §§ 24.207, 24.226.

[13] **Election Law** Powers and duties of officers in general

Election Law Challenges to Voters and Proceedings Thereon

Manual published by Secretary of State and Director of the Bureau of Elections providing instructions to election challengers and poll challengers did not fall under permissive statutory power exception to definition of a rule under the Administrative Procedures Act (APA) on basis that Secretary had statutory duty to issue instructions and promulgate rules for the conduct of elections, and thus Secretary and Director were not excused from requirement that manual be promulgated as a rule under APA for it to be valid on such basis; statutory duty did not include the legislative authority to issue instructions rather than rules, but rather applicable statute preserved distinction between instructions and APA rules, such that each kind of regulation was required to be issued with degree of formality required. Mich. Comp. Laws Ann. §§ 24.207(j), 168.31(1)(a).

1 Case that cites this headnote

[14] **Election Law** Powers and duties of officers in general

Election Law Challenges to Voters and Proceedings Thereon

Provision of manual published by Secretary of State and Director of the Bureau of Elections providing instructions to election challengers and poll challengers that created a form that challengers were purportedly required to use to establish their credentials was invalid absent promulgation of provision as a rule under the Administrative Procedures Act (APA); although Election Law required that election challengers possess written credentials, evidence required to show that challenger was properly credentialed was set out in statute, and additional requirement mandating use of a particular form could not be added absent promulgation of a rule under APA. Mich. Comp. Laws Ann. §§ 24.201 et seq., 168.732.

[15] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of manual published by Secretary of State and Director of the Bureau of Elections providing instructions to election challengers and poll challengers that made one election inspector a "challenger liaison" and stated that challengers were only permitted to communicate with liaison unless otherwise instructed violated Election Law provision permitting challengers to bring certain issues to an election inspector's attention, and thus provision was invalid; statute did not require that challenger only bring matters to a specific election inspector. Mich. Comp. Laws Ann. § 168.733(1)(e).

[16] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of manual published by Secretary of State and Director of the Bureau of Elections providing instructions to election challengers and poll challengers that prohibited election inspectors from recording impermissible challenges violated Election Law provisions outlining duties of election inspectors, and thus provision was invalid; Election Law did not use terms "permissible" and "impermissible"

in describing challenges, and Election Law required documentation of all challenges. Mich. Comp. Laws Ann. § 168.727(2).

[17] **Election Law** Challenges to Voters and Proceedings Thereon

Provision of manual published by Secretary of State and Director of the Bureau of Elections providing instructions to election challengers and poll challengers permitting election inspectors to remove challengers for making repeated impermissible challenges was inconsistent with Election Law provision providing basis for expulsion of a challenger, and thus provision of manual was invalid; Election Law provided that any evidence of drinking alcoholic beverages or disorderly conduct was sufficient cause for expulsion, and Election Law did not authorize adoption of a rule providing other reasons for expulsion. Mich. Comp. Laws Ann. § 168.733(3).

[18] **Election Law** Powers and duties of officers in general

Election Law Challenges to Voters and Proceedings Thereon

Provision of manual published by Secretary of State and Director of the Bureau of Elections providing instructions to election challengers and poll challengers that prohibited electronic devices in absent voter ballot processing facility was not embodied within Election Law provision related to restrictions on communicating certain information, and thus provision was invalid, absent promulgation of provision as a rule under Administrative Procedures Act (APA); although Election Law restricted communicating information regarding the processing or tallying of votes, there was no categorical prohibition on possession of electronic devices. Mich. Comp. Laws Ann. §§ 24.201 et seq., 168.765a.

1 Case that cites this headnote

Court of Claims, LC No. 22-000162-MZ

Court of Claims, LC No. 22-000164-MZ

Before: Boonstra, P.J., and Borrello and Feeney, JJ.

Opinion

Per Curiam.

***1** This consolidated appeal concerns various challenges by plaintiffs [1] to a manual defendants published in May 2022 providing instructions to election challengers and poll challengers. The manual was not published as a formal administrative rule under the Administrative Procedures Act (APA), MCL 24.201 *et seq.* As the trial court, the Court of Claims observed at the opening of its opinion, "[a]n executive branch department cannot do by instructional guidance what it must do by promulgated rule. This straightforward legal maxim does most of the work in resolving these two consolidated cases." Not only do we agree with this observation, we also agree with the trial court's resolution on the issues now challenged on appeal. Accordingly, we affirm.

The May 2022 manual, titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers," is the latest version of a manual that defendants have published for the past 20 years, with the most recent version having been published in October 2020. The manual provides instructions [2] for election challengers and poll watchers. Plaintiffs filed these cases challenging various provisions in the manual. Plaintiffs include elections challengers for the November 2022 general election, two candidates for the Legislature, the Michigan Republican Party, and the Republican National Committee.

The trial court summarized the facts underlying this case as follows:

> Plaintiffs include several election challengers for the November 2022 general election; two candidates for the Michigan Legislature; the Michigan Republican Party; and the Republican National Committee. Section 730 of the Michigan Election Law, MCL 168.1 *et seq.*, permits political parties to designate challengers to be present in the room where the ballot box is kept during the election. MCL 168.730. These consolidated cases relate to a manual that the Michigan Bureau of Elections regularly issues relating to election challengers and poll watchers. By all accounts, the Bureau has issued several iterations of the

manual since at least 2003; the one just prior to the current one was issued in October 2020. In May 2022, defendants drafted and published the current version titled, "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" ("May 2022 Manual")....

***2** On September 28, 2022, plaintiffs Philip O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (collectively, "O'Halloran Plaintiffs"), sued defendants in this Court in Docket No. 22-000162-MZ. O'Halloran, Giacobazzi, and Cushman are designated election challengers for the November 2022 general election. Penny Crider is a candidate for the Michigan House of Representatives, and Kenneth Crider is a candidate for the Michigan Senate. The O'Halloran Complaint raises two claims. In Count I, the O'Halloran Plaintiffs allege that the May 2022 Manual violates Section 733 of the Michigan Election Law, MCL 168.733. In Count II, the O'Halloran Plaintiffs assert that the May 2022 Manual was promulgated without the proper notice-and-comment requirements outlined in the Administrative Procedures Act ("APA"), MCL 24.201 *et seq.*

Two days later, plaintiffs Richard DeVisser (another election challenger), the Michigan Republican Party, and the Republican National Committee (collectively, "DeVisser Plaintiffs") sued defendants separately in Docket No. 22-000164-MM. In Count I, the DeVisser Plaintiffs allege that certain provisions of the May 2022 Manual violate the Michigan Election Law. Like the O'Halloran Plaintiffs, the DeVisser Plaintiffs also allege that the May 2022 Manual is a rule promulgated without the required notice-and-comment procedures outlined in the APA.

Both sets of plaintiffs request ... a declaration that the publication is void in toto, or alternatively, that certain passages must be removed before the November 2022 general election. The O'Halloran Plaintiffs have moved for a temporary restraining order ("TRO") and preliminary injunction; similarly, the DeVisser Plaintiffs have sought expedited declaratory relief under MCR 2.605(O).

... [T]his Court consolidated the cases on October 3, 2022, and ordered defendants to show cause why the relief requested in the complaints should not be granted. Defendants responded and moved for summary disposition ....

... Defendants ... assert that the May 2022 Manual did not need to be promulgated through notice-and-comment rulemaking because the Michigan Election Law grants the Secretary of State broad authority to issue instructions, advice, and directives, and the May 2022 Manual fits within these categories....

Both sets of plaintiffs responded to defendants' motion for summary disposition. They reiterate that the May 2022 Manual's language extends beyond the Michigan Election Law and should have been promulgated as a rule in accordance with the APA.

The trial court issued its extensive opinion and order on October 20, 2022.[3] Ultimately, the trial court granted some but not all of the relief plaintiffs requested. Plaintiffs have not appealed and challenged the denial of that relief. While the trial court rejected some of what it described as "broad, sweeping" requests for relief, it did identify five specific areas where plaintiffs were entitled to relief: (1) the credential-form requirement, (2), communication with election inspectors other than the "challenger liaison," (3) the prohibition on recording "impermissible challenges," (4) the prohibition on electronic devices in the Absent Voter Counting Board (ACVB) facilities, and (5) appointment of challengers on election day. On appeal, defendants do not challenge the last category. Accordingly, we consider the first four and, like the trial court, shall look to each in turn.

***3** **[1]** **[2]** **[3]** There are two primary issues present in this case. First, whether the challenged provisions in the manual are consistent with Michigan Election Law, MCL 168.1 *et seq.*, or are in conflict with the statute. And, second, whether defendants needed to promulgate those provisions, even if authorized by statute, by a formal rule as required by the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, which the manual was not. While a rule promulgated in accordance with the APA has the force of law, *Slis v Michigan*, 332 Mich App 312, 346, 956 N.W.2d 569 (2020), other pronouncements do not, *Twp. of Hopkins v State Boundary Comm'n*, 340 Mich App 669, 689, 988 N.W.2d 1 (2022). As explained in *Hopkins*:

> The APA "applies to all agencies and agency proceedings not expressly exempted." MCL 24.313. An "agency" is defined as a "state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 24.203(2). There is no dispute that the Commission is a state agency. The APA defines a "rule" to include "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 ....” MCL 24.207. A “rule” does not include a “guideline” “that in itself does not have the force and effect of law but is merely explanatory.” MCL 24.207(h). The APA defines “guideline” as “an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person.” MCL 24.203(7). The APA prescribes how agencies adopt guidelines, MCL 24.224 and MCL 24.225 and specifies that “[a]n agency shall not adopt a guideline in lieu of a rule,” MCL 24.226. [340 Mich App at 689, 988 N.W.2d 1.]

Moreover, an administrative rule cannot conflict with a statute. *Brightmoore Gardens, LLC v Marijuana Regulatory Agency*, 337 Mich App 149, 161, 975 N.W.2d 52 (2021) (“an administrative agency is not empowered to change law enactive by the Legislature.... When an administrative rule conflicts with a statute, the statute controls”). Because this case involves an interpretation of a statute, we review the trial court's decision de novo. *Slis*, 332 Mich App at 335, 956 N.W.2d 569.

[4] Const. 1963, art. 2, § 4(2) continues to provide[4] as follows:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting....

According to MCL 168.21, “[t]he secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.” Further, under MCL 168.31(1), the Secretary “shall do all of the following”:

> (a) Subject to subsection (2),[5] issue instructions and promulgate rules pursuant to the administrative procedures act ... for the conduct of elections and registrations in accordance with the laws of this state.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.
>
> (c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots, directions on the location of voting stations in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act.
>
> ***4**
>
> * * *
>
> (e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.
>
> * * *
>
> (h) Investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution.
>
> * * *
>
> (n) Create an election day dispute resolution team that has regional representatives of the department of state, which team shall appear on site, if necessary.

Nondelegation Doctrine

Although neither the trial court nor the parties have framed their positions in terms of nondelegation doctrine, to the extent that defendants suggest that their prerogative to issue “instructions ... for the conduct of elections” under MCL 168.31(1)(a) authorizes them to issue any new requirement without following APA rule procedures simply by calling it an instruction, that doctrine is implicated.

[5] **[6]** **[7]** **[8]** Our state Constitution includes the following provision: “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers

properly belonging to another branch except as expressly provided in this constitution." Const. 1963, art. 3, § 2. Thus, our Constitution prohibits the Legislature from delegating its lawmaking powers to the executive branch. The "essential purpose" of the doctrine is "to protect the public from misuses of the delegated power." *Blue Cross & Blue Shield v Governor*, 422 Mich. 1, 51, 367 N.W.2d 1 (1985). The Legislature may, however, authorize an administrative agency to exercise certain powers when fulfilling its legislatively created duties and responsibilities. See, e.g., *Mich. Central R Co v Mich R Comm*, 160 Mich. 355, 361-368, 125 N.W. 549 (1910); *G F Redmond & Co v Mich. Securities Comm.*, 222 Mich. 1, 192 N.W. 688 (1923). The test for determining whether the Legislature has properly authorized such agency action is whether the Legislature has prescribed "standards ... as reasonably precise as the subject matter requires or permits" when granting regulatory or rulemaking authority to an administrative agency. *Osius v St Clair Shores*, 344 Mich. 693, 698, 75 N.W.2d 25, 27 (1956).

***5** One legal commentator has concluded that "Michigan decisions" provide "no clear rule as to when a legislative rule must be promulgated or, for that matter, whether a rule is legislative or interpretative." McKim, III, *The Sometimes Dubious Efficacy of Michigan Department of Treasury "Rules," "Revenue Administrative Bulletins," "Letter Rulings," "Questions and Answers" and Other Publications*, 60 Tax Law 1019, 1048 (2007).

Although we are aware of no authority that stands for the proposition that the Legislature may not delegate to the executive branch the authority to issue a rule, as defined by MCL 24.207, without requiring the APA's rulemaking procedures, we proceed in our review while keenly mindful of the nondelegation doctrine and the caselaw calling for adherence to APA procedures in particular.

Rulemaking

[9] **[10]** **[11]** The APA defines a "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, 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." MCL 24.207. The APA further states that "[a]n agency shall not adopt a guideline in lieu of a rule." MCL 24.226. "An agency's failure to follow the process outlined in the APA renders a rule invalid." *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594, 873 N.W.2d 827 (2015), lv den 499 Mich. 887, 876 N.W.2d 568 (2016). "In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory." *Danse Corp. v Madison Hts.*, 466 Mich. 175, 181, 644 N.W.2d 721 (2002).

[12] After setting forth the general definition of an administrative "rule," MCL 24.207 sets forth a list of things that do not constitute such rules, including the following:

> (g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.
>
> * * *
>
> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

"[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *American Federation of State, Co & Mun Employees v Dep't of Mental Health*, 452 Mich. 1, 10, 550 N.W.2d 190 (1996).

[13] Defendants argue that the challenged instructions fall under the "permissive statutory power" exception to the definition of "rule" set forth in MCL 24.207(j). In support, defendants cite *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 703 N.W.2d 822 (2005), and *Hinderer v Dep't of Social Servs*, 95 Mich App 716, 727, 291 N.W.2d 672 (1980).

In *By Lo Oil*, 267 Mich App at 47, 703 N.W.2d 822, this Court recited that "Subsection 7(j) excepts administrative action from the APA's definition of 'rule' when the Legislature has either explicitly or implicitly authorized the action in question," and concluded that the agency's use of an administrative bulletin to determine certain tax liability came under that exception because the pertinent statute "explicitly required the department to 'prescribe' the invoice required ... and did not mandate the department to do so pursuant to the procedural requirements of the APA."

***6** In *Hinderer*, 95 Mich App at 727, 291 N.W.2d 672, this Court approved an agency's use of a "lag budgeting

system" for reducing benefits for a recipient of the Aid to Families with Dependent Children program, which was not promulgated as an APA rule, on the ground that the agency was statutorily empowered to "adopt ... a budgetary method of the director's own choosing."

Defendants assert that the Secretary of State's duty under MCL 168.31(1)(a) to "issue instructions and promulgate rules ... for the conduct of elections" includes the legislative authority "to issue instructions rather than rules" as an exception to the requirement that administrative rules be promulgated in accord with the APA. The trial court held that "the Secretary's responsibility for issuing instructions is distinct from the authority to promulgate rules, where the latter has the force and effect of law, but the former does not." In fact, defendants' position would leave them at liberty to issue binding regulations at will, without ever having to adhere to the notice-and-hearing requirements of the APA. MCL 168.31(1)(a) preserves the distinction between mere instructions and APA rules, thus calling on the defendants to respect that distinction and issue each kind of regulation with the degree of formality that is required.

The question, then, for each of the four contested facets of the May 2022 Manual at issue is whether the challenged regulation comports with the Election Law, and, if so, whether it constitutes a sufficient extension of that enabling law that its validity depends on promulgation as an APA rule.

The credential form requirement.

[14] MCL 168.732 requires that election challenges possess written credentials:

> Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

Defendants have created a form that challengers are purportedly required to use to establish their credentials. Specifically, on pages 4-5 of the manual, [6] it states:

> This authority, also known as the Michigan Challenger Credential Card, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger.

***7** The trial court noted that this appears to be a new requirement and that in the past the political parties issued their own credential forms to challengers. The trial court further stated that it did not take issue with having a uniform credential form, but ultimately concluded that the Secretary lacks the authority to require that challengers use defendants' form:

> [O]ur Legislature expressly set out the "evidence" needed to show that a person was properly credentialed as a challenger. In MCL 168. 732, a section entitled, "Presence of challenger in room containing ballot box; *evidence of right to be present*," (emphasis added), our Legislature

> set forth the following three items that evidence a valid challenger: (a) "[a]uthority signed by the recognized chairman or presiding officer" of the organization or committee (here, major political party); (b) the written or printed name of the challenger; and (c) the precinct number for the challenger's assigned precinct. Because our Legislature set forth three specific requirements that a person must satisfy to evidence that the person is a valid challenger, defendants cannot, in the absence of a promulgated rule, add a fourth, i.e., the mandatory use of a particular form issued by the Secretary of State.

The trial court did acknowledge that the Secretary of State can certainly create a form for the challengers' convenience. As the trial court observed,

> our Legislature has set forth the exhaustive list of evidence for validating a credential, and if a purported credential includes the three items in MCL 168.732, then that purported credential fully complies with the Michigan Election Law —nothing more is required. The provision in the May 2022 Manual requiring the use of the uniform challenger-credential form violates the Michigan Election Law and APA.

We agree with the trial court. The Legislature has neither required nor authorized the creation of a mandatory form. Indeed, given that the Legislature has set forth the requirements for challenger credentialing, nothing more may be added. [7]

The requirement that communication only be with the "Challenger Liaison."

[15] On page five of the manual, defendants create the position of "Challenger Liaison," who is one of the election inspectors. On the top of page six, the manual it states in bold print: "**Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff**." This directive is reinforced later on the page with this statement: "Challengers must communicate only with the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff." The restriction is again repeated on page 21. According to the manual, a violation of this or any other instruction or a direction given by an election inspector results in a warning being issued and a repeat violation may result in the challenger's ejection.

***8** The trial court concluded that this requirement was inconsistent with the statute:

> Plaintiffs argue that the manual's limitation on which inspectors the challengers may interact with violates MCL 168.733(1)(e), which provides that a challenger may bring certain issues to "an election inspector's attention" without restriction to a *particular* inspector.
>
> The authority to designate a "challenger liaison" is absent from the Michigan Election Law—in fact, the very label appears nowhere in statute. Defendants have not presented this Court with any statute, common law, case law, or promulgated rule that gives them the authority to restrict with which election inspector a challenger can communicate. Our Legislature provided a challenger the right to communicate to "an" election inspector, and defendants cannot artificially restrict that to a designated inspector. Whether it makes sense to have such a liaison is one thing; it is another thing entirely to require, at the risk of being ejected, a challenger to speak to only the designated liaison. This provision of the May 2022 Manual goes well beyond what is provided in law and impermissibly restricts a challenger's ability to bring certain issues to any inspector's attention. Accordingly, the manual must be revised to make clear that a challenger need not bring an issue to the attention of only a liaison challenger, but instead can bring such issue to the attention of any election inspector at the applicable location. [Emphasis in original.]

MCL 168.733(1) provides in pertinent part:

> The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:
>
> * * *

> (e) Bring to *an* election inspector's attention any of the following ....

As the trial court stated, the statute itself authorizes a challenger to bring a matter to the attention of "an election inspector," not a "challenger liaison." We agree with the trial court that it may be beneficial to designate one of the election inspectors as the challenger liaison to serve as a central point of contact for the challengers. But the statute does not grant defendants the authority to require that a challenger only bring matters to such a liaison and, perhaps more importantly, the statute explicitly authorizes challengers to communicate with any election inspector. Defendants' attempt to restrict that right is a violation of the statute.

The prohibition on recording "impermissible challenges."

[16] This issue involves a restriction in the manual on what challenges may be made. The manual explains the process for making a challenge:

> A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below. Assuming the challenge is permissible, the substance of the challenge, the time of the challenge, the name of the challenger, and the resolution of the challenge must be recorded in the poll book. If the challenge is rejected, the reason for that determination must be recorded in the poll book.

***9** An impermissible challenge, as explained below, need not be noted in the poll book. The manual defines an "impermissible challenge" as:

> Impermissible challenges are challenges that are made on improper grounds. Because the challenge is impermissible, the challenger liaison does not evaluate the challenge to accept it or reject it. Impermissible challenges are:
>
> • Challenges made to something other than a voter's eligibility or an election process;
>
> • Challenges made without a sufficient basis, as explained below; and
>
> • Challenges made for a prohibited reason.

The manual then states that while an election inspector is not required to note an impermissible challenge in the poll books, they may do so. In fact, it "encourages" an inspector to note the content of the impermissible challenge and any warning given to the challenger. If a challenger makes multiple impermissible challenges, the inspector is encouraged to note the content and number of such challenges. The manual then states in bold type: "**Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.**"

MCL 168.727(2) outlines the duties of an election inspector when a challenge is made:

> (2) Upon a challenge being made under subsection (1), an election inspector shall immediately do all of the following:
>
> (a) Identify as provided in sections 745 and 746 a ballot voted by the challenged individual, if any.
>
> (b) Make a written report including all of the following information:
>
> (i) All election disparities or infractions complained of or believed to have occurred.
>
> (ii) The name of the individual making the challenge.
>
> (iii) The time of the challenge.
>
> (iv) The name, telephone number, and address of the challenged individual.
>
> (v) Other information considered appropriate by the election inspector.
>
> (c) Retain the written report created under subdivision (b) and make it a part of the election record.
>
> (d) Inform a challenged elector of his or her rights under section 729.

As the trial court noted, the statute does not use the terms "permissible" and "impermissible" in describing challenges.[8] Nor does it require the documentation of only "permissible" challenges. It requires the documentation of all

challenges, permissible or impermissible. Accordingly, the trial court concluded that

> to the extent that the May 2022 Manual permits an election inspector not to record a challenger's challenge to a person's voting rights because, in the election inspector's view, such challenge does not have a sufficient basis, this is directly contrary to our Legislature's requirement in MCL 168.727(2) that a record of the challenge be made. Even if the challenge is determined to be without basis in law or fact, if the challenge is made, it must be recorded. *Id.*

The trial court did conclude the statutory documentation requirement only extends to challenges regarding voter qualification and that defendants have the discretion to adopt a recordkeeping system regarding challenges not involving voter rights, i.e., for a reason other than those listed in MCL 168.727(1) or MCL 168.733(1)(c).

***10** **[17]** The trial court also addressed the prohibition on making repeated impermissible challenges and it resulting in the challenger's removal. MCL 168.733(3) provides a basis for expulsion of a challenger: "Any evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board." The statute does not authorize defendants to adopt a rule providing other reasons for expulsion. Accordingly, unless the repeated "impermissible" challenges rise to the level of disorderly conduct, we agree with the trial court that there is no basis in law for the challenger's expulsion.

The prohibition on electronic devices in the Absent Voter Counting Board (ACVB) facilities.

[18] The final provision of the manual that the trial court found problematic is the restriction on electronic devices in the ACVB: "No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day."[9] A challenger in violation of this rule may be ejected from the AVCB facility.

The trial court found statutory authority regarding restrictions on communicating certain information, but not on a ban of the possession of electronic devises:

> Thus, MCL 168.765a(9) and (10), collectively, prohibit a challenger from disclosing information relating to the processing of absentee ballots before the polls close, the disclosure of which is a felony. But MCL 168.765a does not categorically prohibit the possession of electronic devices in the AVCB facility or otherwise suggest that physical sequestration includes (or equates to) a prohibition on the possession of electronic devices.

The trial court then noted that the Legislature had plenty of opportunity in recent amendments to the election statute to include such a restriction, but did not do so:

> MCL 168.765a was enacted four years ago as a provision in a 2018 update to the Michigan Election Law. See 2018 PA 123. Our Legislature amended the same statute twice in 2020. See 2020 PA 95 and 2020 PA 177. Cell phones and other electronic devices have been prevalent for decades and have long had the capability to record. In the face of the existence of these devices, our Legislature did not see fit to ban them in AVCB facilities when it added section 765a to the Michigan Election Law in 2018 or when it amended the statute twice in 2020. Rather, our Legislature enacted two different prophylactic measures to guard against the communication of election-related information—I.e., first, the taking of an oath, and second, physical sequestration at the AVCB facility—and, for violating either measure or otherwise communicating election-related information, our Legislature imposed the penalty of a felony conviction. See MCL 168. 765a(9) and (10). Our Legislature could have added a third prophylactic measure, maybe even the one favored by defendants, but it chose not to do so. When our Legislature enacts a public policy in one particular way but not another, its choice must be respected and enforced by the other two branches. *Spalding v Swiacki*, 338 Mich App 126, 138, 979 N.W.2d 338 (2021) ("When

the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional.").

***11** In sum, use of an electronic device to communicate information regarding the processing or tallying of votes is prohibited, under pain of a felony conviction, but the mere possession of an electronic device is not permitted under Michigan's election law. While the cautious approach is, as the trial court points out, for a challenger or poll watcher to simply leave their electronic device outside the room, the statute simply does not require it. As the trial court stated, "[p]rohibiting electronic devices in the AVCB facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule. The Court declines to read a prophylactic measure into a statute that does not appear in its plain language." We agree.

Defendants have broad authority to issue binding non-rule instructions on election workers, but not on challengers or other outside observers. Election workers, including inspectors, conduct operations that come under the authority of the Secretary of State, and thus while doing so are effectively the Secretary's subordinates. Accordingly, instructions directed at such subordinates are not directives of "general applicability" for purposes of the definition of "rule" under MCL 24.207. Defendants are thus free to issue binding instructions applicable to election workers without resort to the APA's formal rulemaking procedures. In contrast, election challengers, by the nature of the office, are outsiders standing ready to raise objections to how elections are conducted. Instructions directed at the latter thus go beyond defendants' immediate scope of inherent supervisory authority and instead function as regulations of general applicability, which for that reason must be issued as properly promulgated APA rules. Defendants may issue mere instructions that are binding on election workers who operate as defendants' employees and subordinates, but regulations targeting election challengers or poll watchers reach beyond defendants' general supervisory scope and must be promulgated as APA rules.

In conclusion, the relief that the trial court granted with respect to these issues is "that defendants shall have the discretion either to (1) rescind the May 2022 Manual in its entirety; (2) revise the May 2022 Manual to comply with this Opinion and Order; or (3) revise an earlier iteration of the manual to comply with this Opinion and Order." For the reasons stated above, we are not persuaded that the trial court erred in granting this relief, and defendants shall comply with the trial court's decree.

Affirmed. Plaintiffs may tax costs.

All Citations

--- N.W.3d ----, 2023 WL 6931928

Footnotes

1 As did the trial court, when necessary to distinguish between the two sets of plaintiffs, we shall refer to the plaintiffs in Docket No. 363503 as the "O'Halloran plaintiffs" and those in Docket No. 363505 as the "DeVisser plaintiffs." When no such distinction is necessary, they shall collectively be referred to simply as "plaintiffs."

2 The introductory paragraph of the manual describes its purpose as follows:

> This publication is designed to familiarize election challengers, poll watchers, election inspectors, and members of the public with the rights and duties of election challengers and poll watchers in Michigan. Election challengers and poll watchers play a constructive role in ensuring elections are conducted in an open, fair, and orderly manner by following these instructions.

3 On November 3, 2022, the Supreme Court ordered that "the October 20, 2022 opinion and order of the Court of Claims, and any decision of the Court of Appeals in this matter, is stayed pending the appeal period for the filing of an application for leave to appeal in this Court, and if an application for leave to appeal is filed from

the Court of Appeals decision, until further order of this Court." *DeVisser v Secretary of State*, 510 Mich 994; 981 N.W.2d 30 (2022); *O'Halloran v Secretary of State*, 510 Mich 970; 981 N.W.2d 149 (2022). Two Justices separately concurred, and two dissented, in lengthy separate statements. *DeVisser*, 510 Mich. at 994-1018, 990 N.W.2d 826; *O'Halloran*, 510 Mich. at 970-994, 990 N.W.2d 826.

4 The recent amendment of Const. 1963, art. 2, § 4(1) only expressly recognizes that the right to vote includes the right to be free from impositions of unreasonable burdens in doing so. The new provisions neither added anything to existing authority as concerns the extent to which the Secretary of State may issue binding authority without recourse to APA rulemaking, nor otherwise call for reading the pertinent provisions of the Election Law in a different light. Accordingly, the constitutional amendment of which the amicus curiae makes issue does not obviate the need to review the decision below on its merits under then-existing law.

5 Subsection (2) requires the Secretary of State to "promulgate rules establishing uniform standards for state and local nominating, recall, and ballot question petition signatures."

6 All references to the manual are from the version appended as an exhibit to the trial court's October 20, 2022 opinion.

7 We do note some apparent contradiction in the trial court's opinion. It states that "defendants cannot, in the absence of a promulgated rule, add a fourth" requirement. [10/20/20 Opinion and Order, p. 15.] This would imply that defendants could, if it had promulgated a rule, establish the requirement. It later states that mandatory use of defendants' uniform challenger credential form "violates the Michigan Election Law and APA." But if it would violate the election statute, then it would seem to follow that defendants could not require the use of the form even if it did promulgate a rule. In any event, at this point we need not engage in an extensive analysis of this point as defendants have not promulgated this as a rule.

8 MCL 168.727(3) does state that a "challenger shall not make a challenge indiscriminately and without good cause." And it also provides that an "individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor." But it does not excuse such improper challenges from being documented.

9 The manual does permit challengers at polling places to possess electronic devices, with some restriction on their use. The prohibition on possessing one only applies to an ACVB.