STATE OF MICHIGAN
IN THE COURT OF APPEALS

3M COMPANY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant.
/

Court of Appeals No. 364067

Court of Claims No. 21-78-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

BRIEF OF APPELLANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Court of Claims declared that Defendant-Appellant Michigan Department of Environment, Great Lakes, and Energy (EGLE) failed to comply with the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq.*, when promulgating rules establishing maximum contaminant levels (MCLs) in drinking water for chemicals referred to as per- and polyfluoroalkyl substances (PFAS), and therefore, found those rules invalid. The November 15, 2022 order granting summary disposition in favor of Plaintiff-Appellant 3M Company (3M) was a "final order" because it disposed of all of the claims and adjudicated all the rights and liabilities of the parties to the case. MCR 7.202(6)(a)(i).

STATEMENT OF QUESTION PRESENTED

EGLE's Drinking Water and Environmental Health Division (EGLE-DWEHD) promulgated maximum contaminant levels (MCLs) for seven PFAS analytes under the Safe Drinking Water Act, MCL 325.101 *et seq.*, which regulates the construction and operation of water supplies in Michigan. By law, two of the drinking water standards also created new criteria for conducting groundwater cleanup under Part 201 of the Natural Resources and Environmental Protection Act, MCL 324.20101 *et seq*. Five of the PFAS MCLs did not become criteria under Part 201 as a matter of law, and as a result, EGLE's Remediation and Redevelopment Division (EGLE-RRD) also enacted rules under Part 201 to establish cleanup criteria for those five toxins.

The APA requires that any agency proposing new rules prepare and submit a regulatory impact statement. EGLE-DWEHD's regulatory impact statement for the drinking water MCLs included an estimate of costs that all water supplies impacted by the proposed rules might incur. But it did not include an estimate of the statewide costs that *businesses* might incur because it did not have available information to make that estimate and that issue would be addressed during EGLE-RRD's effort to enact new Part 201 PFAS criteria. EGLE-RRD's regulatory impact statement for the Part 201 PFAS criteria stated that liable parties would incur costs for any necessary remedial activities but, like EGLE-DWEHD, concluded it did not have sufficient information available to make a statewide estimate of the costs to be incurred by businesses as a result of the new criteria.

1. Did the Court of Claims correctly find that the PFAS drinking water rules should be invalidated because EGLE concluded in its regulatory impact statements that it did not have sufficient information to estimate the statewide costs that business would incur due to changes in the Part 201 groundwater cleanup criteria?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Claims' answer: Yes.

STATUTES AND RULES INVOLVED

This case involves application of the APA, which establishes the processes and procedures for agencies to publish rules. MCL 24.231 *et seq*. One of those procedures appears in MCL 24.245(3), which provides, in relevant part,

> (3) Except as provided in subsection (6), an agency shall prepare and include with a notice of transmittal under subsection (2) the request for rulemaking and the response from the office, a small business impact statement prepared under section 40, and a regulatory impact statement. The regulatory impact statement must contain all of the following information:
>
> (a) A comparison of the proposed rule to parallel federal rules or standards set by a state or national licensing agency or accreditation association, if any exist.
>
> (b) If section 32(8) applies and the proposed rule is more stringent than the applicable federally mandated standard, a statement of the specific facts that establish the clear and convincing need to adopt the more stringent rule and an explanation of the exceptional circumstances that necessitate the more stringent standard.
>
> (c) If section 32(9) applies and the proposed rule is more stringent than the applicable federal standard, either the statute that specifically authorizes the more stringent rule or a statement of the specific facts that establish the clear and convincing need to adopt the more stringent rule and an explanation of the exceptional circumstances that necessitate the more stringent standard.
>
> (d) If requested by the office or the committee, a comparison of the proposed rule to standards in similarly situated states, based on geographic location, topography, natural resources, commonalities, or economic similarities.
>
> (e) An identification of the behavior and frequency of behavior that the rule is designed to alter.
>
> (f) An identification of the harm resulting from the behavior that the rule is designed to alter and the likelihood that the harm will occur in the absence of the rule.
>
> (g) An estimate of the change in the frequency of the targeted behavior expected from the rule.

(h) An identification of the businesses, groups, or individuals who will be directly affected by, bear the cost of, or directly benefit from the rule.

(i) An identification of any reasonable alternatives to regulation under the proposed rule that would achieve the same or similar goals.

(j) A discussion of the feasibility of establishing a regulatory program similar to that proposed in the rule that would operate through market-based mechanisms.

(k) An estimate of the cost of rule imposition on the agency promulgating the rule.

(l) An estimate of the actual statewide compliance costs of the proposed rule on individuals.

(m) A demonstration that the proposed rule is necessary and suitable to achieve its purpose in proportion to the burdens it places on individuals.

(n) *An estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups*.

(o) An identification of any disproportionate impact the proposed rule may have on small businesses because of their size.

(p) An identification of the nature of any report required and the estimated cost of its preparation by small businesses required to comply with the proposed rule.

(q) An analysis of the costs of compliance for all small businesses affected by the proposed rule, including costs of equipment, supplies, labor, and increased administrative costs.

(r) An identification of the nature and estimated cost of any legal consulting and accounting services that small businesses would incur in complying with the proposed rule.

(s) An estimate of the ability of small businesses to absorb the costs estimated under subdivisions (p) to (r) without suffering economic harm and without adversely affecting competition in the marketplace.

(t) An estimate of the cost, if any, to the agency of administering or enforcing a rule that exempts or sets lesser standards for compliance by small businesses.

(u) An identification of the impact on the public interest of exempting or setting lesser standards of compliance for small businesses.

(v) A statement describing the manner in which the agency reduced the economic impact of the rule on small businesses or a statement describing the reasons such a reduction was not feasible.

(w) A statement describing how the agency has involved small businesses in the development of the rule.

(x) An estimate of the primary and direct benefits of the rule.

(y) An estimate of any cost reductions to businesses, individuals, groups of individuals, or governmental units as a result of the rule.

(z) An estimate of any increase in revenues to state or local governmental units as a result of the rule.

(aa) An estimate of any secondary or indirect benefits of the rule.

(bb) An identification of the sources the agency relied on in compiling the regulatory impact statement, including the methodology used in determining the existence and extent of the impact of a proposed rule and a cost-benefit analysis of the proposed rule.

(cc) A detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rule on small businesses as described in section 40(1)(a) to (d).

(dd) Any other information required by the office. [Emphasis added.]

EGLE-DWEHD promulgated its PFAS drinking water rules under the Safe Drinking Water Act, MCL 325.1001 *et seq.*, which regulates the construction and operation of public water supplies in Michigan. The MCLs for PFAS in drinking water are found at Mich Admin Code, R 325.10604g, and the sampling requirements that water supplies undertake to test for those toxins are located at Mich Admin Code, R 325.10717d.

Part 201 is the Michigan law that regulates releases of hazardous substances into the environment and how such contamination should be remediated (if at all).

MCL 324.20101 *et seq*. MCL 324.20120a(5) states that any new drinking water MCLs will automatically supersede any existing groundwater cleanup criteria. The current PFAS cleanup criteria under Part 201 for groundwater is found at Table 1a of Mich Admin Code, R 299.44.

ACRONYMS

3M	3M Company
APA	Administrative Procedures Act
DWEHD	EGLE's Drinking Water and Environmental Health Division
EGLE	Michigan Department of Environment, Great Lakes, and Energy
ERRC	Environmental Rules Review Committee
HFPO-DA	Hexafluoropropylene oxide dimer acid
JCAR	Joint Committee on Agency Rulemaking
MCLs	Maximum Contaminant Levels
MDHHS	Michigan Department of Health and Human Services
PFAS	Per- and Polyfluoroalkyl substances
PFBS	Perfluorobutanesulfonic acid
PFHxA	Perfluorohexanoic acid
PFHxS	Perfluorohexanesulfonic acid
PFNA	Perfluorononanoic acid
PFOA	Perfluorooctanoic acid
PFOS	Perfluorooctanesulfonic acid
RIS	Regulatory Impact Statement
RRD	EGLE's Remediation and Redevelopment Division
SDWA	Safe Drinking Water Act
USEPA	United States Environmental Protection Agency

INTRODUCTION

The Court of Claims has found that EGLE's drinking water PFAS rules are invalid because EGLE did not include in its regulatory impact statements an estimate of the "*actual* statewide compliance costs of the proposed rule on businesses and other groups." (App Vol 1, p 111, emphasis added.) The relevant regulatory impact statement plainly states that "EGLE does not have the ability to estimate the actual statewide compliance costs of the rule amendments on businesses [or individuals]." (App Vol 2, p 356.) No evidence exists in the record to demonstrate that this statement is false, and EGLE publicly explained why it was unable to make an "estimate" of "*actual* statewide compliance costs"—EGLE simply has no way of knowing the number of PFAS contamination sites across the State, and even if it did, the cost to businesses would vary widely depending upon the level of concentration of PFAS, its location, and the extent of contamination. Any firm "estimate" would be irresponsibly premised on guesswork, and could not reflect "actual" compliance costs.

The APA does not require an agency to speculate or make up an answer where no information exists, and in fact, such information could not be considered "actual statewide compliance costs." Yet, that is what the Court of Claims has found EGLE must do—estimate the impossible. That cannot be the answer. Long-established case law in this State holds that courts should defer to agency expertise and fact finding in the rulemaking process, and this scenario demonstrates the wisdom of that deference.

Moreover, the Court of Claims premised its decision not upon any evidence in the record relating to those PFAS rules but instead upon its review of a regulatory impact statement in a related, but distinct rulemaking effort. The Court of Claims obtained that statement for the first time after oral argument on the underlying motions and it found—without soliciting any input from the parties—that EGLE had failed to provide the required estimate in that related regulatory impact statement.

The Court of Claims' attempt to insert itself into the fact-finding process must be reversed.

STATEMENT OF FACTS AND PROCEEDINGS

The State of Michigan's decision to promulgate PFAS drinking water rules to protect public health.

PFAS are human-made substances that do not occur naturally in the environment. Manufacturers of PFAS, such as 3M, sold it to others and used it in their own products as a coating to repel water, grease, and soil. Unfortunately, releases of PFAS products into the environment have created a national and state-wide environmental disaster. In this State alone, 237 sites have been identified where PFAS exceeds applicable cleanup criteria. (MPART: PFAS Geographic Information System (arcgis.com).) Damage caused by the release of these toxins has not been limited to the environment—numerous adverse health effects have been associated with exposure to PFAS. (App Vol 1, p 144.)

The growing awareness of those hazards caused the United States Environmental Protection Agency (USEPA) and various states to begin investigating the need to enact rules to protect the public from exposure to these toxins.[1] Michigan, which had already identified dozens of PFAS-contaminated aquifers within the State, joined those states in taking action.

[1] USEPA's preliminary work has led it to conclude "that negative health effects may occur at much lower levels of exposure to PFOA and PFOS than previously understood and that PFOA is a likely carcinogen," (https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas), though USEPA is unlikely to finalize any new standards until Fall 2023 at the earliest.

EGLE-DWEHD's promulgation of the PFAS Drinking Water Rules.

EGLE-DWEHD enforces the Safe Drinking Water Act, which regulates the construction and operation of public water supplies in Michigan. PFAS contamination in drinking water is perceived to pose the greatest risk to public health because of the universal need for and use of drinking water. As such, EGLE-DWEHD took the lead in promulgating PFAS standards. (*Id.*, pp 157–158.)

Using health-base values recommended by a Science Advisory Workgroup, [2] EGLE-DWEHD proposed amendments to its drinking water rules that established MCLs for seven PFAS analytes: PFNA: 6 ppt; PFOS: 16 ppt; PFOA: 8 ppt; PFHxA: 400,000 ppt; PFHxS: 51 ppt; PFBS: 420 ppt; and HFPO-DA: 370 ppt. (*Id.*, pp 175, 215–216, and 222.) EGLE-DWEHD's draft rules required water supplies to collect and analyze samples. If a running annual average of those samples exceeds the MCL for any PFAS chemical, the water supply is required to take action to reduce the level of contaminants below the listed MCLs. (*Id.*, pp 222–224.)

[2] The Science Advisory Workgroup was comprised of nationally recognized experts in the toxicology, epidemiology, and remediation of PFAS chemicals, who were assisted by multiple experts within EGLE and Michigan Department of Health and Human Services (MDHHS). (*Id.*, pp 116–119.) The Science Advisory Workgroup's June 27, 2019 report sets forth in detail the process it undertook to identify health-based values for seven (7) PFAS contaminants in drinking water. (*Id.*, pp 126–145.) Health-based values establish a level of contamination below which there is not expected to be adverse health impacts. (*Id.*, p 126.)

The Environmental Rules Review Committee's (ERRC) approval of the PFAS Rules.

As required by the APA, EGLE-DWEHD initially submitted the draft rules and regulatory impact statement to the ERRC. The ERRC has been established by the Legislature to oversee all rulemaking in EGLE. Specifically, the Legislature instructed ERRC to ensure that any rules promulgated by EGLE are, among other things, within EGLE's rulemaking authorization, are necessary and suitable to achieve their purposes in proportion to the burdens they place on individuals and businesses and are based on sound and objective scientific reasoning. MCL 24.266(4).

EGLE-DWEHD presented its regulatory impact statement to the ERRC at its October 31, 2019 meeting. (*Id.*, p 161.) Among other topics, a regulatory impact statement must include "estimates" of potential costs that various parties would incur if the rules were enacted. See, e.g., MCL 24.245(3)(k), (l), and (n). The Safe Drinking Water Act regulates "public water supplies," see, e.g., MCL 324.1001a and 1003, over half of which, in the State of Michigan, are owned and operated by government entities such as villages, cities, townships or counties. So when estimating the costs to be incurred as a result of the rules, EGLE-DWEHD's estimates are found at Paragraph 13 (costs to be incurred by state and local government units) and Paragraph 28 (costs on businesses and groups) of its regulatory impact statement. (App Vol 1, pp 229–230 and 232.)

EGLE-DWEHD stated at Paragraph 13 of its regulatory impact statement that two types of costs would be imposed on water supplies by the new rules—(1)

the annual costs incurred by each water supply to sample and monitor for PFAS contaminants in the drinking water, and (2) the costs to install and operate treatment when a water supply detects PFAS in excess of MCLs. (*Id.*, p 230.) Because the number of required samples were initially uniform for all water supplies, it was relatively easy to estimate overall monitoring costs on a statewide basis. (*Id.*)

With respect to treatment costs for water supplies that detected PFAS in excess of the MCLs, there were only two known options which were identified in the regulatory impact statement. Because of those limited options, EGLE-DWEHD provided estimated treatment costs for both large and small water supplies. (*Id.*) Additionally, EGLE-DWEHD had previously invited public water supplies to sample for PFAS contaminants and it knew that samples from 22 water supplies exceeded the MCLs set forth in the draft rules. Thus, EGLE was able to provide a precise estimate of overall costs based upon available data. (*Id.*)

At the October 31, 2019 meeting, the ERRC asked EGLE-DWEHD to respond to questions that members had on the regulatory impact statement. (*Id.*, p 237.) One of the questions related to the impact that new drinking water standards would have on groundwater cleanups under Part 201. Per MCL 324.20120a(5), any new drinking water standards would automatically change already existing groundwater cleanup criteria. Because groundwater cleanup criteria previously existed for PFOA and PFOS, those standards would be changed to the new drinking water standards. No groundwater cleanup standards existed for the five other

PFAS analytes addressed in EGLE-DWEHD's rules, and therefore, new rules would need to be enacted to set criteria for those toxins. Because EGLE-DWEHD had not addressed these costs in its regulatory impact statement, the ERRC asked EGLE-DWEHD to estimate the impact on small businesses, etc., when PFOA and PFOS criteria were changed as a matter of law.

EGLE-DWEHD responded as follows:

> If an entity is responsible for either causing a PFAS release or being responsible for the due diligence associated with a PFOS or PFOA release under Part 201, then they would be obligated to meet those standards. This impact will vary depending on the PFOS or PFOA concentration, media effected, and extent of contamination. Because of this variability, it is not practical to determine the impact of this change. Even if it was, this impact is a result of current statutory applicability not a regulatory requirement. (App Vol 1, pp 242–243.)

After EGLE-DWEHD submitted its written response, the ERRC unanimously found, on November 14, 2019, that the proposed rules met the criteria set forth in MCL 25.266(4) of the APA and directed DWEHD to move forward with public hearings on the rules. (*Id.*, p 246.) EGLE-DWEHD held public hearings at several locations and it received both oral and written comments from stakeholders and the public on the proposed rules. (App Vol 2, pp 258 and 275–276.) Based upon those comments, EGLE-DWEHD made some fairly minor edits to its regulatory impact statement. (*Id.*, pp 248–256.)

Eric Oswald, Director of DWEHD, appeared before the ERRC on February 27, 2020, to discuss the public comments. (*Id.*, pp 257–273.) During his presentation, he provided responses to many of the comments submitted on the regulatory impact statement, including comments on the lack of any discussion

about the state-wide costs to be incurred as a result of changes to the Part 201 standards. Mr. Oswald's notes state that:

> EGLE did not include costs incurred due to changes in 201 cleanup standards as they are not required to be considered under the RIS and they would be very difficult to almost impossible to anticipate. The Remediation and Redevelopment Division of EGLE will consider these costs in their processes. (*Id.*, p 271.)

The ERRC approved the final draft of the rules at its February 27, 2020 Meeting. (*Id.*, pp 276–277.) EGLE-DWEHD's proposed rules were submitted to the legislature's Joint Committee on Agency Rulemaking (JCAR) on March 16, 2020 with all other required documents. (*Id.*, pp 278–344.) The ERRC's chairman sent a letter to JCAR highlighting several issues considered by the ERRC, including the impact that the drinking water rules would have on cleanup criteria for soil and groundwater under Part 201. He stated that the ERRC leadership was aware of uncertainty about implementing the criteria when it approved the rules at its February 27 meeting, noted EGLE-DWEHD's statement acknowledging the need for more study of PFAS fate and transport, and stated that property owners dealing with contaminated soil "should be working with EGLE to apply site specific risk assessment principles to manage PFAS." (*Id.*, pp 345–346.) The ERRC made plain that it was aware of the uncertainties in the means and costs associated with the "collateral impact" of the drinking water rules, but approved the standard with the recommendation that "EGLE should work with the regulated community to provide clarity" in implementing the approved regulations. (*Id.*, p 346.)

JCAR did not take any action during the fifteen session days that the proposed rule was before it. (App Vol 1, p 36.) As a result, the rules were filed with the Office of the Great Seal on July 27, 2020, which made them final under the processes set forth in the APA. (*Id.*) The PFAS drinking water rules became effective on August 3, 2020. (*Id.*)

EGLE-RRD's promulgation of the Part 201 PFAS Rules to establish groundwater cleanup criteria.

Relying heavily on EGLE-DWEHD's work, EGLE-RRD next sought to promulgate PFAS cleanup criteria for groundwater used for drinking water. EGLE-RRD is authorized to establish cleanup criteria under Part 201, but those standards are risk-based and reflect the potential for human health or ecological risks. MCL 324.20120a(3). Multiple factors are considered in determining how and the extent to which a contaminated site must be remediated. Generic (generally applicable) cleanup standards are generally based on the proposed future use of the contaminated property: unrestricted or restricted residential; unrestricted or restricted site-specific; and unrestricted and restricted non-residential. MCL 324.20120a(1), 324.20120b. But Michigan also permits a liable party to avoid cleaning up contamination to those standards if other measures are available to abate unacceptable risks to the public health. MCL 324.20114(1)(d). For example, a party responsible for contaminating a groundwater aquifer that provides drinking water for residences can avoid the cost of remediating the aquifer by preventing exposure to the aquifer through land use restrictions coupled with actions such as buying impacted properties, running municipal water to the affected residences,

installing whole house filters, or conducting a partial remediation of only the heavily contaminated areas. MCL 324.20120a(5), 324.20121.

Additionally, parties liable for a release under Part 201 are able to conduct self-directed cleanup, and in many circumstances are not even required to report the spill and what if any clean up actions are taken. MCL 324.20114(1)(b)(i). Liable parties are often not even required to obtain approval from RRD prior to undertaking response activities, but may lawfully self-implement remedial actions. MCL 324.20114.

EGLE-RRD also had to obtain approval from the ERRC before promulgating its rules. The regulatory impact statement submitted to the ERRC with the proposed rules discussed at multiple locations the costs associated with the Part 201 PFAS rules.[3] (App Vol 2, pp 348–359.) Similar to EGLE-DWEHD's response to the questions posed by the ERRC, the regulatory impact statement explained that the rules would result in additional costs, but because of the multiple variables impacting the nature and extent of any required cleanup, it did not have sufficient information to estimate actual costs to be incurred as a result of the new rules:

> The cost of compliance, including the costs of equipment, supplies, labor, and increased administrative costs with respect to the implementation of remedial or corrective action relying on the proposed rules, would be incurred in the same manner as those costs to comply with statutory obligations to address the release of any hazardous substance.

[3] The regulatory impact statement submitted by EGLE-RRD was not part of the underlying record, but the Court of Claims took judicial notice of that document. EGLE has included a copy of that document in its Appendix. That public document is also available at ARS Public - RFR Transaction (state.mi.us).

The cost to a business to comply with statutory obligations resulting from the contamination at a site are dependent on the type and level of contamination present at a site, the amount and quality of environmental data already known about a site, the type of use of the site, as well as the response activities selected for managing the risks presented by the environmental contamination. (*Id.*, p 355.)

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All businesses that are liable for a release of hazardous substances into the environment are required by statute to address the risks posed by the contamination. There are costs associated with those responsibilities, but as stated above, those costs vary depending on the specifics of the site. EGLE routinely uses enforcement discretion with regard to the financial viability of a particular business and does a formal assessment of a person's ability to pay for the necessary remedial actions or corrective actions when pursuing compliance and enforcement alternatives. (*Id.*, p 355.)

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The proposed promulgation of the generic cleanup criteria for groundwater used for drinking water for PFAS, by itself, does not impose any compliance obligations. The cost of compliance would be incurred in the same manner as those costs to comply with statutory obligations to address the release of any hazardous substance. In this case, there will be increased costs if a person (i.e., individual, small or large business, federal, state or local unit of government, etc.) is the owner or operator for a site of PFAS groundwater contamination.

EGLE does not have the ability to estimate the actual statewide compliance costs of the rule amendments on business [or individuals] since the statute does not always require a responsible party to report the presence of PFAS groundwater contamination. To date, 154 locations have been identified where groundwater contaminated with PFAS is present above enforceable generic cleanup criteria for groundwater in drinking water for PFOA and PFOS. EGLE has also identified locations where concentrations of PFNA, PFHxS, PFBS, PFHxA, and HFPO-DA have been detected above their respective criteria in addition to PFOA and PFOS. Since the same treatment technology can be used to address all seven PFAS, the department does not anticipate that additional actions would be required above and beyond those already required by the presence of PFOA and PFOS contamination.

> The costs associated with each cleanup would vary location to location depending on a number of factors—the proximity of wells used for the drinking water supply, the ability to contain and properly manage the release, the volume and concentration of the pollutant in the groundwater, etc. (*Id.*, p 356.)
>
> ***
>
> EGLE does not have the ability to estimate the actual statewide compliance costs of the rule amendments on business [or individuals] since there are no reporting requirements to estimate the number of sites that have PFAS groundwater contamination or the potential additional response activities that may be necessary. In addition, a person can self-implement actions necessary to address the risks associated with PFAS contamination without department approval and there is no requirement to report the costs of these actions to EGLE. (*Id.*, p 357.)

Following public comment and approval by the ERRC, the Part 201 PFAS Rules were submitted to the JCAR on November 22, 2021. ARS Public - RFR Transaction (state.mi.us). JCAR did not take any action and those rules became effective on February 15, 2022. (*Id.*)

The Court of Claims' rulings in 3M's lawsuit.

As one of the largest manufacturers and users of PFAS, 3M has been repeatedly sued because of contamination caused by its product.[4] As part of its response to such lawsuits, 3M is engaged in a nationwide effort to prevent passage of more restrictive regulation of PFAS contaminants.[5] 3M's lawsuit challenging

[4] See, e.g., https://www.mprnews.org/story/2018/02/20/3m-pfc-groundwater-pollution-trial-announcement; https://www.michigan.gov/pfasresponse/0,9038,7-365-86513_96296-517280--,00.html; https://news.bloomberglaw.com/environment-and-energy/n-y-sues-chemours-dupont-3m-over-pfas-contamination.

[5] See, e.g., https://www.fosters.com/story/news/2019/10/01/3m-suit-aims-to-block-tougher-pfas-standards-for-water-in-nh/2641134007/; https://news.3m.com/Coalition-Challenges-New-Jersey-PFAS-Regulatory-

EGLE-DWEHD's rules is part of that effort. 3M's lawsuit asserts that the rules were invalid for a long list of purported reasons, including that EGLE-DWEHD had exceeded its rulemaking authority under the SDWA, that the rules were arbitrary and capricious, and that the rules violated the APA by failing to address the impact of the rule in its regulatory impact statement as required by MCL 24.245. (App Vol 1, pp 9–50.) One of the multiple faults identified by 3M with EGLE-DWEHD's regulatory impact statement was it failed "to address altogether the costs that would arise from the resulting changes to the groundwater cleanup standards for PFOS and PFOA . . . ." (*Id.*, p 41.)

The Court of Claims initially dismissed Counts IV–VII based upon EGLE's motion to dismiss 3M's complaint under MCR 2.116(C)(8). (*Id.*, p 84–94.) Counts I and II were subsequently dismissed by the Court of Claims on November 15, 2022. (*Id.*, pp 95–114.) The court also rejected five of the six alleged errors identified by 3M in Count III regarding EGLE-DWEHD's regulatory impact statement but ruled in favor of 3M on its claim that EGLE-DWEHD's regulatory impact statement failed to adequately include "[a]n estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups" as required by MCL 24.245(3)(n). (*Id.*, p 113.)

Overreach. 3M has submitted the same or similar objections to other state and federal agencies considering such regulations. See, e.g., (*Id.*,, pp 360–485.); https://www.mass.gov/doc/3m-2019-mcp-pfas-comments/download; https://www.mass.gov/doc/massdep-response-to-comments-proposed-pfas-drinking-water-maximum-contaminant-level-mcl/download, pp 66–72.

Specifically, the Court of Claims found that EGLE-DWEHD did not address the costs associated with changes to Part 201 groundwater cleanup criteria because those costs "would be addressed in separate groundwater-rulemaking process under Part 201." (*Id.*, p 100.) However, when the court obtained via its own volition a copy of the regulatory impact statement submitted by EGLE-RRD as part of the Part 201 rulemaking process, (*Id.*, p 103), it concluded based upon its own analysis that "nowhere in the Part 201 RIS did the Department address any cleanup or compliance costs that a business or group would incur as a result of the PFAS rules." (*Id.*, p 112.) Furthermore, the court asserted that EGLE-RRD "relied on the criteria set for PFOA and PFOS as a result of the SDWA-rulemaking process to justify its decision to ignore any cleanup and compliance costs faced by businesses and groups with respect to the other five PFAS substances under Part 201." (*Id.*) Because those costs were not addressed in either EGLE-DWEHD's or EGLE-RRD's regulatory impact statement, the court found that EGLE-DWEHD's regulatory impact statement was insufficient and invalidated the drinking water PFAS rules. (*Id.*, p. 113.) EGLE appeals.

ARGUMENT

I. EGLE's regulatory impact statements contained all the information required under the APA.

A. Issue Preservation

EGLE argued below that its regulatory impact statement contained all the required information. (3/15/2022 Def's Brief for Sum Disp, pp 20–25; 4/14/2022 Brief in Resp, pp 4–7.)

B. Standard of Review

This court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Prentis Family Foundation, Inc v Karmanos Cancer Institute*, 266 Mich App 39, 43 (2005).

C. Analysis

MCL 24.245(3) requires any agency proposing a rule to prepare a regulatory impact statement that includes "estimates" of "actual statewide compliance costs" that individuals, businesses, and other groups would incur if the rules were enacted. See, e.g., MCL 24.245(3)(l), and (n). The SDWA regulates "public water supplies," see, e.g., MCL 324.1001a and 1003, over half of which in the State of Michigan are owned and operated by government entities such as villages, cities, township or counties. So when estimating the costs to be incurred as a result of the rules, EGLE-DWEHD's response is found at Paragraph 13 (costs to be incurred by state and local government units) (App Vol 2, pp 251–252), and Paragraph 28 (costs on businesses and groups) (*Id.*, p 254), of its regulatory impact statement. EGLE-

DWEHD's responses provide detailed information regarding the estimated costs associated with PFAS drinking water rules. No dispute exists that EGLE-DWEHD prepared a regulatory impact statement or that EGLE-DWEHD provided estimates for each of the required topics in that regulatory impact statement.

1. EGLE-DWEHD was not required to include unsupportable cost estimates in its regulatory impact statement.

Although EGLE-DWEHD's regulatory impact statement contained a detailed explanation of potential costs to be incurred because of the PFAS drinking water rules, it did not include any estimates for costs to be incurred as a result of statutorily mandated changes to the Part 201 groundwater cleanup criteria. EGLE-DWEHD's reasons for not including those costs were not hidden. Before the ERRC, during public comment, and in communications to the JCAR, EGLE-DWEHD's rationale for not including those costs was discussed. EGLE-DWEHD explained its belief that Part 201 costs were not required to be included because (1) the changes to those criteria were not caused by the proposed PFAS drinking water rules, but by legislative decree; (2) although responsible parties would certainly have to incur costs to conduct a Part 201 cleanup or take any other action permitted under Part 201, because of the endless variables that would come into play and a lack of information, EGLE-DWEHD could not provide a state-wide estimate of Part 201 total cleanup costs; and (3) such a discussion would be more appropriate and informed when the division responsible for enforcing Part 201, EGLE-RRD,

undertook its planned effort to amend the Part 201 criteria to address PFAS. (App Vol 1, pp 242–243 and 271.)

The key explanation offered by EGLE-DWEHD was that it did not include Part 201 costs because EGLE lacked the necessary information to make an estimate of statewide compliance costs. It is the key explanation because, as demonstrated above, EGLE-RRD took the same position in its regulatory impact statement associated with the new PFAS groundwater cleanup standards under Part 201. Yes, EGLE-DWEHD also stated that EGLE-RRD would *further* address this issue when promulgating the Part 201 rules. But EGLE-RRD did address that issue, and despite its greater expertise and knowledge in this area, it reached the same conclusion as EGLE-DWEHD: it did not have sufficient information to make an estimate of "actual statewide compliance" costs.

Courts are required to defer "to administrative expertise and not invade agency fact finding by displacing an agency's choice between two reasonably differing views." *Slis v State*, 332 Mich App 312, 352 (2020), citing *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576 (2002). The rationale for this rule was summarized in *Michigan Basic Property Insurance Association v Office of Finance & Insurance Regulation*, 288 Mich App 552, 560 (2010):

> Administrative agencies are created by the Legislature as "repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 198 (2001). "[A]dministrative agencies possess specialized and expert knowledge to address issues of a regulatory nature. Use of an agency's expertise is necessary in regulatory matters in which judges and juries have little familiarity." *Id*. at 198–199. The relationship between the courts and

> administrative agencies is one of restraint, and courts must exercise caution when called upon to interfere with the jurisdiction of an administrative agency. *74th Judicial Dist Judges v Bay Co*, 385 Mich 710, 727 (1971). "Judicial restraint tends to permit the fullest utilization of the technical fact-finding expertise of the administrative agency and permits the fullest expression of the policy of the statute, while minimizing the burden on court resources." *Id*. at 728.

A party substantively challenging an agency's rulemaking must demonstrate that the agency's actions were "arbitrary or capricious." *Luttrell v Dep't of Corrections*, 421 Mich 93, 100 (1984). "In general, an agency's rules will be found to be arbitrary only if the agency 'had no reasonable ground for the exercise of judgment.'" *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 141–141 (2011), citing *American Trucking Ass'n v United States*, 344 US 298, 314 (1953).

There is no evidence in the record to demonstrate that EGLE-DWEHD's conclusion that insufficient information existed was wrong. Any estimate would have been guess-work, which would have simply given 3M another basis to challenge EGLE-DWEHD's rule promulgation efforts as being "arbitrary" or "capricious." The failure to include costs estimates that do not exist cannot serve as a basis for finding that EGLE-DWEHD's regulatory impact statement failed to comply with the APA. The Court of Claims' rejection of EGLE-DWEHD's findings, without any supporting evidence for its conclusions, constitutes an unwarranted intrusion into the rulemaking process and fails to accord EGLE the necessary deference. As a result, its opinion must be overturned.

2. The Court of Claims improperly inserted itself into the rulemaking process by second-guessing EGLE-DWEHD's decision to not include certain information in its regulatory impact statement.

No Michigan court has previously invalidated an agency rule based upon the content of a regulatory impact statement. Any argument that this court should examine the minutiae of the factual statements made by DWEHD and its experts in a regulatory impact statement is a frontal assault on decades of law in Michigan holding that courts should defer to agency fact finding. See, e.g., *Mich Basic Prop Ins Ass'n*, 288 Mich App at 560–561 ("Administrative agencies possess specialized and expert knowledge to address issues of regulatory nature . . . the relationship between the courts and administrative agencies is one of restraint . . . ."); *Slis*, 332 Mich App at 354 (finding that application of separation-of-powers principles requires courts to "give due deference to the agency's expertise and not invade the agency's fact-finding by displacing the agency's choice between two reasonably differing views"). Any such argument must be rejected.

The Court of Claims cited *Clonlara, Inc v State Board of Education*, 442 Mich 230, 239 (1993) and *Michigan Charitable Gaming Association v Michigan*, 310 Mich App 584, 594 (2015) for the proposition that a "deficient regulatory-impact statement invalidates the PFAS rulemaking." (*Id.*, p 113.) But neither case included such a holding or supports the court's decision. Both cases stand for the proposition that rules must be promulgated in accordance with the "procedures" or "process" set forth in the APA. *Clonlara, Inc.*, 442 Mich at 239; *Mich Charitable Gaming Ass'n*, 310 Mich App at 594. Neither case stands for the proposition that a

court may second-guess the fact-finding made by an agency in a regulatory impact statement when following the APA procedural requirements.

The APA does not include any standards specifying how a department must arrive at the required estimate or the degree of accuracy that is required in the estimate to comply with MCL 24.245(3). So long as EGLE followed the procedural requirements of the APA, a court must uphold the agency actions absent a finding of "arbitrary or capricious" behavior. EGLE-DWEHD's regulatory impact statement included substantial, detailed analysis of potential costs, and therefore, it complied with the APA's procedural requirements. EGLE-DWEHD did not include cost projections that it could not make, and EGLE-RRD's subsequent efforts confirmed the accuracy of that decision. The Court of Claims' finding that Part 201 groundwater cost projections should have been included, without any evidence in the record that such information existed or could be acquired, violates the long-standing legal precept that courts should defer to agency fact-finding.

3. EGLE-RRD complied with the APA by substantively addressing the Part 201 groundwater cost issues in its regulatory impact statement.

The Court of Claims found that EGLE-RRD's response to Paragraph 28 of its regulatory impact statement was deficient (and by extension EGLE-DWEHD's regulatory impact statement) because it did not "address any cleanup or compliance costs that a business or group would incur as a result of the PFAS rules" and "relied on the criteria set for PFOA and PFOS as a result of the SDWA-rulemaking process to justify it decision to ignore any cleanup and compliance costs faced by

businesses and groups with respect to the other five PFAS substances under Part 201." (*Id.*, p 112.) Neither of the court's findings is correct, and therefore, cannot support a finding that either EGLE-RRD or EGLE-DWEHD failed to fulfill their obligations under the APA.

First, it is a plainly incorrect reading of EGLE-RRD's response to Paragraph 28 to conclude that it solely relied on EGLE-DWEHD's criteria for PFOA and PFOS to avoid addressing costs. Although RRD does state in Paragraph 28 that the PFAS drinking water criteria would dictate MCLs for PFOS and PFOA, EGLE-RRD did not end its response at that point. EGLE-RRD continued on to give similar responses that EGLE-DWEHD gave during the drinking water rulemaking process—it could not give an estimate of the "statewide compliance costs" because (1) it did not know how many sites with PFAS contaminated groundwater existed in the State, and (2) the highly variable nature of any response activities. (App Vol 2, pp 355–357.) Those statements cannot and should not be ignored.

Second, EGLE-RRD's response does substantively address the cost issue presented by Question 28. Question 28 of the regulatory impact statement requires the agency to estimate "actual statewide compliance costs" caused by the proposed rules on "businesses or groups." (*Id.*, p 356.) Because EGLE-RRD did not know how many contaminated sites exist in Michigan, it accurately stated that "EGLE does not have the ability to estimate the actual statewide compliance costs...." (*Id.*) Without knowing how many contaminated sites existed across the state, EGLE-RRD could not estimate the "statewide compliance costs." Any number would be

mere guesswork and could run headlong into the well-understood requirement that an agency may not act arbitrarily or capriciously.

Third, the Court of Claims incorrectly read Question 28 to require EGLE-RRD to provide an estimate of costs to be incurred by *individual* businesses or groups. Paragraph 28 does not seek that information, and therefore, EGLE-RRD's regulatory impact statement cannot be found to be deficient for that reason. Even though it was not required to, however, EGLE-RRD did explain in its regulatory impact statement why it could not provide an estimate as to the average costs to be incurred by a business or group by the proposed rules. Because of the endless variables that would have to be considered given Michigan's risk-based remedial requirements, *see supra* at pp 7–8, EGLE-RRD could not provide an estimate of average costs that might be incurred by any business or group. EGLE-RRD did not hide that response from the public—it provided that response in Paragraph 28 and multiple other paragraphs of the regulatory impact statement. (App Vol 2, pp 355–357.) EGLE-RRD provided a response that satisfied the ERRC and the JCAR. There is no evidence in the record that EGLE-RRD's response was incorrect. The Court of Claims' finding that EGLE-RRD's regulatory impact statement was deficient ignores RRD's full response to Paragraph 28, and therefore, must be reversed because it is clearly erroneous.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, EGLE requests that this Court reverse the Court of Claims' opinion and order and enter judgment in its favor.

Respectfully submitted,

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