STATE OF MICHIGAN

COURT OF CLAIMS

3M COMPANY,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant.
_____/

OPINION AND ORDER

Case No. 21-000078-MZ

Hon. Brock A. Swartzle

Defendant Department of Environment, Great Lakes, and Energy promulgated rules establishing the allowable maximum-contaminant levels in drinking water for seven chemical substances, all of which fall within the general family of waterproofing chemicals called perfluoroalkyl and polyfluoroalkyl substances (PFAS). Throughout the process, the Department recognized that the rules it set for drinking water regarding Perfluorooctanoic acid (PFOA) and Perfluorooctanesulfonic acid (PFOS) would, by operation of law, automatically set the rules for those substances with respect to groundwater. In other words, once the rules for PFOA and PFOS were set for drinking water, the rules were set for groundwater too. Plaintiff 3M was not directly impacted by the rules with respect to drinking water because it did not operate any drinking-water systems, but the company was impacted by the drinking-water rules because they became the de jure rules for groundwater.

3M challenged the drinking-water rules on several grounds, three of which survived this Court's earlier ruling under MCR 2.116(C)(8): necessity (Count I); arbitrariness or capriciousness

(Count II); and deficiencies in the regulatory-impact statement (Count III). As explained below, the first two claims are without merit. On the third claim, however, the Department did issue a deficient regulatory-impact statement.

Specifically with respect to the regulatory-impact statement: Under the Administrative Procedures Act of 1969, MCL 24.201 *et seq.* (APA), our Legislature requires Executive branch departments to consider the benefits and costs of regulating a particular substance or activity when it promulgates a rule. To ensure that a department actually considers all of the relevant benefits and costs, our Legislature further requires that a department "show its work" in a regulatory-impact statement. MCL 24.245(3). But here, with respect to the anticipated costs imposed on 3M and others like it by the proposed rule, the Department told 3M, lawmakers, and the public that the Department would consider certain costs in a subsequent rulemaking; but then in that subsequent rulemaking, the Department declined to consider those costs, citing the prior promulgated rules as, in effect, a "done deal." A deficient regulatory-impact statement invalidates the promulgated rules.

With that said and as explained more fully below, the Court will, on its own motion, stay the effect of this opinion and order until final judgment, which will allow the parties to seek appellate review under the regulatory status quo. The interests of public health weigh in favor of this stay, so that the parties can pursue appellate relief and the Department can consider, if it wishes, whether additional regulatory actions should be taken in the meantime.

I. BACKGROUND

PFAS are chemicals that have been used in waterproofing products for years without concern, until recently when they have been recognized as hazardous to human health. This realization has prompted several states to regulate the maximum levels of PFAS permitted in

drinking water. For its part, the federal government recently issued proposed rulemaking to designate PFOA and PFOS as hazardous materials under 42 USC 9602, the federal statute governing the designation of hazardous substances and establishment of reportable released quantities. See Environmental Protection Agency, *Proposed Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, (Sept. 8, 2022), <https://www.epa.gov/superfund/proposed-designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos> (accessed November 15, 2022).

Michigan was one of the first states to address the problem and, given the emergent nature of the threat, Governor Gretchen Whitmer called for an accelerated timetable for the Department to promulgate rules under the Safe Drinking Water Act, MCL 325.1001 *et seq.* (SDWA) and Part 201 of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.* (Part 201). The Department acted quickly to address the problem, at one point telling the public, "WE ARE MOVING AT REGULATORY LIGHT SPEED. AWARE OF COMMENTS ON THE OTHER SIDE THAT WE ARE MOVING TOO QUICKLY." Even given the call for prompt action and the acknowledged uncertainties about various benefits and costs, the decision was made at the outset to use the regular, more extensive APA rulemaking process, rather than the APA's more streamlined process for emergent, uncertain environmental risks. See MCL 24.248.

Governor Whitmer directed the Michigan PFAS Action Response Team to establish a science-advisory workgroup "to review both existing and proposed health-based drinking water standards from around the nation to inform the rulemaking process for appropriate" maximum-contaminant levels of PFAS in drinking water. The Response Team created a three-person Workgroup, which in turn developed health-based values for the seven PFAS substances addressed in the drinking-water rules. (In addition to PFOA and PFOS, the group looked at

Perfluorononanoic acid (PFNA), Perfluorohexanoic acid (PFHxA), Perfluorohexanesulfonic acid (PFHxS), Perfluorobutanesulfonic acid (PFBS), and Hexafluoropropylene oxide dimer acid (HFPO-DA).)

The Workgroup identified health-based values for each substance, and each value reflected the group's conclusion of the appropriate maximum levels of contamination, below which "adverse health effects" were not anticipated. The Workgroup acknowledged that "other equally qualified experts" could reach "somewhat different conclusions," but the group concluded that its health-based values were "based on sound science and current practices in risk assessment." The Workgroup also "recognize[d] that the science of PFAS is constantly evolving and new information may come to light that requires a re-evaluation of the drinking water [health-based values] established herein." The Workgroup's health-based values were ultimately adopted by the Department as the PFAS maximum-contaminant levels.

The Department proposed drinking-water rules after the Workgroup submitted its report. As part of its proposal, the Department drafted a regulatory-impact statement titled, "Supplying Water to the Public," 2019-35 EG ("SDWA RIS"). In the statement, the Department explained that the maximum-contaminant levels for the seven PFAS substances were "similar" to those proposed by other states and that there was a " 'clear and convincing need' " for the rules "given the prevalence of PFAS contamination" in Michigan. SDWA RIS ¶¶ 2, 4.

The Department explained that the drinking-water rules would require quarterly sampling and regular monitoring for public-water supplies to track their PFAS levels. *Id.* ¶ 6. The Department estimated that 2,700 public-water supplies would be subject to the monitoring requirements, and that "approximately 22 supplies will be out of compliance based on prior

testing." *Id.* ¶ 10. Sampling for PFAS was estimated to cost $300 to take each sample and another $300 to test each sample, for an estimated total of $600 per sample and $6.4 million per year in sampling costs alone. *Id.* ¶ 13. Other costs associated with the drinking-water rules included installation and maintenance of treatment equipment, although switching to a different water source would also be available for some public-water supplies. *Id.* The Department separated installation costs into large and small systems. The cost for large systems was based on an estimate from a New Hampshire report that had less-stringent PFAS standards. *Id.* The Department used the high end of New Hampshire's estimates. *Id.* The estimate for small systems was based on "[a] recent cost estimate for Robinson Elementary school." *Id.* The Department noted that some public-water supplies were already proactively addressing PFAS contamination and that, for example, the City of Plainfield's efforts were expected to cost $15 million. *Id.* ¶ 14.

As for the benefits of the drinking-water rules, the Department noted that the maximum-contaminant levels would lead to a general increase in public health, but no quantitative estimates were included in the regulatory-impact statement. *Id.* ¶ 31. The Department believed that "[t]here is likely a significant benefit to the reduction [in] exposure to PFAS chemicals given recent findings." *Id.* The Department identified a list of expected health benefits, including improved outcomes along various dimensions with respect to women's pregnancies, decreases in the risks of certain diseases (e.g., thyroid disease, kidney and testicular cancers), and overall better cardiovascular and immune responses. *Id.* The Department estimated that the approximately 75% of Michiganders who receive their drinking water from public-water supplies would realize these health benefits. *Id.* ¶ 29(A). With that said, the Department recognized that more work was needed: "More study on the health benefits and impacts of PFAS exposure reduction and the economic benefit is required before a serious estimate can be made." *Id.*

With respect to groundwater, the Department did not address the costs or benefits that the drinking-water rules would have on groundwater cleanup or the approximately 25% of Michiganders who would benefit from reduced PFAS in groundwater. The Department did note, however, that "[s]ince there are not generic groundwater cleanup standards for [the five PFAS compounds other than PFOA and PFOS], the department may establish them" under Part 201. *Id.* ¶ 3(A). The SDWA RIS did not include any other discussion about groundwater.

As directed by MCL 24.266, the Department then sent its request for rulemaking to the Environmental Rules Review Committee. The Environmental Committee received public comments for a month and a half; the comments were overwhelmingly in favor of the proposed rules, although several "categories of concern" were noted following the public-comment period. 3M participated in this process and raised concerns with the proposed drinking-water rules, including how these rules would necessarily set the groundwater criteria for PFOA and PFOS to which 3M would be subject.

The Department summarized the comments it received and addressed the categories of concern during an Environmental Committee meeting but noted that it would defer to the Response Team and the Workgroup regarding setting the appropriate maximum-contaminant levels. Critical here, the Department explained that it "did not include costs [to businesses or groups] due to changes in [Part] 201 clean-up standards" in the SDWA RIS. The Department informed the Environmental Committee that issues raised by 3M and others involving groundwater (including costs of compliance) would be addressed in a separate groundwater-rulemaking process under Part 201. In other words, the Department recognized that the standards it set in the drinking-water rulemaking process for PFOA and PFOS would, by operation of MCL 324.20120a(5), set the standards for those two substances with respect to groundwater, but the Department explained that

it would consider the costs to business and groups in a separate groundwater (i.e., Part 201) rulemaking process.

The Environmental Committee approved the proposed drinking-water rules despite concerns expressed by some of its members, and the proposed rules were sent to our Legislature's Joint Committee on Administrative Rules (JCAR). In response to an inquiry from JCAR, the Department explained that, by operation of law, the drinking-water rules would automatically change the maximum-contaminant levels for PFOA and PFOS in groundwater, but the rules would not similarly set the levels for the other five PFAS substances in groundwater because, at that time, there were no such existing maximum-contaminant levels. JCAR did not object to the proposed drinking-water rules, and the rules became final on August 3, 2020. See Mich Admin Code, R 325.10107 *et seq.*

3M then sued the Department on seven counts alleging that the drinking-water rules were invalid. The Department moved for summary disposition under MCR 2.116(C)(8). Judge Colleen A. O'Brien, sitting as a Court of Claims judge, granted in part and denied in part the Department's motion, dismissing counts IV-VII.

The present action concerns the three remaining counts. 3M argues that the drinking-water rules are invalid because they exceed the Department's rulemaking authority (Count I); are arbitrary or capricious (Count II); and are embodied in a deficient regulatory-impact statement (Count III). 3M asks this Court to declare the rules procedurally and substantively invalid and enjoin the Department from any efforts to implement or enforce the rules. Both parties have now moved for summary disposition under MCR 2.116 (C)(10).

In its motion, the Department argues that it acted within its authority under the SDWA because the drinking-water rules are necessary to protect the public health. When determining the maximum-contaminant levels, according to the Department, it was not required to consider incremental changes, so its failure to do so does not make the drinking-water rules invalid. Additionally, the rules were not arbitrary or capricious because the Department engaged in a deliberative process.

Finally, with respect to the SDWA RIS, the Department maintains that it considered all the factors for which it was required and the statement itself was not deficient simply because there was nothing included about groundwater cleanup or compliance costs. The drinking-water rules addressed drinking water, not groundwater, so the regulatory-impact statement properly focused on drinking water because groundwater could be addressed in a separate rulemaking process. As the Department explains in one of its briefs, "Moreover, [the Department] intended to issue new rules specifically setting criteria for PFAS in groundwater and would address the costs of complying with the groundwater standards in the RIS relating to those new rules." DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S 04/14/2022 BRIEF IN RESPONSE TO PLAINTIFF'S 03/15/2022 MOTION FOR SUMMARY DISPOSITION, pp 10-11. This point was emphasized by the Attorney General's office during the Court's hearing on the parties' cross motions for summary disposition. In response to the Court's question about whether the Department had considered 3M's concerns about cleanup and compliance costs in the Part 201 rulemaking process, counsel answered: "I don't know the answer to that [] question, but they would have had to prepare a regulatory impact statement, and that would be one of the topics that they *would have to address*." Hr Tr, p 52 (emphasis added).

In response and in support of its own motion, 3M argues that the maximum-contaminant levels were not "necessary" because they were not absolutely required to protect public health. Additionally, the rules were arbitrary or capricious because they resulted from a rushed process that deviated from the PFAS levels established by other states without offering a satisfactory explanation for doing so. Finally, the regulatory-impact statement failed to consider adequately the costs and potential benefits of the rules or how the rules would affect groundwater cleanup.

As just mentioned, this Court held a hearing to address the parties' competing motions for summary disposition, and this Court asked the parties to provide supplemental briefing on 3M's standing. In its supplemental brief, the Department argues that 3M lacks standing because it is not a public-water supply and the drinking-water rules addressed only public-water supplies. 3M responds that it has standing because the drinking-water rules necessarily affected groundwater PFOA and PFOS maximum-contaminant levels by operation of law, and the groundwater standards unquestionably affect 3M's business.

Finally, before analyzing the merits of the parties' arguments, the Court takes judicial notice of the Department's Part 201 groundwater-cleanup rules, Mich Admin Code, R 299.1 *et seq*., which adopted the same maximum-contaminant levels for PFAS in groundwater that the drinking-water rules established for drinking water. MRE 201; see also *Edwards v Detroit News, Inc*, 322 Mich App 1, 4 n 2; 910 NW2d 394 (2017). The Department issued a regulatory-impact statement as part of the groundwater process entitled, "Cleanup Criteria Requirements for Response Activity," 2020-130 EQ ("Part 201 RIS").

A review of the Part 201 RIS confirms that the Department viewed this latter rulemaking as a continuation of the drinking-water rulemaking process. For example, the Department

explicitly recognized, "This rule builds on the rules promulgated by the Department . . . that established PFAS standards for safe water at public water supplies." Part 201 RIS ¶ 1(A). Further, as the Department pointed out, "This [Part 201] rule ensures that all drinking water in the state is protected, regardless of whether the drinking water comes from a public water supply or a private well." *Id.* ¶ 7. With respect to health benefits, the Department did not identify any new benefits beyond those identified in the SDWA RIS:

> As required by and in accordance with the statutory provisions of MCL 324.20120a(4), EGLE calculated and considered the health-based values for establishing the generic cleanup criteria for groundwater used for drinking water for the various PFAS. However, in accordance with the statutory provisions of MCL 324.20120a(5), the SDWS [i.e., drinking-water standards] become the generic cleanup criteria for groundwater used for drinking water for the various PFAS, regardless of the calculated health-based values. [*Id.* ¶ 37.]

Pertinent to 3M's third claim here, the Department recognized in the Part 201 RIS that the groundwater rules for PFOA and PFOS under Part 201 were already set as a result of the earlier SDWA rulemaking. This is because, under Part 201, if there were already existing-cleanup criteria for groundwater (which there were for PFOA and PFOS) and more stringent criteria are subsequently set for drinking water under the SDWA, then that more stringent drinking-water criteria would automatically become the new criteria for groundwater. See MCL 324.20120a(5). Given the SDWA rulemaking, the Department "replaced the existing generic cleanup criteria for [PFOA] and [PFOS] with the State Drinking Water Standards (SDWS), otherwise known as maximum contaminant levels, that were promulgated on August 3, 2020." *Id.* ¶ 1(A). In the words of the Department, "These criteria are effective and legally enforceable by operation of law." *Id.* Because there were not any then-existing groundwater criteria for the other five substances when the drinking-water rules were promulgated, the Department needed a separate rulemaking process under Part 201 to set the groundwater criteria for those other substances. *Id.*

With respect to compliance costs on businesses or groups, the Department did not identify any that were specific to the Part 201 criteria. Instead, the Department identified 154 locations where groundwater cleanup was needed for PFOA and PFOS. *Id.* ¶ 28. But, because the criteria for PFOA and PFOS had already been set as part of the drinking-water rulemaking process, the Department did not consider any costs associated with the cleanup of those substances as part of the subsequent Part 201 rulemaking process. Similarly, the Department did not consider any costs associated with the cleanup of the other five substances, because those five substances could be treated at the same time as 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." *Id.*

Thus, during the Part 201 rulemaking process, the Department did not address the benefits or costs of the drinking-water maximum-contaminant levels for PFOA and PFOS as those applied to groundwater. In fact, the Department used the PFOA and PFOS standards from the drinking-water rules to reduce the projected costs associated with the groundwater rules' regulation of the other five PFAS substances.

With this background set, the Court now turns to whether the drinking-water rules were properly promulgated.

II. ANALYSIS

This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018).

"Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Sherman v City of St Joseph*, 332 Mich App 626, 632; 957 NW2d 838 (2020).

This lawsuit centers on the Department's promulgated rules regulating PFAS. "To be enforceable, administrative rules must be constitutionally valid, procedurally valid, and substantively valid." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 129; 807 NW2d 866 (2011). "It is well settled that an administrative agency may make such rules and regulations as are necessary for the efficient exercise of its powers expressly granted." *Id.* at 134 (cleaned up). "Administrative rules are valid so long as they are not unreasonable; and, if doubt exists as to their invalidity, they must be upheld." *Id*. at 129 (quotation marks and citation omitted). "[J]udicial review of an administrative rule . . . is limited to the administrative record . . . ." *Mich Ass'n of Home Builders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 498; 750 NW2d 593 (2008).

A. 3M HAS STANDING

Before addressing the validity of the rules, 3M must first establish that it has standing to challenge the rules. "A litigant may have standing . . . 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 or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

3M is not a public-water supply so, on their face, the drinking-water rules do not directly govern the company's groundwater activities. But the drinking-water rules did set—automatically by operation of law—the maximum-contaminant levels for PFOA and PFOS in groundwater. See

MCL 324.20120a(5). Given this, if the drinking-water rules were improperly promulgated, the rules would injure 3M because they also established the maximum-contaminant levels for PFOA and PFOS in groundwater, which in turn unquestionably affected 3M's business. Thus, 3M has established an injury different from the citizenry at large sufficient to establish standing to challenge the drinking-water rules.

B. THE DEPARTMENT DID NOT EXCEED ITS RULEMAKING AUTHORITY

The SDWA requires that the Department promulgate rules under the APA "to carry out this act." MCL 325.1005(1). The rules must include, among other things, "State drinking water standards and associated monitoring requirements, the attainment and maintenance of which are necessary to protect the public health." MCL 325.1005(1)(b). 3M challenges the "substantive validity" of the Department's PFAS rules in two essential respects. *Michigan Farm Bureau*, 292 Mich App at 129. First, 3M argues that the rules do not satisfy our Legislature's requirement that the rules be "necessary" for public health. Second, the company argues that the rules are arbitrary or capricious. The Court takes up each of these in turn.

With regard to its first challenge, 3M argues that the Department's PFAS rules do not meet the proper understanding of "necessary" in MCL 325.1005(1)(b). In support of its reading, 3M points this Court to our Supreme Court's decision in *In re Certified Questions from the United States District Court*, 506 Mich 332, 368; 958 NW2d 1 (2020) for the proposition that the term "necessary" means "absolutely needed: REQUIRED." 3M argues that other regulatory options existed from which the Department could have selected, including different levels of maximum exposure or methods of treatment.

3M posits a standard of regulatory fine-tuning that is divorced from the APA. The company draws its preferred standard from a case where our Supreme Court considered whether our Legislature could constitutionally delegate certain authority to Governor Whitmer under the Emergency Powers of the Governor Act of 1945, MCL 10.31 *et seq*., in response to the Covid pandemic. A lengthy recitation of our Supreme Court's opinion is unnecessary, as it is hard to fathom a more divergent set of facts or legal questions than the ones presented in that case and the instant one. It is bad enough to compare apples to oranges; this would be like comparing apples to car batteries.

Relying instead on well-trodden administrative law, unlike a state department's interpretation of statute, to which no deference is given by a court, *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008), this Court must give deference to a department's properly promulgated rules, so long as those rules "are consistent with the legislative scheme," *Mich Farm Bureau*, 292 Mich App at 135. Even when there is some doubt as to the validity of a rule, the department gets the benefit of that doubt. *Id*. at 129.

On the question of what "necessary" means, our Court of Appeals explained in *Twp of Hopkins v State Boundary Comm*, __ Mich App __, __; __ NW2d __ (2022), slip op, p 10, that "the term 'necessary' can have different meanings, depending on the specific context." By using the term, our Legislature could mean " 'requisite' or 'indispensable' " as 3M suggests, or, as the Department argues, "merely 'appropriate' or 'suitable.' " *Id.*

There is nothing in the SDWA to support 3M's strict reading. The term "public health" is a broad concept, one that can be influenced by a virtually infinite number of factors. Given the realities of bounded knowledge, scientific uncertainty, and ever-changing conditions, it would be

an impossible task for the Department to identify and select the single, perfectly optimized regulatory scheme. Instead, the Department must promulgate a rule that is suitable and consistent with the act's objectives, specifically the protection of public health, based on a thoughtful and thorough analysis of the evidence and science.

A review of the record confirms that the Department met this standard here (setting aside, for the moment, the adequacy of the regulatory-impact statement discussed *infra*). The Department found that there was a clear and convincing need for establishing maximum-contaminant levels given the prevalence of PFAS contamination in this state. The scientific and health data confirm that exposure to PFAS above certain levels has been shown to cause various adverse health impacts, as noted earlier. The Department and Workgroup identified research that strongly suggested that there would be improvements in public health, potentially avoided costs, and other positive effects if maximum-contaminant levels were set for the seven PFAS substances. While the Department did add the caveat that more research was needed, when read in context, this and similar statements were not a sign of scientific speculation but rather appropriate caution.

In sum, the Court concludes, based on a thorough review of the administrative record and the arguments made by the parties, that the Department's drinking-water rules do not merely contain speculative assertions about benefits to the public health or costs to be borne by various entities. 3M's allegations regarding the Department's admitted uncertainty as to the precise extent of the health and financial benefits/costs expected from the rules do not convince this Court that the Department's findings are wholly speculative or that the maximum-contaminant levels established by the Department are not necessary to protect the public health.

3M posits that a different level of maximum PFAS concentrations as well as less stringent treatment requirements could be equally beneficial to the public health. 3M might very well be correct, but this type of regulatory fine-tuning is not required by the APA, and this Court must defer to the Department's better vantage point and expertise in setting the precise exposure levels and treatment requirements. See *Mich Farm Bureau* at 129, 135.

C. THE DRINKING-WATER RULES ARE NOT ARBITRARY OR CAPRICIOUS

3M next takes aim at whether the rules are arbitrary or capricious under the APA. Setting aside again the adequacy of the regulatory-impact statement (which is taken up in the next section), the arbitrary-or-capricious analysis essentially "equates with rational-basis analysis." *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 650 n 8; 873 NW2d 842 (2015). A rule that is rationally related to the purpose of the enabling statute is neither arbitrary nor capricious. *Dykstra v Dir, Dept of Nat Res*, 198 Mich App 482, 491; 499 NW2d 367 (1993).

The Department established the rules with assistance of the Workgroup, and that group considered standards from other states as well as scientific and other data from a variety of sources. Despite 3M's contention, the Department's standards were similar to standards imposed in those other states. Moreover, as even 3M acknowledges, the Department followed the advice of the Workgroup that was comprised of subject-matter experts. While 3M may disagree with the composition and methodologies of the Workgroup or the timeframe in which it operated, a difference of opinion does not mean that the rule was "motivated by caprice, prejudice, or animus," promulgated without regard to principles, or otherwise arbitrary or capricious. See *Mich Farm Bureau*, 292 Mich App at 145. Moreover, while 3M faults the Department for failing to incorporate other views into its promulgated rules, a department need not address "every conceivable issue" related to a particular subject. *Dykstra*, 198 Mich App at 493.

Similarly, 3M's allegations regarding the Department's "uncertainty" over the benefits offered by the rules do not demonstrate that the rules themselves are arbitrary or capricious. As already explained, the Department clearly found, based on reams of evidence, that a reduction in exposure to PFOA, PFOS, and the other PFAS substances would benefit public health. The Department sought and received input from the public and submitted the proposed rules to the Environmental Committee and JCAR for their respective reviews. The Department offered reasoned justification for its rules, and the rules are rationally related to improving public health, which is the purpose of the SDWA. Therefore, the promulgated rules themselves are not arbitrary or capricious.

D. THE REGULATORY IMPACT STATEMENT WAS DEFICIENT

Moving to 3M's final claim, the company takes issue with the procedural validity of the SDWA RIS. Generally speaking, a regulatory-impact statement is required whenever an agency seeks to promulgate a new rule, and the statement must include specific information to comply with the APA. MCL 24.245(3). Among other things, a regulatory-impact statement must include "[a]n estimate of the actuals statewide compliance costs of the proposed rule on businesses and other groups." MCL 24.245(3)(n). Failure to comply with the requirements invalidates the entire rule. See *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015).

Most of 3M's challenges to the sufficiency of the SDWA RIS are without merit. With that said, the Court concludes that the Department issued a deficient regulatory-impact statement in one material respect.

To start, the Court does not view the Department's SDWA-rulemaking process with blinders on. Ordinarily, a court reviewing an administrative department's action is limited to the administrative record specific to that action. See *Mich Ass'n of Home Builders*, 481 Mich at 501. In this circumstance, however, the Department repeatedly made clear that it viewed the Part 201-rulemaking process for groundwater as related to, and a continuation of, its earlier SDWA-rulemaking process for drinking water. This made sense, as everyone knew that the criteria that the Department set for PFOA and PFOS in the SDWA-rulemaking process would apply by operation of law to businesses and groups like 3M because of MCL 324.20120a(5). Consistent with this, during the SDWA-rulemaking process, the Department repeatedly justified its decision not to consider groundwater cleanup and compliance costs incurred by businesses and groups because it would consider those costs during the Part 201 rulemaking process.

But this did not happen.

Specifically, 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. In fact, it was the exact opposite—the Department actually 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. Thus, the costs to businesses and groups of complying with the PFOA and PFOS groundwater criteria were never considered in either rulemaking proceeding, and the Department asserted in the Part 201 RIS that regulating the other five PFAS would not lead to additional costs because those costs would already be incurred due to the PFOA and PFOS rules.

A court must give a certain amount of deference to an administrative department's rulemaking process. *Brang, Inc v Liquor Control Comm*, 320 Mich App 652, 661; 910 NW2d 309 (2017). But judicial deference is not infinitely elastic—our Legislature has made clear that, when promulgating a rule, administrative departments must comply with certain standards, and one of those is estimating "the actual statewide compliance costs of the proposed rule on businesses and other groups" and including that information in the regulatory-impact statement. MCL 24.245(3)(n). A department cannot skirt this statutory requirement during Rulemaking A by promising to address the costs later in Rulemaking B, but then when later comes, ignoring the costs in Rulemaking B because the criteria were already set in Rulemaking A, and then, on top of this, characterizing all of the ignored costs as actually zero because they are sunk costs. To do this would be to play a shell game with the public.

The deficient regulatory-impact statement invalidates the PFAS rulemaking. MCL 24.243(1); *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993); *Mich Charitable Gaming Ass'n*, 310 Mich App at 594. 3M has only challenged the SDWA rules in this lawsuit, so the Court will confine its holding to the rules developed under the SDWA-rulemaking process.

Finally, on its own motion and for good cause shown on the record, the Court will stay the effect of this holding under MCR 2.614. There is ample record evidence that, for the benefit of public health, the seven PFAS chemical substances need to be subject to maximum-contaminant levels. While the Department violated the APA by failing to account for certain costs to businesses and groups, the other side of the ledger is sound—there are significant benefits to public health from stringent maximum-contaminant levels for PFAS substances. Moreover, the federal government has recently moved forward with respect to regulating PFOA and PFOS, and

depending on where the maximum-contaminant levels are set by that government, 3M's challenge might become effectively moot under MCL 324.20120a(5). Accordingly, this Court will stay the effect of today's opinion and order as to Count III of 3M's complaint until the parties have exhausted their appellate rights and a judgment becomes final.

III. CONCLUSION

Based on foregoing, the Court orders as follows:

IT IS ORDERED that 3M's motion for summary disposition under MCR 2.116(C)(10) is DENIED on Counts I and II of its complaint and GRANTED on Count III of that complaint.

IT IS FURTHER ORDERED that the Department's motion for summary disposition under MCR 2.116(C)(10) is GRANTED on Counts I and II and DENIED on Count III.

IT IS FURTHER ORDERED that, on this Court's own motion, the holding and effect of this Opinion and Order, specifically with respect to the declaratory and injunctive relief granted on Count III of 3M's complaint, is stayed under MCR 2.614 until the parties have exhausted their appellate rights and a judgment becomes final.

IT IS SO ORDERED. This is a final order and closes the case.

Date: November 15, 2022

Hon. Brock A. Swartzle
Judge, Court of Claims