STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:	Docket No. 18-011549
Petitions of Michigan Citizens for Water Conservation, and Grand Traverse Band of Ottawa and Chippewa Indians on the permit issued to Nestlé Waters North America, Inc. (consolidated cases)	Agency No. 1701 Part: Safe Drinking Water Act, 1976 PA 399 Agency: Department of Environment, Great Lakes, and Energy Case Type: Drinking Water and Environmental Health Division

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FINAL DECISION AND ORDER

This matter was the subject of a contested case hearing in which the Petitioners, Michigan Citizens for Water Conservation and the Grand Traverse Band of Ottawa and Chippewa Indians (collectively Petitioners) challenged the decision of the Respondent, the Michigan Department of Environment, Great Lakes, and Energy[1] (the Department) to issue a permit to the Intervenor, Nestlé Waters North America (Nestlé) to increase the amount of groundwater withdrawn from one of its production wells.

The challenged permit was issued by the Department pursuant to § 17 of Michigan's Safe Drinking Water Act (SDWA), Act 399 of 1976, as amended, MCL 325.1001 *et seq*. The SDWA sets forth a robust statutory regime that regulates

[1] The Michigan Department of Environmental Quality was renamed the Michigan Department of Environment, Great Lakes, and Energy by Executive Order 2019-06.

groundwater withdrawals for the purpose of producing bottled drinking water. This statutory regime is among the most protective, if not the most protective, of its kind in the nation.

It should be noted at the outset that this matter received substantial public attention, and was the subject of a thorough public notice and comment process. Many of the comments received by the Department expressed concern that Nestlé was not required to pay a sufficient fee for its withdrawal of groundwater. This concern, while valid, is not within this Tribunal's purview because § 17 of the SDWA does not allow the Department to charge a fee for groundwater withdrawals. Such an action by the Department was, and remains, impossible absent a statutory amendment by the Legislature.

The contested case that was held in this matter resulted in the issuance of a Proposal for Decision (PFD) dated April 24, 2020. Exceptions to the PFD were filed jointly by the Petitioners. Exceptions were also filed by the Department. Responses to the Petitioners' exceptions were filed by both the Department and Nestlé. A joint response to the Department's exceptions was filed by the Petitioners.

This matter is now before the Director of the Michigan Department of Environment, Great Lakes, and Energy for a final agency decision pursuant to MCL 24.285 and Mich Admin Code, R 792.10133.

FACTS AND PROCEDURAL HISTORY

Permit number 1701 was issued by the Department to Nestlé on April 2, 2018. This permit was issued pursuant to § 17 of the SDWA. As set forth in the

PFD in this matter, Nestlé sought the permit in order to increase the amount of water withdrawn from one of the production wells, PW-101, that it uses to produce Ice Mountain Natural Spring Water. (PFD, p 6.) Nestlé applied for a permit to increase the withdrawal capacity of PW-101 from 250 gallons per minute to 400 gallons per minute. (PFD, p 9.) This proposed increase could not legally occur without a permit under § 17 of the SDWA, MCL 325.1017(3), because it constitutes an increase in the amount of water withdrawn of more than 200,000 gallons per day. (PFD, pp 9–10.)

The Petitioners challenged the Department's decision to issue permit number 1701 by initiating the instant proceeding on June 1, 2018. (PFD, p 1.) Nestlé intervened in the matter effective July 11, 2018. (PFD, p 2.)

On November 16, 2018, the Administrative Law Judge (ALJ) presiding over the matter ordered the Parties to file briefs addressing the issue of subject matter jurisdiction. (11/16/18 Order Requiring the Filing of Briefs.) Specifically, the ALJ noted that "This Tribunal is concerned that a contested case hearing is not expressly authorized by the Safe Drinking Water Act" and directed the Parties to file briefs "regarding the Tribunal's jurisdiction to hear this contested case." (*Id.*, p 2.)

Pursuant to the ALJ's order, on December 21, 2018, the Petitioners filed a joint brief asserting the bases on which they alleged that the Tribunal had subject matter jurisdiction to hear this contested case. Response briefs arguing that there was no authority to hear a contested case under § 17 of the SDWA were filed by the

Department and Nestlé on January 16 and 18, 2019, respectively. The Department's response brief included a motion for summary disposition. The Petitioners then filed a joint rebuttal brief on February 1, 2019. On February 27, 2019, the ALJ ruled that this Tribunal has subject matter jurisdiction to hear this contested case. (2/27/19 Order Regarding Jurisdiction and Motions to Dismiss.)

This matter then proceeded to a hearing. As set forth in the PFD, written direct testimony was filed by the Department on February 6, 2019; by the Petitioners on March 6, 2019; and by Nestlé on April 4, 2019. (PFD, p 2.) Cross-examination of direct witnesses occurred from May 20 to May 23, 2019. (*Id.*) Written rebuttal testimony and stipulated exhibits were received into the record on August 1, 2019, and written closing briefs and responses were filed by the Parties between September 18, 2019 and February 21, 2020. (*Id.*) A hearing admitting exhibits and binding rebuttal testimony into the record was held on March 29, 2020. (*Id.*)

The PFD was issued on April 24, 2020. The PFD contained eight conclusions of law, and proposed that a Final Determination[2] and Order (FDO) be issued that approves the activity proposed in the permit application. (PFD, pp 61–62.)

Pursuant to the Administrative Procedures Act and controlling administrative rule, exceptions to the PFD were filed by the Petitioners and the Department on May 15, 2020. MCL 24.281; Mich Admin Code, R 792.10132.

[2] The PFD, at p 62, refers to a "Final Determination and Order." However, the terminology used in the controlling administrative rule is "Final Decision and Order." Mich Admin Code, R 792.10133.

The Petitioners asserted that they "generally take exception to the entire PFD." (Petitioners' 5/15/20 Exceptions, p 5.) The Petitioners took exception to the PFD's findings of fact and conclusions of law, and asserted that the PFD is contrary to law for multiple reasons. (*Id.*, *passim*.) The Department, in its exceptions, challenged only the ALJ's February 27, 2019 Order holding that this Tribunal has subject matter jurisdiction over this contested case. (Department's 5/15/20 Exceptions.)

The Department and Nestlé filed responses to the Petitioners' exceptions on May 28 and 29, 2020, respectively. The Petitioners filed a response to the Department's exceptions on May 29, 2020.

The Michigan Office of Administrative Hearings and Rules compiled and certified the official record of the contested case hearing and provided it to this Tribunal on July 15, 2020.

LEGAL STANDARD GOVERNING REVIEW OF A PROPOSAL FOR DECISION

Michigan law provides that the final decisionmaker in a contested case may remand, reverse, modify, or set aside a PFD. Mich Admin Code, R 324.74(3). The final decision and order must contain findings of fact and conclusions of law, must be based upon the record as a whole or a portion of the record, and must be supported by competent, material, and substantial evidence. MCL 24.285; Mich Admin Code, R 792.10133. In reviewing the PFD, the final decisionmaker shall

consider whether the proposal for decision is deficient on the grounds that it does any of the following:

(a) Misapplies a rule, statute, or constitutional provision governing the issues involved.

(b) Adopts an incorrect interpretation of a rule or statute or an incorrect conclusion of law.

(c) Incorporates typographical, mathematical, or other obvious errors that affect the substantial rights of one or all of the parties to the action.

(d) Fails to address a relevant issue.

(e) Makes factual findings inconsistent with the evidentiary record.

(f) Improperly excludes or includes evidence that substantially affects the outcome of the case. [Mich Admin Code, R 324.74(3).]

THE DEPARTMENT'S EXCEPTIONS

Because they address this Tribunal's subject matter jurisdiction, and are therefore potentially dispositive, it is appropriate to consider the Department's exceptions first. In its exceptions, the Department alleges that the ALJ erred in holding that the SDWA creates a right to a contested case hearing to challenge permits issued under § 17.

As noted previously, this issue was originally raised *sua sponte* by the ALJ. (11/16/18 Order Requiring the Filing of Briefs.) In their initial Joint Brief Identifying the Subject Matter Jurisdiction of the Tribunal over this Contested Case, the Petitioners argued that they had the right to bring this contested case,

and that this Tribunal has subject matter jurisdiction over this contested case, for three reasons:

1. The SDWA itself provides the right to a contested case hearing by adopting "the applicable standard" from § 23 of Part 327, Great Lakes Preservation, of the Natural Resources and Environmental Protection Act, MCL 324.32723 (referred to in this FDO as § 32723). (Petitioners' 12/21/18 Joint Brief, pp 2–4 and 6–8.)
2. The SDWA's administrative rules provide the right to a contested case hearing. (*Id.*, pp 4–6.)
3. A contested case hearing is available under other Michigan statutes (specifically Part 303, Wetlands Protection, and Part 17, Michigan Environmental Protection Act, of the Natural Resources and Environmental Protection Act) as well as common law principles. (*Id.*, pp 8–9.)

In their response briefs, the Department and Nestlé argued that there is no right to a contested case hearing to challenge Permit 1701 under the authorities cited by the Petitioners, and that this contested case must be dismissed. (Department's 1/16/19 Motion to Dismiss and Response Brief; Nestlé's 1/18/19 Response Brief.) Both the Department and Nestlé argued that neither the SDWA nor its administrative rules provide the right to a contested case hearing to challenge permits issued under § 17, that the other authorities cited by the Petitioners are inapposite, and that the Petitioners should instead have pursued a

direct appeal to the courts under § 631 of the Revised Judicature Act, MCL 600.631. (*Id.*)

The Petitioners' rebuttal brief focused on the first of their three arguments: that, by incorporating the "applicable standard" from § 32723 into § 17 of the SDWA, the Legislature actually incorporated *all* of § 32723, including its contested case provision. (Petitioners' 2/1/19 Rebuttal Brief, pp 2–10.)

In support of this argument, the Petitioners relied on the Michigan Supreme Court decision in *City of Pleasant Ridge v Romney*, 382 Mich 225, 236–238 (1969). (*Id.*, pp 2–3.) In that case, the Michigan Supreme Court held that a Michigan statute that authorized condemnation of property for the construction of state highways was not unconstitutional for lack of standards to guide the highway location board, because it referred to Title 23 of the United States Code, which included such standards. (*Id.*) The Supreme Court held that this reference had the effect of adopting those federal standards into the Michigan statute. (*Id.*) The Petitioners argue that *City of Pleasant Ridge* creates a rule that, when one statute broadly references another statute, it incorporates "all that is fairly covered by the reference." (*Id.*) Petitioners therefore argue that, when § 17(4) of the SDWA requires the Department to consider "the applicable standard" in § 32723, it adopts the entirety of § 32723.

The ALJ held that this Tribunal has subject matter jurisdiction over contested cases that challenge permits issued under § 17 of the SDWA. (2/27/19 Order Regarding Jurisdiction and Motions to Dismiss.) Specifically, the ALJ

adopted the Petitioners' argument that § 17's requirement that the Department consider "the applicable standard" in § 32723 means that the entirety of § 32723 is adopted into § 17 of the SDWA. (*Id.*, pp 7–9.)

CONTROLLING LAW

Michigan law is clear that whether a court or administrative tribunal has subject matter jurisdiction is an issue that cannot be waived and may be raised at any time. *Travelers Ins. Co. v Detroit Edison Co.*, 465 Mich 185, 204 (2001). If a court or tribunal lacks subject matter jurisdiction over a case, then any action it takes other than outright dismissal is void as a matter of law. *Bowie v Arder*, 441 Mich 23, 56 (1992).

Michigan's Constitution provides that the final decisions of administrative agencies are subject to judicial review. Const 1963, art 6 § 28. There are, broadly speaking, two kinds of agency decisions: those that can be challenged in a contested case hearing, and those that cannot. *Morales v Michigan Parole Bd*, 260 Mich App 29, 33 (2004). If an agency decision can be challenged in a contested case, then the final decision in the contested case constitutes the final agency decision that can be appealed to the courts pursuant to the Administrative Procedures Act. *Id.*; MCL 24.301. If the agency decision is one that cannot be challenged in a contested case, then judicial review is obtained by a direct appeal to the courts pursuant to § 631 of the Revised Judicature Act. *Morales*, 260 Mich App 33; MCL 600.631.

Administrative agencies are creatures of statute, and possess only the powers conferred upon them by statutes and rules. *Detroit Public Schools v Conn*, 308 Mich

App 234, 242–243 (2014) (internal citations omitted). A grant of authority to an administrative agency must be clearly expressed in the enabling statute and will not be extended by inference. *Id.*

The three bases for subject matter jurisdiction asserted by the Petitioners must be considered in light of this controlling law.

I. The SDWA's incorporation of "the applicable standard" in § 32723 of the Natural Resources and Environmental Protection Act

Permit 1701 was issued under § 17 of the SDWA, which governs new or increased water withdrawals in excess of 200,000 gallons of water per day or intrabasin transfers of more than 100,000 gallons of water per day average over any 90 day period. MCL 325.1017. As argued by the Department and Nestlé, the SDWA provides for contested case hearings in two limited circumstances: when water suppliers wish to dispute certain administrative fines imposed by the Department, and when water suppliers wish to challenge certain emergency orders issued by the Department. MCL 325.1007(5) and MCL 325.1015(3). Neither situation is present here. The SDWA does not expressly provide for a contested case hearing to challenge a permit issued under § 17.

The Petitioners appear to acknowledge that the SDWA does not directly provide the right to a contested case hearing to challenge a permit issued under § 17. However, the Petitioners point to §§ 17(3) and (4), which they allege incorporate the contested case provision from another statute into the SDWA.

First, § 17(3) provides that a permit from the Department is required in this situation. Specifically, § 17(3) provides:

> A person who proposes to engage in producing bottled drinking water from a new or increased large quantity withdrawal of more than 200,000 gallons of water per day from the waters of the state or that will result in an intrabasin transfer of more than 100,000 gallons per day average over any 90-day period shall submit an application to the department in a form required by the department containing an evaluation of environmental, hydrological, and hydrogeological conditions that exist and the predicted effects of the intended withdrawal that provides a reasonable basis for the determination under this section to be made.

MCL 325.1017(3).

It is undisputed that Permit 1701 was required because Nestlé seeks to increase the water withdrawals from well PW-101 by more than 200,000 gallons per day. The Petitioners then point to § 17(4), which provides:

> The department shall only approve an application under subsection (3) if the department determines both of the following:
>
> (a) The proposed use will meet the applicable standard provided in section 32723 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.32723.
>
> (b) The person will undertake activities, if needed, to address hydrologic impacts commensurate with the nature and extent of the withdrawal. These activities may include those related to the stream flow regime, water quality, and aquifer protection.

MCL 325.1701(4).

The relevant portion of § 17(4) is that, in order to issue a permit under § 17(3), such as Permit 1701, the Department must determine that "the *proposed use* will meet *the applicable standard* provided in § 32723 of the natural resources and environmental protection act, 1994 PA 451." (*Id.*, emphasis added.)

This provision refers to § 23 of Part 327, Great Lakes Preservation, of the Natural Resources and Environmental Protection Act, MCL 324.32701 *et seq*. Part 327 generally governs resource impacts to the Great Lakes, and § 32723 governs water withdrawal permits required under Part 327.[3] There are 13 subsections contained in § 32723. MCL 324.32723(1)–(13). Subsection (12) provides the right to a contested case hearing to challenge "a determination by the department under this section" in a contested case hearing. MCL 324.32723(12).

The question presented to this Tribunal, therefore, is whether § 17(4) of the SDWA incorporates subsection (12) of § 32723. It clearly does not.

In interpreting the meaning of a statute, courts and administrative tribunals first look to whether a term is defined in the statute. *People v Aguwa*, 245 Mich App 1, 3–4 (2001) (internal citations omitted). If it is not, then it is appropriate to apply the plain meaning of the statutory language. *Id*.

First, as noted by the Department and Nestlé, § 17(4) applies only to the Department's initial decision to issue a permit under § 17. By its plain language, § 17(4) provides that "the department shall only *approve an application* if it determines both of the following." MCL 325.1017(4). Here, Permit 1701 has already been approved. Nothing in the plain language of § 17(4) refers to the Department's subject matter jurisdiction to hear a contested case after a permit has been approved.

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[3] As Nestlé notes in its briefs on this issue, Permit 1701 is exempted from regulation under Part 327, and is instead regulated under the SDWA. (Nestlé's 1/18/19 Response Brief, pp 15–16, citing MCL 324.32723(13).)

As noted by the ALJ, § 17(3) also refers to a determination regarding "the proposed use." MCL 325.1017(3). The ALJ correctly held that "the proposed use" refers to "the proposed activity, *i.e.*, 'producing bottled drinking water from a new or increased large quantity withdrawal of more than 200,000 gallons of water per day from the waters of the state or that will result in an intrabasin transfer of more than 100,000 gallons per day average over any 90 day period . . . .'" (2/27/19 Order Regarding Jurisdiction and Motions to Dismiss, pp 8–9.)

Not only does § 17(3) apply only to "the proposed use," it also refers to "the environmental, hydrological, and hydrogeological conditions that exist and the predicted effects of the intended withdrawal." MCL 325.1017(3). Therefore, § 17(4) incorporates the "standard" from § 32327 that applies to the proposed use in light of the environmental, hydrological, and hydrogeological conditions that exist and the predicted effect of the withdrawal. It incorporates technical, scientific standards that apply to the permit application review and approval or denial; it does not incorporate subsequent appeal procedures.

Additionally, § 17(4) specifically does not incorporate the entirety of § 32723. In holding that it does, the ALJ found that the Legislature could have chosen to limit the provisions of § 32723 that it incorporated, but it did not do so. (2/27/19 Order Regarding Jurisdiction and Motions to Dismiss , pp 7–9.) This was an erroneous application of the plain language of the statute, because § 17(4) specifically does limit which provisions of § 32723 it incorporates. In drafting § 17(4), the Legislature chose to incorporate only "the applicable standard provided in

section 32723." MCL 325.1701(4). Had the Legislature intended to incorporate all of § 32723 into § 17(4), it would not have limited its incorporation to "the applicable standard."

The canons of statutory construction require that courts and administrative tribunals interpret statutes in a manner that does not render any statutory language nugatory. *Apsey v Memorial Hosp.*, 477 Mich 120, 130–131 (2007). The ALJ's holding, that § 17(4) adopts and incorporates the entirety of § 32723, effectively deletes the limiting clause "the applicable standard provided in" from the statute. This contradicts the plain meaning of the statute and violates the canons of statutory construction by rendering key language nugatory.

The question remains which provisions of § 32723 are incorporated into § 17(4). This requires an analysis of the language of §§ 17(3) and (4). It is undisputed that the word "standard" is not defined in the SDWA.[4] Therefore, the canons of statutory construction provide that courts and administrative tribunals apply the plain meaning of the term, as found in a dictionary. *Aguwa*, 245 Mich App at 3–4. As noted by the ALJ, Black's Law Dictionary defines "standard" as "[a] criterion for measuring acceptability, quality, or accuracy . . . ." (2/27/19 Order Regarding

[4] The SDWA does define the term "State drinking water standards," which are defined as "quality standards setting limits for contaminant levels or establishing treatment techniques to meet standards necessary to protect the public health." MCL 325.1002(q). While this definition is not dispositive, it is instructive that, in the SDWA, the Legislature defined a different type of water standard as referring generally to contaminant limitations and treatment techniques to protect water quality.

Jurisdiction and Motions to Dismiss , p 9, quoting Black's Law Dictionary, 1412–1413 (7th Ed, 1999).)

Based on this definition, it is clear that §§ 17(3) and (4) of the SDWA require that, when the Department reviews an application under § 17, it must determine whether the proposed new or increased water withdrawal complies with any criteria for measuring acceptability, quality, or accuracy contained in § 32327. As argued by the Department and Nestlé, only the conditions set forth in § 32723(6) satisfy this definition.

Simply put, the right to a contested case hearing to challenge a permit that has already been issued is not a "criterion for measuring acceptability, quality, or accuracy" as it relates to the "environmental, hydrological, or hydrogeological conditions that exist or the predicted effects of the intended withdrawal." Therefore, based on the unambiguous plain language of §§ 17(3) and (4) of the SDWA and § 32723, neither the SDWA nor Part 327 provides a right to a contested case hearing to challenge a permit issued under § 17 of the SDWA.

It must be mentioned that the contested case provision in § 32723(12) relied upon by the Petitioners expressly provides for a contested case to challenge a permitting decision made "under this section," that being § 32723. MCL 324.32723(12). Permit 1701 was not issued under § 32723; rather, it was issued under § 17 of the SDWA. Also, § 32723 expressly exempts permits issued under § 17 of the SDWA from regulation under § 32723. MCL 324.32723(13).

Furthermore, as the Department argues, a holding that § 17(4) incorporates the entirety of § 32723 would create conflict between the two statutes and would render additional statutory language nugatory. For example, § 17 of the SDWA requires a permit application fee of $5,000.00. MCL 325.1017(8). But § 32723 imposes a permit application fee of $2,000.00. MCL 324.32723(2).

If § 17(4) of the SDWA incorporated into its terms the entirety of § 32723, then it would create a direct conflict between the two statutes over the amount of the permit application fee. The Legislature is presumed to be aware of all existing statutes when it enacts a new statute. *Walen v Dep't of Corrections*, 443 Mich 240, 248 (1993). Statutes that appear to conflict should be read together and reconciled if possible. *World Book, Inc. v Dep't of Treasury*, 459 Mich 403, 416 (1999). When two statutes lend themselves to an interpretation that avoids conflict, that interpretation should control. *Jackson Community College v Dep't of Treasury*, 241 Mich App 673, 681 (2000). Here, the interpretation of § 17(4) of the SDWA and § 32723 advocated by the Petitioners creates an unnecessary conflict that is avoided by the interpretation advocated by the Department and Nestlé. The canons of statutory construction require that the latter interpretation controls.

This Tribunal must also consider the Petitioners' argument that, in *City of Pleasant Ridge v Romney*, the Michigan Supreme Court created a rule that, when one statute references another statute, it incorporates "all that is fairly covered by the reference." (2/1/19 Petitioners' Rebuttal Brief, p 5, internal citations omitted.) Based on the foregoing analysis of the plain language of the controlling statutes and

the application of the canons of statutory construction, it is clear that the right to a contested case hearing set forth in § 32723(12) is not "fairly covered" by § 17(4) of the SDWA. The *City of Pleasant Ridge* case is, therefore, inapposite.

II. The SDWA's administrative rules

In addition to the SDWA's reference to § 32723, the Petitioners argue that the administrative rules enacted pursuant to the SDWA also provide the right to a contested case hearing to challenge the issuance of Permit 1701. (Petitioners' 12/21/18 Joint Brief, pp 4–6.) Specifically, the Petitioners cite administrative rules 103(q), 103(r), 204, and 2601–2606. Contrary to the Petitioners' assertions, none of these rules conveys the right to challenge a permit issued under § 17 of the SDWA in a contested case hearing.

The first two rules cited by the Petitioners, rules 103(q) and (r), simply define the terms "contested case" and "contested case hearing," respectively. Mich Admin Code, R 325.10103(q) and (r). These rules do not empower the Department to hold contested case hearings that are not authorized in the SDWA itself.

Rule 204 sets forth the procedures for how one initiates a contested case hearing. Mich Admin Code, R 325.10204. Like the previous two rules relied upon by the Petitioners, Rule 204 does not empower the Department to hold contested case hearings that are not authorized in the SDWA itself.

Finally, Rules 2601–2606 (with Rule 2604 being rescinded) make no mention of contested case hearings whatsoever. Mich Admin Code, R 325.12601–12603 and 12605–12606. Nothing in these rules creates a right to challenge a permit issued

under § 17 of the SDWA in a contested case hearing, or empowers the Department to hold contested case hearings that are not authorized in the SDWA itself.

This Tribunal must briefly address an argument that was raised by both the Department and Nestlé in their briefs. The Department and Nestlé argue that, even if the SDWA's administrative rules did provide the right to a contested case hearing that was not provided in the SDWA itself, such a rule would be invalid because the Court of Appeals has previously held that an administrative rule cannot create a substantive right to a contested case hearing that is not provided in the statute itself. (1/16/19 Department's Motion for Summary Disposition and Brief in Response, p 5; Nestlé's 1/18/19 Response Brief, pp 9–13, both briefs citing *Wolverine Power Cooperative v Dept of Environmental Quality*, 285 Mich App 547 (2009).)

This argument is considered and it is rejected because an administrative agency lacks the authority to strike down or disregard its own administrative rules. *Detroit Base Coalition for Human Rights of the Handicapped v Dep't of Social Servs.*, 431 Mich 172, 189 (1988); *Grass Lake Imp. Bd. v Dep't of Environmental Quality*, 316 Mich App 356, 366–367 (2016) (internal citations omitted). As set forth above, administrative agencies are creatures of statute, and derive their power from statutes and rules. *Conn*, 308 Mich App at 242–243. In other words, it is the statutes and rules that control this Tribunal, not the other way around. Regardless of whether this Tribunal agrees with the argument advanced by the Department and Nestlé, it would be a plainly *ultra vires* act if this Tribunal purported to strike

down an administrative rule. In any event, the Petitioners' argument on this issue fails as a matter of law not because an administrative rule that creates a right to a contested case hearing is invalid, but rather because no such administrative rule exists.

III. Additional Bases for Jurisdiction Invoked in the Petition

In their briefs, the Petitioners argue that there are other bases on which this Tribunal can assert subject matter jurisdiction over this contested case. These bases include: Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, MCL 324.30301 *et seq*.; Part 17, Michigan Environmental Protection Act, of the Natural Resources and Environmental Protection Act, MCL 324.1701 *et seq*.; the Administrative Procedures Act, MCL 24.201 *et seq*.; common law principles of water law in Michigan; and guidance materials published by the Department. (Petitioners' 12/21/18 Joint Brief, pp 4–9; Petitioners' 2/1/19 Rebuttal Brief, pp 10–12; and Petitioners' 5/29/20 Response to the Department's Exceptions, pp 7–8.) Each of these bases must be addressed in turn.

Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, does not apply in this case. Part 303 is Michigan's wetland protection statute, and it governs permits for the dredging, filling, draining, or constructing/operating/maintaining a use in regulated wetlands in Michigan. MCL 324.30304. Part 303 provides the right to a contested case hearing to challenge a permit issued under Part 303. MCL 324.30319. But Permit 1701 was not issued

under Part 303. Nothing in Part 303 or its administrative rules conveys the right to a contested case hearing to challenge a permit issued under § 17 of the SDWA.

Similarly, Part 17, Michigan Environmental Protection Act, of the Natural Resources and Environmental Protection Act, does not provide the right to a contested case hearing to challenge permits issued under § 17 of the SDWA. In fact, the Michigan Environmental Protection Act does not provide the right to initiate any contested case hearing at all. It provides the right for certain persons to intervene in an existing contested case hearing, but not to initiate a contested case hearing. MCL 324.1705(1).

The Michigan Administrative Procedures Act broadly governs contested case hearings and sets forth procedures for how they are carried out, but does not grant the right to initiate a contested case hearing to challenge any specific agency decision, let alone a permit issued under § 17 of the SDWA. MCL 24.271–288.

There is also no common law doctrine that provides the right to a contested case hearing. Contested case hearings are, like administrative agencies themselves, creatures of statute. The Petitioners have not cited any authority that provides a common law right to a contested case hearing to challenge a permit issued under § 17 of the SDWA, because no such authority exists.

Finally, the Petitioners argue that the Department issued public guidance documents that indicate that permits issued under § 17 of the SDWA include all of the requirements of Part 327 permits. (Petitioners' 12/21/18 Joint Brief, pp 10–11; Petitioners' 5/29/20 Response to the Department's Exceptions, p 7.) The record does

not contain findings of fact on this issue. However, even taken as true, this argument fails as a matter of law. The Department is not free to claim subject matter jurisdiction for itself by issuing public guidance materials. The scope of the Department's jurisdiction is determined by the controlling statutes and rules, not by guidance documents. Therefore, even if the Department had issued a guidance document that claimed that members of the public had the right to challenge permits issued under § 17 of the SDWA in a contested case hearing (which it did not), such a guidance document would be *ultra vires* and unenforceable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the foregoing, this Tribunal concludes, as a matter of law, that the SDWA does not create a right to a contested case hearing to challenge permits issued under § 17, including permit number 1701. Rather, the appropriate method to challenge permit number 1701 was a direct appeal to the appropriate circuit court pursuant to § 631 of the Revised Judicature Act, MCL 600.631. Therefore, this Tribunal lacks subject matter jurisdiction to hear this contested case, and the Department's exception on this issue is granted.

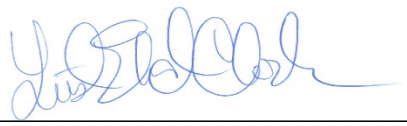
This Tribunal further concludes, as a matter of law, that the contested case hearing in this matter was held in error. Pursuant to Mich Admin Code, R 324.74(3)(a) and (b), the PFD must be set aside because it misapplied a statute governing the issues involved, and because it adopted an incorrect interpretation of a statute, specifically MCL 325.1017(4)(a). The findings of fact and conclusions of law set forth in the PFD are set aside due to a lack of subject matter jurisdiction.

Because this Tribunal lacks subject matter jurisdiction, it can make no further findings of fact or conclusions of law.

NOW, THEREFORE, IT IS ORDERED:

The April 24, 2020 Proposal for Decision is set aside, and this contested case is dismissed with prejudice for lack of subject matter jurisdiction. The Michigan Department of Environment, Great Lakes, and Energy does not retain jurisdiction.

Date: November 20, 2020



Liesl Eichler Clark, Director
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