STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF IONIA,

Defendant-Appellee,

and

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Amicus Curiae,

v

PITSCH RECYCLING & DISPOSAL, INC. and PITSCH SANITARY LANDFILL, INC.,

Plaintiffs-Appellants,

and

MICHIGAN WASTE INDUSTRIES ASSOCIATION,

Amicus Curiae.

UNPUBLISHED
November 1, 2012

No. 302163
Ionia Circuit Court
LC No. 06-024599-CZ

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs Pitsch Recycling & Disposal, Inc. and Pitsch Sanitary Landfill, Inc.[1] appeal by right from an order granting dismissal in favor of defendants Ionia County and the Michigan Department of Environmental Quality (DEQ). A prior panel of this Court had remanded this

[1] Plaintiffs will be collectively referred to as "Pitsch." For ease of reference, we will refer to all parties by name.

case for further proceedings,[2] and had instructed the parties to add the DEQ as a necessary party and instructed the trial court to resolve questions pertaining to Part 115 of the Solid Waste Management Act of the Natural Resources and Environmental Protection Act, MCL 324.11501 *et seq*, with the DEQ's input. The trial court allowed the parties to add the DEQ and, after a series of motions for summary disposition and a bench trial, dismissed the DEQ as a party for lack of subject matter jurisdiction[3] and dismissed Pitsch's claims under Part 115, the Interstate Commerce Clause, and the Substantive Due Process Clause. We affirm.

This Court reviews "both questions of law arising from a declaratory judgment action and questions of statutory interpretation" de novo. See *Guardian Environmental Services, Inc v Bureau of Constr Codes & Fire Safety*, 279 Mich App 1, 5; 755 NW2d 556 (2008). The scope of an agency's authority and whether it has exceeded its authority are questions of law that this Court reviews de novo. See *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 127; 807 NW2d 866 (2011). This Court reviews questions of preemption de novo, because the analysis requires the interpretation of statutes. See *McNeil v Charlevoix Co*, 275 Mich App 686, 691; 741 NW2d 27 (2007). We review de novo constitutional issues, including whether legislation violates the commerce clause, *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663-664; 697 NW2d 180 (2005), or whether a party has been deprived of property without due process of law. See *Sidun v Wayne Co Treas*, 481 Mich 503, 508-509; 751 NW2d 453 (2008). Whether a court has subject matter jurisdiction is a question of law that this Court reviews de novo. See *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004).

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009) (internal quotations and citation omitted). The first criterion to determine the Legislature's intent is the specific language of the statute itself, and if the language of the statute is not ambiguous, the statute must be enforced as written. *Id*. at 12-13. Courts must read statutes as a whole, and "to discern the Legislature's intent, statutory provisions are *not* to be read in isolation[.]" *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (emphasis in original).

Initially, we reject Ionia County's contention that we lack subject matter jurisdiction because the DEQ is no longer a party, contrary to our prior determination that the DEQ is a necessary party. The DEQ's participation in this appeal might theoretically be relevant to whether we can properly and completely resolve the merits of this appeal. However, the DEQ was made a party to the circuit court action and dismissed pursuant to a grant of summary

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[2] *Ionia County v Pitsch Recycling & Disposal, Inc & Pitsch Sanitary Landfill, Inc*, unpublished per curiam decision of the Court of Appeals issued August 6, 2009 (Docket No. 284230). We rely on the recitation of the underlying facts as set forth in this Court's prior opinion.

[3] We concede that our prior opinion did not explicitly state that the parties should transfer venue to the Court of Claims. However, while not pertinent to the outcome of this appeal, we are of the view that the parties should have been aware of the need to do so. We do not know why no such transfer was apparently attempted.

disposition. The claim of appeal in the instant matter was taken from an order dismissing the last pending case in the circuit court, which is appealable of right pursuant to MCR 7.203(A)(1) because it is a final order under MCR 7.202(6)(a)(*i*). The case upon which Ionia County relies, *Davis v Dep't of Corrections*, 251 Mich App 372; 651 NW2d 486 (2002), is inapposite: it involved the circuit court's jurisdiction over an administrative appeal, not this Court's jurisdiction over an appeal from a final order.

Primarily at issue in this case is whether Part 115 of the Solid Waste Management Act of the Natural Resources and Environmental Protection Act, MCL 324.11501 *et seq* (Part 115), permits Ionia County to impose an annual limit on the amount of solid waste accepted for disposal by Pitsch, the only operating landfill in the county. We find no provision within Part 115, individually or as a whole, equally susceptible to more than one meaning or irreconcilably conflicting with any other provision, so Part 115 is not ambiguous. See *Fluor Enterprises, Inc v Dep't of Treas*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007). We further conclude that Ionia County's disposal cap is authorized.

In Part 115, the Legislature directed the DEQ to "assist in developing and encouraging methods for the disposal of solid waste that are environmentally sound, that maximize the utilization of valuable resources, and that encourage resource conservation . . . " MCL 324.11507(1). "Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a period of 10 years or more is collected and recovered, processed, or disposed of at disposal areas that comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas." MCL 324.11533(1). A solid waste disposal area cannot be operated contrary to the provisions of a solid waste management plan. MCL 324.11512(2).

Each county must file a plan with the DEQ, and must review and update the plan every five years. MCL 324.11533(2). The Legislature instructed the DEQ to develop a standard format that it provides to planning entities. MCL 324.11539(a). Before a county adopts a plan, it must submit the plan to the DEQ for review and comment. MCL 324.11535(d). "The state solid waste management plan shall consist of the state solid waste plan and all county plans approved or prepared by the department." MCL 324.11541(1). Part 115 does not contain any list of expressly authorized measures that would impliedly exclude disposal caps. It mandates only that a plan update shall be made according to the form prescribed by the department. MCL 324.11533(1), (3). The DEQ must include in its plan format "[a]n evaluation and selection of technically and economically feasible solid waste management options, which may include sanitary landfill, resource recovery systems, or a combination of feasible options." MCL 324.11538(1)(c). This section states that it applies to initial plan proposals, but it also applies to plan updates because MCL 324.11533(2) indicates that plan updates "shall at a minimum comply with the requirements of sections 11537a and 11538."

The Legislature's use of the word "may" is unambiguously permissive. "It is well settled that the statutory term 'may' is permissive and therefore indicative of discretion." *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007). Therefore, this section does not exclude other management options. In addition, the language directing the DEQ to consider "a combination of reasonable options" is sufficiently broadly worded to include caps on

the amount of waste deposited, so long as the caps were reasonable. Moreover, the instruction in MCL 324.11538(1)(*i*) directs the DEQ to consider whether "the solid waste disposal areas or resource recovery facilities provided for in the solid waste management plan are capable of being developed and operated in compliance with state law and rules of the department pertaining to protection of the public health and the environment, *considering the available land in the plan area, and the technical feasibility of, and economic costs associated with, the facilities*." (emphasis added). Determining the amount of waste each site could accept per year so that it is "technically feasible" for the site to continue to be developed and run safely arguably falls within this direction from the Legislature.

MCL 324.11538(2) supports our finding that disposal caps are permitted. That section provides an enumerated, and explicitly exhaustive, list of methods that may be used to calculate disposal need requirements. In other words, for the purpose of planning the reduction of waste that must to be disposed of in the landfill in the first place. It in no way suggests that other reduction devices or methodologies are impermissible. To the contrary, this section also indicates that "full achievement of the solid waste management plan's volume reduction goals may be assumed by the planning entity if the plain identifies a detailed and systematic approach to achieving these goals." MCL 324.11538(2). Thus, the language of this section indicates that other approaches may be used to meet the goals of Part 115, as long as those approaches are detailed and systematic.

Similarly, MCL 324.11513 prohibits persons from accepting solid waste generated outside of the county contrary to the county's plan. However, it does not address what a county may put *into* its plan. MCL 324.11358(6) indicates that "[i]n order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county." This implicates import caps, not disposal caps. The expression of something in a statute usually excludes other things that have not been expressed. *Miller v Allstate Ins Co*, 481 Mich 601, 611; 751 NW2d 463 (2008). However, this maxim is not helpful when one subsection of a statute expresses a specific thing, but the subsection does not have general application. *Robinson*, 486 Mich at 15 n 15. The testimonial evidence is that import caps and disposal caps are entirely different: the former restricts how much waste can be brought into a county, and the latter limits how much waste can be disposed of at all. These statutory sections apply to the import of solid waste, not to disposal caps or to what methods a county or the DEQ may use in a county's plan generally.

Part 115 expressly instructs the DEQ to "promulgate rules for the development, form, and submission of initial solid waste management plans." MCL 324.11538(1). Part 115 broadly instructs the DEQ to develop a plan format that takes into consideration a variety of waste management options, and indicates that the DEQ has discretion to include other options in its format. MCL 324.11538(1). Thus, it is not necessary for this Court to imply powers to the DEQ in order to conclude that the DEQ was given authority over what may be included in a plan. Clearly, Part 115 calls for each county to exercise a meaningful amount of control over its own individual and possibly unique or even idiosyncratic waste disposal plan, particularly tailored to accommodate its own particular circumstances. The DEQ is equally clearly empowered and authorized to develop rules for the development, form, and submission of solid waste management plans, including the selection of solid waste management options.

Part 115 imposes a floor, not a ceiling, on what a county may include in its plan. An update to a plan must "at a minimum comply with the requirements of sections 11537a and 11538." MCL 324.11533(2). When a statute defines a term, the statute's definition controls. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). If the term is not defined, this Court gives the term its plain and ordinary meaning and may consult dictionary definitions to determine that meaning. *Id.* Minimum is not defined in the statute. Minimum is commonly defined as meaning "[o]f, relating to, or constituting the smallest acceptable or possible quantity in a given case." Black's Law Dictionary (9 ed, 2009). Minimum is also defined as "the least amount possible, allowable, or the like." *Random House Webster's College Dictionary*, 2000. Accordingly, MCL 324.11533(2) requires that a county's plan must at least comply with these requirements. Neither the statute nor the DEQ's rules prohibit a county from exceeding the requirements of MCL 324.11533(2). Because the requirements of the plan format under MCL 324.11538 are permissive, the DEQ's promulgated rule allowing counties to propose disposal caps as an alternative system does not exceed the DEQ's authority, and the DEQ's interpretation is consistent with the statute.

A proper solid waste management plan becomes part of the minimum requirements of Part 115 that a private sector business must comply with. Part 115 indicates that it "is not intended to prohibit the continuation of the private sector from doing business in solid waste disposal and transportation. This part is intended to encourage the continuation of the private sector in the solid waste disposal and transportation business when in compliance with the minimum requirements of this part." MCL 324.11548(1). Part 115 also indicates that a person cannot operate a solid waste disposal area contrary to the provisions of a solid waste management plan. MCL 324.11512(2). Part 115 allows the DEQ to bring an action for "any appropriate relief, including injunctive relief for a violation of this part or rules promulgated under this part." MCL 324.11546(1). Accordingly, Part 115 indicates that a disposal area operator must comply with a county's solid waste management plan as a minimum requirement of the part.

To comply with Part 115, a private company engaged in the disposal of solid waste must comply with the county waste management plan if the plan complies with this part. This Court's prior analysis in *Co of Saginaw v John Sexton Corp of Mich*, 150 Mich App 677; 389 NW2d 144 (1986) is entirely on point. In *Co of Saginaw*, this Court held that the trial court did not err in issuing a permanent injunction prohibiting one county from disposing of solid waste in another county, when the first county was not part of the second county's solid waste management plan. *Id*. at 686. Saginaw's plan in this case did not prohibit landfills from importing solid waste. *Id*. at 681-682. However, it did not identify John Sexton's landfill as a landfill into which solid waste could be imported. *Id*. at 682. The administrative rules required that a county plan indicate landfills into which solid waste could be imported. *Id*. at 682-683. This Court determined that "[w]ere we to construe Act 641[4] and the administrative rules promulgated thereunder to allow private businesses to operate their facilities in a manner inconsistent with a

[4] Act 641 was the predecessor to Part 115. See 1995 PA 451.

county waste management plan, we would frustrate the intent of the Legislature in enacting Act 641." *Id*. at 685.

Therefore, operating a solid waste disposal area in compliance with a solid waste management plan is a minimum requirement of Part 115.

Solid waste management plans must "contain enforceable mechanisms for implementing the plan." MCL 324.11538(1)(f). Part 115 defines "enforceable mechanism" as "a legal method whereby the state, a county, a municipality, or another person is authorized to take action to guarantee compliance with an approved county solid waste management plan. Enforceable mechanisms include contracts, intergovernmental agreements, laws, ordinances, rules, and regulations." MCL 324.11503(6). Although MCL 324.11538(1)(f) is unambiguously mandatory, MCL 324.11503(6) is not. The word "include" means, in relevant part, "to contain or encompass as part of a whole" or "to place as part of a category." *Random House Webster's College Dictionary* (2001 ed); see also *Curry v Meijer*, Inc, 286 Mich App 586, 593-594; 780 NW2d 603 (2009). In other words, unless context indicates otherwise, which it does not here, "include" refers to a subset, not to an entirety. The enumerated enforceable mechanisms found in MCL 324.11503(6) are therefore unambiguously mere examples, not necessarily an exhaustive list.

Amicus MWIA points out, correctly insofar as we can determine, that Ionia County's plan does not explicitly reference any enforcement mechanism, at least in so many words. However, nothing in Part 115 requires a plan to *identify* an enforceable mechanism. "The state solid waste management plan shall consist of the state solid waste plan and all county plans approved or prepared by the department." MCL 324.11541(1). Consequently, a county's disposal plan, once approved by the DEQ, becomes a part of Michigan's statewide solid waste management plan; it is therefore itself enforceable as state law. We note that the DEQ explained in a letter that a county's plan "may contain other provisions that are neither required nor expressly authorized for inclusion in a solid waste management plan" and its approval of any such plan "does not extend to any such provisions." However, the disposal cap here is absolutely necessary to Ionia County's plan, so it could not possibly be a provision "neither required nor expressly authorized."

We conclude that Ionia County's solid waste management plan, including its disposal cap, is enforceable by law pursuant to Part 115.

Pitsch argues that the disposal cap is an unconstitutional imposition on interstate commerce. "The party challenging the constitutionality of a statute or ordinance under the Commerce Clause bears the burden of establishing the unconstitutionality of the legislative act." *Wheeler*, 265 Mich App at 670; See also *Hughes v Okla*, 441 US 322, 336; 99 S Ct 1727; 60 L Ed 2d 250 (1979).

Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." United States Constitution, Art I, § 8, cl 3. Solid waste is an article of interstate commerce. *Fort Gratiot Sanitary Landfill v Mich Dep't of Natural Resources*, 504 US 353, 359; 112 S Ct 2019; 119 L Ed 2d 139 (1992). A law that discriminates against interstate commerce "is virtually *per se* invalid," but if it "regulates

evenhandedly with only incidental effects on interstate commerce," it may not be. *Or Waste Sys v Dep't of Environmental Quality*, 511 US 93, 99; 114 S Ct 1345; 128 L Ed 2d 13 (1994). A statute has the purpose of discriminating against interstate commerce when there is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.*

Ionia County's plan may have some arguable discrimination against other Michigan counties; but nothing in the plan, Part 115, or the legislative history of either suggests in any way that any discrimination was intended against other states. See *SDDS, Inc v SD*, 47 F 3d 263, 268-269 (CA 8, 1995). The plan also does not treat companies differently depending on the state in which they are based, *Ashland Oil v Caryl*, 497 US 916, 918-919; 110 S Ct 3202; 111 L Ed 2d 734 (1990), nor does it attempt to prevent interstate commerce to satisfy local demand or conserve state resources. *Philadelphia v NJ*, 437 US 617, 627; 98 S Ct 2531; 57 L Ed 2d 475 (1978). Pitsch argues that Transload wished to import at least 300,000 tons of waste a year from out of state but Transload withdrew that offer after Pitsch could not obtain an increased disposal cap; however, Pitsch does not explain how this transaction would have proceeded differently had Transload wished to import the waste from somewhere within Michigan.

We note that the United States Supreme Court has indicated that disposal caps could be a nondiscriminatory alternative to protect health and safety by when it stated that, as an alternative to restricting out-of-state imports, "Michigan could, for example, limit the amount of waste that landfill operators may accept each year." *Fort Gratiot Sanitary Landfill*, 504 US at 366-367. The Supreme Court has more recently reiterated its approval of "evenhanded cap[s] on the total tonnage landfilled . . . which would curtail volume from all sources" as a less discriminatory alternative to protect against the dangers of transporting hazardous waste through the state than additional fees on out-of-state waste. *Chemical Waste Mgmt v Hunt*, 504 US 334, 344-346; 112 S Ct 2009; 119 L Ed 2d 121 (1992). The disposal cap in this case is not source-specific, and therefore would evenhandedly curtail volume from any source.

If the regulation is nondiscriminatory and has "only incidental effects on interstate commerce," it is presumptively valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Or Waste Sys*, 511 US at 99 (internal quotations and citation omitted). This is commonly known as the *Pike* test.[5] See *United Haulers Ass'n v Oneida-Herkimer Solid Waste Mgmt Auth*, 550 US 330, 346; 127 S Ct 1786; 167 L Ed 655 (2007). A local interest that could not justify discriminating against interstate commerce may be a "cognizable benefit for the purposes of the *Pike* test." *Id.* Indeed, the promotion of public health and safety interests—when pursued in a legitimate fashion—is compatible with the Commerce Clause. *GMC v Tracy*, 519 US 278, 306; 117 S Ct 811; 136 L Ed 2d 761 (1997). Further, the Supreme Court has recognized that there are local health and safety benefits to solid waste regulation. *Fort Gratiot Sanitary Landfill*, 504 US at 365-366.

"If a legitimate local purpose is found, then the question becomes one of degree." *Pike*, 397 US at 142. Because the question is one of degree, courts are not required to second-guess a

[5] *Pike v Bruce Church*, 397 US 137; 90 S Ct 844; 25 L Ed 2d 174 (1970).

state's interests in providing additional oversight. See *Ark Electric Coop Corp v Ark Pub Services Comm*, 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983) (rejecting the argument that a state regulation was not supported by appreciable interest because the interest was effectively self-regulating). Accordingly, any protection of health and safety contained in other provisions of Part 115 does not render the local purpose of the disposal cap illegitimate; it merely affects how this Court should weigh it. Under the circumstances, we need not do so, because Pitsch has not demonstrated any burden on interstate commerce.

The disposal cap in Ionia County's plan does not unconstitutionally burden interstate commerce.

Pitsch finally argues that the disposal cap violates its substantive due process rights. The state may not deny people property without due process of law. See *In re CR*, 250 Mich App 185, 204; 646 NW2d 506 (2001). This Court determines whether legislation "bears a reasonable relation to a permissible legislative objective" when a due process challenge does not involve a suspect classification or deprivation of a fundamental right. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 404; 738 NW2d 664 (2007) (internal quotations and citation omitted). "To prevail under this *highly deferential* standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute . . . the statute is presumed constitutional, and the party challenging it bears the heavy burden of rebutting that presumption." *Cadle Co v City of Kentwood*, 285 Mich App 240, 256; 776 NW2d 145 (2009) (internal quotations and citation omitted, emphasis in original).

This Court has previously determined that the general purpose of the SWMA is:

> to foster comprehensive planning for the disposal of said waste at the local level and to integrate state licensing with those plans so that the disposal of waste within the planning area would be compatible with the local plan . . . By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation rates . . . The rules and the act provide a method whereby a county can develop a plan which is workable *and will not be disrupted by future disposal of waste from sources not accounted for during the planning process*. [*Fort Gratiot Charter Twp v Kettlewell*, 150 Mich App 648, 653-654; 389 NW2d 468 (1986) (emphasis added).]

The Legislature directed the DEQ in part to "assist in developing and encouraging methods for the disposal of solid waste that . . . maximize the utilization of valuable resources . . . " MCL 324.11507(1). In several places, Part 115 indicates the Legislature's concern with disposal capacity. MCL 324.11507a (annual report on disposal capacity required); MCL 324.11537a (siting mechanisms must meet a 10-year capacity need); MCL 324.11538(2) (plans must calculate capacity of identified disposal areas to determine if disposal needs are met); MCL 324.11538(3) (if county falls below less than 66 months of disposal needs, an interim disposal plan becomes operative until 66 months of capacity are again available). Accordingly, part of the legislative purpose of the statute is to assure that counties have enough disposal capacity to meet their needs.

The plan in this case is rationally related to that purpose. Pitsch testified that "it was some of the sentiments of the other people on the committee who were citizens, that they wanted to conserve the landfill space," and that "[t]hey were just looking at it from the standpoint of getting a mandate to have 20 years capacity." Other testimony established that a disposal cap is "a tool that counties can use to help assure their disposal capacity." Because Pitsch has not demonstrated that a disposal cap is not rationally related to one of the legitimate purposes of Part 115, it has not demonstrated that its substantive due process has been violated.

Affirmed.

/s/ Jane E. Markey
/s/ Amy Ronayne Krause

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UNPUBLISHED
November 1, 2012

No. 302163
Ionia Circuit Court
LC No. 06-024599-CZ

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

SHAPIRO, J. (*concurring*).

I agree with the majority opinion's analysis of the relevant statutes and the authority of the county to issue the challenged waste disposal plan and so join in its resolution of the merits of this case.

I write separately, however, to note that this case could also have been resolved on procedural grounds as Pitsch failed to take the action necessary to include the Department of Environmental Quality (DEQ), as a party. As the prior panel of this court recognized, the DEQ is a necessary party to this action. While the plaintiff seeks to couch its claim as merely a challenge to a county waste disposal plan, the challenge is equally directed at the state as the

county plan in question was adopted by the DEQ on January 19, 2001 and thereby incorporated into the state waste management plan:

> the parties do not dispute that the DEQ has a significant role in the oversight and approval of county waste management plans or that the county waste management plans are incorporated into the state waste management plan overseen by the DEQ. Consequently, *the DEQ would be affected by any decision in this case . . . . [t]herefore, the DEQ is a necessary party to this case*"
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> * * *
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> "[B]ecause this issue would affect the implementation of both the county and the state plans, the inclusion of the DEQ *as a party* in this case is necessary. . . . [*Ionia County v Pitsch Recycling & Disposal, Inc*, unpublished opinion per curiam of the Court of Appeals issued August 6, 2009 (Docket No 284230) (slip op, p6) (italics added)].

It is therefore law of the case that the DEQ is a necessary party whose "interest is of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Mather Investors v Larson*, 271 Mich App 254, 257-258; 720 NW2d 575 (2006).

Count I of Pitsch's complaint challenges the Ionia solid waste management plan as outside the scope of Part 115 and seeks to overturn the DEQ's approval of that plan and incorporation of it into the statewide plan. This claim, however, has been brought well after the deadline for such challenges. A party seeking review of a decision rendered by a state agency has three potential avenues to seek relief: (1) the type of review provided in the statutes applicable to the particular agency; (2) the method of review provided by the Administrative Procedures Act; or (3) an appeal pursuant to MCL 600.631, which allows appeals from an agency decision to the circuit court in all instances where review has not otherwise been provided for by law. See *BCBSM v Comm'r of Ins*, 155 Mich App 723, 728-729; 400 NW2d 638 (1986).

Part 115 does not provide a basis for judicial review directly from MDEQ decisions approving or denying solid waste management plans or updates to those plans. It does not appear that the APA provides a basis for review under these circumstances, but even if it did, a request for such review must be made within 60 days after the agency decision. MCL 24.304(1). Lastly, while MCL 600.631 does provide a basis under which Pitch could have sought review, an appeal of right to the circuit court from an agency decision must be taken within the time limits set by the court rules, which in this case is 21 days. MCR 7.101(B)(1) as in force in 2001 (and now codified in MCR 7.104(A)). *Preserve the Dunes v DEQ*, 471 Mich 508, 520; 684 NW2d 847 (2004); *Davis v Department of Corrections*, 251 Mich App 372, 374-375; 651 NW2d 486 (2002). An application for leave to appeal under section 631 may be made, but no later than six months after the date of the administrative decision. Here, Pitsch did not bring its challenge to the DEQ's decision until more than 5 years after it was made.

Plaintiff argues that because the DEQ was permitted to file amicus briefs below and to this Court, that the failure to name DEQ as a party is of no consequence. However, had our predecessor panel sought only an amicus brief it could have invited one itself or remanded for that purpose. Instead, we remanded for the state to be added as a party and this action was necessary given that Pitsch was seeking to invalidate the decision of a state agency and to seek damages from a county for following a solid waste management plan that was approved by the DEQ and formed a portion of the statewide plan.

The other counts in Pitsch's complaint against the state sought damages and injunctive relief for violation of Pitsch's constitutional rights. These counts, as properly noted by the trial court, may not be brought against the state in the circuit court, but must be brought in the Court of Claims as they are ex delictu and seek money damages as well as equitable relief. See *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 765; 664 NW2d 185 (2003) (holding Court of Claims has exclusive subject-matter jurisdiction over contract or tort claims seeking solely declaratory relief against a state agency). Nevertheless, Pitsch made no attempt to file suit in the Court of Claims after we remanded the case nor even after the claims were dismissed from the circuit court for lack of jurisdiction.[1] Pitsch also did not appeal the circuit court's ruling that it lacked jurisdiction.[2]

Having failed to timely challenge the DEQ's action and having failed to sue the DEQ in the Court of Claims, Pitsch has failed to comply with this court's directive and has failed to name a necessary party to its action against the county. Accordingly, dismissal was proper.

/s/ Douglas B. Shapiro

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[1] After filing against the state in the court of claims, the matter could readily have been joined with the circuit court claim. MCL 600.6421.

[2] As noted, this Court held that the DEQ was a necessary party and directed that it be added on remand. However, this court cannot confer jurisdiction where none exists. By remanding the case, this Court gave plaintiff an opportunity to establish jurisdiction over the DEQ; it did not and could not waive the need for jurisdiction. While this Court may have assumed in its prior opinion that the DEQ could properly be added as a party on remand, it did not analyze the point. Accordingly, any such prior assumption by this Court is not binding "for it is well-established in this state that 'a point thus assumed without consideration is of course not decided.'" *In re Apportionment of State Legislature—1982*, 413 Mich 96, 113-114; 321 NW2d 565 (1982), quoting *Allen v Duffie*, 43 Mich 1, 11; 4 NW 427 (1880).