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Administrative Law

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I. Introduction

A. In General §15.1

Environmental law in Michigan increasingly involves administrative agencies. The past three decades have been marked by a proliferation of legislation concerning every area of the environment, from air quality to endangered species. This legislation is typically implemented by administrative agencies. Knowledge of administrative law is essential if you are to represent clients effectively before administrative agencies. The goal of this chapter is to provide an overview of and a starting point for understanding the role of administrative agencies in environmental law.

Administrative agencies are part of the executive branch of government. There are significant procedural and substantive differences between agencies, courts, and the legislature. There are also differences among agencies. An awareness of those differences is a prerequisite to the effective representation of clients. This chapter discusses the three primary areas of administrative law: adjudication (see §§[15.5-15.28](#)), rulemaking (see §§[15.46-15.56](#)), and information gathering (see §§[15.58-15.66](#)). Although this article is intended to be general in nature, particular emphasis will be placed on practice involving the Michigan Department of Environmental Quality (DEQ or Department).

II. State Administrative Agencies That Regulate the Environment

A. Administrative Framework §15.2

Michigan environmental programs are primarily located in DEQ. It has primary responsibility for regulating industrial and municipal pollutant sources and land use. Pursuant to the Executive Organization Act of 1965, [MCL 16.101 et seq.](#), the governor has grouped most of the major environmental programs within DEQ and realigned some of the powers of the boards and commissions transferred to DEQ. When dealing with a state agency, board, or commission, especially if it was created before 1965, it is important to determine whether the powers of that entity have been changed by the Executive Organization Act or an executive order. Many statutes name the Department of Natural Resources or the Department of Environmental Quality as the administering agency. These agencies were combined into the Michigan Department of Natural Resources and Environment (DNRE) by Governor Granholm in 2009. Executive Order 2009-45. However, almost immediately upon taking office, Governor Snyder dismantled the DNRE and revived the Department of Natural Resources and the Department of Environmental Quality. Executive Order 2011-1.

B. Organization of the Department of Environmental Quality §15.3

DEQ administers numerous statutes and is headed by the Director who is appointed by the Governor. The Director has the power to adjudicate contested cases or promulgate rules. The Administrative Procedures Act of 1969 (MAPA), [MCL 24.201 et seq.](#), establishes the basic procedural framework for adjudication and rulemaking. As a general proposition, all agencies follow the same procedures for rulemaking. Adjudication procedures, however, are often

specialized. Different procedures may be legislatively mandated in the enabling statute or contained in rules promulgated by the agency.

Statutes administered by DEQ bestow rulemaking power on the Director. The rulemaking and adjudicative powers are usually nondelegable—that is, only the named agency may perform these duties. *Detroit Edison Co v Corp & Securities Comm'n*, [361 Mich 150](#); 105 NW2d 110 (1960). The day-to-day implementation of the statutes may be carried out by DEQ staff. If a statute provides express authority to delegate a power, that power may be exercised by the Director's designee.

C. How Encounters with Administrative Agencies Arise and How to Deal with Them §15.4

Because DEQ administers a wide range of programs, a practitioner might become involved with the agency in a number of ways. DEQ issues several thousand permits per year. Most of them, such as wetland permits, regulate land use. Of these permits, only around 200 result in the filing of a contested case. For a number of reasons, such as settlement, withdrawal of petitions, or changes in plans, many contested cases do not reach the stage of an actual hearing. Practicing before DEQ is no different from practicing before any other administrative agency: the majority of a practitioner's time is spent in the permit and negotiation process rather than in hearings.

DEQ issues two kinds of permits and licenses: (1) one-time permits for the construction of a specific project; and (2) continuing permits, such as those for air and water pollution control, marinas, and sanitary landfills. If you represent a regulated municipal or industrial entity, you will usually have a continuing relationship with your client. You will give continuing advice on new regulatory developments and participate closely with your client in the permitting process. Your representation might include compliance counseling, responding to violation notices, and drafting applications for permit renewal. If you are working on a major air or water permit, you will probably work closely with engineering and scientific experts, who will provide you with technical support.

When dealing with DEQ, you must be knowledgeable about administrative law, the organization of the agency, and the substantive subject matter of the negotiations. DEQ is a complex organization with various levels of authority. It is not uncommon for attorneys to begin negotiations with DEQ by contacting the highest-level official they can reach. This might be a good idea if a major project requires the coordination of a number of programs. But DEQ programs are technical and scientific in nature, and the initial decision usually is made at the level closest to the problem. Although higher-level officials have significant policy-making authority, they usually defer to the scientific and technical expertise of those who actually process permits. Thus, it is often a mistake not to follow the usual permitting process.

If negotiations fail or if a permit cannot be issued in an acceptable form, a contested case may be an appropriate vehicle through which to achieve your client's goals, provided that a contested case is authorized by the substantive statute. See [§15.9](#). Contested cases arise in three ways: (1) when a regulated individual is aggrieved by the action or inaction of DEQ in processing a permit; (2) when a third party challenges a permit (for example, when a lake association opposes a marina

permit issued for a project on its lake); or (3) when DEQ takes action to amend, revoke, suspend, or deny a license.

“Administrative agency” is a term of art meaning the entity or individual who has the power to hear contested cases and promulgate rules. The remedies within administrative agencies are statute specific. Petitions must be filed under the correct statute. Thus, the term “agency” is a generic term for that person or group having the authority to perform administrative acts. For example, it is actually the Michigan Administrative Hearing System (MAHS) that receives petitions and hears contested cases on behalf of DEQ; DEQ does not conduct contested cases. However, final decision making authority resides with the Director of DEQ.

When filing for and pursuing a contested case, keep the following in mind:

1. Before you file a petition for a contested case, consult the relevant statutes and their administrative rules and DEQ’s procedural rules.
2. Be sure you have a thorough knowledge of the applicable statutes and rules and of MAPA.
3. Do not make any assumptions about the procedure. In particular, do not assume that the Michigan Court Rules apply.
4. DEQ does not have the power to award purely judicial remedies. For example, it cannot determine the constitutionality of a statute or rule, find a taking, or assess costs.
5. Because most DEQ subject matter is scientific and technical in nature, it is usually essential that you have expert witnesses to support your position.
6. It is unlikely that a party will prevail in a case solely by skillfully cross-examining DEQ experts. Be sure that your experts can offer direct testimony.
7. It is a grave error to not take a contested case hearing seriously on the assumption that an appeal to circuit court is the appropriate place to focus your efforts. Appeals to circuit court are not de novo and are very limited in scope, particularly with regard to the deference given to administrative agencies’ factual determinations.
8. Deciding not to pursue an available administrative remedy may foreclose any remedy at all (see §[15.36](#)).
9. Thoroughly review DEQ’s files as you prepare for the contested case.
10. Unrestricted discovery is not available, as it is in the circuit court.
11. Although the pleading requirements in administrative practice are minimal, because appellate review of administrative decisions lies with the circuit court, you should make the record look like a circuit court file. For example, although an answer is generally not required, always file one.

To those accustomed to the complicated procedural rules of the circuit courts, administrative practice may seem loose and uncomfortable. This is in part because administrative tribunals are primarily fact-finding bodies and are not courts. It is also because MAPA is designed to cover a wide range of subject matters. Cases heard under MAPA range from requests for increases in welfare benefits to multi-party, billion-dollar utility rate cases. Although there are frequently proposals in the legislature to amend MAPA, it is doubtful the hearing system for administrative agencies will ever be as complex as that of the courts.

III. Adjudication: In General

A. Quasi-Judicial Powers of Agencies §15.5

An important power of an administrative agency is its ability to adjudicate disputes between the agency and regulated individuals. Some practitioners do not take agency adjudication seriously under the mistaken belief that such disputes will finally be resolved in a judicial forum. The apparent basis of this belief is that the separation of powers is violated by any agency adjudication and that the agency is improperly exercising judicial power.

Administrative agencies possess quasi-judicial powers to adjudicate disputes but may not exercise powers that are purely judicial. There are also limitations on the exercise of quasi-judicial powers. For example, an agency exercising quasi-judicial power cannot determine constitutional questions, hold statutes unconstitutional, or issue injunctions. *City of Taylor v Detroit Edison Co*, [475 Mich 109](#), 122 n30; 715 NW2d 28 (2006); *Wikman v City of Novi*, [413 Mich 617](#), 646-48; 322 NW2d 103 (1982). The Sixth Circuit has suggested that *Wikman v City of Novi* only “generally” warned against agencies determining constitutional questions. In *Fieger v Thomas*, 74 F3d 740 (CA 6, 1996), the Sixth Circuit recognized, in dicta, that a party may be able to raise constitutional issues in an agency proceeding, and that the agency may be able to give redress to that party. However, there is still no binding precedent overruling *Wikman* with regard to an agency’s inability to determine constitutional questions.

An agency is empowered to interpret its authorizing statute and in doing so may properly take into account relevant court decisions. *Adrian School Dist v Michigan Public School Employees Retirement Sys*, [458 Mich 326](#); 336; 582 NW2d 767 (1998) (“The public policy that allows agencies to establish new principles through contested case proceedings is premised on the fact that an agency cannot promulgate rules to cover every conceivable situation. The agency must interpret the statute it administers, and its interpretations are entitled to great weight.” (internal citations omitted)); *Jackson Cty Ed Ass’n v Grass Lake Community Schools Bd of Ed*, [95 Mich App 635](#), 641; 291 NW2d 53 (1979); but see *In re Complaint of Rovas Against SBC Michigan*, [482 Mich 90](#), 111-12; 754 NW2d 259 (2008) (determining that “agencies’ constructions of statutes are entitled to respectful consideration, but are not binding on courts and cannot conflict with the plain language of the statute”).

The judicial enforcement power by contempt orders is not available to agencies. This does not, however, diminish the validity and binding force of an agency’s writs, orders, or directives. Enforcement is obtainable by application to the circuit court. See generally [MCL 24.203](#); *Edros Corp v City of Port Huron*, [78 Mich App 273](#), 278; 259 NW2d 456 (1977).

B. No Constitutional Requirement for Contested Case Hearing for Every Administrative Decision §15.6

A contested case hearing (see §[15.7](#)) is not available to challenge every administrative decision. Actions that are legislative in nature generally give no right to an individual hearing because legislative activity is of general applicability and is not directed at an individual. The clearest example of legislative activity is rulemaking pursuant to the procedures of MAPA. For a discussion of rulemaking, see §§[15.46-15.56](#).

To determine if a contested case is required or available, thoroughly review the applicable statute and MAPA. If the statute expressly exempts a certain activity from the contested case provisions of MAPA, or if there is no requirement of notice and hearing in the statute, and MAPA does not, itself, invoke the provision, there can be no contested case. See [MCL 24.315](#). For instance, an application for an initial license usually does not entitle the applicant to a contested case hearing, and the provisions of MAPA do not apply if the statute that governs the issue of licenses does not require that the selection of a licensee be preceded by notice and an opportunity for a hearing. See *Delly v Bureau of State Lottery*, [183 Mich App 258](#), 263; 454 NW2d 141 (1990); *Kelly Downs, Inc v Racing Comm'n*, [60 Mich App 539](#), 547; 231 NW2d 443 (1975). Accordingly, because interim status for a hazardous waste facility under the federal Resource Conservation and Recovery Act, [42 USC 6901 et seq.](#) (see [Chapter 4](#)), is not a license, such a facility is not entitled to a contested case hearing. *General Motors Corp v Dep't of Natural Resources*, [189 Mich App 207](#), 209-10; 472 NW2d 49 (1991). This does not mean that there is no remedy for the denial of an initial license; it does mean the remedy may not be an administrative one. See §§[15.38-15.45](#).

Likewise, the Solid Waste Management Part, [MCL 324.11501 et seq.](#), and the Hazardous Waste Management Part, [MCL 324.11101 et seq.](#) of the Natural Resources and Environmental Protection Act (NREPA), [MCL 324.101 et seq.](#), do not provide for a hearing on initial licensing; therefore, there can be no contested hearings pursuant to MAPA. The DEQ cannot, by rule, provide for a contested case where doing so is contrary to the provisions of the enabling statute. In *Wolverine Power Supply Co-op, Inc v Dep't of Environmental Quality*, [285 Mich App 548](#), 572; 777 NW2d 1 (2009), the court of appeals held invalid a DEQ promulgated rule that would have provided for a contested case hearing after the final agency decision on a permit to install under Part 55 (Air Pollution Control) of NREPA, [MCL 324.5501 et seq.](#). The court concluded that the Part 55 provision addressing permits to install set out an exclusive remedy for appeal: judicial review under the Revised Judicature Act. *Id.*

Nevertheless, if fundamental fairness requires a hearing, MAPA contested case hearing provisions will apply to that proceeding, unless such a proceeding is specifically exempted under MAPA. *Lawrence v Dep't of Corrections*, [88 Mich App 167](#); 276 NW2d 554 (1979), superseded on other grounds by statute as stated in *Martin v Dep't of Corrections*, [424 Mich 553](#), 561; 384 NW2d 392 (1986).

IV. Adjudication: Contested Case Procedures

A. In General §15.7

MAPA provides the general outline of the procedures to be followed in all contested cases before DEQ. Because the procedures can vary substantially depending on the statutory scheme being administered, you should review the applicable statute and any administrative rules to determine if a different procedure is mandated. Different procedures often will be embodied in rules, which may contain filing deadlines or specialized requirements for notice to interested parties. DEQ's website describes its [administrative hearings](#) process and provides rules for the hearing process. This webpage links to the [form](#) for filing a contested case. The administrative rules that DEQ used to follow for conducting contested cases, [R 324.1 et seq.](#), was largely rescinded on January 15, 2015.

MAPA Section 3(3) defines a “contested case” as a proceeding, including licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. [MCL 24.203](#); *Penn v Dep't of Corrections*, [100 Mich App 532](#); 298 NW2d 756, 758 (1980). A proceeding is a contested case if a statute requires an evidentiary hearing. *McBride v Pontiac School Dist*, [218 Mich App 113](#), 121; 553 NW2d 646 (1996). Unless an evidentiary hearing is required by law, the proceeding is not a contested case. *In re Annexation of Territory in Larkin Twp to City of Midland*, [146 Mich App 29](#), 33; 379 NW2d 460 (1985).

B. Due Process §15.8

An agency that conducts contested case hearings must conform to fundamental due process, but the proceeding need not duplicate a judicial trial. *Sponick v Detroit Police Dep't*, [49 Mich App 162](#); 211 NW2d 674 (1973). In *Bd of Ed of Rochester Community Schools v Michigan State Bd of Ed*, [104 Mich App 569](#), 580; 305 NW2d 541 (1981), the court observed that MAPA satisfies “rudimentary due process demands” by providing the parties in a contested case with the opportunity for a prompt, trial-type hearing. The court in *Sponick* stated that

“[r]udimentary due process” demands (i) timely written notice detailing the reasons for proposed administrative action; (ii) an effective opportunity to defend by confronting any adverse witnesses and by being allowed to present in person witnesses, evidence, and arguments; (iii) a hearing examiner other than the individual who made the decision or determination under review; and (iv) a written, although relatively informal, statement of findings.

Sponick, 49 Mich App at 189 (citations omitted).

MAPA embodies these elements of rudimentary due process and applies to agency hearings unless the agencies are specifically exempted from MAPA. [MCL 24.315](#). DEQ does not administer any

statutes that exempt administrative hearings from MAPA; thus, MAPA applies to all adjudicative hearings before DEQ.

C. Standing §15.9

A contested case involves a hearing required by law to determine the legal rights, duties, or privileges of a named party. See §15.7. The purpose of the standing doctrine is to ensure sincere and vigorous advocacy. Accordingly, in *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, [487 Mich 349](#); 792 NW2d 686 (2010), the Supreme Court held that litigants have standing “whenever there is a legal cause of action.” *Id.* at 699. Moreover, if a cause of action is not provided at law, then a court can, in its discretion, determine whether a litigant has standing. *Id.* In doing so, it may assess if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large, as well as whether the statutory scheme at issue implies that the Legislature intended to confer standing on the litigant. *Id.*

The *Lansing Schools* decision overruled several cases requiring more demanding standing requirements, including that the litigant establish a concrete and particularized injury in fact, a causal connection between the alleged injury and the challenged conduct, and the possibility that the tribunal can redress their injuries. See *Lee v Macomb Cty Bd of Comm'rs*, [464 Mich 726](#); 629 NW2d 900 (2001); *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, [471 Mich 608](#); 684 NW2d 800 (2004). In DEQ contested cases, standing will be assessed on the basis of the *Lansing Schools* decision. Accordingly, litigants should look to whether a cause of action was provided in the statute, whether the litigant has a special injury, right, or interest different from the public at large, and whether the statutory scheme implies that the Legislature intended to confer standing. Nonprofit organizations may have standing in contested case matters, and may file a contested case, but only so long as one or more of their individual members would have standing to do so. See *Trout Unlimited, Muskegon-White River Chapter v City of White Cloud*, [195 Mich App 343](#), 348; 489 NW2d 188 (1992).

D. Notice and Request for More Definite Statement §15.10

Section 71(2) of MAPA, [MCL 24.271\(2\)](#), contemplates the commencement of cases by the giving of notice where the agency is the moving party against a regulated individual. Most cases within DEQ are not of this character. Rather, it is usually the party denied a permit who files a petition for a contested case. Many statutes provide that parties aggrieved by DEQ action like a permit denial, are entitled to a hearing. Where DEQ is the moving party, it is likely that DEQ will serve the respondent with an administrative complaint. Regardless of the procedural differences in commencing the hearing, the parties are entitled to adequate notice of the nature of the proceedings. *Traverse Oil Co v Chairman, Natural Resources Comm'n*, [153 Mich App 679](#), 688; 396 NW2d 498 (1986).

When the initial notice is inadequate, either party may request a more definite statement. [MCL 24.271\(2\)\(d\)](#). This same rule applies when the pleadings are inadequate for case preparation. Because MAPA's pleading rules are minimal, a more definite statement can be helpful in refining the issues.

E. Answers §15.11

A party to a contested case is not required to file an answer. However, it is good practice to file an answer to an administrative complaint or petition filed in a contested case because it assists in framing the issues and provides a more complete record should there be an appeal. If the initial pleading is not detailed enough to enable you to prepare a complete response, you may request a more definite statement pursuant to [MCL 24.271\(2\)\(d\)](#). See [§15.10](#).

F. Discovery §15.12

[MCL 24.274\(1\)](#) provides that an agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner that is appropriate to its proceedings. There are no generally applicable discovery rules for DEQ, although the substantive rules under some statutes may have minimal discovery rules. In all cases, discovery can take place only with the permission of the tribunal. In cases where discovery is not provided for, a party should ask the tribunal for discovery, detailing the reasons why discovery is sought and the ends to be accomplished by it. The parties are always free to agree to discovery as they deem appropriate. A petitioner has the right to have the agency's case disclosed to it. *Viculin v Dep't of Civil Service*, [386 Mich 375](#); 192 NW2d 449 (1971). Moreover, [MCL 24.274\(2\)](#) states that it is the agency's responsibility to make its records available.

The limited scope of discovery in contested cases is perplexing to many attorneys. They feel comfortable with the discovery rules available in circuit courts and believe those rules should apply to administrative agencies. This is one of the distinctions between agencies and courts. The agency is involved in due process fact-finding and is not a court. Moreover, in addition to being a party to the proceeding, the agency is a public body whose records are readily available to the public for inspection. See the discussion of the Freedom of Information Act in [§§15.58-15.61](#).

A deposition taken in compliance with the Michigan Court Rules in a contested case proceeding may be used as evidence in that proceeding. [MCL 24.274\(1\)](#). Persons involved in contested cases sometimes feel that it is necessary to either take the deposition of the department director or have the director appear as a witness in a case. In *Fitzpatrick v Secretary of State*, [176 Mich App 615](#); 440 NW2d 45 (1989), the plaintiff in an action against the secretary of state sought to take the deposition of the secretary of state. The court held that department heads and other high-ranking officials of state agencies could be compelled to give depositions only when the depositions are essential to the case or when the information cannot be obtained from another official.

G. Subpoenas §15.13

An administrative agency or hearing officer may issue subpoenas only if authorized by statute to do so. *Friends of Crystal River v Kuras Prop*, [218 Mich App 457](#); 554 NW2d 328 (1996). This rule also applies to DEQ proceedings. [MCL 319.387](#), a provision of the Oil and Gas Conservation Act, is the only statute administered by DEQ that gives the agency subpoena power. Parties in contested cases frequently misinterpret [MCL 24.280\(1\)\(b\)](#), which describes some of the powers of the agency's presiding officer, as including the power to sign and issue subpoenas in the agency's name. But the provision does not give an agency the power to issue subpoenas, and [MCL 24.273](#)

states that if there has not been a specific statutory grant of authority, an administrative agency or official has no power to issue a subpoena. Additionally, subpoena power that has not been expressly conferred will not be implied unless it is essential to fulfill the objectives of a statute. *Vance v Ananich*, [145 Mich App 833](#), 836; 378 NW2d 616 (1985). If an agency has subpoena power, a party must request in writing that a subpoena be issued. In at least one case before an administrative board, the subpoena power was broadly construed to include a precomplaint investigative subpoena. *Anonymous v Attorney Grievance Comm'n*, [430 Mich 241](#), 253; 422 NW2d 648 (1988). If an agency subpoena is ignored, an order requiring compliance may be obtained in the circuit court for Ingham County or for the county in which the agency hearing is held. [MCL 24.273](#).

H. Prehearing Conferences §15.14

Section 80(1)(e) of MAPA provides that an agency's presiding officer may "[d]irect the parties to appear and confer to consider simplification of the issues by consent of the parties." [MCL 24.280](#)(1)(e). Furthermore, the parties in a contested case may agree on any fact involved in the controversy by a written stipulation filed with the agency. [MCL 24.278](#)(1). See §[15.19](#) for a discussion of stipulations and consent orders. These two MAPA sections grant the presiding officer the authority to require a prehearing exchange of information in the form of prehearing statements and to conduct a prehearing conference.

DEQ requires parties to file prehearing statements that identify the issues, articulate the positions of the parties, and generally identify witnesses. This process is followed because of limited discovery. If a case is complex or presents unusual issues, a prehearing conference will be held. The purpose of the prehearing conference is the same as a court pretrial conference. It is convened for the parties try to simplify issues, stipulate to facts, and agree on matters that might expedite the course of the proceeding, as well as to set the schedule for the hearing. A schedule for the exchange of witness lists and proposed exhibits may be set. The prehearing conference may be the first meeting of the parties and their counsel. It is an excellent opportunity for resolution of the entire case or for agreement to resolve portions of the case.

I. Defaults, Summary Disposition, and Dismissals §15.15

MAPA is silent about default and summary disposition. [MCL 24.278](#)(2) states that cases are to be disposed of by stipulation, agreed settlement, consent order, waiver, default, or other methods agreed on by the parties. [MCL 24.272](#)(1) states that if a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

This meager guidance suggests two conclusions. First, a case may be disposed of by consent order or other agreement of the parties. See §[15.19](#). Second, if the agency is the moving party, the agency may proceed in the absence of the other party. In *Nylund v Dep't of Natural Resources*, [94 Mich App 584](#); 288 NW2d 660 (1980), commercial fishers involved in a license amendment proceeding chose at the beginning of the hearing not to participate and walked out. The hearing was continued in the absence of the licensees. The court held that the hearing examiner properly proceeded in their absence. *Id.* at 599.

MAPA requires that a factual record be developed in order to proceed against a party other than the agency. [MCL 24.272](#). If the non-agency moving party fails to appear in a contested case, the appropriate action is dismissal. *Id.*

Courts have held that in cases where there are no disputed factual allegations or where all facts are accepted as true, an administrative agency may grant summary disposition. See *Smith v Lansing School Dist*, [428 Mich 248](#); 406 NW2d 825 (1987). In *American Community Mutual Ins Co v Comm'r of Ins*, [195 Mich App 351](#); 491 NW2d 597 (1992), the court of appeals reiterated that the summary disposition rules are appropriate in administrative proceedings and that [MCL 24.272\(3\)](#) does not require evidentiary hearings when material facts are not at issue. Agencies also have the power to order a procedural dismissal of a case for a party's failure to proceed. The power to dismiss is essential for an agency to control proceedings and to provide for a prompt resolution of disputes. *Wronski v Sun Oil Co*, [108 Mich App 178](#); 310 NW2d 321 (1981).

J. Presiding Officers and Decision-makers

1. In General §15.16

The DEQ hearing process involves two steps. A presiding officer hears the case and prepares a proposal for decision. The final decision-maker makes the final determination. The public official named in the applicable statute as the decision-maker may not delegate the final decision-making authority to a subordinate because quasi-judicial duties cannot be delegated in the absence of express statutory authority. See *Detroit Edison Co v Michigan Corp & Securities Comm'n*, [361 Mich 150](#), 154; 105 NW2d 110 (1960). This should not be construed to require that the official actually hear the case. The DEQ uses administrative law judges from the MAHS to hear the case, prepare the record, and prepare a proposal for decision. The Director has delegated to all administrative law judges in the MAHS authority to decide preliminary and procedural matters in contested cases.

2. Bias of Decision-maker §15.17

A party to a contested case is entitled to a fair and impartial hearing; therefore, a decision-maker may be disqualified for bias. *Blue Water Isles Co v Dep't of Natural Resources*, [171 Mich App 526](#), 532, 533; 431 NW2d 53 (1988). If a party believes that the decision-maker is biased, the party must first file in good faith an affidavit alleging personal bias on the part of the presiding officer. The agency must determine the matter as a part of the record in the case, and its determination is subject to judicial review at the conclusion of the proceeding. [MCL 24.279](#). A petitioner need not exhaust administrative remedies where the final decision-maker is predisposed to rule against the aggrieved party. *Michigan Waste Systems, Inc v Dep't of Natural Resources*, [157 Mich App 746](#); 403 NW2d 608 (1987).

The fact that an administrative law judge is employed (or was previously employed) by DEQ is not grounds for removal. An agency's practice of appointing and employing hearing officers to hear cases on its behalf is specifically authorized by [MCL 24.279](#) and is well established in law. See *Champion's Auto Ferry, Inc v Public Service Comm'n*, [231 Mich App 699](#); 588 NW2d 153 (1998).

A decision-maker cannot be disqualified for taking a position, even in public, on a policy issue related to the dispute in the absence of a showing that the decision-maker is not “capable of judging a particular controversy fairly on the basis of its own circumstances.” *City of Livonia v Dep’t of Social Services*, [123 Mich App 1](#), 20; 333 NW2d 151 (1983) (quoting *United States v Morgan*, [313 US 409 \(1941\)](#)), appealed on other grounds, 423 Mich 466; 378 NW2d 402 (1985). *Michigan Intra-State Motor Tariff Bureau v Public Service Comm’n*, [200 Mich App 381](#), 391; 504 NW2d 677 (1993), restates four circumstances that call into question a decision-maker’s impartiality. These are when the decision-maker: (1) has a pecuniary interest in the hearing’s outcome; (2) has personally suffered abuse or criticism from the party; (3) has other matters before him or her involving the same petitioner; or (4) has prejudged the case because of prior involvement with the party.

3. Ex Parte Communications §15.18

After notice of hearing is given in a contested case, ex parte communications are prohibited between the presiding officer or decision-maker and any other person or party. [MCL 24.282](#). For example, in *Kassab v Acho*, [125 Mich App 442](#), 454; 336 NW2d 816 (1983), appealed on other grounds, 150 Mich App 104; 388 NW2d 263 (1986), a licensing case before the Liquor Control Commission, the commission received letters from the local police agency. The court considered the letters to be an ex parte communication to which both the plaintiff and the defendant were entitled to respond; thus, the parties were prejudiced by this procedural irregularity. In contrast, the court of appeals has held that a letter from a DEQ employee received by the agency during the pendency of a contested case, which identifies subject matter jurisdiction issues (and therefore is treated as a motion to dismiss), and which is forwarded to the other parties upon receipt does not constitute improper ex parte communication. See *Maxwell v Dep’t of Environmental Quality*, [264 Mich App 567](#); 692 NW2d 68 (2004).

K. Stipulations and Consent Orders §15.19

The parties in a contested case may agree on any fact involved in the controversy by a written stipulation filed with the agency. This stipulation can be used as evidence at the hearing and is binding on the parties. Parties are requested to agree on facts when practicable. [MCL 24.278\(1\)](#). The Michigan Supreme Court distinguishes between stipulations of fact, which are binding, and stipulations of law, which are not. *Eaton Cty Bd of Road Comm’rs v Schultz*, [205 Mich App 371](#), 379; 521 NW2d 847 (1994).

Stipulations and consent orders are valuable tools for resolving various issues or for disposing of an entire case. This process should be viewed in the same manner as stipulations and consent orders in the judicial system. In *Dana Corp v Appeal Bd of Michigan Employment Security Comm’n*, [371 Mich 107](#), 110; 123 NW2d 277 (1963), the Michigan Supreme Court praised the use of stipulations in administrative cases. The Court stated that after a stipulation has been approved, it is “sacrosanct” and cannot be changed by a hearing officer. If an alteration were permitted, it would deny due process because the parties, after accepting the stipulation, would be prevented from making any testimonial or evidentiary record. Additionally, the violation of a consent order may serve as the basis for the revocation of a license. See *Berlin & Farro Liquid Incineration, Inc v Dep’t of Natural Resources*, [80 Mich App 490](#); 264 NW2d 37 (1978).

L. Conduct of Hearings §15.20

DEQ hearings are often less formal than court proceedings. This informality arises for two reasons. First, MAPA provides only basic procedural guidance on the conduct of contested case hearings. Second, most agencies do not promulgate detailed procedural rules for the conduct of contested cases.

The procedures contemplated in MAPA frequently do not comport with the legislative schemes administered by DEQ. MAPA has evolved through a combination of court opinions and legislative action, both the result of actual or perceived agency abuses of regulated individuals' rights. The focus of MAPA is to protect regulated individuals from arbitrary agency action by ensuring that due process is afforded. MAPA assumes that the agency is the moving party. However, in most cases before DEQ, the moving party is not the agency. For example, Part 303 of NREPA (Wetland Protection), [MCL 324.30301 et seq.](#), provides for hearings initiated by an aggrieved party. It is more likely that a DEQ hearing will be initiated by a regulated individual or a person who has been denied a permit or license or who objects to restrictions imposed in a permit than by the agency.

Under [MCL 24.280](#)(1)(d), the presiding officer may regulate the course of the hearing, set the time and place for continued hearings, and fix the time for the filing of briefs and other motions. The power to regulate the course of the hearings is viewed as the power to do whatever is necessary to assure that a fair and orderly hearing takes place. [MCL 24.280](#). DEQ construes that power broadly, permitting the presiding officer to do those things reasonably necessary to assure a fair and expeditious hearing. This may include procedurally dismissing a case, even though this action might not be expressly authorized by statute. *Wronski v Sun Oil Co*, [108 Mich App 178](#), 185; 310 NW2d 321 (1981). Because administrative bodies are creatures of statute or the constitution, their powers are generally limited to those expressly conferred on them. However, these bodies should not be considered burdened with inflexible procedure; their authority "extends beyond that expressly granted to that necessarily implied." *Turner v General Motors Corp, Fisher Body Plant*, [70 Mich App 532](#), 543, 544; 246 NW2d 631 (1976), modified on other grounds sub nom *McAvoy v HB Sherman Co*, [401 Mich 419](#); 258 NW2d 414 (1977).

M. Evidentiary Matters

1. In General §15.21

MAPA mandates that the parties "be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." [MCL 24.272](#)(3). In addition, it provides for the rights to cross-examine witnesses and to submit rebuttal evidence. [MCL 24.272](#)(4). Deference is generally given to an agency's determination of the credibility of witnesses. However, there must be competent, material and substantial evidence on the whole record to support the determination that a witness is credible. *Birmingham School Dist v Buck*, [204 Mich App 286](#); 514 NW2d 528 (1994), remanded for reconsideration 448 Mich 909; 533 NW2d 581, adhered to on reconsideration 211 Mich App 523; 536 NW2d 297 (1995).

Administrative agencies are required by statute to follow, as far as practical, the rules of evidence as they are applied in civil cases before circuit courts. However, an agency may admit and give

probative effect to evidence of a type commonly relied on by reasonably prudent persons in the conduct of their affairs. [MCL 24.275](#). This can result in an agency admitting evidence that might not be received in a court. For example, hearsay evidence may be considered if it is commonly relied on by reasonably prudent persons in the conduct of their affairs. *Spratt v Dep't of Social Services*, [169 Mich App 693](#), 701; 426 NW2d 780 (1988). Agencies also have latitude both in how they choose to receive evidence and in the order of examination. See *Bates v Genesee Co Rd Comm'n*, [133 Mich App 738](#), 745; 351 NW2d 248 (1984) (ruling that clarification of witness's direct examination testimony on redirect that was arguably beyond scope of cross-examination not improper).

2. Burden of Proof §15.22

MAPA does not allocate the burden of proof in contested cases, and the statutes administered by DEQ seldom indicate who has the burden of proof in a contested case. In *Superior Public Rights, Inc v Dep't of Natural Resources*, [80 Mich App 72](#); 263 NW2d 290 (1977), the court stated that agencies may, by rule or decision, allocate the burden of proof in a manner consistent with the legislative scheme being administered. For example, an agency can impose the burden of producing evidence on a party having greater access to the relevant facts. If there are no formal rules concerning the allocation of the burden of proof, procedural due process requires that the parties be given notice of who is to bear the burden of proof on each issue. *City of Troy v Cleveland Pneumatic Tool Co*, [109 Mich App 361](#), 370 ;311 NW2d 782 (1981). Moreover, no special requirement of a degree of persuasion is generally applied. Agency findings of fact must be supported by the evidence and reflect a judgment that the preponderance of the evidence is in favor of the finding, but they may be based on reasonable inferences of fact. *Superior Public Rights*, 80 Mich App at 80-81. Agency determinations under the substantial evidence standard are those where a reasoning mind would accept the evidence as sufficient to support a conclusion, consisting of more than a mere scintilla of evidence. This may be substantially less than a preponderance of the evidence. See *Campbell v Marquette Prison Warden*, [119 Mich App 377](#); 326 NW2d 516 (1982).

3. Expert Witnesses and Learned Treatises §15.23

Most evidence at DEQ hearings is offered through expert testimony. The careful preparation, examination, and cross-examination of expert witnesses are the most critical aspects of practice before administrative tribunals. Administrative agencies such as DEQ are technical fact-finding bodies that can be expected to apply their expertise in the review of expert testimony. *Miller Bros v Public Service Comm'n*, [180 Mich App 227](#), 234; 446 NW2d 640 (1989). Courts give deference to the administrative agency's expertise, but do not abandon their duty to give meaning to legislative intent. *Id.* at 23. Experts should be properly qualified as to experience, education, and familiarity with the subject matter. Michigan Rules of Evidence 701-707 govern the use of expert testimony before administrative agencies.

Counsel often have difficulty developing certain areas of expert testimony. One such area is the use of learned treatises. Attorneys seem to be greatly tempted to offer into evidence the scientific literature experts rely on in reaching their opinions. It is important that you determine how you are going to use a treatise before you go into the hearing. [MRE 707](#) allows the use of treatises for

impeachment purposes but specifically excludes them from admissibility. You may also get a treatise admitted as an exception to the hearsay rule, [MCL 24.275](#). However, the better practice is to argue that DEQ should take judicial notice of the technical and scientific facts and conclusions in the treatise under [MCL 24.277](#). See [§15.25](#) for a discussion of administrative notice.

Counsel frequently make the mistake of trying to establish their case by cross-examining another party's expert witnesses. This almost never achieves the desired result and is very likely to bolster the credibility of the expert by providing an opportunity for him or her to expand and explain. Cross-examination is necessary to test the basis and soundness of experts' opinions and should be used only for that purpose. Do not submit to the temptation to maximize the use of an expert by soliciting opinions beyond the expert's area of expertise. This practice serves to dilute the true purpose for which the expert was hired.

4. Record [§15.24](#)

An administrative decision must be supported by competent, material, and substantial evidence on the whole record. Mich Const 1963, art 6, §28; *Butcher v Dep't of Natural Resources*, [158 Mich App 704](#); 405 NW2d 149 (1987). Although administrative agencies have considerable flexibility in deciding to receive evidence, it is important to recognize that the decision must have its basis in competent evidence. Thus, providing competent evidence must be a fundamental consideration in developing an administrative record.

Occasionally in administrative proceedings, counsel will remark that they are making a record for appeal to the circuit court. This displays a fundamental misconception of the administrative hearing process. Be aware that it is extremely difficult to overturn the factual determinations made by an administrative tribunal and that the parties are seldom able to expand the record on appeal. In *Thomas Twp v John Sexton Corp of Michigan*, [173 Mich App 507](#); 434 NW2d 644 (1988), conflicting testimony was offered in an administrative hearing in which one of the contested issues was the natural resources impact of draining an inactive clay pit that had filled with water and become a lake. On appeal, the circuit court reviewed the evidence and reached factual conclusions different from those made by the administrative law judge. The court of appeals noted that the circuit court disagreed with the hearing officer's conclusions that destruction of the lake would have no significant effect on fish and that a sports fishery on the site would require intensive management. The court of appeals held that the hearing officer's decision withstood the substantial evidence standard of review (see [§§15.41-15.42](#)) and that the circuit court erred in overturning the hearing officer's choice between two reasonably differing views. Likewise, in *Butcher*, the court observed that the reviewing court's function is not to resolve conflicts in the evidence or to pass on the credibility of the witnesses. 158 Mich App at 707. In *Consumers Power Co v Public Service Comm'n No 2*, [196 Mich App 687](#); 493 NW2d 424 (1992), the court reasoned that the MPSC was right to weigh the conflicting testimony of experts in making a determination, and that competent expert evidence supported the MPSC's conclusions.

Although administrative agencies have wide latitude in receiving evidence, particularly in view of the broad exception allowing receipt of evidence of a type commonly relied on by reasonably prudent persons (see [§15.21](#)), counsel would be wise to rely primarily on the limitations in the Michigan Rules of Evidence. If the rules are not followed and too much incompetent material

becomes part of the record, it becomes difficult for a reviewing court to ascertain whether the administrative decision was based on competent evidence.

5. Administrative Notice of Facts §15.25

Parties preparing for an administrative hearing rarely take advantage of [MCL 24.277](#), which provides that an agency may, in addition to taking notice of judicially cognizable facts, take judicial notice of general, technical, or scientific facts within the agency's specialized knowledge. For example, in *Federal Armored Service v Public Service Comm'n*, [204 Mich App 24](#), 28; 514 NW2d 178 (1994), the court found that a referee acted within the scope of his authority under [MCL 24.277](#) when he took judicial notice of financial statements that had been filed with the MPSC. This process, an expansion of the judicial notice doctrine available in the courts, can save time and the expense of retaining an expert witness to establish a recognized scientific fact. If, in preparing for an administrative hearing, you find that there are general, technical, or scientific facts of which the agency can take notice, request that it do so. You must serve a copy of the request on the other parties.

N. Briefs and Motions §15.26

Under [MCL 24.280](#)(1)(d), the presiding officer may fix the time for the filing of briefs and other motions. However, as is the case with most of administrative law practice, motion practice is not well-defined. Whether to hold oral argument on a motion is also within the discretion of the presiding officer. When a motion is filed, the agency will advise the parties of an appropriate time within which to respond. The administrative law judge will consider the matter and then make a decision on the motion.

O. Proposals for Decision §15.27

The presiding officer is required to prepare and serve a proposal for decision on the parties when the final decision-maker has not heard the case or read the record. [MCL 24.281](#)(1). The proposal must include the rationale for the decision and findings on each issue of fact and law necessary to the proposed decision. [MCL 24.281](#)(2). The proposal for decision must clearly articulate the reasons for the decision with enough detail to allow a meaningful review of the matter on appeal. See *Tziahanas v Dep't of Licensing and Regulation*, [143 Mich App 75](#); 371 NW2d 477 (1985).

After the proposal for decision is issued, the parties have an opportunity to file exceptions. An exception is a pleading that is responsive to the proposal for decision, setting forth the party's view of the evidence and legal interpretations favorable to its position or stating opposition to the decision. Failure to file exceptions to a proposal for decision constitutes a waiver of the objection since the final decision-maker would not be afforded an opportunity to correct any alleged errors. *Attorney Gen v Public Service Comm'n*, [174 Mich App 161](#), 164; 435 NW2d 752 (1988).

P. Final Agency Decision §15.28

After the agency receives the proposal for decision, the record, and the exceptions to the proposal for decision, the final decision maker sets a time for deciding the case. The final decision maker

may permit oral arguments, and DEQ usually does so. If the final decision maker consists of more than one person, the decision must be reached at an open meeting. [MCL 15.261](#) *et seq.* When only one person, such as DEQ's director, is the decision maker, the decision need not be reached at an open meeting. OAG, 1977-1978, No 5183, at 21 (March 8, 1977); see also §§[15.62-15.66](#). Even though the decision of a final decision maker must be made at an open meeting, the general public has no right to address the meeting. Persons who are not parties but who are interested in cases to be decided by DEQ do not have a right to address the final decision maker. See *Bd of Ed of Rochester Community Schools v Michigan State Bd of Ed*, [104 Mich App 569](#); 305 NW2d 541 (1981).

The final decision maker must make detailed findings of fact and conclusions of law. Findings of fact must be based exclusively on the evidence and on matters officially noticed and must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. [MCL 24.285](#); *Butcher v Dep't of Natural Resources*, [158 Mich App 704](#), 707; 405 NW2d 149 (1987).

A final decision maker is free to adopt a proposal for decision prepared by the presiding officer, to adopt a portion of that proposal, or to prepare a separate opinion. The final decision maker has all the power, just as if it had heard the case in the first instance. The only limitation on its power is that it must articulate the rationale for the decision. One thing that distinguishes administrative agency decision making from that of the courts is that an agency may use its technical expertise and experience to decide the case. *Great Lakes Steel Div of Nat'l Steel Corp v Public Service Comm'n*, [130 Mich App 470](#), 488; 344 NW2d 321 (1983).

V. Licensing

A. In General §15.29

Licenses are usually issued for a specific period of time. In cases where the application review is complex, for example in landfill re-licensure, the review might not be completed by the time the license expires. [MCL 24.291](#)(2) anticipates this situation by providing that an existing license for a continuing activity will continue until there is a final disposition of the application for renewal of the license. To obtain the benefit of this automatic extension of a license, the licensee must have made timely and sufficient application for renewal. *Id.*; see also *Weber v Orion Twp*, [136 Mich App 689](#); 358 NW2d 576 (1984). The status quo is preserved during the time of license review or proceedings concerning the validity of that license; for example, during a contested case hearing.

As a general proposition, when the relevant statute does not provide for the right to a hearing, the initial license applicant has no right to a contested case hearing. *TDN Enterprises, Inc v Michigan Liquor Control Comm'n*, [90 Mich App 437](#), 439; 280 NW2d 622 (1979). Where a statute gives a right to a hearing on an initial license application, MAPA's contested case hearing provisions apply. [MCL 24.291](#)(1). The Natural Resources and Environmental Protection Act (NREPA) provides that a person with legal standing to challenge a final decision regarding licensing is entitled to a contested case hearing. [MCL 324.1101](#)(1). The Michigan Court of Appeals has held that the failure of DEQ to promulgate rules governing the renewal of marina operating permits denied due process to the defendant marina because the defendant's permit renewal had been

denied on an *ad hoc* basis. *Dep't of Natural Resources v Bayshore Assoc, Inc*, [210 Mich App 71](#), 82; 533 NW2d 593 (1995).

B. Suspension, Revocation, or Amendment §15.30

The suspension, revocation, or amendment of a license by an agency is a two-step process. The agency must first give notice of the violations or conduct that merits the proposed action and extend an informal opportunity to the licensee to show compliance with all requirements for continued licensure. [MCL 24.292](#). The licensee is entitled to know the nature of the violations the agency believes were committed. The informal hearing is called a “*Rogers* hearing.” The name comes from the case of *Rogers v State Bd of Cosmetology*, [68 Mich App 751](#); 244 NW2d 20 (1976). *Rogers* established the requirement that notice of all violations and an informal opportunity to show compliance must be provided before formal proceedings are commenced. Interpreting MAPA §92, the *Rogers* court stated that it believed that “the Legislature intended to delay the revving up of formal bureaucratic machinery. The delay of formal proceedings, and concomitant provision of informal procedures for problem resolution, implement the legislative intent to allow a licensee to improve its operations without the stigma of formal proceedings.” *Id.* at 757. A permit issued by DEQ to operate a sanitary landfill on state-owned land constitutes a license under MAPA. DEQ may not revoke, withdraw, or cancel that license without providing notice and an opportunity to be heard through the contested case process. *Bois Blanc Island Twp v Natural Resources Comm'n*, [158 Mich App 239](#), 245; 404 NW2d 719 (1987).

At the *Rogers* hearing, the licensee may show that violations have been corrected. This may include the filing of necessary reports or plans or anything else necessary to correct the violation. The agency may still decide, even if the licensee has demonstrated its ability for future compliance, that the violations are sufficiently flagrant, frequent, or serious to warrant some kind of sanction. For example, a waste-handling facility whose poor housekeeping and general negligence cause a serious explosion and fire might not, by repairing the damage and representing that the facility will comply with regulations in the future, avoid license suspension or revocation.

The *Rogers* hearing provides an opportunity to enter into a negotiated resolution, such as a schedule for compliance or a consent order to bring the facility into full compliance. Presenting evidence at the *Rogers* hearing to show that the charged conduct has ceased and is not likely to be repeated does not assure that the agency will not formally pursue action against the licensee. The primary goal of revocation is the protection of the public.

C. Summary Suspension §15.31

When an agency finds that the public health, safety, or welfare requires emergency action, the agency may issue an order summarily suspending a license. [MCL 24.292](#). When a license is summarily suspended, the licensee is not provided with an informal opportunity to show compliance. These cases go immediately to a hearing. MAPA §92 requires that such proceedings be promptly commenced and determined. Summary suspension cases are given priority for hearing, since the license is suspended during the contested case hearing process.

In *Berlin & Farro Liquid Incineration, Inc v Dep't of Natural Resources*, [80 Mich App 490](#); 264 NW2d 37 (1978), DEQ summarily suspended various licenses issued to the operator of a hazardous waste incineration facility. The court held that threatened pollution that violated a consent agreement was sufficient evidence to support the summary suspension of the licenses even though there was no present emergency.

VI. Administrative Orders

A. Force and Effect §15.32

Administrative orders issued by administrative agencies are binding and enforceable. Even though an administrative tribunal, as a quasi-judicial agency, has no contempt powers, its writs, orders, and directives are valid and binding. Enforcement is obtainable by application to the circuit court. *Edros Corp v City of Port Huron*, [78 Mich App 273](#), 278; 259 NW2d 456 (1977). The enforcement of orders is a judicial power and, thus, to make administrative orders effective, a circuit court action must be filed. As is the case with courts, administrative agencies speak through their orders, not their opinions. When there is a conflict between an agency's opinion and a written order, the written order takes precedence. See *Kadri v Ford Motor Co*, [134 Mich App 138](#); 350 NW2d 763 (1984). With respect to penalties for violating an administrative agency's order, when the underlying statute is silent, the choice of penalty is consigned to the agency's discretion. In general, an agency may not reopen an administrative case for a redetermination on the merits or to change the penalty amount. *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm'n*, [212 Mich App 371](#); 538 NW2d 30 (1995).

B. Res Judicata and Collateral Estoppel §15.33

When an administrative order has been issued, the doctrines of res judicata and collateral estoppel may apply. These doctrines apply to administrative decisions when the procedures are of an adjudicatory nature, the parties have had a full opportunity to litigate the issue, a method of appealing the decision is available, and there is a clear legislative intent that the determination be final in the absence of an appeal. *Storey v Meijer, Inc*, [431 Mich 368](#), 373; 429 NW2d 169 (1988). However, a consent order may be subject to challenge by a third party who was neither given notice of nor participated in the proceeding. See *White Lake Improvement Ass'n v City of Whitehall*, [22 Mich App 262](#); 177 NW2d 473 (1970). In *Arim v General Motors Corp*, [206 Mich App 178](#); 520 NW2d 695 (1994), the court held that tort defendants who were state employees could assert collateral estoppel defensively based upon the results of prior state administrative proceedings.

The doctrine of res judicata is applied broadly to claims arising out of the same transaction and occurrence or events that the parties, exercising "reasonable diligence," could have stated at the time of the initial claim. Four requirements must be met for claims to be barred under the doctrine of res judicata: 1) the prior action must have been decided on the merits; 2) the prior action resulted in a final judgment; 3) the prior action included the same parties or those in privity with them; and 4) the issues set forth in the subsequent action were actually, or could have been, raised and decided in the original action. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, [460 Mich 372](#), 380; 596 NW2d 153 (1999).

Unpublished decisions: *Schultz v Dep't of Environmental Quality*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2008 ([Docket No. 272995](#)) (holding that petitioner's reassertion of inverse condemnation issue barred by doctrine of collateral estoppel, having been resolved in a prior case.); *B & S Telecom v Michigan Bell Telephone Co*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2013 ([Docket No. 304030](#)) (setting forth elements of res judicata).

VII. Administrative Searches

A. In General §15.34

Inspections are an integral part of the regulatory schemes implemented by an agency. Most regulatory statutes administered by DEQ provide for the inspection of regulated premises. Inspections may be necessary to determine the suitability of a site for permit issuance or to assure continued compliance with the law and with license requirements. Inspections may include the taking of soil, water, or air samples. In most cases, the licensees consent to an inspection of the premises. Business premises are protected by the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures. *Secretary of Labor v Barlow's, Inc.*, [436 US 307](#) (1978). Although warrants are ordinarily necessary for administrative searches, there are some exceptions to that principle. (see [§15.35](#)).

In *Richter v Dep't of Natural Resources*, [172 Mich App 658](#); 432 NW2d 393 (1988), an administrative search warrant was issued to collect soil and groundwater samples at a site that DEQ believed was contaminated. There was no specific statutory authorization for the search warrant. The court noted the traditional rule that search warrants are executed only after consideration by a neutral party. The court stated that the issuance of an administrative search warrant by a district court magistrate is proper on a showing of why an on-site inspection is justified. The court interpreted the authority of district court magistrates to issue search warrants to include administrative search warrants. See [MCL 780.651](#). Administrative search warrants are not barred and may be used in appropriate circumstances even if not specifically authorized by statute. *Stein v Michigan Employment Security Comm'n.*, [219 Mich App 118](#), 123; 555 NW2d 502 (1996).

B. Exceptions to the Warrant Requirement §15.35

If the licensee does not consent to an administrative inspection, it may be necessary for the agency to obtain an administrative search warrant to conduct the inspection. There are three occasions when search warrants are not required to be obtained prior to undertaking the search: (1) when exigent circumstances are present; (2) when the industry is pervasively regulated; and (3) when the activity is in plain view.

In *Tallman v Dep't of Natural Resources*, [421 Mich 585](#), 598; 365 NW2d 724 (1984), the court ruled that law enforcement officers who have probable cause to believe that a violation of the law has occurred may conduct warrantless searches when exigent circumstances make obtaining a

warrant infeasible. An example of a situation in environmental enforcement where a warrant is not required would be where a government official observes a hazardous waste transporter discharging the material onto the ground. A hazardous waste transporter should not be discharging its load directly into the ground. Thus, there would be probable cause to believe the law was being violated. The exigent circumstance is that there would be no time for the inspector to obtain a warrant before the entire load is discharged and the transporter has moved on.

The pervasively regulated industry exception is based on the premise that the industry to be searched is subject to so much regulation at every stage that no reasonable expectation of privacy remains. The cases that have applied the exception have related to such conduct as sales of firearms, prescription drugs, or alcohol. In *Tallman*, the Michigan Supreme Court extended the pervasively regulated exception to commercial fishing, an industry to which the exception had historically not been applied. *Tallman* is significant because until now, the exception has not applied to storage, transportation, and disposal of hazardous materials. Yet, the regulation of toxic and hazardous substances is extremely detailed and pervasive. Thus, *Tallman* might logically be extended to this area. See also *New York v Burger*, [482 US 691](#) (1987), in which the United States Supreme Court applied the closely regulated industry exception to a vehicle-dismantling business. See also *Gora v City of Ferndale*, [456 Mich 704](#), 715, 576 NW2d 141 (1998) (stating that whether the exemption applies depends upon the pervasiveness of the regulations, and whether persons in the business operate in an environment with knowledge that the business will be inspected in order to be effectively regulated.)

The plain-view exception to warrantless searches is based on the understanding that there can be no reasonable expectation of privacy when an activity is conducted in full public view. In *Dow Chem Co v United States*, [476 US 227](#) (1986), the United States Supreme Court upheld the use of sophisticated aerial photography as an inspection tool. The United States Environmental Protection Agency had obtained aerial photographs of Dow Chemical's plant that revealed substantial details of its manufacturing processes. The area photographed was well within Dow Chemical's plant-site, was not viewable from the ground, and could only be observed from the air with very sophisticated photographic equipment. The *Dow Chemical* case leaves unanswered the question of how sophisticated remote-sensing equipment must be before it causes an unreasonable interference with the expectation of a right to privacy.

VIII. Judicial Review

A. The Exhaustion of Administrative Remedies

1. In General §15.36

When an administrative remedy is available, the courts usually do not permit a judicial action. The courts invoke the doctrines of exhaustion of administrative remedies and primary jurisdiction to prevent aggrieved parties from resorting prematurely to the judicial system. See §[15.37](#) for a discussion of primary jurisdiction. If the underlying statute provides for a right to an administrative hearing that might resolve the dispute, then the parties must pursue that administrative remedy before a court action may be filed:

Exhaustion of administrative remedies serves several policies: (1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute will render a judicial resolution unnecessary.

International Business Machines Corp v Dep't of Treasury, [75 Mich App 604](#), 610; 255 NW2d 702 (1977). An agency's decision is not "final" unless all of a party's administrative remedies are exhausted and the agency's final decisionmaker has issued a final order.

By statute, DEQ can issue declaratory rulings regarding its rules or orders, given the applicable facts in a given case. [MCL 24.263](#). A petitioner in a contested case cannot maintain a separate action for a declaratory judgment in the circuit court until a final agency decision is reached. Rather, under the applicable statute ([MCL 24.263](#), granting agencies the power to issue declaratory judgments), a petitioner must first seek relief from DEQ, and then from the circuit court after DEQ issues or denies the declaratory relief requested.

Exhaustion of administrative remedies is not an inflexible precedent to judicial review and will not be required if review of the agency's final decision will not provide an adequate remedy. *Attorney General v Diamond Mortgage Co*, [414 Mich 603](#); 327 NW2d 805 (1982); *Reo v Lane Bryant, Inc*, [211 Mich App 364](#); 536 NW2d 556 (1995). Direct resort to the courts is proper when the relief sought is beyond DEQ's jurisdiction, such as when a party challenges the constitutionality of a statute. An applicant for a marina denied a permit solely on the basis that the marina did not own the riparian rights to the land might seek direct judicial review because a title question is the only issue presented. Such an issue properly belongs in circuit court.

If an appeal to an administrative agency would be futile, courts can grant an exception to the exhaustion requirement. Futility exists where an administrative agency does not have the power to effect the issue under review. *Manor House Apartments v City of Warren*, [204 Mich App 603](#); 516 NW2d 530 (1994). The court in *WA Foote Mem Hosp v Dep't of Pub Health*, [210 Mich App 516](#); 534 NW2d 206 (1995) concluded that the plaintiff had not sufficiently supported the argument that exhausting administrative remedies would be futile. Further, the court held that the Revised Judicature Act does not confer jurisdiction on the courts unless the plaintiff has exhausted all of its administrative remedies. Finally, the court said that while a plaintiff need not exhaust all administrative remedies when the only issue is a constitutional one, the existence of any other issue requires that administrative procedures be exhausted. See also *Michigan Supervisor's Union OPEIU Local 512 v Dep't of Civil Service*, [209 Mich App 573](#); 531 NW2d 790 (1995); *West Bloomfield Charter Twp v Karachon*, [209 Mich App 43](#); 530 NW2d 99 (1995).

NREPA provides that in all cases where a non-licensing administrative remedy is available, a person who has standing to challenge a final decision need not exhaust administrative remedies but may seek direct court review. The granting of direct court review exhausts the person's

administrative remedies with regard to that matter. [MCL 324.1101\(2\)](#). Note too that there are instances of concurrent jurisdiction between the administrative agency and the circuit court. *Nummer v Dep't of Treasury*, [448 Mich 534](#); 533 NW2d 250 (1995) (civil rights actions). NREPA allows all non-licensing issues to be appealed directly to the circuit court as an alternative to any administrative remedy provided for in NREPA. [MCL 324.1101\(2\)](#). This raises a question about the proper procedure for appeals under the Revised Judicature Act and MAPA. An appeal of a non-licensing issue under MAPA would apparently proceed without an administrative record having been made before the agency as contemplated by MAPA.

A petitioner need not exhaust administrative remedies where the decision-maker was predisposed to rule against the petitioner. *Michigan Waste Systems, Inc v Dep't of Natural Resources*, [157 Mich App 746](#); 403 NW2d 608 (1987). However, there is a presumption that an administrative agency “if given a chance to pass upon the matter, will decide correctly and will not fail in the performance of its duty.” *Stabley v Shelby Twp Supervisor*, [145 Mich App 497](#); 378 NW2d 524 (1985) (quoting *Turner v Lansing Twp*, [108 Mich App 103](#), 110; 310 NW2d 287 (1981)). For further discussion of exhaustion of administrative remedies in terms of potential remedies, see chapter 16.

Unpublished decisions: Chippewa Cty Bd of Rd Comm'rs v Dep't of Natural Resources and Environment, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2012 ([Docket No. 302486](#)) (holding that an agreement with agency to voluntarily withdraw contested case petition and appeal to the circuit court is not a final agency decision); *Grass Lake Improvement Bd v Dep't of Environmental Quality*, unpublished opinion per curiam of the Court of Appeals issued Feb. 14, 2013 ([Docket No. 306991](#)).

2. Primary Jurisdiction Distinguished §15.37

The doctrine of primary jurisdiction can be distinguished from the exhaustion of administrative remedies doctrine in that exhaustion of administrative remedies applies when a claim must first be brought before an administrative agency while primary jurisdiction applies when a court, as well as an administrative agency, has jurisdiction. In such cases, the courts defer to an agency's jurisdiction when there is a need for uniformity of action and the subject matter is within an area requiring the exercise of administrative expertise.

Issues of primary jurisdiction are not uncommon. Court action against DEQ may be available pursuant to citizens' suit provisions in a statute or in Part 17 of NREPA (Michigan Environmental Protection Act) (MEPA), [MCL 324.1701 et seq.](#) (see [Chapter 14](#)). See *Michigan Bear Hunters Ass'n v Natural Resources Comm'n*, [277 Mich App 512](#); 746 NW2d 320 (2007) (jurisdiction exists under either MAPA or Revised Judicature Act where the statute does not clearly articulate the means for review). At the same time, the regulatory statute may provide a right to a contested case hearing. The suit might seek to enjoin an activity DEQ is permitting. A court may grant an injunction maintaining the status quo and remand the case for determination in an administrative hearing. See the discussion in chapter 16 regarding potential remedies.

Unpublished decision: *Michigan Ass’n of Governmental Employees v Michigan*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2013 ([Docket No. 304920](#)) (stating that the Michigan Civil Service Commission does not possess superior knowledge or expertise in the area of contract law that would vest primary jurisdiction in that agency).

B. Avenues for Relief §15.38

Administrative agencies make many decisions concerning regulated entities. Decisions may be reached as a result of a formal contested case hearing or by some other process. In most cases, judicial review of the administrative decisions is available through one of three avenues: (1) review prescribed in the statutes applicable to the particular agency; (2) appeal pursuant to the Revised Judicature Act of 1961, [MCL 600.631](#), which allows appeals from agency decisions to circuit court; or (3) review pursuant to MAPA. *Blue Cross & Blue Shield of Michigan v Comm’r of Ins*, [155 Mich App 723](#), 728-729; 400 NW2d 638 (1986); see also *Michigan Bear Hunters Ass’n*, [277 Mich App 512](#); 746 NW2d 320 (2007).

To determine if an appeal is available and under what procedure, first review the substantive statute. (For a list of primary environmental statutes conferring an opportunity for review, see [Exhibit 15.1](#)). If the statute includes a specialized procedure for appeal, that method must be followed. If an administrative hearing was conducted pursuant to MAPA, the appeal is pursuant to MAPA. Where the statute is silent about appeals from administrative actions, appeal pursuant to the Revised Judicature Act is proper. In *Blue Cross & Blue Shield*, the court stated that the review of agency orders and decisions under MAPA is based on an evidentiary hearing at the administrative level. Because no hearing was held in that case, MAPA was inapplicable. *155 Mich App* at 729. *Blue Cross & Blue Shield* involved a cease and desist order issued by the insurance commissioner. The court held that appeal under the Revised Judicature Act was the appropriate vehicle for review. Thus, a strong argument exists that both cease and desist orders and orders to restore issued by DEQ without a hearing are reviewable in the same manner.

The time frames for filing an appeal under these three different statutory schemes are different. An appeal under MAPA must be filed within 60 days after the date the notice of the final decision or order was mailed. [MCL 24.304](#). An appeal pursuant to Revised Judicature Act §631 must be filed within 21 days after the entry of the order of judgment appealed from. [MCR 7.101\(B\)\(1\)](#). Appeals under statutory procedures vary according to the statute. Awareness of the proper manner of appeal is critical to avoid an untimely filing.

C. Administrative Procedures Act Appeals

1. Mechanics of Filing for Judicial Review §15.39

Parties seeking judicial review of a final decision or order in a contested case after administrative remedies have been exhausted must comply with “any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules.” [MCL 24.302](#). In the absence of special procedures, the appeal is made by petition for review. *Id.*

The petition must be filed within 60 days of the date the notice of the final decision is mailed. [MCL 24.304](#)(1). The action must be filed in the circuit court for the Michigan county in which the petitioner resides or has his or her principal place of business or in the Ingham County Circuit Court. [MCL 24.303](#)(1). The procedure is further detailed in [MCR 7.105](#).

The filing of a petition for review does not operate to stay the agency action. The court or the agency may stay the action during the pendency of the appeal. It is extremely unlikely that an agency will stay actions. The court may order a stay under [MCR 7.105](#)(G).

2. Official Record; Transcripts §15.40

Within 60 days after the petition for review has been served, the agency must file the record of the proceedings with the court. [MCL 24.304](#)(2). The contents of the record to be filed include:

1. notices, pleadings, motions, and intermediate rulings;
2. questions and offers of proof, objections thereto, and rulings thereon;
3. evidence presented, including exhibits and matters officially noticed; and
4. proposed findings and exceptions, and any decisions, opinions, orders, or reports of the presiding officer.

[MCL 24.286](#)(1). Oral proceedings must be recorded. [MCL 24.286](#)(2). The record includes the agency's complete file of the contested case. The file for the contested case hearing is separate from the department's permit file; the latter is not a part of the record unless offered and properly admitted.

Persons appealing agency decisions to circuit court frequently assume that the official record includes a transcript of proceedings. However, MAPA §86(2) provides that oral proceedings at which evidence is presented must be recorded but need not be transcribed unless requested by a party. The requesting party must pay for the transcription of the portion requested except as otherwise provided by law. [MCL 24.286](#)(2). If the agency has not prepared a transcript, the petitioner must order the transcript for transmittal to the circuit court on appeal. The agency has no obligation to prepare a transcript of the proceeding and frequently does not.

3. Standard of Review

a. In General §15.41

A reviewing court may set aside an agency's decision where the decision was:

- (a) in violation of the constitution or a statute;
 - (b) in excess of the statutory authority or jurisdiction of the agency;
 - (c) made upon unlawful procedure resulting in injury to a party;
 - (d) not supported by competent, material and substantial evidence on the whole record;
 - (e) arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion;
- or,

(f) affected by other substantial and material error of law.

[MCL 24.306](#).

In *Citizens Disposal, Inc v Dep't of Natural Resources*, [172 Mich App 541](#); 432 NW2d 315 (1988), the court discussed the standard of review for administrative decisions. The court noted that Mich Const 1963, art 6, §28 and [MCL 24.306](#) require that there be competent, material, and substantial evidence on the whole record to support the decision. The substantial evidence test requires evidence that a reasonable person would accept as sufficient. *Cogan v Bd of Osteopathic Medicine & Surgery*, [200 Mich App 467](#), 469-70; 505 NW2d 1 (1993). Where a court determines that a hearing officer acted in excess of his or her authority or that the hearing officer's decisions are "not supported by competent, material, and substantial evidence[,]...legal rulings of an administrative agency may be set aside if they violate the constitution or a statute or are affected by a substantial and material error of law." *In re 1987-88 Medical Doctor Provider Class Plan*, [203 Mich App 707](#), 716; 514 NW2d 471 (1994); see also *Detroit Police Officers Ass'n v City of Detroit*, [212 Mich App 383](#); 538 NW2d 37 (1995). An agency's guidelines and methodology in interpreting a statute are not entitled to the deference that should be given an agency's construction of rules adopted pursuant to statute. *West Bloomfield Hosp v Certificate of Need Bd*, [452 Mich 515](#); 550 NW2d 223 (1996).

The *Citizens Disposal* court explained that where a statute does not provide for an administrative hearing, the proper review mechanism is under the Revised Judicature Act of 1961, [MCL 600.631](#). A review under the Revised Judicature Act is limited to a determination of whether the action is authorized by law and is arbitrary and capricious. Where a hearing is not required, the evidentiary basis for the agency's decision is not within the scope of the appeals court's review. See, e.g., *Brandon School Dist v Michigan Ed Special Services Ass'n*, [191 Mich App 257](#), 263; 477 NW2d 138 (1991). *Citizens Disposal* demonstrates the confusion that can arise when an appeal is made under multiple statutes with differing standards of review. *Citizens Disposal* also discusses the relationship of judicial review under substantive statutes to judicial review under MEPA, [MCL 324.1701](#) *et seq*. The precise relationship remains uncertain. The case suggests that it is appropriate to apply the "competent, material, and substantial evidence" test to the specific subject matter statute, while MEPA requires review de novo.

Unpublished decision: *Hammond v Civil Service Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2013 ([Docket No. 309704](#)) (if a hearing is not required, the evidentiary basis for the agency's decision is not within the scope of appellate review).

b. Agency Fact-Finding §15.42

The standard for judicial review of agency fact-finding is to determine whether the agency's decision is supported by competent, material, and substantial evidence on the whole record. The party asserting that a decision is erroneous carries the burden of overcoming a presumption of the validity of the agency's decision. The substantial evidence standard is satisfied with more than a scintilla of evidence, which may be substantially less than a preponderance. *Admiral Merchants*

Motor Freight, Inc v Dep't of Labor, [149 Mich App 344](#), 349; 386 NW2d 193 (1986). See also *In re Payne*, [444 Mich 679](#), 692; 514 NW2d 121 (1994); *Great Lakes Sales, Inc v State Tax Comm'n*, [194 Mich App 271](#), 280; 486 NW2d 367 (1992); *Detroit Police Officers Ass'n*, [212 Mich App 383](#); 538 NW2d 37 (1995); *Black v Dep't of Social Services*, [212 Mich App 203](#); 537 NW2d 456 (1995) (stating that substantial evidence is what a reasonable mind would accept as adequate to support a conclusion and consists of more than a scintilla, but less than a preponderance, of the evidence). When a court reviews an agency's decision in order to ascertain whether the decision was supported by competent, material and substantial evidence on the whole record, the court must review the entire record, not just those portions supporting the agency's findings. *Great Lakes Sales*, 194 Mich App at 280. Where requirements of a statute are clearly met, a ruling by an administrative agency to the contrary will be found to be unsupported by competent, material and substantial evidence on the record. *Herman Brodsky Enterprises v State Tax Comm'n*, [205 Mich App 348](#); 522 NW2d 130 (1994); see also *Detroit Police Officers Ass'n*; ; *Black*, 212 Mich App at 203.

Courts give considerable deference to the findings of fact by administrative agencies. When a court reviews an administrative agency's decision for substantial evidence, it "should accept the agency's findings of fact if they are supported by that quantum of evidence." A court should not set aside findings merely because substantial evidence on the record also supports alternative findings. *In re Payne*, 444 Mich at 692; see also *Dep't of Community Health v Risch*, [274 Mich App 365](#); 733 NW2d 403 (2007). Agency decisions need not make individual findings regarding the credibility of each witness. Those findings must include precise statements of the evidence supporting the agency's ruling that will facilitate appellate review. *Butcher v Dep't of Natural Resources*, [158 Mich App 704](#), 707; 405 NW2d 149 (1987). In *Thomas Twp v John Sexton Corp of Michigan*, [173 Mich App 507](#), 513; 434 NW2d 644 (1988), the court held that the circuit court erred in displacing the administrative law judge's choice between two reasonably differing views. The court stated that it is very difficult to overturn the factual findings of an administrative agency on appeal. It further stated that some participants in administrative proceedings mistakenly assume that they are building a record for the circuit court and that the administrative hearing need not be taken seriously because it can be appealed in the circuit court. The administrative process is executive branch fact-finding in a due process framework. The judicial deference to that fact-finding is significant. See §[15.24](#).

Unpublished decisions: *In re Application of Detroit Edison Co*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2013 ([Docket No. 308130](#)) (concluding that remand to the agency was appropriate where Detroit Edison's cost benefit analysis relating to automatic metering infrastructure (\$82.9 million) differed wildly from the Public Service Commission Staff's analysis (negative \$52.3 million)).

c. Conclusions of Law by Agency §15.43

Judicial review of an agency's interpretation of the law and administrative rules is much less constrained than judicial review of agency findings of fact. Nevertheless, courts place considerable value on an agency's interpretations of the law it administers, and deference should be given to an

agency's interpretation of its own rules. *Thomas Twp v John Sexton Corp of Michigan*, [173 Mich App 507](#), 514; 434 NW2d 644 (1988). Unless an administrative agency's statutory interpretation is clearly wrong or another construction is plainly required, the courts will give deference to the agency's construction. *Indenbaum v Michigan Bd of Medicine*, [213 Mich App 263](#); 539 NW2d 574 (1995); *Telephone Ass'n of Michigan v Public Service Comm'n*, [210 Mich App 662](#); 534 NW2d 223 (1995); *Ronney v Dep't of Social Services*, [210 Mich App 312](#); 532 NW2d 910 (1995). An administrative agency may reexamine its prior decisions and depart from precedent, so long as the departure is supported by a rationale that is not arbitrary and capricious. *Melvindale-Northern Allen Park Federation of Teachers v Melvindale-Northern Allen Park Pub Schools*, [216 Mich App 31](#); 549 NW2d 6 (1996). The construction given a statute by an administering agency is always entitled to deference and should not be reversed without good reason. *Margreta v Ambassador Steel Co (On Rehearing)*, [380 Mich 513](#), 519; 158 NW2d 473 (1968). In *Consumers Power Co v Public Service Comm'n No 1*, [196 Mich App 436](#); 493 NW2d 902 (1992), the court of appeals endorsed the concept of deferring to a department's construction and enforcement of its own statute, stating that if the interpretation is reasonable, the appellate courts will not overrule it without cogent reasons, citing *Breuhan v Plymouth-Canton Community Schools*, [425 Mich 278](#), 282-283; 389 NW2d 85 (1986). To prevail in an administrative appeal, the person seeking review must show that the agency has improperly applied the law or made a significant procedural error. See §§[15.41-15.42](#).

D. Mandamus §15.44

Mandamus is a court-issued discretionary writ that commands a public officer or agency to perform a nondiscretionary duty. [MCL 600.4401](#) and [MCR 3.305](#) govern the procedure for issuance of the writ. A mandamus action may be brought against a state officer in the court of appeals, in the circuit court with proper venue, or in the Ingham County Circuit Court. [MCL 600.4401](#)(1). "Mandamus is an extraordinary remedy and lies only when there is a clear legal duty incumbent on the defendant and a clear legal right in the plaintiff to the discharge of that duty." *Moore v Marshall*, [141 Mich App 167](#), 169; 366 NW2d 26 (1985).

Mandamus is used to compel the performance of a ministerial act, rather than to seek relief that would compel a public official or administrative body to exercise decision-making discretion in a particular manner under the law. A writ of mandamus cannot be issued for relief that can be secured through any other remedy, legal or equitable. *Musselman v Governor*, [200 Mich App 656](#), 662-663; 505 NW2d 288 (1993), *aff'd* 448 Mich 503; 533 NW2d 237 (1995), *adhered to on reh'g* 450 Mich 574; 545 NW2d 346 (1996). A writ of mandamus will not issue where the agency was acting in a legislative capacity and its acts were discretionary in nature. *City of South Haven v South Haven Charter Twp*, [204 Mich App 49](#); 514 NW2d 176 (1994).

The question of whether a permit or license should have been issued is not properly the subject of a mandamus action because of the discretion involved in the decision-making process on permit or license applications. *Southfield Woods Water Co v Comm'r of State Dep't of Health*, [352 Mich 597](#); 90 NW2d 850 (1958). However, mandamus might be appropriate in some permit cases. If the Department does not approve or disapprove the permit application within the time provided, the application is considered approved and the Department is considered to have made the determinations required for approval. *Id.* If a complete application has been filed and no action has

been taken within the required time, mandamus might be available to require DEQ to issue a permit.

E. Superintending Control §15.45

A superintending control order enforces a court's superintending control over lower courts and tribunals [MCR 3.302\(A\)](#). A circuit court's superintending control power extends to administrative tribunals of a judicial or quasi-judicial nature. Although a circuit court may exercise superintending control over an administrative agency acting in a quasi-judicial capacity, a superintending control order is an extraordinary remedy and is not available where there is a plain and speedy alternative remedy. *Stabley v Shelby Twp Supervisor*, [145 Mich App 497](#), 499, 500; 378 NW2d 524 (1985). Thus, superintending control is appropriate only where there is not an adequate remedy available. It also is used to determine if the inferior tribunal had jurisdiction, exceeded its jurisdiction, or proceeded unlawfully. *People v Burton*, [429 Mich 133](#), 139; 413 NW2d 413 (1987).

In superintending control actions, the reviewing court determines whether: (1) the inferior tribunal had jurisdiction; (2) the jurisdiction was exceeded; and (3) the tribunal proceeded according to law. See *In re Payne*, [193 Mich App 620](#); 484 NW2d 759 (1992), *aff'd in part and rev'd in part* on other grounds [444 Mich 679](#); 514 NW2d 121 (1994). In *Public Health Dep't v Rivergate Manor*, [452 Mich 495](#); 550 NW2d 515 (1996), the court held that while the Certificate of Need Board had the implied power to modify a certificate of need, a superintending order was appropriate because the Board had failed to follow the procedures set forth in MAPA. The court further noted that a superintending order was the proper remedy because the petitioner (the Department of Public Health) was precluded from appealing the Board's actions. The court in *Gretel v Workers' Compensation Appellate Comm'n*, [217 Mich App 653](#); 552 NW2d 532 (1996), held that the Workers' Compensation Appellate Commission did not have the implied power to vacate a magistrate's decision and that, therefore, the commission had exceeded its authority by vacating a magistrate's decision and requesting a new hearing. Because the commission had exceeded its authority, the court held that the proper remedy was to grant the plaintiff's writ for superintending control to compel the commission to act within the bounds of its express powers.

The distinction between superintending control and mandamus is subtle. Mandamus is directed to an administrative officer in his or her administrative capacity; superintending control is directed to an administrative officer who is acting as a tribunal with quasi-judicial powers. Mandamus seeks to force performance of statutory duties by public officials while superintending control is the exercise of the courts' prerogative to control the actions of inferior tribunals.

The remedy of superintending control can be used in the administrative hearing context in the same manner as it would be used in the courts. If an agency improperly refused to grant a hearing or denied intervention of a proper party, superintending control might be used to correct the errors. Superintending control has been used by the circuit courts to reinstate a license summarily suspended and to require an immediate hearing on the license revocation.

Unpublished decision: Flanagan v Macomb Cty Employees Retirement Sys, unpublished opinion per curiam of the Michigan

Court of Appeals, issued October 25, 2012 ([Docket No. 305754](#)) (stating that superintending control is appropriate where the governmental actor has failed to perform a “clear legal duty,” and the petitioner does not have clear legal remedy, such as in cases where the legislature has not provided a means of appealing the decision of an agency acting in a quasi-judicial manner).

IX. Rulemaking

A. In General §15.46

For those who practice environmental law in Michigan, the rulemaking power is the single most important power of state agencies. This is because the rules authorize administrative agencies to provide the details for the implementation of broadly worded environmental statutes. The statutes usually provide general policy guidance for regulatory programs. Administrative rules provide the specific details necessary to carry out a program and are usually many pages longer than the underlying statute.

A rule is defined under MAPA as:

an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

[MCL 24.207](#). There are several specific exceptions to the definition of a rule, including resolutions of the State Administrative Board, opinions of the Attorney General, decisions in contested cases, rules relating to hunting and fishing, rules governing the use of streets and highways, rules that do not affect the rights of persons, or rules that are merely explanatory.

Rules may be procedural or substantive. For instance, they might describe the application process for permits or licenses, or performance and construction standards for the construction and operation of various regulated activities. For those involved in the permitting process, a thorough knowledge of the rules is essential. The court of appeals upheld the practice of incorporating administrative rules into permit conditions in *Detroit Edison Co v Air Pollution Control Comm’n*, [167 Mich App 651](#); 423 NW2d 306 (1988). Further, a violation of a promulgated rule may be a crime if the statute so provides. [MCL 24.232\(3\)](#).

An agency’s decision regarding the grant or denial of an application is not automatically invalid because the agency has failed to adopt rules requisite to the processing of the application. In *West Bloomfield Hosp v Certificate of Need Bd*, [452 Mich 515](#), 550 NW2d 223 (1996), an agency failed to promulgate a required state medical facilities plan for the agency to use in deciding applications for certificates of need. The court of appeals had held that failure to adopt a state medical facilities plan automatically precluded the Department of Public Health from processing applications for

certificates of need. The Supreme Court reversed, noting that a court may excuse a procedural deficiency if the rule in question merely assists the agency in the exercise of its discretion and there is no substantial prejudice to the complaining party. The Supreme Court remanded to the court of appeals for consideration of whether the board's decision was made in accordance with the statutory criteria.

B. Where to Find Rules §15.47

Administrative rules may be found in three places: the *Michigan Administrative Code*, the *Annual Administrative Code Supplements* (AACS), and the *Michigan Register*. The *Michigan Administrative Code* contains all the rules that existed at the time of its compilation in 1979. Annual administrative code supplements have been issued since 1979. Proposed rules or new rules not yet included in a supplement are found in the *Michigan Register*. The rules are not recompiled on a regular basis, making a search for rules tedious. To find a current version of a rule, all three sources must be searched. The supplements contain only those rules that are new or amended. The unchanged portions of the rules on a particular topic are not reprinted in the supplements. To assemble a complete set of rules in an area where there have been changes requires copying, cutting, and pasting the various components from the Code, the AACS, and the *Michigan Register*. The Freedom of Information Act requires all state agencies to have copies of their promulgated rules available for copying. [MCL 15.241](#)(b), (c). The Michigan Administrative Code is available at the Department of Licensing and Regulatory Affairs [website](#). Many agencies make their rules directly available on their websites.

C. Rule Promulgation Process §15.48

The rule promulgation process in Michigan is long and convoluted. It includes publication of the proposed rule in the *Michigan Register*, a review of the proposed rule by the Legislative Service Bureau (LSB) and the Office of Regulatory Reinvention, public hearings, a public comment period, and approval or rejection of the proposed rule by the legislature's Joint Committee on Administrative Rules (JCAR). The process is so involved and cumbersome that some administrative agencies believe it is easier to propose an amendment to the statute than to promulgate new rules. The rules can be challenged because they were improperly promulgated (see §[15.49](#)) or do not comport with legislative intent (see §[15.50](#)). The Michigan Department of Licensing and Regulatory Affairs publishes a summary of the process called [Administrative Rules Process in a Nutshell](#).

Chapter 3 of MAPA, [MCL 24.231 et seq.](#), contains the procedures for processing and publishing rules. In addition, the JCAR and the LSB have published guidance materials that elaborate on the process and materials that must be filed. For a discussion of the rationale for the complex rulemaking process, see *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services*, [431 Mich 172](#), 177, 178; 428 NW2d 335 (1988).

MAPA severely limits the methods by which a state agency may establish standards of conduct or promulgate policy. Many of the tools used by federal agencies to implement programs, such as policy statements, memorandums, and regulatory bulletins, are not available to Michigan agencies. An agency may establish standards through the rule promulgation process or through a contested

case. *Independent Ins Agents of Michigan v Comm'r of Michigan Financial Institutions Bureau*, [145 Mich App 373](#); 377 NW2d 410 (1985).

D. Who Can Promulgate Rules §15.49

The authority to promulgate rules is an important power of an administrative agency. It is usually not delegable to a subordinate official. The Natural Resources Commission has no authority to delegate the power to promulgate rules to its staff. The Natural Resources Commission also has no authority to promulgate certain rules under Part 55 (Air Pollution Control) of NREPA, [MCL 324.5501](#) *et seq.* This does not mean that the staff cannot draft or prepare the rules or hold public hearings on them. It means that only the entity with the statutory authority may formally adopt a rule.

Within DEQ there is some confusion about where the rulemaking authority resides. This confusion is a result of various governors transferring authority from one agency to another pursuant to the Executive Organization Act of 1965, [MCL 16.101](#) *et seq.* *Soap & Detergent Ass'n v Natural Resources Comm'n*, [415 Mich 728](#); 330 NW2d 346 (1982), involved a challenge to rules promulgated by the Natural Resources Commission under a statute that appeared to vest the power to promulgate rules in the Water Resources Commission (WRC). The case examines some of the confusion resulting from the transfer of powers by executive order. Although the statute at that time named the WRC as the rule-promulgating body, an executive order transferred the power to the Natural Resources Commission. The court concluded that the governor has broad powers to transfer functions among principal departments and held that the challenged rule had been validly promulgated. Executive Order No. 1992-19 created the Michigan Environmental Science Board (ESB), the purpose of which is to advise the governor and DEQ on proposed rules. The ESB was transferred from the Department of Management and Budget to the Michigan Department of Environmental Quality by Executive Reorganization Order No. 2007-15, and later to the DEQ by Executive Reorganization Order No. 2009-31.

E. Standards for Promulgation §15.50

The power to promulgate rules is not unrestrained, and the courts have frequently struggled with challenges to promulgated rules. The rule challenges typically assert that the agency has exceeded the scope of the grant of power or that the legislature has unconstitutionally delegated broad legislative power to the agency. The case of *Nolan v Michigan Dep't of Licensing & Regulation*, [151 Mich App 641](#), 647; 391 NW2d 424 (1986), describes the three-part test used by the courts to determine the validity of rules. The court will examine the rules to determine if they are (1) within the matter covered by the enabling statute, (2) in compliance with the underlying legislative intent, or (3) arbitrary or capricious. Several cases discuss the delegation of powers to administrative agencies. Of particular importance are *Dep't of Natural Resources v Seaman*, [396 Mich 299](#); 240 NW2d 206 (1976), and *Westervelt v Natural Resources Comm'n*, [402 Mich 412](#); 263 NW2d 564 (1978).

Many enabling statutes specify how an agency must promulgate rules to implement legislation. Where there is a clear obligation to promulgate rules, mandamus may be used to compel a public official to promulgate them. See *Lundberg v Corrections Comm'n*, [57 Mich App 327](#); 225 NW2d

752 (1975). Where statutory authority is granted to an administrative agency to act in a legislative capacity, a court will give deference to those decisions made by the agency which are reasonable. *In re Quality of Service Standards for Regulated Telecom Services*, [204 Mich App 607](#); 516 NW2d 142 (1994). Statutes that grant administrative agencies their authority are strictly construed, although the court of appeals has made clear that “due regard must be given to legislative intent and powers necessary to a full effectuation of authority expressly granted.” *Verizon North, Inc. v Public Service Comm’n*, [263 Mich App 567](#); 689 NW2d 709 (2004).

The Michigan Supreme Court issued an important decision regarding what constitutes a rule subject to promulgation in *AFSCME v Dep’t of Mental Health*, [452 Mich 1](#); 550 NW2d 190 (1996). The Mental Health Code required that the Department of Mental Health provide care to certain patients and authorized the department to fulfill that duty by contracting with private care providers. The issue before the court was whether guidelines and a standard contract the department used when contracting with such providers constituted “rules subject to promulgation.” The court held that insofar as the guidelines and contract set forth departmental policy and standards concerning the care mandated by statute, the guidelines and the standard contract were rules subject to promulgation. The court noted that the guidelines and contract were not merely “guidelines” or “interpretive statements” exempt from promulgation under MAPA. See [§15.54](#). In the end, the court reasoned that “the department may not do by contract what it could not do if it were providing these residential mental health services itself.” *Id.* 7; see also *Heritage Manor v Dep’t of Social Services*, [218 Mich App 608](#); 554 NW2d 388 (1996) (holding that policy bulletin that sets forth policies and procedures directly affecting plaintiff’s actions as mandated by statute is a rule under MAPA and therefore must be promulgated accordingly.)

The failure to follow the requirements set forth under MAPA means the rule was improperly adopted and it will be invalidated. *City of Romulus v Dep’t of Environmental Quality*, [260 Mich App 54](#), 80; 678 NW2d 444 (2003). In addition, where the agency exceeds the authority provided by the scope of the enabling statute(s), the rule will be invalidated. See *Wolverine Power Supply Co-op, Inc v Dep’t of Environmental Quality*, [285 Mich App 548](#), 556; 777 NW2d 1 (2009).

F. Construction of Rules [§15.51](#)

Doubts about the validity of a rule are resolved in favor of the rule. *Thomas Bros v Secretary of State*, [90 Mich App 179](#); 282 NW2d 273 (1979), appealed on other grounds after remand, 107 Mich App 805; 310 NW2d 249 (1981). The courts give considerable deference to an agency’s interpretation of its rules. *Citizens Disposal, Inc v Dep’t of Natural Resources*, [172 Mich App 541](#); 432 NW2d 315 (1988). Moreover, administrative rules should be liberally construed in light of their purposes and in a way that effectuates the intent of the agency. *Acrey v Dep’t of Corrections*, [152 Mich App 554](#), 559; 394 NW2d 415 (1986). But this interpretive standard does not imply that rules will always be upheld. See, e.g., *Jackson v Secretary of State*, [105 Mich App 132](#); 306 NW2d 422 (1981). A court’s construction of administrative rules is governed by standard principles of statutory construction. *Sanchez v Lagoudakis*, [217 Mich App 535](#); 552 NW2d 472 (1996). For instances, regulations that address the same subject or that share a common purpose are *in pari materia* and must be read together as one law. *Id.* at 546.

G. Emergency Rules §15.52

In an emergency, an agency is exempted from all or part of MAPA's rulemaking procedures if: (1) the agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following MAPA's notice and participation procedures; (2) the agency states in the rule its reasons for that finding; and (3) the governor concurs in the agency's finding of an emergency. *Michigan State AFL-CIO v Secretary of State*, [230 Mich App 1](#); 583 NW2d 701 (1998). The emergency rule is effective when it is filed in the secretary of state's office and remains in effect until a date fixed in the rule or six months after the date of its filing, whichever is earlier. The rule may be extended one time only not for more than six months. [MCL 24.248](#).

Emergency rules are prepared when rules are required to implement legislation that is given immediate effect or when the rules must be prepared in a very short period of time. The promulgation of emergency rules is not a common practice. An agency will ordinarily proceed with formal rulemaking during the period the emergency rules are in effect.

H. Exceptions to Rulemaking

1. In General §15.53

Although the legislature broadly defined "rule" in MAPA, the definition explicitly excludes such things as orders issued in contested cases, declaratory rulings, fish and game orders, opinions of the attorney general, and the like. [MCL 24.207](#). This means that an agency may issue such rulings, opinions, and so on without going through MAPA rulemaking procedures. For example, DEQ is empowered to issue fish and game regulations as an exception to the rule promulgation requirements because such regulations are not "rules" under MAPA. *Binsfield v Dep't of Natural Resources*, [173 Mich App 779](#); 434 NW2d 245 (1988). DEQ may set policy by guidelines, interpretive statements, declaratory rulings, and opinions in contested cases.

2. Guidelines §15.54

Agency guidelines are the primary exception to MAPA's strict rule promulgation requirements. See [MCL 24.207](#)(h). A guideline is a statement or declaration by the agency of policy (1) that the agency intends to follow, (2) that does not have the force or effect of law, and (3) that binds the agency but does not bind any other person. [MCL 24.203](#)(6).

The guideline promulgation process under Chapter 2 of MAPA, [MCL 24.224 et seq.](#), is basically a notice and comment process. MAPA forbids an agency to adopt a guideline in lieu of a rule. [MCL 24.226](#). In *Delta Cty v Dep't of Natural Resources*, [118 Mich App 458](#); 325 NW2d 455 (1982), the court found that the grant of a license was conditioned on compliance with 31 stipulations that were departmental guidelines and internal policies. The court held that these were rules under the guise of guidelines and policies, and that they did not fall within the exceptions to the rulemaking power. The court stated that the stipulations affected the rights and practices available to the public, and the rights of the public may not be determined, nor may licenses be denied, on the basis of unpromulgated policies. Unpromulgated policies or internal standards may

not be incorporated as license conditions. See also *Mallchok v Liquor Control Comm'n*, [72 Mich App 341](#); 249 NW2d 415 (1976).

In *AFSCME v Dep't of Mental Health*, [452 Mich 1](#); 550 NW2d 190 (1996), the Michigan Supreme Court found that “guidelines” and a “standard contract” used by the Department of Mental Health when contracting with mental health care providers were not exempt from promulgation. The court noted that the label that an agency gives to a directive is not determinative of whether it is a rule or an exempt guideline under MAPA. Further, in order to reflect MAPA’s preference for making policy decisions pursuant to rulemaking procedures, the court emphasized that MAPA’s definition of “rule” should be construed broadly while exceptions to the definition should be construed narrowly. Finally, the fact that the standard contract at issue bound only those who decided to contract with the department was not dispositive. Rather, the court found that the standard contract was of “general applicability” because many regulated health care providers had no choice but to contract with the department under the department’s terms.

In *Goins v Greenfield Jeep Eagle, Inc*, [449 Mich 1](#); 534 NW2d 467 (1995), the court held that an instruction manual given to automobile dealers by the secretary of state did not have the force of law because it had never been properly promulgated. The manual was at best an interpretive statement, guideline, information pamphlet or other item that did not have the force of law but was merely explanatory. See also *Dep't of Natural Resources v Bayshore Assoc, Inc*, [210 Mich App 71](#); 533 NW2d 593 (1995). There is no requirement that guidelines be published before they are adopted. *People v Williamson*, [205 Mich App 592](#); 517 NW2d 846 (1994).

The Michigan Attorney General has opined that the “operational memoranda” issued by DEQ pursuant to NREPA, ostensibly to provide staff guidance, are not “rules” requiring promulgation under MAPA. However, the opinion made clear that such operational memoranda do not have the force and effect of law and are not legally binding on the public or the regulated community. The attorney general further pointed out that “to the extent any guidance offered in an operational memorandum were to substantively deviate from the applicable statutory requirements, the guidance would be invalid.” OAG, No 7,223 (December 22, 2008).

3. Interpretive Statements §15.55

An agency may issue an interpretive statement indicating how the agency interprets a statute or rule. Such interpretive statements are not subject to notice and publication requirements under MAPA. *Lyon Dev Co v Dep't of Natural Resources*, [157 Mich App 190](#), 197; 403 NW2d 78 (1986). There is very little case law on interpretive statements because their status is undefined and agencies are reluctant to issue them. The declaratory ruling process is a more clearly defined process by which an agency may issue a statement concerning the interpretation of a rule or statute it administers. See [MCL 24.263](#) *et seq*; see also [§15.57](#). The interpretive statement, as the product of an informal process, is something less than a declaratory ruling; however, as the agency’s interpretation of an act or rule it administers, it should be entitled to some degree of judicial deference if challenged. *Lyon Dev Co*, 157 Mich App at 197.

The case of *Clonlara, Inc v State Bd of Ed*, [442 Mich 230](#); 501 NW2d 88 (1993), raises several issues concerning an agency’s power to issue interpretive statements. The case approves of

agencies issuing such interpretations when no rulemaking power exists. The issuance of such interpretive statements, while not having the force and effect of law, was found to be proper and appropriate even though the process was entirely outside of MAPA. The decision creates considerable confusion in the area of policy and statutory interpretation by agencies. A well-written partial dissent points out the inherent problems with the majority opinion. See also *AFSCME v Dep't of Mental Health*, [452 Mich 1](#); 550 NW2d 190 (1996) and *Goins v Greenfield Jeep Eagle, Inc.*, [449 Mich 1](#); 534 NW2d 467 (1995), discussed in §[15.54](#).

I. Legislative Approval of Rules §15.56

The Michigan legislature no longer has a “legislative veto” in the rulemaking process (although it may pass rules-stopping legislation). When the legislature acts, the governor must be extended an opportunity for a veto (i.e. the “enactment and presentment” requirements). Furthermore, the executive branch is empowered to implement laws within the policy and standards set by the legislature. Separation of powers is violated when a legislative committee is allowed to usurp executive powers. In *Immigration & Naturalization Service v Chadha*, [462 US 919](#) (1983), the Supreme Court held that a one-house veto of an agency’s actions was unconstitutional because it violated constitutional requirements for legislative action. The Michigan Supreme Court, following *Chada*, struck down several sections of MAPA as violating the separation of powers clause of the Michigan Constitution. *Blank v Dep't of Corrections*, [462 Mich 103](#), 120; 611 NW2d 530 (2000).

X. Declaratory Rulings

A. In General §15.57

Declaratory rulings are an agency’s formal method for issuing opinions concerning the applicability of an agency rule, an agency order, or a statute administered by the agency to an actual set of facts. [MCL 24.263](#). Such rulings are a prospective declaration of how an agency will apply the law. An interested person may request a declaratory ruling about the applicability of a statute administered by the agency to an actual state of facts. Such a person must show a direct effect on his or her legally protected interests. *Human Rights Party v Michigan Corrections Comm'n*, [76 Mich App 204](#); 256 NW2d 439 (1977). As with declaratory judgments, the parties must agree on the underlying facts. It is not uncommon for the agency to disagree with the facts as propounded by the applicant for a declaratory ruling. If the facts can be agreed upon, the declaratory ruling process provides an expeditious path for the resolution of questions about the technical meaning of rules or statutes.

Declaratory rulings serve two distinct purposes. First, they allow a party to obtain a binding determination of rights from an agency in the nature of a declaratory judgment. The agency, and parties dealing with the agency, have greater flexibility under this procedure. Second, a party that has obtained a declaratory ruling can seek judicial review of the ruling without exhausting other administrative remedies. *Pletz v Secretary of State*, [125 Mich App 335](#); 336 NW2d 789 (1983).

A party may not seek judicial review of or a declaratory judgment regarding the applicability or validity of rules until it has made a declaratory ruling request. Once a request has been made, the

agency may either issue a ruling or decline to do so. The failure of the agency to make a ruling is considered a denial and does not prevent judicial review. Requests for declaratory relief in the courts must be preceded by a request for a declaratory ruling from the agency. *Southland Corp v Liquor Control Comm'n*, [95 Mich App 466](#), 291 NW2d 84 (1980). Declaratory rulings are subject to judicial review in the same manner as agency final decisions or orders in contested cases. MAPA §63, [MCL 24.263](#). A declaratory ruling may properly be reviewed on appeal to circuit court in the same manner as a final agency action or the decision in a contested case proceeding. *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, [277 Mich App 531](#), 545; 747 NW2d 321 (2008).

MAPA requires all agencies to promulgate rules for the processing of requests for declaratory rulings. Since the power to make declaratory rulings resides with the agency possessing the rulemaking power, the rules for the appropriate entity must be consulted.

NREPA provides the Director of DEQ with rulemaking power. The power to make rules vests the Director with the power to issue declaratory rulings. This power appears to be delegable to staff members. DEQ has published a [form](#) for requesting a declaratory ruling. See §[15.7](#) for a link to DEQ's contested case and declaratory ruling procedures.

XI. Freedom of Information Act

A. In General §15.58

Government agencies possess a wealth of information that can be useful to attorneys in representing their clients. The data and reports collected and compiled by DEQ can be extremely valuable. DEQ information can range from the licensing history of an industrial site to the identification of endangered species on a parcel of land. The historical reluctance of state agencies to disclose information has been circumvented by the passage of the Freedom of Information Act (FOIA), [MCL 15.231](#) *et seq.*, which establishes the right of the public to inspect and copy public documents, with very few exceptions, [MCL 15.233](#).

Applying for information under the FOIA is fairly simple. The requesting person must make an oral or written request that describes the public record in enough detail to enable the public body to find the record so that it can be inspected or copied. [MCL 15.233](#)(1). The FOIA recognizes the potential burden placed on agencies if they must search for records that have not been sufficiently identified. Absolute precision in identifying records is not required, but reasonable information to enable an agency to secure the requested materials is necessary.

The number and volume of requests for information addressed to DEQ is staggering. Often, requests for information are overly broad, such as a request for "all permit files granting wetland permits for 2009." A request such as this would involve several thousand pages of documents. If the goal of your request is an overview of how permits are handled, then the efficient and effective method of review is to make an appointment to review a range of files at DEQ's office. If you find materials of interest, you may order copies of them. A public agency generally has no obligation to create a report, summary, or compilation of materials if the record does not already exist. See *Bredemeier v Kentwood Bd of Ed*, [95 Mich App 767](#), 771; 291 NW2d 199 (1980).

An agency must respond to requests for information within five business days. [MCL 15.235\(2\)](#). Under unusual circumstances, the agency may issue a notice extending for not more than ten business days the time to respond to the request. [MCL 15.235\(2\)](#); see *Key v Paw Paw Twp*, [254 Mich App 508](#), 513; 657 NW2d 546 (2002) (holding that a ten day extension is measured from the end of the original five day period and not from the original request to extend the deadline). Unusual circumstances are defined in the act. [MCL 15.232\(d\)](#). Given the number of requests made of DEQ each day, DEQ will invoke this ten-day extension in almost all instances where FOIA requests are made. The practitioner is cautioned to perceive this as a fifteen-day period when requesting documents from DEQ.

There is a presumption under FOIA that records are disclosable. *International Union, United Plant Guard Workers of America v Dep't of State Police*, [422 Mich 432](#), 441; 373 NW2d 713 (1985); accord *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, [265 Mich App 185](#), 194; 693 NW2d 850 (2005) (“Under federal and state freedom of information acts . . . the public has a broad right to inspect government documents, and the general policy promoted is one of ‘full disclosure.’”). Therefore, a written notice and justification for the denial or partial denial of a request must be provided. [MCL 15.235\(4\)](#). Failure to respond is considered a denial. [MCL 15.235\(3\)](#).

B. Exemptions §15.59

There are numerous exemptions from disclosure set forth in Section 13 of the FOIA. The exemptions cover, among other things, matters subject to attorney-client privilege, trade secrets or commercial information, all materials held confidential by statute, and various materials relating to law enforcement activities. [MCL 15.243\(1\)](#). Any exemption must be narrowly construed, and the party who seeks to invoke the exemption must prove that nondisclosure conforms to the intent of the legislature. *Taylor v Lansing Bd of Water and Light*, [272 Mich App 200](#), 204; 725 NW2d 84 (2006).

A common exemption relating to DEQ involves materials relating to an active criminal investigation, for example, when a hazardous waste hauler is being investigated for the unlawful disposal of hazardous materials. DEQ and other public bodies are exempt from disclosure under FOIA if the request involves materials relating to pending litigation, including contested case hearings, where the requesting party and the public body are both parties. See [MCL 15.243\(1\)\(v\)](#). With respect to that exemption, the Michigan Court of Appeals held that unless the public body proves that it is a party in the civil litigation with the party directly submitting the FOIA request, the exemption does not apply. *Taylor*, 272 Mich App at 206-07. Hence, in that case, the best friend (and agent) of the plaintiff was entitled to receive the information via the FOIA even though the plaintiff was not. *Taylor*, 272 Mich App at 206-07.

If a public record contains material that is exempt from disclosure as well as material that is not exempt, the agency must separate the exempt and nonexempt material and make the nonexempt material available for examination and copying. [MCL 15.244\(1\)](#). The decision to release exempt information in this situation, however, is discretionary. *Taylor*, 272 Mich App at 205.

C. Cost of Materials §15.60

Where the fees for copying will exceed \$50.00, a deposit of up to one-half the estimated cost of reproduction can be required. [MCL 15.234](#)(2). The charges for materials must be reasonable and in accord with the guidance provided by the FOIA. *Tallman v Cheboygan Area Schools*, [183 Mich App 123](#), 129-130; 454 NW2d 171 (1990). An agency can charge the hourly wage of the lowest paid employee of that public body capable of retrieving the information, but not the wages paid to a private attorney or another independent contractor. See *Coblentz v City of Novi*, [475 Mich 558](#), 578, 580; 719 NW2d 73 (2006). Specific requirements of a statute could override the general provisions of the FOIA with regard to format of copies, as well as determining the appropriate costs of the copies that would be provided. *Lapeer Cty Abstract & Title Co v Lapeer Cty Register of Deeds*, [264 Mich App 167](#); 691 NW2d 11 (2004).

D. Enforcement §15.61

To enforce the policy of public access to records, FOIA creates a cause of action against agencies for violation of the statute. [MCL 15.240](#)(1). Actions must be brought in the circuit court for the county where the plaintiff resides or has its principal place of business, or in the county in which the public record or office of the public body is located. [MCL 15.240](#)(4); *Grebner v Oakland Cty Clerk*, [220 Mich App 513](#), 515; 560 NW2d 351 (1996). The court's standard of review depends on the context of the appeal. Circuit courts review legal determinations under the de novo standard, review factual findings for clear error, and review decisions committed to the agency's discretion for abuse of discretion. *Herald Co, Inc v Eastern Michigan University Bd of Regents*, [475 Mich 463](#), 471-72; 719 NW2d 19 (2006). At all times, the burden is on the public body to sustain its denial.

The circuit court action can be commenced whether the request to the public body was oral or written. [MCL 15.235](#)(1), (7). However, an oral request that has been denied must be confirmed by a written request made at least five days prior to the commencement of an action to compel disclosure. [MCL 15.240](#)(2). Should the court find that the public body improperly denied a request, the prevailing party is entitled to costs and reasonable attorney fees. [MCL 15.240](#)(4). Punitive damages of \$500 may also be assessed against the public body [MCL 15.240](#)(6).

XII. Open Meetings Act

A. In General §15.62

Just as FOIA ensures that the public has access to government records, the Open Meetings Act (OMA), [MCL 15.261](#) *et seq.*, ensures that the public has access to the decision-making processes of public bodies. The OMA is relatively simple. It provides that (1) a public body must give notice of the time and place of its meetings, [MCL 15.264](#); (2) the meetings must be open to the public, and the public must be given an opportunity to address the policy-making body, [MCL 15.263](#); and (3) the minutes of the meetings must promptly be made available to the public for inspection and copying, [MCL 15.269](#).

DEQ's various boards and commissions publish agendas in advance, which are available to the public. Those who wish to be on the mailing list for the agendas and meeting announcements need only make a request to the board or commission. A person may also be placed on the mailing list to receive the minutes of the meetings. These minutes can be a valuable source of information to those who practice before the commissions. All of the boards and commissions have public comment periods, and extend the invitation to bring matters to their attention.

B. Exceptions §15.63

Like FOIA, the OMA provides a number of exceptions that permit a public body to meet in closed session. The circumstances allowing closed sessions are set forth in [MCL 15.268](#). Exceptions include personnel evaluations, collective bargaining, consultation with an attorney regarding settlement strategy, and employment application reviews. None of the exceptions apply to the consideration of a permit, license, declaratory ruling, or promulgation of rules by the agency. In *Ridenour v Bd of Ed of the City of Dearborn School Dist*, [111 Mich App 798](#); 314 NW2d 760 (1981), the court stated that the OMA must be strictly construed against exemptions to public meetings. The burden of proof lies with the party seeking the exception to the OMA. *Willis v Deerfield Twp*, [257 Mich App 541](#), 551; 669 NW2d 279 (2003).

C. Contested Case Hearings §15.64

Contested case hearings are subject to the OMA, but the OMA is read in conjunction with MAPA. In *Goode v Dep't of Social Services*, [143 Mich App 756](#), 760; 373 NW2d 210 (1985), it was argued that the OMA required that a hearing officer's opinion be rendered at an open meeting. The court stated that it would be costly and "defy common sense" to require a hearing officer to hold a second hearing so that the opinion could be read out loud. The court found that, in the interest of judicial economy, releasing a written opinion to the public sufficiently met the requirements of the OMA. The courts have also rejected the argument that the public is entitled to address a meeting convened for the purpose of hearing oral arguments and deciding a contested case hearing. *Bd of Ed of Rochester Community Schools v Michigan State Bd of Ed*, [104 Mich App 569](#); 305 NW2d 541 (1981).

D. Voting §15.65

The OMA requires that all decisions be made in public, [MCL 15.263](#)(2), and recorded, [MCL 15.269](#)(1). As the court noted in *Esperance v Chesterfield Twp*, [89 Mich App 456](#), 463; 280 NW2d 559 (1979), the OMA supports the contention that the act was passed to combat secret voting in all its forms, whether by closed meeting or by secret ballot.

E. Remedies for Violation §15.66

Action for injunctive relief under the OMA against a local public body must be commenced in the circuit court for the county in which the public body serves. If the action is against a state public body, the action may be brought in the circuit court for the county where the public body has its principal office or in the Ingham County Circuit Court [MCL 15.271](#)(2). An action for mandamus

against a public body must be commenced in the court of appeals. [MCL 15.271\(3\)](#). Successful complainants in such an action are entitled to court costs and actual attorney fees. [MCL 15.271\(4\)](#).

The OMA provides that the intentional violation of the act is a crime. A first violation is a misdemeanor punishable by a fine of not more than \$1,000; a second violation is punishable as a misdemeanor with a fine of not more than \$2,000 and not more than one year imprisonment. [MCL 15.272](#). A civil action may also be brought against a public official who intentionally violates the act. A public official is personally liable for actual and exemplary damages of not more than \$500, plus court costs and actual attorney fees [MCL 15.273\(1\)](#). Actual costs and fees may be recovered if a party proves a violation of the OMA. The court in *Ridenour v Bd of Ed of the City of Dearborn School Dist*, [111 Mich App 798](#); 314 NW2d 760 (1981) awarded costs and fees because the plaintiff requested and obtained injunctive relief, as allowed under the OMA. *Id.* 111 Mich App at 806. A later court of appeals panel distinguished that from the case where the relief sought was declaratory rather than injunctive, and declined to award costs and fees. *Leemreis v Sherman Twp*, [273 Mich App 691](#), 708; 731 NW2d 787 (2007).

When a reviewing court finds a violation of the OMA, it may invalidate the decision made at the meeting. However, those seeking to have a decision invalidated must allege not only that the public body failed to comply with the OMA, but also that this failure impaired the rights of the public. *Esperance v Chesterfield Twp of Macomb Co*, [89 Mich App 456](#), 463; 280 NW2d 559 (1979).

Exhibit 15.1

STATUTES PROVIDING FOR JUDICIAL REVIEW AFTER AN ADMINISTRATIVE HEARING

Administrative Procedures Act of 1969

[MCL 24.201](#) *et seq.*

Judicial review of final decision or order in contested case by any applicable special statutory review proceeding in any court specified by statute and in accordance with general court rules, in absence or inadequacy thereof, judicial review is by petition for review in accordance with MCL [24.302](#)-305.

Water Resources Protection

[MCL 324.3113](#)

Judicial review following DEQ's final order of determination, permit, or denial after hearing requested by person aggrieved by commission denial, restriction of polluting content, or any other order, permit, consent order, or stipulation.

Air Pollution Control

[MCL 324.5515](#)(4)

Judicial review following final order or determination of DEQ after hearing requested by person not party to pollution abatement contract who is aggrieved by agreement between DEQ and another party.

Solid Waste Management

[MCL 324.11519](#)(3)

Judicial review following DEQ director's final order revoking, suspending, or restricting disposal area construction permit or operating license after contested case hearing.

Inland Lakes and Streams

[MCL 324.30110](#)(3)

Judicial review following determination, action, or inaction by Natural Resources Commission after formal hearing requested by person aggrieved by DEQ action or inaction under act.

Wetlands Protection

[MCL 324.30319](#)(3)

Judicial review following DEQ's determination, action, or inaction after hearing requested by person aggrieved by DEQ action or inaction under act.

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