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STATE OF MICHIGAN
IN THE SUPREME COURT

3M COMPANY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant.

Supreme Court No. 166189

Court of Appeals No. 364067

Court of Claims No. 21-78-MZ

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

THE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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Dated: March 29, 2024

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ACRONYMS

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

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STATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals err in holding that the Michigan Department of Great Lakes, Environment, and Energy (EGLE) violated Section 45 of the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*. by issuing new rules changing the permissible levels of per- and polyfluoroalkyl substances in drinking water without preparing a regulatory impact statement that included a sufficient "estimate of the actual statewide compliance costs of the proposed rules on businesses and other groups," MCL 24.245(3)(n)?

Appellant's answer:	Yes.
Appellee's answer:	No.
Court of Claims' answer:	No.
Court of Appeals' answer:	No.

STATUTES INVOLVED

MCL 24.245(3) provides in relevant part:

(3) Except as provided in subsection (6), an agency shall prepare and include with a notice of transmittal under subsection (2) the request for rulemaking and the response from the office, a small business impact statement prepared under section 40, and a regulatory impact statement. The regulatory impact statement must contain all of the following information:

> (a) A comparison of the proposed rule to parallel federal rules or standards set by a state or national licensing agency or accreditation association, if any exist.
>
> (b) If section 32(8) applies and the proposed rule is more stringent than the applicable federally mandated standard, a statement of the specific facts that establish the clear and convincing need to adopt the more stringent rule and an explanation of the exceptional circumstances that necessitate the more stringent standard.
>
> (c) If section 32(9) applies and the proposed rule is more stringent than the applicable federal standard, either the statute that specifically authorizes the more stringent rule or a statement of the specific facts that establish the clear and convincing need to adopt the more stringent rule and an explanation of the exceptional circumstances that necessitate the more stringent standard.
>
> (d) If requested by the office or the committee, a comparison of the proposed rule to standards in similarly situated states, based on geographic location, topography, natural resources, commonalities, or economic similarities.
>
> (e) An identification of the behavior and frequency of behavior that the rule is designed to alter.
>
> (f) An identification of the harm resulting from the behavior that the rule is designed to alter and the likelihood that the harm will occur in the absence of the rule.
>
> (g) An estimate of the change in the frequency of the targeted behavior expected from the rule.
>
> (h) An identification of the businesses, groups, or individuals who will be directly affected by, bear the cost of, or directly benefit from the rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

> (v) A statement describing the manner in which the agency reduced the economic impact of the rule on small businesses or a statement describing the reasons such a reduction was not feasible.
>
> (w) A statement describing how the agency has involved small businesses in the development of the rule.
>
> (x) An estimate of the primary and direct benefits of the rule.
>
> (y) An estimate of any cost reductions to businesses, individuals, groups of individuals, or governmental units as a result of the rule.
>
> (z) An estimate of any increase in revenues to state or local governmental units as a result of the rule.
>
> (aa) An estimate of any secondary or indirect benefits of the rule.
>
> (bb) An identification of the sources the agency relied on in compiling the regulatory impact statement, including the methodology used in determining the existence and extent of the impact of a proposed rule and a cost-benefit analysis of the proposed rule.
>
> (cc) A detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rule on small businesses as described in section 40(1)(a) to (d).
>
> (dd) Any other information required by the office. [Emphasis added]

EGLE promulgated its PFAS drinking water rules under the SDWA, MCL 325.1001 *et seq*. The MCLs for PFAS in drinking water are found at Michigan Administrative Code, R 325.10604g, and the sampling requirements that water supplies undertake to test for those toxins are located at Michigan Administrative Code, R 325.10717d.

Part 201 is the Michigan law that regulates releases of hazardous substances into the environment and how such contamination should be remediated (if at all). MCL 324.20101 *et seq.*

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MCL 324.20120a(5) provides as follows:

> (5) If a cleanup criterion derived under subsection (4) for groundwater in an aquifer differs from either: (a) the state drinking water standards established pursuant to section 5 of the safe drinking water act, 1976 PA 399, MCL 325.1005, or (b) the national secondary drinking water regulations established pursuant to 42 USC 300g-1, or (c), if there is not national secondary drinking water regulation for a contaminant, the concentration determined by the department according to methods approved by the United States Environmental Protection Agency below which taste, odor, appearance, or other aesthetic characteristics are not adversely affected, the cleanup criterion is the more stringent of (a), (b), or (c) unless the department determines that compliance with this subsection is not necessary because the use of the aquifer is reliably restricted or controlled under provisions of a postclosure plan or a postclosure agreement or by site-specific criteria approved by the department under section 20120b.

EGLE's rules establishing generic current PFAS cleanup criteria under Part 201 for groundwater are found at Table 1a of Mich Admin Code, R 299.44.

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INTRODUCTION

In August 2020, following an intensive state-wide investigation and detailed scientific analysis, EGLE promulgated new standards designed to protect the public from PFAS toxins in drinking water. Both the Court of Claims and the Court of Appeals have ruled that EGLE's rules are invalid because EGLE did not include in the regulatory impact statement accompanying the proposed rules a sufficiently comprehensive estimate of the "actual statewide compliance costs of the proposed rule on businesses and other groups." (Appellant's Appendix Vol 1, p 120.) But both courts reached the same conclusion for different reasons. And both courts erred in their conclusions.

The Court of Claims invalidated the rules for a reason that was not raised by 3M, was not briefed by or discussed with either party, and was based on a document not even in the administrative record. The Court of Appeals rightly rejected the lower court's reasoning. The APA requires that estimates be limited to those arising under "the proposed rule." MCL 24.245(3)(n). As such, EGLE included estimates in its regulatory impact statement directly related to the drinking water rules at issue but did not include any estimates for costs imposed indirectly under other statutes or rules. But the Court of Appeals, although acknowledging the plain language of the statute supported EGLE's reading, in a 2-to-1 majority decided that by reading the statute "in its entirety," costs that might arise under other rules or laws should have also been included in the estimate. (App'x Vol 1, p 119.) Yet, the majority identified no compelling language in the statute supporting its belief that some greater meaning of the statute could be divined. In fact, none exists, which is

exactly the conclusion reached by the dissent, which believed that the plain language of the statute supported EGLE's position. (*Id.*, p 122.)

Importantly, neither court questioned the need for these higher standards to protect the public. And indeed, these standards are necessary. Up to now, no Michigan court has invalidated an agency rule due to an allegedly deficient regulatory impact statement. But if allowed to stand, the below opinion will insert the judiciary into the minutiae of agency rule-making to an extent that violates the long-standing deferential approach previously enforced by this Court. That opinion will also give parties a guaranteed path to object to new rules by dreaming up costs not predicted or discerned by the promulgating agency—an approach that is both impractical and contrary to legislative intent.

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STATEMENT OF FACTS AND PROCEEDINGS

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

PFAS are human-made substances that do not occur naturally in the environment. Manufacturers of PFAS, such as 3M, sold it to others and used it in their own products as a coating to repel water, grease, and soil. Unfortunately, releases of PFAS products into the environment have created a national and state-wide environmental disaster. In this State alone, 280 sites have been identified where PFAS exceeds applicable cleanup criteria.[1] And damage caused by the release of these toxins has not been limited to the environment—numerous adverse health effects have been associated with exposure to PFAS. (App'x Vol 1, p 153.)

The growing awareness of those hazards caused the United States Environmental Protection Agency (USEPA) and various states to begin investigating the need to enact rules to protect the public from exposure to these toxins.[2] Michigan, which had already identified dozens of PFAS-contaminated aquifers within the State, joined those states in taking action.

[1] MPART: PFAS Geographic Information System (arcgis.com) (viewed on 3/21/24). The number of sites on the PFAS list is constantly in flux as new sites are added when sampling shows an exceedance of applicable criteria at those sites.

[2] Preliminary work by USEPA's Science Advisory Board has led it to conclude "that negative health effects may occur at much lower levels of exposure to PFOA and PFOS than previously understood." (https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas), though USEPA is unlikely to finalize any new standards until sometime in 2024.

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EGLE's promulgation of the PFAS Drinking Water Rules

EGLE's Drinking Water and Environmental Health Division (EGLE-DWEHD) enforces the Safe Drinking Water Act, which regulates the construction and operation of public water supplies in Michigan. PFAS contamination in drinking water is perceived to pose the greatest risk to public health because of the universal need for and use of drinking water. As such, EGLE-DWEHD took the lead for EGLE in promulgating PFAS standards. (App'x Vol 1, pp 166–167.)

Using health-base values recommended by a Science Advisory Workgroup[3], EGLE-DWEHD proposed amendments to its drinking water rules that established MCLs for seven PFAS analytes: PFNA: 6 ppt; PFOS: 16 ppt; PFOA: 8 ppt; PFHxA: 400,000 ppt; PFHxS: 51 ppt; PFBS: 420 ppt; and HFPO-DA: 370 ppt. (*Id.*, pp 175, 215–216, and 222.) EGLE-DWEHD's draft rules required water supplies to collect and analyze samples. If a running annual average of those samples exceeds the MCL for any PFAS chemical, the water supply is required to take action to reduce the level of contaminants below the listed MCLs. (*Id.*, pp 231–233.)

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[3] The Science Advisory Workgroup was comprised of nationally recognized experts in the toxicology, epidemiology, and remediation of PFAS chemicals, who were assisted by multiple experts within EGLE and Michigan Department of Health and Human Services (MDHHS). (*Id.*, pp 126–127.) The Science Advisory Workgroup's June 27, 2019 report sets forth in detail the process it undertook to identify health-based values for seven (7) PFAS contaminants in drinking water. (*Id.*, pp 135–154.) Health-based values establish a level of contamination below which there are not expected to be adverse health impacts. (*Id.*, p 135.)

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

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

EGLE-DWEHD presented its regulatory impact statement to the ERRC at its October 31, 2019 meeting. (App'x Vol 1, p 168.) Among other topics, a regulatory impact statement must include "estimates" of potential costs that various parties would incur if the rules were enacted. See, e.g., MCL 24.245(3)(k), (l), and (n). The Safe Drinking Water Act regulates "public water supplies," see, e.g., MCL 324.1001a and 1003, over half of which, in the State of Michigan, are owned and operated by government entities such as villages, cities, townships or counties. So when estimating the costs to be incurred as a result of the rules, EGLE-DWEHD's estimates are found at Paragraph 13 (costs to be incurred by state and local government units) and Paragraph 28 (costs on businesses and groups) of its regulatory impact statement. (*Id.,* pp 238–239 and 241.)

EGLE-DWEHD stated at Paragraph 13 of its regulatory impact statement that two types of costs would be imposed on water supplies by the new rules: (1) the annual costs incurred by each water supply to sample and monitor for PFAS contaminants in the drinking water; and (2) the costs to install and operate treatment when a water supply detects PFAS in excess of MCLs. (App'x Vol 1, p 239.) Because the number of required samples were initially uniform for all water supplies, it was relatively easy to estimate overall monitoring costs on a statewide basis. (*Id.*)

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

At the October 31, 2019 meeting, the ERRC asked EGLE-DWEHD to respond to questions that members had on the regulatory impact statement. (*Id.*, p 246.) One of the questions related to the impact that new drinking water standards would have on groundwater cleanups under Part 201. Per MCL 324.20120a(5), any new drinking water standards would automatically change already existing groundwater cleanup criteria. Because groundwater cleanup criteria previously

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existed for PFOA and PFOS, those standards would be changed to the new drinking water standards. No groundwater cleanup standards existed for the five other PFAS analytes addressed in DWEHD's rules, and therefore, new rules would need to be enacted to set criteria for those toxins. Because EGLE-DWEHD had not addressed these costs in its regulatory impact statement, the ERRC asked EGLE-DWEHD to estimate the impact on small businesses, etc., when PFOA and PFOS criteria were changed as a matter of law.

EGLE-DWEHD responded as follows:

> If an entity is responsible for either causing a PFAS release or being responsible for the due diligence associated with a PFOS or PFOA release under Part 201, then they would be obligated to meet those standards. This impact will vary depending on the PFOS or PFOA concentration, media effected, and extent of contamination. Because of this variability, it is not practical to determine the impact of this change. Even if it was, this impact is a result of current statutory applicability not a regulatory requirement. [App'x Vol 1, pp 251–252.]

After EGLE-DWEHD submitted its written response, the ERRC unanimously found, on November 14, 2019, that the proposed rules met the criteria set forth in MCL 25.266(4) of the APA and directed the agency to move forward with public hearings on the rules. (*Id.*, p 255.) EGLE-DWEHD held public hearings at several locations, and it received both oral and written comments from stakeholders and the public on the proposed rules. (App'x Vol 2, pp 267, 284–285.) Based upon those comments, EGLE-DWEHD made some fairly minor edits to its regulatory impact statement. (*Id.*, pp 257–265.)

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Eric Oswald, Director of DWEHD, appeared before the ERRC on February 27, 2020, to discuss the public comments. (App'x Vol 2, pp 266–282.) During his presentation, he provided responses to many of the comments submitted on the regulatory impact statement, including comments on the lack of any discussion about the state-wide costs to be incurred as a result of changes to the Part 201 standards. Mr. Oswald's notes state that:

> EGLE did not include costs incurred due to changes in 201 cleanup standards as they are not required to be considered under the RIS and they would be very difficult to almost impossible to anticipate. The Remediation and Redevelopment Division of EGLE will consider these costs in their processes. [App'x Vol 2, p 280.]

The ERRC approved the final draft of the rules at its February 27, 2020 Meeting. (*Id.*, pp 285–286.) EGLE-DWEHD's proposed rules were submitted to the Legislature's Joint Committee on Agency Rulemaking (JCAR) on March 16, 2020, with all other required documents. (*Id.*, pp 297–353.) The ERRC's chairman sent a letter to JCAR highlighting several issues considered by the ERRC, including the impact that the drinking water rules would have on cleanup criteria for soil and groundwater under Part 201. He stated that the ERRC leadership was aware of uncertainty about implementing the criteria when it approved the rules at its February 27 meeting, noted EGLE-DWEHD's statement acknowledging the need for more study of PFAS fate and transport, and stated that property owners dealing with contaminated soil "should be working with EGLE to apply site specific risk assessment principles to manage PFAS." (*Id.*, pp 354–356.) The ERRC made plain that it was aware of the uncertainties in the means and costs associated with the "collateral impact" of the drinking water rules, but it approved the standard with

the recommendation that "EGLE should work with the regulated community to provide clarity" in implementing the approved regulations. (*Id.*, p 355.)

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

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

Relying heavily on EGLE-DWEHD's work, EGLE's Remediation and Redevelopment Division (EGLE-RRD) next sought to promulgate PFAS cleanup criteria for groundwater used for drinking water. EGLE-RRD is authorized to establish cleanup criteria under Part 201, but those standards are risk-based and reflect the potential for human health or ecological risks. MCL 324.20120a(3). Multiple factors are considered in determining how and the extent to which a contaminated site must be remediated. Generic (generally applicable) cleanup standards are usually based on the proposed future use of the contaminated property: unrestricted or restricted residential; unrestricted or restricted site-specific; and unrestricted and restricted non-residential. MCL 324.20120a(1), 324.20120b. But Michigan also permits a liable party to avoid cleaning up contamination to those standards if other measures are available to abate unacceptable risks to the public health. MCL 324.20114(1)(d). For example, a

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party responsible for contaminating a groundwater aquifer that provides drinking water for residences can avoid the cost of remediating the aquifer by preventing exposure to the aquifer through land use restrictions coupled with actions such as buying impacted properties, running municipal water to the affected residences, installing whole house filters, or conducting a partial remediation of only the heavily contaminated areas. MCL 324.20120a(5), 324.20121.

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

EGLE-RRD proposed rules to set groundwater cleanup criteria for the same 7 PFAS compounds covered by the drinking water rules in January 2021, and also required approval from the ERRC before promulgating its rules. The regulatory impact statement submitted to the ERRC with the proposed rules discussed the costs associated with the Part 201 PFAS rules at multiple locations.[4] (App'x Vol 2, pp 357–368.) Similar to EGLE-DWEHD's response to the questions posed by the ERRC, the regulatory impact statement explained that the rules would result in

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

additional costs, but because of the multiple variables impacting the nature and extent of any required cleanup, it did not have sufficient information to estimate "actual costs" to be incurred as a result of the new rules. (App'x Vol 2., pp 365–366.)

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

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

As one of the largest manufacturers and users of PFAS, 3M has been repeatedly sued because of contamination caused by its product.[5] As part of its response to such lawsuits, 3M is engaged in a nationwide effort to prevent passage of more restrictive regulation of PFAS contaminants.[6] 3M's lawsuit challenging EGLE's rules is part of that effort. 3M's lawsuit asserted that the rules were invalid for a long list of purported reasons, including that EGLE had exceeded its

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

[6] See, e.g., https://www.fosters.com/story/news/2019/10/01/3m-suit-aims-to-block-tougher-pfas-standards-for-water-in-nh/2641134007/; https://news.3m.com/Coalition-Challenges-New-Jersey-PFAS-Regulatory-Overreach. 3M has submitted the same or similar objections to other state and federal agencies considering such regulations. See, e.g., (*Id.*,, pp 360–485.); https://www.mass.gov/doc/3m-2019-mcp-pfas-comments/download; https://www.mass.gov/doc/massdep-response-to-comments-proposed-pfas-drinking-water-maximum-contaminant-level-mcl/download, pp 66–72.

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rulemaking authority under the SDWA, that the rules were arbitrary and capricious, and that the rules violated the APA by failing to address the impact of the rule in its regulatory impact statement as required by MCL 24.245. (App'x Vol 1, pp 9–50.) One of the multiple faults 3M alleged with respect to EGLE's regulatory impact statement was that it failed "to address altogether the costs that would arise from the resulting changes to the groundwater cleanup standards for PFOS and PFOA . . . ." (*Id.*, p 41.)

The Court of Claims initially dismissed Counts IV–VII based upon EGLE's motion to dismiss 3M's complaint under MCR 2.116(C)(8). (*Id.*, pp 84–94.) Counts I and II were subsequently dismissed by the Court of Claims on November 15, 2022. (*Id.*, pp 107–111.) The court also rejected five of the six alleged errors identified by 3M in Count III regarding EGLE's regulatory impact statement, but ruled in favor of 3M on its claim that EGLE's regulatory impact statement failed to adequately include "[a]n estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups" as required by MCL 24.245(3)(n). (*Id.*, p 113.)

Specifically, the Court of Claims found that EGLE-DWEHD did not address the costs associated with changes to Part 201 groundwater cleanup criteria because those costs "would be addressed in separate groundwater-rulemaking process under Part 201." (*Id.*, pp 100 and 112.) However, when the court obtained *sua sponte* a copy of the regulatory impact statement submitted by EGLE's Remediation and Redevelopment Division (EGLE-RRD) as part of the Part 201 rulemaking process, (*Id.*, p 103), it concluded based upon its own analysis that "nowhere in the Part 201

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RIS did the Department address any cleanup or compliance costs that a business or group would incur as a result of the PFAS rules." (App'x Vol 1, p 112.) 3M had not raised this argument in its motion. Furthermore, the court asserted that EGLE-RRD "relied on the criteria set for PFOA and PFOS as a result of the SDWA-rulemaking process to justify its decision to ignore any cleanup and compliance costs faced by businesses and groups with respect to the other five PFAS substances under Part 201." (*Id.*, p 112.) Because those costs were not addressed in either EGLE-DWEHD's or EGLE-RRD's regulatory impact statement, the court found that EGLE-DWEHD's regulatory impact statement was insufficient and invalidated the drinking water PFAS rules. (*Id.*, p 113.)

The Court of Appeals' Ruling

In a 2-to-1 opinion, a majority of the Court of Appeals affirmed the Court of Claims' ruling, albeit for different reasons. The majority acknowledged that it did not "quibble" with EGLE's argument that the APA only requires an agency to estimate costs "*of the proposed rule* on businesses and other groups," that EGLE had passed the proposed PFAS rules under the SDWA, and that EGLE-DWEHD's regulatory impact statement fully analyzed the potential costs that water supplies would incur as a result of the proposed PFAS drinking water rules under the SDWA. (*Id.*, p 119.) Despite the plain language of the statute, however, the majority held that because it was undisputed the proposed rules would modify the Part 201 cleanup criteria as a matter of law, a reading of "the statute in its entirety" led it to conclude that an estimate of the Part 201 costs should have been included

in the regulatory impact statement. (*Id.*) Because an estimate of those costs had not been included, the majority ruled that EGLE-DWEHD's regulatory impact statement did not comply with the APA, and therefore, declared the drinking water PFAS rules to be invalid.

The majority also rejected EGLE's argument that it was not required to include an estimate of the Part 201 costs because of a lack of information. (*Id.*, p 120.) Because the APA states that a regulatory impact statement "shall" contain the information listed in MCL 24.245(3), the majority found that EGLE was either required to include such an estimate or to "propose the rule in a way that complies with the APA." As such, it rejected EGLE's argument. (*Id.*)

Disagreeing with the majority, the dissent found that the APA only required EGLE to estimate costs incurred under the SDWA. Specifically, the dissent held that the APA required an estimate of the costs "*of the proposed rule.*" Because "the" has been defined by this Court's precedent as referring to a "specific thing" and the PFAS drinking water rules were solely being promulgated under the SDWA, the dissent concluded that EGLE was only obligated to estimate costs associated with those rules. (*Id.*, p 122.) Nowhere in the text of the APA was a promulgating agency required to account for costs caused by "ripple effects in other rules". (*Id.*) Because EGLE had estimated the costs associated with the proposed PFAS drinking water rules under the SDWA, the dissent opined that EGLE's regulatory impact statement complied with the APA. (*Id.*)

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ARGUMENT

I. EGLE complied with the plain language of the APA by estimating compliance costs for only the PFAS drinking water rules under the SDWA.

A. Standard of Review

Courts review agency findings "to determine if it was authorized by law and supported by competent, material, and substantial evidence on the whole record." *Nat'l Wildlife Federation v Dep't of Environmental Quality (No 2)*, 306 Mich App 369, 372–373 (2014), citing Const 1963, art 6, § 28. "An agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious." *Id*. at 373. Courts review de novo questions of whether an agency's actions comply with those statutes. *New Covert Generating Co v Twp of Covert*, 334 Mich App 24, 45 (2020). Even so, "[c]ourts give the agency's statutory interpretation respectful, nonbinding consideration and do not overturn it absent cogent reasons." *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich 97, 119 (2020), citing *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103 (2008).

B. Analysis

EGLE was required to include estimated costs associated with the proposed rule, which it did here consistent with the plain language of the APA and Supreme Court precedent. The ruling of a majority of the Court of Appeals to the contrary is

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unsupported in law, as EGLE-DWEHD was not required to include unsupportable cost estimates in its regulatory impact statement.

1. EGLE complied with the law when it included an estimated cost associated with the rule it proposed.

The APA required EGLE to provide an estimate "of the actual statewide compliance costs *of the proposed rule* on businesses and other groups." MCL 24.245(3)(n) (emphasis added). "[T]he proposed rule" at issue is the PFAS drinking water rules: 2019-35 EG, "Supplying Water to the Public." (App'x Vol 2, p 257.) Under the plain language of the APA, EGLE was required to estimate compliance costs relating to that proposed rule set. It did so in its regulatory impact statement. See, e.g., Paragraph 13 (costs to be incurred by state and local government units) (*Id.*, pp 260–261), and Paragraph 28 (costs on businesses and groups) (*Id.*, p 263). No dispute exists that EGLE provided estimates for costs to be incurred under the SDWA, and therefore, EGLE complied with the APA's requirements.

The Legislature's choice of words matters. Courts are required to "give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Johnson v Pastoriza*, 491 Mich 417, 436 (2012). When determining the Legislature's intent, courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *2 Crooked Creek, LLC v Cass City Cty Treasurer*, 507 Mich 1, 9 (2021); *Rouch World, LLC v Dep't of Civ Rights*, 510 Mich 398, 429 (2022) ("When

the statute's language is clear, as it is here, we rely on the plain language as the best evidence of its meaning."). Courts must give meaning to "the Legislature's choice of one word over another," *Robinson v City of Detroit*, 462 Mich 439, 459 (2000), "may not assume that the Legislature inadvertently made use of one word or phrase instead of another, (id), and will not re-write the Legislature's language. *Hesse v Ashland Oil, Inc*, 466 Mich 21, 30 (2002).

In this case, the Legislature chose to require an estimate of compliance costs arising out of "the proposed rule." It is well established under this Court's precedent that "the" means a "definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect as opposed to the indefinite or generalizing force of the indefinite article a or an . . . ." *Robinson v City of Lansing*, 486 Mich 1, 14 (2010) (discussing that the phrase "a proximate cause" should not interpreted the same as "the proximate cause"), citing Random House Webster's College Dictionary, p 1382. See also *Robinson*, 462 Mich at 461–462 (same); *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 35 (2016) (finding "the notice" refers to "a specific notice").

Applying this rule of interpretation to the language at issue, as correctly noted by the dissent, "the" modifies "proposed rule" and specifies that the compliance cost estimate is limited to the particular rule at issue: 2019-35 EG, "Supplying Water to the Public". EGLE's regulatory impact statement included the required cost estimates for that rule, and therefore, it complied with the APA. Any other interpretation violates the plain meaning of the statute and impermissibly

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requires a judicial re-writing of the statute, contrary to established precedent of this Court.

2. The Court of Appeals' decision to override the plain language of the APA statute based upon a reading of the statute "in its entirety" is unsupported and contrary to the language of that statute.

The majority admitted a plain reading of the statute supports EGLE's interpretation: "We don't quibble with EGLE's position that within MCL 24.245(3)(n) the word 'the' modifies the phrase 'proposed rule,' and that the proposed rule is 2019-35 EG, 'Supplying Water to the Public.'" (App'x Vol 1, p 119.) The majority then failed to apply the plain language by relying on the old saw that a statute must also be "read in its entirety". (*Id.*)

The majority divined a broader intent in the statute because, in its words, MCL 24.245(3)(n) required EGLE to provide "an estimate 'of the actual statewide compliance costs' of the proposed rule." (*Id.)* But that language provides no support for the majority's actions because it overlooks that the referenced language ("actual statewide compliance costs") is limited by the key language at issue ("the proposed rule"). That limiting language cannot be ignored and highlights the lack of logic in majority's conclusion that the statute as a whole required a different outcome.

There is no language in the APA requiring a promulgating agency to not only estimate costs directly associated with the proposed rule, but to also divine all other potential costs that individuals or businesses might incur because of—to adopt the phrase used by the dissent—the "ripple effect" of the proposed rule. Nowhere in the

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APA does it require EGLE to include estimates for "all" or "any" costs that might be incurred as a result of the proposed rules. The majority's opinion impermissibly re-writes the language of the statute—a job that only the Legislature can undertake. See *Hesse*, 466 Mich at 30 ("the Legislature can and may rewrite the statute, but we will not do so.").

Additionally, the Legislature clearly understood that it would be impossible for agencies predict all costs that might flow from their actions, which is why the statute requires only an "estimate" of potential costs. "Estimates" are by definition less than "all." See *American Heritage Dictionary* (2nd College Ed, 1985) (defining "estimate" as "[a] tentative evaluation or rough calculation," "[a] preliminary calculation of the costs of the project," and a judgment based on one's impressions."). Again, it bears noting that nowhere in the APA does it require an agency to include estimates for "all" or "any" costs that might be incurred as a result of the proposed rules. The majority's decision to override the plain language of the statute has resulted in an opinion that is directly at odds with the language of the statute.

Importantly, too, the majority's opinion not only violates the plain language of the APA, but also puts in place a pathway for every agency rule to be challenged. No agency has the ability to predict all costs that will or might flow from a proposed rule. Yet, if the COA majority opinion stands, companies like 3M will be able to fight any new regulation by dreaming up costs not addressed by the agency during the rule-making process. The majority's ruling has set a standard that no agency will be able to meet. That cannot be a logical result, and this Court must reject it.

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3. Contrary to the ruling of the majority in the Court of Appeals, EGLE-DWEHD was not required to include unsupportable cost estimates in its regulatory impact statement.

It is important to emphasize that EGLE-DWEHD's decision not to address costs arising under Part 201 in its regulatory impact statement was not an attempt to avoid addressing that issue during rule-making. Before the ERRC, during public comment, and in communications to the JCAR, EGLE-DWEHD's rationale for not including those costs was discussed. EGLE-DWEHD explained its belief that Part 201 costs were not required to be included because (1) the changes to those criteria were not caused by the proposed PFAS drinking water rules, but by the Part 201 rules; (2) although responsible parties would certainly have to incur costs to conduct a Part 201 cleanup or take any other action permitted under Part 201, because of the endless variables that would come into play and a lack of information, EGLE-DWEHD could not provide a state-wide estimate of Part 201 total cleanup costs; and (3) such a discussion would be more appropriate and informed when the division responsible for enforcing Part 201, EGLE-RRD, undertook its planned effort to amend the Part 201 criteria to address PFAS. (App'x Vol 1, pp 251–252 and 280.)

The Court of Claims stated that EGLE-DWEHD's decision to delay that discussion to EGLE-RRD's efforts under Part 201 "made sense, as everyone knew that the criteria that the Department set for PFOA and PFOS in the SDWA-rulemaking process would apply by operation of law to businesses and groups like

3M because of MCL 324.20120a(5).” (*Id.*, p 112.) 3M did not appeal that decision and it has no right to contest that ruling at this time.

The underlying majority, however, rejected that decision by finding that EGLE-DWEHD was required to include in estimates not only for costs directly related to a rule, but also costs that might indirectly be incurred under Part 201. But the Court of Appeals’ decision violates the maxim that courts are required to defer “to administrative expertise and not invade agency fact finding by displacing an agency’s choice between two reasonably differing views.” *Slis v State*, 332 Mich App 312, 352 (2020), citing *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576 (2002). The rationale for this rule was summarized in *Michigan Basic Property Insurance Association v Office of Finance & Insurance Regulation*, 288 Mich App 552, 560 (2010):

> Administrative agencies are created by the Legislature as “repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field.” *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 198 (2001). “[A]dministrative agencies possess specialized and expert knowledge to address issues of a regulatory nature. Use of an agency’s expertise is necessary in regulatory matters in which judges and juries have little familiarity.” (*Id.* at 198–199.) The relationship between the courts and administrative agencies is one of restraint, and courts must exercise caution when called upon to interfere with the jurisdiction of an administrative agency. *74th Judicial Dist Judges v Bay Co*, 385 Mich 710, 727 (1971). “Judicial restraint tends to permit the fullest utilization of the technical fact-finding expertise of the administrative agency and permits the fullest expression of the policy of the statute, while minimizing the burden on court resources.” [*Id.* at 728.]

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

In this case, as the Court of Claims found, it was reasonable for EGLE-DWEHD to defer any discussion of the Part 201 costs to EGLE-RRD's efforts, which everybody knew was coming after the PFAS drinking water rules were promulgated. The Court of Appeals' strained effort, which overlooks the plain meaning of the APA, does not justify the result reached because a vehicle still existed for the Part 201 costs to be discussed. The Court of Appeals' rejection of EGLE-DWEHD's choices constitutes an unwarranted intrusion into the rulemaking process and fails to accord EGLE the necessary deference. As a result, its opinion must be overturned.

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

No Michigan court has previously invalidated an agency rule based upon the content of a regulatory impact statement. Any argument that this court should examine the minutiae of the factual statements made by DWEHD and its experts in

a regulatory impact statement is a frontal assault on decades of law in Michigan holding that courts should defer to agency fact finding. See, e.g., *Mich Basic Prop Ins Ass'n*, 288 Mich App 560–561 (2010) ("Administrative agencies possess specialized and expert knowledge to address issues of regulatory nature . . . the relationship between the courts and administrative agencies is one of restraint . . . ."); *Slis*, 332 Mich App at 354 (finding that application of separation-of-powers principles requires courts to "give due deference to the agency's expertise and not invade the agency's fact-finding by displacing the agency's choice between two reasonably differing views"). Any such argument must be rejected.

The APA does not include any standards specifying how a department must arrive at the required estimate or the degree of accuracy that is required in the estimate to comply with MCL 24.245(3). So long as EGLE followed the procedural requirements of the APA, a court must uphold the agency actions absent a finding of "arbitrary or capricious" behavior. EGLE-DWEHD's regulatory impact statement included substantial, detailed analysis of potential costs, and therefore, it complied with the APA's procedural requirements. EGLE-DWEHD did not include cost projections that it could not make. The Court of Appeals' finding that Part 201 groundwater cost projections should have been included, without any evidence in the record that such information existed or could be acquired, violates the long-standing legal precept that courts should defer to agency fact-finding. [7]

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[7] The Court of Claims' finding that EGLE-RRD's response to Paragraph 28 of its regulatory impact statement was deficient (and by extension EGLE-DWEHD's regulatory impact statement) is both incorrect and irrelevant. First, it is a plainly

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CONCLUSION AND RELIEF REQUESTED

The Court of Appeals holding that EGLE violated Section 45 of the APA is contrary to the plain language of the APA, improperly inserts the courts into the rule-making process, and creates a detrimental pathway for new and endless changes to agency rule-making.

For these reasons, EGLE respectfully requests that this Court grant this application for leave to appeal from the August 22, 2023 opinion of the Court of

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incorrect reading of EGLE-RRD's response to Paragraph 28 to conclude that it solely relied on EGLE-DWEHD's criteria for PFOA and PFOS to avoid addressing costs. Although RRD does state in Paragraph 28 that the PFAS drinking water criteria would dictate MCLs for PFOS and PFOA, EGLE-RRD did not end its response at that point. EGLE-RRD continued on to give similar responses that EGLE-DWEHD gave during the drinking water rulemaking process—it could not give an estimate of the "statewide compliance costs" because (1) it did not know how many sites with PFAS contaminated groundwater existed in the State, and (2) the highly variable nature of any response activities. (App'x Vol 2, pp 365–367.) Those statements cannot be ignored.

Second, EGLE-RRD's response does substantively address the cost issue presented by Question 28. Question 28 of the regulatory impact statement requires the agency to estimate "actual statewide compliance costs" caused by the proposed rules on "businesses or groups." (App'x Vol 2, p 365.) Because EGLE-RRD did not know how many contaminated sites exist in Michigan, it accurately stated that "EGLE does not have the ability to estimate the actual statewide compliance costs…." (*Id.*) Without knowing how many contaminated sites existed across the state, EGLE-RRD could not estimate the "statewide compliance costs." Any number would be mere guesswork and could run headlong into the well-understood requirement that an agency may not act arbitrarily or capriciously.

Regardless, 3M has not challenged EGLE-RRD's rule-making process, and any alleged deficiency in its regulatory impact statement cannot be used to invalidate EGLE-DWEHD's PFAS drinking water rules.

Appeals. In the alternative, EGLE respectfully requests that this Court reverse the Court of Appeals and award the following relief:

(1) Reverse the partial denial of EGLE's motion for summary disposition and grant summary disposition in favor of EGLE on Court III; and

(2) Hold that EGLE's PFAS drinking water rules were validly promulgated because EGLE's regulatory impact statement includes an estimate of costs that business would incur due to the changes to the SDWA.

Respectfully submitted,

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WORD COUNT STATEMENT

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