STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LAKESHORE GROUP AND ITS MEMBERS, LAKESHORE CHRISTIAN CAMPING, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KEN ALTMAN, DAWN SCHUMANN & MARJORIE SCHUHAM,
Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellee.

Supreme Court No. 159033

Court of Appeals No. 341310

Court of Claims No. 17-000140-MZ

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PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF
PURSUANT TO THE COURT'S OCTOBER 22, 2021 ORDER

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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STATEMENT IDENTIFYING JUDGMENT APPEALED

Appellants submit this brief as directed by the Court's October 22, 2021, Order in connection with their application for leave to appeal the unpublished Michigan Court of Appeals decision dated December 18, 2018, Appendix pages 159a-165a, which affirmed the November 13, 2017 decision of the Court of Claims, Appendix pages 72a-74a.

RELIEF SOUGHT

Appellants respectfully ask this Court to grant leave to appeal or, in the alternative, to take peremptory action reversing the Court of Appeals decision and upholding the right to judicial review under MEPA of Department conduct reviewing NREPA permits, and ruling that the complaint in this case states a cause of action pursuant to MEPA and Part 353, with remand to the trial court for pre-trial proceedings and trial.

STATEMENT OF QUESTIONS PRESENTED
Pursuant to the Court's October 22, 2021 Order

I. Whether administrative review and approval of a permit can ever form the basis of a cause of action under MCL 324.1701(1), see *Preserve the Dunes, Inc v DEQ,* 471 Mich 508 (2004); and, if so,

II. Whether the appellants have stated a cause of action under MCL 324.1701 based on the issuance of permits that allegedly violate the Sand Dunes Protection and Management Act, MCL 324.35301 *et seq.* (Part 353).

Court of Claims answers the first question:	"No."
Court of Appeals answers:	"No."
Appellants answer both questions:	"Yes."
Appellee answers:	"No."

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Michigan Constitution

> Const. 1963, art. IV, § 52:
>
> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

The Michigan Environmental Protection Act ("MEPA"), Part 17 of NREPA, MCL 324.1701 *et seq.*

324.1701 Actions for declaratory and equitable relief for environmental protection; parties; standards; judicial action.

Sec. 1701.

(1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur 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.
(2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:
(a) Determine the validity, applicability, and reasonableness of the standard.
(b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

. . .

324.1703 Rebuttal evidence; affirmative defense; burden of proof; referee; costs.

Sec. 1703.

(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from

pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part.

(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his or her findings to the court in the action.

(3) Costs may be apportioned to the parties if the interests of justice require.

. . .

324.1705 Administrative, licensing, or other proceedings; intervenors; determinations; doctrines applicable.

Sec. 1705.

(1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

(2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

The Sand Dunes Protection and Management Act, Part 353 of NREPA, MCL 324.35301 *et seq*.

324.35301 Definitions.

Sec. 35301.

As used in this part:

. . .

(c) "Critical dune area" means a geographic area designated in the "atlas of critical dune areas" dated February 1989 that was prepared by the department of natural resources.

(d) "Department" means the department of environmental quality.

(e) "Foredune" means 1 or more low linear dune ridges that are parallel and adjacent to the shoreline of a Great Lake and are rarely greater than 20 feet in height. The lakeward face of a

foredune is often gently sloping and may be vegetated with dune grasses and low shrub vegetation or may have an exposed sand face.

. . .

(g) "Permit" means a permit for a use within a critical dune area under this part.

. . .

(j) "Special use project" means any of the following:

(i) A proposed use in a critical dune area for an industrial or commercial purpose regardless of the size of the site.

(ii) A multifamily use of more than 3 acres.

(iii) A multifamily use of 3 acres or less if the density of use is greater than 4 individual residences per acre.

(iv) A proposed use in a critical dune area, regardless of size of the use, that the planning commission, or the department if a local unit of government does not have an approved zoning ordinance, determines would damage or destroy features of archaeological or historical significance.

(k) "Use" means a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristic of a critical dune area or a contour change done or caused to be done by a person. Use does not include sand dune mining as defined in part 637.

. . .

324.35302 Legislative findings.

Sec. 35302.

The legislature finds that:

(a) The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource.

(b) The purpose of this part is to balance for present and future generations the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, functions, and values of the state's critical dunes with the benefits of economic development and multiple human uses of the critical dunes and the benefits of public access to and enjoyment of the critical dunes. To accomplish this purpose, this part is intended to do all of the following:

(i) Ensure and enhance the diversity, quality, functions, and values of the critical dunes in a manner that is compatible with private property rights.

(ii) Ensure sound management of all critical dunes by allowing for compatible economic development and multiple human uses of the critical dunes.

(iii) Coordinate and streamline governmental decision-making affecting critical dunes through the use of the most comprehensive, accurate, and reliable information and scientific data available.

. . .

324.35304 Permit for use in critical dune area; requirements; decision of local unit of government; limitations; ordinance; model zoning plan; special exceptions; assisting local units of government.

Sec. 35304.

(1) A person shall not initiate a use within a critical dune area unless the person obtains a permit from the local unit of government in which the critical dune area is located or the department if the department issues permits as provided under subsection (7). A permit for a use within a critical dune area is subject to all of the following:

(a) A person proposing a use within a critical dune area shall file an application with the local unit of government, or with the department if the department is issuing permits under the model zoning plan. The application form shall include information necessary to conform with the requirements of this part. If a project proposes the use of more than 1 critical dune area location within a local unit of government, 1 application may be filed for the uses.

(b) The local unit of government shall provide notice of an application filed under this section to each person who makes a written request to the local unit of government for notification of pending applications. The local unit of government may charge an annual fee for providing this notice. The local unit of government shall prepare a monthly list of the applications made during the previous month and shall promptly provide copies of the list for the remainder of the calendar year to the persons who have requested notice. In addition, if the department issues permits under this part within a local unit of government, notice of an application shall also be given to the local conservation district office, the county clerk, the county health department, and the local unit of government in which the property is located. The monthly list shall state the name and address of each applicant, the location of the applicant's project, and a summary statement of the purpose of the use. The local unit of government may hold a public hearing on pending applications.

(c) The notice shall state that unless a written request is filed with the local unit of government within 20 days after the notice is sent, the local unit of government may grant the application without a public hearing. Upon the written request of 2 or more persons who own real property within 2 miles of the project, the local unit of government shall hold a public hearing pertaining to a permit application.

(d) At least 10 days' notice of a hearing to be held pursuant to this section shall be given by publication in 1 or more newspapers of general circulation in the county in which the proposed use is to be located, and by providing notice to the persons who have requested notice pursuant to subdivision (b) and to the person requesting the hearing.

(e) After the filing of an application, the local unit of government shall grant or deny the permit within 60 days, or within 90 days if a public hearing is held. If a permit is denied, the local unit of government shall provide to the applicant a concise written statement of its reasons for denial of the permit, and if it appears that a minor modification of the application would result in the granting of the permit, the nature of the modification shall be stated. In an emergency, the local unit of government may issue a conditional permit before the expiration of the 20-day period referred to in subdivision (c).

(f) The local unit of government shall base a decision to grant or deny a permit under this section on the model zoning plan or on any existing ordinance that is in effect in the local unit of government that provides a substantially equivalent level of protection for critical dune areas and that is approved by the department.

(g) Subject to section 35316, a permit 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, or, if the land is publicly owned, the public interest in the publicly owned land, by significant and unreasonable depletion or degradation of any of the following:

(i) The diversity of the critical dune areas within the local unit of government.

(ii) The quality of the critical dune areas within the local unit of government.

(iii) The functions of the critical dune areas within the local unit of government.

. . .

. . .

The Sand Dune Mining Act, Part 637 of NREPA, MCL 324.63701 *et seq*.

324.63702 Sand dune mining permit within critical dune area; "adjacent" defined.

Sec. 63702.

(1) Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 after July 5, 1989, except under either of the following circumstances:

(a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.

(b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit.

. . .

324.63705 Environmental impact statement.

Sec. 63705.

The environmental impact statement submitted to the department shall comply with the requirements of the department and shall include, but is not limited to, the following:

(a) The compatibility of the proposed sand dune mining activity with adjacent existing land uses or land use plans.

(b) The impact of the proposed sand dune mining activity on flora, fauna, or wildlife habitats.

(c) The economic impact of the proposed sand dune mining activity on the surrounding area.

(d) The effects of the proposed sand dune mining activity on groundwater supply, level, quality, and flow on site and within 1,000 feet of the proposed sand dune mining activity.

(e) The effects of the proposed sand dune mining activity on adjacent surface resources.

(f) The effect of the proposed sand dune mining activity on air quality within 1,000 feet of the proposed sand dune mining activity.

(g) Whether the proposed sand dune mining activity is located within any of the following:

(i) 1,000 feet of a residence.

(ii) 2,000 feet of a school.

(iii) 500 feet of a commercial development.

(h) Alternatives, if any, to the location of the proposed sand dune mining activity and the reasons for the choice of the location of the proposed sand dune mining activity over those alternatives.

(i) A description of the environment as it exists prior to commencement of sand dune mining activity of area of the proposed sand dune mining activity. The environmental impact statement shall provide the greatest detail of the areas and the environmental elements that receive the major impacts from the proposed activity, but also shall include areas that may be impacted as an indirect result of the project.

(j) An inventory of the physical environmental elements of the proposed site. The inventory shall be conducted at a time or at different times of the year that will provide the most complete information regarding the existing conditions of the area that will be impacted directly or indirectly by the proposed activity.

. . .

GROUNDS FOR JURISDICTION

As previously explained in greater detail in the Application, Appellants submit that the Supreme Court should grant this application under three of the grounds set forth in MCR 7.305(B):

> (B) Grounds. . . . (2) the issue has significant public interest and the case is one by or against the state or one of its agencies . . . ; (3) the issue involves a legal principle of major significance to the state's jurisprudence; . . . (5) in an appeal of a decision of the Court of Appeals, (a) the decision is clearly erroneous and will cause material injustice, or (b) the decision conflicts with a Supreme Court decision . . . .

1. MCR 7.305(B)(2): *An issue of significant public interest in a case against a state agency*

This case against the Department – the executive branch agency known variously in the past as DNR and DEQ but now called the Department of the Environment, Great Lakes and Energy or "EGLE" – is of significant public interest because (A) it involves questions of citizen and judicial involvement in protection of the environment and (B) the agency has argued that its conduct is immune from judicial review under the Michigan Environmental Protection Act ("MEPA"). MEPA was enacted to involve the citizens and courts of Michigan in the protection of the environment. MCL 324.1701. The Department's position conflicts with that purpose.

It is beyond dispute that protection of the environment and natural resources of Michigan is and has long been of significant public interest. One need not examine statistics on Michiganders' hunting and fishing licenses and the effects of our natural resources on tourism and other businesses; the state constitution makes clear the will of the public in this regard:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Const. 1963, art. IV, §52. There are also two centuries of Michigan Supreme Court decisions too numerous to cite, from before *Hilt v Weber*, 252 Mich 198 (1930) (reviewing the Michigan courts' balancing of public interests with private rights in property and the use of natural resources from the 1800s on) through more recent cases such as *Glass v Goeckel*, 473 Mich 667 (2005) (Great Lakes shoreline) and *Lakeshore Group v DEQ*, 507 Mich 52 (2021) (protected sand dunes), that recognize the well-established public interest in and importance of the environment and natural resources of Michigan.

The legislature has repeatedly reinforced the significance of protecting the environment and natural resources through specific legislative acts. See discussion *infra* at argument Point I.D. regarding the Natural Resources and Environmental Protection Act or "NREPA" and its individual statutes or "parts," together with other authorities emphasizing the importance of Michigan's natural resources and the role of the Department in that regard.

The Department argues that, despite its charge to protect the environment, its conduct is exempt from judicial review under MEPA. The judiciary's role in reviewing challenges to the exercise of executive authority is well-established and should not be barred as the Department requests. Compare *Midwest Inst. of Health, PLLC v Governor of Mich*., 506 Mich 332 (2020) (reviewing and ruling on the validity of executive orders of the Governor). The need to reject this argument seeking to insulate agency conduct is also of substantial public interest. And the Department's argument that its interpretation of what this court said supports a rule contrary to long precedent merits careful review and a strong rejection.

This case is a good vehicle for deciding the questions presented pertaining to *Preserve the Dunes v DEQ*, 471 Mich 508 (2004), because it presents a simple but fundamental legal question

of the right to proceed with a MEPA action seeking judicial review of the Department's permitting conduct and the proper use of precedent.

2. MCR 7.305(B)(3): *A legal principle of major significance to the state's jurisprudence*

In this case, the Department asks the Court to support the principle that the Department's conduct is sacrosanct, protected from judicial review under MEPA, despite the fact that its purpose as an agency of the government – to protect the environment – and the standards it applies are the very subject of MEPA. Arguably everything it does, according to its defining purpose, affects the environment. The Legislature declared in MEPA that actions may be brought against "any party" to protect the environment. Precedent and at least one prior Department director have recognized the legitimacy and public benefit of this very type of action. The decision the Department relies on does not hold to the contrary.

This case presents two questions that go to a legal principle of major significance regarding whether the Department is supreme over the rest of state government:

a. Does the conduct of the administrative agency charged with protecting the environment have any impact on the environment; and

b. Can that agency insulate itself against judicial review under MEPA by substituting its own self-serving interpretation of this Court's words and decisions?

Appellants submit it is important for the Court to soundly reject the Department's position on both of these points as significant matters of state jurisprudence.

3. MCR 7.305(B)(5)(a & b): *The Court of Appeals decision is clearly erroneous and will cause material injustice;* and *the decision conflicts with a Supreme Court decision*

The Court of Appeals decision upholding the Court of Claims decision by a 2-1 vote held that this Court's statement in *Preserve the Dunes* (that review of a non-environmental status decision about the eligibility of an applicant to seek a mining permit is not a proper subject for MEPA review) must be extended to bar all judicial review under MEPA of any agency conduct as a matter of stare decisis. That decision is clearly erroneous and will cause material injustice because it takes a narrow statement about a ministerial matter the Court said was not covered under MEPA and seeks to transform it into a blanket shield from MEPA of all permitting conduct of the Department, conduct which obviously and demonstrably is *related* to and will affect the *likelihood* of impairment of the environment through its permitting actions and decisions. It also merits review by this Court now because it conflicts with the same decision by this Court in *Preserve the Dunes* for the reasons just stated, discussed in the Application and addressed further below.

This case involves the Sand Dunes Protection and Management Act and natural resources the Legislature required to be not only protected but *mapped*. The Legislature explicitly directs the Department to apply standards to balance the public interest and private property rights. This appeal is a good vehicle for the Court to decide the questions presented as it involves a situation in which the Department starkly seeks to curtail the applicability of the Legislature's enactment of MEPA pursuant to the state constitutional mandate to protect the environment so as to shield the very agency charged with protecting the environment from all judicial review using the very statute enacted to foster the development of Michigan's common law of the environment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Introduction

The case below is simple procedurally. Appellants filed a MEPA complaint against both the developer and the Department in Ingham County Circuit Court. The Department transferred the action against it to the Court of Claims. The Department filed a motion to dismiss on the legal ground presented here, explicitly not challenging the factual basis of the complaint. The Court of Claims dismissed the action and the Court of Appeals affirmed, both asserting that stare decisis required that action. Appellants sought leave to appeal.

A. Plaintiffs-Appellants filed a timely MEPA complaint alleging violations by MDEQ of environmental protection standards set forth in MEPA and Part 353

In 2015 and thereafter, MDEQ (the "Department") granted a series of sand dune development permits pursuant to Part 353 to developer Dune Ridge SA LP. *See* Complaint, Appendix pages 1a-17a, at ¶ 11 and ¶ 48-51. The permits authorized transformation of a century-old wooded church camp on 130 acres the public could access adjacent to Oval Beach Park in Saugatuck/Douglas, Michigan, into over 20 luxury home sites in a gated community with paved roads, utilities and septic fields. *Id.* Plaintiffs-Appellants filed their Complaint against both the developer and the Department. Caption and ¶ 10 & 11.

The Complaint alleges that MEPA authorizes the filing of the action. Complaint, Appendix pages 1a-17a, ¶ 13. The Complaint alleges that MEPA authorizes the trial court to review and rule on laws or "standards" enacted by the Legislature to protect the environment and natural resources of Michigan. *Id.* at ¶ 15. The Complaint alleges that the Sand Dunes Protection and Management Act or Part 353, MCL §324.35301 *et seq*., includes legislatively mandated standards that govern the Department's conduct during permit review to protect natural resources when, as here, an

applicant seeks a Part 353 permit to build on the state-protected sand dunes. *Id.,* ¶ 16. The Complaint alleges that the Department's conduct with regard to complying with and enforcing such standards could – and here did – constitute a violation of MEPA that threatens the environment because it did not comply with the Legislature's directives set forth in Part 353. *Id*., ¶ 17.

The Complaint alleges that Part 353 "sets forth a number of standards and procedures to protect against the impairment of sand dunes." *Id*., ¶ 22. The Complaint alleges that these standards include, for example: (A) a broad focus on the municipality where the development is planned, *id*., ¶ 23; (B) special rules governing permit proposals that have a commercial purpose and/or involve multi-family use of more than three acres, *id*., ¶ 24-25 and ¶ 37-38; (C) a legislative mandate identifying the protected sand dunes as an "irreplaceable resource" and requiring the Department to balance the public interest against private rights, *id*. ¶ 26; (D) identification of key characteristics of sand dunes and a mandate to the Department to "ensure and enhance" those characteristics, *id*. ¶ 27; (E) a direction to the Department to "use the most comprehensive, accurate, and reliable information and scientific data available," *id*.; and more. See Complaint, Appendix pages 1a-17a, generally.

The Complaint alleges that, in violation of MEPA, the Department's conducting the permit application process, reviewing the applicant's information and making decisions under Part 353 did not comply with the standards set forth in Part 353. *Id*., ¶ 29-30, 32, 33, 39, 41, 42, 43, 44, 45, 56 and 58, among others.

The Department transferred the case against it to the Court of Claims, Case 17-000140-MZ. Notice of transfer, Appendix pages 18a-19a. The Department refused to consent to allow the

judge with the identical developer case in Ingham County Circuit Court to handle the case against it. *Id*.

B. The Court of Claims ruled that it was required to dismiss the complaint under principles of *stare decisis* based upon this Court's *Preserve the Dunes* decision

The Department moved to dismiss the case, arguing that there is no right to judicial review of the Department's permit decision making conduct under MEPA based on this Court's decision in *Preserve the Dunes.* The Department moved for summary disposition in the Court of Claims, arguing the complaint failed to state a claim upon which relief could be granted pursuant to MCR 2.116(C)(8) and relying upon the Supreme Court decision in *Preserve the Dunes.* Department Motion and Brief are provided in the Appendix at pages 20a-51a.

Appellants opposed dismissal on the grounds that both MEPA and Part 353 authorized the action, and that this Court's decision in *Preserve the Dunes* did, as well. Appendix pages 52a-71a.

On November 13, 2017, the Court of Claims granted MDEQ's motion to dismiss, ruling that it was "bound by the doctrine of stare decisis" to grant summary disposition under the authority of this Court's 2004 decision in *Preserve the Dunes,* and labelling Plaintiffs' complaint a "collateral attack on the permitting process" despite its focus on the environmental consequences of MDEQ's conduct. Court of Claims decision, Appendix pages 72a-74a, at 2 & 3.

C. Appellants appealed the dismissal to the Court of Appeals, which affirmed the Court of Claims decision granting summary disposition.

Plaintiffs-Appellants filed a timely claim of appeal to the Court of Appeals. Appendix pages 75a-76a. The parties briefed the appeal, Appendix pages 77a-121a, 122a-145a, and 146a-158a, respectively, and the court heard oral argument on November 7, 2018.

On December 18, 2018, a divided panel of the Court of Appeals affirmed the dismissal of this MEPA action against MDEQ. Court of Appeals' unpublished per curiam decision and dissent

at Appendix pages 159a-165a. Two judges ruled that this Court in *Preserve the Dunes* "reasoned that an administrative decision, such as the issuance of a permit, 'standing alone, does not harm the environment'" and that "[a] plaintiff can challenge the MDEQ's permitting decision at the administrative level with limited judicial review" or challenge the permit holder in a MEPA lawsuit, but "cannot . . . challenge MDEQ's permitting decision in a [MEPA] lawsuit . . . ." Court of Appeals majority decision (Riordan and Swartzle, JJ), at 4, carryover paragraph through final paragraph. Appendix pages 159a-162a.

The dissenting judge in the Court of Appeals (Krause, J) ruled that, when this Court's statement in *Preserve the Dunes* that "[a]n improper administrative decision, standing alone, does not harm the environment . . . is considered in context, . . . our Supreme Court did not hold that an administrative decision cannot constitute wrongful conduct under MEPA . . . [, only that it] does not *necessarily* constitute wrongful conduct under MEPA." Court of Appeals dissenting opinion, Appendix pages 163a-165a, at 2 (emphasis in original). The dissent went on to note, as did this Court in *Preserve the Dunes*, that "the *eligibility* determination was merely the first procedural step in the permitting process; the DEQ was required to conduct an environmental impact analysis as the next step . . ." (emphasis supplied) and that MDEQ conduct is reviewable. *Id.* at 2-3. The dissent concluded, "the trial court erred by concluding that plaintiffs were absolutely barred from bringing the instant claims" and "should have evaluated each of the DEQ's alleged errors . . . ." *Id.* at 3, Appendix page 165a.

Appellants now ask this Court to overturn the decisions of the courts below and rule clearly and emphatically that the Department's conduct in permit review and decision making can and does affect the environment and is therefore subject to judicial review under MEPA.

STANDARD OF REVIEW

Questions of law such as statutory interpretation and a decision on a motion for summary disposition are reviewed *de novo* and without any required deference to the lower court. *Whitman v City of Burton,* 493 Mich 303 (2013); *Millar v Constr Code Auth,* 501 Mich 233 (2018).

ARGUMENT

Introduction

This case centers on the word "administrative" as it is used in one particular sentence in *Preserve the Dunes v DEQ,* 471 Mich 508 (2004). As used there, "administrative decision" is plainly meant to refer to the making of a ministerial decision, in that case whether or not the permit applicant was eligible to apply for a sand dune mining permit pursuant to the statutory criteria for eligibility; it does not refer to the exercise of judgment or independent decision making authority vested in the administrative agency (once DEQ, now EGLE or the "Department") with regard to actions affecting the environment. Unfortunately, the Department has attempted to endow this narrow use of the word with broad meaning and has sought to turn that into a bar on judicial MEPA review of its core "administrative agency" work, including permit review and decisions. The result sought by the Department ignores and is contrary to its charter, as well as to the plain meaning of this Court's decision in *Preserve the Dunes* as a whole and other precedent. Appellants respectfully request that this Court overturn the lower court decision approving the Department's argument and clarify that *Preserve the Dunes* stands for the conclusion that the Department's conduct when it reviews and approves permits under NREPA is judicially reviewable using MEPA.

The lower courts said that they based their decisions on the doctrine of stare decisis, ruling that the precedent of *Preserve the Dunes* required them to reject any MEPA suit to review agency conduct. However, stare decisis does not stand for the proposition that words taken out context

from a decision must be followed, but that the *decision* should be followed based on the reasoning of the court. The Court of Claims erred in dismissing Appellants' MEPA complaint on the grounds of stare decisis and two of three Court of Appeals judges erred in affirming. They failed to review the decision as a whole or even to consider the Court's meaning of this single sentence. Rather, at the Department's urging, they took the sentence as bearing a meaning that stands for something different than what this Court was saying with these words.

The Department's work does not consist entirely of ministerial administrative decisions that MEPA does not reach. To the contrary, the core of the Department's work involves review, analysis and decision making that affects the environment because it determines what actions the permittee may or may not take based on how those actions will affect the environment and natural resources and whether that should be allowed as a matter of law, policy and science. The Department's purpose and function of protecting the environment is made manifest and explained in documents created by multiple government authorities, including the constitution, legislative acts, governors' executive orders and multiple decisions of this Court.

MEPA authorizes suit to seek judicial review of actions that impair or are likely to impair the environment; the Department's conduct clearly falls within this range of covered conduct. Judicial review of Department conduct under Section 1701 is essential to the Legislature's purpose in MEPA of developing the state's common law of environmental protection. What the Department authorizes or bars through its environmental permit decisions affects the environment; therefore, its conduct reviewing and approving permits pursuant to its legislated and executive authority to act is reviewable using MEPA.

The complaint in this case alleges a number of specific violations of Part 353 and MEPA that state a claim under MEPA. Appellants respectfully request that this Court reject the

Department's misreading of the *Preserve the Dunes* decision, rule clearly and affirmatively that the Department's conduct regarding environmental actions by permittees is MEPA-reviewable, and remand this case to the trial court.

POINT I The Department's administrative review and approval of a permit authorizing action affecting the environment is a legitimate subject for an action under MCL 324.1701(1) pursuant to this Court's decision in *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508 (2004).

A. The plain meaning of the Court's decision in *Preserve the Dunes* is that MEPA review covers environmental permitting decisions, only excluding the ministerial, non-environmental matter of the eligibility of an applicant under a simple statutory criterion

This appeal does not seek to overturn the decision of this Court in *Preserve the Dunes v DEQ,* 471 Mich 508 (2004) ("*Preserve the Dunes")*. To the contrary, Appellants ask this Court to reject the Department's efforts to subvert and misuse its prior decision in *Preserve the Dunes* through the Department's self-serving misinterpretation of one sentence, to clarify and confirm the meaning and precedential import of the decision as a whole, and to reverse the lower court decision.

This is important because the correct result here will be to reiterate what the Court has decided multiple times, including in 2004, that MEPA authorizes judicial review of the Department's permit review processes and decisions because they affect or are "likely to" affect the environment. See MCL 324.1703(1) (a prima facie case consists of showing that the conduct of the defendant has harmed "or is likely to" impair the environment). Further, the Department's agency purpose and function under the Michigan constitution, the acts of the Legislature and multiple Governors' Executive Orders not only may be likely to affect but *are intended to affect* the environment; to deny that the Department's conduct affects or is likely to affect the environment is tantamount to arguing that the Department entirely lacks expertise, judgment and

purpose, and that all of its work is rote activity lacking any meaningful impact. It would be shocking for the Director of the Department to take that position; yet, that in effect is the argument the Department makes in this case. Confirming that its conduct is subject to MEPA review is not only consistent with longstanding judicial precedent – *including Preserve the Dunes* – but also makes sense as a matter of what the agency has been created to do and charged with doing.

1. The sentence at issue This Court's decision in *Preserve the Dunes* contains a short sentence that appears to enunciate, and according to the Department stands for, a simple but stark rule of law – no "administrative decision," which it argues should be interpreted as referring to all decisions of the agency, affects the environment; therefore, MEPA cannot be used to seek judicial review of any administrative decision it makes in that broad sense. The sentence in question is:

> An improper administrative decision, standing alone, does not harm the environment.

471 Mich at 519.

While the above sentence may appear at first blush when taken on its own to refer to any and all decisions of an administrative agency such as the Department, it plainly does not say "permitting decision." Yet when the Department argues that its work does not affect the environment and, therefore, is not reviewable under MEPA, it often does so by misstating what this Court said in *Preserve the Dunes* in that regard. For example, in its motion to dismiss the complaint in the Court of Claims, the Department added a reference to "issuing a permit," stating, "The Michigan Supreme Court has specifically held that . . . an administrative decision, *such as issuing a permit*, does not pollute, impair, or destroy natural resources" (emphasis supplied).

Department Motion to Dismiss, Appendix pages 20a-51a, at page 3, paragraph 6.[1] And the Department has repeatedly strained to ignore the terms and purpose of MEPA and the applicability of MEPA to its conduct as the permitting agency.[2]

2. What the sentence really said Appellants' application brief explained why the Department's argument is based upon an erroneous reading of the sentence.[3] Looking more narrowly at the wording where the sentence in question appears in *Preserve the Dunes*, the paragraph in which the sentence is placed also clearly delineates what the Court meant by it:

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[1] See additional instances of the Department putting the words "permitting decision" in the mouth of this Court at its Court of Claims Motion, Appendix pages 23a-28a, at page 5 ("an administrative *permitting* decision cannot, as a matter of law, violate MEPA"); Brief in support of Motion, Appendix pages 29a-40a, at page 5 ("the Supreme Court held that an administrative decision, *such as issuing a permit,* does not pollute") misstating what the Court said and ignoring the fact that Department conduct is *related* to the permit holder's actions because it authorizes it); Department Brief in Court of Appeals, Appendix pages 122a-145a, at 142a (arguing that the *Anglers III* concurrence said "DEQ *permitting decisions* are not reviewable under MEPA" when it did not say that, but rather, more simply, said that precedent was restored); and Department Opposition to Application in this Court, at 15 ("DEQ's conduct, on the other hand, consists of *deciding to issue a permit*. This does not itself pollute . . . ," ignoring the fact that the permit process involves review and decision making that is related to and affects the likelihood of impairment through exercise of authorized actions DEQ has permitted) (emphasis supplied in these quoted passages).

[2] See, for example, Department Motion, Appendix pages 23a-28a, at 4 and 5 (ignoring MEPA in a discussion of review of permitting decisions, falsely claiming a hearing had been held and ignoring MEPA provisions); Department Brief in support of motion, Appendix pages 29a-40a, at 6-7, 9 and 10 (criticizing citizen action without any acknowledgement or discussion of a cause of action under MEPA); Department Brief in Court of Appeals, Appendix pages 122a-145a, at 143a (again rejecting the use of MEPA contrary to its plain terms); and Department Opposition to Application at 1, 10-11 ("there are three ways to obtain review," not including MEPA), 15-16 & 18 (ignoring the differences between an administrative appeal and a MEPA action and ignoring and rejecting the terms of Section 1701).

[3] Appellants will not repeat here the discussion from the Application of the many aspects of the *Preserve the Dunes* decision that support this conclusion. See Appellants' Application at 16 (the decision included a remand for appellate review of MEPA trial findings rather than rejecting the MEPA review conducted by the trial court); 19 (discussed other legal remedies as alternatives, *not* as the only options); and 24 (distinguished the status issue of applicant eligibility as a non-environmental matter in framing the issue before the court as well as in the body of the decision).

> An improper administrative decision [on sand dune mining "permit eligibility made under § 63702(1)"], standing alone, does not harm the environment.

471 Mich at 519. The language inserted here in brackets is taken verbatim from the immediately preceding sentence of the opinion; it explains exactly which "administrative decision" the Court was saying does not affect the environment, namely a status decision concerning the permit applicant and not a decision about what actions the permittee may take or what effect they will have on the environment.[4] To put the sentences in order as set forth in the decision, the two sentences of the decision state:

> MEPA provides no private cause of action in circuit court for plaintiffs to challenge DEQ's determination of permit eligibility under §§ 63702(1) and 63704(2).[5] An improper administrative decision, standing alone, does not harm the environment.

Id. In other words, this second sentence refers to the type of decision described in the first sentence, a decision that involves an "administrative" or ministerial eligibility issue that asks simply whether the applicant seeks to renew or amend an existing permit. The decision does not address what a

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[4] Section 63702(1) of the Sand Dunes Mining Act, MCL 324.63701 *et seq*., requires an applicant to satisfy one of two fact patterns in order to be allowed to apply for a Part 637 permit in critical dunes. Either the applicant "*seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989,*" or the applicant "holds a sand dune mining permit . . . [it] *is seeking to amend . . . to include land that is adjacent"* (emphasis supplied). MCL 324.63702(1)(a & b).

[5] Neither of the Section 63702 provisions gets into an analysis of environmental impacts. That comes only later if the applicant proceeds to make the Section 63704 submissions and the Department reviews the Section 63705 environmental impact statement ("EIS") submitted by the applicant. Among the required information in the EIS are a duty to "comply with the requirements of the department" and to address "[t]he impact of the proposed sand dune mining activity on flora, fauna, or wildlife habitats." MCL 324.63705 (listing 10 different areas the EIS must cover).

permittee will or will not be authorized to do to the environment.[6] It certainly does not refer to the central work of the Department, generally, as an "administrative agency" created to protect Michigan's natural resources. See discussion at Point I.D, *infra*. In short, the Department takes the sentence out of context and argues it stands for something entirely different than the way the court used the words by proffering an inaccurate interpretation of the words.[7]

In fact, the sentence in the decision that precedes these two sentences further clarifies the meaning of the key sentence by distinguishing it from the allowed MEPA review of what actions can be taken "on the property," which is the subject of the agency's permit review for an eligible applicant:

> As previously discussed, DEQ determinations of permit eligibility under §§ 63702(1) and 63704(2) are *unrelated to* whether the applicant's proposed activities on the property violate MEPA (emphasis supplied).

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[6] The use of "administrative" in this sentence refers to what one might call "small administrative" or "ministerial" acts rather than "large administrative" or "central to the agency's powers and functions" acts. An administrative act in the small sense can be a mere ministerial act, "being or having the characteristics of an act or duty prescribed by law as part of the duties of an administrative office," Merriam-Webster online at Ministerial Definition & Meaning - Merriam-Webster, as opposed to decision making that goes to the core environmental protection functions of the agency, such as permit review and decisions.

[7] Note the phrase separated by commas in the key sentence, "standing alone." While the eligibility decision may "stand alone" in the sense that it does not authorize and therefor tie the Department to permittee conduct, the permit review and approval does the opposite. It involves the Department in analyzing what the permittee's impacts under the law will be and ties the Department to the permittee as a joint actor when the Department authorizes the permittee to proceed. In other words, the Department's permit review and approval does not "stand alone" but rather goes hand in hand with the environmental impacts of the permittee's actions it authorizes. See also, discussion in Point I.C *infra* of this Court's explanation using the word "unrelated" in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 649-650 (2004).

Id. Thus, when read together, the three sentences from the decision make clear that the oft-quoted sentence is referring to the ministerial eligibility question and *not* to MEPA-reviewable agency decision making authorizing on-site conduct:

> As previously discussed, DEQ determinations of permit eligibility under §§ 63702(1) and 63704(2) are unrelated to whether the applicant's proposed activities on the property violate MEPA. Therefore, MEPA provides no private cause of action in circuit court for plaintiffs to challenge DEQ's determination of permit eligibility under §§ 63702(1) and 63704(2). An improper administrative decision, standing alone, does not harm the environment.

471 Mich at 519.

3. The Court's focus on conduct that could affect the environment The very next sentence in the decision helps explain that the Court is rejecting the use of MEPA to challenge the mere status issue of eligibility. The decision continues: "Only wrongful conduct offends MEPA." *Id*. The four sentences taken verbatim from the decision, state:

> As previously discussed, DEQ determinations of permit eligibility under §§ 63702(1) and 63704(2) *are unrelated to* whether the applicant's proposed *activities on the property* violate MEPA. Therefore, MEPA provides no private cause of action in circuit court for plaintiffs to challenge DEQ's *determination of permit eligibility* under §§ 63702(1) and 63704(2). An improper administrative decision, *standing alone*, does not harm the environment. Only wrongful conduct offends MEPA (emphasis supplied).

Id. Clearly, the Court was distinguishing between the Department's ministerial administrative decision about the sand mining permit applicant's eligibility, on the one hand, and the Department's conduct reviewing and deciding on environmental permits, which conduct involves its core function pursuant to the direction of both our Legislature and numerous Governors and which is *related to* the permitted "work on the ground" and therefore *does* affect the environment.

Finally, the sentence preceding this paragraph makes clear that this portion of the majority decision was explaining the majority's disagreement with the dissent, which argued that holding that an applicant was ineligible *was* environmental protection because the applicant was then barred from applying and no sand dune mining would take place.[8] The majority decision was not only distinguishing between the dissent's analysis and its own; it also was distinguishing what it considered the *non-environmental* eligibility administrative decision from the MEPA-reviewable consideration of impacts on the environment involved in the Department's review and approval of the actions to be permitted.[9]

The majority held that the Department's decision to consider the applicant eligible to apply for a permit did not affect the environment and therefor was not subject to MEPA review.[10] In contrast, the agency's conduct reviewing and approving the permit and the permittee's conduct under the permit are closely *related*, with the first leading to the second and making the latter possible or "likely." Compare MCL 324.1703 (defendant's conduct "has polluted . . . or is likely to pollute"; affirmative defense requires showing conduct consistent with promoting protection).

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[8] See also Section G of the majority decision, 471 Mich at 521-524, and the dissent beginning at 471 Mich 525.

[9] "The only issue properly before us is whether MEPA authorizes . . . an action that challenges flaws in the permitting process *unrelated* to whether the conduct involved has polluted, impaired, or destroyed . . . natural resources protected by MEPA" (emphasis supplied). 471 Mich at 511.

[10] An additional element of the decision's analysis was that the Court determined that the challenge to eligibility was not timely. "The time for challenging . . . eligibility for a permit is long past. . . . That decision is time-barred." 471 Mich at 521. Thus, this argument that the sentence in question denigrates *all* administrative decisions is even further removed from the result of the decision, which remanded the case to the Court of Appeals to review the MEPA findings of the trial court after a MEPA trial. Obviously, that MEPA challenge was not time-barred. And, notably, while the *Preserve the Dunes* plaintiffs were criticized for waiting to file their MEPA action, these Appellants filed their MEPA complaint before the permits at issue were final. They are still not final today as a result of the Department's litigious approach to judicial review of permitting.

In short, the language the Department and the Court of Claims relied on to dismiss this MEPA/Sand Dunes Protection and Management Act case[11] under the doctrine of stare decisis simply does not stand for the conclusion that a MEPA action cannot be brought against the Department. To the contrary, it was explicitly stated by the Court to refer to a non-environmental question of the permit applicant's eligibility to apply for a mining permit, including citations to the eligibility sections of the Sand Dune Mining Act, Part 637, and later contrasting those with the environmental review sections of the act. Compare MCL 324.63702 (applicant must satisfy one of two fact patterns to be eligible to apply) and 324.63705 (setting forth ten points an environmental impact statement must address, including sub-section (b) on the impact of the proposed mining on "flora, fauna or wildlife habitats").

The language of the paragraph containing the misused sentence mirrors the decision as a whole in making clear that the Court's use of the word "administrative" in that sentence was not referring to the core environmental protection functions of the Department.

B. The doctrine of *stare decisis* requires that later decisions follow prior *decisions*; it does not support the creation of new, contrary principles by taking words out of context as the lower courts have done here at the Department's urging.

The Department argument and the lower court decisions suffer from the same error in mis-applying the principle of stare decisis. They take one sentence out of context and say that their interpretation of it *must be followed* as a rule of law established by this Court; but they fail to consider or follow what the Court meant by the sentence in the context of the *Preserve the Dunes*

[11] This case arises under Part 353, which protects critical dunes against harm from development; it does not involve Part 637, the dunes mining statute at issue in *Preserve the Dunes.* Part 353 does not contain an eligibility provision like that in Part 637.

decision as a whole. Appellants respectfully ask this Court to explain that this approach undermines the work of this Court and is not what stare decisis means nor what it requires.

Stare decisis stands for the guiding principle of the common law that courts considering later cases should "stand by the thing decided" in earlier decisions unless there is good reason to alter the rule of the prior decision.

> Stare decisis attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors.

Peterson v Magna, 484 Mich 300, 314 (2009). See also, *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 366-368 (2010) ("*Lansing Schools"*). "Under the long-standing doctrine of stare decisis, 'principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed.' *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) (quotation marks and citations omitted)." 487 Mich at 366. "As the United States Supreme Court has stated, the doctrine 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' *Payne v Tennessee*, 501 U.S. 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991)." 487 Mich at 367. "Stare decisis is a principle of policy that commands judicial respect for a court's earlier *decisions* and the rules of law that they embody (emphasis supplied). See *Harris v United States*, 536 U.S. 545, 556-557; 122 S Ct 2406; 153 L Ed 2d 524 (2002); *Helvering v Hallock*, 309 U.S. 106, 119; 60 S Ct 444; 84 L Ed 604; 1940-1 C.B. 223 (1940)." *Lansing Schools* concurrence, 487 Mich at 384.

As Appellants explain above, the statement from *Preserve the Dunes* at issue here is not an error needing correction, but rather a sentence taken out of context that was stated by this Court to mean something in that decision other than what the Department offers it for and the lower

courts have used it to mean. In other words, they are (A) treating one sentence as if it were the Court's decision of the case when it was not; and (B) they interpret the words to mean something other than what the Court meant, as explained in the prior section. Stare decisis not only does not *require* this, it does not allow it. The only rulings that need to be corrected are the ones erroneously applying the single sentence to stand for a rule of law that bars judicial MEPA review of Department permitting conduct. Stare decisis was misapplied by the Court of Claims at the Department's urging and the Court of Appeals majority erred in affirming that error.

It is well-established that stare decisis focuses on prior *decisions*, not words taken out of context or dicta from the prior decisions. Stare decisis requires one to "focus[ ] on the reasoning of the judge whose decision is going to be used as precedent." Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 Mich L Rev 1, 2 (2012).

> The rule of law requires people in positions of authority to exercise their power under the authority, and within a constraining framework, of public norms (laws) rather than on the basis of their own preferences or ideology; the framework of public norms (laws) should provide a basis of legal accountability for the power that they exercise. It requires also that the laws be the same for all and that they be accessible to the people in a clear, public, stable, and prospective form.

Stare Decisis and the Rule of Law, 111 Mich L Rev at 3. See also, *Hamed v. Wayne County*, 490 Mich. 1, 25 (2011) ("We consider a multifactored test when determining whether to overrule precedent. The first question is whether the *decision* at issue was wrongly decided" (emphasis supplied)). Other rationales for applying stare decisis include "the quest for constancy and predictability in the law, and the importance of generality and treating like cases alike." *Stare Decisis and the Rule of Law*, 111 Mich L Rev at 4. All of these rationales for applying the principle focus on the *decision* being followed, not dicta or words taken out of context that fail to take into

account the "reasoning of the judge whose decision is going to be used as precedent." 111 Mich L Rev at 2.

As the United States Supreme Court has stated,

> *stare decisis* is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 Wayne L Rev 1911, 1913 (2009), quoting from *Hohn v United States,* 524 U.S. 236, 251 (1998). Notably, in addition to expressing rationales that focus on integrity and good judgment, this quotation also explicitly refers the practitioner to "reliance on judicial *decisions*" (emphasis supplied), and does not encourage one to extract words and phrases, much less alter their meanings, in order to stand for rules that the Court was not enunciating or to support arguments that do not follow from the prior decision as a whole.

As the concurrence to *Lansing Schools* explained:

> Any particular approach to stare decisis, such as the one taken in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), is not "law" or "established precedent" that would require us to overrule, reject or modify its analysis. The *Robinson* approach to stare decisis, just as the one taken in *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009), is one among many varying approaches, and no particular approach, in and of itself, is inherently superior to another. As with any policy determination, the approach taken in any given case will depend on the facts and circumstances presented. Historically, the United States Supreme Court has utilized many different approaches to stare decisis, including such approaches as those involving a "compelling justification," "special justification," and a determination that a case was "wrongly decided." Each of these approaches is valid and offers a different nuance to stare decisis consideration. However, because stare decisis is a policy consideration, which must be considered on a case-by-case basis, the particular analytical approach will differ from case to case. *Most importantly, the critical analysis should be*

> *on the rationale* regarding whether or not to change precedent (footnoted citations omitted) (emphasis supplied).

Lansing Schools, supra, 487 Mich at 386.

Courts following precedent often cite the Latin phrase *ratio decidendi*, "the rule of law on which a judicial decision is based." See Merriam Webster online legal dictionary ("the principle or rule constituting the basis of a court decision"). Thus, courts look not just to the few words one might extract from a decision but to the decision itself and, as noted in this definition, the rule of law underlying and constituting the basis of the decision. To follow words from a decision without regard to their intended meaning or its underlying principle is not the proper application of stare decisis.

The Court of Claims and the Court of Appeals were wrong when they failed to follow the *Preserve the Dunes* decision of this Court as a whole while claiming they were required by stare decisis to apply a misinterpretation of one sentence.

C. Longstanding precedent holds that MEPA authorizes judicial review of Department analysis and decision making on permits under NREPA. *Preserve the Dunes* is consistent with this body of precedent and supports it

1. What MEPA says MEPA is brief, only six short sections long. In Section 1701 of MEPA, the Legislature provided that "any person may maintain an action in the circuit court . . . for declaratory and equitable relief against any person . . . ." MCL 324.1701(1). The statute does not limit the parties who may sue or be sued. It was obvious and well-understood that the Department could be sued in an action seeking judicial review of its permitting actions and decisions.

Just two years after MEPA's enactment, in a 1972 letter quoted in a law review article, then-Director of the Department, Ralph A. MacMullen, was crystal clear that that was understood:

> . . . suit has been brought under the Environmental Protection Act by persons who disagree with that decision [which he had made to authorize construction]. *The Act – one of the landmark pieces of environmental protection legislation in the nation – was passed for precisely that reason; to allow dissenting citizens an opportunity to register their dissents in court.* Even though we have been made the defendants in this suit, we welcome it as an expression of public interest in the environment, and another step toward redefining the law so that we can better interpret the wishes of the people (emphasis supplied).

Prefatory quotation preceding text of Sax and Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1003, 1004 (1972) ("*MEPA Progress Report*").[12] See also, *Mich Bear Hunters Ass'n v Mich Natural Res Comm'n*, 277 Mich App 512, 526 (2007)

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[12] MEPA "authorizes any person to bring suit against either a public agency or a private entity . . . ." *MEPA Progress Report*, 70 Mich L Rev at 1004. MEPA authorizes a plaintiff to protect the environment "in much the same way . . . [as] a property or contract right . . . . In taking this step, the legislature reduced the broad discretion that regulatory agencies formerly had . . . [from] a sweeping mandate to enforce environmental standards as they thought best . . . . Now these agencies must be prepared to defend themselves against charges that *their decisions fail to protect nature resources* . . . (emphasis supplied)." 70 Mich L Rev at 1005. See also Sax and DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 Ecology LQ 1, 51-52 (1974) ("not a single . . . public agency defendant reported difficulty in obtaining needed experts"); Haynes, Chapter 14 of the Michigan State Bar Environmental Law Section Deskbook, available online at Ch. 14 Michigan Environmental Protection Act - Environmental Law Section (michbar.org), §14.1 ("MEPA . . . prohibits agencies from authorizing conduct that harms the air, water, or other natural resources, or the public trust in these resource"); Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J Urban L 589, 667 (1976) (quoting DNR comments opposing amendments to weaken MEPA as it "allows interested citizen groups to participate . . . in making certain that adequate and necessary environmental protection considerations are evaluated and required in any action of the Department"); Slone, *The Michigan Environment Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980s*, 12 Ecology LQ 271, 312 (1985) ("MEPA permits plaintiffs to initiate court actions whether or not they have exhausted relevant administrative remedies . . . [and] to prod recalcitrant regulatory agencies into more careful consideration of possible environmental problems"); and Note, *The Michigan Environmental Protection Act (MEPA): Developing a Common Law Threshold of Harm for the Prima Facie Case*, 69 U Det Mercy L Rev 55, 55-56 (1991) ("initial concerns about . . . the flood of frivolous litigation have been put to rest").

("MCL 324.1701(1) does not differentiate between the method by which an order has been issued and the effect of the order on a particular resource; instead, the statute permits any person to maintain an action against any person (including the DNR) in order to protect a natural resource"); and *Genesco, Inc v DEQ*, 250 Mich App 45, 50 & 54 (2002) (MEPA "provides a direct method for enforcing environmental regulations and challenging an administrative agency's decision without exhausting administrative remedies" and can be "applied to the state, and all political subdivisions or agencies of the state," citing *State Highway Comm v Vanderkloot,* 392 Mich 159 (1974)).

Nor did the Legislature limit the focus of a MEPA Section 1701 action; to the contrary, it authorizes actions generally "for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL 324.1701(1). It would appear self-evident on the face of the statute that any claim whose purpose is to protect the environment in the sense of challenging actual or likely impairment or pollution or destruction is authorized. It also is evident from these words that one could seek declaratory and/or equitable relief with regard to any situation or behavior that created or resulted in the need for such "protection . . . from pollution, impairment, or destruction" without any specific limitation as to how action by the defendant would or could lead to harm. Section 1701 certainly does not limit the focus of the court's review to permittee conduct nor bar the court from considering the Department's role in authorizing permittee conduct that will cause impairment.

Indeed, the next paragraph of Section 1701 focuses the court's attention in a MEPA action on any "standard . . . fixed by rule or otherwise, by the state or an instrumentality, *agency*, or political subdivision of the state" (emphasis supplied) and authorizes the court to consider and

"[d]etermine the validity, applicability, and reasonableness of the standard."[13] The Legislature thus clearly authorized the court to consider and rule on the Department's "applica[tion]" of any statutory or regulatory "standard" or any practice of its own ("fixed by rule or otherwise") that was related to the "protection of the air, water, and other natural resources," as noted in sub-paragraph (1). MCL 324.1701(2)(a). Section 1701 concludes by authorizing the court to "direct the adoption of a standard approved and specified by the court" if, upon reviewing the "validity, applicability, and reasonableness" of any standard, the court "finds a standard to be deficient." MCL 324.1701(2)(b). It is no wonder that the Department's response to the Application so assiduously ignored MEPA and its terms; the words of the statute make plain that the Department arguments that Michigan courts lack authority to address the Department's role in environmental impairment are simply contrary to the Legislature's plain language in MEPA. See also, *Opal Lake Assoc v Michaywe Ltd Partnership and DNR*, 47 Mich App 354, 364 n 3 (1973) (MEPA "is part of a legislative recognition of the ancient powers of a court to hear nuisance cases, balance equities and fashion suitable remedies").

While the provisions of Section 1701 are broad and not limited by the additional terms of MEPA, the other sections add to the Legislature's explanation of the authorization for the court to act in a MEPA case based on the evidence before it and when there is a related administrative action. For example:

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[13] It would be remarkable for the Department *not* to be a party to any case addressing the standards it applies in its work. The Department's argument that Appellants can obtain relief in an action against the developer in which the Department is not a party is unrealistic.

- Section 1703 – MEPA describes the burden that must be met by a defendant if the plaintiff makes a prima facie case. The defendant may offer rebuttal evidence or may also show, by way of an affirmative defense, that "there is no feasible and prudent alternative to defendant's conduct *and* that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources . . ." (emphasis supplied). MCL 324.1703(1). The Legislature described the prima facie case to be rebutted as a "showing that the conduct of the defendant has . . . or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources." Inclusion of the phrase "or is likely to" plainly undermines the inference that the Department wants to draw (and some few decisions have adopted, discussed below) that only conduct on the ground and directly interacting with the environment is covered by MEPA. Clearly, if something can increase the likelihood of harm – and errors by the Department in its permit review and decisions can do just that, then any such conduct or activity is subject to MEPA.
- Section 1704 – MEPA authorizes the court not only to grant equitable relief but also to "impose conditions on the defendant that are required to protect the air, water, and other natural resources . . . ." MCL 324.1704(1). The court may also, but does not have to, "direct the parties to seek relief" in administrative proceedings if they are "required or available . . . ." MCL 324.1704(2). MEPA goes on to authorize the court making such a referral to grant temporary equitable relief and retain jurisdiction. MCL 324.1704(2-4).
- Section 1705 authorizes the attorney general "or any other person to intervene as a party" in administrative proceedings if they are available. MCL 324.1705(1). MEPA goes on to

require that the harm to natural resources "shall be determined" in any such administrative proceeding "and in any judicial review of such a proceeding." MCL 324.1705(2).

As this brief review of some of the provisions of MEPA demonstrates, the authority granted to the court by the legislature through the enactment of MEPA is traditional common law authority to use judicial powers "for the protection" of Michigan's environment and natural resources. MCL 324.1701(1).

2. The Three *Anglers of the AuSable* decisions The Department attempts to make much of statements in certain decisions that appear to support its reading of *Preserve the Dunes*. However, upon closer inspection, they do not support the misinterpretation of *Preserve the Dunes* that the lower court decisions here suffered from.

a. *Anglers I* In *Anglers of the AuSable, Inc v Dep't of Envtl Quality*, 283 Mich App 115 (2009) ("*Anglers I")*, five years after *Preserve the Dunes*, the Court of Appeals would have dismissed the Department as a defendant, while upholding the trial court's finding that the permittee's conduct would violate MEPA, *Id*. at 142, with an interpretation of *Preserve the Dunes* that Appellants submit is flawed:

> Because plaintiffs challenged the DEQ's approval of the corrective action plan, their challenge pertained to an administrative decision rather than conduct. However, '[a]n improper administrative decision, standing alone, does not harm the environment' *Id.* Indeed, it is the actual discharge of treated water in Kolke Creek and Lynn Lake that plaintiffs assert would harm the environment. Thus, MEPA provides no basis for judicial review of this agency decision.

293 Mich App at 128-129. See also, Exhibit 1, *Citizens for Envtl Inquiry v DEQ*, 2010 Mich App LEXIS 295 (February 9, 2010) (unpublished decision, Appendix pages 166a-170a) at *7-8 (affirming summary disposition for DEQ in suit seeking an order forcing the agency to enact air emissions regulations, on the ground that "MEPA authorizes suits against regulated or regulable

actors," not the agency, relying upon *Preserve the Dunes).* The *Anglers I* decision was reversed by the Supreme Court in *Anglers II* and vacated in *Anglers III,* and therefore has no precedential value. Appellants ask the Court to make clear the *Anglers I* decision was in error.

b. ***Anglers II*** Although the decision of this Court in *Anglers of the AuSable, Inc v Dep't of Envtl Quality*, 488 Mich 69 (2010) ("*Anglers II")* reversed the Court of Appeals decision in *Anglers I* and explicitly overruled *Preserve the Dunes*, the majority did so based on the same erroneous interpretation of *Preserve the Dunes* as the court below. Instead of recognizing that the majority in *Preserve the Dunes* had fashioned a narrow exception to the use of MEPA that left Department permitting subject to MEPA review – which it correctly recognized was a legitimate use of MEPA,[14] it agreed with the dissent in *Preserve the Dunes* that it was "untenable" to hold that "permit eligibility is unrelated to whether the conduct permitted will harm the environment." *Anglers II* 488 Mich at 77.[15] Thus, because the *Anglers II* majority saw the *Preserve the Dunes* majority decision as conflicting with the body of MEPA "caselaw that came

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[14] See Section F of the *Preserve the Dunes* decision, 471 Mich at 521 (the review of the alleged harmful conduct proposed under the mining permit "was properly before the circuit court").

[15] See also, concurring opinion in *Anglers II*. "I believe that *Preserve the Dunes, Inc v Dep't of Environmental Quality* was wrongly decided with respect to whether the Department of Environmental Quality (DEQ) may be liable for an alleged violation of the Michigan environmental protection act (MEPA) by issuing a permit." 488 Mich at 86. That is not what the majority decision in *Preserve the Dunes* said or stood for. The concurrence went on to say with equal vigor but a bit more accuracy, "The *Preserve the Dunes* majority's conclusion that eligibility for a permit is unrelated to whether the conduct permitted will harm the environment is untenable." *Id.* at 87. It appears that the disagreement with the Court's decision that a narrow eligibility matter does not rise to the level of a MEPA issue became a wholesale rejection of MEPA ("mocked our Legislature's intent to prevent environmental harm," *Id*.) in the view of the *Preserve the Dunes* dissent and *Anglers II* concurrence, an unfortunate error that ironically appears to feed into and support the Department's arguments now that its entire business is immune from judicial review under MEPA.

before it," 488 Mich at 78, it failed or refused to recognize the simpler and more accurate interpretation of what the *Preserve the Dunes* majority had done in finding a narrow exception to the use of MEPA, rather than "rul[ing] that a permit decision was insulated from a MEPA action." 488 Mich at 78. In its zeal to embrace the position of the *Preserve the Dunes* dissent that even eligibility is a MEPA issue because an ineligible applicant cannot harm the environment, rather than seeing it as a ministerial decision that preceded rather than involved the Department's exercise of its expertise in conducting a permit review, the *Anglers II* majority ignored the rest of the *Preserve the Dunes* decision in which the majority had *upheld* the MEPA review and remanded the case to the Court of Appeals to review the trial court's MEPA analysis based on a trial in which both the applicant and the Department were defendants. The *Anglers II* majority concluded with a summary of authority supporting its action but describing the *Preserve the Dunes* majority's decision in the way the Department would like this Court to interpret it even though that is contrary to the decision as a whole:

> Because the *Preserve the Dunes* decision to insulate DEQ permit decisions from MEPA violated the Legislative intent behind MEPA, conflicted with previous caselaw regarding MEPA, and subverted the will of the people contained in article 4 of Michigan's constitution, we overrule it.

488 Mich at 80. This broad attack on the *Preserve the Dunes* decision based on an erroneous reading inspired a strong dissenting opinion.

The *Anglers II* dissent argued that the case was moot before it was heard, see, *e.g.,* 488 Mich at 91, 96-97 & 134, but also erroneously characterized the *Preserve the Dunes* decision as holding that the Department "may not be sued under the Michigan environmental protection act (MEPA) for issuing a permit." 488 Mich at 92. Twice as long as the majority and concurrence opinions together, the dissent discusses at some length reasons why judicial review should be

limited, with particular emphasis on mootness. See discussion in dissent at 488 Mich at 97-108. With respect to *Preserve the Dunes*, the dissent notes early that "the plaintiff did not challenge the mining operation's eligibility for the permit during the appropriate time for review." 488 Mich at 124. But rather than focus on this narrow holding on timeliness, the dissent then proceeds, like the majority and concurrence, to confuse the challenge to eligibility with the challenge to the Department's permitting process and decision making as a whole, and gets into a discussion of the use in Section 1703 of the word "conduct." 488 Mich at 125. Then, ignoring the more general terms of Section 1701 and the repeated focus in MEPA on the "likelihood" of harm, the dissent argues that only conduct that "by itself" pollutes or impairs can be challenged using MEPA. *Id.* at 126. Unfortunately, that is not what MEPA says or what it stands for.

The dissent goes on to attempt to distinguish a small number of the many prior MEPA decisions and to challenge the majority's rationale. *Id*. at 127-131. Unfortunately, having decided to discuss the rationales of the decisions of the lower court and the majority, the dissent repeats the erroneous interpretation that *Preserve the Dunes* "focused enforcement of MEPA not against the agency but only against those individuals and entities who are actually harming, or whose imminent conduct threatens to harm, this state's natural resources," *Id*. at 130, while ignoring the fact that the Department's activity in reviewing and deciding on permits affects the environment as surely as the hand that wields the axe or steers the bulldozer.

c. ***Anglers III*** The two-page order of the court in *Anglers of the AuSable, Inc v Dep't of Envtl Quality*, 489 Mich 884 (2011) ("*Anglers III*") vacated both this Court's opinion in *Anglers II* and the decision of the Court of Appeals (*Anglers I*) on mootness grounds. 489 Mich 884-885. In so doing, the decision ignores the many explanations of the majority, concurrence and dissent in *Anglers II*, all of which it implicitly regards as dicta given the mootness ruling. The two-

justice *Anglers III* concurrence discusses why the prompt reconsideration in that case was appropriate. It makes reference to vacating the decision that "disregarded the mootness doctrine so that it could overrule *Preserve the Dunes*," 489 Mich at 889. The concurrence goes on to say that rehearing was proper in part because "*Preserve the Dunes* properly interprets Michigan law," *Id*., but the concurrence does not articulate what the interpretation means or stands for. That task falls to this Court today.

3. *National Wildlife Federation* In a decision decided and filed by this Court on the same day as *Preserve the Dunes*, the same majority of four justices engaged in some discussion of *Preserve the Dunes* in the context of its disagreement with certain characterizations in the concurring and dissenting opinions of this companion mining case. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 649-650 (2004) ("*Nat'l Wildlife Federation*"). The dissenters in *Nat'l Wildlife Federation*, as in *Preserve the Dunes*, were concerned that the majority's decision created or allowed harm to the environment. 471 Mich at 651ff. In addition to having allowed a remand for review in the Court of Appeals of the trial court's MEPA trial findings, making it clear that a MEPA cause of action to review the environmental implications of the permit was properly allowed to proceed,[16] the majority characterized its *Preserve the Dunes* decision explicitly as rejecting MEPA's use to challenge a point "*unrelated* to whether the conduct

[16] The dissent in *Nat'l Wildlife Federation* seemed to have overlooked this key aspect of the *Preserve the Dunes* decision as it argued, at footnote 31, that "the same majority insulates an illegal sand dune mining permit from scrutiny under MEPA . . . ." 471 Mich at 674. To the contrary, while the majority allowed the permittee to apply for a permit by rejecting the Court of Appeals decision that had held MEPA could be used to challenge its eligibility to apply, the majority in fact upheld the use of MEPA to review of Department's analysis of environmental impacts of the permit and remanded the case for Court of Appeals review of the trial court's MEPA trial findings.

involved has polluted, or will likely pollute natural resources" (emphasis in original). The more complete quotation from *Nat'l Wildlife Federation* is as follows:

> Further, in the other case referenced, *Preserve the Dunes*, in which this same majority has also allegedly "assaulted MEPA," this Court addressed the following specific legal question – whether MEPA authorizes a collateral action to challenge the Department of Environmental Quality's decision to issue a permit under the Sand Dune Mining Act, MCL 324.63701, enacted by the Legislature, where that collateral action seeks to challenge flaws in the permitting process *unrelated* to whether the conduct involved has polluted, or will likely pollute natural resources. We can only invite the reader of the instant opinion to also read *Preserve the Dunes* to determine whether that opinion represents an "assault on MEPA," or instead an honest and impartial effort to resolve the limited question of statutory interpretation presented in that case.

471 Mich at 648-649 (emphasis in original). In short, the majority of the Court emphasized in both of these decisions that the bar to the use of MEPA applied where the flaw at issue (eligibility to apply for a permit under specific provisions of the statute that did not get into analysis of environmental impacts), was "*unrelated*" to conduct affecting the environment. In sharp contrast, the Department's processing and decision making on what a permittee could or could not do to the environment is closely *related* to conduct affecting the environment because it would bar, limit or authorize it.

Consider the comments of the Minnesota Supreme Court in a decision under its MEPA-like Minnesota Environmental Rights Act. In *White Bear Lake Restoration Association v Minn DNR*, 946 NW2d 373 (2020), the majority rejected its dissent's attempt to rely on *Preserve the Dunes* to argue that agency conduct was not covered by Minnesota's statute. The majority decision cited to the *Anglers* cases, which they acknowledged left Michigan law "murky," 946 NW2d at 381, and quoted with approval the statement that, "The permit from the [agency] serves as the trigger for the environmental harm to occur. The permit process is entirely *related* to the

environmental harm that flows from an improvidently granted, or unlawful, permit" (emphasis supplied). 946 NW2d at 381, n 4 (quoting *Anglers II*). The Minnesota Supreme Court went on to find that agency conduct was covered under its statute.

Thus, while *Nat'l Wildlife Federation* has limited precedential effect because its rulings on standing were overruled by *Lansing Schools*, the majority's discussion of *Preserve the Dunes* supports Appellants' position and undermines the Department's argument that *Preserve the Dunes* rejected the use of MEPA to review a Department permitting decision, which is reviewable because it affects the environment, in part because it is *related* to the permittee's conduct.

Conclusion

Language in a very few decisions has interpreted *Preserve the Dunes* as the Department proposes. However, it may not be necessary to overrule them because two have already been vacated (and a third is unpublished) and the subsequent, vacating decision left open the question before the Court today. In addition, another decision, *National Wildlife Federation,* characterized the decision in *Preserve the Dunes* as one over which certain judges or courts are unhappy but which, in fact, stands for a narrow proposition, that it is only work of the Department that is "unrelated" to conduct impacting the environment which does not fall within the purview of MEPA judicial review. *National Wildlife Federation,* 471 Mich at 649. Notwithstanding this clarification by the Court, the Department has argued that its conduct affecting the environment is completely insulated from judicial MEPA review.

The task of considering this history and confirming for the lower courts that Department permitting work and decisions involve conduct subject to MEPA review falls to this Court today. To address this issue, it is instructive to consider what authorities have to say about the role and function of the Department.

D. The Department was established and is charged with the purpose and function of protecting the environment, bringing its permit review processes and decisions into the realm of conduct *related to* and *likely to affect* the environment and, therefore, squarely within the purview of MEPA.

Appellants argue above that the simplest and most accurate interpretation of the decision in *Preserve the Dunes* is that MEPA can be used to seek court review of Department conduct that does or may affect the environment, which may exclude certain "administrative" or ministerial decisions but which *includes* its review of applications for permits and decision making on the permits. However, if the Court has any doubt that the conduct of the Department affects the environment or that it is *not* "*un*related to" impacts on the environment, as the Court characterized the test in *National Wildlife Foundation* (as well as *Preserve the Dunes* itself, see quotation, *supra*, at footnote 9) it is worthwhile to consider in somewhat more depth what the Department is established to do and charged with doing.

Appellants respectfully ask the Court to consider and compare its own work when analyzing whether the Department's work affects the environment. Surely, everyone would agree that the work of this Court affects the state of Michigan and its citizens, even though the seven justices (and the Court's employees) do not go about the state personally clearing icy sidewalks, protecting drivers from traffic accidents, managing companies' handling of employee issues, deciding corporate strategy, prosecuting or defending criminal defendants, or otherwise directly interacting with our citizens with regard to their legal rights and obligations. The work of this Court involves direction to parties and counsel, analysis and discussion of arguments and evidence presented, consideration of rules and precedent, conferring and making decisions on specific cases.

Yet, without going out and directly interacting with citizens, the Court by performing its usual functions certainly affects the lives of the citizens of Michigan.[17]

Similarly, the work of the Department reviewing permit applications involves consideration of statutes and rules, review of application materials, decision making on the completeness of the information needed to decide on an application, engaging with the applicants and the public about the proposed work and its effects, reviewing requests for permits and making decisions about them that consider and control or influence the effects of the proposed activities upon the land, air and water of the state, the effects upon riparian rights and the public trust in natural resources and the balancing of private rights to use property against the public interest in protecting natural resources. These decisions can result in wetlands being filled, lake bottomlands being dredged and built on, sand dunes being altered, chemicals being handled a certain way, waste being disposed in certain locations and manners, pollutants being emitted into the air and numerous other actions being taken that, by virtue of the Department's conduct, are allowed or barred or limited. In other words, just as the life of Michiganders is related to and affected by the work of this Court, the environment and natural resources of Michigan and the public trust in these resources, are all related to and affected by the Department's conduct in its review and decision

[17] Appellants acknowledge that the Court's work also includes actions one might consider to have less effect, or a less direct effect, on the people of Michigan, such as approving admission of an out of state attorney, allowance of amicus filings, requiring filing fees to be paid, and more. Similarly, the Department might be said to make some ministerial decisions that do not affect the environment, such as the Part 637 eligibility question, whether and when to hold a public hearing or other office matters that do not involve permit review with regard to the completeness of an application and the effect of proposed activities on the environment that the Department may or may not allow.

making on permits. Numerous authorities demonstrate why this truth should not be considered surprising.

1. Michigan's Constitutional Mandate As this Court noted in *State Hwy Comm'n v Vanderkloot*, 392 Mich 159 (1974), the protection of the environment is not only historical, it is also grounded in the Michigan Constitution of 1963:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. *The Legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.*

Const. 1963, art. 4, § 52, quoted in *Vanderkloot,* 392 Mich at 178 (emphasis in decision). This constitutional declaration by the people of Michigan makes clear that the function of protecting the environment is important. The *Vanderkloot* Court continues, "we further hold that the Legislature has in fact acted pursuant to that duty in the EPA," now commonly referred to as MEPA. 392 Mich at 179. Pursuant in part to Legislative action, the Department is charged with serving that protective function.

2. The Legislature's enactment of NREPA generally In Act 451 of 1995, the Legislature drew together the many environmental protection laws of Michigan into the "natural resources and environmental protection act," commonly abbreviated as "NREPA." MCL 324.101. The name itself would appear to make a point about the powers and duties of any government agency or official charged with enforcing its terms. And the prefatory paragraph of the act confirms that, describing its purposes as including:

> to protect the environment and natural resources of the state; . . . to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials.

Act 451 of 1994 preface.[18] These words may not carry the weight of the provisions of NREPA themselves, but they convey the intention to empower the Department to act in ways *related to* and *likely to affect* the environment and natural resources of Michigan.

Part 5 of NREPA recognizes the creation of the Department of Natural Resources and the commission of natural resources. MCL 324.501(1 & 2).[19] It states that a department "is created which shall possess the powers and perform the duties granted and imposed by this act and as otherwise provided by law." MCL 324.501(1).

Section 503 begins, "The department shall protect and conserve the natural resources of this state." MCL 324.503(1).

Section 504 requires that the "department shall promulgate rules for the protection of the lands and property under its control against wrongful use . . . ." MCL 324.504(1).

Section 507 emphasizes the Legislature's determination that the conduct of the Department would have an important impact on the environment and natural resources:

> This part is declared to be immediately necessary for the preservation of the public health, safety, and welfare and the environment.

MCL 324.507.

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[18] This prefatory language found before MCL 324.101 may be found online, for example, at Michigan Legislature - Act 451 of 1994.

[19] The earlier Department of Natural Resources is the historical predecessor of today's Department. The various changes in names, and the mergers and separation of functions under names like DNR, Department of Natural Resources and the Environment, and DEQ, as well as the evolution of the work of various commissions, is beyond the focus of this brief and does not alter the point being made regarding the Department's function. See also discussion, *infra*, of Executive Orders.

Shortly after Part 5, in which the Legislature included these mandates and priorities, NREPA continues with Part 17, MEPA. MCL 324.1701 *et seq*.

3. The Legislature's enactment of specific statutes within NREPA Numerous individual "parts" of NREPA that come sequentially after MEPA, as well as the regulations promulgated pursuant to these laws, include terms by which the Legislature made clear the duty of the Department to protect the environment, natural resources and the public trust interest in these resources. These legislatively-defined obligations of the Department often apply in the context of permit review as it oversees the process of considering and deciding on applications by members of the public for permits to, for example, build in wetlands, alter inland lakes and streams, develop portions of protected sand dunes, mine in protected sand dunes, emit substances into the air, discharge substances into water, dispose of solid waste, manage landfills for waste, clean up spills and historical contamination, and the list goes on and on. The list of Parts that govern the environment and natural resources of Michigan is far longer,[20] but examples of relevant language make clear that the Department's conduct affects the environment.

One example, Part 301, the Inland Lakes and Streams Act, prohibits certain enumerated actions without a permit, including:

> (a) Dredge or fill bottomland.
> (b) Construct, enlarge, extend, remove, or place a structure on bottomland.

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[20] The table of contents of the Natural Resources and Environmental Protection Act in some versions is over 100 pages long. NREPA includes dozens of "parts" or statutes, including, to note a very few, Part 31 (Water Resource Protection), Part 87 (Groundwater and Fresh Water Protection), Part 111 (Hazardous Waste Management), Part 115 (Solid Waste Management), Part 201 (Environmental Remediation), Pat 211 (Underground Storage Tanks), Part 301 (Inland Lakes and Streams), Part 303 (Wetlands Protection), Part 315 (Dam Safety), Part 353 (Sand Dunes Protection and Management Act), and Part 831 (State Forest Recreation).

> (c) Construct, reconfigure, or expand a marina.
> (d) Create, enlarge, or diminish an inland lake or stream.
> (e) Structurally interfere with the natural flow of an inland lake or stream.
> (f) Construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing inland lake or stream.
> (g) Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.

MCL 324.30102(1). Part 301 gives direction to the Department regarding its review and decision making on a permit to conduct any of these activities affecting the environment:

> The department shall issue a permit *if it finds* that the structure or project *will not adversely affect the public trust or riparian rights*. In passing upon an application, *the department shall consider the possible effects* of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. *The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state.* This part does not modify the rights and responsibilities of any riparian owner to the use of his or her riparian water. A permit shall specify that a project completed in accordance with this part *shall not cause unlawful pollution* as defined by part 31 (emphasis supplied).[21]

MCL 324.30106.

Section 30110 authorizes the Department to "promulgate and enforce" regulations for the protection of inland lakes and streams. The Part 301 rules can be found at MAC R 281.811 and

[21] The two references in this quoted text to the Department deciding whether proposed activity will cause *unlawful* impairment or pollution points to one reason why judicial review of the Department's decision making is particularly appropriate.

following. Among other relevant provisions, the rules give the Department control over the permit review process ("After receipt of an otherwise complete application, the department may request such additional information, environmental assessments, waterway design calculations, records, or documents as are determined to be necessary to make a decision to grant or deny a permit." R 281.812(4)); and require the Department to consider environmental impacts:

> In each application for a permit, all existing and potential adverse environmental effects shall be determined and the department shall not issue a permit unless the department determines both of the following: (a) That *the adverse impacts to the public trust, riparian rights, and the environment will be minimal*. (b) That a feasible and prudent alternative is not available (emphasis supplied).

R 281.814. Thus, the Department's role is defined to include analysis and decision making to allow or prohibit impacts on the environment and natural resources.

Similarly, Part 303 of NREPA, the Wetlands Act, MCL 324.30301 *et seq*., requires the Department to regulate impacts upon the environment. Section 30304 prohibits certain acts, including to fill, dredge, develop or drain a wetland "without a permit issued by the department." MCL 324.30304. Section 30311 requires the Department to make determinations before a permit can be issued and its decisions must "reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction." Compare MCL 324.30311(2) with MCL 324.1701.

Part 353 of NREPA, the Sand Dunes Protection and Management Act, MCL 324.35301 *et seq*., imposes the duty on the Department to regulate the balancing of public interests and private rights in an area defined as critical sand dunes. The terms of Part 353 are further addressed in Point II, *infra*, but we note here that the legislative charge set forth in Section 35302 emphasizes that the Department's role in the service of protecting designated "critical dune areas of this state" includes

the duty to "[c]oordinate and streamline government decision-making *affecting* critical dunes through the use of the most comprehensive, accurate, and reliable information and scientific data available" (emphasis supplied). MCL 324.35302.

Other "parts" of NREPA includes laws that govern the Department's conduct protecting the environment and natural resources from air pollution, wastewater, landfilling of solid waste, cleanup of spilled chemicals, other contamination and leaks from underground storage tanks, among many other provisions. It would be difficult to find a single part of NREPA that does not support the point made here that the work of the Department, not just incidentally but as a matter of its charge and its function, has an effect on the environment through its review and decision making on permits and other approvals.

In sum, these few examples illustrate some of the ways in which the Legislature charged the Department with serving as the gate keeper for the public to protect these resources. By definition and by direction of the Legislature, the work of the Department is directly related to impacts on the environment; that is its core function, to determine what actions are allowed consistent with environmental protection and to bar or restrict actions which would harm the environment. One cannot reasonably argue that the decision making of the Department on permits is *unrelated* to impacts upon the environment.

4. Governors' Executive Orders Another type of government decision document that is relevant to the Department's role and function are the Executive Orders ("EO") issued by the Governors of Michigan on the subject of the Department and its organization, purpose and function. Over the years, key executive orders have repeatedly made clear that Michigan Governors agreed with the Legislature that the Department's function is to protect the environment.

In 1965, Governor Romney issued Executive Order 1965-21, Exhibit 2, Appendix pages 171a-172a, that established the Department of Conservation within the executive branch, in part pursuant to the Executive Organization Act of 1965, MCL 16.101 *et seq*. (consolidated the work of many existing departments and agencies into 19). One of those was the Department of Natural Resources, which had been created in 1921 as the Department of Conservation. See Executive Order 1991-31, Exhibit 3, Appendix pages 173a-179a, at page 1, fourth and fifth "whereas" paragraphs. See also, 1975 comments of Governor Milliken at an annual meeting of the Michigan United Conservation Clubs:

> Let me say most emphatically that I will not tolerate attempts to do away with [MEPA], or to jeopardize its basic objectives. *To repeal the Act in fact – or by any effect – would represent a throwback to the dark ages of environmental irresponsibility* (emphasis supplied).

Quoted at *Michigan's Environmental Protection Act in its Sixth Year, supra*, 53 J Urban L at 668. Appellants submit that the Department's arguments in this case would in effect repeal the Act (MEPA) as it pertains to suits against the Department.

In 1991, Governor Engler issued Executive Order 1991-31, in which he replaced the old DNR with a new DNR. EO 1991-31, Exhibit 3, Appendix pages 173a-179a. The order retained and transferred all duties "relating to environmental protection." *Id*. at 175a, paragraph 1. Governor Engler also issued Executive Order 1991-32, Exhibit 4, Appendix pages 181a-184a, to create a commission to consolidate the many environmental protection statutes to make them more organized, understandable and effective with regard to "natural resources management and environmental protection." This Executive Order resulted in the consolidation in 1995 of the many existing environmental protection statutes into what is now known as NREPA, MCL 324.101 *et seq*., discussed above.

In Executive Order 1995-18, Exhibit 5 at Appendix pages 185a-191a, Governor Engler created DEQ and transferred to it key functions of environmental and natural resource protection. The first page of EO 1995-18 recognizes that "the people of the State of Michigan have consistently demonstrated the importance they place on both natural resource management and protection of Michigan's unique environmental qualities" and emphasizing the importance it had for the governor and for future generations. *Id*.

In 2009, Governor Granholm issued Executive Order 2009-45, Exhibit 6, Appendix pages 192a-220a, to consolidate DNR and DEQ into DNRE. "The Department shall protect and conserve the air, water, and other natural resources of this state." *Id*., at page 4, paragraph II.A.1.

In 2011, Governor Snyder issued Executive Order 2011-1, Exhibit 7, Appendix pages 221a-235a, in which he abolished DNRE and re-created DNR and DEQ. "The Department [DEQ] shall protect the environment of this state." *Id*. at paragraph IV.A.1.

In 2019, Governor Whitmer issued Executive Order 2019-2, Exhibit 8, Appendix pages 236a-254a, changing DEQ to EGLE and reiterating the important function of the Department, to be "focused on improving the quality of Michigan's air, land, and water." Exhibit 8 at 237a.

These few orders make clear that our governors over a period of half a century authorized and required the various iterations of the Department to exercise duties and responsibilities that would have real impacts upon the environment and natural resources of the state of Michigan.

5. Director's Statements On August 12, 2019, Department Director Liesl Clark issued a notice confirming that the mission of the Department is "[t]o protect Michigan's environment and public health by managing air, water, land, and energy resources." Copy of notice available online at: https://www.michigan.gov/mienvironment/0,9349,7-385-90161-504472--,00.html provided as Exhibit 9, Appendix pages 255a-257a. It is difficult to imagine the

Department doing its job without that work affecting the environment, or in a way that is "unrelated" to the environment, or in a manner that is not "likely" to affect whether or not the environment is impaired.

The position of the Department in this case that its conduct does not affect the environment appears to be contrary not only to the public perception of its function but also to many directives by the legislature and the chief executives of our state as to the Department's purpose and function. These charges have been recognized by this Court in a long line of MEPA decisions that authorize citizen suits under MEPA and, contrary to the Department's argument here and the erroneous ruling below, *Preserve the Dunes* did not alter that line of precedent.

Conclusion

In sum, the Michigan constitution states the people's strongly held position that protection of the environment is a "paramount" priority. The Legislature has assigned the job of protecting it to the executive agency selected by the governor to do so and has made that clear in numerous individual statutes as well as the general provisions of NREPA. The Governors of the state have for decades consistently reiterated that the duty and responsibility of the Department is to avoid pollution, impairment or destruction of the environment and natural resources through its work on behalf of the people of Michigan, often using wording identical to that in MEPA. The Department Director reiterated that mission as recently as 2019. And the courts of Michigan, including this Court, have repeatedly recognized that the Department has duties to protect the state's environment and natural resources, and that its fulfilment of those duties affects the environment, whether by protecting it or by failing to do so. In short, all three branches of government have unequivocally stated that the Department is charged with protecting the environment and balancing private rights and public interests in doing so. Department permitting affects the environment.

For the Department to argue now that its conduct reviewing and deciding on permits is mere "administrative action that does not affect the environment" is not only disingenuous and an inaccurate reading of this Court's precedent, it flies in the face of these decades of Legislative enactments and other pronouncements, mandates and directions to it to do its job. While Appellants have refrained from labeling the argument frivolous, and the few judicial decisions accepting the Department's argument (albeit vacated and unpublished) would appear to suggest otherwise, it is difficult for at least some of the citizens of Michigan not to perceive it as such.

POINT II The complaint in this case states a cause of action under MEPA, MCL 324.1701 *et seq*., based on the Department's review and issuance of permits that allegedly violate the Sand Dunes Protection and Management Act, MCL 324.35301 *et seq.* ("Part 353") and MEPA.

1. Introduction MEPA authorizes an action "for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL 324.1701(1). To that end, plaintiffs may seek "declaratory and equitable relief against any person." *Id.* In addition to providing that relief, "the court may: (a) [d]etermine the validity, applicability, and reasonableness of [any applicable] standard . . . [and] (b) [i]f a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court." MCL 324.1701(2). In short, this key operative provision, Section 1701 of MEPA, sets forth a broad authorization focused on existing environmental laws to empower "any person" to seek judicial review to protect the environment against any other person whose actions may make harm to the environment more likely, such as by permitting it to happen.

In a recent case brought by DEQ, the Court of Appeals ruled that "the complaint was adequate" because it was addressed to both the permitting party and the working party. *DEQ v Sancrant*, __ Mich App __, 2021 Mich App LEXIS 3936, *24-25 (June 24, 2021), in Appendix as

Exhibit 10 at 258a-279a. "In other words, plaintiff was alleging that together, by way of . . . [one party's] physical work and . . . [the other's] permitting . . . [the first party] to do that work," a cause of action was adequately pleaded. *Id*., citing MCR 2.111(B)(1).

MCR 2.111(B)(1) states:

> A complaint . . . must contain . . . [a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary *reasonably to inform* the adverse party of the nature of the claims the adverse party is called on to defend (emphasis supplied).

Appellants submit that the complaint in this case satisfies the requirements of MCR 2.111(B)(1), reasonably informs the Department of the nature of the claims, and alleges violations of MEPA Section 1701 and Part 353. Other decisions support this conclusion.

In *City of Jackson v Thompson-McCully Co., LLC*, 239 Mich App 482 (2000), the Court of Appeals remanded a case in part based on its ruling that the trial court should not have "required a showing of actual harm rather than *likely* harm" (emphasis supplied). *Id*. at 489, citing *Nemeth v Abonmarche Development, Inc*, 457 Mich 16 (1998). In *Nemeth*, this Court's decision discussed the fact that, under MEPA, proofs are "not restricted to actual environmental degradation, but also encompass[ ] probable damage to the environment, as well." 457 Mich at 25, quoting *Ray v Mason Co Drain Comm'r,* 393 Mich 294 (1975). The *Nemeth* decision went on to discuss the "vital part" the court's role plays in developing the common law of the environment under Section 1701, citing with approval the federal court's analysis of this key judicial function in *Her Majesty the Queen v Detroit*, 874 F 2d 332 (1989), and ruling that "MEPA does not impose specific requirements or standards; instead, it provides for de novo review in Michigan courts, allowing those courts to determine any adverse environmental effect and to take appropriate measures." *Nemeth*, *supra*, 457 Mich at 30. See also, *Pure Waters, Inc. v DNR*, 873 F Supp 41 (1994), in which citizens sued

the DNR for issuing NPDES (wastewater discharge) permits pertaining to combined sewer overflow discharges.

This Court has long recognized that MEPA constitutes the Legislature's authorization and direction to the courts of Michigan to engage in the further development of the common law of the environment. Among the many decisions are those cited herein, including *State Highway Comm v Vanderkloot,* 392 Mich 159 (1974), *Ray v Mason Co Drain Comm'r,* 393 Mich 294 (1975), and *Nemeth v Abonmarche Development, Inc*, 457 Mich 16 (1998). See also, law review articles and other authorities reviewing the state's judicial experience with MEPA cited above.

2. The Complaint Appellants turn to the allegations of the complaint to demonstrate that it states a cause of action under Section 1701. The complaint as initially filed before the Department's transfer, Appendix pages 1a-17a, identifies both the Department and the permittee as defendants. *Id.* at paragraphs 10 and 11. This complaint was not amended or altered in the Court of Claims.

The complaint seeks declaratory and equitable relief. *Id.* at paragraphs 13, 63, 69-70 and 72-74.

The complaint cites applicable authorities in both MEPA and Part 353, see, e.g., paragraphs 13, 15 & 16, and specifically alleges in paragraph 17:

> Failure by MDEQ to apply the procedures and standards of MEPA and Part 353 is likely to result in the pollution, impairment and/or destruction of the critical sand dunes and that failure constitutes a prima facie case in this action. MCL 324.1703.

In addition to numerous specific examples of alleged statutory violations, the complaint alleges generally in paragraphs 59 and 60:

> MDEQ's policies and procedures are not designed to comply with or satisfy the state standards and regulations created to protect the

> critical sand dunes and therefore violate Part 353 and MEPA. MDEQ's review of Part 353 permits generally, and in the case of the applications of Dune Ridge specifically, does not comply with or satisfy the state standards and regulations created to protect the critical sand dunes.

"Critical sand dunes" are those small portions of all of Michigan's sand dunes which were mapped pursuant to the authority of Part 353, in which the Legislature called upon the Department to identify and protect them. See MCL 324.35301(c) (definition and reference to 1989 mapping); 35302 (legislature finds the critical dune areas are unique and irreplaceable); 35303 (atlas of critical dunes to be disseminated in 1989); 35304 (permit required for any "use" – defined at 35301(k) – in critical dune areas); 35310(2) (specified government enforcement "shall be in addition to the rights provided in part 17," MEPA) and more.

The complaint at paragraphs 65 and 66 also alleges that:

> MDEQ's practices and procedures for the review and decision-making regarding Part 353 permits [generally and with regard to the specific permits sought by Dune Ridge] fail to comply with the mandates of Part 353 and MEPA.

Paragraph 68 states:

> As a direct result of the failures of Dune Ridge in its applications and MDEQ's failures in its practices and procedures, both MEPA and Part 353 have been violated because (a) *the actions of MDEQ* and Dune Ridge do not comply with the statutory mandates and (b) *the natural resources of the state* have been put at risk of impairment and *are being impaired* in violation of state standards and procedures, to the detriment of plaintiffs and the public trust and public interests they represent (emphasis supplied).

In short, the complaint states a cause of action and more than adequately puts the Department on notice of the matters to be addressed in the case. These allegations, supported by numerous specific examples set forth in the complaint, comply with applicable case law and MCR 2.111(B)(1).

Some of the specific allegations set forth in the complaint to put the developer and Department on notice, by way of example, include:

- One of the paragraphs that puts the Department on notice that its actions are a subject of the complaint is paragraph 14 (referring to "MDEQ, the agency whose actions are at issue and alleged to be in violation of MEPA in this case");
- Paragraph 22 notes that "examples set forth below" illustrate Part 353 violations the complaint alleges include "standards" (see MEPA at MCL 324.1701) and are intended "to protect against the impairment of sand dunes";
- Paragraph 23 alleges that the Legislature focused the protections of Part 353 on effects on the municipality where protected dunes are located;
- Paragraphs 24, 25, 57-58 and 67-68 allege that the development at issue is a "special use project," defined at MCL 324.35301(j), but that the applicant did not apply for a permit for it as a special use project, the Department did not review the whole as such and both the developer and the Department violated the statutory mandates of both MEPA and Part 353.
- At paragraphs 27-30 & 32-33, the complaint alleges that the permit applicant failed to provide complete, accurate and scientific information as required by statute and the Department reviewed and decided on the permits without such required information despite the statutory duty to require it and review it with regard to characteristics the Legislature specified the Department must consider (the "diversity, quality, functions and values" of the protected sand dunes);
- Paragraphs 34-35 allege violations of statutory prohibitions on construction in protected dunes "on the first lakeward facing slope" or foredune;

- Paragraphs 37-41 address the failure to provide or require an environmental impact statement and study of threatened and endangered species for the project as a whole, as required;
- Paragraph 42 alleges the Department accepted and approved an application without a statutorily-required sewage disposal plan;
- Paragraphs 43-45 put the Department on notice that it acted contrary to the statutory requirements or standards in Part 353, and thus contrary to MEPA, that it should require and make permit decisions based on credible, accurate, scientific information about the potential effects of the proposed development as a whole; and
- Many more specific allegations.

These allegations manifestly comply with the court rules, e.g., MCR 2.111(B)(1), as they fairly put the defendants on notice of the nature of the claims they will be required to defend against. More is not required by the court rule or Michigan law, which "requires the pleadings to be only so specific as to 'reasonably . . . inform' the adverse party of the nature of the cause he is called upon to defend, *Rose v Wertheimer,* 11 Mich App 401; 161 NW2d 406 (1968)." *Fenton Country House, Inc. v. Auto-Owners Ins. Co*., 63 Mich App 445, 448 (1975).

Conclusion

At its heart the most important part of this case is not the developer's harm to these protected sand dunes; rather, it is the harm to the rule of Michigan law represented by the Department's permitting misconduct and the disclaimers of responsibility inherent in its litigation posture, which Appellants perceive – fairly or not – as the Department arguing that it is above the law. Only as a result of the departmental misconduct or error in permit review can the permittee

proceed to damage the protected sand dunes and harm the public interest in those dunes. Appellants respectfully submit that this Court can and should correct this injustice and error, overrule the decisions below, clarify the meaning of the *Preserve the Dunes* decision, and direct the trial court to conduct a MEPA hearing on the permits and the Department's review and approval of them.

REQUEST FOR RELIEF

Appellants respectfully request that their application be granted or that the Court summarily grant the relief requested, reversing the erroneous decisions of the lower courts and making clear that *Preserve the Dunes* does not bar but rather follows longstanding precedent upholding the right of citizens to seek MEPA judicial review of Department work on environmental permits.

Respectfully Submitted,

Date: January 31, 2022

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STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LAKESHORE GROUP AND ITS MEMBERS, LAKESHORE CHRISTIAN CAMPING, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KEN ALTMAN, DAWN SCHUMANN & MARJORIE SCHUHAM,
Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellee.

Supreme Court No. 159033

Court of Appeals No. 341310

Court of Claims No. 17-000140-MZ

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PROOF OF SERVICE

On this date I have caused to be served a copy of Plaintiffs-Appellants' Supplemental Brief, Appendix and proof of service on counsel through the use of Truefiling.

Respectfully Submitted,

Date: January 31, 2022

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