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.

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

ORAL ARGUMENT REQUESTED

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INTRODUCTION

In reading Appellee 3M Company's (3M) brief, you would think that nothing unusual happened in the underlying case. There is virtually no discussion of the fact that the Court of Claims obtained a document that existed outside of the administrative record, and then relied on its own analysis of that document, without seeking any input from the parties, when rendering its opinion. 3M's silence on the topic speaks loudly to the errors committed below.

Instead, 3M's brief misconstrues the underlying ruling, argues that the Appellant Michigan Department of Environment, Great Lakes & Energy (EGLE) should have relied on guesswork during the rule-making process (which 3M would have surely challenged as evidenced by its expansive attacks on the rules at issue), and that EGLE waived arguments not made below. Yet, 3M never explains how EGLE was supposed to make those arguments when the Court of Claims never gave it a chance to address the document. 3M's silence, once again, is telling.

EGLE's Regulatory Impact Statement and Cost-Benefit Analyses (RIS) complied with all the requirements of the APA. EGLE's decisions on how to address the cost of cleaning up per- and polyfluoroalkyl substances (PFAS) in both the RIS relating to drinking water and the RIS related to groundwater cleanup were reasonable and due deference should be given to those decisions. The Court of Claims did not hew to that standard, and therefore, its opinion should be reversed.[1]

[1] On March 14, 2023, the United States Environmental Protection Agency (USEPA) finally issued is proposed drinking water standards for 6 PFAS analytes. Those standards are almost all more restrictive than EGLE's drinking water rules. The USEPA expects to finalize those rules by the end of 2023. (Per- and Polyfluoroalkyl

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ARGUMENT

I. 3M's contention that the APA requires EGLE to estimate "all" costs of proposed rules in its RIS misstates the language of the statute.

3M's argument is principally based on its repeated contention that the "APA required EGLE to estimate *all* costs of the Rule in the RIS for that Rule." (3M Brief, p 11 (emphasis in original).) But that statement is incorrect. The word "all" does not appear in the relevant statutory sections. To the contrary, MCL 24.245(3)(l) and (n) only require an agency proposing a rule to prepare a RIS that includes "estimates" of "actual statewide compliance costs" that individuals, businesses, and other groups would incur if the rules were enacted. "Estimates" are by definition less than "all." See *American Heritage Dictionary* (2nd College Ed, 1985) (defining "estimate" as "[a] tentative evaluation or rough calculation," "[a] preliminary calculation of the cost of the project," and "a judgment based on one's impressions.") 3M's argument that "all" costs must be evaluated in a RIS violates the language of the APA, and therefore, should be rejected. *Hesse v Ashland Oil, Inc*, 466 Mich 21, 30 (2002) ("the Legislature can and may rewrite the statute, but we will not do so."); *Rouch World, LLC v Dep't of Civ Rights*, 510 Mich 398, 429 (2022) ("When the statute's language is clear, as it is here, we rely on the plain language as the best evidence of its meaning.").

Substances (PFAS) | US EPA.) The USEPA's actions validate the conclusions reached by EGLE on the health hazards posed by PFAS and rejects the vast majority of the arguments made by 3M in its attack on those rules. Once those standards are finalized, EGLE will need to adopt those more rigorous standards in order to maintain its position as the primary regulator of drinking water in the State. See, e.g., 42 USC 300g–2.

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Not only is 3M's contention contrary to the statutory language, but it defies common sense because no agency could predict "all" possible costs that might be incurred as a result of its rulemaking. EGLE is the expert, not an oracle. And all rules would be subject to invalidation under 3M's theory. That is not a reasonable outcome. As more fully set forth below and in Appellant's Brief, EGLE's Drinking Water and Environmental Health Division (EGLE-DWEHD) made reasonable decisions as to which costs should be addressed in its RIS, and the Court of Claims should have deferred to that determination by the agency.

II. 3M's contention that the Court of Claims rejected EGLE's argument that the discussion of groundwater costs could be delayed until the groundwater rules were being promulgated misstates the opinion.

3M follows up on its initial error with an argument based upon its belief that the Court of Claims "rejected EGLE's arguments that the APA somehow allowed EGLE to delay providing the required costs estimates for the Rule until the subsequent Part 201 rulemaking." (3M Brief, p 12.) But that contention is also incorrect. The Court of Claims actually stated that EGLE-DWEHD's decision to delay "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)." (Opinion and Order, p 18.)

In fact, the Court of Claims invalidated the PFAS drinking water rules based upon its conclusion that EGLE's Remediation and Redevelopment Division (EGLE-RRD) subsequently did not adequately address groundwater cleanup costs in its

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RIS establishing PFAS rules under Part 201 of the Natural Resources and Environmental Protection Act, MCL 324.20101 *et seq*. (Opinion and Order, p 19.) All of the Court of Claims' analysis focused on the alleged deficiencies in EGLE-RRD's RIS. It was because of those perceived deficiencies in that RIS that the Court of Claims invalidated the PFAS drinking water rules.

The Court of Claims agreed that EGLE-DWEHD did not need to address the groundwater costs in its drinking water RIS and could defer any discussion to EGLE-RRD's groundwater RIS. 3M did not appeal that decision and so it has no right to contest that ruling at this time. The issue before this Court is whether the Court of Claims' determination that EGLE-RRD's RIS did not include the required estimate of the "actual statewide compliance costs of the proposed rule on business and other groups" is supported by the evidence and can be used to invalidate the PFAS drinking water rules.

III. EGLE did not waive any arguments.

As set forth above, 3M's waiver argument is wrong because it ignores that the Court of Claims finding was based upon EGLE-RRD's RIS—a document that was outside the administrative record and as to which EGLE was given no opportunity to address the court's concerns. (Opinion and Order, p 19.) EGLE did not waive any argument because it had no opportunity to make an argument with respect to that document.

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In any event, EGLE-DWEHD consistently argued that it was not required to address the groundwater costs in its RIS because that issue would be addressed during EGLE-RRD's efforts (04/14/2022 Response Br, p 10), that 3M's arguments were contrary to Michigan law holding that court's should defer to agency decisions (*id.*, p 6), and that the APA did not require the level of detail demanded by 3M, (*id.*, pp 6–7). None of those arguments were waived and those arguments go to the heart of the issues before this Court.

EGLE-DWEHD also repeatedly referenced its explanations to the Environmental Rules Review Commission (ERRC) as to why groundwater costs had not been incorporated in its RIS, which included a statement that it could not estimate the groundwater cleanup costs. (04/14/2022 Response Br, pp 3, 10.) The Court of Claims clearly understood EGLE-DWEHD's reservations on this issue because it quoted from this very sentence in its Opinion. (Opinion and Order, p 6, quoting from Ex 7 to EGLE's 04/14/2022 Brief in Response (EGLE_045565)) ("EGLE did not include costs incurred due to changes in 201 cleanup standards as they are not required to be considered in the RIS and they would be very difficult to almost impossible to anticipate.") The Court of Claims' understanding is also reflected in the extended discussion during oral argument on the difficulty of determining whether the groundwater rules would even be applied to a cleanup action in a Part 201 cleanup. (06/14/2022 Tr at pp 53–54.)

In short, 3M's waiver argument has no merit and should be rejected.

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IV. EGLE explained why it could not estimate the actual statewide compliance costs in its RIS and 3M's attempt to second-guess that decision is not permitted.

Paragraph 28 of EGLE-RRD's RIS required it to "[e]stimate the actual statewide compliance costs of" the PFAS groundwater on businesses or groups. EGLE-RRD responded that "since the statute does not always require a responsible party to report the presence of PFAS groundwater contamination," it did not know how many sites with PFAS groundwater contamination existed across the state. Without knowing how many contaminated sites existed across the state, EGLE-RRD asserted that it "does not have the ability to estimate the actual statewide compliance costs." (App Vol 2, p 356.) Regardless, EGLE-RRD further stated that the "costs associated with each cleanup would vary location to location depending on a number of factors—the proximity of the 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.*) In summary, because of the unknown number of sites and the variety of potential cleanup costs, any attempt by EGLE-RRD to estimate the "actual statewide compliance costs" would be pure guesswork.

3M's response can be summed up as "so what." (3M's Brief, pp 15–18.) Because EGLE-RRD knew that at least a certain number of sites existed across the State and it had knowledge of what the compliance costs would be at a subset of those sites, 3M contends that EGLE-RRD was required under law to provide an estimate regardless of the known uncertainty. (*Id.*) The folly in 3M's argument is self-evident. EGLE-RRD is not required to provide figures known to be inaccurate

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and that would be subject to change based upon individual site conditions. Such actions would be by definition "arbitrary and capricious," which is plainly forbidden.

EGLE-RRD was caught between the proverbial "rock and a hard place." Its decision to explain the problem that it faced and why it chose not to include an estimate is reasonable. The case law is clear that courts should "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). See also *Oakland Co Water Resources v Mich Dep't of Environmental Quality*, unpublished opinion of the Court of Claims, issued July 26, 2019 (Docket No. 18-000259-MZ) (rejecting argument that a RIS did not comply with the APA because it did not address all possible costs) (Ex A). The ERRC agreed with EGLE's decision and so did the Joint Committee on Administrative Rules (JCAR). In the absence of any evidence in the record to demonstrate that EGLE's decision was incorrect, EGLE respectfully submits that the Court of Claims' actions were an unwarranted intrusion into the lawful rulemaking process and its opinion should be overturned.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and, in its February 21, 2023 Brief, EGLE requests that this Court reverse the Court of Claims' opinion and order and enter judgment in its favor.

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Respectfully submitted,

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.212(G because, excluding the part of the document exempted, this **reply brief** contains no more than 3,200 words. This document contains 1,891 words.

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