

Environmental Implications: Supreme Court Update

Kyle Konwinski, Varnum LLP, Conference Co-Chair

Elizabeth Morrisseau, Attorney General's Office

INTRODUCTION

- Important decisions in the last year. Shifting attitude?
- Panelist Introduction

Michigan Farm Bureau v EGLE

- Michigan Supreme Court
- Decided July 31, 2024
- NPDES general permits and those permits' conditions are not “rules” under the Administrative Procedures Act.

Michigan Farm Bureau v EGLE

1. EGLE issues 2020 CAFO General Permit.
2. Industry files a petition for a contested case before the Michigan Office of Administrative Rules and Hearings (fully presented and briefed, stayed upon EGLE's decision to appeal #5, now live.)
3. Industry files a declaratory judgment action in the Court of Claims, arguing that new permit conditions are unlawfully promulgated rules.
4. Court of Claims dismisses Industry's action for lack of subject matter jurisdiction.
5. Court of Appeals upholds Court of Claims' dismissal on alternate grounds that the 2020 CAFO General Permit was actually a rule that should be challenged first by a request for a declaratory ruling.
6. Industry filed a request for a declaratory ruling, which EGLE denies, and which Industry then challenged in the Court of Claims (stayed upon filing, now live).
7. MSC upholds dismissal that Court of Claims had no subject matter jurisdiction because the 2020 CAFO General Permit was not a rule (the case you're interested in!)

COMPLETED

Michigan Supreme
Court

Court of Appeals

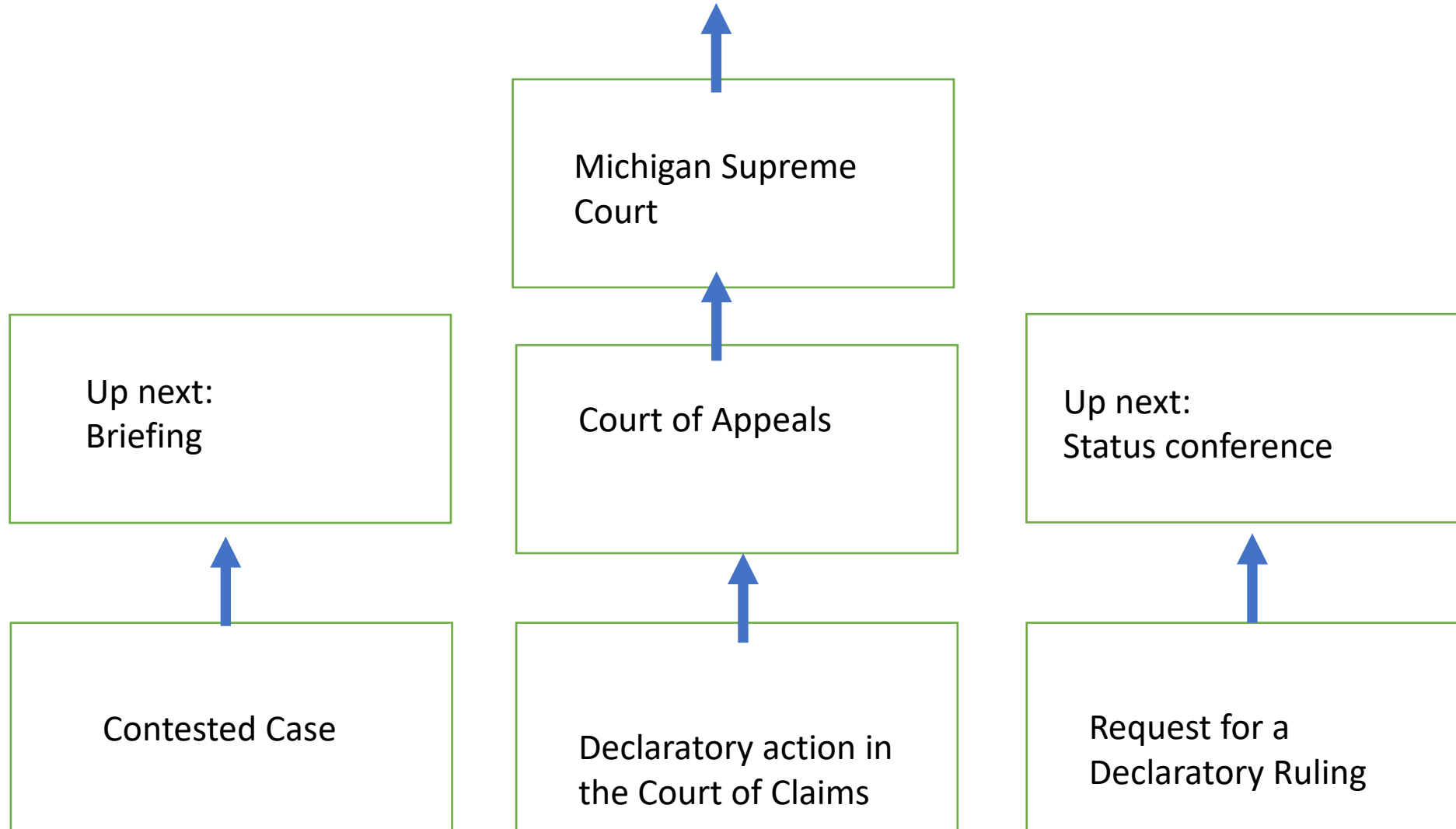
Up next:
Briefing

Up next:
Status conference

Contested Case

Declaratory action in
the Court of Claims

Request for a
Declaratory Ruling



Page three:

“In sum, EPA and EGLE rules require every CAFO permit to include certain conditions, but federal and state law give EGLE discretion to include extra conditions in a permit that are more stringent than these conditions when EGLE decides those conditions are necessary to achieve applicable Part 4 water-quality standards or to comply with applicable laws and regulations.”

Page twenty:

“Because it is beyond dispute that EGLE lacks the power to issue rules relating to NPDES permits issued to CAFOs, neither the general permit nor the discretionary conditions therein can have the force and effect of law, and so they cannot be “rules” as defined by the APA. They can be only a statement explaining how EGLE plans to exercise its discretionary permitting power or a statement explaining what conditions EGLE plans to prove are necessary to achieve applicable Part 4 water-quality standards or to comply with other applicable laws and regulations in adjudications involving a CAFO.”

United States Supreme Court Decisions

- *Loper Bright Enterprises v Raimondo*, Decided June 28, 2024
- *Ohio v Environmental Protection Agency*, Decided June 27, 2024
- *Corner Post v Board of Governors of Federal Reserve System*, Decided July 1, 2024

- A blow to administrative agencies' powers.



Conservative majority in each decision



Loper Bright Enterprises v Raimondo

- Decided June 28, 2024
- When deciding whether an administrative agency has the authority to enact a rule, a court should not defer to the agency's interpretation.



Loper Bright Enterprises v Raimondo (cont'd)

FACTS:

- In 1976, Congress enacted a statute setting out the National Marine Fisheries Service's authority.
- National Marine Fisheries Service: Fishing vessels in the Atlantic ocean must have an "observer."
- NMFS: Vessels must sometimes pay. \$710/day (20% profit).
- But the authorizing statute does not say who must pay for it.

Loper Bright Enterprises v Raimondo (cont'd)

- Relying on *Chevron* (a 1984 case), the trial court and court of appeals deferred to the agency's interpretation.
- *Chevron* has been a staple of administrative law for many years.
- **HOLDING:** It is a court's job to interpret the law, and no deference should be given to an agency's interpretation.

Loper Bright Enterprises v Raimondo (cont'd)

RAMIFICATIONS:

- Administrative agencies will have less authority.
- Courts (especially currently) will determine whether a statutory basis exists for an agency to promulgate rules.

Ohio v Environmental Protection Agency

- Decided June 27, 2024
- **Holding:** The EPA's federal implementation plan was likely to be proven to be arbitrary and capricious.



Ohio v Environmental Protection Agency

(cont'd)

- Under the Clean Air Act, states submit State Implementation Plan (“SIP”) to satisfy standards.
- If SIP inadequate, EPA proposes a federal plan (unless SIP corrected)
- 2022: EPA said it was going to disapprove of 23 states SIPs (Michigan included).
- EPA’s model depended on all 23 states using the federal plan.
- Litigation ensued in multiple jurisdictions and EPA’s federal plan did not apply to at least 12 states.

Ohio v Environmental Protection Agency

(cont'd)

- **The EPA's final FIP was "arbitrary" or "capricious."**
- The EPA's model inappropriately hinged on all 23 states using the federal plan.
- The EPA ignored an important aspect of the problem.
- The EPA's rule was not "reasonably explained"

Ohio v Environmental Protection Agency

(cont'd)

Ramifications:

- This case was a broader message from the Court curbing administrative agency power.
- The Court clearly felt that agencies are not held accountable enough for its actions.
- Courts meddling in fact intensive issues and second-guessing factual decisions made by an agency?

Corner Post v Board of Governors of Federal Reserve System

- Decided July 1, 2024
- To challenge a rule under the Administrative Procedures Act, the statute of limitations begins to run when a claim “accrues,” which is when the plaintiff suffers an injury from final agency action.

Corner Post (cont'd)

- Corner Post (a truck stop and convenience store) open in 2018.
- Pays debit card transaction fees.
- Challenges the Federal Reserve Board's rule setting the amount of the transaction fee.
- The Federal Reserve Board's rule was promulgated in 2011.
- Statute of limitations is only 6 years.



Corner Post (cont'd)

- **HELD:** Corner Post's claim was timely because the statute of limitations starts when a claim "accrues," which is when the plaintiff is injured.
- Here, Corner Post was not injured until it paid the transaction fees in 2018.

Corner Post (cont'd)

- Many courts said the statute started when the final agency action occurred (here, 2011).
- Could open the gate for more lawsuits. Here, Corner Post did not even exist when the rule was created.
- Persuasive to Michigan courts? Michigan Courts seem to have a different interpretation of when a claim “accrues”

Questions?

Kyle Konwinski
Elizabeth Morrisseau