SURVEY OF MICHIGAN ENVIRONMENTAL CASES FOR THE PERIOD MAY 2021 THROUGH JUNE 2022

NATHAN DUPES[†] & ERICA SHELL[‡]

I. INTRODUCTION

During the *Survey* period, May 2021 through June 2022, many of Michigan's published environmental law cases turned on administrative law principles, including standing, exhaustion of administrative remedies, and the rulemaking process. In two cases, the Michigan Supreme Court foreshadowed significant changes in the public's ability to intervene in permitting and land use decisions. On the regulatory front, both the U.S. Environmental Protection Agency (EPA) and the Michigan Department of Environment, Great Lakes, and Energy (EGLE) promulgated new regulations to address per– and poly–fluoroalkyl substances (collectively known as PFAS) in the environment, which will surely form the basis of environmental litigation for years to come. This litigation is sure to include challenges to both the regulatory process and enforcement litigation.

[†] Member, Bodman PLC. B.A., 2007, with highest distinction, University of Michigan; J.D., 2011, *magna cum laude*, Order of the Coif, Wayne State University Law School.

[‡] Member, Bodman PLC. B.A., 2010, *magna cum laude*, Phi Beta Kappa, Vanderbilt University; M.A., 2012, University of Detroit Mercy; J.D., 2015, *summa cum laude*, Order of the Coif, Wayne State University Law School.

II. ANALYSIS

A. 3M Company v. Michigan Department of Environment, Great Lakes, and Energy

The Court of Claims issued a significant opinion concerning Michigan's regulation of PFAS. Although the decision was released shortly after the *Survey* period, it is included in this article because most of the litigation leading up to the decision occurred within the *Survey* period.

Even casual observers of environmental law will recognize that PFAS are one of the most prominent and dynamic subjects of current environmental regulation and litigation. PFAS compounds are widely used chemicals that do not readily biodegrade in the environment.[1] Studies have shown that exposure to PFAS may cause adverse health effects in humans and animals.[2] Federal and state agencies have been very active in promulgating regulations to address PFAS.

The EPA regulates PFAS compounds. On September 6, 2022, the EPA published a proposed rule to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[3] On March 14, 2023, EPA announced proposed National Primary Drinking Water Regulations for six PFAS.[4]

Michigan has been at the forefront of PFAS regulation. As early as January 2018, EGLE established groundwater cleanup criteria for PFOS and PFOA.[5] EGLE also promulgates and revises Water Quality Values (WQVs) to limit discharges into Michigan's surface water.[6] Previously,

---

1. 3M Co. v. Mich. Dep't of Env't Great Lakes & Energy, opinion and order of Mich. Ct. Cl. (Case No. 21-000078-MZ).

2. For example, PFAS compounds are common in waterproofing applications. PFAS Explained, U.S. ENV'T PROT. AGENCY (April 28, 2022), https://www.epa.gov/pfas/pfas-explained [https://perma.cc/KB95-VGNX].

3. 3M Co. v. Mich. Dep't of Env't Great Lakes & Energy, opinion and order of Mich. Ct. Cl. (Case No. 21-000078-MZ).

4. Per– and Polyfluoroalkyl Substances (PFAS): Proposed PFAS National Primary Drinking Water Regulation, U.S. ENV'T PROT. AGENCY (March 23, 2023), https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas [https://perma.cc/3X4H-JSB3].

5. See Scott Dean, EGLE Establishes New Surface Water Values for Two PFAS Chemicals, DEP'T OF ENV'T, GREAT LAKES & ENERGY (July 27, 2022), https://www.michigan.gov/egle/newsroom/mi-environment/2022/07/27/egle-establishes-new-surface-water-values-for-two-pfas-chemicals [https://perma.cc/S2GG-KYU9].

6. *Id.*

EGLE established a WQV for perfluorooctanesulfonic acid (PFOS).[7] In July 2022, EGLE implemented WQVs for perfluorobutane sulfonic acid (PFBS) and revised existing WQVs for perfluorooctanoic acid (PFOA).[8] Under Michigan law, these WQVs become the generic Groundwater-Surface Water Interface (GSI) criteria.[9]

The Safe Drinking Water Act (SDWA) grants EGLE authority to establish maximum contaminants levels for various substances, below which adverse health effects are not expected to occur.[10] EGLE's recent exercise of that authority regarding certain PFAS compounds became the subject of *3M Company v. Michigan Department of Environment, Great Lakes, and Energy*.[11]

Governor Gretchen Whitmer directed the Michigan PFAS Action Response Team to develop maximum contaminant levels for PFAS in drinking water.[12] The health-based values that the Response Team developed were ultimately promulgated by EGLE as a rule setting maximum contaminant levels.[13]

As part of that rulemaking, EGLE created a regulatory-impact statement, which is a requirement of Michigan's Administrative Procedures Act (APA).[14] Although the regulatory-impact statement addressed the costs and benefits of the proposed rule concerning the State's drinking water, it did not directly address the costs and benefits the rule would have regarding groundwater cleanup.[15] Groundwater cleanup costs were relevant because, under MCL 324.20120a(5),[16] the maximum

---

7. *Id.*
8. *Id.*
9. MICH. COMP. LAWS ANN. § 24.201 (2022).
10. MICH. COMP. LAWS ANN. § 325.1001 (2022).
11. See 3M Co. v. Mich. Dep't of Env't Great Lakes & Energy, opinion and order of Mich. Ct. Cl. (Case No. 21-000078-MZ); see also Complaint for Plaintiff, Attorney General v. 3M Co., et al., Mich. Ct. Cl. (Case No. 2020-003366-NZ).
12. Complaint for Plaintiff, supra note 11, at 3.
13. *Id.* at 4.
14. MICH. COMP. LAWS ANN. § 24.245(3).
15. Complaint for Plaintiff, *supra* note 11, at 6.
16. Mich. Comp. Laws Ann. § 324.20120a (5) (2022) provides:

If a cleanup criterion derived under subsection (4) for groundwater in an aquifer differs from either: (a) the state drinking water standards established pursuant to section 5 of the safe drinking water act, 1976 PA 399, MCL 325.1005, or (b) the national secondary drinking water regulations established pursuant to 42 USC 300g-1, or (c), if there is not national secondary drinking water regulation for a contaminant, the concentration determined by the department according to methods approved by the United States Environmental Protection Agency below which taste, odor, appearance, or other aesthetic characteristics are not adversely affected, the cleanup criterion is the more stringent of (a), (b), or (c) unless the department determines that compliance with this subsection is not necessary because the use of the aquifer is reliably restricted or controlled under provisions

contaminant levels set for PFOA and PFOS would automatically become the groundwater cleanup criteria under Part 201 of Michigan's Natural Resources and Environmental Protection Act (NREPA).[17] 3M and others submitted comments to EGLE regarding their groundwater concerns. Rather than directly addressing these concerns in the drinking water rulemaking, EGLE stated that it would address them in a separate rulemaking under Part 201.[18]

In response, 3M sued EGLE in the Court of Claims, asserting that the drinking water rules were invalid.[19] Several of 3M's claims were dismissed before the instant decision, leaving the following three counts in 3M's complaint: the rules were invalid because they (1) exceeded EGLE's rulemaking authority, (2) were arbitrary and capricious, and (3) were embodied in a deficient regulatory-impact statement. Both parties moved for summary disposition under MCR 2.116(C)(10) as to the remaining counts.[20]

The court first addressed whether 3M had standing, that is, whether 3M had "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on" 3M.[21] At first blush, one might think that a business like 3M could not make this showing because it is not a public water supply, but the drinking water rules automatically established the groundwater cleanup criteria for PFOA and PFOS, and cleanup standards do impact 3M's business.[22] Thus, the court concluded 3M had standing to challenge the rules.

The court then rejected 3M's claim that EGLE exceeded its rulemaking authority. MCL 325.1005(1)(b) requires EGLE to establish state drinking water standards, "the attainment and maintenance of which are necessary to protect public health."[23] 3M argued that the rules were not necessary because there were other regulatory options from which EGLE could have selected, relying heavily on the Michigan Supreme Court's decision in *In re Certified Questions from the United States District*

---

of a postclosure plan or a postclosure agreement or by site-specific criteria approved by the department under section 20120b.

17. MICH. COMP. LAWS ANN. § 324.20101 (2022).

18. 3M Co. v. Mich. Dep't of Env't Great Lakes & Energy, opinion and order of Mich. Ct. Cl. (Case No. 21-000078-MZ).

19. *Id.* at 7.

20. *Id.*

21. *Id.* at 12 (citing Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed., 487 Mich. 349, 372, 792 N.W.2d 686 (2010)).

22. *Id.* at 12–13.

23. MICH. COMP. LAWS ANN. § 325.1005(1)(b) (2022).

Court.[24] The court quickly dispensed 3M's reliance on the Supreme Court decision, which considered the authority that could be delegated to Governor Whitmer under the Emergency Powers of the Government Act of 1945[25] in response to the COVID–19 pandemic. As the Court put it:

> A lengthy recitation of our Supreme Court's opinion is unnecessary, as it is hard to fathom a more divergent set of facts or legal questions that the ones presented in that case and the instant one. It is bad enough to compare apples to oranges; this would be like comparing apples to car batteries.[26]

The court instead relied on a recent Court of Appeals decision recognizing that the word "necessary" could mean "requisite or indispensable" or "appropriate or suitable" depending on the context.[27] The Court concluded that the more liberal definition was appropriate in the context of the SDWA, reasoning that:

> It would be an impossible task for the Department to identify and select the single, perfectly optimized regulatory scheme. Instead, the Department must promulgate a rule that is suitable and consistent with the act's objectives, specifically the protection of public health, based on a thoughtful and thorough analysis of the evidence and science.[28]

Applying that standard, the court found that EGLE appropriately considered the available science, and EGLE's observation that more research was needed was "not a sign of scientific speculation but rather [an] appropriate caution."[29]

Next, the court rejected 3M's argument that the rules were arbitrary and capricious. EGLE followed the advice of subject-matter experts and 3M's mere difference of opinion with the rules did not make them arbitrary and capricious.[30]

Ultimately, however, the court invalidated the rules because it concluded that EGLE had relied on a deficient regulatory impact

---

24. 3M Co., No. 21-000078-MZ at 13–14 (citing In re Certified Questions From United States Dist. Court, 506 Mich. 332, 958 N.W.2d 1 (2020)).

25. MICH. COMP. LAWS ANN § 10.31 (2022).

26. *3M Co*., No. 21-000078-MZ at 14.

27. *Id*. at 14 (citing Twp. of Hopkins v. State Boundary Comm., No. 355195, 2022 WL 567783 (Mich. Ct. App. Feb. 24, 2022)).

28. *Id*. at 14–15.

29. *Id*. at 15.

30. *Id*. at 16.

statement. The APA requires that a regulatory impact statement include "[a]n estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups."[31] If that requirement is not met, the entire rule is invalid.[32]

Although the court recognized that it is typically limited to reviewing the administrative record, it concluded in this case that it was appropriate to consider the Part 201 rulemaking process in addition to the drinking water rulemaking process because EGLE itself stated that the Part 201 process was a continuation of the former.[33] And although EGLE assured the regulated community that it would consider groundwater cleanup and compliance costs in the Part 201 rulemaking, it did not.[34] The court summed the problem up as follows:

> A department cannot skirt [the APA's] statutory requirement during Rulemaking A by promising to address the costs later in Rulemaking B, but then when later comes, ignoring the costs in Rulemaking B because the criteria were already set in Rulemaking A, and then, on top of this, characterizing all of the ignored costs as actually zero because they are sunk costs. To do this would be to play a shell game with the public.[35]

After invalidating the rules, the court *sua sponte* stayed the effect of its holding under MCR 2.614 to allow the parties to exhaust their appellate rights.[36] The court justified its decision because of the "ample record evidence that, for the benefit of public health, the seven PFAS chemical substances need to be subject to maximum-contaminant levels."[37] The court also noted that, given potential regulation of PFOA and PFOS by the federal government, 3M's challenge could become moot under MCL 324.20120a(5).[38]

On December 6, 2022, EGLE filed a claim of appeal, which remains pending.

---

31. MICH. COMP. LAWS ANN. § 24.245(3).
32. Mich. Charitable Gaming Ass'n v. Michigan, 310 Mich. App. 584, 594, 873 N.W.2d 827 (2015).
33. *3M Co*., No. 21-000078-MZ at 18.
34. *Id.*
35. *Id.* at 19.
36. *Id.*
37. *Id.*
38. *Id.*

B. Lakeshore Group v. State

During the *Survey* period, the Michigan Supreme Court was presented with the opportunity to review the scope of claims under the Michigan Environmental Protection Act[39] (MEPA) concerning permits issued by EGLE.[40] Although the Court denied leave to appeal, its decision is significant because of the concurring and dissenting statements of Justices Bernstein and Welch, respectively, and what they could bode for future developments in this area of environmental law.

MEPA allows any person to bring an action "for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."[41] *Lakeshore Group* involved MEPA challenges to permits EGLE (then MDEQ) issued as part of residential development in a critical dune area.[42] EGLE issued the permits under the Sand Dunes Protection and Mining Act (SDPMA).[43] Justice Bernstein voted to deny leave because "[a]lthough the SDPMA does not outright say that it provides the exclusive pathway to challenging permits granted under its provisions, MEPA does not appear to offer an alternate route to challenging SDPMA permits."[44] Justice Bernstein based his conclusion on four observations. First, the SDPMA allows a limited class of people to challenge permits—the applicant and an aggrieved owner of immediately adjacent property.[45] Second, while MEPA provides original jurisdiction in the circuit courts, SDPMA permit challenges follow the contested case procedures under the APA.[46] Third, the standard of review in MEPA favors permit challengers while the standard in SDPMA is more demanding—all permits "shall be approved unless the local unit of government or the department determines that the use will significantly damage the public interest on the privately owned land."[47] Fourth, the procedures for challenging permits in MEPA and SDPMA differ significantly.[48]

In light of these observations, Justice Bernstein relied on the canon of statutory interpretation that the specific controls over the more general. He

39. MICH. COMP. LAWS § 324.1701.
40. Lakeshore Group v. State, 977 N.W.2d 789 (Mich. 2022)
41. MICH. COMP. LAWS ANN. § 324.1701(1) (2022).
42. *Lakeshore Group*, 977 N.W.2d 789.
43. MICH. COMP. LAWS ANN. § 324.35301 (2022).
44. *Lakeshore Group*, 977 N.W.2d at 789.
45. *Id*. at 789–90.
46. *Id*. at 790.
47. *Id*. (citing MICH. COMP. LAWS ANN. § 324.35304(1)(g) (2022)).
48. *Id*. at 789 –90.

concluded that the SDPMA's more specific pathway for challenging permits issued under it means that a plaintiff cannot evade those specific controls by challenging such permits under MEPA.[49]

Justice Welch, joined by Justices McCormack and Cavanagh, dissented from the denial order.[50] Justice Welch began by describing the unique origins of MEPA, highlighting the fact that it was the first environmental citizen-suit statute in the world and was emulated by the likes of the federal Clean Air Act and Clean Water Act.[51] She noted that the author of MEPA, Professor Joseph Sax, was clear that "MEPA was intended to be supplementary to all other environmental laws and regulations that were in existence or that might one day be enacted unless its applicability was suspended by the Legislature."[52] Justice Welch also noted that it was well-accepted that MEPA applies to a final permitting decision that is likely to harm the environment, relying principally on *West Mich. Environmental Action Council, Inc. v. Natural Resources Comm. (WMEAC)*, which involved a MEPA challenge to oil and gas drilling permits.[53]

Justice Welch then discussed the Court's decision in *Preserve the Dunes, Inc. v. Dep't of Environmental Quality*, which held that MEPA does not authorize an indirect challenge to a mining permit because "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA."[54] Justice Welch observed that *Preserve the Dunes* made no mention of *WMEAC* or other conflicting Court of Appeals precedent.[55] Although the Court subsequently overruled *Preserve the Dunes* in *Anglers of the AuSable, Inc. v. Dep't of Environmental Quality*,[56] Justice Welch noted that it was short-lived because, after the composition of the bench changed in the 2010 election, the Court granted a motion for reconsideration and vacated its prior decision as moot.[57]

---

49. *Id.* at 790–91.

50. *Id.* at 791–96.

51. *Id.* at 791.

52. *Id.*

53. *Id.* at 793 (citing W. Mich. Env't Action Council, Inc. v. Nat. Res. Comm'n, 405 Mich. 741, 275 N.W.2d 538 (1979)).

54. *Id.* (citing Pres. the Dunes, Inc. v. Dep't of Env't Quality, 471 Mich. 508, 684 N.W.2d 847 (2004)).

55. *Id.*

56. Anglers of the AuSable, Inc. v. Dep't of Env't Quality, 488 Mich. 69, 793 N.W.2d 596 (2010), *opinion vacated on reh sub nom.* Anglers of AuSable, Inc. v. Dep't of Env't Quality, 489 Mich. 884, 796 N.W.2d 240 (2011).

57. *Lakeshore Group*, 977 N.W.2d at 793–94 (citing *Anglers*, 489 Mich. 884, 796 N.W.2d 240 (2011)).

Based on the Court of Appeals decision rejecting the MEPA claim, Justice Welch concluded that "*Preserve the Dunes* has been read to foreclose *all* direct MEPA challenges against government agencies that are based on the issuance of a permit or license authorizing third-party conduct that will or is likely to harm the state's natural resources."[58] But Justice Welch stated that it was possible to harmonize *Preserve the Dunes* and *WMEAC* "by limiting the former to procedural or intermediate administrative decisions that are disconnected from the final approval authorizing harmful conduct."[59] Justice Welch also favorably quoted from the first *Anglers of AuSable* decision, in which the Court recognized that a final permit "serves as the trigger for the environmental harm to occur" and "[t]he permit process is entirely related to the environmental harm that flows from an improvidently granted, or unlawful, permit."[60]

As to Justice Bernstein's conclusion that the instant case did not present a proper opportunity to review MEPA's language and the Court's precedents, Justice Welch stated that given the way that lower courts are applying *Preserve the Dunes* to bar all MEPA challenges to permits, "there will be little opportunity to analyze the intricacies of how MEPA interacts with an agency's duties under specific permitting statutes. The Court's decision to deny leave in this case effectively ensures that these issues will remain unresolved.

Despite Justice Welch's premonition, the Court will likely revisit MEPA's application to permitting decisions when presented with an appropriate case. Two justices joined Justice Welch's dissent and even Justice Bernstein claimed to "share many of the dissent's concerns that this Court should ensure that MEPA is consistently and faithfully interpreted."[61]

C. Saugatuck Dunes Coastal Alliance v. Saugatuck Township

In another decision released shortly after the survey period, the Michigan Supreme Court ruled on a years-long dispute over a local Planning Commission's grant of conditional approval to North Shores of Saugatuck, LLC, for a private condominium complex and marina involving a critical dune area.[62] In its opinion, the Court revisited the standard that a party must satisfy to challenge a planning commission or

---

58. *Id*. at 794.
59. *Id*. at 795.
60. *Id*. (quoting *Anglers*, 488 Mich. at 77, 793 N.W.2d at 601).
61. *Id*. at 791.
62. Saugatuck Dunes Coastal Alliance v. Saugatuck Twp., 509 Mich. 561, 983 N.W.2d 798 (2022) (hereinafter *Saugatuck II*).

zoning board's decision under the Michigan Zoning Enabling Act (MZEA).[63]

The dispute centered on approximately 300 acres of land that the State of Michigan considers a critical dune area but is zoned residential.[64] The plaintiff, a citizen group comprised of residents and business owners in Saugatuck, challenged the Planning Commission's approval before the Saugatuck Board of Zoning Appeals (ZBA), which held that the citizen group lacked standing to appeal the Planning Commission's decision.[65] MZEA requires a party to establish that they have been "aggrieved" by a zoning decision in order to appeal.[66] Specifically, the ZBA relied on *Unger v. Forest Home Twp.*[67] and ruled that the appellant members' complaints "might be true of any proposed development in the area and found that appellant had not demonstrated any special damages—environmental, economic, or otherwise—that would be different from those sustained by the general public as a result of the proposed development."[68] The members' complaints included the "depositing of dredge spoils within 300 feet of some members' property and the potential adverse effects on sturgeon restoration, local hydrology, and the nearby Patricia Birkholz Natural Area."[69]

On appeal, the appellant argued that it "would suffer aesthetic, ecological, practical, and other alleged harms from the grant of the zoning variance."[70] Both the circuit court and the Court of Appeals agreed with the ZBA that the appellant failed to qualify as a "party aggrieved" by the Planning Commission's approvals, under *Olsen v. Jude & Reed, LLC*.[71] Under *Olsen*, a party is required to demonstrate that she stood to "suffer harms distinct from other property owners similarly situated. A party generally cannot show a sufficiently unique injury from a complaint that 'any member of the community might assert.'"[72] This implied property

63. *Id.*

64. Saugatuck Dunes Coastal Alliance v. Saugatuck Twp., No. 342588, 2019 WL 4126752 (Mich. Ct. App. Aug. 29, 2019), *vacated in part* 509 Mich. 561, 983 N.W.2d 798 (2022) (hereinafter *Saugatuck I*).

65. *Saugatuck II*, 509 Mich. at 569, 983 N.W.2d at 802.

66. MICH. COMP. LAWS ANN. § 125.3604(1) (planning commission appeal to the zoning board); MICH. COMP. LAWS ANN. §125.3605 (zoning board appeal to the circuit court).

67. Unger v. Forest Home Twp., 65 Mich. App. 614, 237 N.W.2d 582 (1972).

68. *Saugatuck II*, 509 Mich. at 572, 983 N.W.2d at 803.

69. *Id.*

70. *Id.* at 608, 983 N.W.2d at 822 (Viviano, J., dissenting).

71. *Id.* at 605–06 (citing Olsen v. Chikaming Twp., 325 Mich. App. 170, 924 N.W.2d 889 (2018)).

72. Saugatuck Dunes Coastal Alliance v. Saugatuck Twp., No. 342588, 2019 WL 4126752, at 4 (Mich. Ct. App. Aug. 29, 2019), *vacated in part* 509 Mich. 561, 983 N.W.2d 798 (2022).

ownership as a prerequisite to aggrieved party status. The Court of Appeals reasoned that "all of the articulated concerns are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by any nearby neighbor, business, or tourist."[73] As such, the appellant "was not an aggrieved party pursuant to MCL 125.3605, so plaintiff's appeals were correctly dismissed."[74]

Justice Welch, writing for the Court, opined that MZEA standing had long been interpreted too narrowly and held "that the MZEA *does not* require an appealing party to own real property and to demonstrate special damages only by comparison to other real-property owners similarly situated."[75] The Court first noted that "[m]any of the seminal cases addressing the meaning of 'aggrieved' under prior zoning statutes were never appealed to this Court. This is the first opportunity for us to decide this issue on the merits."[76] The Court then criticized the addition of a property ownership analysis in *Joseph v. Grand Blanc Township* as unfounded in the then-applicable zoning statute.[77] In *Joseph*, the Court of Appeals had limited aggrieved party status to property owners, but "there was no discussion about why property ownership was itself key to one's ability to contest a zoning decision or how that requirement could be derived from any of Michigan's zoning statutes that were then in effect."[78] After *Joseph*, "the term 'aggrieved' in the MZEA has become inappropriately intertwined with real-property ownership to a point where judicial decisions have begun to suggest that only real-property owners can appeal a zoning decision."[79] To qualify as an aggrieved party, a party is still required to demonstrate special damages:

> [T]o be aggrieved by a legal determination, one must have a protected interest or a *protected personal, pecuniary, or property right that is or will be adversely affected* by the substance and effect of the challenged decision. Moreover, despite some disagreements with prior Court of Appeals precedent, we agree with the longstanding requirement that a party appealing under the MZEA must demonstrate special damages as a part of demonstrating aggrieved-party status. This is a derivative of the

---

73. *Id.*
74. *Id.*
75. *Saugatuck Dunes II*, 509 Mich. at 568, 983 N.W.2d at 801.
76. *Id.* at 580, 983 N.W.2d at 807.
77. *Id.* at 569, 983 N.W.2d at 801 (quoting Joseph v. Grand Blanc Twp., 5 Mich. App. 566, 147 N.W.2d 458 (1967)).
78. *Id.* at 582, 983 N.W.2d at 808.
79. *Id.* at 594, 983 N.W.2d at 815.

> requirement that the complaining party demonstrate injury to a protected right or interest.[80]

The Court announced three factors that a party must establish to demonstrate aggrieved party status: (1) that the party participated in the challenged proceedings, including that the party made a public comment; (2) that the party "claim[ed] some legally protected interest or protected personal, pecuniary, or property right that is likely to be affected by the challenged decision;" and (3) that the party provided some evidence of special damages, which are "different in kind or more significant in degree" than the potential effect on the community at large.[81] Property ownership may be relevant to the third factor, but is no longer an express requirement of aggrieved party standing.

In his dissent, Justice Viviano criticized the majority as heralding "far-ranging and destabilizing effects on Michigan zoning law."[82] Regardless of whether *Saugatuck* opens the floodgates to land use challenges, the elimination of real property ownership as a pre-requisite to aggrieved party status allows citizen groups to challenge land use decisions based on environmental impacts.

D. Alexander v. Lane

The Court of Appeals issued an unpublished opinion involving a dispute between owners of adjoining, lakefront property.[83] The two properties at issue originally were owned by the same owner, who installed a drainage system on what would later become defendant Lane's property.[84] The system drained artesian spring water from the properties into Lake Michigan; it consisted of a cistern, artesian spring casings, and a boat well with a pipe.[85] The boat well was located on Lane's property, and the cistern straddled the boundary between Lane's property and what would become plaintiff Alexander's property.[86]

After she acquired her property, Lane hired a contractor to fill the boat well and remove the deck over it.[87] Alexander sued, claiming that Lane's activities resulted in flooding on his property because the water from the artesian springs no longer vented into Lake Michigan but instead vented

80. *Id.*
81. *Id.* at 595, 983 N.W.2d at 815–16.
82. *Id.* at 601, 983 N.W.2d at 819 (Viviano, J., dissenting).
83. Alexander v. Lane, No. 356636, 2022 WL 1702051 (Mich. Ct. App. May 26, 2022).
84. *Id.* at 1.
85. *Id.*
86. *Id.*
87. *Id.* at 2.

and flowed onto his property.[88] Alexander asserted claims for nuisance, easement by necessity or implied from a quasi-easement, and trespass.[89] Shortly before he filed suit, EGLE issued Lane a notice of violation for filling a wetland without a permit.[90] The court observed that Lane resolved the violation by removing some topsoil, but EGLE did not require her to reopen the filled boat well.[91]

After the parties conducted discovery, Lane filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), which the trial court granted. The Court of Appeals affirmed.

The court made short work of the nuisance in fact claim, reasoning that because Alexander's claim involved the physical intrusion of water onto his property, i.e., a trespassory invasion of his property, he could not state a claim for nuisance in fact.[92] The court observed that "a nuisance involves some kind of contamination of the environment over the land of another that interferes with that other's use of the property and causes significant harm."[93] Alexander argued that he stated a valid claim for nuisance per se because Lane's conduct violated Michigan wetlands law. The court disagreed, stating that "we are unaware of any statutory or case law—and none has been cited—establishing that violations of environmental regulations should also constitute nuisances per se."[94]

The court also rejected the claim for implied easement because an easement by necessity arises only where the owner of a landlocked parcel cannot access the parcel, which was not the situation Alexander faced.[95] The court then addressed Alexander's argument that he had a quasi-easement, which arises when one person owns adjacent parcels and imposes a servitude on one to benefit the other and the servitude is open and notorious, continuously used, and reasonably necessary for use of the dominant parcel.[96] Although the court concluded that Alexander established a question of fact on most of the elements for an easement implied from a quasi-easement, it held that Alexander failed to establish an issue of fact as to the easement being permanent and obvious.[97] The court found that the record showed that while some of the structural

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 3.
93. *Id.* (citing Wiggins v. City of Burton, 291 Mich. App. 532, 805 N.W.2d 517 (2011)).
94. *Id.* at 5.
95. *Id.*
96. *Id.* at 6.
97. *Id.*

components of the servitude may have been obvious (e.g., the existence of the boat well), it would not have been apparent to Lane that the structures served any purpose, let alone served the purpose of diverting water from Alexander's property to Lake Michigan.[98]

Finally, as to the trespass claim, the court held that Alexander had created an issue of fact that Lane's conduct caused spring water to flow onto Alexander's property, through the testimony of Alexander's expert.[99] However, Alexander failed to establish the scienter element of a trespass claim.[100] The court held that the record did not show that Lane should have known that altering the structures would have caused water to intrude upon Alexander's property.[101]

E. Michigan Farm Bureau v. Michigan Dep't of Env't, Great Lakes & Energy

In September, the Court of Appeals issued an unpublished opinion on a challenge to a general permit issued by EGLE.[102] At issue was whether the plaintiffs had standing to challenge the general permit under MCL 24.264 when they had initiated—but not seen through to completion—a contested case proceeding and had not sought declaratory relief from the agency.[103]

The plaintiffs were a collection of livestock and farmers' associations that operated Concentrated Animal Feeding Operations (CAFOs).[104] As such, their wastewater discharges are considered point source discharges, which must be permitted under the Clean Water Act[105] and MCL 324.3101.[106] By rule, EGLE is authorized to issue a general permit where "certain discharges are appropriately and adequately controlled by a permit."[107] CAFOs may apply for (and be accepted for coverage under) a general permit issued by EGLE or may apply for their permit or a determination that their operations will not result in a covered discharge requiring a permit.[108] The dispute arose from EGLE's issuance of a general

98. *Id.*
99. *Id.* at 7.
100. *Id.* at 8.
101. *Id.*
102. Mich. Farm Bureau v. Mich. Dep't of Env't, Great Lakes & Energy, No. 356088, 2022 Mich. App. LEXIS 5532 (Mich. Ct. App. Sept. 15, 2022) (hereinafter *Mich. Farm Bureau*).
103. *Id.* at 1.
104. *Id.*
105. 33 U.S.C. § 1251.
106. *Mich. Farm Bureau*, 2022 Mich. App. LEXIS 5532 at 1–2.
107. MICH. ADMIN. CODE R. 323.2191(1) (2022).
108. *Mich. Farm Bureau*, 2022 Mich. App. LEXIS 5532 at 11.

permit on March 27, 2020, which imposed several new restrictions on CAFO discharges.[109]

At first, plaintiffs initiated a contested case proceeding.[110] Before the hearing could be held, however, they filed an action in the Court of Claims seeking to invalidate the general permit because EGLE exceeded its statutory authority and failed to adhere to the procedures outlined in the Administrative Procedures Act when it adopted the 2020 general permit.[111] Their action relied on MCL 24.264, which provides:

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule . . . 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.[112]

EGLE filed a motion for summary disposition, arguing that the Court of Claims lacked jurisdiction because the plaintiffs had failed to exhaust their administrative remedies because the contested case hearing had not yet occurred when they filed in the Court of Claims.[113] The court agreed and "concluded that plaintiffs failed to exhaust administrative remedies and their contested case remained pending such that the court lacked jurisdiction requiring dismissal."[114]

First, the Court of Appeals considered whether a permit condition could even be challenged under MCL 24.264, which speaks in terms of challenging a *rule*.[115] The court overruled the Court of Claims' holding that "only rules that have been formally promulgated as 'rules' under the APA may be subject to a challenge under MCL 24.264."[116] It held that the Court of Claims' reliance on *Jones v. Dep't of Corrections*[117] was misplaced because the 2020 general permit deviated in several material respects from the Rule that specifies in detail what a general permit must include.[118] Specifically, the Court reasoned:

---

109. *Id.* at 3.
110. *Id.* at 5.
111. *Id.*
112. *Id.* at 13.
113. *Id.* at 6.
114. *Id.* at 10.
115. *Id.* at 3.
116. *Id.* at 15.
117. Jones v. Dep't of Corrections, 185 Mich. App. 134, 460 N.W.2d 575 (1990).
118. *Mich. Farm Bureau*, 2022 Mich. App. LEXIS 5532 at 18–21.

> 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. As such the new conditions expand the regulatory restrictions generally applicable to CAFOs that implement and apply the CWA and NREPA. The new conditions set rigid standards with which CAFOs and CAFO waste recipients must comply. The new conditions are not merely guidelines but have the force and effect of 'rules' not formally promulgated. The record indicates that EGLE chose not to follow the applicable APA procedures to adopt a new rule or amend the existing rule pertaining to CAFO permits. Instead, it essentially created an agency regulation, standards, and instructions of general applicability that implements or applies law enforced or administered by the agency.[119]

When permit "conditions prohibit what the existing rule permits," they may be challenged the same way that a rule may be challenged, including by seeking declaratory relief under MCL 24.264.[120] While jurisdictional in nature, the court's analysis of the additional limitations suggested some skepticism as to the validity of the 2020 general permit, consistent with the substance of the plaintiffs' challenge.

Second, the court considered the administrative steps taken by the plaintiffs before filing suit and found them lacking. Unfortunately for the plaintiffs, the ability to challenge the 2020 general permit under MCL 24.264 also required them to satisfy its requirements. Under MCL 24.264, a declaratory judgment action may not be commenced unless a plaintiff has requested a declaratory ruling from the agency and the agency has either denied the request or failed to act expeditiously.[121] Although plaintiffs were not required to initiate a contested case with EGLE, the Court of Claims dismissed the case for failure to exhaust their administrative remedies.[122] The Court of Appeals "affirm[ed] the trial court's dismissal of the case because it reached the right result, albeit for the wrong reason."[123] The dismissal was made without prejudice to the plaintiffs' ability to seek a declaratory ruling from EGLE, leaving open

119. *Id.* at 23.
120. *Id.* at 24.
121. *Id.*
122. *Id.* at 25.
123. *Id.*

the possibility for a substantive ruling on the merits of the 2020 general permit.

F. Joyce v. Gogebic County Road Commission

In October 2021, the Court of Appeals considered inverse condemnation and NREPA claims arising from the replacement of road culverts diverting water from Duck Lake.[124] The Court of Appeals directed the trial court to enter a judgment in favor of the defendant Road Commission on all claims.[125] At issue was whether a riparian property owner has a property right at a certain lake level, where the State had not established a statutory lake level.[126]

The plaintiffs owned riparian property on Duck Lake, in Gogebic County.[127] Years ago, the culverts had sustained damage, causing the water level to rise to a level that plaintiffs came to prefer.[128] The road commission believed this damage was actually vandalism and "posited that landowners placed everything from cement bags to dumbbells to debris in the culverts to divert water flow."[129] Eventually, the road commission determined that culvert "replacement was necessary to avoid an emergency situation involving the road."[130] It applied for and received a permit from EGLE to replace the culverts.[131] In its permit application, the road commission noted that a legal lake level had not been established for Duck Lake.[132]

After the culvert replacement, Duck Lake's water level decreased by about eighteen inches, and the plaintiffs filed suit for inverse condemnation.[133] Plaintiffs later "added [a] claim under Part 17 of the NREPA [i.e., MEPA], seeking equitable relief for defendant's actions in impairing Duck Lake that caused plaintiffs' loss of riparian rights and an increase in invasive species."[134] As described in Section B, above, MEPA allows the attorney general or a private citizen to maintain an action in circuit court "for declaratory and equitable relief against any person for

124. Joyce v. Gogebic Cnty. Rd. Comm'n, No. 353297; 354621, 2022 Mich. App. LEXIS 5902 (Mich. Ct. App. Oct. 14, 2021).
125. *Id.*
126. *Id.*
127. *Id.* at 2.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 3.
132. *Id.*
133. *Id.* at 4.
134. *Id.*

the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."[135]

The road commission filed a motion for summary disposition, in which it argued that plaintiffs did not have a property interest in their desired water level and could not establish an inverse condemnation claim because the road commission acted under EGLE's permit.[136] As to the NREPA claim, the road commission argued that "plaintiffs had failed to follow the proper channels for disputing the issuance of the permit," and instead "should have pursued establishment of the lake level."[137] The trial court denied summary disposition, and the road commission appealed.[138]

The Court of Appeals agreed with the road commission's argument that the plaintiffs could not establish an inverse condemnation claim based on a property interest in their desired lake level.[139] The court reasoned that "in the context of inverse condemnation, a taking occurs when there is some action by the defendant specifically directed toward the plaintiff's property that causes a limitation on the use of the property."[140] The road commission had a statutory duty to maintain the culverts.[141] Even assuming that the culvert replacement adversely impacted the plaintiff's property, their replacement was not an action directed at the property:

> Yet, it was the deliberate placement of debris in the location of the culverts that caused the elevated lake levels that plaintiffs preferred to enjoy their properties. Thus, any action by defendant was taken in accordance with its statutory requirement to keep the culverts in reasonable repair, and the associated removal of debris to fulfill that statutory duty and replace the culverts was not overt action by defendant directed at plaintiffs' properties.[142]

It was the debris, and not the culverts as designed, that impacted the water level in Duck Lake. This distinction proved fatal to the plaintiffs' inverse condemnation claim, and the court held that the trial court erred in denying the road commission's motion.[143]

---

135. MICH. COMP. LAWS ANN. § 324.1701 (2022).
136. *Joyce*, 2022 Mich. App. LEXIS 5902 at 4.
137. *Id*. at 5.
138. *Id*. at 6.
139. *Id*. at 8.
140. *Id.* at 9 (quoting Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club, 283 Mich. App. 264, 295, 769 N.W.2d 234 (2009)).
141. *Id*. at 13.
142. *Id.*
143. *Id*. at 9.

The court also agreed that the gravamen of the plaintiffs' NREPA claim was an attempt to establish a statutory lake level for Duck Lake by judicial process.[144] Because the legislature adopted NREPA and thereby "enacted a comprehensive scheme for the establishment and maintenance of legal lake levels," the trial court lacked the authority to do so.[145] Instead, plaintiffs should have followed the process outlined in Part 307 of the NREPA.[146] Once a lake level has been established, "the delegated authority of the county or counties in which the lake is located shall maintain that normal level."[147] The Court remanded the case to the trial court with instruction to enter an order granting the road commission's motion for summary disposition.

III. CONCLUSION

In short, the cases in the *Survey* period were significant primarily because they dealt with common administrative and standing principles that environmental practitioners routinely encounter and must understand. On the substantive side, they were significant because they touched on one of the most publicized issues in environmental law today—the regulation of PFAS.

144. *See id*. at 17 (stating, "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.").

145. Id. at 18 (quoting Yee v. Shiawassee County Board of Commissioners, 251 Mich. App. 379, 387–89, 651 N.W.2d 379 (2002)).

146. *Id*; see also MICH. COMP. LAWS ANN. § 324.30702(1) (2022).

147. MICH. COMP. LAWS ANN. § 324.30702(3) (2022).