STATE OF MICHIGAN
IN THE SUPREME COURT

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

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

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has discretion to grant any application for leave to appeal from a Michigan Court of Appeals decision. MCR 7.303(B); MCL 600.215(3). It has done so here via its May 31, 2023 Order.[1]

[1] Pursuant to MCR 7.312(H)(5), neither the parties nor counsel for the parties had any part in authoring this brief, either in whole or in part. Additionally, neither the parties nor counsel for the parties, nor any other person, made any monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF QUESTIONS PRESENTED

In granting the petition for review, the Court posed three questions:

1. "[W]hether the unpromulgated new permit conditions that the Department of Environment, Great Lakes, and Energy ["EGLE" or "the Department"] seeks to enforce with its 2020 General Permit can be challenged by way of a declaratory judgment under MCL 24.264"?

    - Amici's Answer: No. The new permit conditions cannot be challenged in a declaratory judgment action under MCL 24.264 because that provision applies only to "rules" and under the Administrative Procedure Act, the challenged permit conditions are not "rules"; rather, they are "licenses," which must be challenged in a contested case under MCL 324.3112(5) and MCL 24.271-88.

2. "[W]hether a contested case proceeding under MCL 324.3112(5) and MCL 24.271 to MCL 24.288 is "an exclusive procedure or remedy . . . provided by a statute governing the agency" under MCL 24.264"?

    - Amici's Answer: The "exclusive procedure or remedy" exception in MCL 24.264 quoted in this question never comes into play in this case because that statute is inapplicable in the first instance (since it applies only to challenges to "rules").

3. "[W]hether it was necessary for the Court of Appeals to decide if the challenged permit conditions meet the definition of a "rule" under MCL 24.207 or of a "license" under MCL 24.205(a) of the Administrative Procedures Act, MCL 24.201 et seq., and if so, [b] did it decide the question correctly."

    - Amici's Answer: (1) It was not technically necessary for the Court of Appeals to decide the license vs. rule issue; it could have dismissed the case without prejudice based solely on the CAFOs' failure to exhaust their administrative remedies by seeking a declaration from EGLE. But the failure to exhaust did not prevent or preclude the Court of Appeals from deciding the license vs. rule issue and does not prevent this Court from doing so either, especially since the CAFOs have now cured their failure to exhaust. See *Fort Bend Cnty, Texas v Davis*, 139 S. Ct. 1843, 1849 (2019) (exhaustion requirements are not "jurisdictional"). (2) For the reasons explained in response to question 1, the Court of Appeals decided the license vs. rule question incorrectly.

STATUTES AND RULES INVOLVED

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

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, 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.

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, unless reversed, the Court of Appeals opinion will significantly damage Michigan's waters and other natural resources. Also, with the exception of Sierra Club, The University of Detroit Mercy School of Law Environmental Law Clinic, and National Wildlife Federation, all Amici are parties to the contested case proceeding currently pending (and stayed) before Hon. Daniel Pulter. 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. Amici submit this brief in accordance with this Court's Order dated May 31, 2023, which provides that "Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae."
3. Pursuant to MCR 7.312(H)(6), Amici request a Court order allowing them to participate in oral argument.
4. **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.
5. **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.

6. **Environmentally Concerned Citizens of South Central Michigan (ECCSCM)** is a non-profit 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. EC-CSCM 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. As a local, grassroots group, ECCSCM supports responsible agriculture that preserves and protects water quality in streams and lakes; that 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.
7. **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.
8. **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.

9. **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 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.
10. **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.
11. **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.

12. **National Wildlife Federation (NWF)** is a nonprofit corporation organized and existing under the laws of the Virginia. NWF is the largest citizen-supported conservation 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.
13. **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.

14. **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.

INTRODUCTION

The Court of Appeals' Opinion[2] may at first look like a narrow procedural ruling dismissing this case for failure to exhaust administrative remedies. In reality, it turns Michigan's environmental protection regime on its ear and condemns Michigan's waters to permanent impairment from large industrial livestock operations known as Concentrated Animal Feeding Operations ("CAFOs").

The Opinion achieves this result by confusing invalid permit terms with "unpromulgated rules" under the Administrative Procedures Act, MCL 24.201 *et seq*., ("APA"). The Opinion found that certain conditions of the 2020 CAFO General Permit ("2020 Permit") amounted to "rules" under the APA and should have been promulgated as such.[3] It thus allowed Plaintiffs—numerous CAFOs and their industry groups ("Plaintiffs" or "the CAFOs")—to challenge those conditions in a case under MCL 24.264, which provides for a declaratory judgment action to contest "the validity or applicability of a rule." MCL 24.264 ("Rule Review Provision"). The Opinion reached this conclusion despite dismissing the CAFOs' case for failure to exhaust administrative remedies under the Rule Review Provision. Opinion at 8.

As explained in Argument section I.A below, however, environmental permits and permit conditions issued pursuant to rules are "licenses" under the APA, not "rules." An environmental permit condition that conflicts with an applicable rule is simply an invalid permit term. Permittees can challenge such conditions in a contested case under MCL 324.3112(5) and MCL 24.271 to

[2] All references to the "Opinion" in this brief is to the Court of Appeals ruling at *Michigan Farm Bureau v Dep't of Environment, Great Lakes, and Energy*, __Mich App__(2022) (Docket No. 356088) ("Opinion.")

[3] This brief uses the words "terms" and "conditions" interchangeably to refer to the provisions of the 2020 Permit that the CAFOs challenge and incorrectly characterize as "rules."

MCL 24.288, such as the one the CAFOs filed in 2020, which is now stayed pending this Court's decision. A permit term that conflicts with a rule does not somehow morph into an "unpromulgated rule" that can be challenged under MCL 24.264. The CAFOs have no cognizable claim under the Rule Review Provision and the Court of Appeals erred in holding otherwise.

The Opinion compounds this error by accepting the CAFOs' underlying premise: that the disputed permit conditions in this case amount to "unpromulgated rules" merely because they impose requirements not specifically mandated on the face of existing rules, particularly Mich Admin Code, R 324.2196 ("Rule 2196"). Opinion at 12. As explained in Argument section I.A.2 below, this premise is incorrect as a matter of law. There is no prohibition against permits imposing requirements beyond those specifically mandated by rule. Otherwise, EGLE would have to promulgate a new rule in order to impose even the most modest permit improvement. That would render the entire permitting regime (embodied in Mich Admin Code, R 323.2101 *et seq.*)—including the requirement to renew permits every five years and the contested case process—functionally useless.

Making matters worse, a 2004 amendment to the Natural Resources and Environmental Protection Act ("NREPA") rescinded EGLE's rulemaking authority except in circumstances inapplicable here. *See* MCL 324.3103(4).

That means that unless the Opinion is reversed on this issue, EGLE will be powerless to improve *any* conditions in the current CAFO General Permit, which was issued in 2015 ("2015 Permit"). As EGLE staff acknowledged in the contested case, the 2015 Permit is failing to control water pollution from CAFOs, which is impairing the state's waters with toxic algal blooms and *E. coli*. The Opinion would make that impairment permanent.

It would also put the Department into permanent noncompliance with its legal obligations under two of Michigan's foundational environmental statutes: Part 31 of NREPA, MCL 324.3101 *et seq*., 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 improving the current CAFO permit within the bounds of its discretion under existing rules, the Opinion forces EGLE to violate those statutory obligations. The Opinion similarly forces the Department to violate MEPA, which prohibits anyone, including state agencies, from engaging in "conduct" that has "or is likely to pollute [or] impair . . . water, or other natural resources" unless "there is no feasible and prudent alternative." MCL 324.1703(1). EGLE would violate that prohibition if it had to keep using the 2015 Permit, which the Department admits will pollute Michigan's waters despite the existence of a "feasible and prudent alternative" in the form of the 2020 Permit.

In short, the Opinion misapplies the APA by deeming the disputed permit conditions "unpromulgated rules." It also renders the environmental permitting process superfluous and effectively nullifies the Department's duties under NREPA and MEPA, leaving Michigan's waters irrevocably impaired by CAFO pollution. This result is as legally groundless as it is environmentally destructive.

Amici respectfully ask this Court to: (a) affirm the dismissal based on the CAFOs' failure to exhaust administrative remedies (which does not implicate subject matter jurisdiction, as

explained in Argument section III below); and (b) reverse the Opinion's conclusions that the disputed permit terms amount to "unpromulgated rules" and that the CAFOs have a cognizable claim under the Rule Review Provision. The CAFOs can fully and fairly challenge the disputed permit terms on any other ground—including that they conflict with current rules (which they do not)—in the pending contested case, which is subject to judicial review.

STATEMENT OF FACTS AND PROCEEDINGS

I. CAFOs and water pollution.

Amici present the following detailed discussion about CAFO water pollution in order to: (a) illustrate the Opinion's devastating impact on Michigan's waters; and (b) refute numerous factual assertions in the CAFOs brief, for which they cite only to their Complaint. See Appellees Michigan Farm Bureau, et. al's Brief On Appeal ("Opp Br") at 4-6, 8-12, 21-22, 40 (citing Appellee's Appendix at 000117-186, Verified Complaint).

A. CAFOs generate dangerous waste 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.[4] 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. The United States Department of Agriculture ("USDA") recognizes that CAFOs are not farms in this traditional sense—they are "large industrialized livestock operations."[5] USDA also acknowledges that this shift to industrialization is "not without costs," including "[e]xcess nutrients" in manure and other CAFO

[4] See USDA, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks*, p iii, *<https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf?v=0>* (accessed September 19, 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.").

[5] *Id.* at 36.

waste that "may damage air and water resources."[6] According to the Centers for Disease Control, this shift "has resulted in an increase in contaminants polluting soil and waterways."[7]

1. CAFOs generate massive volumes of dangerous waste.

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 manage. "[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 v Dep't of Envtl Quality*, 292 Mich App 106, 140–41; 807 NW2d 866, 889 (2011). This waste includes feces, urine, "process wastewater" and "production area waste," such as wastewater from cleaning animal confinement areas. See Ex 1 at 32 (defining "CAFO Waste").

As of 2012, large CAFOs in the United States produced more than 20 times the volume of fecal wet mass produced by all of the country's humans.[8] In Michigan, permitted CAFOs reported producing 3.9 billion gallons of liquid waste and 1.3 million tons of dry waste in 2020 alone.[9] Statewide in 2020, animals on permitted CAFOs in Michigan produced approximately 62.7 million

[6] *Id.* at 1.

[7] Centers for Disease Control and Prevention, *Water Contamination* <https://www.cdc.gov/healthywater/other/agricultural/contamination.html> (accessed September 19, 2023).

[8] This number reflects only "large" CAFOs, and excludes the thousands of small and medium-sized confined animal feeding operations across the country. Earthjustice, *Petition to Adopt a Rebuttable Presumption That Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act*, p 3-4, available at <https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf> (accessed September 19, 2023).

[9] EGLE, Regulated Concentrated Animal Feeding Operations (CAFOs) map <https://egle.maps.arcgis.com/apps/webappviewer/index.html?id=0fae269e1c45485f876c99391403bd3e> [Click "OK", click arrow on the bottom of the screen to "Open Attribute Table"] (accessed on September 19, 2023) (sum of "Waste Total Dry Tons" and "Waste Total Liquid Gallons" for all registered CAFOs).

pounds of fecal waste per day,[10] more than *six times* that produced by the State's entire human population.[11] The hogs raised by Plaintiff Dykhuis Farms alone[12] generated more waste than the city of Kalamazoo that year.[13]

Unlike human waste—which undergoes significant and expensive treatment to minimize pollutants and toxins before disposal—CAFO waste is not treated before disposal. Most dairy and hog CAFOs use wet manure systems, storing manure and other waste in liquid form in open

[10] All calculations in this footnote are supported by the following two sources: (1) EGLE's CAFO website data table (as cited in FN 9 above), and (2) MSU Extension, *Small Farm Manure Management Planning*, <https://www.canr.msu.edu/resources/small-farm-manure-management-planning.> (accessed September 20, 2023). MSU estimates that lactating cows (of which there were 271,079 on CAFOs in 2020) generate 150 pounds per day in "manure" and finishing beef (of which there were 142,693) generate 64 pounds per day, **for a total of 49,794,202 pounds per day from cows/cattle/veal**. MSU extension estimates that gestating sows produce 11 pounds per day, and growing and finishing pigs produce 10 pounds per day. EGLE separates hogs by weight not type, so for this calculation, the number of swine over 55 pounds (627,061) was calculated at 11 pounds per day, and the number of swine under 55 pounds (89,671) was calculated at 10 pounds per day, **for a total of 7,794,381 pounds per day from swine**. MSU Extension estimates that poultry produces 0.23 pounds of manure per day; according to EGLE, there were 21,635,447 chickens and 775,615 turkeys on CAFOs in 2020, **for a total of 5,154,544 pounds per day from poultry**. MSU extension estimates that horses produce 57 pounds of manure per day, for a total of **570 pounds per day from horses** (10 horses on CAFOs). Altogether, these numbers add up to 62,743,697 pounds per day of waste from CAFO-confined animals in Michigan.

[11] MSU Extension also estimates that humans produce between 3 to 6 pounds of wet manure per day. MSU Extension, *Cows, Streams, and E. Coli: What Everyone Needs to Know (E3103)*, p 1, <https://www.canr.msu.edu/uploads/resources/pdfs/cows,_streams,_and_e._coli_-_what_everyone_needs_to_know_(e3103).pdf> (accessed September 19, 2023). For this calculation, a median of 4.5 pounds per day was used. According to the 2020 census, the human population of Michigan was roughly 10.08 million. US Census Bureau, *Michigan QuickFacts People Population: 2020* <https://www.census.gov/quickfacts/fact/table/MI/PST040222#PST040222> (accessed September 19, 2023).

[12] According to EGLE's CAFO data (accessible at the link cited in the footnote above), Plaintiff Dykhuis Farms, Inc. operates 4 different permitted CAFOs which, in 2020, housed a total of 25,751 hogs over 55 pounds and 10,963 hogs under 55 pounds. Using MSU's 10- and 11-pound estimates from the source cited in the footnote above, that is a total of 392,891 pounds per day of waste.

[13] Using the 4.5 pound per day estimate described in FN 7, supra, it would take a human population of 87,309 to generate 392,891 pounds of waste. Kalamazoo's 2022 population was estimated to be 72,873. Michigan Demographics, *Michigan Cities by Population* <https://www.michigan-demographics.com/cities_by_population> (accessed September 19, 2023).

cesspits (euphemistically called "lagoons"). CAFOs or third-party transferees then apply the waste, untreated, to crop fields, ostensibly as fertilizer (since manure contains nutrients, like nitrogen and phosphorus). But liquid CAFO waste is costly to transport and hauling costs generally exceed fertilizer value whenever waste is hauled more than one mile. Ex 2 at PDF 2.[14] As a result, agricultural fields near CAFOs are likely to receive far more nutrients than crops need. This is particularly true for phosphorus, which accumulates in soil.[15] 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 Background section I.A.3 below.

By routinely applying waste beyond agronomic need, CAFOs are, in the words of EGLE staff, engaging in "cheap manure disposal," not "the utilization of manure for crop production." Ex 3 at 839:11-12. Indeed, during the contested case, Plaintiff Robert Dykhuis of Dykhuis Farms testified that even a modest tightening of the Permit's waste disposal guidelines would require his operation to buy additional farmland, not to grow crops, but simply to dispose of untreated waste. Ex 4 at 1970:24-1971:4.

To deflect responsibility for the water pollution caused by their waste management practices, the CAFOs tout the supposed benefits of "manure" for crop growth. Opp Br at 5-6. But as just noted, the substance regulated by the 2020 Permit is "CAFO waste," which includes not only manure but also "process wastewater" and "production area waste," none of which has any

[14] Exhibits 3-5,7, 11, 16, 24, 28, and 32 are transcript excerpts from the parallel contested case proceeding. The remaining exhibits are academic articles or other documents that are not readily available online.

[15] Michigan State University Extension, *How to Use Phosphorus Wisely*, <https://www.canr.msu.edu/news/how_to_use_phosphorus_wisely> (accessed on September 19, 2023).

agronomic benefit. See Ex 1 at 32 (defining "CAFO Waste"); Ex 5 at 1237. Manure itself contains substances without agronomic benefit, many of which are affirmatively harmful, including antibiotics and other pharmaceuticals, *E. coli*, and PFAS. In any event, the 2020 Permit does not "presumptive[ly] ban" (Opp Br at 9,11) land application of CAFO waste; it simply regulates the practice to reduce the grave risks it poses to water quality.

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

Two types of CAFO pollutants pose the biggest threat to surface water quality: nutrients and *E. coli*. Nutrient pollution, particularly dissolved reactive phosphorus, is driving the formation of harmful algal blooms (HABs) in surface waters across Michigan, including Lake Erie. See Ex 6; see also Ex 7 at 1573:1-23.[16] HABs are "accumulations of cyanobacteria in amounts that are aesthetically unappealing and capable of producing algal toxins."[17] HABs can also create hepatoxins and neurotoxins which, if consumed, have been linked to kidney and liver damage,[18] gastrointestinal distress, infections, as well as "dementia, amnesia, other neurological damage and

[16] 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 September 19, 2023) ("Animal agriculture manure is a primary source of nitrogen and phosphorus to surface and groundwater.").

[17] 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> (accessed September 19, 2023).

[18] Earthjustice, *Petition to Adopt a Rebuttable Presumption That Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the Clean Water Act*, p 10, 60 <https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf> (accessed September 19, 2023).

death."[19] The U.S. EPA Office of Inspector General recently declared that "the prevalence, severity, and frequency of [HAB] occurrences in recreational waters . . . will increase as excess nutrients flow into these waters, temperatures rise, and extreme weather events increase with a changing climate."[20]

A chart in Exhibit 8 shows that algal toxins are more toxic by orders of magnitude than other toxic compounds, including, cyanide, botulinum toxin, and DDT. Ex 8 at PDF 13.[21] By EGLE's own account, "the number of lakes that contain[] toxins [in Michigan] is likely under-estimated," (Ex 6 at 7) and growing. See Ex 7 at 1573:17-23.

In Adrian, Michigan, which is in a CAFO-heavy watershed,[22] dangerous neurotoxins and liver toxins were detected in the city's drinking water as well as the inlets to one source of its drinking water, the Lake Adrian reservoir.[23] Wayne State University conducted a study of nearby

[19] Megan Avakian, National Institute of Environmental Health Sciences, *New Study Finds Ocean Pollution a Threat to Human Health,* <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 September 19, 2023).

[20] US EPA Office of Inspector General, *EPA Needs an Agencywide Strategic Action Plan to Address Harmful Algal Blooms*, p 17, <https://www.epa.gov/system/files/documents/2021-09/_epaoig_20210929-21-e-0264.pdf> (accessed September 19, 2023).

[21] 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 September 19, 2023).

[22] 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 September 19, 2023).

[23] 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/> (accessed September 19, 2023); see also US EPA, *Cyanobacteria and Cyanotoxins: Information for Drinking Water Systems,*

home tap water—which has undergone extensive treatment for safety and potability—and 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 9.[24]

E. coli is a fecal coliform that lives in the intestines of warm-blooded animals.[25] 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 11 at 1297:12-13. Total body contact can cause gastroenteritis, cryptosporidiosis, cholera, and other intestinal parasites. *Id*. at 1297:14-17.

In addition to these serious health impacts, nutrient and *E. coli* pollution have costly economic repercussions. As of 2015, tourism was a $20+ billion industry in Michigan, accounting for over 214,000 jobs, and it centers on the state's freshwater resources.[26] A recent study by the National Oceanic and Atmospheric Administration showed that HABs cause $82 million annually in economic losses in fishing and tourism.[27] According to MSU, "[i]f the tourism industry did not exist in Michigan, the cost to each household would be in the order of $640 per year."[28] And

<https://www.epa.gov/sites/default/files/2014-08/documents/cyanobacteria_factsheet.pdf> (accessed September 19, 2023).

[24] For instance, of samples collected on September 14, 2019, 53% contained the Microcystis gene, 3% contained the microcystin gene, and 3% contained the anatoxin-a gene. See Ex 9 at 16, 20, 24, 28. 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 10.

[25] 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 September 19, 2023).

[26] Yvonne Wichtner-Zoia and Sarah Nicholls, MSU Extension, *Michigan's tourism industry continues to grow*, <https://www.canr.msu.edu/news/michigans_tourism_industry_continues_to_grow> (accessed September 19, 2023).

[27] NOAA, Why do harmful algal blooms occur? <https://oceanservice.noaa.gov/facts/why_habs.html> (accessed September 19, 2023).

[28] *Id.*

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.[29] Just this summer, 88 public beaches have been closed due to bacterial contamination, many for weeks or even months.[30]

Protecting drinking water from algal toxins is also extremely expensive. After Microcystin contaminated its drinking water in 2014, Toledo had to invest over $400 million to upgrade its water utilities.[31] One study determined that an average family in Toledo has to pay an additional $100 per year in water costs due to ongoing HAB outbreaks.[32]

Finally, HABs deplete dissolved oxygen levels and fuel the growth of toxic organisms, leading to major fish kills,[33] harming the endocrine and reproductive systems of fish, and reducing diversity of fish species.[34] There have also been "an increasing number of cases in which dogs have gotten sick and even died after [HAB] exposure."[35]

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[29] EGLE Water Resources Division, *Michigan Beach Monitoring Year 2018 Annual Report*, p 5; <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/SWAS/Monitoring-Beach/2018-annual-report.pdf?rev=d0dba298aedd4948934ca89b4a7a6aea> (accessed September 19, 2023) (reporting a total of 53 beach advisories and closures in 2018).

[30] EGLE Water Resources Division, *BeachGuard Search Results*, <https://www.egle.state.mi.us/beach/SearchResults.aspx?instatepark=False&beachtype=Public&wbtype=ALL&advisoryclosurefrom=4%2f1%2f2023+12%3a00%3a00+AM&advisoryclosureto=9%2f2%2f2023+12%3a00%3a00+AM> (click on "Search/Export", search for at least 1 advisory or closure between May 1, 2023 and September 19, 2023) (accessed September 19, 2023).

[31] US EPA Office of Inspector General, *EPA Needs an Agencywide Strategic Action Plan to Address Harmful Algal Blooms*, p 2, <https://www.epa.gov/system/files/documents/2021-09/_epaoig_20210929-21-e-0264.pdf> (accessed September 19, 2023).

[32] 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/> (accessed September 19, 2023).

[33] Earthjustice, *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, <https://earthjustice.org/wpcontent/uploads/cafopresumptionpetitionfinal_oct2022.pdf> (accessed September 19, 2023).

[34] *Id.* at 14.

[35] 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%

3. Voluminous evidence links CAFOs with water pollution.

The relationship between CAFOs and water pollution is well-established. The charts at Exhibit 12 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 12 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.[36] 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 12 at 24.

Exhibit 13, 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 13.[37] The scientific and governmental consensus is that pollution from

20dogs%20are%20at%20greater%20risk,a%20single%20exposure%20of%20a%20higher%20toxin%20concentration.> (posted October 13, 2014) (accessed September 19, 2023).

[36] Keith Schneider, Circle of Blue, *Danger Looms Where Toxic Algae Blooms,* <https://www.circleofblue.org/2022/world/danger-looms-where-toxic-algae-blooms/> (accessed September 19, 2023).

[37] 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 Bay, however, into which much of that region drains, has suffered numerous blooms (Ex 7 at 1574-76) and beach closures. *See* EGLE BeachGuard, *Saginaw Bay-Lake Huron – Singing Bridge Beach* [Click "Closures and Advisories" tab) <https://www.egle.state.mi.us/beach/BeachDetail.aspx?BeachID=1162> (accessed September 19, 2023).

agriculture, including from CAFOs, is driving HABs. See Ex 14.[38] Ohio recently estimated that agriculture was responsible for approximately 92% of the phosphorus going into Lake Erie.[39]

Exhibit 15 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. 33 USC 1313(c)-(d)(1); 33 USC 1314(l)(1). Nearly all nutrient TMDL areas and impaired waterways are located near CAFOs.[40]

Exhibit 17 also vividly demonstrates the connection between CAFOs and *E. coli* pollution. The green on the map indicates an *E. coli* TMDL watershed, with the triangles representing CAFOs. Ex 17. 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

[38] See also EGLE, *State of Michigan Domestic Action Plan for Lake Erie*, <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/AOC/Domestic-Action-Plan-Lake-Erie.pdf?rev=18406bc013f04baa9a1f56a346fd31bd&hash=900D695008434971BC13EE76B020CDF5> (accessed September 19, 2023); Binational, *Great Lakes Water Quality Agreement*, <https://binational.net/wp-content/uploads/2014/05/1094_Canada-USA-GLWQA-_e.pdf> (accessed September 19, 2023); US EPA, *Causes of CyanoHABs* <https://www.epa.gov/cyanohabs/causes-cyanohabs> (accessed September 19, 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 September 19, 2023).

[39] Ohio EPA, *Maumee Watershed Nutrient Total Maximum Daily Load*, p 27 <https://epa.ohio.gov/static/Portals/35/tmdl/MaumeeNutrient/Maumee-Watershed-Nutrient-TMDL-Final.pdf> (accessed September 20, 2023).

[40] 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 16 at 1545:17-1546:2.

quality standards, Michigan has prepared a statewide *E. coli* TMDL, which allows EGLE to add additional waterbodies to the TMDL as they are discovered. See Ex 18.[41] According to EGLE estimates, about 50 percent of Michigan's rivers and streams are impaired by *E. coli*.[42]

EGLE's witnesses testified in the contested case hearing that "CAFOs contribute to phosphorus pollution in Michigan." Ex 16 at 1478:1-4.[43] On-the-ground data backs this up, both with respect to both phosphorus and *E. coli*. Amicus ECCSCM has compiled more than 4,700 documented violations of water quality standards between 2001-2021 from just 12 CAFOs.[44] 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.[45] Of all sites tested, 85% of samples exceeded EGLE's "total body contact" maximum for *E. coli*—a level of exposure that,

[41] See also EGLE, *Michigan's Statewide E. coli Total Maximum Daily Load*, <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/SWAS/TMDL-Ecoli/statewide-ecoli-tmdl.pdf?rev=e87d217ad5494ab28dc5c65bafe2ccaf&hash=C30940057328DBD714C1BBD3CB27BF09> (accessed September 20, 2023).

[42] EGLE, *Michigan's E. coli Pollution and Solution Mapper*, <https://egle.maps.arcgis.com/apps/MapSeries/index.html?appid=2a060da30e25451292220861632b2c99> [Click "Introduction"] (accessed on September 20, 2023).

[43] 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/> (accessed September 20, 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.").

[44] 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 September 20, 2023).

[45] 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 September 20, 2023).

as noted earlier, is linked to serious illness, including cholera and other intestinal parasites. Ex 11 at 1297:14-17. Animal and cyanobacteria DNA were found in a majority of the samples as well.[46]

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 19 at PDF 2; Ex 20 at PDF 2. These drainage systems draw moisture from the soil's surface into underground pipes, which discharge into human-made ditches or streams. The systems lower the water table and make what was originally swampland dry enough for agriculture. Tile drainage is ubiquitous in Michigan's CAFO-heavy watersheds.[47] When applied to a tile-drained field, liquid CAFO waste, including all dissolved contaminants, behaves just like water; some portion of it inevitably flows down into the tile system and is discharged to surface waters, even if applied at agronomic rates. See Ex 21 at 5, 11-12.[48]

[46] *Id.* Excess orthophosphate was also found.

[47] See CAFO-heavy regions of eastern and central Michigan in tile drainage map at: Springer Nature, *A well-validated 30-meter resolution tile drainage map for the United States*, <https://researchdata.springernature.com/posts/a-well-validated-30-meter-resolution-tile-drainage-map-for-the-united-states> (accessed September 19, 2023).

[48] 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 September 20, 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

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

Like other industrial polluters (for example, steel mills), CAFOs in Michigan must get National Pollutant Discharge Elimination System (NPDES) permits. See Mich Admin Code, R 324.2196. Other NPDES permittees, however, must treat their waste to remove pollutants. Human waste, for example, must undergo decontamination in septic systems or at wastewater treatment plants. Environmental permits often require industrial dischargers to spend vast sums on treatment technology, and regularly monitor and report the precise volumes of each pollutant discharged to EGLE. See, e.g., EGLE's Secondary Treatment Wastewater General Permit (requiring daily, weekly, and monthly monitoring).[49]

By contrast, CAFOs are not required to use any waste treatment technology, or even to collect meaningful data about the pollutants they discharge. Michigan's current CAFO permit simply requires CAFOs to follow so-called "best management practices," or BMPs, in managing waste, in the hope that doing so will minimize pollution. See Ex. 22. BMPs include, for example, not applying waste 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 *id.* The state of water quality in Michigan and elsewhere demonstrates that the BMP-only approach is not working. This is unsurprising given that many BMPs are useless in controlling pollution from tile drain outlets

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Association of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, p 4, <https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf> (accessed September 20, 2023). It "can be especially harmful to infants, leading to blue baby syndrome and possible death." *Id.*

[49] EGLE, *Authorization to Discharge Under the National Pollutant Discharge Elimination System*, <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 September 20, 2023).

(see Ex 21), and some BMPs can make pollution worse.[50] There is growing consensus that BMPs alone will never be sufficient to stop pollution.[51]

CAFO regulation is also dramatically more lenient than the permitting regime governing biosolids, which are the post-treatment remnants of human waste that, like CAFO waste, can also be land applied as fertilizer. Even though biosolids are 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 22.

Additionally, unlike biosolids generators (or any other class of NPDES permittees), CAFOs are allowed to transfer or "manifest" their untreated waste to third parties who can dispose

[50] See Ex 23 at 3, describing a demonstration of what happens when liquid manure is applied via "injection"- a BMP touted as reducing runoff – on a continuously cover-cropped and no-till field. The liquid entered the tile lines "within seconds" of injection, causing the scientist leading the demonstration to explain: "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; "if you've got a surface practice it's not going to be effective" at preventing phosphorus loss when dissolved reactive phosphorus is flowing straight into the tiles. The same is true with respect to any other pollutants, including *E. coli*. Presentation available at Ohio Sea Grant, *Understanding Algal Blooms: State of the Science Virtual Conference 2021*, <https://www.youtube.com/watch?v=Exc9zfVYjRY> from 2:24 to 2:58 (accessed September 20, 2023).

[51] 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, https://greatlakes.org/wp-content/uploads/2023/02/AGL_WLEB_AgReport_2023_Final-WITH-CHARTS.pdf (accessed September 20, 2023) ("Annual, in-field conservation practices are not sufficient to meet water quality objectives . . .").

of it without any regulatory oversight. Ex 22 at 15. Michigan CAFOs "manifest" enormous volumes of waste (over 1.5 billion gallons in 2019 alone), and EGLE staff attested that this practice hides significant volumes of waste from EGLE's oversight. Ex 24 at 424, 430-31.

C. CAFOs externalize costs onto the environment and the public, disadvantaging smaller farming operations.

If CAFOs were regulated like other industrial operations, they would either have to treat their waste before disposing of it or adjust their operations to stop generating waste in quantities they cannot safely handle. By operating with BMP-only permits, CAFOs externalize their costs onto Michigan's waters and the public that depends on those waters. That is especially true because CAFOs receive generous subsidies for current waste management practices, such as building storage structures and preparing Certified Nutrient Management Plans (CNMPs).[52] According to one study, 272 CAFOs in Michigan received more than $103 million in direct federal subsidies from 1995-2014. Ex 25 at 3. Plaintiff Dykhuis Farms has received more than $2 million in government payments to support its operations. Ex 26 at 1.

Under-regulation of CAFOs gives them an unfair competitive advantage over smaller farming operations and punishes livestock farmers who are not externalizing their pollution costs. See generally, Ex 27. The CAFO General Permit only applies to 256 livestock facilities—a tiny fraction of Michigan's more than 47,000 farms[53]—regulating only the largest operations whose

[52] USDA Natural Resources Conservation Service, *Environmental Quality Incentives Program*, <https://www.nrcs.usda.gov/programs-initiatives/eqip-environmental-quality-incentives> (accessed September 20, 2023).

[53] See USDA National Agricultural Statistics Service, *Table 1: Historical Highlights: 2017 and Earlier Census Years*, identifying that Michigan had 47,641 total farms as of 2017. Beyond the 256 covered by the General Permit, an additional 35 have individual or "no potential to discharge" permits. <https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/st26_1_0001_0001.pdf> (accessed September 18, 2023).

scale and size present the greatest risk to water pollution. Indeed, the "get big or get out" pressures created by CAFOs have "squeeze[d] smaller farms," causing many to exit the industry altogether.[54] Between 1987 and 2017, Michigan lost over 4,300 dairy farms (a 67% loss), even though there are nearly 100,000 more dairy cows (an 81% increase) being raised in the state.[55] In that same period, Michigan lost over 3,100 hog farms (a 56% loss), even though the number of hogs being raised in the state has nearly doubled to over 4 million.[56]

II. CAFO Clean Water Act permitting in Michigan.

A. Constitutional and statutory requirements

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, 179; 220 NW2d 416, 425 (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.

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[54] See James M. MacDonald and William D. McBride, USDA, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks*, p 2, 4, <https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf?v=0> (accessed September 20, 2023).

[55] See USDA National Agricultural Statistics Service, *Table 1: Historical Highlights: 2017 and Earlier Census Years*, <https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/st26_1_0001_0001.pdf> (accessed September 18, 2023).

[56] *Id.*

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*. 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).

- 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.

- NREPA section 3106 also requires EGLE to issue permits "that ***will assure compliance with water quality standards***." MCL 324.3106 (emphasis added).

Following NREPA's commands, EGLE promulgated rules setting water quality standards (Mich Admin Code, R 323.1041, *et seq.*) and rules establishing the NPDES permitting program (Mich Admin Code, R 323.2101, *et. seq.*) (the "Part 21 Rules").[57] The Part 21 Rules include Rule 2137, which requires NPDES permits to include any "***any limitation deemed necessary by the department to meet***" water quality standards. Mich Admin Code, R 323.2137. The Part 21 Rules require environmental permits to 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). In addition to individual permits tailored to individual permittees, EGLE can issue "general permits" for a "category of discharge" after determining that "certain discharges are appropriately and adequately controlled by a general

[57] The federal Clean Water Act (33 USC 1251 *et seq.* (1972)) established the nationwide NPDES program, which Michigan administers pursuant to a delegation of authority from US EPA. US EPA, *NPDES State Program Authority* <https://www.epa.gov/npdes/npdes-state-program-authority> (accessed on September 20, 2023).

permit." Mich Admin Code, R 323.2191(1). General permittees obtain "certificates of coverage" under the general permit. *Id.*

B. Rule 2196 and the 2005-2015 CAFO General Permits

The Part 21 Rules also establish NPDES permitting programs for specific industries, including Rule 2196 governing CAFOs. Promulgated in 2005, Rule 2196 requires CAFOs to get NPDES permits and provides certain "minimum" requirements for those permits. See Mich Admin Code, R 324.2196.

The CAFOs and their representatives challenged the validity of Rule 2196 in a declaratory judgment action. Relying on federal caselaw, the CAFOs argued that Rule 2196 exceeded EGLE's authority by requiring all CAFOs to apply for NPDES permits. The Court of Appeals rejected that challenge in *Michigan Farm Bureau*, 292 Mich App at 132. The court held that "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." *Id.* at 146. The court emphasized that 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, particularly, the duty to "take all appropriate steps to prevent pollution" in MCL 324.3106. *Id.* at 134. 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 its broad authority, the Department'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 24 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 marginal improvements over the 2005 version, and the CAFO industry never challenged any of them.

III. The 2020 Permit and related litigation

A. Permit issuance

As the evidence discussed in section I above demonstrates, the 2015 Permit has failed to "assure compliance" with water quality standards as required by NREPA. MCL 324.3106. EGLE witnesses conceded this point in the contested case, including Environmental Quality Specialist (and farmer) Bruce Washburn, who explained that the 2015 Permit has proven "ineffective," and noted that "additional water bodies [have been] listed as impaired, in part due to [EGLE's] ineffective control of CAFOs." Ex 24 at 387:22-388:5.

EGLE tried to improve the situation with the 2020 Permit. In the process of developing the new permit, EGLE engaged in extensive public outreach, holding a series of stakeholder meetings, including with the CAFOs and their representatives and vendors. Ex 28 at 306-07. EGLE incorporated some stakeholder 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 28 at 310:6-7. Among other provisions, the Draft Permit banned CAFO waste application from January 1 through March 19 and required use of the Michigan Phosphorus Risk Assessment, the best available tool for reducing pollution from land application. See Ex 29 at 1.

During the public comment period on the Draft Permit, EGLE held three public meetings and also met directly with industry groups and CAFO permittees. Ex 5 at 1057. After the public comment period closed, EGLE held additional meetings with the CAFO industry, even accepting

proposed edits to the draft permit from industry groups without seeking response from the environmental community. Ex 5 at 1273-74.

Under heavy pressure from industry, EGLE's final 2020 Permit backed off from numerous key improvements in the draft, including the calendar-based ban on winter waste application and requirement to use the Michigan Phosphorus Risk Assessment. See Ex 29 at 1 of 45 (redline comparing post-public notice version of the 2020 CAFO permit with the final version).

B. Administrative and judicial proceedings

1. The contested case and disputed permit conditions.

EGLE's concessions on the 2020 Permit were not enough for the CAFOs; they opposed *any* substantive improvements from the 2015 Permit, no matter how minor. The CAFOs filed a contested case under MCL 324.3112(5), challenging the improvements in the 2020 Permit, arguing that they amounted to "unpromulgated rules" and suffered from other supposed legal infirmities, as well as attacking them as unnecessary to reduce pollution. As they do in this case, the CAFOs mischaracterized modest, incremental permit improvements as being so onerous and "sweeping" (Opp Br at 9-10) that they needed to be promulgated as rules. For example:

- Annual v. quarterly reporting. The CAFOs complain that the 2020 Permit requires them 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 Ex 30 at 61. But as noted earlier, most non-CAFO NPDES permittees must submit monthly or even weekly reports, based on regular discharge monitoring and water testing and there are serious data gaps related to CAFO waste disposal and discharges.

- Winter waste application. The CAFOs complain that 2020 Permit tightened the 2015 Permit's limitations around winter waste application by: (a) requiring waste to be "incorporated" or tilled into the soil "immediately" after application instead of within 24 hours; and (b) restricting third party transfers or "manifesting" of waste between January and March. See Ex 29 at 20. These changes are far short of the full ban on waste application between January 1 and March 19 proposed in the Draft 2020 Permit and hardly amount to a "presumptive ban," as the CAFOs' wrongly state (Opp Br at 9, 11). As EGLE staff attested, that calendar ban is needed to

protect water quality from the unique dangers of winter spreading and is simple to follow and enforce. Ex 24 at 412:6-7. CAFOs should be able to easily comply with such a ban given that winter waste application serves no agronomic purpose (since no crop is growing) and CAFOs must have six months' worth of waste storage capacity. Ex 1 at 9.

- Manifesting requirements. In addition to the restriction on manifesting waste in winter, the CAFOs complain that the 2020 Permit requires them to record slightly more information about manifested waste than the 2015 Permit did, specifically: (a) full "contact information" for the receiving party (instead of just their name and address) and; (b) the "longitude and latitude center" of the land application site (instead of the "address or other description" of that site). See Ex. 30 at 61. In reality, these modest changes are the least EGLE could do to close a huge data and enforcement gap caused by the CAFOs "manifesting" more than a billion gallons of liquid waste per year to third parties outside the regulatory system (something no other NPDES permittees are allowed to do). Ex 24 at 424, 430-31.

Environmental and citizen groups—including most Amici—intervened in the contested case, presenting extensive evidence and legal arguments in support of the 2020 Permit's improvements and demonstrating that additional, specified permit improvements were needed. The administrative tribunal (Hon. Daniel Pulter) heard two and a half weeks of live testimony and the parties submitted exhaustive post-trial briefing, which was completed in July 2022.

2. **Court of Claims cases**

Two and half months after filing the contested case, the CAFOs filed this case in the Court of Claims, seeking a declaratory judgment under MCL 24.264 invalidating the disputed permit terms as "unpromulgated rules." Because of the CAFOs' challenges, EGLE stayed enforcement of the 2020 Permit, allowing CAFOs to continue operating under the failing 2015 Permit.[58]

[58] EGLE is also highly deferential to CAFOs in enforcing current permit terms, including in an episode this past June, when CAFO waste flowed off a field into a ditch that feeds into a federally-protected wetland and the CAFO kept applying waste. See For the Love of Water, *A River of Manure: CAFO Sewage Runoff Threatens Water Systems*, https://forloveofwater.org/river-of-manure/ (accessed September 20, 2023).

EGLE successfully moved to dismiss the Court of Claims case, arguing that the CAFOs had to complete the contested case before seeking judicial review. But on September 15, 2022, the Court of Appeals issued the Opinion, which affirmed the Court of Claims' dismissal but for "different reasons." Opinion at 3. The Opinion dismissed the case as premature because the CAFOs failed to exhaust their administrative remedies under MCL 24.264 by first seeking a declaration from EGLE.[59] But in doing so, the Court of Appeals ruled on the CAFOs' underlying argument and held that the disputed permit conditions amounted to "rules" under the APA and were therefore subject to challenge in a declaratory action under MCL 24.264. *Id.* at 12.

EGLE filed its petition for review of the Opinion on December 28, 2022, which the court granted on May 31, 2023, and Administrative Law Judge Pulter stayed the contested case pending resolution of the proceedings before this Court. Meanwhile, the CAFOs exhausted their administrative remedies by seeking a declaration from EGLE (which the Department denied) and then filed a new case in the Court of Claims asserting the same "unpromulgated rule" claim under the Rule Review Provision that they asserted in this case. See *Michigan Farm Bureau, et al v. EGLE*, Court of Claims No. 23-000048-MZ (filed April 11, 2023). The Court of Claims stayed that case pending this Court's resolution.

[59] See MCL 24.264 ("An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.") As explained in Argument section III below, this exhaustion requirement does not implicate subject matter jurisdiction as the Court of Appeals incorrectly found.

ARGUMENT

As explained in detail below:

- Question 1: The disputed permit conditions are "licenses," not "rules," under the APA and thus cannot be challenged under the Rule Review Provision, MCL 24.264. In holding otherwise, the Opinion confuses an invalid permit term with an "unpromulgated rule" under the APA and renders the environmental permitting process functionally meaningless. It also forces EGLE into permanent noncompliance with its obligations under Part 31 of NREPA and MEPA, dooming Michigan's waters to impairment from CAFO pollution.

- Question 2: Because MCL 24.264 is inapplicable, the "exclusive procedure or remedy" exception in that provision never comes into play in this case.

- Question 3: The Court of Appeals did not have to reach the license vs. rule issue that lies at the heart of this case; it could have dismissed this case based solely on the CAFOs' failure to exhaust administrative remedies under the Rule Review Provision. But because that failure to exhaust did not implicate subject matter jurisdiction, it did not prevent the Court of Appeals from deciding the license vs. rule issue, which the court did incorrectly. This Court should reverse that incorrect decision and allow this dispute to be resolved through the contested case process, which is what should have happened from the beginning.

I. Question 1: The disputed permit terms cannot be challenged in a declaratory judgment action under MCL 24.264.

MCL 24.264 is titled "Declaratory judgment action as to validity or applicability of rule" and the statutory text creates a declaratory judgment cause of action only to contest the "validity or applicability of a rule." MCL 24.264. The CAFOs concede that MCL 24.264 "only applies to rules" under the APA. Opp Br at 34.

The disputed permit terms, however, are not "rules" under the APA; rather, they are "licenses," which must be challenged in a contested case under MCL 324.3112(5) and MCL 24.271-88. As explained below, this conclusion is mandated by the text and structure of the APA, as well as the requirement to read the APA consistently with other statutes, particularly Part 31 of NREPA and MEPA. In holding otherwise, the Court of Appeals upends Michigan's water pollution regulation regime and compels EGLE to violate its obligations to protect water quality.

A. The disputed permit terms are "licenses," not "rules," under the APA.

Basic principles of statutory construction dispose of the CAFOs' arguments. "Statutory provisions are *not* to be read in isolation." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171, 180 (2010) (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, 717 (2002). Courts "are to give statutory language its ordinary and generally accepted meaning, [but] 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, 646 (1996). Courts also "regard all statutes upon the same general subject-matter as part of one system"; even statutes in "apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each." *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.") (emphasis added; citations omitted).

Applying these principles, none of the 2020 Permit's conditions are "rules" under the APA; instead, they are "licenses." 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) (emphasis added). The 2020 Permit is unquestionably a "permit," which NREPA defines as a "permit or operating license issued by [EGLE] under this act or the rules promulgated under this act." MCL 324.1301(g)(ii). [60]

[60] The certificates of coverage that CAFOs must obtain to be covered by the CAFO General Permit are likewise "licenses." See MCL 24.204(a) ("license" includes "certificate").

The CAFOs do not dispute that the 2020 Permit is a "license" under the APA or a "permit" under NREPA, challengeable in a contested case; indeed, they prosecuted a contested case raising (among other points) the exact argument they make in this case. Rather, the CAFOs insist that the disputed permit terms also amount to "rules" under the APA, and therefore can be separately challenged in a declaratory action under MCL 24.264. The CAFOs say this is the case because the disputed permit terms supposedly: (a) meet the APA's definition of "rule" in MCL 24.207; and (b) impose requirements that are not specifically mandated by EGLE's existing rules, which, according to the CAFOs, necessarily means they had to be promulgated as new rules. The CAFOs are wrong on both fronts.

1. The APA's definition of "rule" does not include "licenses."

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." MCL 24.207. This list of agency actions that can amount to a "rule" does *not* include "license," even though that term is separately defined in the statute. *See id.* Because MCL 24.205 "specifically defines" the term "license" to include "permits[,]" "that definition alone controls." *Tryc*, 451 Mich at 136. And because that defined term is not listed in the 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 a set of promulgated rules is a "license" and cannot itself be a "rule" under MCL 24.207.

The CAFOs emphasize that "license" is not included in the list of exceptions to the definition of "rule" in MCL 24.207(a)-(s) and claim that under "*epxressio unius*," that absence means the definition of "rule" can include "licenses." Opp Br at 43. But as just explained, "license" is not included in the definition of "rule" in the first place, making its absence from the

list of exceptions meaningless. Because MCL 24.207 is unambiguous that "licenses" are not "rules," *expressio unius* is inapplicable. See *City of Coldwater v. Consumers Energy Co,* 500 Mich 158, 167; 895 NW2d 154 (2017) (if language is unambiguous, "[n]o further judicial construction is required or permitted"). Based solely on the APA's definition of "rule," the disputed permit terms are not "rules" and the CAFOs cannot challenge them under MCL 24.264.

2. A permit condition does not become a "rule" just because it imposes requirements beyond those specifically mandated by existing rules.

The premise of the CAFOs' argument (and the Opinion) is that permits can never include any requirements or limitations that are not specifically mandated on the face of existing rules; any new permit requirements, even minor ones, automatically amount to "rules" and must be promulgated as such. The CAFOs do not cite any authority for this proposition and neither did the Court of Appeals. Nor could they, given that the proposition directly conflicts with the APA and NREPA, and renders multiple statutory and rule provisions "surplusage or nugatory." *State Farm,* 466 Mich at 146.

The APA and NREPA consistently treat rules separately from licenses/permits issued pursuant to rules, without any suggestion that the latter can somehow morph into the former. Most importantly, the APA establishes distinct remedial paths for challenging "the validity or applicability of a rule" (declaratory action under MCL 24.264) and "licensing" decisions (contested case under MCL 24.203(3)/MCL 24.271-88). NREPA allows anyone "aggrieved by" by a permitting decision to file a contested case (MCL 324.3112(5)), which is subject to judicial review after the director issues a "final agency action." MCL 324.1317. The APA expressly defers to NREPA regarding nearly every aspect of such contested cases, including the availability of other administrative remedies and judicial review:

> In a contested case regarding a permit, as that term is defined in section 1301(g) of [NREPA], the designation of a presiding officer, the effect of a decision by a presiding officer, the availability of other administrative remedies, and judicial review are controlled by sections 1315 and 1317 of [NREPA].

MCL 24.288.

As this Court recognized in *Michigan Ass'n of Home Builders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 498; 750 NW2d 593, 595 (2008), "[a]n administrative determination is categorized ***as either*** a contested or a non-contested case." (emphasis added). Issuance of the 2020 Permit falls squarely into the former category.

The CAFOs' argument (and the Opinion) not only collapse the distinction this Court drew in *Home Builders*, it renders the contested case remedy for challenging permits largely meaningless. If permits could do no more than replicate text from existing rules into permits, any substantive challenge to a permit term would necessarily be a challenge to the rule, which parties could bring directly under MCL 24.264. There would likewise be no rationale for the Environmental Permit Review Commission, a 15-member expert body that NREPA established to "to advise the director on disputes related to permits and permit applications" (MCL 324.1313(1)), including to review hearing officer decisions in contested cases. See MCL 324.1317. EGLE would need only the Environmental Rules Committee, a separate body established by the APA "to oversee all rule-making of the department." MCL 24.265(19).

Indeed, if the Department had to promulgate a new rule every time it sought to improve permit terms (which, as noted above, must be sufficient to "ensure compliance with water quality standards" per MCL 324.3106), NREPA's entire environmental permitting process would be largely superfluous, rendering MCL 324.1301-17 and the Part 21 Rules "surplusage or nugatory." *State Farm*, 466 Mich at 146. Permits would be no more than ministerial certifications of compliance with existing rules and there would be no need for the APA to allow permit renewals

(MCL 24.205(b)), let alone for the Part 21 Rules to require NPDES permit renewal every five years. See Mich Admin Code, R 323.2150 (permits have fixed 5-year terms); R.323.2159(1)(a) (allowing EGLE to "modify any [permit] term or condition" to require a "reduction or elimination of a permitted discharge").

The challenged permit conditions here vividly illustrate this point. Among other things, the CAFOs challenge the 2020 Permit's requirement that waste manifesting forms record the "contact information" for recipients of transferred waste as opposed to just their "name and address" as required by the 2015 Permit. If EGLE needed to promulgate a new rule to make a change that minor, its power to "modify" permit terms under Rule 2159 would be meaningless.

Finally, the Opinion directly conflicts with Rule 2196, which expressly allows EGLE to impose CAFO permit conditions that go beyond those specifically mandated by the rules. In addressing the primary element of a CAFO Permit—the requirement to prepare and follow a Certified Nutrient Management Plan (CNMP) – Rule 2196 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 . . . ." Mich Admin Code, R 323.2196 (5)(a) (emphasis added). By beginning with "at a minimum" and ending with "including," this sentence confirms that the specific CNMP restrictions listed in Rule 2196(5)(a) establish a floor, not a ceiling, on what a permit can require. In this respect, Rule 2196 reflects the mandate of Rule 2137 that permits must include "***any limitation deemed necessary by the department***" to assure compliance with water quality standards. Mich Admin Code, R 323.2137(d).

In short, the text, structure, and operation of the APA, NREPA, and EGLE's current rules confirm that the premise of the CAFOs' argument and the Court of Appeals' ruling is incorrect:

there is no prohibition against permits imposing requirements beyond those specifically mandated on the face of an existing rule, and permit conditions do not transform into "rules" in those circumstances. Permit conditions must, of course, be consistent with and not conflict with rules, but as explained in the next section, even if such conflict exists (and none does here), the conditions would simply be invalid permit terms, not "unpromulgated rules." And any claim that a permit term conflicts with applicable rules must be brought in a contested case, not a declaratory action under the Rule Review Provision.

B. Permit conditions that conflict with a statute or rule are invalid permit terms, not "rules," and must be challenged in a contested case.

As just shown, the disputed permit conditions did not morph into "rules" just because they impose requirements not included verbatim in Rule 2196. That does not, however, mean that EGLE has unchecked authority to impose whatever new permit conditions it wants. The governing statutes and rules—read "as a whole" (*Robinson*, 486 Mich at 15)—establish the boundaries for appropriate permit conditions. If an affected party thinks a permit condition conflicts with applicable statutes and/or rules, they can challenge it in a contested case. If the administrative tribunal agrees, it 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 invalid permit condition an "unpromulgated rule" that can be challenged in a duplicative declaratory action under MCL 24.264, as the Court of Appeals did here.

This Court's decision in *Clonlara, Inc v State Bd of Educ*, 442 Mich 230; 501 NW2d 88 (1993) makes this point explicit. Plaintiffs challenged a statement by the State Board of Education which, they claimed, met the definition of "rule" in MCL 24.207 and should have been stricken for being unpromulgated. 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), and noted that it

lacked authority to promulgate rules on the relevant topic. The Court recognized that the real dispute was not whether the Board's action amounted to a rule (which it could not 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." *Clonlara*, 442 Mich at 243.

By the same token, the real dispute here is not whether the challenged 2020 Permit conditions amount to "rules" (which, as discussed in section I.C below, EGLE lacks authority to promulgate in these circumstances) but rather, 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."[61]

A recent entry in the treatise Michigan Administrative Law by WMU-Cooley School of Law Professor (and former Dean) Don LeDuc decries the errors in and confusion created by the Court of Appeals Opinion and the entire "unpromulgated rule" construct:

> ***By substituting various characterizations of agency action as if the actions constitute rules, the courts engage in unnecessary and often complicated analysis.*** The key remains that the definition of rule is intended to limit or describe what a rule is; ***if an agency action does not meet that definition because APA Chapter 3's rulemaking requirements have not been followed, that action cannot result in a rule. Whatever that action is, it is not a rule and it is not governed by Sections 63 or 64.*** Any issues in a particular controversy regarding that action must be resolved through other administrative and judicial proceedings.

Mich Admin Law § 8:11 (June 2023 Update) (emphasis added). Attached as Ex 31.

[61] Amici and EGLE demonstrated the lack of any such conflict in the contested case and Amici summarized those arguments at pages 44-46 of our prior brief.

Finally, analyzing potential conflicts between permit terms and authorizing rules inevitably raises fact questions that require evidence about the meaning and effect of disputed permit terms, which can only be gathered in a contested case. See *Home Builders*, 481 Mich at 498 (no evidentiary hearing allowed in "non-contested case" rule challenge). Resolving the CAFOs' claims here, for instance, requires understanding the impact and effect of the specific agricultural practices addressed by Rule 2196 and the 2020 Permit, including the highly technical terms contained within Comprehensive Nutrient Management Plans and how implementation of those terms impacts Michigan watersheds. A court is not equipped to address those questions without a factual record. The Opinion demonstrates the dangers of a court trying to do so: it accepts the CAFOs' incorrect characterizations of the 2020 Permit, at the pleading stage, without any independent analysis.

The CAFOs acknowledged how inextricably their "unpromulgated rule" argument is tied to the facts and evidence presented in the contested case. Administrative Law Judge Pulter asked the CAFOs' counsel why, if their argument raised purely legal issues, the CAFOs 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
> 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 32 (emphasis added). This response essentially concedes that the CAFOs' claims in this case cannot be resolved in a declaratory action under MCL 24.264 but instead require the fact-finding that occurs only in a contested case. See *Home Builders*, 481 Mich at 498.

This exchange also refutes the CAFOs' insistence that without a claim under the Rule Review Provision, they would be forced to go through a needless factual hearing. As Judge Pulter's question made clear, contested case parties can raise a "clean, threshold legal question" (Opp Br at 1) on a motion for summary disposition before any fact-finding begins. In a move that "befuddled" Judge Pulter, the CAFOs chose not to go that route.

In essence, the CAFOs have re-cast a technical, fact-dependent dispute about the substantive validity of permit terms (which must 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 argument not only conflicts with the APA and NREPA as explained above, it also creates needless procedural confusion, allowing (if not requiring) litigants to pursue parallel actions and seek duplicative relief in two separate forums, as the CAFOs did here, wasting judicial resources, causing needless delay, and risking inconsistent rulings. This Court should put an end to the CAFOs' gamesmanship and reverse the Opinion's holding that the disputed 2020 Permit terms are "unpromulgated rules" subject to challenge in a declaratory action under MCL 24.264. The CAFOs can have their day in court to challenge permit terms after completing the contested case process.

C. Treating the disputed permit conditions as "rules" would force the Department to violate NREPA and MEPA and doom Michigan waters to impairment from CAFO pollution.

As noted above Courts read "all statutes upon the same general subject-matter as part of one system"; even statutes in "apparent conflict, should, so far as reasonably possible, be construed

in harmony with each other, so as to give force and effect to each." *IBM*, 496 Mich at 651–52 (courts must "find *any other* reasonable construction than a repeal by implication."). The Opinion violates this precept by forcing EGLE into permanent noncompliance with key obligations to protect water quality under Part 31 of NREPA and MEPA, depriving relevant statutory provisions of "force and effect." *Id*.

1. NREPA

As explained in Background section II.A above, NREPA obligates the Department to issue NPDES permits that "will assure compliance with" water quality standards (MCL 324.3106), and Department rules require permits to include "any limitation deemed necessary by the department" to meet that goal. Mich Admin Code, R 323.2137(d). Rules also require permits to 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." *Id.*; R 2159(1)(a).

The Opinion prevents EGLE from fulfilling those obligations. The Court of Appeals effectively held that EGLE cannot add *any* new requirements to a permit without promulgating them as rules. But in 2004, the Legislature amended NREPA to sharply limit EGLE's rulemaking authority: "[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). By requiring all permit improvements to be promulgated as rules (which EGLE cannot do), the Opinion prevents any improvement at all. It freezes the ineffective 2015 Permit in

place and compels EGLE to issue permits that fail to "assure compliance" with water quality standards, in violation of MCL 324.3106 and the Part 21 Rules.[62]

Indeed, the Opinion 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). But Rule 2196 does not confer any affirmative rights; it simply describes what EGLE must include, "at a minimum," in CAFO permits. Mich Admin Code R 324.2196. 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.

The CAFOs point to an exception to the NREPA amendment that limited EGLE's rulemaking authority and suggest it somehow softens the Opinion's blow to the environment: "The department may promulgate rules and take other actions as may be necessary to comply with the federal [Clean Water Act]." MCL 324.3103(3). See Opp Br at 3. It is not clear, however, that this provision—which was in NREPA prior to the amendment—survives the amendment. But even if it did, this exception would not allow EGLE to promulgate rules to comply with *NREPA*, which, as the Court of Appeals recognized in 2011, gives EGLE "much broader duties and powers with respect to the regulation of water pollution" than the Clean Water Act. *Michigan Farm Bureau*, 292 Mich App at 134 (emphasis added).

In short, because EGLE lost its rulemaking authority but retained its statutory and regulatory obligations to issue effective permits, EGLE must have authority to impose new permit conditions to protect water quality (within the bounds of existing rules). In holding otherwise, the

[62] The NREPA amendment limiting EGLE's rulemaking authority expressly left existing rules "in effect unless rescinded" (MCL 324.3103(4)), which none of the Part 4 or Part 21 Rules were.

Opinion renders the Department's statutory and regulatory obligations a dead letter and condemns Michigan's waters to ever-worsening pollution from CAFOs.

2. MEPA

MEPA "represents a comprehensive effort on the part of the legislature to preserve, protect and enhance the natural resources so vital to the wellbeing of this State" as required by the state Constitution. *Vanderkloot*, 392 Mich at 183 (citing Mich Const 1963, art. 4, sec. 52). MEPA "imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment." *Ray v Mason Cnty Drain Com'r*, 393 Mich 294, 306; 224 NW2d 883, 888 (1975). It 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.*

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 allows "any person" to seek that same relief by intervening in administrative proceedings, and prevents administrative decisionmakers from "authoriz[ing] or approv[ing]" any polluting conduct "if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2). A feasible and prudent alternative cannot be excluded unless it involves costs of an "extraordinary

magnitude" or "truly unusual factors." *Wayne County Dept. of Health v Olsonite Corp.*, 79 Mich App 688, 706; 263 NW2d 778, 797 (1977).

Crucially, "MEPA is supplementary to other administrative and regulatory procedures provided by law," such as NPDES permitting. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30; 576 NW2d 641, 648 (1998) (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.* (citations omitted; emphasis in original).

The Opinion obliterates the rights and obligations created by MEPA. As explained above, by requiring EGLE to promulgate all new permit conditions as rules, the Opinion prevents EGLE from improving the CAFO General Permit and freezes the failing 2015 Permit in place. This puts EGLE into permanent noncompliance with MEPA: the Department will have to continue using a permit that is resulting in pollution and impairment of Michigan's waters, even though "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.[63] By locking the 2015 Permit in place, the Opinion also nullifies the public's right to enforce MEPA through administrative processes and the courts, and renders the MEPA provisions establishing that right "surplusage or nugatory." See *State Farm*, 466 Mich at 146.

[63] On top of the full 2020 Permit, the additional permit conditions proposed by environmental intervenors in the contested case are also "a feasible and prudent alternative" under MEPA.

D. None of the cases the CAFOs cite support requiring permit terms to be promulgated as rules just because they are not mandated by existing rules.

The CAFOs cite several Michigan cases and a slew of cases from federal and other state courts that, they say, support automatically requiring all permit conditions that are not specifically imposed by existing rules to be promulgated as new rules. See Opp Br at 38-39. The Michigan cases, however, did not involve permits or licenses issued pursuant to already-promulgated rules, as is the case here. See *Detroit Base Coal. for Hum Rts of Handicapped v. Dep't of Soc Servs*, 431 Mich 172; 428 NW2d 335 (1988) (agency attempted to change hearing rights set by rule through a "policy bulletin").[64] To the extent the CAFOs' cases involved licenses at all, the agencies had failed to promulgate rules establishing a licensing program (despite having authority to do so) and instead conditioned the issuance of licenses on informal policies. See *Delta Cnty v 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, 72-73 (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, 417 (1976) (agency denied license based on unwritten policy).

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 on the 2020 Permit itself). None of the cases that the CAFOs cite address the proper scope of licenses that *are* issued pursuant

[64] See also, e.g., *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).

to a rule regime (like the 2020 Permit) and in no way suggest that such licenses somehow become "rules" merely by imposing requirements that are not specifically mandated by the existing rule.[65]

Cases applying the federal Administrative Procedure Act, 5 USC 551 *et seq*. (Opp Br at 38) 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 shown by the fact that the CAFOs did not challenge the 2005, 2010, or 2015 CAFO General Permits, none of which were promulgated as rules. Second, EGLE's public notice and hearing process 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 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 would prevent EGLE from fulfilling them.

The CAFOs' litany of cases from other states (Opp Br at 38-39) are irrelevant for similar reasons. No other state's APA can override the Michigan APA, NREPA, and MEPA, all of which, read separately and together, establish that that a permit condition does not become a "rule" just because it imposes requirements not specifically mandated by current rules.

[65] The CAFO also cite to a recent Court of Appeals decision, *3M Co v Dep't of Environment, Great Lakes, and Energy*, __Mich App__, issued Aug 22, 2023 (Docket No 364067), but that case is immaterial. It had nothing to do with EGLE permits or declaratory actions under MCL 24.264. Rather, that case dealt with whether the regulatory impact statement EGLE conducted for a newly promulgated rule about PFAS standards complied with MCL 24.245(3)(n).

E. Conclusion to Question 1

Though it may first look like an ordinary dismissal for failure to exhaust administrative remedies, the Court of Appeals' Opinion actually upends Michigan's environmental protection regime, nullifying vast swathes of statutory and regulatory text and preventing EGLE from fulfilling its core obligation to protect Michigan's waters. The bottom line is that the CAFOs cannot challenge the disputed permit conditions in a declaratory action under MCL 24.264 because they are not "rules." The CAFOs can fully and fairly litigate their objections to the permit conditions—including whether they conflict with existing rules—in the contested case proceeding, which is subject to judicial review.

II. Question 2: Because the Rule Review Provision is inapplicable, its "exclusive procedure or remedy" exception never comes into play.

Question 2 asks "whether a contested case proceeding under MCL 324.3112(5) and MCL 24.271 to MCL 24.288 is 'an exclusive procedure or remedy . . . provided by a statute governing the agency' ***under*** MCL 24.264."[66] The answer to that question is "no." The quoted phrase appears at the outset of MCL 24.264 and creates an exception: "Unless an exclusive procedure or remedy is provided by a statute governing the agency," a party may challenge "the validity or applicability of a rule" in a declaratory action. MCL 24.264. Because the declaratory judgment

[66] The CAFOs muddle this Court's question about exclusive *remedy*, and instead argue that Part 31 cannot be read to give EGLE "exclusive power" or "exclusive jurisdiction" to determine the ultimate validity of its own permit conditions, arguing it would be like giving EGLE "the role of fox guarding the hen house on whether it complied with the APA." See Opp Br at 23-24, 28-29. Amici National Federation of Independent Business Small Business Legal Center, Inc. and Michigan Chamber of Commerce effectively make the same argument in more overheated terms. This is a straw man. No party has argued (and no court has ruled) that EGLE's actions are beyond the reach of the courts; the only question is which *path* the CAFOs must take to get there. As noted earlier, the contested case procedures provide for judicial review after the EGLE director issues a "final agency action." MCL 324.1317.

remedy in MCL 24.264 exists only to challenge rules, the alternative "procedure[s] or remed[ies]" contemplated by the exception must also be for rule challenges.

Contested case proceedings, however, cannot be used to challenge rules; as explained in Argument section I above, they apply to permits and other licenses. Consequently, while contested case proceedings are, in fact, the appropriate remedy for challenging permit conditions, they do not qualify as "an exclusive procedure or remedy . . . provided by a statute governing the agency" as that phrase is used in MCL 24.264. In other words, the "exclusive remedy" exception in MCL 24.264 never comes into play in this case because that statute, which applies to challenges to rules, not permit conditions, is inapplicable in the first instance.

III. Question 3: It was not necessary for the Court of Appeals to decide the license vs. rule issue and it decided that issue incorrectly.

The Court of Appeals technically did not have to decide the license vs. rule issue. Because the CAFOs did not exhaust their administrative remedies under the Rule Review Provision by first seeking a declaration from EGLE, the Court of Appeals could have dismissed this case solely on that basis. See MCL 24.264 (action under this section "may not be commenced unless the plaintiff has first requested" declaratory ruling from agency).

The CAFOs' failure to exhaust administrative remedies did not, however, implicate the subject matter jurisdiction, as the Opinion incorrectly stated. *See* Opinion at 8.[67] "[T]he word "jurisdictional" is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise

[67] The fact that the Court of Appeals apparently believed it lacked subject matter jurisdiction but went on to decide the license vs. rule issue anyway further demonstrates how much confusion the CAFOs' argument has caused.

adjudicatory authority (personal jurisdiction)." *Fort Bend Cnty, Texas v Davis*, 139 S Ct 1843, 1848 (2019). As the US Supreme Court explained:

> Characterizing a rule as a limit on subject-matter jurisdiction renders it unique in our adversarial system. Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them sua sponte. H]arsh consequences" attend the jurisdictional brand [and] [t]ardy jurisdictional objections occasion wasted court resources and disturbingly disarm litigants.

Id. at 1849 (citations omitted). *See also Forest Hills Coop v Ann Arbor*, 305 Mich App 572, 617, 854 NW2d 172 (2014) ("Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case.").

Against that background, the US Supreme Court held in *Fort Bend County* that a failure to exhaust administrative remedies is not jurisdictional. *Fort Bend Cnty*, 139 S Ct at 1850. Rather than impose hard limits on judicial power, exhaustion requirements are "claim-processing rules" that "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1849 (citations omitted). "A claim-processing rule may be 'mandatory' in the sense that a court must enforce the rule if a party properly raise[s] it . . . [b]ut an objection based on [such] a rule may be forfeited if the party asserting the rule waits too long to raise the point." *Id.* (citations omitted). See also *Davis v Montcalm Ctr for Behav Health*, No 354049, 2021 WL 3828801, at *3 (Mich Ct App, Aug. 26, 2021), appeal denied sub nom *Davis v. Montcalm Cnty Cmty Mental Health Auth*, 509 Mich 855; 969 NW2d 60 (2022), and appeal denied sub nom *Davis v. Montcalm Cnty Cmty. Mental Health Auth*, 509 Mich 855; 969 NW2d 65 (2022) (following *Fort Bend County* in recognizing that failure to exhaust contested case remedy under MCL 24.301 was not "jurisdictional").

Consequently, while the CAFOs' failure to exhaust may have made it unnecessary for the Court of Appeals to decide the license vs. rule issue, that failure did not deprive the court of subject

matter jurisdiction to do so. And as explained in Argument section I above, the Court of Appeals decided the license vs. rule issue incorrectly, upending the state's water pollution control regime and sentencing Michigan's waters to permanent impairment from CAFO pollution.

In their effort to defend the Opinion, the CAFOs go one step further, arguing that the license vs. rule issue is itself "jurisdictional." See Opp Br at 33. This argument is groundless. Of course, as the CAFOs acknowledge (*id*.), the Rule Review Provision applies only to "rules." MCL 24.264. But whether a challenged agency action amounts to a "rule" is a merits question; it has nothing to do with a court's "power to act and authority to hear and determine [the] case" in the first place. *Forest Hills Coop*, 305 Mich. App. at 617 (defining "jurisdiction"). Showing that a challenged agency action is a "rule" is simply one element (albeit a threshold element) of proving a claim on the merits under MCL 24.264. It is no more "jurisdictional" than a civil rights plaintiff's membership in a protected class.

Given the above, Amici respectfully ask this Court to: (a) affirm the dismissal based on the CAFOs' failure to exhaust administrative remedies (which does not implicate subject matter jurisdiction, as just explained); and (b) reverse the Opinion's conclusions that the disputed permit terms amount to "unpromulgated rules" and that the CAFOs have a cognizable claim under the Rule Review Provision. The CAFOs can fully and fairly challenge the disputed permit terms on any other ground—including that they conflict with current rules (which they do not)—in the pending contested case, which is subject to judicial review.

Resolving the case in this manner will restore order to a process that the CAFOs have been delaying and complicating for three years. It will allow EGLE to move to dismiss the new Court of Claims case—which raises the same meritless Rule Review Provision claims at issue here—on claim preclusion or *res judicata* grounds. And it will allow Administrative Law Judge Pulter to

revive the contested case and issue his decision [right name?], which will ultimately be subject to judicial review under MCL 324.1317.

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." Const 1963, Art IV, § 52. 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 expert staff admits is failing.

Unless this Court reverses the Court of Appeals' opinion on the "unpromulgated rule" argument and application of the Rule Review Provision, this regulatory failure will become frozen in place. EGLE will be locked into permanent violation of MEPA, NREPA and the Part 21 Rules, and the distinction between "licenses" and "rules" under the APA will remain hopelessly confused. Amici respectfully ask the Court to reverse the Opinion's holding that the disputed permit conditions amount to "unpromulgated rules" that can be challenged under the Rule Review Provision and allow this dispute to be resolved in the contested case where it has always belonged.

Respectfully submitted on this 20th day of September, 2023,

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INDEX TO EXHIBITS

Exhibit 30 Michigan Farm Bureau Initial Post-Hearing Brief Docket No. 20-009773

Exhibit 31 Mich Admin Law § 8:11 (June 2023 Update)

Exhibit 32 Hearing Transcript, Openings for Amicus Brief