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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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| MICHIGAN FARM BUREAU, et al.,<br><br>Plaintiffs-Appellees,<br><br>v<br><br>MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY<br><br>Defendant-Appellant. | Supreme Court No. 165166<br><br>Court of Appeals No. 356088<br><br>Court of Claims Case No. 20-000148-MZ |

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# BRIEF OF AMICUS CURIAE ALLIANCE FOR THE GREAT LAKES, ENVIRONMENTAL LAW AND POLICY CENTER, ENVIRONMENTALLY CONCERNED CITIZENS OF SOUTH CENTRAL MICHIGAN, FOOD & WATER WATCH, FOR LOVE OF WATER, FRESHWATER FUTURE, MICHIGAN ENVIRONMENTAL COUNCIL, MICHIGAN LEAGUE OF CONSERVATION VOTERS, NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, AND UNIVERSITY OF DETROIT MERCY LAW SCHOOL'S ENVIRONMENTAL LAW CLINIC

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## STATEMENT OF JURISDICTION

The undersigned organizations rely on the Statement of Jurisdiction set forth in Defendant-Appellant Michigan Department Of Environment, Great Lakes, And Energy's (EGLE or the Department's) Application For Leave To Appeal.

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## STATEMENT OF QUESTIONS PRESENTED

Amici incorporate EGLE's Statement of Questions Presented.

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## STATUTES AND RULES INVOLVED

Amici incorporate EGLE's Statutes and Rules Involved, with the following additions:

**MCL 324.1701**

(1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

(2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:

(a) Determine the validity, applicability, and reasonableness of the standard.

(b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

**MCL 324.1703**

(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part.

**MCL 324.1704**

(1) The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction.

**MCL 324.1705**

(1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has,



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or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

(2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

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## INTEREST OF AMICI CURIAE

1. Amici are a coalition of local, regional, and national groups who are concerned about how concentrated animal feeding operations (CAFOs) are polluting Michigan's waters. Amici are concerned that this case could have significant impacts on Michigan's waters and other natural resources. Amici have an interest in ensuring that EGLE and other agencies are able to issue environmental permits in accordance with their legal obligations to protect Michigan's natural resources.
2. **Alliance for the Great Lakes (AGL)**. Founded in 1970, The Alliance for the Great Lakes is a regional nonpartisan nonprofit working across the Great Lakes Basin to protect water resources for current and future generations.
3. **Environmental Law & Policy Center (ELPC)** is the Midwest's leading regional environmental advocacy organization. For nearly 30 years, ELPC has used litigation, policy advocacy, and strategic communications to improve environmental quality and protect the Midwest's natural resources.
4. **Environmentally Concerned Citizens of South Central Michigan (ECCSCM)** is a nonprofit organization, formed in 1999 to educate the public and public agencies about the health risks and environmental damage industrial livestock operations have brought to our local watersheds and to advocate for environmentally sustainable farm practices. ECCSCM documents environmental violations of confined animal feeding operations in south central Michigan and disseminates observations and monitoring data from many local sites along with research findings to educate and inform the public through our web site, presentations, publications, and advocacy work. A local, grassroots group, we support responsible agriculture that preserves and protects water quality in streams and lakes; that

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raises animals in a healthy, natural environment, grazing, absorbing sunshine; that avoids the steady diet of hormones and antibiotics given animals in the crowded, confined conditions of industrial facilities; that values and protects farmland, the environment, and the rural community.

5. **Food & Water Watch (FWW)** is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. Water pollution from CAFOs is a core issue area for FWW.
6. **For Love of Water (FLOW)** is a Great Lakes Law and Policy nonprofit corporation incorporated under the laws of the State of Michigan. FLOW provides legal, scientific, and policy analyses, education, and advocacy to protect the waters of the Great Lakes Basin, its ecosystem, and the public trust rights of citizens in those waters.
7. **Freshwater Future** is a catalyst for community action that strengthens policies designed to safeguard the waters of the Great Lakes region. We help create and strengthen community action on water by providing grants and professional development services to over 2,000 community groups working on local issues impacting their water. Through this engagement with groups, we learn of and track emerging issues that impact many communities in the region, and are able to synthesize those concerns into strategic policy solutions. We elevate the voices of many communities to the state, provincial and federal level where policy change happens. We champion the causes of communities and have

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taken leadership roles in coordinating on issues such as stopping Asian carp from entering the Great Lakes, securing over $2 billion for Great Lakes restoration activities, and passing the Great Lakes Compact to prevent diversions of Great Lakes water.

8. **The Michigan Environmental Council (MEC)** champions lasting protections for Michigan's air, water, and the places we love. For more than 40 years, MEC has driven a statewide environmental agenda as key policy experts dedicated to enacting protections that put Michiganders and our communities first. MEC represents nearly 100 environmental and conservation organizations from every corner of the state, and brings their perspectives and priorities to Lansing in an effort to shape just policies that are felt for generations to come.
9. **Michigan League of Conservation Voters (MLCV)** is a Michigan nonprofit organization that works to protect air, land, and water and democracy in communities all across Michigan by engaging, convening, and educating decision-makers to advocate for an environment that sustains the health and well-being of us all. We are dedicated to ensuring every Michigander has access to clean air and water and can enjoy the pure beauty of our state. We know that decisions made by public officials every day impact our health, community and the places we love the most, and we are committed to fighting for a cleaner, healthier state and a democratic process that works for everyone. Protecting Michigan's great lakes, inland lakes, rivers, streams and watersheds to preserve the foundational integrity of the natural world and to deliver humans clean, safe, and affordable drinking water is a core pillar of our work.
10. **National Wildlife Federation (NWF)** is a nonprofit corporation organized and existing under the laws of the Virginia. NWF is the largest citizen-supported conservation

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advocacy and education organization in the United States, with affiliate organizations, members, and supporters across the nation, including Michigan. NWF works actively on behalf of its members to maintain and enhance the quality of the nation's waters, including the waters of the Great Lakes, the waters in the Great Lakes Basin, and all the waters under Michigan's jurisdiction. Maintaining the integrity of Michigan's groundwater, streams, lakes, and rivers is a priority for NWF and its members in order to protect the quality of Michigan's drinking water and the integrity of Michigan's great outdoor heritage.

11. **Sierra Club** is the nation's oldest grassroots organization dedicated to the protection and preservation of the environment. Sierra Club has over 730,000 members, including chapters in each of the 50 states. Sierra Club is dedicated to practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives. The Sierra Club's activities include working to protect communities and the environment from the harmful effects of water pollution, including from concentrated animal feeding operations.

12. **The University of Detroit Mercy School of Law Environmental Law Clinic** provides law students with an opportunity to learn the legal and regulatory process and to impact environmental policy development. In the clinic, students have the opportunity to research and draft legislative proposals at the request of clients and work to develop the field of environmental law and set new precedents for the application of existing statutes and regulations to emerging environmental problems through appeals and litigation.

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## INTRODUCTION AND REASONS FOR GRANTING THE APPLICATION

The Court of Appeals' Opinion radically upends Michigan administrative and environmental law.[1] In erroneously interpreting the Michigan Administrative Procedure Act (APA), MCL 24.201 *et seq*., the court effectively nullified two landmark environmental statutes that embody the Michigan Constitution's directive to protect the State's natural resources. Unless this Court accepts EGLE's application for review and vacates the Opinion, EGLE will be forced to violate its key statutory obligations and Michigan's waters will be doomed to certain but preventable pollution and impairment.

The Court of Appeals acknowledged that it lacked subject matter jurisdiction and had no evidentiary record before it. The court nonetheless found that a National Pollution Discharge Elimination System (NPDES) general permit EGLE issued for large industrial livestock operations known as "Concentrated Animal Feeding Operations" or "CAFOs" supposedly prohibits activities that are allowed under one of EGLE's promulgated rules governing such permits, Mich Admin Code, R 323.2196 (Rule 2196). Consequently, the court found, the disputed permit conditions should have been promulgated as "rules" under the APA, and Plaintiffs can challenge those conditions in a declaratory action under MCL 24.264.

Although it did not say so expressly, the opinion effectively creates a new legal rule: EGLE permits—or any other agency's general permits—cannot, as a legal matter, contain any prohibitions that do not appear verbatim in the agency rules establishing the permitting program; any such conditions must instead be promulgated as new rules. Because EGLE no longer has authority to promulgate rules except in circumstances inapplicable here, the Opinion has massive real-world impact: it freezes EGLE's current CAFO permit in place, even though EGLE staff

[1] The term "Opinion" refers to the Court of Appeals' decision dated September 15, 2022 (with reconsideration denied November 17, 2022).

acknowledge that it is failing to protect water quality. The opinion will allow CAFOs to continue to apply billions of gallons of untreated hazardous waste to crop fields across the state with ineffective regulatory oversight.

This new legal rule is as legally groundless as it is environmentally destructive. The APA commands that it "shall not be construed to repeal additional requirements imposed by law." MCL 24.211. But this is exactly what the Opinion does because it reads the APA to prevent EGLE from fulfilling its obligations under two of Michigan's foundational environmental statutes: Part 31 of the Natural Resources and Environmental Protection Act, MCL 324.3101 *et seq*. (NREPA or Part 31), and the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.,* both of which were passed to fulfill the Michigan Constitution's requirement that the legislature "shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, or destruction." Const 1963, art IV, § 52.

NREPA commands that EGLE "take all appropriate steps to prevent any pollution [it] considers to be unreasonable and against public interest" and issue permits that "will assure compliance" with water quality standards. MCL 324.3106. By preventing EGLE from exercising its authority to improve the current CAFO permit within the bounds of its discretion under existing rules, the Opinion forces EGLE to violate those statutory obligations, effectively repealing them. The Opinion similarly effects a repeal by implication of MEPA, which prohibits anyone, including state agencies, from engaging in "conduct" that has "or is likely to pollute, impair, or destroy the air, water, or other natural resources" unless "there is no feasible and prudent alternative." MCL 324.1703(1). If, as the Opinion requires, EGLE issued a CAFO general permit that the Department admits will pollute Michigan's waters despite the existence of a "feasible and prudent alternative" in the form of the 2020 Permit, EGLE would violate MEPA.



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The Opinion's new legal rule also misreads and distorts the APA, under which the 2020 Permit is a "license," not a "rule," and must be challenged in a contested case. The Opinion wrongly turns a fact-dependent dispute about highly technical permit terms into a supposedly legal dispute about whether those terms are "rules." And although it is an issue for the contested case and not before this Court, the disputed 2020 Permit terms are perfectly consistent with Rule 2196, which the CAFO industry tried and failed to invalidate at the time it was promulgated. See *Michigan Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 140–41; 807 NW2d 866, 889 (2011). Plaintiffs are trying to get through the side door what they failed to get through the front door more than a decade ago.

Consequently, EGLE's application is warranted on multiple grounds under MCR 7.305(B):

- This case involves "a substantial question about the validity of a legislative act" (MCR 7.305(B)(1)), namely whether the APA effects a repeal by implication of the Department's obligations under NREPA and MEPA.

- This case is against a state agency and involves a matter of "significant public interest," (MCR 7.305(B)(2)), namely, Michiganders' right to safe, clean water, which the Michigan Constitution recognizes is "of paramount public concern." Mich Const 1963, art 4, § 52.

- This case is "of major significance to the [S]tate's jurisprudence" (MCR 7.305(B)(3)) because unless this Court vacates the Opinion, EGLE will be forced to violate its statutory and regulatory obligations in an area of "paramount public concern." Mich Const 1963, art 4, § 52.

- The Opinion is "clearly erroneous" because it amounts to a repeal by implication of NREPA and MEPA and conflicts with the plain language of the APA. The Opinion will result in "material injustice" by depriving Michiganders of their right to safe, clean water as recognized by the Michigan Constitution. MCR 7.305(B)(5)(a).

- The Opinion "conflicts with" (MCR 7.305(B)(5)(b)) Michigan Supreme Court decisions interpreting and applying MEPA, including *State Highway Comm'n v. Vanderkloot*, 392 Mich 159, 178, 220 NW2d 416 (1974); *Ray v Mason Cnty Drain Com'r*, 393 Mich 294, 305–06; 224 NW2d 883 (1975) and *Nemeth v. Abonmarche Dev., Inc.*, 457 Mich 16, 30; NW2d 641 (1998), as well as with this Court's decision in *Clonlara, Inc v State Board of Education*, 442 Mich 230, 501 NW2d 88 (1993) interpreting the APA, and with the Michigan Court of Appeals' decision upholding the validity of Rule 2196, *Michigan Farm Bureau*, 292 Mich App 106.



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Amici respectfully ask the Court to grant EGLE's application, vacate the Opinion, and dismiss Plaintiffs' case for lack of subject matter jurisdiction based on their failure to complete the contested case. Without intervention from this Court, EGLE will be handcuffed from fulfilling its statutory obligations and the State's vital water resources will continue to suffer impairment from CAFO pollution.

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## STATEMENT OF FACTS AND PROCEEDINGS

Amici incorporate EGLE's Statement of Facts and Proceedings and further state as follows:

### 1. CAFOs generate dangerous waste products and cause water pollution.

Over the last 40 years, CAFOs have transformed animal agriculture. Traditional, diversified farms—which evoke the red barn "family farm" of popular imagination—kept a manageable number of animals at pasture and used their manure to fertilize crops on the farm.[2] This natural cycle of balanced nutrient intake (grazing) and output (manure) is absent from the CAFO business model, which rose to prominence in the 1990s. According to the U.S. Department of Agriculture, "[l]ivestock agriculture has undergone a striking transformation."[3] CAFOs are not "farms" in this traditional sense; they are "large industrialized livestock operations."[4] Even USDA recognizes that this shift to industrialization is "not without costs,"[5] including because "if not properly managed, manure can pose environmental risks," and "[e]xcess nutrients . . . may damage air and water resources."[6] According to the Centers for Disease Control, "[t]his growth in agricultural production has resulted in an increase in contaminants polluting soil and waterways."[7]

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[2] See US Department of Agriculture, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks* (January 2009), p iii, <*https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf?v=0*> (accessed February 9, 2023) ("Livestock agriculture has undergone a series of striking transformations. Production is more specialized—farms usually confine and feed a single species of animal, often with feed that has been purchased rather than grown onsite, and they typically specialize in specific stages of animal production. . . . And the farms that account for most production are much larger than they were in the past.").

[3] *Id.* at 1.

[4] *Id.* at 36.

[5] *Id.* at 1.

[6] *Id.*

[7] Centers for Disease Control and Prevention, *Water Contamination* <https://www.cdc.gov/healthywater/other/agricultural/contamination.html> (accessed February 9, 2023).

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**a. CAFOs generate dangerous waste products.**

Because CAFOs concentrate thousands—sometimes hundreds of thousands—of animals in a relatively small space, they generate far more manure and other waste than they can safely dispose of. "[B]y virtue of their sheer size and number of animals, [CAFOs] accumulate great amounts of waste that must either be stored or ultimately discharged." *Michigan Farm Bureau*, 292 Mich App at 140–41. According to the National Association of Local Boards of Health, a single large CAFO produces "one and a half times more than the annual sanitary waste produced by the city of Philadelphia."[8] As of 2012, in the United States, large CAFOs produced more than 20 times the volume of fecal wet mass produced by all humans in the United States.[9] That was 11 years ago, and the number of CAFO-raised animals has increased. Indeed, permitted CAFOs in Michigan reported producing 3.9 billion gallons of liquid waste and 1.3 million tons of dry waste in 2020 alone.[10] And as explained in Section 2.a below, comparisons to human waste understate the impact of CAFO waste because human waste must undergo significant treatment to minimize pollutants and toxins before disposal; CAFO waste does not.

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[8] National Association of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, p 2 <https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf> (accessed February 10, 2023).

[9] This number reflects only "large" CAFOs, and excludes the thousands of small and medium-sized confined animal feeding operations across the country. *Petition to Adopt a Rebuttable Presumption That Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act* (October 2022), p 4, available at <https://earthjustice.org/sites/default/files/files/cafo_presumptionpetition_withexhibits_oct2022_.pdf> (accessed February 14, 2023).

[10] EGLE, *Regulated Concentrated Animal Feeding Operations (CAFOs)* map <https://egle.maps.arcgis.com/apps/webappviewer/index.html?id=0fae269e1c45485f876c99391403bd3e> [Click "OK", click arrow to "Open Attribute Table"] (accessed on February 13, 2023) (sum of "Waste Total Dry Tons" and "Waste Total Liquid Gallons" for all registered CAFOs).

Most dairy and hog CAFOs use wet manure systems, storing liquid waste in open cesspools (euphemistically called "lagoons") until they apply it to crop fields, ostensibly as fertilizer. Liquid CAFO waste is costly to transport, and hauling costs generally exceed fertilizer value whenever waste is hauled more than one mile. Ex 1.[11] As a result, agricultural fields near CAFOs are likely to receive far more nutrients (nitrogen and phosphorus) than crops need. When liquid CAFO waste is land applied, it can easily run off field edges or get into subsurface or "tile" drainage systems, which pervade many CAFO-heavy areas of Michigan and drain into surface waters, as discussed in more detail in Section 1.c below.

CAFOs thus routinely land apply waste well in excess of agronomic need, which, according to EGLE staff, amounts to "cheap manure disposal," not "the utilization of manure for crop production." Ex 2 at 839:11-12. Even Plaintiffs concede that many large CAFOs are essentially engaging in waste disposal, not crop fertilization. During the contested case, Plaintiff CAFO operator Robert Dykhuis of Dykhuis Farms testified that even a modest tightening of waste disposal guidelines would require his operation to buy additional farmland, not to grow crops, but simply to dispose of untreated waste. Ex 3 at 1970:24-1971:4.

In their Opposition to EGLE's request for appeal (Pl Opp Br), Plaintiffs tout the supposed benefits of "manure," suggesting that because CAFO waste can theoretically be used to fertilize crops, any permit terms that restrict its application are somehow unreasonable or unnecessary. See Pl Opp Br at 5-6. But Plaintiffs' argument obscures three key realities. First, it inaccurately equates "manure" with "CAFO waste," which is the substance regulated by the 2020 Permit. "CAFO waste" includes not only manure but also "process wastewater" and "production area

[11] Exhibits 2, 3, 5, 8, 12, 17, 22, 28, 29, 32, 36 are transcript excerpts from the parallel contested case proceeding. The remaining exhibits are academic articles or other documents that are not readily available online.



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waste," such as wastewater from cleaning milkhouses and animal confinement areas. See Ex 4 at PDF 33 (defining "CAFO Waste"); Ex 5 at 1237. Second, the argument disregards the dangerous components of CAFO waste apart from excess nitrogen and phosphorus: *E. coli* and other pathogens, detergents, heavy metals, and pharmaceuticals, none of which help crops grow.

Third, the argument ignores that the core problem is ***over-application*** of CAFO waste untethered to agronomic or crop need. The 2020 Permit does not propose to ban land application of CAFO waste, only to regulate it to protect water quality as required by NREPA, MEPA and the Clean Water Act, as discussed in the Argument section below. For example, Plaintiffs challenge the 2020 Permit's terms related to applying CAFO waste on frozen or snow-covered ground. But this practice has no agronomic justification: no crops are growing to take up nutrients, and frozen soil is impervious and unable to absorb nutrients. Ex 6 at 12. The practice is also uniquely dangerous. *Id.* When the ground eventually thaws and the snow melts, CAFO waste will flow off of fields or into subsurface tile drains and into surface waters. *Id.* at 11 ("[T]he vast majority of studies suggest that winter application of manure increases loss of nutrients."). Plaintiffs' challenge to the 2020 Permit boils down to an argument that CAFOs should be allowed to land apply waste cheaply and conveniently, regardless of agronomic purpose or risk to water quality.

**b. CAFO water pollution imperils human health, wildlife, and the economy.**

The dangers of CAFO water pollution are well-documented, primarily from nutrients like phosphorus and nitrogen and pathogens like *E. coli*.



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CAFOs contribute to phosphorus pollution, which is linked to harmful algal blooms (HABs). See Ex 7; see also Ex 8 at 1573:1-23.[12] That term generally describes "accumulations of cyanobacteria in amounts that are aesthetically unappealing and capable of producing algal toxins."[13] Direct human contact with HABs can lead to gastrointestinal tract distress and skin, eye, and ear infections.[14] HABs can also create hepatoxins and neurotoxins which, if consumed, have been linked to kidney and liver damage,[15] as well as "dementia, amnesia, other neurological damage and death."[16] The U.S. EPA Office of Inspector General recently declared that "the prevalence, severity, and frequency of [harmful algal bloom] occurrences in recreational waters . . . will increase as excess nutrients flow into these waters, temperatures rise, and extreme weather events increase with a changing climate."[17]

[12] See also US EPA, *Estimated Animal Agriculture Nitrogen and Phosphorus from Manure* <https://www.epa.gov/nutrient-policy-data/estimated-animal-agriculture-nitrogen-and-phosphorus-manure> (accessed February 10, 2023) ("Animal agriculture manure is a primary source of nitrogen and phosphorus to surface and groundwater.").

[13] Michelle Selzer, EGLE, *The state of knowledge on harmful algal blooms of cyanobacteria in the Great Lakes* <https://www.michigan.gov/egle/newsroom/mi-environment/2022/07/06/the-state-of-knowledge-on-harmful-algal-blooms-of-cyanobacteria-in-the-great-lakes#:~:text=Harmful%20Algal%20Blooms%20%28HABs%29%20of%20cyanobacteria%20in%20freshwater,aesthetically%20unappealing%20and%20capable%20of%20producing%20algal%20toxins.> (posted July 6, 2022) (accessed February 10, 2023).

[14] *Petition to Adopt a Rebuttable Presumption That Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act* (October 2022), p 10, available at <https://earthjustice.org/sites/default/files/files/cafo_presumptionpetition_withexhibits_oct2022_.pdf> (accessed February 14, 2023).

[15] *Id.* At 60.

[16] Megan Avakian, National Institute of Environmental Health Sciences, *New Study Finds Ocean Pollution a Threat to Human Health* (February 2021) <https://www.niehs.nih.gov/research/programs/geh/geh_newsletter/2021/2/articles/new_study_finds_ocean_pollution_a_threat_to_human_health.cfm> (accessed February 10, 2023).

[17] US EPA Office of Inspector General, *EPA Needs an Agencywide Strategic Action Plan to Address Harmful Algal Blooms, Report No. 21-E-0264* (September 29, 2021) p 17, available at <https://www.epa.gov/system/files/documents/2021-09/_epaoig_20210929-21-e-0264.pdf> (accessed February 10, 2023).



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The chart at Exhibit 9 shows that algal toxins are more toxic by orders of magnitude than other toxic compounds, including, cyanide, botulinum toxin, and DDT. Ex 9 at 12. For example, the reference dose—the amount that can be orally ingested by a person above which a toxic effect may occur—for Microcystin LR (0.000003 mg/kg-d) is 6,700 times smaller than the dose for cyanide (0.02 mg/kg-d). *Id.*[18] By EGLE's own account, "the number of lakes that contain[] toxins [in Michigan] is likely under-estimated," (Ex 7 at 7) and growing. See Ex 8 at 1573:17-23.

In Adrian, Michigan, which is in a CAFO-heavy watershed,[19] dangerous neurotoxins and liver toxins were detected in the city's drinking water and the inlets to one source of its drinking water, the Lake Adrian reservoir. Wayne State University conducted a study of treated home tap water, and in 2019 identified the presence of Microcystis aeruginosa (harmful algae), a species of cyanobacteria, and two algal toxins it can produce, microcystin and anatoxin-a. See Ex 10.[20] For instance, of samples collected on September 14, 2019, 53% contained the Microcystis gene, 3%

[18] See also US EPA, Additional Information about Cyanotoxins in Drinking Water <https://www.epa.gov/ground-water-and-drinking-water/additional-information-about-cyanotoxins-drinking-water> (accessed February 13, 2023).

[19] EGLE, *Regulated Concentrated Animal Feeding Operations* map, available at <https://egle.maps.arcgis.com/apps/webappviewer/index.html?id=0fae269e1c45485f876c99391403bd3e> [Click "OK", zoom in on Adrian, MI] (accessed on February 13, 2023).

[20] See also NoCAFOs.org, *Adrian Drinking Water Study Results released: Wayne State University, 2/13/22 - Monitoring, Reporting, Educating about CAFO Pollution* <https://nocafos.org/news/adrian-drinking-water-study-results-releases-wayne-state-university-21322> (posted February 13, 2022) (accessed February 10, 2023).



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contained the microcystin gene, and 3% contained the anatoxin-a gene. *Id*.[21] Adrian's watershed is also impaired by *E. coli* and drains into Lake Erie.[22]

CAFOs also cause *E. coli* pollution. *E. coli,* a fecal coliform that lives in the intestines of warm-blooded animals, is also linked to adverse human health impacts.[23] *E. coli* is an indicator of fecal contamination, and the higher the *E. coli* level, the higher the risk that a person will be impacted if they ingest or contact the water. Even partial body contact with water containing elevated *E. coli* levels can "cause illness by infection of wounds, or indirect entry to the body (e.g., hand to mouth, hand to eyes, etc.)." Ex 12 at 1297:12-13. Total body contact has been linked to gastroenteritis, cryptosporidiosis, cholera, and other intestinal parasites. *Id*. at 1297:14-17.

[21] The study also found that 48% of the samples collected on June 22, 2019 contained the Microcystis gene, 16% contained the microcystin gene, and none contained the anatoxin-a gene. See also Ex 11; Table 7.5-1, U.S. Geological Survey, Chapter A7, "Cyanobacteria in lakes and reservoirs: Toxin and taste-and-odor sampling guidelines" (displaying which cyanobacteria genera produce which algal toxins, their health impacts (skin, liver, brain), and which taste and odor compounds each produces).

[22] EGLE, *Michigan's E. coli Pollution and Solution Mapper* <https://egle.maps.arcgis.com/apps/MapSeries/index.html?appid=2a060da30e2545129222086163 2b2c99> [Click "E. coli Monitoring and Impaired Waters," zoom in on Adrian, MI and hover over surrounding areas] (accessed on February 13, 2023). Other notorious instances of Microcystin drinking water contamination include: (1) an incident in 1996 in which 76 out of 116 dialysis patients, who had been exposed intravenously to water containing Microcystin, died; (2) a Microcystin outbreak in Toledo in 2014 during which, for three days, "more than half a million Toledo-area residents were ordered not to drink or even touch their water." Alliance for the Great Lakes, *New Study: Downstream Water Users Bear Financial Burden of Upstream Pollution* <https://greatlakes.org/2022/05/new-study-downstream-water-users-bear-financial-burden-of-upstream-pollution/> (posted May 23, 2022) (accessed February 10, 2023); see also US EPA, *Cyanobacteria and Cyanotoxins: Information for Drinking Water Systems* (September 2019), available at <https://www.epa.gov/sites/default/files/2014-08/documents/cyanobacteria_factsheet.pdf> (accessed February 13, 2023).

[23] US EPA, *Fecal Coliform and E. coli* <https://archive.epa.gov/katrina/web/html/fecal.html#:~:text=Coliforms%20are%20bacteria%20that%20live%20in%20the%20intestines,is%20part%20of%20the%20group%20of%20fecal%20coliforms.> (accessed February 10, 2023).



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CAFO-caused water pollution has economic repercussions as well. As of 2015, tourism was a $20+ billion industry in Michigan, accounting for over 214,000 jobs.[24] According to Michigan State University, "[i]f the tourism industry did not exist in Michigan, the cost to each household would be in the order of $640 per year."[25] Water pollution puts these jobs and investments at risk. Indeed, EGLE has allocated over $3 million to monitoring Michigan's beaches for *E. Coli,* and is forced to close dozens of beaches every year due to contamination.[26] After Microcystin contaminated its drinking water in 2014, Toledo had to invest over $400 million to upgrade its water utilities.[27] And one study determined that an average family in Toledo has to pay an additional $100 per year in water charges due to ongoing HAB outbreaks.[28]

With respect to wildlife, HABs can deplete dissolved oxygen levels and fuel the growth of toxic organisms, leading to major fish kills.[29] CAFO pollutants also harm the endocrine and

[24] Yvonne Wichtner-Zoia and Sarah Nicholls, Michigan State University Extension, *Michigan's tourism industry continues to grow* <https://www.canr.msu.edu/news/michigans_tourism_industry_continues_to_grow> (posted April 22, 2015) (accessed February 10, 2023).
[25] *Id.*
[26] Michigan Department of Environment, Great Lakes, And Energy Water Resources Division, *2018 Annual Beach Monitoring Report*, p 2, 5; available at <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/SWAS/Monitoring-Beach/2018-annual-report.pdf?rev=d0dba298aedd4948934ca89b4a7a6aea> (accessed February 10, 2023) (reporting a total of 53 beach advisories and closures in 2018).
[27] US EPA Office of Inspector General, *EPA Needs an Agencywide Strategic Action Plan to Address Harmful Algal Blooms, Report No. 21-E-0264* (September 29, 2021), p 2, available at <https://www.epa.gov/system/files/documents/2021-09/_epaoig_20210929-21-e-0264.pdf> (accessed February 10, 2023).
[28] Alliance for the Great Lakes, *Downstream Water Users Bear Financial Burden of Upstream Pollution* <https://greatlakes.org/2022/05/new-study-downstream-water-users-bear-financial-burden-of-upstream-pollution/> (posted May 23, 2022) (accessed February 10, 2023).
[29] *Petition to Adopt a Rebuttable Presumption That Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act* (October 2022), p 13, available at <https://earthjustice.org/sites/default/files/files/cafo_presumptionpetition_withexhibits_oct2022_.pdf> (accessed February 14, 2023).



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reproductive systems of fish, reducing diversity of fish species.[30] In Michigan, the threatened piping plover is sensitive to pollutants from CAFOs, and its range overlaps significantly with areas where CAFOs are concentrated.[31] There have also been "an increasing number of cases in which dogs have gotten sick and even died after [HAB] exposure."[32]

**c. Voluminous evidence links CAFOs with water pollution.**

The relationship between water pollution and CAFOs is well documented. The charts at Exhibit 13 page 24 shows a direct correlation between the rise of dissolved reactive phosphorus loads into Lake Erie (which is the primary driver of HABs) and the rise of the CAFO business model in the 1990s. See Ex 13 at 24. After implementation of the 1972 Clean Water Act, dissolved phosphorus levels steadily decreased, due to better regulation of wastewater treatment plants and the removal of phosphate from laundry detergents.[33] But that decline reversed in the 1990s, coinciding with "a trend toward construction of large, confined dairy facilities with herds of 650 to 3,000 head" using liquid manure systems. Ex 13 at 24.

Exhibit 14, a map of CAFO locations in Michigan and cyanobacteria blooms, shows that for the most part, watersheds with higher densities of CAFOs also have higher densities of confirmed HABs. See Ex 14. While it may first appear that the CAFO-heavy thumb area has relatively few blooms, that area also has very few inland lakes on which blooms can form; Saginaw

[30] *Id*. at 14.
[31] *Id*. at 16.
[32] Outdoor News, *Dogs and HABs: What you can do to help* <https://www.outdoornews.com/2014/10/13/dogs-and-habs-what-you-can-do-to-help/#:~:text=In%20general%2C%20smaller%20dogs%20are%20at%20greater%20risk,a%20single%20exposure%20of%20a%20higher%20toxin%20concentration.> (posted October 13, 2014) (accessed February 10, 2023).
[33] Keith Schneider, Circle of Blue, *Danger Looms Where Toxic Algae Blooms,* available at: <https://www.circleofblue.org/2022/world/danger-looms-where-toxic-algae-blooms/> (posted September 8, 2022) (accessed February 10, 2023).



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Bay, however, into which much of that region drains, has suffered numerous blooms. Ex 8 at 1574-76. The scientific and governmental consensus is that agricultural runoff, including from CAFOs, is contributing to HABs and water pollution. See Ex 15.[34] Ohio's recent nutrient mass balance study estimated that agricultural runoff was responsible for approximately 90% of the phosphorus going into Lake Erie.[35]

Exhibit 16 similarly illustrates the connections between CAFOs and water pollution. This map shows waterbodies impaired by nutrients or excessive plant growth in purple, watersheds with nutrient "total maximum daily loads" or "TMDLs" in green, and CAFOs with empty circles. The Clean Water Act requires a TMDL for any water body that is "impaired," meaning that it does not comply with state water quality standards for a particular pollutant. 33 USC 1313(c)-(d)(1); 33 USC 1314(l)(1). Nearly all TMDL areas and impaired waterways are located near CAFOs. While there are also numerous CAFOs in areas without TMDLs or impairments, that does not indicate an absence of impairments because EGLE has not had the resources to assess most waterbodies. See Ex 17 at 1545:17-1546:2.

[34] See also EGLE, *Michigan Domestic Action Plan for Lake Erie* (February 28, 2018), available at <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/AOC/Domestic-Action-Plan-Lake-Erie.pdf?rev=18406bc013f04baa9a1f56a346fd31bd&hash=900D695008434971BC13EE76B020CDF5> (accessed February 10, 2023); Ohio Lake Erie Task Force, *Great Lakes Water Quality Agreement*, available at <https://binational.net/wp-content/uploads/2014/05/1094_Canada-USA-GLWQA-_e.pdf> (accessed February 10, 2023); US EPA, *Causes of CyanoHABs* <https://www.epa.gov/cyanohabs/causes-cyanohabs> (accessed February 10, 2023); US Geological Survey, *NWQP Research on Harmful Algal Blooms (HABs)* <https://www.usgs.gov/mission-areas/water-resources/science/nwqp-research-harmful-algal-blooms-habs> (accessed February 10, 2023).

[35] Ohio Environmental Protection Agency, *Nutrient Mass Balance Study for Ohio's Major Rivers 2020*, p 24 <https://epa.ohio.gov/static/Portals/35/documents/Nutrient-Mass-Balance-Study-2020.pdf> (accessed February 14, 2023).



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Exhibit 18 also vividly demonstrates the connection between CAFO locations and *E. coli* pollution. The green on the map indicates an *E. coli* TMDL watershed, with the triangles representing CAFOs. Ex 18. Nearly all of the CAFOs are within or very close to a TMDL watershed. *Id.* While there are a handful of CAFOs in areas without an *E. coli* TMDL, EGLE has not had the resources to assess most waterbodies. Indeed, because so many waterways exceed *E. coli* water quality standards, Michigan has prepared a statewide *E. coli* TMDL, which was approved by U.S. EPA in 2019. See Ex 19 (presentation describing structure and operation of statewide *E. coli* TMDL).[36] This allows EGLE to add additional waterbodies to the TMDL as they are discovered, which happens on a regular basis. According to recent EGLE estimates, "approximately 50 percent of the rivers and streams in Michigan exceed the [water quality standards] for *E. coli*.[37]

EGLE's own witnesses testified in the contested case hearing that "CAFOs contribute to phosphorus pollution in Michigan." Ex 17 at 1478:1-4.[38] On-the-ground data backs this up, both with respect to both phosphorus and *E. coli*. Amicus ECCSCM has compiled more than 4,700 violations of water quality standards between 2001-2021 from just 12 CAFOs—and this number

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[36] See also *EGLE, Michigan's Statewide E. coli Total Maximum Daily Load* (July 2019), available at <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/SWAS/TMDL-Ecoli/statewide-ecoli-tmdl.pdf?rev=e87d217ad5494ab28dc5c65bafe2ccaf&hash=C30940057328DBD714C1BBD3CB27BF09> (accessed February 15, 2023).

[37] EGLE, *Michigan's E. coli Pollution and Solution Mapper* <https://egle.maps.arcgis.com/apps/MapSeries/index.html?appid=2a060da30e254512922208616 32b2c99> [Click "Introduction"] (accessed on February 13, 2023).

[38] See also Jane Johnston, Great Lakes Now, *One Michigan county tells the story of a nation plagued by water pollution* <https://www.greatlakesnow.org/2020/09/michigan-county-cafos-agriculture-water-pollution/> (posted September 25, 2020) (accessed February 10, 2023) (Gratiot County resident noting that "The [Pine] river is loaded with nutrients, it's loaded with bacteria . . . . We see it upstream and downstream, we can look at where it's coming from. It's coming from application sites of manure, and it's coming from CAFOs themselves.").

includes only violations formally documented by federal or state agencies.[39] Additionally, ECCSCM conducted water testing in the Raisin River and Bean Creek watersheds—both of which feed into Lake Erie—for *E. coli*, and DNA analysis for different genera of cyanobacteria, cyanotoxins, and source species DNA from Bacteroides.[40] Of all sites tested, 85% of samples exceeded EGLE's "total body contact" maximum of 300 mg/mL for *E. coli*—a level of exposure that, as noted earlier, has been linked to serious illness, including cholera and other intestinal parasites. Ex 12 at 1297:14-17. Animal and cyanobacteria DNA were found in a majority of the samples as well.[41]

DNA (sample positive out of samples tested for that parameter)

DNA Bacteroides – Cattle = 81%
DNA Bacteroides – Swine = 40%
DNA Cyanobacteria - Unidentified (2017) or Other than Tested (2018) = 64%
DNA Cyanobacteria – Microcystis = 50%
DNA Cyanobacteria – Planktothrix = 50%
DNA Cyanobacteria – Anabaena = 36%
DNA microcystin = 78%
DNA anatoxin = 100%

Finally, liquid CAFO waste is particularly dangerous in Michigan because of the state's extensive system of subsurface tile drainage. See Ex 20 at 1; Ex 21 at 1. Indeed, Exhibit 13 shows that as of 1992, between 60-100% of agricultural land in the western Lake Erie and Saginaw Bay watersheds is tiled. Ex 13 at 58. That is because the land in these watersheds was formerly a swamp. Ex 22 at 616, 756. Agriculture became possible only by installing subsurface tile

[39] NoCAFOs.org, *Confirmed Violations/Discharges from CAFOs and Liquid-System Livestock Operations to Bean/Tiffin Watershed and River Raisin Watershed* <https://nocafos.org/violations> (accessed February 10, 2023).
[40] ECCSCM also tested for orthophosphate, nitrates, ammonia, dissolved oxygen, and temperature. See NoCAFOs.org, *Monitoring Projects: 2001-2020* <https://nocafos.org/water-sampling-data> (accessed February 10, 2023).
[41] *Id.* Excess orthophosphate was also found.



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drainage, which draws moisture from the top layer of soil into underground pipes. *Id.* Those pipes then empty into ditches or streams, ultimately flowing into rivers and lakes. In other words, these systems pull moisture—including liquid CAFO waste—from the surface and move it, via underground pipes, into surface waters. *Id.* Tile drainage systems offer a direct conduit from the land into Michigan's surface waters. Critically, this means that CAFO waste application can lead to discharges of pollutants into surfaces waters, even if applied at agronomic rates.[42]

**2. CAFOs operate under a uniquely lenient regulatory regime.**

As shown above, when CAFO waste gets into the water, the cost of addressing that pollution does not go unpaid; it just gets passed along to others and the environment.

**a. CAFOs are held to a lower standard than other industrial polluters.**

Like other industrial polluters, CAFOs in Michigan must get National Pollutant Discharge Elimination System (NPDES) permits. Other NPDES permittees, however, must treat their waste to remove pollutants. In Michigan, human waste, for example, must undergo decontamination at wastewater treatment plants, and any waste resulting from that process is highly regulated. Environmental permits often require wastewater treatment plants and other industrial dischargers to spend vast sums on treatment technology, and regularly monitor and report the precise volumes

[42] Michigan's groundwater is also at risk. Nearly 1.12 million households in Michigan rely on private wells. EGLE, *Drinking Water* <https://www.michigan.gov/egle/about/organization/Drinking-Water-and-Environmental-Health/drinking-water#:~:text=Michigan%20has%20nearly%201.12%20million%20households%20served%20by,of%20groundwater%20contamination%20affecting%20drinking%20water%20wells.%20COVID-19> (accessed February 10, 2023). Nitrates from CAFO waste, when consumed, can hinder the ability of blood to carry oxygen, and nitrate exposure has been linked to birth defects, miscarriage, and cancer. National Association of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, p 4, available at <https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf> (accessed February 10, 2023). It "can be especially harmful to infants, leading to blue baby syndrome and possible death." *Id.*



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of each pollutant discharged to EGLE. See, e.g., EGLE's Secondary Treatment Wastewater General Permit[43] (requiring daily, weekly, and monthly monitoring).

By contrast, CAFOs are not required to use any waste treatment technology, or even collect meaningful data about the pollutants they are discharging into the environment. Michigan's current CAFO permit simply requires CAFOs to follow so-called "best management practices," or BMPs, in the hope that doing so will minimize pollution. BMPs include, for example, not applying waste to land within a certain distance of waterways, engaging in no-till or low-till farming, or installing vegetative buffers to minimize runoff at the field's edge. See Ex 23. The state of water quality in Michigan and elsewhere demonstrates that hopes for BMP effectiveness have not been met. In some cases—particularly in heavily tiled areas—some BMPs can make pollution worse,[44] and there is growing consensus that BMPs alone will never be sufficient to stop pollution.[45]

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[43] EGLE, *Authorization to Discharge Under the National Pollutant Discharge Elimination System, Permit No. MIG570000*, issued December 26, 2019, available at <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/NPDES/General-Permits/MIG570000-secondary-treatment-wastewater-general-permit-2025.pdf?rev=f8c62a956ddf4c1e8c78070b79a28b85&hash=460F95BBE6AD65EFDE73BCEDC141EB70> (accessed February 14, 2023).

[44] See Ex 24 at 3, describing a study involving "injection" - a BMP that is touted as reducing runoff - showing that liquid manure on a tile-drained field would enter the tile lines "within seconds" of injection. The author explained: "The problem is simple. We're watering manure down to where it behaves like water. Let me repeat that. We're watering manure down to where it behaves like water. You don't need to be a rocket scientist to understand that." As Dr. Deanna Osmond explained at last year's Understanding Algal Blooms: State of the Science Virtual Conference, "almost all the papers" analyzing the effectiveness of surface [BMPs] (like buffer strips and cover crops) do not concern heavily tiled areas. As Dr. Osmond explained, "if you've got a surface practice it's not going to be effective" at preventing phosphorus loss when DRP is flowing straight into the tiles. The same is true with respect to any other pollutants, including *E. coli*. Presentation available at <https://www.youtube.com/watch?v=Exc9zfVYjRY> from 2:24 to 2:58 (last accessed February 13, 2023).

[45] Alliance for the Great Lakes and Ohio Environmental Council, *The Cost to Meet Water Quality Goals in The Western Basin of Lake Erie*, p 2, available at <https://greatlakes.org/wp-content/uploads/2023/02/AGL_WLEB_AgReport_2023_Final-WITH-CHARTS.pdf> ("Annual, in-field conservation practices are not sufficient to meet water quality objectives . . . .")

CAFO regulation is also dramatically more lenient than the permitting regime governing biosolids, which are the post-treatment remnants of human waste that can also be land applied as fertilizer. Even though biosolids are, by definition, already treated to remove contaminants, and even though humans generate far less waste than livestock, the CAFO permit does not include many of the key protections imposed by the biosolids permit, including prohibiting application on frozen or snow-covered ground (unless additional treatment is used), requiring advance notice to local governments before land applying, and payment of fees in order to land apply. Compare Mich Admin Code, R 323.2415 with Ex 23. Additionally, unlike biosolids generators, CAFOs are allowed to transfer or "manifest" their untreated waste to third parties who can dispose of it without any regulatory oversight. Ex 23 at 15.

**b. CAFOs externalize costs and distort markets.**

Because CAFOs are able to foist the cost of pollution onto others, they receive an unfair competitive advantage. Many farmers in Michigan, including some livestock farmers, are dedicated to responsible farming that protects the environment, and voluntarily undertake protective measures that are not required under existing regulations. But under-regulation of CAFOs punishes those farmers who are trying to be good neighbors by not externalizing their pollution costs, and rewards those who have no compunction about doing so. See generally, Ex 25. Without an adequate regulatory system, free riders profit while those who do the right thing get priced out, creating a no-win scenario for environmentally minded farmers. See *id.*

Indeed, "[s]trong financial pressures have driven the industrialization of U.S. livestock farms," and can "squeeze smaller farms," causing many to exit the industry altogether.[46] Nearly

[46] USDA, at 2, 4.



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3,000 independent family farms, particularly dairies, have gone out of business in Wisconsin;[47] in Missouri, 90% of independent hog farmers have gone out of business in the past generation.[48]

This market distortion is further exacerbated by massive subsidies benefitting CAFOs. CAFOs have access to billions of dollars of federal funds through conservation programs including Environmental Quality Incentives Program, which they can use to build things like manure lagoons and composting facilities for dead animals.[49] Taxpayers also indirectly support CAFOs by subsidizing feed and grain costs, which CAFO owners rely on to feed their animals at an artificially cheap cost.[50] According to one study, 272 CAFOs in Michigan received more than $103 million in direct federal subsidies from 1995-2014. Ex 26 at 3. Plaintiff Dykhuis Farms has received more than $2 million in government payments to support its operations. Ex 27 at 1.

**3. Michigan's existing CAFO permitting regime is allowing water pollution.**

Because Plaintiffs challenged the 2020 Permit, EGLE administratively stayed its implementation, leaving its predecessor, the 2015 CAFO General Permit (2015 Permit) in place. During the contested case, EGLE staff confirmed on the record that the 2015 Permit is failing to protect water quality. See Ex 28. As EGLE Environmental Quality Specialist (and farmer) Bruce Washburn explained, the 2015 Permit has proven itself "ineffective," noting that "additional water

[47] Schulte, *Massive factory farms called CAFOs are on the rise as small family operations fade. Here is why they're controversial in Wisconsin*, Milwaukee Journal Sentinel (May 27, 2022) <https://www.jsonline.com/story/news/local/wisconsin/2022/05/27/cafos-rise-wisconsin-what-know-factory-farms/9704281002/> (accessed February 14, 2023).
[48] Missouri Rural Crisis Center, *Concentrated Animal Farming Operations (CAFOs) in Missouri* <https://morural.org/confinement-animal-farming-operations-cafos/> (accessed Feb 14, 2023).
[49] USDA Natural Resources Conservation Service, *Environmental Quality Incentives Program* <https://www.nrcs.usda.gov/programs-initiatives/eqip-environmental-quality-incentives> (accessed February 10, 2023).
[50] Union of Concerned Scientists, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations* (April 2008), p 29, available at <https://www.ucsusa.org/sites/default/files/2019-10/cafos-uncovered-full-report.pdf> (accessed February 10, 2023).



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bodies [have been] listed as impaired, in part due to [EGLE's] ineffective control of CAFOs." Ex 22 at 387:22-388:5.

The failure of the existing permitting regime reflects its history. EGLE promulgated Rule 2196, which requires CAFOs to get NPDES permits, in 2005. See Mich Admin Code, R 324.2196. CAFOs and their representatives challenged the rule, arguing that CAFOs should not have to get NPDES permits at all. The Court of Appeals rejected that challenge in *Mich Farm Bureau v Dep't of Environmental Quality*, concluding that "Rule 2196 does not exceed the scope of [EGLE's] statutory rulemaking authority." 292 Mich App at 146. The court determined that the rule "falls squarely within the scope of Part 31 of the NREPA, is consistent with the underlying legislative intent, and is not arbitrary or capricious." *Id.* Importantly, the court concluded that EGLE was "fully authorized" to require CAFOs to get NPDES permits. *Id.* The court "recognize[d] that plaintiffs are unhappy with Rule 2196, which will certainly impose new costs and requirements," but noted that a rule is not arbitrary or capricious merely because it displeases the regulated parties or causes "some inconvenience." *Id.* at 145.

Despite that broad authority, EGLE's initial CAFO General Permit, issued in 2005, relied primarily on "standard industry practices, instead of establishing new requirements from the water quality perspective." Ex 22 at 427:8-15. Those standard industry practices rested on "heavy input from agricultural groups and limited input from groups looking to protect the environment and public health." *Id.* at 427:21-25. The 2010 and 2015 Permits included only marginal improvements over the 2005 version, and the CAFO industry never challenged any of them.

**4. The 2020 Permit was a compromise with the CAFOs and would still fail to protect water quality.**

The 2020 Permit tried to improve the situation. In the process of developing the new permit, EGLE engaged in extensive public outreach. EGLE first held a series of pre-public notice



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meetings for stakeholders, including CAFOs. Ex 29 at 306-07. EGLE incorporated some of the stakeholders' suggestions into a pre-public notice draft permit and solicited input from U.S. EPA. *Id.*; see also Ex 5 at 1038-39, 1051-52. EGLE then released a draft permit for public comment, giving the public 50 days to weigh in. Ex 29 at 310. During that period, EGLE held three public meetings and met directly with industry groups and CAFO permittees. Ex 5 at 1057. EGLE received more than 2,400 comments and responded to all of them. Ex 30. After the public comment period closed, EGLE held additional meetings with the CAFO industry, even accepting proposed edits to the draft permit from poultry groups. Ex 5 at 1273-74.

Throughout this lengthy process, EGLE faced significant pressure from the CAFO industry and the final 2020 Permit backed off of numerous key improvements in the draft, including the draft's full ban on winter waste application and a requirement to use the Michigan Phosphorus Risk Assessment, the best available tool for reducing pollution from waste land application. See Ex 31 at 1 of 45 (redline comparing post-public notice version of the 2020 CAFO permit with the final version). But even these concessions were not enough for the CAFO industry. They initiated a contested case challenging nearly every improvement in the 2020 Permit, arguing that they amounted to unpromulgated rules and suffered from other supposed legal infirmities, as well as attacking them on the merits as not needed to reduce pollution. Two and half months later, the industry filed suit in the Court of Claims repeating the same legal arguments, ultimately leading to the Court of Appeals' Opinion.

Environmental and citizen groups—including most Amici—intervened in the contested case and introduced extensive evidence and legal arguments supporting the 2020 Permit's improvements and demonstrating that additional, specified permit improvements were needed.

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The administrative tribunal presided over two and a half weeks of live testimony, and the parties submitted exhaustive post-trial briefing, which was completed in July 2022.

During the contested case, EGLE staff conceded that the 2020 Permit reflected numerous concessions to the CAFOs and was insufficient to protect water quality. See Ex 32. Plaintiffs nonetheless insist that the new 2020 Permit conditions are so onerous and "sweeping" that they needed to be promulgated as rules. See Pl Opp Br at 10. We refute the legal bases for Plaintiffs' argument in section IV of the Argument section of this brief, but even a cursory look at the disputed permit conditions belies Plaintiffs' hyperbole about their scope and impact. For example:

Annual v. quarterly reporting. As noted earlier, EGLE requires most NPDES permittees to regularly monitor their discharge and submit monthly discharge monitoring reports to the Department. Although EGLE staff attested to the lack of data regarding CAFO waste disposal and discharges, the 2020 Permit did not impose anything close to effective NPDES permit monitoring and reporting requirements. Instead, the 2020 Permit merely requires CAFOs to submit quarterly reports of where and when they dispose of their waste, as opposed to the annual reports required by the 2015 Permit. See Pl Opp Br at 38.

Winter waste application. Among other things, the Draft 2020 Permit would have prohibited winter waste application between January and March. Such prohibition is the only responsible approach, given that CAFO waste applied to frozen or snow-covered ground is uniquely dangerous to water quality and serves no agronomic purpose. And because CAFOs must have at least six months' worth of waste storage capacity, complying with a three-month ban is practical. Ex 4 at 9. A calendar-based ban is also straightforward from an enforcement and compliance perspective. But under pressure from the CAFOs, EGLE removed the calendar-based ban in the final 2020 Permit and instead slightly tightened the limits on winter spreading that were



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in the 2015 Permit, such as requiring waste to be "incorporated" or tilled into the soil immediately after application instead of within 24 hours. See Ex 31 at 20.

Manifesting requirements. CAFOs routinely transfer their waste to unregulated third parties for disposal. See Ex 24. The 2015 Permit requires CAFOs to complete a form for such transfers known as a "manifest," so the transfer process is known as "manifesting." The amount of manifested waste is enormous (over 1.5 billion gallons in liquid waste in 2019 alone), and EGLE staff attested that this practice hides significant volumes of waste from EGLE's oversight. Ex 22 at 424, 430-31. But the final 2020 Permit included only modest changes from the 2015 Permit, including: (1) limiting manifesting for land application during winter months, and (2) requiring CAFOs to include slightly more information on manifest forms, namely, the contact information for the receiving party (instead of just their name and address) and the "longitude and latitude center" of the land application site (instead of the "address or other description" of that site).

These minor revisions do not come close to unprecedented "sweeping mandates" (Pl Opp Br at 35) as Plaintiffs insist. To the contrary, they are the minimum incremental improvements Michiganders should expect in a permit for an industry that continues to dangerously pollute Michigan's waters. The 2020 Permit is a step in the right direction but still not nearly sufficient to fulfill EGLE's statutory mandate to protect Michigan waters.

**5. Current status of contested case**

When the Court of Appeals' Opinion came down, the tribunal requested supplemental briefing to explain its impact on the tribunal's ongoing deliberations. Plaintiffs' brief argues that the Opinion "definitively answered the threshold legal issue on the 2020 General Permit" and required the tribunal to "enter judgment in [Plaintiffs'] favor." Ex 33 at 1. After EGLE submitted its request for leave to appeal, the parties jointly requested a stay of the contested case, and the



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tribunal granted that request and entered a stay "pending a decision from the Supreme Court in the appeal of the Michigan Farm Bureau case." Ex 34.

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## STANDARD OF REVIEW

Amici incorporate EGLE's Standard of Review.

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## ARGUMENT

The Court of Appeals acknowledged that it lacked subject matter jurisdiction and had no factual record before it. The court nonetheless went on to opine that some conditions of the 2020 Permit prohibit practices that Rule 2196 supposedly allows and, for that reason, meet the definition of "rule" under the APA. See Opinion at 13.[51] The Opinion thus enables Plaintiffs to challenge those permit conditions as unpromulgated rules in a declaratory action under MCL 24.264 at the same time they are challenging them in a contested case. Although it does not say so expressly, the Court of Appeals effectively announced a new legal rule with sweeping consequences for environmental regulation: Agency permits cannot contain prohibitions that do not specifically appear on the face of existing agency rules; such permit conditions amount to "rules" under the APA and must be promulgated.

As explained below, this new legal rule has no basis in Michigan law. The APA expressly commands that it "shall not be construed to repeal additional requirements imposed by law." MCL 24.211. But this would be the exact result if the Opinion stands because the Opinion's new legal rule puts the APA into direct conflict with NREPA and MEPA, both of which embody the Michigan Constitution's prioritization of environmental protection, and forces EGLE to violate its core obligations to protect Michigan's waters.

The Opinion's new legal rule also misreads and distorts the APA, under which the 2020 Permit is a "license," not a "rule," and can only be challenged in a contested case. The Opinion improperly turns a fact-dependent dispute about the substantive validity of permit terms, which

[51] Technically, Rule 2196 does not "allow" or "prohibit" any practices because it does not apply directly to CAFOs. Instead, the Rule outlines the requirements for CAFO NPDES permits, including the minimum requirements for a CNMP. By eliding this distinction, the Opinion further demonstrates its failure to engage with what Rule 2196 and the 2020 Permit actually provide.



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should be resolved in a contested case, into a supposedly legal dispute about whether those terms are really "rules." And although it is an issue for the contested case and not before this Court, the disputed 2020 Permit terms are perfectly consistent with Rule 2196. For all of these reasons, Amici respectfully ask the Court to grant EGLE's application, vacate the Opinion, and order dismissal of this case based on Plaintiffs' failure to exhaust their contested case remedy. See *Hendee v Putman Twp*, 486 Mich 556, 573; 786 NW2d 521 (2010).

## I. The Michigan Constitution requires the Legislature to protect natural resources and the Legislature enacted Part 31 of NREPA and MEPA to fulfill that obligation.

Article 4 of Michigan's Constitution expressly prioritizes environmental protection and obligates the Legislature to advance that goal:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Const 1963, art IV, § 52. This Court has held that article IV, section 52 imposes a "***mandatory legislative duty to act to protect Michigan's natural resources***." *State Highway Comm'n v. Vanderkloot*, 392 Mich 159, 178, 220 NW2d 416 (1974) (emphasis added). That duty can take the form of "specific provisions in pertinent enactments or in the form of generally applicable legislation." *Id*. at 182.

Pursuant to that constitutional mandate, the Legislature enacted statutes to protect water and other natural resources, which are now codified as NREPA, MCL 324.101 *et seq*. These provisions include Part 31 of NREPA (MCL 324.3101 *et seq*.), which, among other things, requires permits to prevent and control water pollution, and Part 17 of NREPA (MCL 324.1701 *et seq*.), which was originally passed as the Michigan Environmental Protection Act or MEPA.



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## II. The Opinion's new legal rule creates a conflict between the APA and NREPA and forces EGLE to violate NREPA.

"When construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). "[T]o discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2017) (emphasis in original). See also *People v Shahideh*, 482 Mich 1156, 1160; 758 NW2d 536 (2008) ("provisions must be read in the context of the entire statute so as to produce a harmonious whole"). Statutes must also be construed "harmoniously" with other statutes; otherwise, the later-enacted statute would amount to a repeal by implication of the earlier-enacted statute, which is heavily disfavored. *Int'l Bus Machines Corp v Dep't of Treasury,* 496 Mich 642, 651–52; 852 NW2d 865, 872 (2014) *("IBM")* ("We will construe statutes, claimed to be in conflict, harmoniously to find *any other* reasonable construction than a repeal by implication.") (quotations and citations omitted).

Contrary to this well-settled law, the Opinion creates a direct conflict between the APA and NREPA and prevents EGLE from complying with its obligations under the latter statute.

### A. Part 31 of NREPA and EGLE's Part 4 and 21 Rules require EGLE to impose permit conditions "deemed necessary by the Department" to "assure compliance" with water quality standards.

Part 31 of NREPA implements the Constitutional mandate to protect Michigan's water resources as follows:

- NREPA requires EGLE to "protect and conserve the water resources of the state" and "***take all appropriate steps to prevent any pollution*** the department considers to be unreasonable and against public interest." MCL 324.3103; 324.3106 (emphasis added).



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- NREPA requires EGLE to "establish pollution standards for lakes, rivers, streams and other waters of the state in relation to the public use to which they are or may be put, as it considers necessary." MCL 324.3106. That same section requires EGLE to issue permits "that ***will assure compliance with water quality standards***." MCL 324.3106 (emphasis added).

- EGLE promulgated rules setting water quality standards (Mich Admin Code, R 323.1041, *et seq.*) and the Part 21 Rules establishing the NPDES program, including Rule 2137 (requiring permits to include any "**limitation deemed necessary by the department to meet**" water quality standards) and Rule 2196 (requiring NPDES permits for CAFOs).

- Environmental permits must be renewed every five years and modified to address "change[s] in any condition that requires a temporary or permanent reduction or elimination of a permitted discharge." Mich Admin Code, R 323.2159(1)(a).

- Consistent with the permit program, NREPA states that "[a] person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to," inter alia, "the public health, safety, or welfare, . . . recreational or other uses being made of such waters, [or] wild animals, birds, fish, aquatic life, or plants or to their growth or propagation." MCL 324.3109(1).

Taken together, the provisions mean EGLE is legally obligated to: (a) "take all appropriate steps to prevent" pollution; (b) issue permits that "assure compliance with water quality standards" pursuant to the Part 21 Rules; and (c) modify permits every five years as necessary to meet those objectives. Consequently, as expressly stated in Rule 2137, EGLE has authority to issue permit conditions "deemed necessary by the department to meet" water quality standards, even if they are not specifically required by Rule 2196, so long as those conditions otherwise do not conflict with the Part 21 Rules. Mich Admin Code, R 323.2137.

The obligation to renew permits every five years makes this clear because if permit conditions could only be changed by newly promulgated rules, there would be no reason to give permits any fixed duration. Five-year permit terms give EGLE the opportunity to change permit conditions in light of new data, technology, weather patterns or other factors that might affect what conditions are needed to "assure compliance with" water quality standards. MCL 324.3106.



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Indeed, Rule 2196 itself expressly allows EGLE to impose new and more stringent permit conditions with respect to the primary element of a CAFO Permit—the requirement to prepare and comply with a Certified Nutrient Management Plan (CNMP). See Mich Admin Code, R 323.2196. Rule 2196(5)(a) states "***[a]t a minimum***, a CNMP shall include best management practices and procedures necessary to implement applicable effluent limitations and technical standards established by the department ***including*** all of the following . . . ." By beginning with "at a minimum" and ending with "including," this sentence confirms that the list of CNMP provisions in subsections 2196(5)(a)(i)-(x) set a floor, not a ceiling on what EGLE can require in a CAFO permit; CNMPs must contain whatever practices are "necessary to achieve applicable effluent limitations."[52] Rule 2196 fits hand in glove with the overall legal framework, all of which is geared toward eliminating pollution in the real world consistent with the Michigan Constitution. The Court of Appeals' opinion ignores this key language from 2196, as well as the broader framework.

**B. The 2004 NREPA amendments confirm EGLE's permitting powers.**

The Legislature amended NREPA to sharply limit EGLE's rulemaking authority in 2004: "[N]otwithstanding any rule-promulgation authority that is provided in this part, except for rules authorized under section 3112(6) [which concerns oceangoing vessels] the department shall not promulgate any additional rules under this part after December 31, 2006." MCL 324.3103(2). The amendment did not, however, limit EGLE's substantive obligations under NREPA. It also added a new subsection preserving the rules EGLE had already promulgated or would promulgate in the next two years: "Notwithstanding the limitations on rule promulgation under subsection (2), rules

[52] Under Rule 2137(d), "effluent standards and limitations" include federal performance standard and "[a]ny other more stringent limitation deemed necessary by the department to meet applicable water quality standards . . . including applicable requirements necessary to meet [TMDLs]." Mich Admin Code, R 2137(d).



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promulgated under this part before January 1, 2007, shall remain in effect unless rescinded. expressly stated that existing rules "shall remain in effect unless rescinded." MCL 324.3103(4).

Because EGLE can no longer promulgate new rules, the current rules must give EGLE sufficient authority to issue new permit conditions if "deemed necessary by the Department" to "assure compliance" with water quality standards as required by NREPA and Rule 2137, so long those permit terms do not conflict with the Part 21 Rules. Otherwise, the 2004 amendment would have improperly effected a repeal by implication of MCL 3214.3106, which, pursuant to Constitutional mandate, requires EGLE to "take all appropriate steps to prevent any pollution the department considers to be unreasonable and against the public interest" and issue permits "that will assure compliance with water quality standards." See *IBM*, 496 Mich at 651–52.

Plaintiffs claim the amendment limiting EGLE's rulemaking authority is immaterial because of MCL 324.3103(3), which states: "The department may promulgate rules and take other actions as may be necessary to comply with the federal [Clean Water Act]." It is not clear, however, that this provision—which was in NREPA prior to the amendment—survives the amendment. In any event, regardless of whether any permit conditions here are "necessary to comply" with the Clean Water Act, they are undoubtedly necessary to comply with NREPA, which is more protective than the Clean Water Act. The Court of Appeals emphasized this fact in 2011 when it rejected Farm Bureau's challenge to Rule 2196 for exceeding minimum federal standards: EGLE "***has much broader duties and powers*** with respect to the regulation of water pollution under Part 31 of the NREPA" than under the Clean Water Act. *Mich Farm Bureau*, 292 Mich App at 134 (emphasis added). Those "broader duties and powers" include the duty to "take all appropriate steps to prevent pollution" in MCL 323.3106. EGLE was authorized to require CAFOs



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to apply for NPDES permits even when they would not have to do so under federal law. See *Mich Farm Bureau*, 292 Mich App at 135.[53]

Because EGLE lost its rulemaking authority but retained its statutory obligations to prevent pollution and issue effective permits, the Legislature must have understood the Department to have authority to improve permit terms as needed to protect water quality.

### C. The Opinion's new legal rule forces EGLE to violate NREPA.

By preventing EGLE from modifying the CAFO General Permit unless it promulgates new rules (which the Department cannot do), the Opinion freezes the current CAFO General Permit in amber, even though it has remained largely unchanged since it was first issued in 2005 and is manifestly failing to achieve water quality standards. Consequently, the Opinion locks EGLE into permanent noncompliance with its obligations to "take all appropriate steps to prevent" pollution under MCL 3103(1) and to "issue permits that will assure compliance with water quality standards" under MCL 3106, as well as its obligations under the Part 21 Rules.

Indeed, the Opinion's new legal rule essentially grants CAFOs a *right* to engage in any practices not expressly prohibited by Rule 2196—regardless of the impact on water quality—unless EGLE modifies Rule 2196 (which EGLE can no longer do). The Opinion grants this right even though Rule 2196 does not confer any affirmative rights on Plaintiffs or any other permittees;

[53] The greater breadth of NREPA also defeats Plaintiffs' suggestion that EGLE is trying to "circumvent" the limitation on rulemaking in MCL 24.232(8), which states: "if the federal government has mandated that this state promulgate rules, an agency shall not adopt or promulgate a rule more stringent than the applicable federally mandated standard unless the director of the agency determines that there is a clear and convincing need to exceed the applicable federal standard." MCL 24.232(8). Here, it is NREPA, not "the federal government," that has mandated EGLE to promulgate rules to "prevent pollution" and issue permits that "assure compliance with [water quality standards]." MCL 324.3103. MCL 24.232(8) imposes no restriction against such rules or permits imposing pollution standards stricter than federal minimums.



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it simply describes what EGLE must include, "at a minimum," in CAFO permits. The Opinion transforms a rule intended to require permits that "assure compliance" with water quality standards into an entitlement for CAFOs that would prevent such compliance.

For all these reasons, the Opinion is far more than a "purely procedural directive," as Plaintiffs assert. See Pl Opp Br at 20. Indeed, as noted earlier, Plaintiffs argued to the contested case tribunal that the Opinion "definitively answered the threshold legal issue on the 2020 CAFO General Permit" and required it to "enter judgment in [Plaintiffs'] favor." The Opinion also puts every EGLE general permit in industry's cross-hairs,[54] a threat that is already materializing. The meat processing industry recently filed an administrative challenge to a new EGLE groundwater general permit, relying on the Opinion to argue that the permit should be stricken as an unpromulgated rule. See Ex 35 at p 3, ¶ 7.[55]

In short, rather than reading the APA and NREPA "harmoniously" (*IBM*, 496 Mich at 651–52), the Opinion puts them into direct conflict. In doing so, the Opinion radically curtails EGLE's statutory power to protect water quality—which is itself compelled by the Michigan Constitution––and renders key provisions of NREPA a dead letter.

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[54] See EGLE, *NPDES - General Permits* <https://www.michigan.gov/egle/about/organization/water-resources/npdes/general-permits> (accessed February 10, 2023) (surface water general permits); see also EGLE, *Groundwater Discharge General Permit Categories* <https://www.michigan.gov/egle/about/organization/water-resources/groundwater-discharge/general-permit-categories> (accessed February 10, 2023) (groundwater general permits).

[55] Adding insult to injury, meat processing companies filed this action after the Legislature made up to $38 million in taxpayer funds available to them to reduce their water pollution as the challenged general permit would require. See 2022 PA 166, Sec. 901, available at <www.michigan.gov/budget/-/media/Project/Websites/budget/Fiscal/Final-Signed-Budget-Bills/FY23-General-Omnibus-Budget---PA-166-of-2022.pdf?rev=bd8046f52ca34add82153b25098d7b1f&hash=834779B0701389EACB946DD740496D2C> (accessed February 14, 2023).



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## III. The Opinion's new legal rule creates a conflict between the APA and MEPA and forces EGLE to violate MEPA.

MEPA "represents a comprehensive effort on the part of the legislature to preserve, protect and enhance the natural resources so vital to the well being of this State" as required by the state Constitution. *Vanderkloot*, 392 Mich at 186. MEPA provides a cause of action against anyone, including governmental bodies, whose "conduct has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources." MCL 324.1703(1). The only "affirmative defense" to a MEPA claim is "that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction." *Id.*

To make the statute's promise real, section 1704 of MEPA empowers courts to "grant temporary and permanent equitable relief or . . . impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction." MCL 324.1704(1). MEPA "also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment. . . ." *Ray*, 393 Mich at 305–06.

Section 1705 of MEPA applies the statute's broad commands to "administrative, licensing, or other proceedings" in which judicial review is available. MCL 324.1705. It allows any person to intervene in such proceeding by "filing a pleading" claiming that the proceeding "involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources." MCL 324.1705(1). Section 1705(2) then requires the administrative decisionmaker or court to "determine" the validity of the intervenors' claims and states: "conduct shall not be authorized or approved that has or is likely to



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have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2).

Crucially, "MEPA is supplementary to other administrative and regulatory procedures provided by law," such as the NPDES permitting program. *Nemeth*, 457 Mich. at 30 (internal citations omitted). "MEPA specifically authorizes a court to determine the validity, reasonableness, and applicability of any standard for pollution or pollution control"—such as the conditions of a NPDES permit—"*and* to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA." *Id.* (internal citations omitted; emphasis in original). See also *id*.

The Opinion's new legal rule would obliterate the rights and obligations created by MEPA. As explained in the preceding section, the Opinion prevents EGLE from updating or improving the CAFO General Permit to include any terms not specifically on the face of Rule 2196, even though EGLE's own staff believe the current permit is failing to prevent pollution and allowing impairment of Michigan's waters. The Opinion's new legal rule would force EGLE to violate MEPA by issuing a permit that "is likely to pollut[e], impair[], or destroy[] the air, water, or other natural resources," even though the agency has determined that "there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare" (MCL 324.1705(2)), namely, the full 2020 Permit. The Opinion also conflicts with the MEPA provisions requiring EGLE (including its administrative law judges) and courts to grant equitable relief in MEPA cases. See *Nemeth*, 457 Mich at 30.



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## IV. The Opinion's new legal rule misreads and conflicts with the APA.

In addition to effecting a repeal by implication of EGLE's key duties under NREPA and MEPA, the Opinion's new legal rule distorts the APA, under which the 2020 Permit is a "license," not a "rule," and must be challenged in a contested case.

### A. The 2020 Permit is a "license" under the APA, not a "rule."

As discussed above, "statutory provisions are *not* to be read in isolation." *Robinson*, 486 Mich at 15 (emphasis in original). Courts must "give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co.*, 466 Mich 142, 146; 644 NW2d 715 (2002). While courts "are to give statutory language its ordinary and generally accepted meaning, . . . when a statute specifically defines a given term, that definition alone controls." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135–36; 545 NW2d 642 (1996). Similarly, "to produce an harmonious and consistent whole" in reading a statute, "the omission of a provision in one part of a statute, which is included elsewhere in the statute, should be construed as intentional." *Cherry Growers, Inc v Agric Mktg & Bargaining Bd*, 240 Mich App 153, 170; 610 NW2d 613 (2000).

Applying these principles, none of the 2020 Permit's conditions are "rules" under the APA. The APA defines a "license" as "the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law." MCL 24.205(a). The next subsection defines "licensing" as "agency activity involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license." MCL 24.205(b). The 2020 Permit—like any NPDES permit—is plainly a "license" under the APA and its issuance was an act of "licensing."



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Plaintiffs do not dispute that the 2020 Permit is a "license"; rather they insist each condition they do not like can also be a "rule." Pl Opp Br at 29. But the APA defines "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207. Critically, the list of agency actions that can amount to a "rule" under this definition does not include "license," even though that term is separately defined in the statute. That is not the case with the other agency actions listed in MCL 24.207 ("regulation, statement, standard, policy, ruling, or instruction").

Because MCL 24.205 "specifically defines" the term "license" to include "permits[,]" "that definition alone controls." *Tryc*, 451 Mich at 136. And since that defined term is not included in the list of agency actions that can constitute a "rule" in MCL 24.207, reading those two sections together "as a whole" (*Robinson*, 486 Mich at 15) compels one conclusion: a permit issued pursuant to rule cannot itself be a "rule" under MCL 24.207. See also *Cherry Growers,* 240 Mich App at 170 ("omission of a provision in one part of a statute, which is included elsewhere in the statute, should be construed as intentional").

The structure of the APA reinforces the distinction between licenses (like the 2020 Permit) and rules. Chapter 3 is titled "Procedures for Processing and Publishing Rules" and contains the declaratory judgment remedy in MCL 24.264. Chapter 5 is titled "Licensing" and Chapter 4 is titled "Procedures in Contested Cases," which apply to licensing decisions. MCL 24.203(3). The Legislature also established separate administrative bodies to oversee EGLE's rulemaking (Environmental Rules Committee, MCL 24.265) and permitting (Environmental Permit Review Commission, MCL 324.1313(1)). And the APA establishes distinct remedial paths for challenging



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"licensing" decisions (contested case under MCL 24.203(3)/MCL 24.271-288) and for challenging "the validity or applicability of a rule" (declaratory action under MCL 24.264). See *Michigan Ass'n of Home Builders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 498; 750 NW2d 593 (2008) ("[a]n administrative determination is categorized ***as either*** a contested or a non-contested case"; refusing to allow contested case style evidentiary hearing in challenge to rule under MCL 24.264) (emphasis added).

The distinction between permitting and rulemaking also pervades NREPA, which separately authorized EGLE to promulgate rules (MCL 324.3403(2)) and issue permits (MCL 324.3106). See also MCL 324.3302 (recognizing EGLE's authority to issue "general permits" that apply to "a category of activities"). Pursuant to NREPA, EGLE then promulgated the Part 21 Rules establishing the NPDES permit program, and began issuing permits pursuant to those rules. See Mich Admin Code, R 323.2101 *et seq*. See also infra Sec. III.B.

Plaintiffs nonetheless insist that a "license" can "also be[] a 'rule' under the APA" because "license" is not among the exceptions to the definition of "rule" listed in MCL 24.207(a)-(s). Pl Opp Br at 29. But because the separately defined term "license" is not included in the definition of "rule" in the first place and is the subject of an entire separate section of the APA, there was no need to include it in the list of exceptions.

In sum, reading the APA "to produce a harmonious whole" (*Shahideh,* 482 Mich at 1160), an agency's promulgation of rules establishing a permitting program and its issuance of permits pursuant to such rules are separate actions, disputes over which must be resolved in separate proceedings. By holding that a general permit can somehow become a rule if it contains any prohibition that does not specifically appear on the face of an existing rule, the Opinion collapses those distinctions, violating core tenets of statutory construction.



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### B. Permit conditions that conflict with a statute or rule are invalid permit terms, not "rules," disputes about which must be resolved in a contested case.

As shown above, nothing in the APA creates a categorical bar on permit conditions not found verbatim on the face of an agency rule. But this does not mean an agency is unconstrained in issuing permits. The governing statutes and rules—read "as a whole" (*Robinson*, 486 Mich at 18)—establish the boundaries for appropriate permit conditions. If an affected party thinks a permit condition conflicts with applicable statutes and/or rules, they are free to challenge that condition in a contested case, and they can move for summary disposition before the evidentiary phase of the contested case begins. If the administrative law judge agrees, they can strike the permit condition for conflicting with the statute and/or rule. There is no legal basis or practical reason to take the extra step of declaring the violative condition an "unpromulgated rule," let alone to allow affected parties to bring such challenges in a duplicative action under MCL 24.264.

This Court's decision in *Clonlara,* 442 Mich 230, makes this point explicit. Plaintiffs in that case challenged actions by the State Board of Education which, they claimed, met the definition of "rule" in MCL 24.207. Because the Board had no authority to promulgate rules on the relevant topic, plaintiffs claimed its action should be stricken as an unpromulgated rule. The Board argued that the challenged action was merely an "interpretive statement," which is an exception to the definition of "rule" in MCL 24.207(h). The Court recognized that the real dispute was not whether the Board's action amounted to a rule (which the Board had no authority to promulgate) but whether it was a proper exercise of the authority the Board *did* have to interpret statutes: "An interpretation not supported by the enabling act is an invalid interpretation, not a rule. . . . An invalid interpretation cannot become an invalid rule unless the agency is empowered to promulgate rules." *Id.* at 243.



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By the same token, the dispute here is not whether the challenged 2020 Permit conditions amount to "rules" (which EGLE has no authority to promulgate in these circumstances); rather, the dispute is whether those conditions were a valid exercise of the permitting authority EGLE undisputedly *does have* under NREPA and the Part 21 Rules. If the permit terms conflicted with any of those rules (which they do not), they would simply be invalid permit terms, not unpromulgated rules.

Moreover, analyzing such potential conflicts almost inevitably requires evidence about the practical meaning and effect of disputed permit terms, which can only be gathered in a contested case. See *Home Builders*, 481 Mich 496, 498 (no evidentiary hearing allowed in "non-contested case" rule challenge). Resolving Plaintiffs' claims here, for instance, requires understanding highly specific business, agricultural, and agronomic practices addressed by Rule 2196, including the terms and implementation of CNMPs. A court is not equipped to address those questions without a factual record. The Opinion demonstrates the dangers of a court attempting to do so: the court simply accepted Plaintiffs' characterizations of the 2020 Permit without any independent analysis, even though, as shown in section IV below, those characterizations are plainly wrong.[56]

Plaintiffs themselves acknowledged how inextricably their claims are tied to the facts and evidence presented in the contested case. Administrative Law Judge Pulter asked Plaintiffs why, if their "unpromulgated rule" argument raised purely legal issues, Plaintiffs did not move for summary disposition in the contested case:

> 1[JUDGE PULTER]: I am still kind of befuddled by your decision not to raise
> 2 the unlawful rulemaking argument before the contested case
> 3 hearing because it seems like an incredible waste of time
> 4 that we go through an entire contested case hearing. And if

[56] The Opinion even disregarded the plain text of Rule 2196, which states that the nutrient management plan provisions it outlines are the "minimum" that must be included in a permit, not the outer limits of what EGLE could require. Mich Admin Code, R 325.2196(5)(a).



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5 I were to make that kind of a recommendation to the director
6 that it would be unlawful rulemaking and the director
7 decides that I'm correct, it just seems like an incredible
8 waste of time and I'm perplexed why you didn't raise that
9 issue before the case proceeded to hearing. If that is
10 really your concern in this case, I just don't understand
11 your decision to hold that back.
12 MR. LARSEN: Your Honor, respectfully, it is one
13 concern and it is a concern as to which because of the
14 Department's characterization of certain factual issues ***we***
***15 though it would still be helpful for this Court to -- or for***
***16 this Tribunal to have the underlying facts.***

See Ex 36 emphasis added. Plaintiffs' answer shows that a court or other decisionmaker cannot fully evaluate a challenge to the conditions of a permit that was issued pursuant to a rule scheme without considering the "underlying facts."

In essence, Plaintiffs have engaged in sleight of hand: they have re-cast a technical, fact-dependent dispute about the substantive validity of permit terms (which should be resolved in a contested case) into a supposedly purely legal dispute about whether those terms are really "rules" that can be challenged in a declaratory action. This completely subverts the APA. It also creates procedural confusion. The Opinion opens the door for litigants to pursue simultaneous, parallel actions and seek identical relief in two separate forums, as Plaintiffs did here. See Ex 33 at 1. This result wastes judicial time and resources and risks inconsistent rulings.

**C. None of the cases Plaintiffs cite support the Opinion's new legal rule.**

Plaintiffs cite several Michigan cases and a slew of cases from federal and other state courts that, they say, support automatically requiring all new permit conditions to be promulgated as rules. See Pl Opp Br at 23-30. The Michigan cases, however, did not involve permits or licenses issued pursuant to promulgated rules, as is the case here. Instead, those cases involved agencies that failed to promulgate rules establishing a licensing program (despite having authority to do so) and instead conditioned the issuance of licenses on unpromulgated policies. See *Delta Cnty v*



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*Michigan Dep't of Nat Res*, 118 Mich App 458, 468; 325 NW2d 455, 459 (1982) (abrogated on other grounds in *Livingston Cnty v Dep't of Mgmt & Budget*, 430 Mich 635, 651-52; 425 NW2d 65 (1988)) (agency denied license based on "departmental guidelines and policies" not promulgated as rules); *Mallchok v Liquor Control Comm'n*, 72 Mich App 341, 345; 249 NW2d 415 (1976) (agency denied license based on unwritten policy).[57]

Those cases would be analogous only if EGLE had issued the 2020 CAFO Permit without first promulgating the Part 4 water quality standards or the Part 21 Rules creating the NPDES permitting program (and without providing public notice and hearings). Those cases do not address the proper scope of licenses that *are* issued pursuant to a rule regime and in no way suggest that such licenses are categorically barred from imposing conditions not found on the face of existing rules.

Cases applying the federal Administrative Procedure Act, 5 USC 551 *et seq*. (Pl Opp Br at 24-25) are also inapplicable. First, the federal APA requires all general permits to be "issued pursuant to administrative rulemaking procedures." *NRDC v US EPA*, 279 F3d 1180, 1183 (9th Cir 2002) (citing 40 CFR §§ 122.28, 124.19(a)). The Michigan APA imposes no such requirement, as illustrated by the fact that Plaintiffs did not challenge the 2005, 2010, or 2015 CAFO General Permits, none of which were promulgated as rules. Second, the public notice and hearing process EGLE conducted for the 2020 Permit was far more extensive than the rulemaking requirements of the federal APA. See 5 USC 553 (requiring only a 30-day written comment period and no other public outreach). The CAFOs have enjoyed more procedural rights with respect to the 2020

[57] See also *Am Fed of State, County & Mun Employees (AFSCME), AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996) (agency tried to establish operational requirements for mental health facilities through "guidelines" and a form contract); *Spear v Mich Rehab Srvs*, 202 Mich App 1; 507 NW2d 761 (1993) (agency conditioned benefits determination on compliance with "Casework Operations Manual" not issued pursuant to a rule).



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Permit—including public hearings and private meetings with EGLE staff—than they would have with any federal rule. Third, as shown above, Michigan statutes impose stricter pollution control obligations on EGLE than the Clean Water Act does, and the Opinion's new legal rule would prevent EGLE from fulfilling them. Plaintiffs are improperly asking the Court to use federal procedural law to force EGLE into violating its substantive obligations under NREPA and MEPA.

Plaintiffs' litany of cases from other states are irrelevant for similar reasons. No other state's APA can override the Michigan statutes at issue here (APA, NREPA, and MEPA), all of which, read separately and together, preclude the Opinion's new legal rule.

The bottom line is that under Michigan law, environmental permits issued pursuant to agency rules are "licenses," not "rules," and if affected parties object to any permit conditions, they can fully and fairly litigate them in a contested case, including eventual judicial review. The Opinion's new legal rule—that EGLE cannot even slightly improve the terms of an environmental permit issued pursuant to a comprehensive rule regime without promulgating a new rule—misreads the APA and upends administrative practice and environmental protection in Michigan.[58]

## V. In any event, there is no conflict between the 2020 Permit and Rule 2196.

As shown above, Plaintiffs must pursue their assertion that the 2020 Permit conflicts with Rule 2196 in the contested case. Because that contested case is still pending, it would be premature for any court, let alone this one, to evaluate Plaintiffs' claims, and we are not asking the Court to

[58] In the alternative, if this Court determines that the 2020 General Permit is not a license under MCL 24.205, the permit would fall under the exception to the definition of "rule" in MCL 24.207(h): an "interpretative statement . . . that in itself does not have the force and effect of law but is merely explanatory." This exclusion describes the 2020 Permit, which updates EGLE's interpretation of Rule 2196 but has no effect on any CAFO until applied through the issuance of a certificate of coverage. It is also a valid interpretation because, as shown in Section V, it is perfectly consistent with Rule 2196. See *Airgas Specialty Prod v Michigan Occupational Safety & Health Admin*, 338 Mich App 482, 495; 980 NW2d 530 (2021).



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do so. We do, however, briefly note that the permit conditions Plaintiffs complain about are perfectly consistent with Rule 2196. For example:

Winter waste application. Plaintiffs complain that the 2020 Permit unduly restricts spreading CAFO waste between January 1 and March 30, supposedly conflicting with the less onerous controls in Rule 2196(5)(a)(ix)(C). But that subsection of Rule 2196 is part of the list of requirements for a CNMP, which, as noted earlier, sets a floor, not a ceiling, on what permits can require. Mich Admin Code, R 323.2196(5)(a) ("***At a minimum***, a CNMP shall include best management practices and procedures necessary to implement applicable effluent limitations and technical standards established by the department ***including*** all of the following . . . .") (emphasis added). Rule 2196 does not handcuff EGLE from requiring more than the specified winter spreading conditions or give CAFOs a perpetual right to engage in any particular practices.

Manifesting. Plaintiffs complain that the 2020 Permit unduly restrains CAFOs' ability to "manifest" their untreated hazardous waste to unregulated third parties. But again, the relevant subsection of Rule 2196 sets a floor, not a ceiling, about what a CAFO permit can require. Rule 2196(e) is predicated with the phrase "[u]nless the department determines otherwise" and no language in Rule 2196(e) prevents EGLE from restricting whether, when, or how CAFOs can manifest waste; it simply provides the minimum documentation and other procedures "in cases where" EGLE does allow it. The Rule certainly does not create an affirmative *right* for CAFOs to engage in manifesting, as the Opinion effectively found. Indeed, Rule 2196(1(a) states that "the NPDES requirements for CAFOs apply to all animals in confinement at the operation and to ***all*** production areas waste and CAFO process wastewater ***generated by*** those animals or the production of those animals." Mich Admin Code, R 3234.2196(1)(a) (emphasis added). There is no carve-out for waste generated by a CAFO and then transferred to someone else.



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Quarterly Reports. Plaintiffs complain that requiring CAFOs to submit quarterly reports regarding their operations and waste disposal somehow violates Rule 2196(f), which requires such information in "annual" reports. See Pl Opp Br at 38. But Rule 2196(5)(f) does not forbid more frequent reports, and it certainly does not create any right on the part of CAFOs to withhold information except in an annual report. The Part 21 Rules also state that EGLE "may require a permittee to report periodically the results of all monitoring activities" and that "the reporting frequency shall not be less than at least once in a period of 1 year." Mich Admin Code, R 323.2155(2).

Given that these permit conditions comport with Rule 2196, Plaintiffs are really just trying to re-litigate their challenge to the breadth of that rule, which they lost in 2011. See *Mich Farm Bureau*, 292 Mich App at 146, (Rule 2196 "falls squarely within the scope of Part 31 of the NREPA, is consistent with the underlying legislative intent, and is not arbitrary or capricious."). The Court of Appeals was wrong even to entertain that challenge, let alone accept it.

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## CONCLUSION

Clean, fresh water is at the heart of Michigan's identity, and the state Constitution affirms that preventing water pollution is of "paramount public concern." But Michigan's waters are increasingly impaired by nutrient and *E. coli* pollution from CAFOs. Although EGLE is statutorily obligated to issue permits that "assure compliance" with water quality standards, CAFOs are still operating under a permit from 2015 that contains the minimum allowable standards and that EGLE staff admits is failing.

Unless this Court vacates the Court of Appeals' opinion, this regulatory failure will become frozen in place and EGLE will be locked into permanent violation of MEPA, NREPA and the Part 21 Rules. Amici respectfully ask the Court to accept EGLE's application and vacate the Opinion, and order dismissal of Plaintiffs' case for failure to exhaust their contested case remedy.

In the event the Court holds oral argument, Amici respectfully request permission to participate.

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## WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.305(A)(1) and 7.212(B) because, beginning with "Interest of Amici" through the end of the "Conclusion," this **Brief of Amicus Curiae** contains no more than 16,000 words. This document contains 15,061 words.

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Exhibit 29 Excerpt of Testimony of Megan McMahon for Amicus Brief

Exhibit 30 EGLE Response to Public Comment

Exhibit 31 2020 CAFO General Permit with Redlines for Amicus Brief

Exhibit 32 Combined Excerpts of Testimony of B. Washburn, T. Cleary, M. Rippke, and S. Holden for Amicus Brief

Exhibit 33 October 31, 2022 Supplemental Brief of Michigan Farm Bureau for Amicus Brief

Exhibit 34 Contested Case Ordering Stay for Amicus Brief

Exhibit 35 Petition of the Michigan Meat Association, et al. for Amicus Brief

Exhibit 36 Hearing Transcript, Openings for Amicus Brief

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