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STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN FARM BUREAU, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant-Cross-Appellee.

Supreme Court No. 165166

Court of Appeals No. 356088

Court of Claims No. 20-000148-MZ

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

APPELLANT'S APPENDIX VOLUME ONE

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Dated: July 26, 2023

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STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN FARM BUREAU, et al.,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000148-MZ

Hon. Cynthia Diane Stephens

Pending before the Court is defendant's motion for summary disposition filed pursuant to MCR 2.116(C)(4) and (C)(8). Because plaintiffs did not follow the available administrative process to its completion, the Court lacks subject-matter jurisdiction, and the motion is GRANTED as a result. This matter is being decided without oral argument. See LCR 2.119(A)(6).

I. BACKGROUND

The group of plaintiffs in this case is comprised of various organizations of farmers as well as numerous livestock farms. The farms at issue are regulated as Concentrated Animal Feeding Operations (CAFOs). Defendant in this case is the Department of Environment, Great Lakes, and Energy which, pursuant to statute, "shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by waste disposal of any person." MCL 324.3103(1). As

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part of its statutory role, defendant is charged with developing and maintaining a permitting system to ensure certain environmental standards are met. MCL 324.3106.

At issue in this case is what is known as the 2020 CAFO General Permit issued in accordance with Mich Admin Code, R 323.2191(1), which authorizes defendant to issue a general permit if it determines that "certain discharges are appropriately and adequately controlled by a general permit." Defendant's issuance of general permits is subject to conditions set forth in the Administrative Code. Mich Admin Code, R 323.2192(2). Permits issued by defendant have a fixed term of not more than five years. Mich Admin Code, R 323.2150. The general permit at issue in this case was first issued in 2000 and it is reissued every five years. The version of the CAFO General Permit at issue in this case was subject to notice and public comment earlier this year.

A person who seeks to be covered by a general permit must apply for coverage under the permit. Mich Admin Code, R 323.2192(a). After defendant receives an application, it must determine whether the applicant meets the criteria for coverage under the general permit. Mich Admin Code, R 323.2192(b). A person is not covered under a permit until after defendant issues a "notice of coverage" stating that the person meets the criteria set forth in the general permit. *Id.* Anyone who is "aggrieved by the coverage may file a sworn petition for a contested case hearing on the matter" with the department as provided in the Administrative Procedures Act (APA). Mich Admin Code, R 323.2192(c). See also MCL 324.3113(3).

Defendant has not issued any certificates of coverage under the 2020 CAFO General Permit. Instead, given the existence of a currently pending contested case proceeding regarding

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the 2020 CAFO General Permit—discussed below—defendant has declined to issue new coverage certificates, meaning that applicants are currently covered by prior permitting requirements.

Attached to defendant's motion for summary disposition as Exhibit B is a Petition for Contested Case Hearing submitted by plaintiff Michigan Farm Bureau and many of the named plaintiffs in the instant action. The petition states that it is an appeal of 2020 CAFO General Permit. The petition seeks "a hearing to evaluate the legality of certain conditions imposed by the General Permit that have a tenuous relation to water quality and cumulatively will have a significant adverse impact on food production in Michigan." The petition raises many of the same provisions of the General Permit that are at issue in the instant case, save for plaintiffs' claims—discussed below—that the permit is a rule promulgated without compliance with the APA, as well as constitutional claims.

As is the case with the currently pending contested case hearing, the 2020 CAFO General Permit is the parties' focus in the instant action. According to the allegations contained in plaintiffs' complaint, the 2020 CAFO General Permit imposes costly and burdensome requirements on this state's agricultural economy by implementing certain changes to CAFOs, including implementing a three-month ban on applying manure to crop fields during the winter. Plaintiffs filed a six-count complaint in this Court in which they allege a number of shortcomings by defendant under the APA, as well as constitutional violations.

II. ANALYSIS

Defendant has asked this Court to grant summary disposition in its favor pursuant to MCR 2.116(C)(4), for the reason that plaintiffs failed to pursue available administrative remedies to their completion. "Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when

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a plaintiff has failed to exhaust its administrative remedies." *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

"The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009). If the Legislature has expressed an intent to grant a state agency exclusive jurisdiction over a particular type of dispute, "courts must decline to exercise jurisdiction until all administrative proceedings are complete." *L & L Wine & Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citation and quotation marks omitted). Courts are to presume "that an administrative agency will correct its errors if given a chance to do so." *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 664; 669 NW2d 326 (2003).

At issue in this case is the 2020 CAFO General Permit. Under MCL 324.3112(5) of the Natural Resources and Environmental Protection Act, any person who is aggrieved by "the reissuance, modification, suspension, or revocation of an existing permit of the department executed pursuant to this section may file a sworn petition with the department setting forth the grounds and reasons for the complaint and requesting a contested case hearing on the matter pursuant to the" APA. The APA sets forth procedures for contested cases under MCL 24.271-MCL 24.288, as well as for the issuance of final decisions that are subject to judicial review. Regarding the right to judicial review under the APA, MCL 24.301 expressly requires the exhaustion of available administrative remedies and states that "[w]hen a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law." Until a petitioner pursues

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an administrative challenge to the issuance of a final decision, exhaustion has not occurred, and the administrative claim is not subject to judicial review. See *Hendee v Putman Twp*, 486 Mich 556, 573; 786 NW2d 521 (2010).

In the instant case, plaintiffs have not exhausted their available administrative remedies, as evidenced by the petition for contested-case hearing attached to defendant's motion for summary disposition as Exhibit B. By all accounts, that contested-case hearing remains pending at this time, meaning that the administrative process has not run its course. And because the administrative process has not run its course, plaintiffs failed to exhaust all available administrative remedies. The failure to exhaust administrative remedies deprives this Court of jurisdiction and requires dismissal. See *Cummins*, 283 Mich App at 691.

In response to the above analysis, plaintiffs contend that they are entitled to file the instant case as an original action under the express terms of the APA. They argue that MCL 24.264 of the APA gives this Court jurisdiction to determine the validity of administrative rules by issuing a declaratory judgment. The Court does not agree with plaintiffs' assertions. MCL 24.264 provides in pertinent part that:

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

The manner for seeking declaratory judgment under MCL 24.264 does not apply to the instant case. By all accounts, the requirements contained in the 2020 CAFO General Permit were not formally promulgated in accordance with the APA's procedures. Indeed, plaintiffs fault the

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2020 CAFO General Permit for this very (alleged) shortcoming. This is significant, because the Court of Appeals has held that only rules that have been formally promulgated as "rules" under the APA may be subjected to a challenge under MCL 24.264. See *Jones v Dep't of Corrections*, 185 Mich App 134, 138; 460 NW2d 575 (1990). See also *Slis v State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 351211; 351212), slip op at 15 ("In our view, MCL 24.264 reveals a general legislative intent to provide an avenue for a party to challenge a rule promulgated by an agency . . . ."). In other words, plaintiffs may not simply characterize the 2020 CAFO General Permit's requirements as "rules" and thereby invoke MCL 24.264. See *Jones*, 185 Mich App at 138.

Plaintiffs also argue that MCR 2.605, the Declaratory Judgment rule, allows them to maintain an original action in this Court against defendant. MCR 2.605(A)(1) applies in "a case of actual controversy" and it permits a court to "declare the rights and other legal relations of an interested party seeking declaratory judgment . . . ." Here, as defendant points out, there is no actual controversy for purposes of the Court Rule because the available administrative process has not yet run its course. See *Citizens for Common Sense in Gov't*, 243 Mich App at 55.

Next, and in the alternative, plaintiffs argue that if the exhaustion requirement would ordinarily apply, it should be excused in this case. They first contend that exhaustion of administrative remedies is unnecessary because they are challenging defendant's authority to act. See *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 192; 590 NW2d 747 (1998). However, the Court finds plaintiffs' citation to *Huggett* and the principle recognized therein to be inapposite. In *Huggett*, the plaintiffs' failure to exhaust administrative remedies was excused because the plaintiffs "did not challenge the propriety of defendant's denial of the permit but sought a declaration that defendant had no statutory authority to require a permit in the first place."

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The plaintiffs in that case argued that the Legislature "exempted the proposed activity from defendant's regulation." *Id*. Here, by contrast, there is no dispute that defendant has statutory authority to require and to issue the permits. There is also no dispute that defendant has statutory authority to regulate plaintiffs. The dispute raised by plaintiffs concerns the *manner* of that regulation. That dispute does not implicate defendant's authority to regulate plaintiffs in the first instance, and it does not excuse plaintiffs' failure to exhaust available administrative remedies.

Plaintiffs next argue that they are raising pure legal questions that do not require the development of a factual record, meaning that one of the typical rationales for exhaustion—deferring to an agency's ability to employ its technical expertise in a complex factual setting—is not present in this case. This state's jurisprudence recognizes an exception to the exhaustion requirement when judgment is sought on undisputed facts. See *L & L Wine & Liquor Corp*, 274 Mich App at 361-362. Here, though, plaintiffs' complaint raises factual issues which should first be examined during the administrative process. In this respect, plaintiffs are essentially questioning the necessity and efficacy of certain matters included within the 2020 CAFO General Permit. These allegations are typified, among many others, in ¶¶ 332, 338, 345, 347, and 355 of their complaint. These fact-intensive issues require the development of a factual record. Plaintiffs have also alleged in ¶ 363 of their complaint that some of the permit requirements are not "required by any law," such that defendant lacked the authority to issue them. However, defendant points out that MCL 324.3101 requires it to develop standards to assure certain regulatory goals are met. Comparing the statutory goals to the permitting conditions and determining whether the permitting conditions further those goals will also require the development of a factual record that is best suited for the administrative process.

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Next, plaintiffs argue that the presence of their constitutional claims excuses the exhaustion of administrative remedies. The assertion of constitutional questions can excuse a failure to exhaust available administrative remedies. See *Papas*, 257 Mich App at 664. However, merely characterizing an issue by using constitutional terms does not excuse the exhaustion requirement, particularly where there remain factual issues for the agency to resolve. See *id*. Here, the presence of the factual issues noted above convinces the Court that the presence of plaintiffs' constitutional claims does not excuse exhaustion. In addition, it must be remembered that plaintiffs are alleging that they suffered constitutional violations as part of the permitting process. This permitting process has not yet run its course, meaning that any errors that have allegedly occurred have not been submitted to defendant for correction. Again, "[i]t is presumed that an administrative agency will correct its errors"—if any—"if given a chance to do so." *Papas*, 257 Mich App at 664.

Finally, plaintiffs argue that exhaustion is not applicable to the farm plaintiffs who lack standing to pursue an administrative appeal in the first instance. These are plaintiffs that, according to defendant, are "individually-permitted" and who are not regulated under general permits. According to plaintiff, if there is no remedy to exhaust in the administrative proceeding due to these plaintiffs' lack of standing in the pending administrative process, there can be no exhaustion requirement. This argument is unconvincing. As an initial matter, plaintiffs have not specifically identified these purported plaintiffs. Furthermore, plaintiffs have failed to explain how plaintiffs who are not subject to general permits would have standing—either in the administrative process or in this Court, for that matter—to challenge general permits to which they are not subject. See *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (describing standing, in general). And in any event, where plaintiffs have not meaningfully developed this

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argument, the Court declines to find that it represents a reason to excuse the exhaustion of administrative remedies.

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED under MCR 2.116(C)(4) and this matter is DISMISSED because plaintiffs failed to exhaust available administrative remedies.[1]

December 30, 2020

Cynthia Diane Stephens
Judge, Court of Claims

[1] Because the Court lacks subject-matter jurisdiction, it will not address defendant's contentions regarding whether plaintiffs can state a claim on which relief can be granted.

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN FARM BUREAU; MICHIGAN MILK PRODUCERS ASSOCIATION; MICHIGAN PORK PRODUCERS ASSOCIATION; MICHIGAN ALLIED POULTRY INDUSTRIES; DAIRY FARMERS OF AMERICA; SELECT MILK PRODUCERS, INC.; MICHIGAN CATTLEMEN'S ASSOCIATION; SNIDER FARMS, LLC d/b/a and permitted as Airport View Turkeys; ALPINE PORK, LLC; ATE FARMS, LLC; BEBOW DAIRY FARM, INC. d/b/a and permitted as Bebow Dairy Farm; BENNETT FARMS LIVESTOCK, LLC d/b/a and permitted as Bennet Farms Livestock; BLEICH DAIRY; BROOK VIEW DAIRY, LLC d/b/a and permitted as Brook View Dairy; BURNS POULTRY FARMS, INC.; CAR-MIN-VU FARMS, LLC d/b/a and permitted as Car-Min-Vu Dairy; CARY DAIRY FARM, INC.; CARY'S PIONEER FARM, INC.; CENTERWOOD FARMS, LLC; CENTRAL MICHIGAN MILK PRODUCERS, LLC d/b/a and permitted as Central Michigan Milk Production; CLOVER FARMS, LLC d/b/a and permitted as Clover Family Farms; CONTRACT FINISHERS, INC.; COURTER FARMS EAST FEEDLOT, LLC d/b/a and permitted as Courter Farms East; COURTER FARMS WEST FEEDLOT, LLC d/b/a and permitted as Courter Farms West; CROSSROADS DAIRY, LLC; D & K FARMS; DEN DULK DAIRY FARM, LLC; DEYOUNG PORK, INC. d/b/a and permitted as DeYoung Pork Inc.-Plainwell; DOUBLE QUAD FARMS, LLC d/b/a and permitted as Double Quad Farms; DUTCH MEADOWS DAIRY, LLC d/b/a and permitted as Dutch Meadows Dairy; DYKHUIS FARMS, INC. d/b/a and permitted as Baseline Farm, Ehinger Farm, Riverbend Farm, Shamrock Farm, and Village Central Sandy Ridge; EDGE WOOD DAIRY, LLC d/b/a and permitted as Edge Wood Dairy; FAIRGROVE FARMS, INC. d/b/a and permitted as Fairgrove Farms; GERNAAT FAMILY FARMS; GW DAIRY, LLC; HALBERT DAIRY, LLC d/b/a and permitted as Halbert Dairy; DJN CATTLE FARMS, INC. d/b/a and permitted as Halliwill Farms; HICKORY GABLES, INC. d/b/a and permitted as Hickory

Court of Claims Case No: 20-000148-MZ

Hon. Cynthia Diane Stephens

Court of Appeals Docket No:

CLAIM OF APPEAL

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Gables; HIGH LEAN PORK, INC. d/b/a and permitted as High-Lean Pork 3 – Hoover; HIGHLAND DAIRY, LLC d/b/a and permitted as Highland Dairy; GEERLINGS HILLSIDE FARMS, LLC d/b/a and permitted as Hillside Farms – Fennville, Hillside Farms-Overisel, and Hillside Farms-Overisel Hog Barns; HARVEST HILL FARM, by its permittee Ron Klein; HASS FEEDLOT, LLC, d/b/a and permitted as Hass Feedlot Home Farm and Hass Feedlot 2; HOLLOO FARMS, LLC, d/b/a and permitted as Holloo Farms; HURON PORK, LLC; INGLESIDE FARMS; J&J RUSSCHER PROPERTIES, LLC; J AND A PORK, LLC d/b/a and permitted as J and A Pork; JMAX LLC d/b/a and permitted as JMax Dairy; KARNEMAATS, LLC; KOBER FARMS, LLC; KY-10 FARMS, LLC d/b/a and permitted as KY-10 Farms; LAIER FARMS, INC. d/b/a and permitted as Laier Farms; LUCKY 7 DAIRY, LLC; LUCKY 7 FARMS, LLC; MYERS FARMS, LLC d/b/a and permitted as Myers Farms; NEW FLEVO DAIRY, INC. d/b/a and permitted as New Flevo Dairy; NOBIS FARMS, LLC d/b/a and permitted as Nobis Dairy Farms; NVF, INC.; OOMEN BROTHERS, INC. d/b/a and permitted as Oomen Brothers Hogs; PACKARD FARMS, LLC, d/b/a and permitted as Packard Farms; PAYLA MEADOWS, LLC; PEACEFUL ROAD FARM, LLC d/b/a and permitted as Peaceful Road Farms; PERFORMANCE FARMS, LLC; PETRO FARMS; POLL FARMS, INC.; PRAIRIE VIEW DAIRY, LLC; PRECISION PORK FARM, INC. d/b/a and permitted as Precision Pork Farm; PREFERRED HOG FARMS, INC. d/b/a and permitted as Preferred Hog 146th; THE PRESTON FARMS, LLC, d/b/a and permitted as Preston Hog Farms; PRIDGEON FARMS, LLC d/b/a and permitted as Pridgeon Farms; PSY FARMS; R&R PORK, LLC d/b/a and permitted as R&R Pork; RAPID RIDGE FARMS, LLC d/b/a and permitted as Rapid Ridge; RED ARROW DAIRY, LLC d/b/a and permitted as Red Arrow Dairy; RUGGLES BEEF FARMS, LLC d/b/a and permitted as Ruggles Beef Farms; S&T BARNS, LLC d/b/a and permitted as S&T Barns – Booth, S&T Barns - Fawn River, S&T Barns – TSC, and S&T Barns-Haenni; SAND CREEK DAIRY, LLC; SCENIC VIEW DAIRY, LLC d/b/a and permitted as Scenic View Dairy; SCHURING

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FARMS, LLC d/b/a and permitted as Schuring Farms; SCHURING SWINE, LLC; SCOTT MCKENZIE FARMS; SELDOM REST HOG FARM, LLC d/b/a and permitted as Seldom Rest Hog Farm; SIDE STREET PORK, LLC d/b/a and permitted as Side Street Pork; SKINNER FARMS, LLC d/b/a and permitted as Skinner Farms; STEENBLIK DAIRY INC.; STEWART FARMS, LLC d/b/a and permitted as Stewart Farms; STOREY FARMS, LLC; STOUGHTON CREEK FARMS, LLC d/b/a and permitted as Stoughton Creek Farms; SWISSLANE DAIRY FARMS, INC. d/b/a and permitted as Swisslane Farms; TERREHAVEN FARMS, INC. d/b/a and permitted as Terrehaven Farms; VALLEY VIEW PORK, LLC d/b/a and permitted as Valley View Pork; VAN OEFFELEN FARM SERVICES; VANDERPLOEG HOLSTEINS, LLC d/b/a and permitted as Vanderploeg Holsteins; VDS FARMS, LLC d/b/a and permitted as VDS Farms-Fulton and VDS Farms-S Avenue; VELD FARMS, LLC d/b/a and permitted as Veld Farms; WALNUTDALE FARMS, INC. d/b/a and permitted as Walnutdale Farms Dorr Twp; WIL-LE FARMS, INC. d/b/a and permitted as Wil-Le Farms; WILLOW CREEK FARMS; WILLOW POINT DAIRY, LLC d/b/a and permitted as Willow Point Dairy; WILSON CENTENNIAL FARM, LLC; BAKERLADS FARM; DEER CREEK POULTRY FARM; HARTLAND FARMS, INC. d/b/a and permitted as Hartland Farms; HUDSON DAIRY, LLC d/b/a and permitted as Hudson Dairy; MAYFLOWER DAIRY, LLC; MEADOW ROCK, LLC d/b/a and permitted as Meadow Rock Dairy; MEDINA DAIRY, LLC d/b/a and permitted as Medina Dairy; NOBEL FAMILY DAIRY, LLC; OTTAWA TURKEY FARM, permitted as Ottawa Turkey Farm 112th; and CROCKERY CREEK TURKEY FARMS, LLC d/b/a and permitted as Crockery Creek – 80th,

Plaintiffs-Appellants,

v

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MICHIGAN DEPARTMENT OF ENVIRONMENT,
GREAT LAKES, AND ENERGY,

Defendant-Appellee.
_____/

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_____/

CLAIM OF APPEAL

Plaintiffs-Appellants MICHIGAN FARM BUREAU; MICHIGAN MILK PRODUCERS ASSOCIATION; MICHIGAN PORK PRODUCERS ASSOCIATION; MICHIGAN ALLIED POULTRY INDUSTRIES; DAIRY FARMERS OF AMERICA; SELECT MILK PRODUCERS, INC.; MICHIGAN CATTLEMEN'S ASSOCIATION; SNIDER FARMS, LLC d/b/a and permitted as Airport View Turkeys; ALPINE PORK, LLC; ATE FARMS, LLC; BEBOW DAIRY FARM, INC. d/b/a and permitted as Bebow Dairy Farm; BENNETT FARMS LIVESTOCK, LLC d/b/a and permitted as Bennet Farms Livestock; BLEICH DAIRY; BROOK VIEW DAIRY, LLC d/b/a and permitted as Brook View Dairy; BURNS POULTRY FARMS, INC.; CAR-MIN-VU FARMS, LLC d/b/a and permitted as Car-Min-Vu Dairy; CARY DAIRY FARM, INC.; CARY'S PIONEER FARM, INC.; CENTERWOOD FARMS, LLC; CENTRAL MICHIGAN MILK

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PRODUCERS, LLC d/b/a and permitted as Central Michigan Milk Production; CLOVER FARMS, LLC d/b/a and permitted as Clover Family Farms; CONTRACT FINISHERS, INC.; COURTER FARMS EAST FEEDLOT, LLC d/b/a and permitted as Courter Farms East; COURTER FARMS WEST FEEDLOT, LLC d/b/a and permitted as Courter Farms West; CROSSROADS DAIRY, LLC; D & K FARMS; DEN DULK DAIRY FARM, LLC; DEYOUNG PORK, INC. d/b/a and permitted as DeYoung Pork Inc.-Plainwell; DOUBLE QUAD FARMS, LLC d/b/a and permitted as Double Quad Farms; DUTCH MEADOWS DAIRY, LLC d/b/a and permitted as Dutch Meadows Dairy; DYKHUIS FARMS, INC. d/b/a and permitted as Baseline Farm, Ehinger Farm, Riverbend Farm, Shamrock Farm, and Village Central Sandy Ridge; EDGE WOOD DAIRY, LLC d/b/a and permitted as Edge Wood Dairy; FAIRGROVE FARMS, INC. d/b/a and permitted as Fairgrove Farms; GERNAAT FAMILY FARMS; GW DAIRY, LLC; HALBERT DAIRY, LLC d/b/a and permitted as Halbert Dairy; DJN CATTLE FARMS, INC. d/b/a and permitted as Halliwill Farms; HICKORY GABLES, INC. d/b/a and permitted as Hickory Gables; HIGH LEAN PORK, INC. d/b/a and permitted as High-Lean Pork 3 – Hoover; HIGHLAND DAIRY, LLC d/b/a and permitted as Highland Dairy; GEERLINGS HILLSIDE FARMS, LLC d/b/a and permitted as Hillside Farms – Fennville, Hillside Farms-Overisel, and Hillside Farms-Overisel Hog Barns; HARVEST HILL FARM, by its permittee Ron Klein; HASS FEEDLOT, LLC, d/b/a and permitted as Hass Feedlot Home Farm and Hass Feedlot 2; HOLLOO FARMS, LLC, d/b/a and permitted as Holloo Farms; HURON PORK, LLC; INGLESIDE FARMS; J&J RUSSCHER PROPERTIES, LLC; J AND A PORK, LLC d/b/a and permitted as J and A Pork; JMAX LLC d/b/a and permitted as JMax Dairy; KARNEMAATS, LLC; KOBER FARMS, LLC; KY-10 FARMS, LLC d/b/a and permitted as KY-10 Farms; LAIER FARMS, INC. d/b/a and permitted as Laier Farms; LUCKY 7 DAIRY, LLC; LUCKY 7 FARMS, LLC; MYERS

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FARMS, LLC d/b/a and permitted as Myers Farms; NEW FLEVO DAIRY, INC. d/b/a and permitted as New Flevo Dairy; NOBIS FARMS, LLC d/b/a and permitted as Nobis Dairy Farms; NVF, INC.; OOMEN BROTHERS, INC. d/b/a and permitted as Oomen Brothers Hogs; PACKARD FARMS, LLC, d/b/a and permitted as Packard Farms; PAYLA MEADOWS, LLC; PEACEFUL ROAD FARM, LLC d/b/a and permitted as Peaceful Road Farms; PERFORMANCE FARMS, LLC; PETRO FARMS; POLL FARMS, INC.; PRAIRIE VIEW DAIRY, LLC; PRECISION PORK FARM, INC. d/b/a and permitted as Precision Pork Farm; PREFERRED HOG FARMS, INC. d/b/a and permitted as Preferred Hog 146th; THE PRESTON FARMS, LLC, d/b/a and permitted as Preston Hog Farms; PRIDGEON FARMS, LLC d/b/a and permitted as Pridgeon Farms; PSY FARMS; R&R PORK, LLC d/b/a and permitted as R&R Pork; RAPID RIDGE FARMS, LLC d/b/a and permitted as Rapid Ridge; RED ARROW DAIRY, LLC d/b/a and permitted as Red Arrow Dairy; RUGGLES BEEF FARMS, LLC d/b/a and permitted as Ruggles Beef Farms; S&T BARNS, LLC d/b/a and permitted as S&T Barns – Booth, S&T Barns - Fawn River, S&T Barns – TSC, and S&T Barns-Haenni; SAND CREEK DAIRY, LLC; SCENIC VIEW DAIRY, LLC d/b/a and permitted as Scenic View Dairy; SCHURING FARMS, LLC d/b/a and permitted as Schuring Farms; SCHURING SWINE, LLC; SCOTT MCKENZIE FARMS; SELDOM REST HOG FARM, LLC d/b/a and permitted as Seldom Rest Hog Farm; SIDE STREET PORK, LLC d/b/a and permitted as Side Street Pork; SKINNER FARMS, LLC d/b/a and permitted as Skinner Farms; STEENBLIK DAIRY INC.; STEWART FARMS, LLC d/b/a and permitted as Stewart Farms; STOREY FARMS, LLC; STOUGHTON CREEK FARMS, LLC d/b/a and permitted as Stoughton Creek Farms; SWISSLANE DAIRY FARMS, INC. d/b/a and permitted as Swisslane Farms; TERREHAVEN FARMS, INC. d/b/a and permitted as Terrehaven Farms; VALLEY VIEW PORK, LLC d/b/a and permitted as Valley View Pork; VAN OEFFELEN

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FARM SERVICES; VANDERPLOEG HOLSTEINS, LLC d/b/a and permitted as Vanderploeg Holsteins; VDS FARMS, LLC d/b/a and permitted as VDS Farms-Fulton and VDS Farms-S Avenue; VELD FARMS, LLC d/b/a and permitted as Veld Farms; WALNUTDALE FARMS, INC. d/b/a and permitted as Walnutdale Farms Dorr Twp; WIL-LE FARMS, INC. d/b/a and permitted as Wil-Le Farms; WILLOW CREEK FARMS; WILLOW POINT DAIRY, LLC d/b/a and permitted as Willow Point Dairy; WILSON CENTENNIAL FARM, LLC; BAKERLADS FARM; DEER CREEK POULTRY FARM; HARTLAND FARMS, INC. d/b/a and permitted as Hartland Farms; HUDSON DAIRY, LLC d/b/a and permitted as Hudson Dairy; MAYFLOWER DAIRY, LLC; MEADOW ROCK, LLC d/b/a and permitted as Meadow Rock Dairy; MEDINA DAIRY, LLC d/b/a and permitted as Medina Dairy; NOBEL FAMILY DAIRY, LLC; OTTAWA TURKEY FARM, permitted as Ottawa Turkey Farm 112th; and CROCKERY CREEK TURKEY FARMS, LLC d/b/a and permitted as Crockery Creek – 80th (together "Plaintiffs-Appellants") hereby claim an appeal from the Opinion and Order Granting Summary Disposition entered December 30, 2020 in the Michigan Court of Claims by Judge Cynthia Diane Stephens in Case No. 20-000148-MZ. No bond is required as a condition of this appeal.

Respectfully submitted,

CLARK HILL PLC

/s/ Zachary C. Larsen
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Dated: January 20, 2021

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STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN FARM BUREAU, et al.,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000148-MZ

Hon. Cynthia Diane Stephens

Pending before the Court is defendant's motion for summary disposition filed pursuant to MCR 2.116(C)(4) and (C)(8). Because plaintiffs did not follow the available administrative process to its completion, the Court lacks subject-matter jurisdiction, and the motion is GRANTED as a result. This matter is being decided without oral argument. See LCR 2.119(A)(6).

I. BACKGROUND

The group of plaintiffs in this case is comprised of various organizations of farmers as well as numerous livestock farms. The farms at issue are regulated as Concentrated Animal Feeding Operations (CAFOs). Defendant in this case is the Department of Environment, Great Lakes, and Energy which, pursuant to statute, "shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by waste disposal of any person." MCL 324.3103(1). As

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part of its statutory role, defendant is charged with developing and maintaining a permitting system to ensure certain environmental standards are met. MCL 324.3106.

At issue in this case is what is known as the 2020 CAFO General Permit issued in accordance with Mich Admin Code, R 323.2191(1), which authorizes defendant to issue a general permit if it determines that "certain discharges are appropriately and adequately controlled by a general permit." Defendant's issuance of general permits is subject to conditions set forth in the Administrative Code. Mich Admin Code, R 323.2192(2). Permits issued by defendant have a fixed term of not more than five years. Mich Admin Code, R 323.2150. The general permit at issue in this case was first issued in 2000 and it is reissued every five years. The version of the CAFO General Permit at issue in this case was subject to notice and public comment earlier this year.

A person who seeks to be covered by a general permit must apply for coverage under the permit. Mich Admin Code, R 323.2192(a). After defendant receives an application, it must determine whether the applicant meets the criteria for coverage under the general permit. Mich Admin Code, R 323.2192(b). A person is not covered under a permit until after defendant issues a "notice of coverage" stating that the person meets the criteria set forth in the general permit. *Id.* Anyone who is "aggrieved by the coverage may file a sworn petition for a contested case hearing on the matter" with the department as provided in the Administrative Procedures Act (APA). Mich Admin Code, R 323.2192(c). See also MCL 324.3113(3).

Defendant has not issued any certificates of coverage under the 2020 CAFO General Permit. Instead, given the existence of a currently pending contested case proceeding regarding

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the 2020 CAFO General Permit—discussed below—defendant has declined to issue new coverage certificates, meaning that applicants are currently covered by prior permitting requirements.

Attached to defendant's motion for summary disposition as Exhibit B is a Petition for Contested Case Hearing submitted by plaintiff Michigan Farm Bureau and many of the named plaintiffs in the instant action. The petition states that it is an appeal of 2020 CAFO General Permit. The petition seeks "a hearing to evaluate the legality of certain conditions imposed by the General Permit that have a tenuous relation to water quality and cumulatively will have a significant adverse impact on food production in Michigan." The petition raises many of the same provisions of the General Permit that are at issue in the instant case, save for plaintiffs' claims—discussed below—that the permit is a rule promulgated without compliance with the APA, as well as constitutional claims.

As is the case with the currently pending contested case hearing, the 2020 CAFO General Permit is the parties' focus in the instant action. According to the allegations contained in plaintiffs' complaint, the 2020 CAFO General Permit imposes costly and burdensome requirements on this state's agricultural economy by implementing certain changes to CAFOs, including implementing a three-month ban on applying manure to crop fields during the winter. Plaintiffs filed a six-count complaint in this Court in which they allege a number of shortcomings by defendant under the APA, as well as constitutional violations.

II. ANALYSIS

Defendant has asked this Court to grant summary disposition in its favor pursuant to MCR 2.116(C)(4), for the reason that plaintiffs failed to pursue available administrative remedies to their completion. "Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when

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a plaintiff has failed to exhaust its administrative remedies." *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

"The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009). If the Legislature has expressed an intent to grant a state agency exclusive jurisdiction over a particular type of dispute, "courts must decline to exercise jurisdiction until all administrative proceedings are complete." *L & L Wine & Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citation and quotation marks omitted). Courts are to presume "that an administrative agency will correct its errors if given a chance to do so." *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 664; 669 NW2d 326 (2003).

At issue in this case is the 2020 CAFO General Permit. Under MCL 324.3112(5) of the Natural Resources and Environmental Protection Act, any person who is aggrieved by "the reissuance, modification, suspension, or revocation of an existing permit of the department executed pursuant to this section may file a sworn petition with the department setting forth the grounds and reasons for the complaint and requesting a contested case hearing on the matter pursuant to the" APA. The APA sets forth procedures for contested cases under MCL 24.271-MCL 24.288, as well as for the issuance of final decisions that are subject to judicial review. Regarding the right to judicial review under the APA, MCL 24.301 expressly requires the exhaustion of available administrative remedies and states that "[w]hen a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law." Until a petitioner pursues

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an administrative challenge to the issuance of a final decision, exhaustion has not occurred, and the administrative claim is not subject to judicial review. See *Hendee v Putman Twp*, 486 Mich 556, 573; 786 NW2d 521 (2010).

In the instant case, plaintiffs have not exhausted their available administrative remedies, as evidenced by the petition for contested-case hearing attached to defendant's motion for summary disposition as Exhibit B. By all accounts, that contested-case hearing remains pending at this time, meaning that the administrative process has not run its course. And because the administrative process has not run its course, plaintiffs failed to exhaust all available administrative remedies. The failure to exhaust administrative remedies deprives this Court of jurisdiction and requires dismissal. See *Cummins*, 283 Mich App at 691.

In response to the above analysis, plaintiffs contend that they are entitled to file the instant case as an original action under the express terms of the APA. They argue that MCL 24.264 of the APA gives this Court jurisdiction to determine the validity of administrative rules by issuing a declaratory judgment. The Court does not agree with plaintiffs' assertions. MCL 24.264 provides in pertinent part that:

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

The manner for seeking declaratory judgment under MCL 24.264 does not apply to the instant case. By all accounts, the requirements contained in the 2020 CAFO General Permit were not formally promulgated in accordance with the APA's procedures. Indeed, plaintiffs fault the

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2020 CAFO General Permit for this very (alleged) shortcoming. This is significant, because the Court of Appeals has held that only rules that have been formally promulgated as "rules" under the APA may be subjected to a challenge under MCL 24.264. See *Jones v Dep't of Corrections*, 185 Mich App 134, 138; 460 NW2d 575 (1990). See also *Slis v State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 351211; 351212), slip op at 15 ("In our view, MCL 24.264 reveals a general legislative intent to provide an avenue for a party to challenge a rule promulgated by an agency . . . ."). In other words, plaintiffs may not simply characterize the 2020 CAFO General Permit's requirements as "rules" and thereby invoke MCL 24.264. See *Jones*, 185 Mich App at 138.

Plaintiffs also argue that MCR 2.605, the Declaratory Judgment rule, allows them to maintain an original action in this Court against defendant. MCR 2.605(A)(1) applies in "a case of actual controversy" and it permits a court to "declare the rights and other legal relations of an interested party seeking declaratory judgment . . . ." Here, as defendant points out, there is no actual controversy for purposes of the Court Rule because the available administrative process has not yet run its course. See *Citizens for Common Sense in Gov't*, 243 Mich App at 55.

Next, and in the alternative, plaintiffs argue that if the exhaustion requirement would ordinarily apply, it should be excused in this case. They first contend that exhaustion of administrative remedies is unnecessary because they are challenging defendant's authority to act. See *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 192; 590 NW2d 747 (1998). However, the Court finds plaintiffs' citation to *Huggett* and the principle recognized therein to be inapposite. In *Huggett*, the plaintiffs' failure to exhaust administrative remedies was excused because the plaintiffs "did not challenge the propriety of defendant's denial of the permit but sought a declaration that defendant had no statutory authority to require a permit in the first place."

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The plaintiffs in that case argued that the Legislature "exempted the proposed activity from defendant's regulation." *Id.* Here, by contrast, there is no dispute that defendant has statutory authority to require and to issue the permits. There is also no dispute that defendant has statutory authority to regulate plaintiffs. The dispute raised by plaintiffs concerns the *manner* of that regulation. That dispute does not implicate defendant's authority to regulate plaintiffs in the first instance, and it does not excuse plaintiffs' failure to exhaust available administrative remedies.

Plaintiffs next argue that they are raising pure legal questions that do not require the development of a factual record, meaning that one of the typical rationales for exhaustion—deferring to an agency's ability to employ its technical expertise in a complex factual setting—is not present in this case. This state's jurisprudence recognizes an exception to the exhaustion requirement when judgment is sought on undisputed facts. See *L & L Wine & Liquor Corp*, 274 Mich App at 361-362. Here, though, plaintiffs' complaint raises factual issues which should first be examined during the administrative process. In this respect, plaintiffs are essentially questioning the necessity and efficacy of certain matters included within the 2020 CAFO General Permit. These allegations are typified, among many others, in ¶¶ 332, 338, 345, 347, and 355 of their complaint. These fact-intensive issues require the development of a factual record. Plaintiffs have also alleged in ¶ 363 of their complaint that some of the permit requirements are not "required by any law," such that defendant lacked the authority to issue them. However, defendant points out that MCL 324.3101 requires it to develop standards to assure certain regulatory goals are met. Comparing the statutory goals to the permitting conditions and determining whether the permitting conditions further those goals will also require the development of a factual record that is best suited for the administrative process.

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Next, plaintiffs argue that the presence of their constitutional claims excuses the exhaustion of administrative remedies. The assertion of constitutional questions can excuse a failure to exhaust available administrative remedies. See *Papas*, 257 Mich App at 664. However, merely characterizing an issue by using constitutional terms does not excuse the exhaustion requirement, particularly where there remain factual issues for the agency to resolve. See *id.* Here, the presence of the factual issues noted above convinces the Court that the presence of plaintiffs' constitutional claims does not excuse exhaustion. In addition, it must be remembered that plaintiffs are alleging that they suffered constitutional violations as part of the permitting process. This permitting process has not yet run its course, meaning that any errors that have allegedly occurred have not been submitted to defendant for correction. Again, "[i]t is presumed that an administrative agency will correct its errors"—if any—"if given a chance to do so." *Papas*, 257 Mich App at 664.

Finally, plaintiffs argue that exhaustion is not applicable to the farm plaintiffs who lack standing to pursue an administrative appeal in the first instance. These are plaintiffs that, according to defendant, are "individually-permitted" and who are not regulated under general permits. According to plaintiff, if there is no remedy to exhaust in the administrative proceeding due to these plaintiffs' lack of standing in the pending administrative process, there can be no exhaustion requirement. This argument is unconvincing. As an initial matter, plaintiffs have not specifically identified these purported plaintiffs. Furthermore, plaintiffs have failed to explain how plaintiffs who are not subject to general permits would have standing—either in the administrative process or in this Court, for that matter—to challenge general permits to which they are not subject. See *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (describing standing, in general). And in any event, where plaintiffs have not meaningfully developed this

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argument, the Court declines to find that it represents a reason to excuse the exhaustion of administrative remedies.

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED under MCR 2.116(C)(4) and this matter is DISMISSED because plaintiffs failed to exhaust available administrative remedies.[1]

December 30, 2020

Cynthia Diane Stephens
Judge, Court of Claims

[1] Because the Court lacks subject-matter jurisdiction, it will not address defendant's contentions regarding whether plaintiffs can state a claim on which relief can be granted.

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN FARM BUREAU; MICHIGAN MILK PRODUCERS ASSOCIATION; MICHIGAN PORK PRODUCERS ASSOCIATION; MICHIGAN ALLIED POULTRY INDUSTRIES; DAIRY FARMERS OF AMERICA; SELECT MILK PRODUCERS, INC.; MICHIGAN CATTLEMEN'S ASSOCIATION; SNIDER FARMS, LLC d/b/a and permitted as Airport View Turkeys; ALPINE PORK, LLC; ATE FARMS, LLC; BEBOW DAIRY FARM, INC. d/b/a and permitted as Bebow Dairy Farm; BENNETT FARMS LIVESTOCK, LLC d/b/a and permitted as Bennet Farms Livestock; BLEICH DAIRY; BROOK VIEW DAIRY, LLC d/b/a and permitted as Brook View Dairy; BURNS POULTRY FARMS, INC.; CAR-MIN-VU FARMS, LLC d/b/a and permitted as Car-Min-Vu Dairy; CARY DAIRY FARM, INC.; CARY'S PIONEER FARM, INC.; CENTERWOOD FARMS, LLC; CENTRAL MICHIGAN MILK PRODUCERS, LLC d/b/a and permitted as Central Michigan Milk Production; CLOVER FARMS, LLC d/b/a and permitted as Clover Family Farms; CONTRACT FINISHERS, INC.; COURTER FARMS EAST FEEDLOT, LLC d/b/a and permitted as Courter Farms East; COURTER FARMS WEST FEEDLOT, LLC d/b/a and permitted as Courter Farms West; CROSSROADS DAIRY, LLC; D & K FARMS; DEN DULK DAIRY FARM, LLC; DEYOUNG PORK, INC. d/b/a and permitted as DeYoung Pork Inc.-Plainwell; DOUBLE QUAD FARMS, LLC d/b/a and permitted as Double Quad Farms; DUTCH MEADOWS DAIRY, LLC d/b/a and permitted as Dutch Meadows Dairy; DYKHUIS FARMS, INC. d/b/a and permitted as Baseline Farm, Ehinger Farm, Riverbend Farm, Shamrock Farm, and Village Central Sandy Ridge; EDGE WOOD DAIRY, LLC d/b/a and permitted as Edge Wood Dairy; FAIRGROVE FARMS, INC. d/b/a and permitted as Fairgrove Farms; GERNAAT FAMILY FARMS; GW DAIRY, LLC; HALBERT DAIRY, LLC d/b/a and permitted as Halbert Dairy; DJN CATTLE FARMS, INC. d/b/a and permitted as Halliwill Farms; HICKORY GABLES, INC. d/b/a and permitted as Hickory

Court of Claims Case No: 20-000148-MZ

Hon. Cynthia Diane Stephens

Court of Appeals Docket No:

STATEMENT REGARDING HEARING TRANSCRIPT

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Gables; HIGH LEAN PORK, INC. d/b/a and permitted as High-Lean Pork 3 – Hoover; HIGHLAND DAIRY, LLC d/b/a and permitted as Highland Dairy; GEERLINGS HILLSIDE FARMS, LLC d/b/a and permitted as Hillside Farms – Fennville, Hillside Farms-Overisel, and Hillside Farms-Overisel Hog Barns; HARVEST HILL FARM, by its permittee Ron Klein; HASS FEEDLOT, LLC, d/b/a and permitted as Hass Feedlot Home Farm and Hass Feedlot 2; HOLLOO FARMS, LLC, d/b/a and permitted as Holloo Farms; HURON PORK, LLC; INGLESIDE FARMS; J&J RUSSCHER PROPERTIES, LLC; J AND A PORK, LLC d/b/a and permitted as J and A Pork; JMAX LLC d/b/a and permitted as JMax Dairy; KARNEMAATS, LLC; KOBER FARMS, LLC; KY-10 FARMS, LLC d/b/a and permitted as KY-10 Farms; LAIER FARMS, INC. d/b/a and permitted as Laier Farms; LUCKY 7 DAIRY, LLC; LUCKY 7 FARMS, LLC; MYERS FARMS, LLC d/b/a and permitted as Myers Farms; NEW FLEVO DAIRY, INC. d/b/a and permitted as New Flevo Dairy; NOBIS FARMS, LLC d/b/a and permitted as Nobis Dairy Farms; NVF, INC.; OOMEN BROTHERS, INC. d/b/a and permitted as Oomen Brothers Hogs; PACKARD FARMS, LLC, d/b/a and permitted as Packard Farms; PAYLA MEADOWS, LLC; PEACEFUL ROAD FARM, LLC d/b/a and permitted as Peaceful Road Farms; PERFORMANCE FARMS, LLC; PETRO FARMS; POLL FARMS, INC.; PRAIRIE VIEW DAIRY, LLC; PRECISION PORK FARM, INC. d/b/a and permitted as Precision Pork Farm; PREFERRED HOG FARMS, INC. d/b/a and permitted as Preferred Hog 146th; THE PRESTON FARMS, LLC, d/b/a and permitted as Preston Hog Farms; PRIDGEON FARMS, LLC d/b/a and permitted as Pridgeon Farms; PSY FARMS; R&R PORK, LLC d/b/a and permitted as R&R Pork; RAPID RIDGE FARMS, LLC d/b/a and permitted as Rapid Ridge; RED ARROW DAIRY, LLC d/b/a and permitted as Red Arrow Dairy; RUGGLES BEEF FARMS, LLC d/b/a and permitted as Ruggles Beef Farms; S&T BARNS, LLC d/b/a and permitted as S&T Barns – Booth, S&T Barns - Fawn River, S&T Barns – TSC, and S&T Barns-Haenni; SAND CREEK DAIRY, LLC; SCENIC VIEW DAIRY, LLC d/b/a and permitted as

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Plaintiffs-Appellants,

v

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MICHIGAN DEPARTMENT OF ENVIRONMENT,
GREAT LAKES, AND ENERGY,

Defendant-Appellee.

_____/

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_____/

STATEMENT REGARDING HEARING TRANSCRIPT

Plaintiffs-Appellants by and through their attorneys Clark Hill PLC and pursuant to MCR 7.204(C)(2), state that there is no record to be transcribed in this matter.

Respectfully submitted,

CLARK HILL PLC

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Dated: January 20, 2021

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN FARM BUREAU; MICHIGAN MILK PRODUCERS ASSOCIATION; MICHIGAN PORK PRODUCERS ASSOCIATION; MICHIGAN ALLIED POULTRY INDUSTRIES; DAIRY FARMERS OF AMERICA; SELECT MILK PRODUCERS, INC.; MICHIGAN CATTLEMEN'S ASSOCIATION; SNIDER FARMS, LLC d/b/a and permitted as Airport View Turkeys; ALPINE PORK, LLC; ATE FARMS, LLC; BEBOW DAIRY FARM, INC. d/b/a and permitted as Bebow Dairy Farm; BENNETT FARMS LIVESTOCK, LLC d/b/a and permitted as Bennet Farms Livestock; BLEICH DAIRY; BROOK VIEW DAIRY, LLC d/b/a and permitted as Brook View Dairy; BURNS POULTRY FARMS, INC.; CAR-MIN-VU FARMS, LLC d/b/a and permitted as Car-Min-Vu Dairy; CARY DAIRY FARM, INC.; CARY'S PIONEER FARM, INC.; CENTERWOOD FARMS, LLC; CENTRAL MICHIGAN MILK PRODUCERS, LLC d/b/a and permitted as Central Michigan Milk Production; CLOVER FARMS, LLC d/b/a and permitted as Clover Family Farms; CONTRACT FINISHERS, INC.; COURTER FARMS EAST FEEDLOT, LLC d/b/a and permitted as Courter Farms East; COURTER FARMS WEST FEEDLOT, LLC d/b/a and permitted as Courter Farms West; CROSSROADS DAIRY, LLC; D & K FARMS; DEN DULK DAIRY FARM, LLC; DEYOUNG PORK, INC. d/b/a and permitted as DeYoung Pork Inc.-Plainwell; DOUBLE QUAD FARMS, LLC d/b/a and permitted as Double Quad Farms; DUTCH MEADOWS DAIRY, LLC d/b/a and permitted as Dutch Meadows Dairy; DYKHUIS FARMS, INC. d/b/a and permitted as Baseline Farm, Ehinger Farm, Riverbend Farm, Shamrock Farm, and Village Central Sandy Ridge; EDGE WOOD DAIRY, LLC d/b/a and permitted as Edge Wood Dairy; FAIRGROVE FARMS, INC. d/b/a and permitted as Fairgrove Farms; GERNAAT FAMILY FARMS; GW DAIRY, LLC; HALBERT DAIRY, LLC d/b/a and permitted as Halbert Dairy; DJN CATTLE FARMS, INC. d/b/a and permitted as Halliwill Farms; HICKORY GABLES, INC. d/b/a and permitted as Hickory

Court of Claims Case No: 20-000148-MZ

Hon. Cynthia Diane Stephens

Court of Appeals Docket No:

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Gables; HIGH LEAN PORK, INC. d/b/a and permitted as High-Lean Pork 3 – Hoover; HIGHLAND DAIRY, LLC d/b/a and permitted as Highland Dairy; GEERLINGS HILLSIDE FARMS, LLC d/b/a and permitted as Hillside Farms – Fennville, Hillside Farms-Overisel, and Hillside Farms-Overisel Hog Barns; HARVEST HILL FARM, by its permittee Ron Klein; HASS FEEDLOT, LLC, d/b/a and permitted as Hass Feedlot Home Farm and Hass Feedlot 2; HOLLOO FARMS, LLC, d/b/a and permitted as Holloo Farms; HURON PORK, LLC; INGLESIDE FARMS; J&J RUSSCHER PROPERTIES, LLC; J AND A PORK, LLC d/b/a and permitted as J and A Pork; JMAX LLC d/b/a and permitted as JMax Dairy; KARNEMAATS, LLC; KOBER FARMS, LLC; KY-10 FARMS, LLC d/b/a and permitted as KY-10 Farms; LAIER FARMS, INC. d/b/a and permitted as Laier Farms; LUCKY 7 DAIRY, LLC; LUCKY 7 FARMS, LLC; MYERS FARMS, LLC d/b/a and permitted as Myers Farms; NEW FLEVO DAIRY, INC. d/b/a and permitted as New Flevo Dairy; NOBIS FARMS, LLC d/b/a and permitted as Nobis Dairy Farms; NVF, INC.; OOMEN BROTHERS, INC. d/b/a and permitted as Oomen Brothers Hogs; PACKARD FARMS, LLC, d/b/a and permitted as Packard Farms; PAYLA MEADOWS, LLC; PEACEFUL ROAD FARM, LLC d/b/a and permitted as Peaceful Road Farms; PERFORMANCE FARMS, LLC; PETRO FARMS; POLL FARMS, INC.; PRAIRIE VIEW DAIRY, LLC; PRECISION PORK FARM, INC. d/b/a and permitted as Precision Pork Farm; PREFERRED HOG FARMS, INC. d/b/a and permitted as Preferred Hog 146th; THE PRESTON FARMS, LLC, d/b/a and permitted as Preston Hog Farms; PRIDGEON FARMS, LLC d/b/a and permitted as Pridgeon Farms; PSY FARMS; R&R PORK, LLC d/b/a and permitted as R&R Pork; RAPID RIDGE FARMS, LLC d/b/a and permitted as Rapid Ridge; RED ARROW DAIRY, LLC d/b/a and permitted as Red Arrow Dairy; RUGGLES BEEF FARMS, LLC d/b/a and permitted as Ruggles Beef Farms; S&T BARNS, LLC d/b/a and permitted as S&T Barns – Booth, S&T Barns - Fawn River, S&T Barns – TSC, and S&T Barns-Haenni; SAND CREEK DAIRY, LLC; SCENIC VIEW DAIRY, LLC d/b/a and permitted as

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Scenic View Dairy; SCHURING FARMS, LLC d/b/a and permitted as Schuring Farms; SCHURING SWINE, LLC; SCOTT MCKENZIE FARMS; SELDOM REST HOG FARM, LLC d/b/a and permitted as Seldom Rest Hog Farm; SIDE STREET PORK, LLC d/b/a and permitted as Side Street Pork; SKINNER FARMS, LLC d/b/a and permitted as Skinner Farms; STEENBLIK DAIRY INC.; STEWART FARMS, LLC d/b/a and permitted as Stewart Farms; STOREY FARMS, LLC; STOUGHTON CREEK FARMS, LLC d/b/a and permitted as Stoughton Creek Farms; SWISSLANE DAIRY FARMS, INC. d/b/a and permitted as Swisslane Farms; TERREHAVEN FARMS, INC. d/b/a and permitted as Terrehaven Farms; VALLEY VIEW PORK, LLC d/b/a and permitted as Valley View Pork; VAN OEFFELEN FARM SERVICES; VANDERPLOEG HOLSTEINS, LLC d/b/a and permitted as Vanderploeg Holsteins; VDS FARMS, LLC d/b/a and permitted as VDS Farms-Fulton and VDS Farms-S Avenue; VELD FARMS, LLC d/b/a and permitted as Veld Farms; WALNUTDALE FARMS, INC. d/b/a and permitted as Walnutdale Farms Dorr Twp; WIL-LE FARMS, INC. d/b/a and permitted as Wil-Le Farms; WILLOW CREEK FARMS; WILLOW POINT DAIRY, LLC d/b/a and permitted as Willow Point Dairy; WILSON CENTENNIAL FARM, LLC; BAKERLADS FARM; DEER CREEK POULTRY FARM; HARTLAND FARMS, INC. d/b/a and permitted as Hartland Farms; HUDSON DAIRY, LLC d/b/a and permitted as Hudson Dairy; MAYFLOWER DAIRY, LLC; MEADOW ROCK, LLC d/b/a and permitted as Meadow Rock Dairy; MEDINA DAIRY, LLC d/b/a and permitted as Medina Dairy; NOBEL FAMILY DAIRY, LLC; OTTAWA TURKEY FARM, permitted as Ottawa Turkey Farm 112th; and CROCKERY CREEK TURKEY FARMS, LLC d/b/a and permitted as Crockery Creek – 80th,

Plaintiffs-Appellants,

v

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MICHIGAN DEPARTMENT OF ENVIRONMENT,
GREAT LAKES, AND ENERGY,

Defendant-Appellee.
_____/

CLARK HILL PLC
Attorneys for Plaintiffs-Appellants
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RosaJ4@michigan.gov

_____/

PROOF OF SERVICE

I hereby certify that on January 20, 2021, copies of:

1. Plaintiffs-Appellants' Claim of Appeal;

2. The Court of Claims December 30, 2020 Opinion and Order Granting Defendant-Appellee's Motion for Summary Disposition;

3. The Statement Regarding Transcript indicating no record was transcribed in this matter;

4. A copy of this Proof of Service;

5. The Court of Claims Register of Actions; and

6. The Jurisdictional Checklist.

were served on the Court of Claims by mailing the same with first class postage fully prepaid

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and addressed as indicated below and with the Clerk of this Court using the MiFile system which will send notification of such filing to all of the parties of record:

Michigan Court of Claims
Hall of Justice
925 W. Ottawa St.
P.O. Box 30185
Lansing, MI 48909

Elizabeth Morrisseau
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Respectfully submitted,

CLARK HILL PLC

/s/ Zachary C. Larsen
Michael J. Pattwell (P72419)
Zachary C. Larsen (P72189)
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Dated: January 20, 2021

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CASE

Judicial Officer	Date Filed	Adjudication	Status
STEPHENS, CYNTHIA	8/6/20	SUMMARY DISPOSITION 12/30/20	CLOSED 12/30/20

PARTICIPANTS

PLAINTIFF 1	MICHIGAN FARM BUREAU	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 2	MICHIGAN MILK PRODUCERS ASSOCIATION	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 3	MICHIGAN PORK PRODUCES ASSOCIATION	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 4	MICHIGAN ALLIED POULTRY INDUSTRIES	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 5	DAIRY FARMERS OF AMERICA	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 6	SELECT MILK PRODUCERS, INC.	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 8	SNIDER FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 10	ATE FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 11	BEBOW DAIRY FARM, INC.	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 12	BENNETT FARMS LIVESTOCK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 13	BLEICH DAIRY	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 14	BROOK VIEW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 15	BURNS POULTRY FARMS, INC.	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 16	CAR-MIN-VU FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 17	MICHIGAN CATTLEMEN'S ASSOCIATION	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 17	ALPINE PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 18	CARY DAIRY FARM, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 19	CARY'S PIONEER FARM, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 20	CENTERWOOD FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 21	CENTRAL MICHIGAN MILK PRODUCERS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 22	CLOVER FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 23	CONTRACT FINISHERS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 24	COURTER FARMS EAST FEEDLOT, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 25	COURTER FARMS WEST FEEDLOT, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 26	CROSSROADS DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 27	D&K FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 28	DEN DULK FAIRY FARM, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 29	DEYOUNG PORK, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 30	DOUBLE QUAD FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 31	DUTCH MEADOWS DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 32	DYKHUIS FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 33	EDGE WOOD DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 34	FAIRGROVE FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 35	GERNAAT FAMILY FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 36	GW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 37	HALBERT DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 38	DJN CATTLE FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 39	HICKORY GABLES, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 40	HIGH LEAN PORK, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 41	HIGHLAND DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 42	GEERLINGS HILLSIDE FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 43	HARVEST HILL FARM	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 44	HASS FEEDLOT, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 45	HOLLOO FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 46	HURON PARK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 47	INGLESIDE FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 48	J&J RUSSCHER PROPERTIES, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 49	J AND A PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 50	JMAX LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 51	KARNEMAATS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 52	KOBER FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 53	KY-10 FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 54	LAIER FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 55	LUCKY 7 DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 56	LUCKY 7 FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 57	MYERS FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 58	NEW FLEVO DAIRY, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 59	NOBIS FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 60	NVF, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 61	OOMEN BROTHERS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 62	PACKARD FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 63	PAYLA MEADOWS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 64	PEACEFUL ROAD FARM, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 65	PERFORMANCE FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 66	PETRO FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 67	POLL FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 68	PRAIRIE VIEW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 69	PRECISION PORK FARM, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 70	PREFERRED HOG FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 71	THE PRESTON FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 72	PRIDGEON FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 73	PSY FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 74	R&R PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 75	RAPID RIDGE FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 76	RED ARROW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 77	RUGGLES BEEF FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 78	S&T BARNS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 79	SAND CREEK DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 80	SCENIC VIEW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 81	SCHURING FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 82	SCHURING SWINE, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 83	SCOTT MCKENZIE FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 84	SELDOM REST HOG FARM, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 85	SIDE STREET PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 86	SKINNER FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 87	STEENBLIK DAIRY INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 88	STEWART FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 89	STOREY FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 90	STOUGHTON CREEK FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 91	SWISSLANE DAIRY FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 92	TERREHAVEN FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 93	VALLEY VIEW PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 94	VAN OEFFELEN FARM SERVICES	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 95	VANDERPLOEG HOLSTEINS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 96	VDS FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 97	VELD FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 98	WALNUTDALE FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 99	WIL-LE FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 100	WILLOW CREEK FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 101	WILLOW POINT DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 102	WILSON CENTENNIAL FARM, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 103	BAKERLADS FARM	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 104	DEER CREEK POULTRY FARM	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 105	HARTLAND FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 106	HUDSON DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 107	MARYFLOWER DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 108	MEADOW ROCK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 109	MEDINA DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 110	NOBEL FAMILY DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 111	OTTAWA TURKEY FARM	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 112	CROCKERY CREEK TURKEY FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
DEFENDANT 1	MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY	FILED: 8/6/20
	ATTY: ELIZABETH ANNE MORRISSEAU # 81899 PRIMARY RETAINED	

RECEIVABLES/PAYMENTS

	Assessed	Paid/Adjusted	Balance
PTF 1 MICHIGAN FARM BUREAU	$175.00	$175.00	$0.00

	Assessed	Paid/Adjusted	Balance
DEF 1 MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, A	$20.00	$20.00	$0.00

CHRONOLOGICAL LIST OF ACTIVITIES

Activity Date	Activity		User	Entry Date
8/6/20	SUMMONS AND COMPLAINT	$175.00	amd mmla	8/6/20 8/7/20
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
	PTF 8			
	PTF 10			
	PTF 11			
	PTF 12			
	PTF 13			
	PTF 14			
	PTF 15			
	PTF 16			
	PTF 17			
	PTF 17			
	DEF 1			
8/6/20	JUDICIAL OFFICER ASSIGNED TO STEPHENS, CYNTHIA DIANE 28417		amd	8/6/20
8/6/20	RECEIVABLE ELECTRONIC FILING SYSTEM FEE	$25.00	amd	8/6/20

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Activity Date	Activity		User	Entry Date
8/6/20	RECEIVABLE FILING FEE	$150.00	amd	8/6/20
8/7/20	PAYMENT	$175.00	mmla	8/7/20
	RECEIPT NUMBER: COC-LAN.0004668			
	METHOD: CHECK $175.00			
9/9/20	MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) AND (C)(8) AND BRIEF IN SUPPORT (ORAL ARGUMENT REQUESTED)	$20.00	mmla amd	9/9/20 11/13/20
	DEF 1			
9/9/20	RECEIVABLE MOTION FEE	$20.00	mmla	9/9/20
9/11/20	STIPULATION AND PROPOSED ORDER SETTING DATE FOR RESPONSE BRIEF WITH PROOF OF SERVICE		mmla	9/11/20
9/30/20	BRIEF FILED IN RESPONSE TO DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) AND (C)(8) (ORAL ARGUMENT REQUESTED) WITH PROOF OF SERVICE		mmla	9/30/20
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
	PTF 8			
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Activity Date	Activity		User	Entry Date
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	PTF 105			
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	PTF 108			
	PTF 109			
	PTF 110			
	PTF 111			
	PTF 112			
10/5/20	REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION (ORAL ARGUMENT REQUESTED) WITH PROOF OF SERVICE		mmla	10/5/20
	DEF 1			
11/13/20	PAYMENT	$20.00	amd	11/13/20
	RECEIPT NUMBER: COC-LAN.0004985			
	METHOD: ELECTRONIC FUND TRANSFER $20.00			
12/30/20	OPINION AND ORDER		mmla	12/30/20
	DEF 1			
12/30/20	CLOSE CASE STATUS		mmla	12/30/20

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Trial Court/Tribunal Name:	**Court of Appeals, State of Michigan**	CASE NO.
State of Michigan Court of Claims	**Jurisdictional Checklist**	Trial Court/Tribunal: 20-000148-MZ Court of Appeals:

Case Name: MICHIGAN FARM BUREAU, ET AL. v MEGLE

INSTRUCTIONS: Please complete this checklist and file with your claim of appeal. **ALL** of the numbered items are required. Check each box as you confirm that each item is being filed.

☑ 1. A **signed** claim of appeal showing the correct lower court number(s). [MCR 7.204(B)(1) & (D).]

☑ 2. A filing fee of $375.00 or appropriate fee substitute. [MCR 7.202(3) & 7.204(B)(2).] (Where multiple lower court or tribunal numbers are involved, an additional filing fee may be required. Appellants will be advised of any additional amount required.)

☑ 3. A copy of the order you are appealing. [MCR 7.204(C)(1).] (This is the order deciding the merits and not an order denying reconsideration, new trial, or other post-judgment relief.)

☐ 4. Evidence that the necessary transcript has been ordered. [MCR 7.204(C)(2).] (Only one item from a through g is required).

- ☑ a. No transcript will be filed. [MCR 7.204(C)(2).]
- ☐ b. The transcript has already been filed. [MCR 7.210(B)(1)(a).]
- ☐ c. The complete transcript has been ordered. [MCR 7.210(B)(1)(a).]
- ☐ d. This appeal is from a probate court proceeding which does not require a complete transcript. [MCR 7.210(B)(1)(b).]
- ☐ e. A motion has been filed in the lower court or tribunal for submission of the appeal on less than the complete transcript. [MCR 7.210(B)(1)(c).]
- ☐ f. The parties have stipulated to submission of the appeal on less than the complete transcript. [MCR 7.210(B)(1)(d).]
- ☐ g. The parties have stipulated to a statement of facts. [MCR 7.210(B)(1)(e).]

☑ 5. Proof of service demonstrating that all other parties have been served. [MCR 7.204(C)(3).] (***Even if a party is not an appellee, they must be served.***)

☑ 6. A **current** register of actions from the lower court or tribunal. [MCR 7.204(C)(5).]

Finality of Order Being Appealed (Check the box that demonstrates your claim of appeal is by right. If neither applies, you do not have an appeal by right.)

☑ The claim of appeal is from an order defined as a final order by MCR 7.202(6) or MCR 5.801(A). [MCR 7.203(A)(1).] Please specify which category of final order applies: MCR 7.202(6)(a)(i)

☑ The claim of appeal is from an order which is designated by statute, court rule, or case law as an order appealable by right to the Court of Appeals. Please specify the authority under which you have an appeal by right: MCL 600.6446(1); MCL 600.308(1)

1/20/21
Date

/s/ Zachary C. Larsen
Preparer's Signature

4/19

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN FARM BUREAU, *et al.*

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellee.
_____/

Court of Claims Case No: 20-000148-MZ

Hon. Cynthia Diane Stephens

Court of Appeals Docket No: 356088

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_____/

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants Michigan Farm Bureau, *et al*., timely filed a claim of appeal on January 20, 2021 from a December 30, 2020 Opinion and Order of the Michigan Court of Claims granting summary disposition and dismissing the case. That order was a "final order" per MCR 7.202(6)(a)(*i*). Therefore, this Court has jurisdiction under MCR 7.203(A)(1), MCL 600.6446(1), and MCL 600.308(1).

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STATEMENT OF QUESTIONS PRESENTED

1. The Administrative Procedures Act, MCL 24.201 *et* seq., provides an action for declaratory judgment to determine "the validity or applicability of a *rule*," including whether it is procedurally valid, and the APA expressly defines a "rule" without reference to its promulgation. MCL 24.207. Plaintiffs filed this suit challenging conditions of MEGLE's General Permit as invalid, unpromulgated rules. Did the Court of Claims err in holding that the declaratory action provided by MCL 24.264 is limited to *promulgated* "rules" and that such an action does not allow a party to challenge a rule's validity based on an agency's failure to promulgate the rule?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

2. Plaintiffs need only "an adverse interest necessitating a sharpening of the issues raised" to file a declaratory judgment action under MCR 2.605(A). Plaintiffs are livestock farms who are mandated to obtain coverage under an NPDES permit at threat of significant civil penalties or even criminal prosecution, and MEGLE has issued a final 2020 General Permit with significant regulatory mandates and defended those mandates in litigation. Have Plaintiffs presented an "actual controversy" that supports the filing of a declaratory judgment action?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

3. The doctrine of exhaustion of administrative remedies applies only where there is a clear legislative intent to grant an agency *exclusive* jurisdiction over a subject. The Legislature has granted courts the ability to determine "the validity . . . of a rule" under the APA, and MEGLE has no similar exclusive grant of jurisdiction to self-regulate its compliance with the APA. Does the doctrine of administrative remedies deprive the Court of Claims of jurisdiction to decide MEGLE's compliance with the APA?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Yes.

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4. The exhaustion of administrative remedies doctrine is both flexible and riddled with exceptions, including a longstanding exception for legal issues and an exception for challenges to an agency's authority to act. Plaintiffs here filed a legal challenge to the authority of MEGLE to incorporate unpromulgated rules as conditions of a legally mandatory permit. Did the Court of Claims err in refusing to apply those exceptions to exhaustion?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

5. Exhaustion of administrative remedies is not required where a plaintiff has no remedy to exhaust. MEGLE has affirmatively contended that individually permitted and "no potential to discharge" CAFOs—several of whom are Plaintiffs here—have no ability to appeal the General Permit within the agency. Did the Court of Claims err in dismissing those Plaintiffs and the associations who represent them based on an alleged "failure to exhaust" unavailable administrative remedies?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

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CONSTITUTIONAL PROVISION, STATUTES, AND COURT RULE INVOLVED

U.S. Constitution

". . . nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const., Am. XIV, § 1.

Statutes

"Unless an exclusive procedure or remedy is provided by a statute governing the agency, *the validity or applicability of a rule*, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, *may be determined in an action for declaratory judgment* if the court finds that the rule or its threatened application interferes with or impairs or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff." MCL 24.264 (emphasis added).

"*'Rule' means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency*, or that prescribes the organization, procedure, or practice of the agency . . . ." MCL 24.207 (emphasis added).

" . . . a rule is not valid unless it is processed in compliance with section 66, if applicable, section 42, and in substantial compliance with section 41(2), (3), (4), and (5)." MCL 24.243(1).

Court Rule

"In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A).

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INTRODUCTION

When the Michigan Department of Environment, Great Lakes, and Energy ("MEGLE") sought to impose novel, industrywide regulations on Michigan's large livestock farms without promulgating those standards under the Administrative Procedures Act, MCL 24.201 *et seq.* , ("APA"), as "rules," the affected farms and farm associations ("Farm Plaintiffs") filed a declaratory judgment action to challenge MEGLE's authority to legislate through a permit. The lower court improperly dismissed that action. The court reasoned that: (1) the APA does not allow challenges to "rules" when an agency wholly circumvents rulemaking procedures—that act only allows challenges to *lesser* procedural deviations; and (2) in any event, affected persons must first ask MEGLE to self-adjudicate the agency's compliance with the APA. This appeal now asks two fundamental questions: what types of challenges may be brought to determine "the validity . . . of *a rule*" under MCL 24.264 and who must decide those questions?

On the first, a "rule" is expressly defined under the APA. MCL 24.207. And MCL 24.264 is not limited to a certain type of challenge. Thus, Farm Plaintiffs contend that section provides a cause of action for affected persons to bring *any* available challenge to "the validity" of a "rule" under the Legislature's controlling definition. That includes challenging a "rule" on the basis of an agency's failure to promulgate the rule when the agency was required to do so.

The lower court held the opposite. Relying on *Jones v Department of Corrections*, 185 Mich App 134; 460 NW2d 575 (1990) . But *Jones* is non-binding, MCR 7.215(J)(1), and it was built on a faulty foundation: a case defining the word "rule" by reference to the conditions that make a "*valid* rule." That constrained definition is both contrary to the exclusive statutory definition of a "rule," (MCL 24.207), and it is illogically circular. Why would the Legislature

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limit challenges to "the validity . . . of a rule" to only already "*valid* rules"? It did not. This Court must disregard *Jones* and instead apply the APA's controlling definition.

On the second question, the Court of Claims is the proper actor to decide Farm Plaintiffs' challenge. MCL 24.264 confers jurisdiction on the *courts* to determine a rule's validity. It is not the exclusive province of an administrative agency to judge its own compliance with the APA. So, the "exhaustion of administrative remedies" is not required.

Again, the lower court held the opposite, wrongly imposing an "exhaustion" requirement as a prerequisite to having courts determine a purely legal question about whether the agency complied with the APA. But there are no indicia that the Legislature intended for agencies to regulate themselves on questions concerning their procedural adherence to the APA. And, in any event, exhaustion is not required when a case seeks a threshold legal determination or challenges an agency's authority to act. This case presents both.

Relatedly, the lower court also incorrectly dismissed several Farm Plaintiffs on the basis of exhaustion when MEGLE adamantly contends that these Plaintiffs *have no remedy to exhaust*. That error is self-evident. Further, to the extent that the court ostensibly dismissed these Plaintiffs for lacking standing, MEGLE did not argue that issue in its motion and that question was never presented to the Plaintiffs. Accordingly, the trial court's dismissal violated due process by depriving the Plaintiffs of notice and an opportunity to respond to this issue.

For those reasons, Farm Plaintiffs ask this Court to reverse the lower court and remand for a determination of the legal issues presented in this declaratory judgment action.

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STATEMENT OF FACTS

Regulation of CAFOs under the Clean Water Act and Part 31

Michigan's largest livestock farms, known in regulatory vernacular as "Concentrated Animal Feeding Operations" (or "CAFOs"), are subject to extensive existing environmental regulation under the statutory and regulatory regimes of both the Clean Water Act, 33 USC 1251 *et seq.*, and Part 31 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.3101, *et seq*. Per the terms of the Clean Water Act, large livestock farms are designated as CAFOs, and CAFOs are regulated as point sources. 33 USC 1362(14) (defining "point source" as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel . . . from which pollutants are or may be discharged.") (emphasis added).

As point sources, CAFOs are defined as the "*lot or facility where* . . . : (*i*) *Animals* . . . *have been, are, or will be stabled, or confined*, and fed or maintained for a total of 45 days or more in any 12-month period . . . ." 40 CFR 122.23(b)(1) (emphasis added). In other words, for regulatory purposes, a CAFO is the physical location where animals are stabled or confined—not the entirety of the livestock farming operation. Because discharges from point sources must be permitted under the National Pollutant Discharge Elimination System ("NPDES"), 33 USC 1311(a); 33 USC 1342(a)(1), CAFOs must also be permitted under that program as well.[1]

[1] The Clean Water Act only requires CAFOs with "*actual* discharges—not potential discharges" to obtain NPDES permits, *Waterkeeper Alliance, Inc v US EPA*, 399 F3d 486, 505 (CA2 2005). Nonetheless, the State of Michigan has gone well beyond this and required all CAFOs to obtain a permit even if they have never discharged and never will do so.

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Michigan has primacy under the Clean Water Act to administer its NPDES program. That means that MEGLE is the agency charged with issuing and administering permits, its program must be no less stringent than federal standards, and that a state-issued permit satisfies the federal permitting requirements. 33 USC 1342(b). But, by legislative decree, Michigan standards may not be any more stringent than federal standards unless the director of the agency that is promulgating the rules has made specific findings that there is a "clear and convincing need" justifying an exceedance of federal standards. MCL 24.232(8).

MEGLE's permits for CAFOs go well beyond setting effluent limitations for discharges from the physical site of a CAFO (i.e., the rates for the discharge of a pollutant below which the operations may lawfully discharge). Instead, CAFO permits require Comprehensive Nutrient Management Plans ("CNMPs") that in turn govern nearly every aspect of the farm's operation:

(a) from setting parameters for controlling the use of water in the production area, Mich Admin Code, R 323.2196(5)(a)(*iii*), to setting the boundaries where animals may roam, Mich Admin Code, R 323.2196(5)(a)(*iv*);

(b) from mandating storage requirements for the manure produced by the animals and prescribing rules for the maintenance and operation of storage facilities, Mich Admin Code, R 323.2196(5)(a)(*i*), to mandating the type of records a farm must maintain, Mich Admin Code, R 323.2196(5)(a)(*x*); and

(c) even regulating the CAFO operator's activities outside of the area that is designated as the "CAFO," such as the land application of manure onto farm fields off site and not owned by the CAFO, Mich Admin Code, R 323.2196(5)(a)(*viii*) & (5)(a)(*ix*)—and much more. See Mich Admin Code, R 323.2196(5)(a).

This extraordinarily broad assertion of regulatory authority over farms is purportedly premised on the State's grant of administrative primacy under the Clean Water Act, 33 USC 1251 *et seq*., an act that is focused on preventing pollution from pipes and other methods of conveying pollutants into the nation's waters. 33 USC 1362(12); 33 USC 1342(a). And both federal and state law set, by statute or rule, conditions to be required within a CAFO's NPDES permit.

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Federal law specifies many conditions to be included in the farms' CNMPs and permits through promulgated regulations that address CAFOs and are codified under the Code of Federal Regulations. 40 CFR 122.23(h)(1); 40 CFR 122.42(e); & 40 CFR 412.4(c). Likewise, Michigan's law does the same, providing by promulgated administrative rules many conditions that must be included within the NPDES permits for CAFOs. Mich Admin Code, R 323.2196(5)(a).

To comply with these regulatory mandates and to prevent pollution from entering into the State's surface waters, Michigan's family farms expend significant sums of money annually. (Appell. Appx. #048, Ver. Compl., ¶ 169.) For instance, dairy CAFOs spend between $116 and $129 per cow per year on hauling manure for agronomic land application, for total annual costs ranging between $81,000 and $450,000.[2] (*Id*., ¶ 170.) Constructing manure storage structures that meet permitting requirements costs between $0.50 per cubic foot for a typical dairy structure, and $1.50 per cubic foot for a typical hog structure, with the average total costs for such structures ranging between $160,000 and $1.4 million.[3] (*Id*., ¶ 171.)

Manure is an organic fertilizer and has great value as a nutrient source for crop farms, providing up to 16 pounds each of nitrogen and phosphorus per ton for dairy manure, up to 20 pounds of nitrogen and 13 pounds of phosphorus for beef manure, up to 27 pounds of nitrogen and 62 pounds of phosphorus for swine manure, and up to 111 pounds of nitrogen and 96 pounds

[2] Harrigan, T. 2011. Economics of Liquid Manure Transport and Land Application. *Michigan Dairy Review, 16*(4), retrieved from: https://www.canr.msu.edu/uploads/234/76582/liquidmanure.pdf.

[3] Kammel, D. W. 2015. Building Cost Estimates – Dairy Modernization. University of Wisconsin Extension. Retrieved from: https://fyi.extension.wisc.edu/dairy/files/2015/11/Building-Cost-Estimates-Dairy-Modernization.pdf.

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of phosphorus from poultry manure.[4] (*Id*., ¶ 172.) Manure is additionally a complete nutrient, supplying micronutrients and building soil carbon, which also carry significant costs if they must instead be supplied with fertilizer inputs. (*Id*., ¶ 173.) Fertilizer costs vary widely depending on the formulation and timing of purchase, but Michigan State University recently reported averages of $517 per ton for phosphorus and $417 for nitrogen.[5] (*Id*., ¶ 174.) Therefore, on Michigan's average-sized farm of 205 acres[6] applying at crop removal rates, if a farmer must use phosphorus and nitrogen fertilizer instead of manure, the farmer might need to spend $10,000 to $12,000 more per year for crop nutrients. (*Id*., ¶ 175.)

MEGLE's Use of General Permits for CAFOs

To meet the NPDES permitting requirements for some discharges, MEGLE sometimes uses "general permits." An NPDES "general permit" is an administrative tool that is intended to serve the convenience of the regulator and the regulated entities by outlining the conditions under which a certain category of discharges are permitted. See 40 CFR 122.28. A general permit contrasts with an individual permit in that it does not adjudicate a permit applicant's individual circumstances. Rather, with a general permit, the regulator issues a single permit intended to cover a broad category of discharges that the agency has determined "can be appropriately and adequately controlled by a general permit," and the regulator authorizes

[4] Warncke, D., Dahl, J. and Jacobs, L. 2009. Nutrient Recommendations for Field Crops in Michigan. *Michigan State University Extension Bulletin E2904*, retrieved from: http://www.soils.msu.edu/wp-content/uploads/2014/06/MSU-Nutrient-recomdns-field-crops-E-2904.pdf.

[5] Silva, 2018. Year-End Fertilizer Prices. Michigan State University Extension, retrieved from: https://www.canr.msu.edu/news/year-end-fertilizer-prices.

[6] U.S. Census of Agriculture: Michigan. United States Department of Agriculture, retrieved from: https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/.

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regulated entities to discharge if they obtain coverage under that permit. Mich Admin Code, R 323.2191(1). The agency then determines who may obtain coverage under the general permit by granting or denying an applicant's request for coverage under the general permit. Mich Admin Code, R 323.2191(3)–(6).

Importantly, MEGLE controls whether a regulated entity who applies for coverage under a general permit will receive coverage under the general permit or will be required to obtain coverage under an individual permit. Mich Admin Code, R 323.2191(3) & (4). Where the agency determines that an individual is ineligible for coverage under a general permit, it is generally because the agency believes an individual applicant's circumstances require greater restrictions or higher standards than those included in that general permit. See Mich Admin Code, R 323.2191(3)(a) & (3)(b) (allowing MEGLE to require an individual permit in cases where "[t]he discharge is a significant contributor to pollution as determined by the department on a case-by-case basis" or where "[t]he discharger is not complying, or has not complied, with the conditions of the general permit.") CAFOs that exceed 5,000 animal units, for example, move outside of an exemption for regulating groundwater discharges, so those CAFOs trigger a groundwater discharge standard different from that legally required for CAFOs under the General Permit, Mich Admin Code, R 323.2210(f), and cannot obtain coverage under a general permit. MEGLE also holds unbridled discretion to require even a regulated entity who generally qualifies for and *prefers* to be covered by an individual permit to seek coverage under the general permit. For example, Michigan Administrative Code, R 323.2191(5) explains that "[t]he department may deny an application for an individual national permit *if [MEGLE] determines that the general permit is more appropriate*." (Emphasis added). Likewise, Michigan Administrative Code, R 323.2192(d) provides that "[t]he department may terminate the individual national permit and

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include the discharge under the coverage of the general permit *if the department determines that the general permit is more appropriate*." (Emphasis added).

Farms in Michigan obtain coverage under the CAFO General Permit by applying for a "certificate of coverage."

Mich Admin Code, R 323.2196(1)(b). Once granted, a certificate of coverage modifies the General Permit only to the limited extent specified under the terms of the certificate of coverage. As with all permits, a general permit is an act of licensing. And it is not exempt from the limitations on an agency's licensing authority. A permit may only contain such conditions as are either required by law or are "necessary to achieve compliance" with the law. See MCL 324.1307(5). For NPDES permits, that means that the terms of the permit must reflect the requirements of Part 31 of NREPA. See MCL 324.3106. Per MEGLE's practice, the CAFO General Permit is issued every five years, and it offers regulated entities coverage for a five-year period under the conditions specified within the permit. (Appell. Appx. #052, Ver. Compl., ¶ 193.)

MEGLE's CAFO General Permit governs nearly all large farms who are regulated as "CAFOs" within the livestock industry. (*Id*., ¶ 193.) Some very large farms are regulated as "Super CAFOs" and are therefore required by MEGLE to submit to individual permits, principally for the reasons of the groundwater discharge permit requirements identified above. (*Id*., ¶ 195.) MEGLE has also required a few other farms to apply for individual permits because of compliance disputes with the agency. (*Id*., ¶ 197); see also Mich Admin Code, R 323.2191(3) & (4). And just a very few other farms are under individual permits because they either manifest all of their waste for land application to fields that are not under their operational control or because they use unique waste treatment systems. (Appell. Appx. #053, Ver. Compl., ¶ 198) But,

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all told, 256 of the 277 largest livestock farms that are regulated as CAFOs as of April 1, 2020 (or 92.4%) were covered under and were governed by the terms of the General Permit.[7] (*Id.*, ¶ 199.)

Moreover, those farms that are covered under individual permits are not governed by *less* stringent permit conditions than the conditions placed in the General Permit. (*Id.*, ¶ 200.) The individual permit requirements are ordinarily *more* stringent. (*Id.*) Consequently, when MEGLE writes a condition into the CAFO General Permit other than those that are mandated by federal or state statute or regulation, it is setting a policy of general applicability on the agency's implementation or enforcement of Part 31 of NREPA. (*Id.*, ¶ 201.) MEGLE's adoption of such conditions represent generally applicable policy as such conditions govern the vast majority of CAFOs whom the agency expects and requires to be permitted under the General Permit. (*Id.*, ¶ 202.) By writing conditions into the General Permit that are not mandated by statute or regulation, MEGLE is making an affirmative policy statement that such conditions implement or apply the underlying law (Part 31 of NREPA); otherwise, MEGLE has no authority to act. (*Id.*, ¶ 203.) And, by such conditions, the agency has effectively set a minimum floor for the behaviors and the requirements MEGLE demands of all large livestock farms that are regulated as CAFOs in order for those farms to receive a permit. (*Id.*, ¶ 204.) Some such farms may have to do *more* or may have the rule adapted to a unique circumstance. (*Id.*, ¶ 205.) But these General Permit conditions nonetheless set MEGLE's default policy, standards, and regulatory requirements for CAFOs. (*Id.*)

Issuance of 2020 CAFO General Permit

[7] This excludes 10 farms that have requested confirmation, and following an extensive MEGLE review process, have been determined to have "no potential to discharge" and who therefore do not need an NPDES permit. Mich Admin Code, R 323.2196(1)(b) & (4).

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On March 27, 2020, MEGLE issued its 2020 CAFO General Permit—a document intended to govern the vast majority (or 92.4%) of CAFOs and set the tone for the remainder for the next five years. (Appell. Appx. #052–53, Ver. Compl., ¶¶ 194–205). Despite the existing, all-encompassing regulatory mandates that are identified in promulgated rules and the agency's incorporation of those rules into its CAFO General Permits (and the associated significant regulatory costs), MEGLE inserted into its General Permit both legislatively rejected and never-before promulgated substantive legal requirements as a way of regulating farm operations without adhering to rigorous APA procedure or the constitutional separation of powers. These added requirements are nowhere mandated by law, they are far beyond federal and state regulatory requirements, and in some case, they are contrary to those requirements.

Among its new and sweeping mandates, the General Permit: (1) presumptively bans CAFOs from applying agriculturally beneficial manure to crop fields for three months every year; (2) prohibits the transfer of manure to other entities during those months; (3) cuts the allowable amount of phosphorous in soil that receives manure (thus significantly reducing the land available to receive manure); (4) mandates the conversion of vast acreage of crop farmland into non-usable wilderness; and (5) vastly expands MEGLE's jurisdictional reach under Part 31. (Appell. Appx. #015, Ver. Compl., ¶ 2.) Significantly, though MEGLE received public comments and held so-called "stakeholder meetings" before issuing such mandates, MEGLE completely bypassed the APA process for adopting these new "rules." See MCL 24.231–MCL 24.266.

That process requires MEGLE to justify its policies through a cost-benefit analysis assessing the financial impact on businesses (like Farm Plaintiffs), local governments, and others, MCL 24.245(3)(a)–(3)(dd); to submit its proposals to legislative review, MCL 24.245a;

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to receive approval of an environmental rules committee that includes agricultural interests, MCL 24.266; and to justify any standard more stringent than federal standards by a "clear and convincing need" for its departure, MCL 24.232(8). Egregiously, MEGLE not only bypassed these safeguards but also adopted a "winter manure spreading ban" even though the Legislature has repeatedly rejected the same proposal. See 2019 SB 247; 2019 HB 4418; 2017 SB 639; & 2017 HB 5185.

Bypassing the APA's *procedural* requirements also allowed MEGLE to circumvent the APA's *substantive* restrictions. As noted, the APA prohibits administrative agencies from adopting standards at the state level that are more restrictive than the corresponding federal standards without first finding a "clear and convincing need" to exceed the federal standard. MCL 24.232(8). Yet MEGLE's new standards went well beyond federal requirements.

For example, federal regulations require farmers to implement "100-foot setbacks"—not applying manure "closer than 100 feet to any down-gradient surface waters." 40 CFR 412.4(c)(5). As an equivalent alternative practice, the rules allow farmers to "substitute the 100-foot setback with a 35-foot wide vegetated buffer." 40 CFR 412.4(c)(5)(*i*). But MEGLE's 2020 CAFO General Permit has now required both in most circumstances, mandating the "permanent" destruction of valuable cropland and its replacement with non-crop yielding vegetation in vast amounts of land. (Appell. Appx. #066–67, Ver. Compl., ¶¶ 275–279.) Likewise, federal regulations place no restrictions on the season when manure is land applied, instead focusing on a "field-specific assessment of the potential for nitrogen and phosphorus transport from the field" to control runoff. 40 CFR 412.4(c)(1). Nonetheless, MEGLE has presumptively banned farmers from applying manure for three months each year (January through March) and has banned

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altogether the transfer of manure to other farms during that timeframe. (Appell. Appx. #057–063, Ver. Compl., ¶¶ 224–259.)

Though the agency would be required to demonstrate a "clear and convincing need" to justify these more restrictive practices under the APA, MCL 24.232(8), MEGLE did not make such a showing in issuing its permit.

PROCEEDINGS BELOW

Following MEGLE's issuance of the General Permit, Plaintiffs Michigan Farm Bureau, Michigan Milk Producers Association, Michigan Pork Producers Association, Michigan Allied Poultry Industries, Michigan Cattlemen's Association, Dairy Farmers of America, and Select Milk Producers, Inc., and a total of 165 farms filed a protective administrative appeal within the 60-day statutory window on May 26, 2020 under MCL 324.3112(5). On August 6, 2020, Farm Plaintiffs filed this suit seeking threshold legal determinations under the APA, the U.S. Constitution, and the Michigan Constitution.

Though MEGLE has derided the Farm Plaintiffs here as "not farms in the ordinary sense of the word," (Appell. Appx. #142, MEGLE MSD at 1),[8] Farm Plaintiffs are by definition the "ordinary" farm. Farm Plaintiffs' family owned farms represent roughly half of the livestock farming industry in Michigan. (Appell. Appx. #044–045, Ver. Compl., ¶¶ 147, 150–51.) Farm Plaintiffs maintain herd sizes large enough to "benefit from economies of scale that allow both costs and regulatory burdens to be more efficiently distributed" and to reduce the cost per unit to keep our farms competitive in providing food to consumers. (*Id.*, ¶ 152.) Those economies of scale are necessary due to increasingly restrictive regulation, (*id.*), which demonstrates why

[8] MEGLE's pejorative tone toward livestock farming throughout its brief underscores the necessity of the safeguards provided by the APA process, which bring legislative oversight and more significant industry input to agency decision making. MCL 24.265; MCL 24.266.

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submitting regulations like those at issue here to the deliberative rulemaking process is necessary before making further changes.

Farm Plaintiffs' six-count complaint under MCL 24.264 and MCR 2.605(A), (Appell. Appx., #043, Ver. Compl., ¶¶ 140 & 142), sought declarations that specific challenged conditions of the 2020 General Permit are:

> (a) "rules" under the APA; (b) procedurally invalid as they have been improperly adopted outside of the APA's rulemaking process; (c) substantively invalid where MEGLE lacks the authority to adopt them, they are contrary to Part 31, and they are otherwise arbitrary and capricious; (d) invalid and unenforceable as violative of due process; (e) unconstitutional as contrary to the Separation of Powers of Michigan's Constitution; and (f) violative the Takings Clauses of the Michigan Constitution and U.S. Constitution.

(See also Ver. Compl., ¶¶ 323 & Relief Requested at (a)-(g)). In response to the complaint, MEGLE filed a motion for summary disposition on September 8, 2020 under MCR 2.116(C)(4) and (C)(8). Farm Plaintiffs responded on September 30, 2020, and MEGLE filed a reply on October 5, 2020.

The Court of Claims decided the matter without oral argument in a nine-page written opinion issued on December 30, 2020. (Appell. Appx. #214, Opin. & Order.) The court granted MEGLE's motion under MCR 2.116(C)(4) on the basis that Farm Plaintiffs were required to exhaust administrative remedies and the Court of Claims therefore lacked subject-matter jurisdiction. The court rejected Farm Plaintiffs' argument that MCL 24.264 expressly conferred jurisdiction to challenge "the validity . . . of a rule," holding that "*only rules that have been formally promulgated* as 'rules' under the APA may be subjected to a challenge under MCL 24.264." (Appell. Appx. #219, Opin. & Order, at 6) (emphasis added). The court also rejected jurisdiction under MCR 2.605(A), reasoning that "there is no actual controversy for purposes of the Court Rule because the available administrative process has not yet run its course." (*Id.*)

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The court refused to apply the exceptions to exhaustion for a challenge to an agency's authority to act, reasoning that Farm Plaintiffs challenge "the *manner of*" MEGLE's regulation rather than its authority. (*Id*. at 6–7). And the court refused to apply the legal questions exception, instead recharacterizing Farm Plaintiffs' complaint as requiring factual issues regarding the justification of the General Permit conditions, (*id*. at 7)—despite Farm Plaintiffs' plea in briefing that "Plaintiffs do not seek to challenge the wisdom of these conditions . . . but only the agency's power to issue them." (Appell. Appx. #173, Pls.' Resp. Br., at 7). Lastly, the court dismissed even those individual Farm Plaintiffs who MEGLE has asserted have *no administrative remedy*, wrongly claiming that these Plaintiffs were not identified and reasoning that, in any event, these Plaintiffs would lack standing—although lack of standing was not a basis for MEGLE's motion. (Appell. Appx. #221, Opin. & Order, at 8.) This appeal followed.

STANDARD OF REVIEW

All issues raised in this brief are on *de novo* review. Whether a party was entitled to summary disposition is reviewed *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Issues concerning the interpretation of a statute (here, the Michigan APA) also present questions of law that are reviewed *de novo*. *In re Complaint of Rovas*, 482 Mich 90, 97; 754 NW2d 259 (2008). Plaintiffs-Appellants also raise the interpretation of a court rule and a constitutional question, which are both reviewed *de novo*. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 504; 844 NW2d 470 (2014); *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

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ISSUE PRESERVATION

Each of the questions raised on appeal were squarely presented to and decided by the Michigan Court of Claims in its December 30, 2020 opinion. (See Appell. Appx. #216–22, Opin. & Order, at 3–9.) There is no concern regarding preservation.

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ARGUMENT

I. Subject-matter jurisdiction exists in the Court of Claims because the Michigan Administrative Procedures Act provides an express cause of action "for a declaratory judgment" to challenge the procedural validity of "rules."

This suit was filed as a declaratory judgment action to challenge MEGLE's failure to follow the APA's mandatory procedures for promulgating "rules" when it imposed several novel and industry-altering regulations through its 2020 CAFO General Permit—which governs large livestock farms in the state. The Michigan Legislature expressly provided jurisdiction over such declaratory judgment actions. MCL 24.264. But the lower court held that Farm Plaintiffs could not file a declaratory judgment action under MCL 24.264. The court reasoned that the Legislature's grant of jurisdiction applies *only* to "promulgated" rules. (Appell. Appx. #219, Opin. & Order, at 6). Not so.

The APA's plain language makes no distinction between promulgated and unpromulgated rules under MCL 24.264 and MCL 24.207. Though an agency's failure to promulgate is a basis to declare a "rule" procedurally invalid, it does not strip a "rule" of its status as a "rule" as to which MCL 24.264 applies. Moreover, the court's holding would create a massive loophole in the APA's mandatory safeguards for an agency's quasi-legislative action—allowing parties to challenge *only* administrative agencies' minor procedural transgressions but offering wholesale forgiveness for the agencies' other, more grievous sins. Such reasoning is flawed. This Court must reverse.

a. Michigan's APA grants the Court of Claims jurisdiction over declaratory judgment actions challenging the validity of "rules"—regardless of whether such rules were promulgated by the agency.

Administrative agency actions that affect private interests generally fall under one of two categories. Administrative agencies exercise quasi-judicial powers, such as conducting contested

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cases. *In re Rovas*, 482 Mich at 98. They also exercise "quasi-legislative" powers, including rulemaking authority. *Id*.

"Rules" are defined as *any* "agency regulation, statement, standard, policy, ruling, or instruction of general applicability that applies law enforced or administered by the agency"—with some limited exceptions. MCL 24.207. And those exceptions are construed narrowly. *American Federation of State, Co & Muni Employees (AFSCME), AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996) ("[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed."). Importantly, the definition of a "rule" does not hinge on whether or not a "rule" is promulgated. *Id.*

To ensure that an agency's exercise of quasi-legislative policymaking decisions that can impact the livelihoods and well-being of Michiganders are subject to appropriate oversight, agencies must submit those decisions through the rulemaking process. MCL 24.226; MCL 24.243(1) . The Legislature's prescribed "elaborate procedure for rule promulgation" under the APA serves to "ensure that none of the essential functions of the legislative process are lost in the course of performance by agencies of many law-making functions once performed by our legislatures." *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 178; 428 NW2d 335 (1988). So important is this process that adherence to promulgation procedures determines a rule's procedural validity. *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015) ("[a]n agency's failure to follow the process outlined in the APA renders a rule invalid"), citing *Faircloth v Family Independence Agency*, 232 Mich App 391, 402; 591 NW2d 314 (1998). Accordingly, appellate courts have routinely scrutinized or invalidated promulgated rules that fail to follow the rulemaking process.

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See, e.g., *id*.; and *Slis v State*, 332 Mich App 312; 956 NW2d 569 (2020). And Michigan courts have equally invalidated *unpromulgated* "rules" that fit the definition of MCL 24.207, when an agency has wholly circumvented the rulemaking process. See, e.g., *Palozolo v Dep't of Social Servs*, 189 Mich App 530, 533–34; 473 NW2d 765 (1991).

As examples of Michigan courts invalidating "rules" that were never promulgated, the Michigan Supreme Court in *AFSCME* held that a standard-form contract used by the Department of Mental Health in contracting with a few hundred group home providers constituted "rules" under MCL 24.207. 452 Mich at 5–6. The contract set standards for care and staff training requirements for these group homes. *Id*. at 7–8. And the Department's contract was inflexible, offered to the providers without negotiation. *Id*. at 5–6. The Supreme Court thus held that they were "rules" that were required to be promulgated. *Id*. at 3.

Likewise, this Court in *Delta County v Department of Natural Resources*, 118 Mich App 458; 325 NW2d 455 (1982) held that conditions of a license requiring adherence to 31 departmental guidelines and policies were also "rules" under the APA. The Court observed that the agency's conditioning a license on a person's acceptance of such guidelines made the guidelines "effectively . . . rules under the guides of guidelines and policies." *Id*. at 468. The Court rebuked the agency, noting that "[t]he rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies." *Id*., citing *Mallchok v Liquor Control Comm'n*, 72 Mich App 341; 249 NW2d 415 (1976). And the Court admonished that "[t]he rulemaking procedures of the APA may not be circumvented." *Id*.

More recently, this Court's Chief Judge—acting as a Court of Claims judge in *Genetski v Benson*, Ct of Claims Docket No 20-000216-MM—invalidated Secretary of State guidance or directives as unpromulgated rules that should have been promulgated under the APA. (Ex. A,

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Genetski v Benson, at 8.) Though that opinion is not binding on this Court, it is instructive on an identical issue, and it should be carefully considered. See, e.g., *Stirling v County of Leelanau*, __ NW2d __, issued Mar 25, 2021 (Docket No 353117) (a trial court's legal rulings should be given "careful consideration"). Taken together, these cases illustrate both that "rules" are not defined by whether they are promulgated and also that an unpromulgated rule is procedurally invalid.

Through the declaratory judgment action provided by MCL 24.264, the Legislature created a cause of action for affected persons to challenge "the validity . . . of a rule." As noted, the APA has defined a "rule" under MCL 24.207. The APA must be read as a consistent whole. *Cherry Growers, Inc v Agric Mktg & Bargaining Bd*, 240 Mich App 153, 170; 610 NW2d 613, 622 (2000) ("Provisions of a statute must be read in the context of the entire statute so as to produce an harmonious and consistent whole"). Further, "when a statute specifically defines a given term, that definition alone controls." *Tryc v Mich Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Accordingly, in defining which "rules" may be challenged when that word was used by the Legislature under MCL 24.264, this Court has to apply the Legislature's definition of "rule" under MCL 24.207. To read the statute differently would place the APA at odds with itself and to fail to give effect to the Legislature's declared intent.

The lower court rejected this reading, instead relying on *Jones v Department of Corrections,* 185 Mich App 134; 460 NW2d 575 (1990) .[9] *Jones* held that MCL 24.264 is limited to rules that have been "formally promulgated as a rule pursuant to § 33 of the APA." *Id*. at 137.

[9] The trial court also obliquely referenced *Slis*, 332 Mich App at 586. (Appell. Appx. #219, Opin. & Order, at 6.) *Slis* involved promulgated, emergency rules, and the Court did not consider whether MCL 24.264 applies to all "rules" under MCL 24.207 or only a subset. The passing reference in *Slis* to "promulgated rules" is thus *obiter dicta* that did not adjudicate anything and is not precedential. *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 557–58, 741 NW2d 549, 553 (2007) ("It is a well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication."

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That holding is incorrect, and this Court need not (and should not) follow that decision for three reasons.

First, *Jones* is not binding precedent. Per MCR 7.215(J)(1), precedential opinions from this Court are only those "issued on or after November 1, 1990 . . ." *Jones* was issued before that date. Thus, this Court is not bound by it. *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

Second, the holding of *Jones* is contrary to the plain-language reading the APA and the statutorily provided definition of "rule" under MCL 24.207. That definition alone controls. *Tryc*, 451 Mich at 136. *Jones* thus requires rewriting the statute by slipping into MCL 24.264 the word "the validity or applicability of a ***promulgated*** rule . . . may be determined in an action for declaratory judgment . . . ." (Emphasized text inserted). But this Court has no authority to rewrite the statutory text. *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 583; 939 NW2d 705 (2019).

Third, the holding in *Jones* is built on circular reasoning from a prior case that did just that (i.e., rewrote the statute). The *Jones* panel relied on *Bentley v Department of Corrections*, 169 Mich App 264; 425 NW2d 778 (1988), which declared that "[f]or purposes of § 64, *only those statements formally promulgated in accordance with the act's rulemaking procedures are construed as rules*," *Bentley*, 169 Mich App at 270 (emphasis added). But *Bentley*'s holding relied on a definition of the conditions that are prerequisite to "a ***valid*** . . . Michigan 'rule'"—or a rule that is both procedurally and substantively valid. *Id*., quoting from *Mich Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich 141, 150; 289 NW2d 699 (1980) (emphasis added).

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In other words, *Bentley* reasoned that "a rule must be promulgated to be valid" and therefore concluded that "a person cannot challenge a rule's validity unless it has been promulgated." The *Bentley* panel's circular logic undoes itself. MCL 24.264 is a mechanism for challenging the validity of any "rule" as defined by MCL 24.207. It is not limited to filing futile challenges to procedurally "***valid*** rules." The lower court thus erred in relying on *Jones*. This Court should not follow it and should reverse.

b. The lower court's reading of MCL 24.264 creates a perverse result.

Significantly, reading MCL 24.264 as limited only to "valid" or "promulgated" rules also creates a massive loophole for administrative agencies under the APA. Under that reading, an action under MCL 24.264 is limited to correcting *minor* procedural errors, such as the financial estimates in cost-benefit analyses conducted by agencies in promulgating rules. But such an action does not allow affected persons to correct *major* procedural errors—like whether a "rule" is even promulgated. This is a perverse result that is contrary to the plain text, the overarching scheme, and the purposes of the APA.

Rules may be invalidated on both procedural and substantive grounds. *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 257; 501 NW2d 88 (1993); *Luttrell v Dep't of Corrections*, 431 Mich 93, 100; 365 NW2d 74 (1984). On the procedural side, agencies may not adopt a "guideline" in lieu of a rule to circumvent rulemaking. MCL 24.226. And "rules" are invalid if they are not properly promulgated in accordance with the APA's public notice requirements, MCL 24.241, public hearing requirements, MCL 24.242, and—for environmental rules like those at issue in this matter—submitted to the "environmental rules review committee." See MCL 24.243(1) . Less significant procedural failures are also a basis for declaring a rule invalid. For example, MCL 24.264 allows that "the failure of an agency to accurately assess the impact of the rule on business, including small businesses, in its regulatory impact statement" can be a basis for

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challenging a rule under that provision. Likewise, this Court has analyzed procedural validity challenges to rules on the basis of defects like whether a rule is submitted for consideration by the Joint Committee on Administrative Rules ("JCAR") following changes to the rule. *Michigan Charitable Gaming Ass'n*, 310 Mich App at 599.

Under the lower court's reasoning, small glitches in the APA process give rise to a cause of action under MCL 24.264. But, if an agency adopts generally applicable policies *without* promulgating those policies, there is no recourse. As argued above, that reading ignores the statutory definition of a "rule" under MCL 24.207, it bucks the democratic policymaking objectives of the APA, *Detroit Base Coalition*, 431 Mich at 178, and it is simply nonsensical. MCL 24.264 encompasses *any* challenge to "the validity . . . of a rule" as defined by MCL 24.207. The lower court erred in limiting that action to "*promulgated* rules" only.

c. The General Permit conditions are "rules" under MCL 24.207.

The lower court did not reach the question of whether the new conditions of the 2020 General Permit for CAFOs are "rules" under MCL 24.207. To the extent this Court deems it necessary to reach this question, they undoubtedly are. As noted above, an agency policy constitutes a "rule" if it is: (1) a "regulation, statement, standard, policy, ruling or instruction, of general applicability"; (2) "that implements or applies law enforced or administered by the agency"; and (3) it is not specifically exempted under the statute's carveouts. MCL 24.207.

MEGLE's General Permit conditions for CAFOs meet each criterion. *First*, the conditions set standards and regulations of "general applicability." *Id*. CAFOs are mandated to have an NPDES permit with very few exceptions. Mich Admin Code, R 323.2196(1)(b). "Nearly all" (or 92.4%) of CAFOs are governed by the General Permit. (Appell. Appx. #053,Ver. Compl., ¶¶199 & 309). Almost all remaining CAFOs are regulated under MEGLE's individual permits which reflect the terms of MEGLE's General Permit as a minimum standard. (*Id*., ¶¶ 317–321.) And

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MEGLE exercises unbridled control over which farms are issued a General Permit. Mich Admin Code, R 323.2191(5) and R 323.2192(d). Thus, these conditions apply broadly to a class of farms and have "general applicability." *Hinderer v Dep't of Social Servs*, 95 Mich App 716, 725 (1980) (lag budgeting system met this requirement because it affected benefit recipients generally). To that point, MEGLE has even called these conditions an exercise of "quasi-legislative power," (Appell. Appx. #156, MEGLE MSD at 15)—the very type of action that must be submitted to rulemaking. *Detroit Base Coalition*, 431 Mich at 178. *Second*, these conditions "implemen[t] or appl[y] law enforced or administered by the agency"—Part 31 of NREPA, MCL 324.3101 *et seq.*, as MEGLE itself maintains in its brief. *Third*, no statutory exemption applies.

On this last prong, at the lower court, MEGLE attempted to rely on MCL 24.207(j). That subsection exempts "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." *Id*. But the exemption, which must be narrowly construed, *AFL-CIO*, 452 Mich at 9, protects only an agency's decision *whether* to exercise a permissive statutory authority and does not shield agencies from being required to promulgate rules justifying or exemplifying *how* they apply such power. *Spear v Mich Rehab Servs*, 202 Mich App 1, 4; 507 NW2d 761 (1993) (deciding to employ a welfare needs test was covered by the exemption but the agency needed to promulgate a rule explaining its test). Thus, deciding to employ a General Permit is a "decision . . . to exercise . . . a permissive statutory power." MCL 24.207. But MEGLE's new substantive standards, written into the General Permit, are not.

The conclusion that MEGLE's new General Permit conditions are "rules" is consistent with the Michigan court decisions considering whether agency actions are "rules," including the *AFSCME* and *Delta County* decisions discussed above. Like the agencies in both of those cases,

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MEGLE here seeks to fold mandatory standards into a form document. Because those standards are generally applicable policies of the agency, they are rules.

Further buttressing this analysis, several courts have found either general permits or the conditions thereof to be "rules." For example, in *National Association of Home Builders v United States Army Corps of Engineers*, 417 F3d 1272 (2005), the U.S. Court of Appeals for the D.C. Circuit held that nationwide permits issued by the Army Corps under the Clean Water Act, see 33 USC 1344(e)(1), constituted "rules" subject to the rulemaking provisions of the federal APA. *Id*. at 1284. That court explained:

> Each [nationwide permit] easily fits within the APA's definition of a 'rule.' This is so because each [nationwide permit], which authorizes a permittee to discharge . . . is a legal prescription of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA. As such, each [nationwide permit] constitutes a rule: An 'agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.' [*Id*. at 1284–85.]

The D.C. Circuit reaffirmed this holding in *Lakes Carriers Association v US Environmental Protection Agency*, 652 F3d 1, 6 n 3 (CADC 2011). See also *NRDC v US EPA*, 279 F3d 1180, 1183 (2002) ("[g]eneral permits . . . are issued pursuant to administrative rulemaking procedures"); *Alaska Community Action on Toxics v Aurora Energy Servs, LLC*, 765 F3d 1169, 1172 (CA9 2014) ("general permits are considered to be rulemakings."). Similarly, an Administrative Law Judge in North Carolina recently reached the exact same conclusion suggested here—that conditions of that State's CAFO General Permit were rules that require promulgation. (Appell. Appx. #193–205, NC ALJ Decision.)

MEGLE adopted generally applicable standards that the agency will apply to the livestock farm industry on a widespread basis. These new conditions of the General Permit fall within the definition of "rule" under MCL 24.207. The APA requires MEGLE to follow a process in adopting such "rules." *Detroit Base Coalition*, 431 Mich at 178–79 (1988) ; MCL

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24.226; MCL 24.243. But MEGLE admittedly did not do so. Accordingly, the procedural validity of these "rules" can and should be determined in Farm Plaintiffs' action under MCL 24.264.

II. Farm Plaintiffs have satisfied the "actual controversy" requirement by challenging an already issued, final NPDES permit that these livestock farms are required to obtain.

As an alternative cause of action, Farm Plaintiffs relied on MCR 2.605(A). But the lower court erroneously held that no "actual controversy" exists to support a declaratory judgment action under that rule. To the contrary, MEGLE issued its 2020 General Permit for CAFOS on March 27, 2020 and Farm Plaintiffs are required to obtain permit coverage. This controversy is not hypothetical or speculative; the dispute is very real.

MCR 2.605(A) allows that "in a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment . . . ." The prerequisite to an "actual controversy" is simply that plaintiffs "plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Shavers v Attorney General*, 402 Mich 554, 588–589; 267 NW2d 72 (1978). Further, "although the actual controversy requirement precludes a court from deciding hypothetical issues, 'a court is not precluded from reaching issues before actual injuries or losses have occurred.'" *Associated Builders & Contractors v Dir of Dep't of Consumers & Indus Servs*, 472 Mich 117, 126; 693 NW2d 374 (2005), overruled in part on other grounds *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371 n. 18; 792 NW2d 686 (2010). "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights.'" *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 624; 873 NW2d 783 (2014).

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Here, Farm Plaintiffs asked the lower court to address a very real, "actual controversy" that provides a sufficient "sharpening of the issues" to support a declaratory judgment. *Shavers*, 402 Mich at 588–589. Following a period of development where the 2020 General Permit for CAFOs was in flux, MEGLE issued a final version of that permit on March 27, 2020. Farm Plaintiffs are mandated by law to obtain NPDES permit coverage and are thus subject to the terms of this permit. Mich Admin Code, R 323.2196(1)(b). If Farm Plaintiffs fail to abide by MEGLE's maze of new conditions and restrictions, they are subject to drastic civil (or even criminal) consequences. MCL 324.3115. Farm Plaintiffs thus challenged the development and incorporation of new terms into the permit, which are not required by existing law and have not been developed in accordance with the APA. (Appell. Appx. #074–76, Ver. Compl., ¶¶ 329–340). MEGLE has vigorously defended those permit conditions. (Appell. Appx. #150–53, MEGLE MSD at 9–12). There is no reason to suspect that MEGLE will suddenly change their mind.

Given these facts, the lower court's reliance on *Citizens for Common Sense in Government v Attorney General* was misplaced. 243 Mich App 42, 55; 620 NW2d 546 (2000). This is not a situation where plaintiffs' claim "is based . . . on its speculation concerning how the [agency] would have acted if called on to do so." *Citizens for Common Sense in Gov't*, 243 Mich App at 55. There, no "actual controversy" existed because the plaintiff filed suit based on the *assumption* that "the Secretary of State will not enforce the 'law' against the MML because the Secretary of State must abide by the Attorney General's 1981 erroneous opinion." *Id*. at 46–47. And the plaintiff did not seek a declaratory ruling at the Secretary of State to test whether that assumption about the agency's position was in fact accurate. *Id*.

Farm Plaintiffs do not speculate or assume about what MEGLE *might do*; MEGLE has already issued the General Permit, and the agency has defended what it *has done*. Additionally, no

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matter what occurs in Farm Plaintiffs' administrative appeal to MOAHR, any speculative change in the substance of the conditions that Farm Plaintiffs challenge will not alter the flawed process already employed by MEGLE. Farm Plaintiffs' complaint for declaratory relief below sought to challenge MEGLE's process: the agency's failure to follow the APA in adopting what qualify as "rules" under MCL 24.207. MEGLE has already vigorously defended below its failure to follow that process, (Appell. Appx. #150–53, MEGLE MSD at 9–12), and there is an "actual controversy" as to whether the APA must be followed in this instance.

Accordingly, Farm Plaintiffs' complaint does not present merely a "hypothetical" or "speculative" controversy. The reverse is true. The lower court and MEGLE's suggestion that something *might* change that will alleviate the need for this lawsuit is speculative and hypothetical. This controversy is "actual," and Farm Plaintiffs are sufficiently threatened with injury to demonstrate "an adverse interest necessitating a sharpening of the issues raised." *Shavers*, 402 Mich at 55. MCR 2.605(A) is satisfied. Farm Plaintiffs were entitled to have the lower court answer the legal questions raised in their request for a declaratory judgment: whether MEGLE's new General Permit conditions are "rules" that should have been promulgated under the APA. This Court should reverse.

III. The "exhaustion of administrative remedies" doctrine does not strip the Court of Claims of the jurisdiction expressly granted under MCL 24.264.

The lower court ostensibly concluded that the doctrine of "exhaustion of administrative remedies" somehow deprived the Court of Claims of express jurisdiction *even* over a statutorily provided declaratory judgment action under MCL 24.264. That is incorrect. Where the Legislature expressly provided this cause of action to challenge the "validity. . . of a rule," MCL 24.264, there can be no implicit requirement of exhaustion. Nor does either the APA or Part 31 of

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NREPA indicate a legislative intent that MEGLE must first answer questions concerning its own procedural compliance with the APA before a court may do so.

a. This Court has already held that a party need not exhaust administrative remedies to bring a challenge to the *validity* of a rule under MCL 24.264.

This Court has already addressed whether exhaustion of remedies is required when someone seeks a declaration that an administrative rule is invalid in a case involving *these same parties*. The Court forcefully answered "no." And, although Farm Plaintiffs cited this case in their brief to the lower court below, (Appell. Appx. #172, Pls.' Resp. Br., at 6), the lower court never addressed it.

In *Michigan Farm Bureau v Department of Environmental Quality*, 292 Mich App 106; 807 NW2d 106 (2011), this Court held that the only exhaustion requirement that is a prerequisite to filing a declaratory judgment action in MCL 24.264 applies to declaratory judgment actions "as to the *applicability* of a rule, not as to its *validity*." *Id*. at 119 n7 (quoting LeDuc, Michigan Administrative Law [2001], § 8:13, p. 576) (emphasis in original). In that matter, this Court reasoned that:

> Because plaintiffs sought to challenge the *validity* of Rule 2196 rather than its *applicability* to a particular state of facts, they were not required to ask the DEQ for a declaratory ruling under MCL § 24.263 in the first instance, and were instead entitled to directly commence this declaratory judgment action in the circuit court pursuant to MCL 24.264. [*Id*.]

So, the doctrine of exhaustion did not apply.

This case is no different. Farm Plaintiffs here bring a challenge to the *validity* of MEGLE's rules under MCL 24.264. (Appell. Appx. #019, Ver. Compl., ¶¶ 17, 140, 223, 324–348). Hence, as this Court has already held, exhaustion is not required. *Michigan Farm Bureau*, 292 Mich App at 119, n7. That case suffices to reverse the lower court on this point.

b. The Legislature did not grant MEGLE exclusive jurisdiction to decide its own compliance with the APA.

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Even if this Court's prior precedent is insufficient, the general principles regarding exhaustion demonstrate that exhaustion of remedies is not required here because this case does not involve a matter that has been committed by the Legislature to MEGLE's exclusive jurisdiction. This is not a substantive challenge to the factual support for specific conditions of the General Permit under Part 31. Nor does it involve any other matter that is within MEGLE's exclusive bailiwick per a legislative decree. Indeed, reading an exhaustion requirement as precluding an APA challenge to the *procedures* by which agencies act is putting the fox in charge of guarding the hen house—an extreme exercise in trusting the agency to self-regulate its own adherence to the APA. The Legislature declared in MCL 24.264 that such oversight belongs to the courts. Thus, no exhaustion is required.

The exhaustion of administrative remedies doctrine hinges on a legislative decision to "make an administrative tribunal's jurisdiction *exclusive* . . . ." *L & L Wine and Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 356; 733 NW2d 107 (2007); (Appell. Appx. #217, Opin. & Order, at 4); see also *Darby v Cisneros*, 509 US 137, 144–45; 113 S Ct 2539, 2543 (1993) ("Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise, for ***'[o]f 'paramount importance' to any exhaustion inquiry is congressional intent*** . . . .') (emphasis added). Thus, "the statutory language chosen by the Legislature" must "establish[h] the intent to endow the state agency with exclusive jurisdiction . . . ." *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 657; 669 NW2d 326 (2009).

In each case where exhaustion has been applied, the Legislature's intent to deprive a court of otherwise existing jurisdiction over a particular topic has been clear. For example, in applying the doctrine to this case, the lower court relied on *Common Sense in Government v Attorney*

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General, 243 Mich App 43 (2000) to invoke the exhaustion doctrine. But, there, the statute at issue explicitly said that:

> There is no private right of action . . . pursuant to this act. ***The remedies provided in this act are the exclusive means by which this act may be enforced*** and by which any harm resulting from a violation of this act may be redressed. [*Id.* at 51, quoting MCL 169.215(9) (emphasis added).]

Similarly, in *L & L Wine and Liquor Corp*, this Court held that the exhaustion doctrine precluded a declaratory judgment action to determine whether a proposed purchase of stock would run afoul of a particular administrative rule under the Liquor Control Code. *L & L Wine and Liquor Control Corp*, 274 Mich App at 355. This Court held that, because both the Michigan Constitution and statutes vested the Commission with "the *sole* right, power, and duty to control the alcoholic beverage traffic" and the Commission had established procedures to address declaratory ruling requests like the one at issue, the exhaustion doctrine applied. *Id.* at 357. In both cases, the exhaustion doctrine was applicable because of an explicit legislative intent for the agency to answer those questions at issue in the litigation.

Here, by contrast, the Legislature explicitly noted its desire that courts—not agencies—should determine whether the APA has been followed. MCL 24.264. And nothing in the statute suggests that MEGLE has exclusive jurisdiction to determine the questions at issue in this litigation: what the APA requires concerning the procedural or substantive requirements for *administrative rules* (i.e., whether the rules are "valid"). Indeed, assuming such exclusive jurisdiction would be misplaced. As one leading commentator has noted, "an agency is unlikely to find its own rules invalid" and "[c]ourts will ultimately determine the validity of a rule." LeDuc, Michigan Administrative Law (2013 Ed.), § 8:13, at 577; see also *Michigan Farm Bureau*, 292 Mich App at 119, n 7 (citing LeDuc for this point).

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Instead, MCL 24.264 unambiguously indicates a legislative intent to provide a declaratory judgment action to challenge "the validity . . . of a rule." There is no similar unambiguous intent to require resort to a lengthy agency appeal to have the agency determine *this question*. MCL 324.3112(5) certainly allows for appeals of permits to an administrative law judge. Those appeals concern MEGLE's factual justifications for its permitting decisions. But that statute does not grant MEGLE *any* jurisdiction to adjudicate its compliance with the APA when it has adopted new standards in violation of that Act.

Likewise, nothing in MCL 24.301 supports the notion that an exhaustion requirement overrides a legislatively created declaratory judgment action. MCL 24.301 merely provides that an agency decision "is subject to review by the courts a provided by law," after "a person has exhausted all administrative remedies within the agency." This is a procedure for challenging the quasi-adjudicative actions of agencies (determining and applying facts in individual circumstances)—not the quasi-legislative actions with broad policy-setting implications like establishing "rules." LeDuc, at § 8:11 ("*[T]he [APA]* and [RJA] *review provisions deal exclusively with judicial and quasi-judicial action by state administrative agencies*") (referring to MCL 24.301-MCL 24.306) (emphasis added).

Because the same Legislature adopted *both* MCL 24.301 and MCL 24.264, the two provisions must be read as a consistent whole. *Cherry Growers, Inc*, 240 Mich App 170; *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014) ("[The court] must read the statute as a whole"). So, the exhaustion requirement under MCL 24.301 for seeking direct judicial review of an agency action following a contested case should not be read to render the declaratory judgment action provided in MCL 24.264 nugatory or otherwise unavailable. The two apply to different types of agency actions.

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Accordingly, because Farm Plaintiffs had an express statutory cause of action for declaratory judgment under the APA, the lower court erred in dismissing the suit for failure to exhaust administrative remedies.

IV. Farm Plaintiffs were not required to exhaust administrative remedies because this declaratory judgment action sought a threshold legal determination concerning MEGLE's authority to act.

Additionally, even if this Court holds that the exhaustion of remedies is otherwise required, any exhaustion requirement should have been excused in this case. The doctrine of exhaustion of administrative remedies is flexible. *Int'l Bus Mach Corp v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977) (noting exhaustion "is not an inflexible condition precedent to judicial consideration"). It is also riddled with exceptions. LeDuc, § 10:31, p 806 ("If there is an administrative law doctrine with more exceptions than exhaustion of administrative remedies, it does not readily come to mind."). At least two of those exceptions apply here. Farm Plaintiffs' sought a declaratory judgment on *purely* legal questions. And Farm Plaintiffs raised a threshold challenge concerning MEGLE's authority to act.

a. Exhaustion of administrative remedies is not required for challenges to an agency's authority to act.

First, exhaustion is unnecessary where a plaintiff challenges an agency's authority to act. *Int'l Bus Mach Corp*, 75 Mich App at 610; see also *Universal Am-Can Ltd v Att'y Gen*, 197 Mich App 34, 38; 494 NW2d 787 (1992) ("[B]oth judicial economy and the interests of justice" militated again requiring exhaustion where "Plaintiff claimed that the PSC lacked the statutory authority to regulate it . . . ."); *Mich Waste Sys, Inc v Dep't of Nat Res,* 157 Mich App 746, 759; 403 NW2d 608 (1987). That is the case here. Farm Plaintiffs' declaratory judgment action challenged the authority of MEGLE to circumvent the APA by incorporating as permit

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conditions wholly new regulations that have not been adopted as rules. (Appell. Appx. #019, Ver. Compl., ¶¶ 17, 223, 337–340.)

The lower court rejected this exception, reasoning that this exception to an exhaustion requirement is limited only to broad objections to the "statutory authority" of an agency "to regulate" and is inapplicable to more limited objections on the basis of "the *manner* of" regulation. (Appell. Appx. #220, Opin. & Order, at 7.) The court was mistaken. For example, this Court applied this exception to a challenge to the method by which the Michigan Department of Treasury redetermined franchise fees under the Michigan Corporate Franchise Tax, MCL 450.304 *et seq.*, in *International Business Machines Corp*, 75 Mich App at 610. The issue in that case did not involve a wholesale challenge to Treasury's authority to levy the tax, but rather when and how the agency could redetermine the tax. *Id*. at 607–610. Similarly, in *K Mart Corporation v Department of State*, 127 Mich App 390; 339 NW2d 32 (1983), this Court excused any need for exhaustion of remedies where the plaintiffs challenged the ability of the Department of State to commence an administrative action to enforce the Motor Vehicle Service and Repair Act, MCL 257.1301, *et seq.*, without first promulgating a rule defining a particular term in that Act. *Id*. at 392–93. This Court held that exhaustion was not required as a prerequisite to deciding "whether the Department of State had authority to bring" that action, *id*. at 393—even though this was a challenge to "the *manner* of" regulation rather than a wholesale challenge to the agency's authority to regulate.

Accordingly, because this suit presents a challenge to MEGLE's authority to act—specifically, to the agency's authority incorporate unpromulgated "rules" into its 2020 General Permit for CAFOs—exhaustion is not required.

b. No exhaustion is required when a party presents a legal question as a threshold issue.

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Moreover, no exhaustion is required where a case is one for declaratory judgment presenting a legal issue. Indeed, if the issue is "clearly framed for the court as one of law (statutory interpretation) that [does] not call for extensive findings of fact or technical expertise." *Huggett v Dep't of Nat Res*, 232 Mich App 188, 192; 590 NW2d 747 (1998). In that instance, requiring exhaustion would be "nothing more than a formal step on the way to the courthouse."

In this case, Farm Plaintiffs' APA challenges (Counts I & II) and Separation of Powers claim (Count IV) presented threshold legal questions on MEGLE's authority to include certain conditions in the General Permit. The Complaint clearly framed these claims as seeking *only* declaratory relief on legal questions. (Appell. Appx. #019, Ver. Compl., ¶¶ 17, 223, & 323, Relief Request (a)–(g)). Similarly, Farm Plaintiffs' brief in response to MEGLE's motion could not have made this clearer, noting:

> Plaintiffs do not seek to challenge the wisdom of these conditions here but only the agency's power to issue them. The questions raised are thus legal. They ask whether certain generally applicable conditions placed in the General Permit constitute "rules" that must be promulgated per APA procedure, whether MEGLE lacks the statutory authority for such rules, or, if it possesses such authority, whether the statute contains sufficient guidelines for the exercise of that authority under separation-of-powers principles. (Compl., ¶¶ 304–48, 358–64.) [Appell. Appx. #173, Pls.' Resp. Br. at 7.]

Indeed, under Count I, the legal questions raised were simply this: (1) are the conditions "rules" under MCL 24.207; and (2) did MEGLE fail to follow APA procedures in establishing them?

Since there is no dispute that the new conditions in the 2020 General Permit for CAFOs were not promulgated in accordance with APA procedures, the real issue is whether the conditions at issue are "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. Deciding that question does not require "extensive findings of fact or technical expertise . . . ." *Huggett*, 232 Mich App at 192. Rather, it requires a legal interpretation of the APA, Part 31, and the conditions of 2020 General Permit—a document that was attached to the

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Complaint. (Appell. Appx. #088–131, Ver. Compl., Ex. A.) Similarly, Farm Plaintiffs' claim under Count II challenged the substantive validity of MEGLE's General Permit conditions. A substantive challenge asks principally whether the rules at issue are outside of the scope of the enabling act or contrary to legislative intent. *Luttrell*, 431 Mich at 100; (Appell. Appx. #077, Ver. Compl., ¶¶ 345–348). Those are *legal* questions—not a fact-driven, technical analysis.

The lower court's recharacterization of Farm Plaintiffs' declaratory relief complaint as requiring heavily technical fact-finding as a prerequisite decision was a gross misreading of these claims. Indeed, the lower court ignored Farm Plaintiffs' own representation of their claims and the relief they sought (quoted above), contrary to the rule that a Plaintiff is the master of its complaint. *Trowell v Providence Hosp and Med Centers, Inc*, 502 Mich 509, 540; 918 NW2d 645 (2018) ("In our system, the plaintiff gets to decide what facts to allege and what legal theories of recovery to assert."); *Bint v Doe*, 274 Mich App 232, 238; 732 NW2d 156 (2007) ("[A] plaintiff controls his or her pleadings . . . ."). There were no technical facts that needed to be found to determine whether MEGLE's General Permit conditions are generally applicable agency standards. MCL 24.207.

The lower court equally missed the mark in its comment that "comparing the statutory goals to the permitting standards" to decide whether the conditions are "required by any law" or "further" statutory "goals" required "development of a factual record that is best suited for the administrative process." (Appell. Appx. #220, Opin. & Order, at 7.) First, this again misread Farm Plaintiffs' complaint. Farm Plaintiffs' claims nowhere required the court to determine "whether the permitting conditions further" statutory goals. Instead, the question for procedural validity is whether MEGLE acted consistent with APA procedures. *Mich Charitable Gaming Ass'n*, 310 Mich App at 594. And the questions for substantive validity are: (1) whether the rules

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are outside of the scope of the enabling act; or (2) whether they are contrary to legislative intent. *Luttrell*, 431 Mich 93, 100. These are legal questions concerning the meaning of the relevant statutes, as is any attendant interpretation of the General Permit.

Accordingly, this is a legal exercise—not a factual one. The lower court thus erred in requiring exhaustion of administrative remedies because the doctrine is inapplicable to legal questions that addressed MEGLE's authority to act.

V. Those Plaintiffs whom MEGLE has contended have no recourse to appeal to the agency cannot be require to "exhaust" non-existent administrative remedies.

Finally, the lower court erred in dismissing certain Farm Plaintiffs on the basis of exhaustion even though MEGLE has claimed that those Plaintiffs *have no administrative remedy*. And, by doing so in part on the basis of "lack of standing," when standing was never argued by MEGLE in its motion, the lower court violated these Plaintiffs' due-process rights. This Court should reverse this portion of the lower court's opinion.

a. A person who has no administrative remedy cannot be required to "exhaust."

It is axiomatic that, where no administrative remedy is available to a person, that person cannot be required to "exhaust" non-existent remedies prior to filing a declaratory action suit. See LeDuc, § 10:28, p 797–98 (noting exhaustion "applies *only where there is actually a remedy to exhaust*") (emphasis added). Indeed, the Michigan Supreme Court recognized as much in *Attorney General v Diamond Mortgage Company*, 414 Mich 604; 327 NW2d 805 (1982) in observing that "there is . . . no basis for requiring that administrative remedies . . . be exhausted" when "there were no administrative remedies available in that agency." *Id*. at 611. And this Court likewise held in *Great Lakes Gas Transmission Company v State Treasurer*, 140 Mich App 635; 364 NW2d 773 (1985) that exhaustion does not apply where the remedies available are inapplicable to the relief sought in the suit. *Id*. at 644–645.

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Here, MEGLE has affirmatively argued within the Michigan Office of Administrative Hearings and Rules that the individually permitted Plaintiffs and "no potential to discharge" Plaintiffs in this action cannot appeal to the agency. (Appell. Appx. #187–191, Pls.' Resp. Br., Ex. A.) MEGLE cannot have it both ways—demanding that these Plaintiffs "exhaust" a remedy within the agency that the agency says they do not have.

The lower court attempted to sidestep this issue on the bases that: (1) "plaintiffs have not specifically identified these purported plaintiffs"; and (2) "plaintiffs have not meaningfully developed this argument." Both of these assertions were patently mistaken. On the first, Farm Plaintiffs attached as Exhibit A to their response brief a list of the Farm Plaintiffs whom MEGLE said have no remedy. (Appell. Appx. #174 & 187–191, Pls.' Resp. Br. at 8 & Exhibit A). Farm Plaintiffs likewise clearly identified these individually permitted and no-potential discharge Plaintiffs at Paragraphs 126 through 135 of the complaint, noting as to each either that the Plaintiff has "been permitted under an individual NPDES CAFO permit" or has "been provided a 'No Potential to Discharge' determination." (See Appell. Appx. #040–42, Ver. Compl., ¶¶ 126–135.) On the second, Farm Plaintiffs clearly articulated the rationale of this argument sufficiently for the lower court to decide this matter—dedicating nearly as much space to this sub-issue as MEGLE gave to the exhaustion question altogether. (Compare Appell. Appx. #148–49, MEGLE's MSD, at 7–8; & Appell. Appx. #176, Pls.' Resp. Br. at 8.) Accordingly, the lower court erred in dismissing these Plaintiffs.

b. To the extent that the lower court dismissed certain Plaintiffs for "lack of standing," its decision violated Plaintiffs' due-process rights.

Lastly, to the extent that the lower court contended that individually permitted Plaintiffs lacked standing, its decision violated Plaintiffs' due-process rights.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

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guarantees that no state may "deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const., Am. XIV, § 1. Though due-process is "flexible," it requires, at a minimum, that a party must receive adequate notice, *Mullane v Central Hannover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652 (1950), and be "given a meaningful opportunity to present their case." *Mathews v Eldridge*, 424 US 319, 349; 96 S Ct 893 (1976). Accordingly, this Court has held in *Al-Maliki v LaGrant*, 286 Mich App 483; 781 NW2d 853 (2009) that a trial court must afford an opportunity for hearing before considering an issue *sua sponte*. *Id*. at 485.

Here, MEGLE did not argue in its motion for summary disposition that the individual Plaintiffs' lacked standing. MEGLE did not even mention that argument until its reply. (Appell. Appx. #209, MEGLE Reply Br. at 2). But because "[r]eply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief," *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007), that argument was not properly before the lower court. And Farm Plaintiffs were not allowed oral argument or any other opportunity to respond. (Appell. Appx. #216, Opin. & Order, at 1) (noting "[t]his matter is being decided without oral argument"). Accordingly, the lower court's decision to address standing without providing Farm Plaintiffs an opportunity to respond erroneously deprived these Plaintiffs of due process.

Moreover, although the lower court did not understand how these Plaintiffs would have standing in this suit if they lack an administrative remedy, the answer is simple. Whether a person is "aggrieved" under Part 31 is a distinct standard from whether they have standing in a declaratory action. MCL 324.3112(5) allows only "a person who is aggrieved" by an agency decision to appeal. See *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 571; 692 NW2d 68 (2004) (defining "aggrieved" for purposes of an administrative appeal). But, under

Appellant's App'x 000098

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Lansing Schools Ed Ass'n v Lansing Bd of Ed, a person has standing to file a declaratory relief action if the "litigant had . . . a special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large . . . ." 487 Mich at 372. Because the individually permitted Plaintiffs are regulated as CAFOs, are subject to MEGLE's complete discretion in whether they are individually permitted or permitted under the General Permit, and because the General Permit sets a baseline standard for all individual permits, (Appell. Appx. #040–042, Ver. Compl., ¶¶ 126–135, 182–187, 200, & 201), these Plaintiffs have a "substantial interest" that will be "detrimentally affected in a manner different from the citizenry at large." *Lansing Sch Ed Ass'n*, 487 Mich at 372.

Consequently, Farm Plaintiffs had a valid argument to present regarding these individual Plaintiffs' standing to sue. The lower court's dismissal of their case on this basis—without providing an opportunity for these Plaintiffs to respond to this concern was improper. This Court should reverse.

CONCLUSION AND RELIEF REQUESTED

MCL 24.264 encompasses all procedural challenges to "the validity of . . a rule"—including the failure to promulgate a rule altogether—and it incorporates the definition of "rule" under MCL 24.207. Farm Plaintiffs validly alleged that the 2020 CAFO General Permit conditions constitute unpromulgated "rules," and the lower court should have heard that dispute on its merits.

Further, because the Legislature has expressly granted this cause of action and did not indicate an intent to have MEGLE determine the validity of rules under the APA, the doctrine of exhaustion of administrative remedies did not deprive the lower court of jurisdiction. Farm

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Plaintiffs likewise filed a valid cause of action over which the lower court has jurisdiction because there is an "actual controversy" justifying declaratory relief under MCR 2.605(A).

But, to the extent that exhaustion of administrative remedies has any application here, the lower court erred by refusing to apply the exceptions for legal issues and threshold challenges to an agency's authority to act. Moreover, individually permitted Plaintiffs as to whom MEGLE has asserted have no remedy cannot be required to exhaust, and it was a violation of due-process for the lower court to dismiss these Plaintiffs for lack of standing without allowing them an opportunity to respond.

For each those reasons, this Court should reverse.

Respectfully Submitted,

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STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN FARM BUREAU, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant-Cross-Appellee.

Supreme Court No. 165166

Court of Appeals No. 356088

Court of Claims No. 20-000148-MZ

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

APPELLANT'S APPENDIX VOLUME TWO

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN FARM BUREAU, *et al.*

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellee.
_____/

Court of Claims Case No: 20-000148-MZ

Hon. Cynthia Diane Stephens

Court of Appeals Docket No: 356088

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PLAINTIFFS-APPELLANTS' APPENDIX TO BRIEF ON APPEAL

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CASE

Judicial Officer	Date Filed	Adjudication	Status
STEPHENS, CYNTHIA	8/6/20	SUMMARY DISPOSITION 12/30/20	CLOSED 12/30/20

PARTICIPANTS

PLAINTIFF 1	MICHIGAN FARM BUREAU	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 2	MICHIGAN MILK PRODUCERS ASSOCIATION	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 3	MICHIGAN PORK PRODUCES ASSOCIATION	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 4	MICHIGAN ALLIED POULTRY INDUSTRIES	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 5	DAIRY FARMERS OF AMERICA	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 6	SELECT MILK PRODUCERS, INC.	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 8	SNIDER FARMS, LLC	FILED: 8/6/20
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PLAINTIFF 10	ATE FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 11	BEBOW DAIRY FARM, INC.	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 12	BENNETT FARMS LIVESTOCK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 13	BLEICH DAIRY	FILED: 8/6/20
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PLAINTIFF 14	BROOK VIEW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 15	BURNS POULTRY FARMS, INC.	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 16	CAR-MIN-VU FARMS, LLC	FILED: 8/6/20
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PLAINTIFF 17	MICHIGAN CATTLEMEN'S ASSOCIATION	FILED: 8/6/20
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PLAINTIFF 17	ALPINE PORK, LLC	FILED: 8/6/20
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PLAINTIFF 18	CARY DAIRY FARM, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 19	CARY'S PIONEER FARM, INC	FILED: 8/6/20
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PLAINTIFF 20	CENTERWOOD FARMS, LLC	FILED: 8/6/20
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PLAINTIFF 21	CENTRAL MICHIGAN MILK PRODUCERS, LLC	FILED: 8/6/20
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PLAINTIFF 22	CLOVER FARMS, LLC	FILED: 8/6/20
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PLAINTIFF 23	CONTRACT FINISHERS, INC	FILED: 8/6/20
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PLAINTIFF 24	COURTER FARMS EAST FEEDLOT, LLC	FILED: 8/6/20
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PLAINTIFF 25	COURTER FARMS WEST FEEDLOT, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 26	CROSSROADS DAIRY, LLC	FILED: 8/6/20
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PLAINTIFF 27	D&K FARMS	FILED: 8/6/20
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PLAINTIFF 35	GERNAAT FAMILY FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 36	GW DAIRY, LLC	FILED: 8/6/20
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PLAINTIFF 37	HALBERT DAIRY, LLC	FILED: 8/6/20
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PLAINTIFF 38	DJN CATTLE FARMS, INC	FILED: 8/6/20
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PLAINTIFF 39	HICKORY GABLES, INC	FILED: 8/6/20
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	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 41	HIGHLAND DAIRY, LLC	FILED: 8/6/20
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PLAINTIFF 42	GEERLINGS HILLSIDE FARMS, LLC	FILED: 8/6/20
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PLAINTIFF 47	INGLESIDE FARMS	FILED: 8/6/20
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PLAINTIFF 48	J&J RUSSCHER PROPERTIES, LLC	FILED: 8/6/20
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PLAINTIFF 49	J AND A PORK, LLC	FILED: 8/6/20
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PLAINTIFF 52	KOBER FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 53	KY-10 FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 54	LAIER FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 55	LUCKY 7 DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 56	LUCKY 7 FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 57	MYERS FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 58	NEW FLEVO DAIRY, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 59	NOBIS FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 60	NVF, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 61	OOMEN BROTHERS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 62	PACKARD FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 63	PAYLA MEADOWS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 64	PEACEFUL ROAD FARM, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 65	PERFORMANCE FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 66	PETRO FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 67	POLL FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 68	PRAIRIE VIEW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 69	PRECISION PORK FARM, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 70	PREFERRED HOG FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 71	THE PRESTON FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 72	PRIDGEON FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 73	PSY FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 74	R&R PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 75	RAPID RIDGE FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 76	RED ARROW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 77	RUGGLES BEEF FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 78	S&T BARNS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 79	SAND CREEK DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 80	SCENIC VIEW DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 81	SCHURING FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 82	SCHURING SWINE, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 83	SCOTT MCKENZIE FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 84	SELDOM REST HOG FARM, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 85	SIDE STREET PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 86	SKINNER FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 87	STEENBLIK DAIRY INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 88	STEWART FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 89	STOREY FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 90	STOUGHTON CREEK FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 91	SWISSLANE DAIRY FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 92	TERREHAVEN FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 93	VALLEY VIEW PORK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 94	VAN OEFFELEN FARM SERVICES	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 95	VANDERPLOEG HOLSTEINS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 96	VDS FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 97	VELD FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 98	WALNUTDALE FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 99	WIL-LE FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 100	WILLOW CREEK FARMS	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 101	WILLOW POINT DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 102	WILSON CENTENNIAL FARM, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 103	BAKERLADS FARM	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 104	DEER CREEK POULTRY FARM	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 105	HARTLAND FARMS, INC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 106	HUDSON DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 107	MARYFLOWER DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	

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PLAINTIFF 108	MEADOW ROCK, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 109	MEDINA DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 110	NOBEL FAMILY DAIRY, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 111	OTTAWA TURKEY FARM	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
PLAINTIFF 112	CROCKERY CREEK TURKEY FARMS, LLC	FILED: 8/6/20
	ATTY: MICHAEL JOHN PATTWELL # 72419 PRIMARY RETAINED	
DEFENDANT 1	MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY	FILED: 8/6/20
	ATTY: ELIZABETH ANNE MORRISSEAU # 81899 PRIMARY RETAINED	

RECEIVABLES/PAYMENTS

	Assessed	Paid/Adjusted	Balance
PTF 1 MICHIGAN FARM BUREAU	$175.00	$175.00	$0.00

	Assessed	Paid/Adjusted	Balance
DEF 1 MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, A	$20.00	$20.00	$0.00

CHRONOLOGICAL LIST OF ACTIVITIES

Activity Date	Activity		User	Entry Date
8/6/20	SUMMONS AND COMPLAINT	$175.00	amd mmla	8/6/20 8/7/20
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
	PTF 8			
	PTF 10			
	PTF 11			
	PTF 12			
	PTF 13			
	PTF 14			
	PTF 15			
	PTF 16			
	PTF 17			
	PTF 17			
	DEF 1			
8/6/20	JUDICIAL OFFICER ASSIGNED TO STEPHENS, CYNTHIA DIANE 28417		amd	8/6/20
8/6/20	RECEIVABLE ELECTRONIC FILING SYSTEM FEE	$25.00	amd	8/6/20

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Activity Date	Activity		User	Entry Date
8/6/20	RECEIVABLE FILING FEE	$150.00	amd	8/6/20
8/7/20	PAYMENT	$175.00	mmla	8/7/20
	RECEIPT NUMBER: COC-LAN.0004668			
	METHOD: CHECK $175.00			
9/9/20	MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) AND (C)(8) AND BRIEF IN SUPPORT (ORAL ARGUMENT REQUESTED)	$20.00	mmla amd	9/9/20 11/13/20
	DEF 1			
9/9/20	RECEIVABLE MOTION FEE	$20.00	mmla	9/9/20
9/11/20	STIPULATION AND PROPOSED ORDER SETTING DATE FOR RESPONSE BRIEF WITH PROOF OF SERVICE		mmla	9/11/20
9/30/20	BRIEF FILED IN RESPONSE TO DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) AND (C)(8) (ORAL ARGUMENT REQUESTED) WITH PROOF OF SERVICE		mmla	9/30/20
	PTF 1			
	PTF 2			
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Activity Date	Activity		User	Entry Date
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	PTF 112			
10/5/20	REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION (ORAL ARGUMENT REQUESTED) WITH PROOF OF SERVICE		mmla	10/5/20
	DEF 1			
11/13/20	PAYMENT	$20.00	amd	11/13/20
	RECEIPT NUMBER: COC-LAN.0004985			
	METHOD: ELECTRONIC FUND TRANSFER $20.00			
12/30/20	OPINION AND ORDER		mmla	12/30/20
	DEF 1			
12/30/20	CLOSE CASE STATUS		mmla	12/30/20

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COURT OF CLAIMS

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN FARM BUREAU; MICHIGAN MILK PRODUCERS ASSOCIATION; MICHIGAN PORK PRODUCERS ASSOCIATION; MICHIGAN ALLIED POULTRY INDUSTRIES; DAIRY FARMERS OF AMERICA; SELECT MILK PRODUCERS, INC.; MICHIGAN CATTLEMEN'S ASSOCIATION; SNIDER FARMS, LLC d/b/a and permitted as Airport View Turkeys; ALPINE PORK, LLC; ATE FARMS, LLC; BEBOW DAIRY FARM, INC. d/b/a and permitted as Bebow Dairy Farm; BENNETT FARMS LIVESTOCK, LLC d/b/a and permitted as Bennet Farms Livestock; BLEICH DAIRY; BROOK VIEW DAIRY, LLC d/b/a and permitted as Brook View Dairy; BURNS POULTRY FARMS, INC.; CAR-MIN-VU FARMS, LLC d/b/a and permitted as Car-Min-Vu Dairy; CARY DAIRY FARM, INC.; CARY'S PIONEER FARM, INC.; CENTERWOOD FARMS, LLC; CENTRAL MICHIGAN MILK PRODUCERS, LLC d/b/a and permitted as Central Michigan Milk Production; CLOVER FARMS, LLC d/b/a and permitted as Clover Family Farms; CONTRACT FINISHERS, INC.; COURTER FARMS EAST FEEDLOT, LLC d/b/a and permitted as Courter Farms East; COURTER FARMS WEST FEEDLOT, LLC d/b/a and permitted as Courter Farms West; CROSSROADS DAIRY, LLC; D & K FARMS; DEN DULK DAIRY FARM, LLC; DEYOUNG PORK, INC. d/b/a and permitted as DeYoung Pork Inc.-Plainwell; DOUBLE QUAD FARMS, LLC d/b/a and permitted as Double Quad Farms; DUTCH MEADOWS DAIRY, LLC d/b/a and permitted as Dutch Meadows Dairy; DYKHUIS FARMS, INC. d/b/a and permitted as Baseline Farm, Ehinger Farm, Riverbend Farm, Shamrock Farm, and Village Central Sandy Ridge; EDGE WOOD DAIRY, LLC d/b/a and permitted as Edge Wood Dairy; FAIRGROVE FARMS, INC. d/b/a and permitted as Fairgrove Farms; GERNAAT FAMILY FARMS; GW DAIRY, LLC; HALBERT DAIRY, LLC d/b/a and permitted as Halbert Dairy; DJN CATTLE FARMS, INC. d/b/a and permitted as Halliwill Farms; HICKORY GABLES, INC. d/b/a and permitted as Hickory

No. 20- 000148 -MZ

HON. Stephens

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Gables; HIGH LEAN PORK, INC. d/b/a and permitted as High-Lean Pork 3 – Hoover; HIGHLAND DAIRY, LLC d/b/a and permitted as Highland Dairy; GEERLINGS HILLSIDE FARMS, LLC d/b/a and permitted as Hillside Farms – Fennville, Hillside Farms-Overisel, and Hillside Farms-Overisel Hog Barns; HARVEST HILL FARM, by its permittee Ron Klein; HASS FEEDLOT, LLC, d/b/a and permitted as Hass Feedlot Home Farm and Hass Feedlot 2; HOLLOO FARMS, LLC, d/b/a and permitted as Holloo Farms; HURON PORK, LLC; INGLESIDE FARMS; J&J RUSSCHER PROPERTIES, LLC; J AND A PORK, LLC d/b/a and permitted as J and A Pork; JMAX LLC d/b/a and permitted as JMax Dairy; KARNEMAATS, LLC; KOBER FARMS, LLC; KY-10 FARMS, LLC d/b/a and permitted as KY-10 Farms; LAIER FARMS, INC. d/b/a and permitted as Laier Farms; LUCKY 7 DAIRY, LLC; LUCKY 7 FARMS, LLC; MYERS FARMS, LLC d/b/a and permitted as Myers Farms; NEW FLEVO DAIRY, INC. d/b/a and permitted as New Flevo Dairy; NOBIS FARMS, LLC d/b/a and permitted as Nobis Dairy Farms; NVF, INC.; OOMEN BROTHERS, INC. d/b/a and permitted as Oomen Brothers Hogs; PACKARD FARMS, LLC, d/b/a and permitted as Packard Farms; PAYLA MEADOWS, LLC; PEACEFUL ROAD FARM, LLC d/b/a and permitted as Peaceful Road Farms; PERFORMANCE FARMS, LLC; PETRO FARMS; POLL FARMS, INC.; PRAIRIE VIEW DAIRY, LLC; PRECISION PORK FARM, INC. d/b/a and permitted as Precision Pork Farm; PREFERRED HOG FARMS, INC. d/b/a and permitted as Preferred Hog 146th; THE PRESTON FARMS, LLC, d/b/a and permitted as Preston Hog Farms; PRIDGEON FARMS, LLC d/b/a and permitted as Pridgeon Farms; PSY FARMS; R&R PORK, LLC d/b/a and permitted as R&R Pork; RAPID RIDGE FARMS, LLC d/b/a and permitted as Rapid Ridge; RED ARROW DAIRY, LLC d/b/a and permitted as Red Arrow Dairy; RUGGLES BEEF FARMS, LLC d/b/a and permitted as Ruggles Beef Farms; S&T BARNS, LLC d/b/a and permitted as S&T Barns – Booth, S&T Barns - Fawn River, S&T Barns – TSC, and S&T Barns-Haenni; SAND CREEK DAIRY, LLC; SCENIC VIEW DAIRY, LLC d/b/a and permitted as

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Scenic View Dairy; SCHURING FARMS, LLC d/b/a and permitted as Schuring Farms; SCHURING SWINE, LLC; SCOTT MCKENZIE FARMS; SELDOM REST HOG FARM, LLC d/b/a and permitted as Seldom Rest Hog Farm; SIDE STREET PORK, LLC d/b/a and permitted as Side Street Pork; SKINNER FARMS, LLC d/b/a and permitted as Skinner Farms; STEENBLIK DAIRY INC.; STEWART FARMS, LLC d/b/a and permitted as Stewart Farms; STOREY FARMS, LLC; STOUGHTON CREEK FARMS, LLC d/b/a and permitted as Stoughton Creek Farms; SWISSLANE DAIRY FARMS, INC. d/b/a and permitted as Swisslane Farms; TERREHAVEN FARMS, INC. d/b/a and permitted as Terrehaven Farms; VALLEY VIEW PORK, LLC d/b/a and permitted as Valley View Pork; VAN OEFFELEN FARM SERVICES; VANDERPLOEG HOLSTEINS, LLC d/b/a and permitted as Vanderploeg Holsteins; VDS FARMS, LLC d/b/a and permitted as VDS Farms-Fulton and VDS Farms-S Avenue; VELD FARMS, LLC d/b/a and permitted as Veld Farms; WALNUTDALE FARMS, INC. d/b/a and permitted as Walnutdale Farms Dorr Twp; WIL-LE FARMS, INC. d/b/a and permitted as Wil-Le Farms; WILLOW CREEK FARMS; WILLOW POINT DAIRY, LLC d/b/a and permitted as Willow Point Dairy; WILSON CENTENNIAL FARM, LLC; BAKERLADS FARM; DEER CREEK POULTRY FARM; HARTLAND FARMS, INC. d/b/a and permitted as Hartland Farms; HUDSON DAIRY, LLC d/b/a and permitted as Hudson Dairy; MAYFLOWER DAIRY, LLC; MEADOW ROCK, LLC d/b/a and permitted as Meadow Rock Dairy; MEDINA DAIRY, LLC d/b/a and permitted as Medina Dairy; NOBEL FAMILY DAIRY, LLC; OTTAWA TURKEY FARM, permitted as Ottawa Turkey Farm 112th; and CROCKERY CREEK TURKEY FARMS, LLC d/b/a and permitted as Crockery Creek – 80th,

Plaintiffs,

v

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MICHIGAN DEPARTMENT OF ENVIRONMENT,
GREAT LAKES, AND ENERGY,

Defendant.
_____/

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Michigan Farm Bureau, Michigan Milk Producers Association, Michigan Pork Producers Association, Michigan Allied Poultry Industries, Dairy Farmers of America, and Select Milk Producers, Inc. (collectively, the "Association Plaintiffs"); and 103 livestock farms identified individually below who are regulated as Concentrated Animal Feeding Operations ("CAFOs") (collectively, the "Permit-Applicant Plaintiffs") (all together, the "Plaintiffs"), by and through their attorneys, Michael J. Pattwell and Zachary C. Larsen of Clark Hill PLC, hereby bring this Complaint for Declaratory and Injunctive Relief and state as follows in support:

INTRODUCTION

1. This is a case of administrative overreach that arises out of the Michigan Department of Environment, Great Lakes, and Energy's ("MEGLE") attempt to unilaterally impose a novel and industry-altering set of rules on Michigan's CAFOs both in excess of MEGLE's legislatively-delegated authority and in circumvention of the legislatively-mandated rulemaking process set forth in Michigan's Administrative Procedures Act ("APA"), MCL 24.201 *et seq.*

2. Through the bureaucratic process of revising its CAFO General Permit ("2020 CAFO General Permit") (Ex A), MEGLE now seeks to impose costly and cumbersome requirements on Michigan's agricultural economy that:

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(a) Presumptively ban CAFOs from land-applying agriculturally beneficial "CAFO waste" (hereinafter, "manure") to crop fields during a three-month period every year by setting conditions precedent to applying manure that are overly burdensome and difficult to meet;[1]

(b) Outright prohibit CAFOs from transferring their manure to other entities that land-apply such nutrient-enhancing substances during those same three months;

(c) Arbitrarily restrict the amount of phosphorus permitted in soil to which manure may be land applied without any scientific support for its determination;

(d) Mandate that CAFOs and any farms that receive manure from CAFOs both install *permanent*, 35-foot vegetated buffer strips *and* prevent application of manure within 100 feet of every surface water, tile-line intake, drain, and roadside ditch located on any land to which their manure is applied, thus severely limiting the amount of land that can be crop farmed or, alternatively, denying CAFOs the ability to use the nutrients in manure for crop production in an environmentally and agriculturally beneficial manner;

(e) Supersede the Michigan Agriculture Environmental Assurance Program ("MAEAP") by denying environmentally conscious and legally compliant farms the promised benefit of the MAEAP program and imposing additional restrictions based on such farms' location within a Total Maximum Daily Load ("TMDL") watershed;

(f) Vastly expand the jurisdictional reach of CAFO permitting to govern the activities of wholly separate legal entities that are not regulated as CAFOs; and

(g) Write a blank check to MEGLE to impose additional conditions on CAFOs based on their location within a TMDL watershed, thereby transforming coverage under the General Permit into what is akin to an individual permit for such farms.

3. Because MEGLE requires the vast majority of CAFOs to obtain coverage under its CAFO General Permit, the agency has broadly applied these mandates to the industry.

4. Each of the challenged standards and mandates delimited above force Michigan's largest farms to incur substantial costs and threaten the viability and continued operations of some farms.

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[1] One of the novel regulations MEGLE now seeks to impose by way of administrative edict (*i.e.*, a presumptive winter land application ban) has been considered and expressly rejected by the Michigan Legislature over the course of the last several legislative sessions. See, e.g., 2019 SB 247; 2019 HB 4418; 2017 SB 639; & 2017 HB 5185.

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5. But rather than the executive lobbying for the Legislature to pass legislation or, at least, vetting those novel mandates and standards through Michigan's rigorous rule-promulgation process, MEGLE has chosen to impose its mandates on Michigan farms through the much less rigorous procedures of general permitting.

6. For example, MEGLE's avoidance of statutorily mandated rulemaking procedures has:

(a) enabled the agency to ignore the legislative directive that it must justify its policies with a Regulatory Impact Statement and Cost Benefit Analysis (RIS-CBA) that would estimate the economic impact of its CAFO standards on business, small business, and local governments;

(b) permitted MEGLE to eschew legislative oversight of the agency's proposals; and

(c) allowed MEGLE to skirt the scrutiny of the recently formed Environmental Rules Review Committee, which includes representatives from the agricultural industry.

7. MEGLE has also ignored Michigan law prohibiting an agency from adopting standards at the state level that are more restrictive than the corresponding federal standards without first finding a "clear and convincing need to exceed" the federal standard. MCL 24.232(8).

8. Instead, MEGLE has adopted mandates that are far more restrictive than applicable federal regulations.

9. MEGLE has thus imposed massive and industry-altering legal mandates through unelected officials without legislative approval and without even the quasi-legislative veneer of rulemaking—even though the People's elected officials in the Legislature have repeatedly rejected less-demanding standards when proposed as amendments to Part 31 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.3101.

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10. Worse still, MEGLE has imposed these substantial costs on Michigan's largest family farms during a time when our country's health and its economy have been ravaged by COVID-19 a/k/a "the Coronavirus" and our dependence on farms to provide an abundant and healthy food supply is even greater than ever.

11. And though here, as in most cases, the process by which something is created and vetted significantly impacts the quality and character of the final product, MEGLE's failings are not limited to ignoring the legislatively mandated APA process.

12. MEGLE's permit conditions also exceed the agency's delegated authority under statute, they are contrary to the language and intent of Part 31, and they are arbitrary and capricious—rendering them substantively invalid as well.

13. Moreover, MEGLE's actions are unconstitutional under both the state and federal constitution.

14. MEGLE has deprived Plaintiffs of due process of law by failing to adhere the Legislature's prescribed procedures and promised protections, depriving these farms of liberty and property through arbitrary executive action, and asserting authority under unconstitutionally vague pronouncements.

15. Further, MEGLE's exceedance of its limited statutory authority and its usurpation of legislative power violates the Separation of Powers Clause of the Michigan Constitution. Const 1963, art III, § 2.

16. And MEGLE's mandate to convert economically beneficial farmland into economically useless wilderness is a violation of the Takings Clauses of both the Michigan Constitution and U.S. Constitution. Const 1963, art X, § 2; U.S. Const, Amend V.

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17. For those reasons, Plaintiffs ask this Court to declare that the challenged mandates and standards in MEGLE's 2020 CAFO General Permit are: (a) "rules" under the APA; (b) procedurally invalid as they have been improperly adopted outside of the APA's rulemaking process; (c) substantively invalid where MEGLE lacks the authority to adopt them, they are contrary to Part 31, and they are otherwise arbitrary and capricious; (d) invalid and unenforceable as violative of due process; (e) unconstitutional as contrary to the Separation of Powers of Michigan's Constitution; and (f) violative of the Takings Clauses of the Michigan Constitution and U.S. Constitution.

18. Additionally, Plaintiffs seek both a preliminary injunction staying MEGLE's enforcement of the challenged conditions of the General Permit terms during the course of this suit[2] and a permanent injunction against MEGLE's use of the challenged mandates and standards—whether by way of the 2020 General Permit or in any individual permit.

PARTIES

19. Plaintiffs in this matter include associations representing Michigan's agricultural industry and many of Michigan's largest farms that are applicants to the 2020 CAFO General Permit.

Association Plaintiffs

20. Plaintiff Michigan Farm Bureau ("Farm Bureau") is a grassroots organization that exists to promote and represent the interests of the agricultural industry across the State of

[2] Plaintiffs have sought clarity from MEGLE concerning whether these new general permit conditions will be applied to farms during the pendency of this suit and a related administrative appeal. In particular, Plaintiffs have asked MEGLE to provide written guidance regarding how MEGLE will be handling the permitting of farms previously provided certificates of coverage under the 2015 General Permit for CAFOs. That request remains outstanding. Depending on how MEGLE responds to this pending request, a preliminary injunction may not be required.

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Michigan. Farm Bureau represents the full spectrum of Michigan's agricultural diversity, from crops and livestock to fruits and vegetables, greenhouses, forestry, and more.

21. Plaintiff Farm Bureau's membership includes both large and small livestock farms across the State of Michigan, including numerous farms that are regulated as CAFOs, many of which are subject to the terms of General Permit No. MIG010000, as well as non-CAFO crop and livestock farms within Michigan. Farm Bureau's members include CAFOs that raise chickens for egg and meat production, dairy cows for milk, cheese, ice cream, and other dairy product production, cattle for beef, pigs for pork, and a variety of other animals for their capacity to efficiently produce food essentials that feed Michiganders at affordable prices.

22. Plaintiff Michigan Milk Producers Association ("MMPA") is a dairy farmer owned cooperative and dairy processor. Founded in 1915, MMPA serves hundreds of dairy farmers in Michigan. MMPA's membership includes many large dairy farms that are regulated as CAFOs, many of which are subject to the terms of General Permit No. MIG010000.

23. Plaintiff Michigan Pork Producers Association ("Pork Producers") is a state affiliate of the National Pork Producers Council, a national organization of pork industry producers. Pork Producers' membership includes large pork farms that are regulated as CAFOs, many of which are subject to the terms of General Permit No. MIG010000.

24. Plaintiff Michigan Allied Poultry Industries ("Allied Poultry") is a non-profit statewide trade organization representing Michigan's egg, chicken, and turkey farmers, and their young stock network of breeders, hatcheries, and pullet growers. Allied Poultry's membership includes large poultry farms that are regulated as CAFOs, many of which are subject to the terms of General Permit No. MIG010000.

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25. Plaintiff Dairy Farmers of America ("Dairy Farmers") is a global dairy cooperative owned by dairy farmers who supply milk consumed by Michiganders. Dairy Farmers cooperative members includes many of Michigan's large dairy farms that are regulated as CAFOs, many of which are subject to the terms of General Permit No. MIG010000.

26. Plaintiff Select Milk Producers, Inc. ("Select") is a dairy farmer owned cooperative with dairy farm members located in Michigan, among other states. Select also owns dairy processing facilities located in Michigan and supplies milk from its member farms to other Michigan dairy processors. Select's cooperative members include Michigan dairy farms that are regulated as CAFOs, many of which are subject to the terms of General Permit No. MIG010000.

27. Plaintiff Michigan Cattlemen's Association ("MCA") is a nonprofit organization representing over 15,000 cattle producers in Michigan. MCA exists to foster, promote, and protect and an environment conducive to profitable beef production. MCA's members include Michigan cattle farms that are regulated as CAFOs, many of which are subject to the terms of General Permit No. MIG010000.

Permit-Applicant Plaintiffs

28. Plaintiff Snider Farms, LLC d/b/a and permitted as Airport View Turkeys is a turkey farm located at 1716 W Baseline Rd., Hart, Michigan. Airport View Turkeys is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010269, and has applied for coverage under the 2020 General Permit.

29. Plaintiff Alpine Pork, LLC is a swine farm located at 15713 Pierce, West Olive, Michigan. Alpine Pork, LLC is regulated by Defendant MEGLE as a CAFO, was permitted

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under the 2015 General Permit under Certificate of Coverage Number MIG010217, and has applied for coverage under the 2020 General Permit.

30. Plaintiff ATE Farms, LLC is a swine farm located at 10890 West Weidman Rd., Weidman, Michigan. ATE Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010203, and has applied for coverage under the 2020 General Permit.

31. Plaintiff Bebow Dairy Farm, Inc. d/b/a and permitted as Bebow Dairy Farm is a dairy farm located at 9119 North Baldwin Rd., St. Louis, Michigan. Bebow Dairy Farm is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010141, and has applied for coverage under the 2020 General Permit.

32. Plaintiff Bennett Farms Livestock, LLC d/b/a and permitted as Bennet Farms Livestock is a swine farm located at 8170 S. Brucker Ave., Fremont, Michigan. Bennett Farms Livestock is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010166, and has applied for coverage under the 2020 General Permit.

33. Plaintiff Bleich Dairy is a dairy farm located at 14501 Steward Rd., Hudson, Michigan. Bleich Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010060, and has applied for coverage under the 2020 General Permit.

34. Plaintiff Brook View Dairy, LLC d/b/a and permitted as Brook View Dairy is a dairy farm located at 10560 Freeport Ave., Freeport, Michigan. Brook View Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit

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under Certificate of Coverage Number MIG010089, and has applied for coverage under the 2020 General Permit.

35. Plaintiff Burns Poultry Farms, Inc. is a poultry farm located at 9922 Irish Rd., Millington, Michigan. Burns Poultry Farms, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010031, and has applied for coverage under the 2020 General Permit.

36. Plaintiff Car-Min-Vu Farms, LLC d/b/a and permitted as Car-Min-Vu Dairy is a dairy farm located at 2965 Howell Rd., Webberville, Michigan. Car-Min-Vu Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010205, and has applied for coverage under the 2020 General Permit.

37. Plaintiff Cary Dairy Farm, Inc. is a dairy farm located at 6625 Poorman Rd., Battle Creek, Michigan. Cary Dairy Farm, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010087, and has applied for coverage under the 2020 General Permit.

38. Plaintiff Cary's Pioneer Farm, Inc. is a cattle farm located at 3977 North Bliss Rd., Alma, Michigan. Cary's Pioneer Farm, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010053, and has applied for coverage under the 2020 General Permit.

39. Plaintiff Centerwood Farms, LLC is a swine farm located at 3623 Pierce Road, Remus, Michigan. Centerwood Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010255, and has applied for coverage under the 2020 General Permit.

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40. Plaintiff Central Michigan Milk Producers, LLC d/b/a and permitted as Central Michigan Milk Production is a dairy farm located at 9119 North Baldwin Rd., St. Louis, Michigan. Central Michigan Milk Production is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010230, and has applied for coverage under the 2020 General Permit.

41. Plaintiff Clover Farms, LLC d/b/a and permitted as Clover Family Farms is a swine farm located at 2412 Stage Rd., Ionia, Michigan. Clover Family Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010094, and has applied for coverage under the 2020 General Permit.

42. Plaintiff Contract Finishers, Inc. is a swine farm located at 5792 136th Ave., Hamilton, Michigan. Contract Finishers, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010068, and has applied for coverage under the 2020 General Permit.

43. Plaintiff Courter Farms East Feedlot, LLC d/b/a and permitted as Courter Farms East is a cattle farm located at 10068 Luce Rd., Alma, Michigan. Courter Farms East is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010025, and has applied for coverage under the 2020 General Permit.

44. Plaintiff Courter Farms West Feedlot, LLC d/b/a and permitted as Courter Farms West is a cattle farm located at 8495 Monroe Rd., Elwell, Michigan. Courter Farms West is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010184, and has applied for coverage under the 2020 General Permit.

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45. Plaintiff Crossroads Dairy, LLC is a dairy farm located at 588 3 Mile Rd. NW, Suite 203, Grand Rapids, Michigan. Crossroads Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010071, and has applied for coverage under the 2020 General Permit.

46. Plaintiff D & K Farms is a swine farm located at 7751 West Allan Rd., Elsie, Michigan. D & K Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010294, and has applied for coverage under the 2020 General Permit.

47. Plaintiff den Dulk Dairy Farm, LLC is a dairy farm located at 588 3 Mile Rd. NW, Suite 203, Grand Rapids, Michigan. den Dulk Dairy Farm, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010112, and has applied for coverage under the 2020 General Permit.

48. Plaintiff DeYoung Pork, Inc. d/b/a and permitted as DeYoung Pork Inc.-Plainwell is a swine farm located at 381 114th Ave., Plainwell, Michigan. DeYoung Pork, Inc.-Plainwell is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010082, and has applied for coverage under the 2020 General Permit.

49. Plaintiff Double Quad Farms, LLC d/b/a and permitted as Double Quad Farms is a swine farm located at 9755 East Polk Rd., Wheeler, Michigan. Double Quad Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010017, and has applied for coverage under the 2020 General Permit.

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50. Plaintiff Dutch Meadows Dairy, LLC d/b/a and permitted as Dutch Meadows Dairy is a dairy farm located at 11481 Blue Spruce Dr., Fowler, Michigan. Dutch Meadows Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010096, and has applied for coverage under the 2020 General Permit.

51. Plaintiff Dykhuis Farms, Inc. is the parent company of five farms headquartered at 3759 46th St., Hamilton, Michigan and is doing business and is permitted through wholly owned subsidiaries as Baseline Farm, Ehinger Farm, Riverbend Farm, Shamrock Farm, and Village Central Sandy Ridge. Each farm is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Numbers MIG010075, MIG010186, MIG010132, MIG010074, and MIG010122; and each farm has applied for coverage under the 2020 General Permit.

52. Plaintiff Edge Wood Dairy, LLC d/b/a and permitted as Edge Wood Dairy is a dairy farm located at 588 3 Mile Rd., NW Ste. 203, Grand Rapids, Michigan. Edge Wood Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010212, and has applied for coverage under the 2020 General Permit.

53. Plaintiff Fairgrove Farms, Inc. d/b/a and permitted as Fairgrove Farms is a swine farm located at 69676 Balk Rd., Sturgis, Michigan. Fairgrove Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010242, and has applied for coverage under the 2020 General Permit.

54. Plaintiff Gernaat Family Farms is a dairy farm located at 11800 S. Hoekwater Rd., Marion, Michigan. Gernaat Family Farms is regulated by Defendant MEGLE as a CAFO,

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was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010102, and has applied for coverage under the 2020 General Permit.

55. Plaintiff GW Dairy, LLC is a dairy farm located at 1910 E. Meyering Rd., Marion, Michigan. GW Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010145, and has applied for coverage under the 2020 General Permit.

56. Plaintiff Halbert Dairy, LLC d/b/a and permitted as Halbert Dairy is a dairy farm located at 23675 Banfield Rd., Battle Creek, Michigan. Halbert Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010051, and has applied for coverage under the 2020 General Permit.

57. Plaintiff DJN Cattle Farms, Inc. d/b/a (and permitted as) Halliwill Farms is a cattle and dairy farm located at 2450 Wilkinson Rd., Adrian, Michigan. Halliwill Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010192, and has applied for coverage under the 2020 General Permit.

58. Plaintiff Hickory Gables, Inc. d/b/a and permitted as Hickory Gables is a dairy farm located at 15565 Lockshore Road, Hickory Corners, Michigan. Hickory Gables is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010200, and has applied for coverage under the 2020 General Permit.

59. Plaintiff High Lean Pork, Inc. d/b/a and permitted as High-Lean Pork 3 – Hoover is a swine farm located at 11304 Edgewater Dr., Allendale, Michigan. High Lean Pork, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit

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under Certificate of Coverage Number MIG010229, and has applied for coverage under the 2020 General Permit.

60. Plaintiff Highland Dairy, LLC d/b/a and permitted as Highland Dairy is a dairy farm located at 8549 Stein Rd., Sebewaing, Michigan. Highland Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010018, and has applied for coverage under the 2020 General Permit.

61. Plaintiff Geerlings Hillside Farms, LLC d/b/a and permitted as Hillside Farms – Fennville is a swine farm located at 186 W 35th St., Holland, Michigan. Hillside Farms – Overisel is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010207, and has applied for coverage under the 2020 General Permit.

62. Plaintiff Geerlings Hillside Farms, LLC d/b/a and permitted as Hillside Farms-Overisel Hog Barns is a swine farm located at 5834 Natilyn Dr., Hamilton, Michigan. Hillside Farms-Overisel Hog Barns is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010130, and has applied for coverage under the 2020 General Permit.

63. Plaintiff Harvest Hill Farm by its permittee Ron Klein is a swine farm located at A-4438 140th Ave., Holland, Michigan. Harvest Hill Farm is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010069, and has applied for coverage under the 2020 General Permit.

64. Plaintiff Hass Feedlot, LLC d/b/a and permitted as Hass Feedlot Home Farm and Hass Feedlot 2 operates cattle farms located at 775 Carpenter Rd., Bad Axe, Michigan and 2258 Thomas Rd., Bad Axe, MI 48413. Hass Feedlot Home Farm and Hass Feedlot 2 are regulated by

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Defendant MEGLE as CAFOs, were permitted under the 2015 General Permit under Certificate of Coverage Numbers MIG010040 & MIG010042, and have applied for coverage under the 2020 General Permit.

65. Plaintiff Holloo Farms, LLC d/b/a and permitted as Holloo Farms is a dairy farm located at 20849 F. Drive South, Marshall, Michigan. Holloo Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010167, and has applied for coverage under the 2020 General Permit.

66. Plaintiff Huron Pork, LLC is a swine farm located at 11304 Edgewater Dr., Suite A, Allendale, Michigan. Huron Pork, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010013, and has applied for coverage under the 2020 General Permit.

67. Plaintiff Ingleside Farms is a cattle farm located at 8891 36-Mile Rd., Romeo, Michigan. Ingleside Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG10157 and has applied for coverage under the 2020 General Permit.

68. Plaintiff J&J Russcher Properties, LLC is a swine farm located at A-4721 40th St., Zeeland, Michigan. J&J Russcher Properties, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010180, and has applied for coverage under the 2020 General Permit.

69. Plaintiff J and A Pork, LLC d/b/a and permitted as J and A Pork is a swine farm located at 5774 Fenwick Rd., Greenville, Michigan. J and A Pork is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010020, and has applied for coverage under the 2020 General Permit.

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70. Plaintiff JMax LLC d/b/a and permitted as JMax Dairy is a dairy farm located at 7084 West 72nd St., Fremont, Michigan. JMax Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010227, and has applied for coverage under the 2020 General Permit.

71. Plaintiff Karnemaats, LLC is a swine farm located at 5118 West 72nd St., Fremont, Michigan. Karnemaats, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010077, and has applied for coverage under the 2020 General Permit.

72. Plaintiff Kober Farms, LLC is a swine farm located at 8990 Peach Ridge Ave. NW, Sparta, Michigan. Kober Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010055, and has applied for coverage under the 2020 General Permit.

73. Plaintiff KY-10 Farms, LLC d/b/a and permitted as KY-10 Farms is a swine farm located at 14093 Portage Rd., Vicksburg, Michigan. KY-10 Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010221, and has applied for coverage under the 2020 General Permit.

74. Plaintiff Laier Farms, Inc. d/b/a and permitted as Laier Farms is a dairy farm located at 7416 Argentine Rd., Howell, Michigan. Laier Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010064, and has applied for coverage under the 2020 General Permit.

75. Plaintiff Lucky 7 Dairy, LLC is a dairy farm located at 10550 Strief Rd., McBain, Michigan. Lucky 7 Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted

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under the 2015 General Permit under Certificate of Coverage Number MIG010261, and has applied for coverage under the 2020 General Permit.

76. Plaintiff Lucky 7 Farms, LLC is a swine farm located at 14093 Portage Rd., Vicksburg, Michigan. Lucky 7 Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010225, and has applied for coverage under the 2020 General Permit.

77. Plaintiff Myers Farms, LLC d/b/a and permitted as Myers Farms is a dairy farm located at 7565 40th St. S, Scotts, Michigan. Myers Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010276, and has applied for coverage under the 2020 General Permit.

78. Plaintiff New Flevo Dairy, Inc. d/b/a and permitted as New Flevo Dairy is a dairy farm located at 9650 Plank Road, Clayton, Michigan. New Flevo Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010258, and has applied for coverage under the 2020 General Permit.

79. Plaintiff Nobis Farms, LLC d/b/a and permitted as Nobis Dairy Farms is a dairy farm located at 5813 W. Walker Rd., Saint Johns, Michigan. Nobis Dairy Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010058, and has applied for coverage under the 2020 General Permit.

80. Plaintiff NVF, Inc. is a dairy farm located at 11691 East Walton Rd., Shepherd, Michigan. NVF, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010041, and has applied for coverage under the 2020 General Permit.

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81. Plaintiff Oomen Brothers, Inc., d/b/a and permitted as Oomen Brothers Hogs is a swine farm located at 2157 East Jackson Rd., Hart, Michigan. Oomen Brothers, Inc., d/b/a Oomen Brothers Hogsis regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010001, and has applied for coverage under the 2020 General Permit.

82. Plaintiff Packard Farms, LLC d/b/a and permitted as Packard Farms is a dairy farm located at 6584 S. Brand Ave., Clare, Michigan. Packard Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010034, and has applied for coverage under the 2020 General Permit.

83. Plaintiff Payla Meadows, LLC is a swine farm located at 14093 Portage Rd., Vicksburg, Michigan. Payla Meadows, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010211, and has applied for coverage under the 2020 General Permit.

84. Plaintiff Peaceful Road Farm, LLC d/b/a and permitted as Peaceful Road Farms is a dairy farm located at 1125 122nd Ave., Martin, Michigan. Peaceful Road Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010209 and has applied for coverage under the 2020 General Permit.

85. Plaintiff Performance Farms, LLC is a swine farm located at 1944 17 Mile Rd., Remus, Michigan. Performance Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010226, and has applied for coverage under the 2020 General Permit.

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86. Plaintiff Petro Farms is a dairy farm located at 3387 102nd Ave., Gobles, Michigan. Petro Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010062, and has applied for coverage under the 2020 General Permit.

87. Plaintiff Poll Farms, Inc. is a swine farm located at 4406 134th Ave., Hamilton, Michigan. Poll Farms, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010148, and has applied for coverage under the 2020 General Permit.

88. Plaintiff Prairie View Dairy, LLC is a dairy farm located at 12850 Parker Rd., Delton, Michigan. Prairie View Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010123, and has applied for coverage under the 2020 General Permit.

89. Plaintiff Precision Pork Farm, Inc. d/b/a and permitted as Precision Pork Farm is a swine farm located at 5014 Perry St., Zeeland, Michigan. Precision Pork Farm is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010086, and has applied for coverage under the 2020 General Permit.

90. Plaintiff Preferred Hog Farms, Inc. d/b/a and permitted as Preferred Hog 146th is a swine farm located at A-5136 146th Ave., Holland, Michigan. Preferred Hog 146th is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010208, and has applied for coverage under the 2020 General Permit.

91. Plaintiff The Preston Farms, LLC d/b/a and permitted as Preston Hog Farms is a swine farm located at 1097 Central Rd., Quincy, Michigan. Preston Hog Farms is regulated by

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Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010099, and has applied for coverage under the 2020 General Permit.

92. Plaintiff Pridgeon Farms, LLC d/b/a and permitted as Pridgeon Farms is a swine farm located at 1115 Pridgeon Rd., Montgomery, Michigan. Pridgeon Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010105, and has applied for coverage under the 2020 General Permit.

93. Plaintiff PSY Farms is a swine farm located at 2501 East Galien-Buchanan Rd., Buchanan, Michigan. PSY Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010124, and has applied for coverage under the 2020 General Permit.

94. Plaintiff R&R Pork, LLC d/b/a and permitted as R&R Pork is a swine farm located at 25430 Featherstone Rd., Sturgis, Michigan. R&R Pork is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010263, and has applied for coverage under the 2020 General Permit.

95. Plaintiff Rapid Ridge Farms, LLC d/b/a and permitted as Rapid Ridge is a dairy farm located at 4903 Toles Rd., Mason, Michigan. Rapid Ridge is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010274, and has applied for coverage under the 2020 General Permit.

96. Plaintiff Red Arrow Dairy, LLC d/b/a and permitted as Red Arrow Dairy is a dairy farm located at 50 South 64th Ave., Coopersville, Michigan. Red Arrow Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010210, and has applied for coverage under the 2020 General Permit.

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97. Plaintiff Ruggles Beef Farms, LLC d/b/a and permitted as Ruggles Beef Farms is a cattle farm located at 6327 Sanilac Rd., Kingston, Michigan. Ruggles Beef Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010253, and has applied for coverage under the 2020 General Permit.

98. Plaintiff S&T Barns, LLC d/b/a and permitted as S&T Barns - Booth is a swine farm located at 822 Snow Prairie Rd., Bronson, Michigan. S&T Barns - Booth is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010272, and has applied for coverage under the 2020 General Permit.

99. Plaintiff S&T Barns, LLC d/b/a and permitted as S&T Barns - Fawn River is a swine farm located at 822 Snow Prairie Rd., Bronson, Michigan. S&T Barns - Fawn River is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010283, and has applied for coverage under the 2020 General Permit.

100. Plaintiff S&T Barns, LLC d/b/a and permitted as S&T Barns – TSC is a swine farm located at 822 Snow Prairie Rd., Bronson, Michigan. S&T Barns – TSC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010273, and has applied for coverage under the 2020 General Permit.

101. Plaintiff S&T Barns, LLC d/b/a and permitted as S&T Barns-Haenni is a swine farm located at 822 Snow Prairie Rd., Bronson, Michigan. S&T Barns-Haenni is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010271, and has applied for coverage under the 2020 General Permit.

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102. Plaintiff Sand Creek Dairy, LLC is a dairy farm located at 1045 Soloman Rd., Hastings, Michigan. Sand Creek Dairy, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010138, and has applied for coverage under the 2020 General Permit.

103. Plaintiff Scenic View Dairy, LLC d/b/a and permitted as Scenic View Dairy is a dairy farm located at 186 West 35th St., Holland, Michigan. Scenic View Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010106, and has applied for coverage under the 2020 General Permit.

104. Plaintiff Schuring Farms, LLC d/b/a and permitted as Schuring Farms is a swine farm located at 3971 Hayes Rd., Muir, Michigan. Schuring Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010049, and has applied for coverage under the 2020 General Permit.

105. Plaintiff Schuring Swine, LLC is a swine farm located at 2659 Struble Rd., Michigan. Schuring Swine, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010095, and has applied for coverage under the 2020 General Permit.

106. Plaintiff Scott McKenzie Farms is a swine farm located at 53721 Hemlock Lake Rd., Marcellus, Michigan. Scott McKenzie Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010098, and has applied for coverage under the 2020 General Permit.

107. Plaintiff Seldom Rest Hog Farm, LLC d/b/a and permitted as Seldom Rest Hog Farm is a swine farm located at A4098 146th Ave., Holland, Michigan. Seldom Rest Hog Farm is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit

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under Certificate of Coverage Number MIG010117, and has applied for coverage under the 2020 General Permit.

108. Plaintiff Side Street Pork, LLC d/b/a and permitted as Side Street Pork is a swine farm located at 4843 North Johnson Rd., Weidman, Michigan. Side Street Pork is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010228, and has applied for coverage under the 2020 General Permit.

109. Plaintiff Skinner Farms, LLC d/b/a and permitted as Skinner Farms is a swine farm located at 377 S. Alger Rd., Ithaca, Michigan. Skinner Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010003, and has applied for coverage under the 2020 General Permit.

110. Plaintiff Steenblik Dairy Inc. is a dairy farm located at 3844 N. Hubbardston Rd., Pewamo, Michigan. Steenblik Dairy Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010080, and has applied for coverage under the 2020 General Permit.

111. Plaintiff Stewart Farms, LLC d/b/a and permitted as Stewart Farms is a swine farm located at 7596 Wilson Rd., Bannister, Michigan. Stewart Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010021, and has applied for coverage under the 2020 General Permit.

112. Plaintiff Storey Farms, LLC is a swine farm located at 1328 6 Mile Rd., Remus, Michigan. Storey Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010032, and has applied for coverage under the 2020 General Permit.

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113. Plaintiff Stoughton Creek Farms, LLC d/b/a and permitted as Stoughton Creek Farms is a swine farm located at 10580 Blackmer Rd., Carson City, Michigan. Stoughton Creek Farms, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010183, and has applied for coverage under the 2020 General Permit.

114. Plaintiff Swisslane Dairy Farms, Inc. d/b/a and permitted as Swisslane Farms is a dairy farm located at 12877 84th St., Alto, Michigan. Swisslane Farms, Inc. is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010052, and has applied for coverage under the 2020 General Permit.

115. Plaintiff Terrehaven Farms, Inc. d/b/a and permitted as Terrehaven Farms is a cattle farm located at 3007 Wolf Creek Hwy., Adrian, Michigan. Terrehaven Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010061, and has applied for coverage under the 2020 General Permit.

116. Plaintiff Valley View Pork, LLC d/b/a and permitted as Valley View Pork is a swine farm located at P.O. Box 158, Allendale, Michigan. Valley View Pork is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010081, and has applied for coverage under the 2020 General Permit.

117. Plaintiff Van Oeffelen Farm Services is a dairy farm located at 305 Hoover St., Conklin, Michigan. Van Oeffelen Farm Services is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010270, and has applied for coverage under the 2020 General Permit.

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118. Plaintiff Vanderploeg Holsteins, LLC d/b/a and permitted as Vanderploeg Holsteins is a dairy farm located at 1223 South Begole Rd., Ithaca, Michigan. Vanderploeg Holsteins is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010092, and has applied for coverage under the 2020 General Permit.

119. Plaintiff VDS Farms, LLC d/b/a and permitted as VDS Farms-Fulton and VDS Farms-S Avenue operates dairy farms located at 14461 S. 44th St., Fulton, Michigan and 8426 East S. Ave., Fulton, Michigan. VDS Farms-Fulton and VDS Farms-S Avenue are regulated by Defendant MEGLE as CAFOs, were permitted under the 2015 General Permit under Certificate of Coverage Numbers MIG010278 and MIG010279, and have applied for coverage under the 2020 General Permit.

120. Plaintiff Veld Farms, LLC d/b/a and permitted as Veld Farms is a swine farm located at 1261 136th Ave., Wayland, Michigan. Veld Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010121, and has applied for coverage under the 2020 General Permit.

121. Plaintiff Walnutdale Farms, Inc. d/b/a and permitted as Walnutdale Farms Dorr Twp is a dairy farm located at 4309 14th St., Wayland, Michigan. Walnutdale Farms Dorr Twp is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010063, and has applied for coverage under the 2020 General Permit.

122. Plaintiff Wil-Le Farms, Inc. d/b/a and permitted as Wil-Le Farms is a dairy farm located at 2445 North Van Dyke Rd., Bad Axe, Michigan. Wil-Le Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit

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under Certificate of Coverage Number MIG440027, and has applied for coverage under the 2020 General Permit.

123. Plaintiff Willow Creek Farms is a swine farm located at 305 East Roosevelt Rd., Ashley, Michigan. Willow Creek Farms is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010114, and has applied for coverage under the 2020 General Permit.

124. Plaintiff Willow Point Dairy, LLC d/b/a and permitted as Willow Point Dairy is a dairy farm located at 588 3 Mile Rd. NW, Ste. 203, Grand Rapids, Michigan. Willow Point Dairy is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010259, and has applied for coverage under the 2020 General Permit.

125. Plaintiff Wilson Centennial Farm, LLC is a dairy farm located at 11624 West Wilson Rd., Carson City, Michigan. Wilson Centennial Farm, LLC is regulated by Defendant MEGLE as a CAFO, was permitted under the 2015 General Permit under Certificate of Coverage Number MIG010286, and has applied for coverage under the 2020 General Permit.

126. Plaintiff Bakerlads Farm is a dairy farm located at 10960 Cadmus Rd., Clayton, Michigan. Bakerlads Farm is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual National Pollutant Discharge Elimination System (NPDES) CAFO permit under Permit No. MI0059009.

127. Plaintiff Deer Creek Poultry Farm is a poultry farm located at 24868 US-12 Sturgis, Michigan. Deer Creek Poultry Farm is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MI0059948.

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128. Plaintiff Hartland Farms, Inc. d/b/a and permitted as Hartland Farms is a dairy farm located at 1580 Hughes Hwy., Clayton, Michigan. Hartland Farms is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MI0057536.

129. Plaintiff Hudson Dairy, LLC d/b/a and permitted as Hudson Dairy is a dairy farm located at 8502 South Meridian Road, Hudson, Michigan. Hudson Dairy is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MI0058888.

130. Plaintiff Mayflower Dairy, LLC is a dairy farm located at 588 3-Mile Rd., Suite 203, Grand Rapids, Michigan. Mayflower Dairy, LLC is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MI0059294.

131. Plaintiff Meadow Rock, LLC d/b/a and permitted as Meadow Rock Dairy is a dairy farm located at 588 3-Mile Rd., Suite 203, Grand Rapids, Michigan. Meadow Rock Dairy is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MIG010136.

132. Plaintiff Medina Dairy, LLC d/b/a and permitted as Medina Dairy is a dairy farm located at 7601 Dillion Highway, Hudson, Michigan. Medina Dairy is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MI0057473.

133. Plaintiff Nobel Family Dairy, LLC is a dairy farm located at 25360 12th Ave., Gobles, Michigan. Nobel Family Dairy, LLC is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MI0059149.

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134. Plaintiff Ottawa Turkey Farm permitted as Ottawa Turkey Farm 112th is a turkey farm located at 11306 Polk St., Holland, Michigan. Ottawa Turkey Farm is regulated by Defendant MEGLE as a CAFO and has been permitted under an individual NPDES CAFO permit under Permit No. MI0058448.

135. Plaintiff Crockery Creek Turkey Farms, LLC d/b/a and permitted as Crockery Creek – 80th is a turkey farm located at 11170 Radcliff Dr., Allendale, Michigan. Crockery Creek – 80th is regulated by Defendant MEGLE as a CAFO. Crockery Creek – 80th has been provided a "No Potential to Discharge" determination under MINTD004 that currently exempts the farm from the requirements of either the CAFO General Permit or a similarly modeled individual permit, but as a CAFO, the farm remains subject to Part 31 and Defendant MEGLE may later require the farm to apply for either an individual permit of a COC under the General Permit based on circumstances described under Mich Admin Code, R 323.2196(4)(f).

Defendant MEGLE

136. Defendant MEGLE is a principal department of the executive branch of government under Michigan's constitution, as defined by Const 1963, Art V, § 2.

137. Defendant MEGLE is the agency assigned by statute to regulate the discharge of waste and waste effluent into the waters of the state under Part 31 of NREPA. MCL 324.3101 *et seq.*; Executive Order No 2019-2.

JURISDICTION AND VENUE

138. The Revised Judicature Act ("RJA") confers on the Michigan Court of Claims "exclusive" jurisdiction over most claims that may be brought against the State. MCL 600.6419(1).

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139. That includes authority "*to hear and determine any claim or demand, statutory or constitutional*, liquidated or unliquidated, ex contractu or ex delicto, or *any demand for monetary, equitable, or declaratory relief* or any demand for an extraordinary writ *against the state or any of its departments* or officers *notwithstanding another law that confers jurisdiction of the case in the circuit court.*" MCL 600.6419(1)(a) (emphasis added).

140. MCL 24.264 directs that a claim for declaratory judgment under Michigan's APA "shall be filed in the circuit court of the county where the plaintiff resides or has his or her principal place of business in this state or in the circuit court for Ingham county."

141. Nonetheless, the instruction of MCL 600.6419(1)(a), as revised by 2013 PA 164, that this Court possesses exclusive jurisdiction over claims for declaratory relief against the State governs and requires this suit to be filed in this Court. *See, e.g., Telford v Michigan*, 327 Mich App 195, 198–201; 933 NW2d 347 (2019) (holding that this provision of the RJA impliedly repealed contrary provisions addressing Headlee Amendment suits).

142. Further, per MCR 2.605(A)(2), an action for declaratory judgment under that court rule "is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment."

143. Because the Court of Claims has jurisdiction over all claims for declaratory judgment over the State, an action under the court rule is similarly within the jurisdiction of this Court. MCL 600.6419(1)(a).

144. Additionally, the Court of Claims has jurisdiction over Plaintiffs' constitutional claims under MCL 600.6419(1)(a).

145. Venue is proper in this Court under MCL 600.1615 and MCL 600.6413.

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STATEMENT OF FACTS

Michigan's Agricultural Economy

146. Michigan's largest family farms play a significant role in both employing and feeding Michiganders.

147. More than 99% of *all* U.S. farms, and greater than 90% of dairy farms are family owned—including the great majority of the largest livestock farms.[3]

148. Nationwide, livestock farms produce $176.5 billion in agricultural goods, including poultry and egg farms, hog farms, dairy farms, cattle farms, and others.[4]

149. Within Michigan, dairy farms contribute $1.9 billion in direct economic impact to the economy and in total contribute $2.8 billion in both direct and indirect economic impacts, including employment and allied economic activity. Similarly, cattle farms contribute more than $600 million in direct and more than $800 million in indirect impact, hog farms account for more than $350 million in direct impact and $500 million in indirect impact, and poultry farms account for more than $500 million in direct impact and more than $700 million in indirect impact to Michigan's economy.[5]

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[3] U.S. Department of Agriculture Economic Research Service. 2016. *America's Diverse Family Farms: 2016 Edition.* Economic Information Bulletin Number 164. Retrieved from: https://www.ers.usda.gov/webdocs/publications/81408/eib-164.pdf?v=2587.7.

[4] U.S. Department of Agriculture Economic Research Service. 2020. Farming and Farm Income. *Ag and Food Statistics: Charting the Essentials.* Retrieved from: https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/.

[5] Knudson, W. 2018. *The Economic Impact of Michigan's Food and Agriculture System.* Michigan State University Product Center, retrieved from: https://www.canr.msu.edu/miim/uploads/kundson_william_economic_impact_food-ag_system_201807.pdf.

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150. Among all farms, the largest scale family farms account for 45.9% of all production.[6]

151. The same is generally true in Michigan. Dairy farms with a herd size of over 1,000 head account for 48.9% of the value of milk sold, cattle farms with a herd size of over 1,000 head account for 31.5% of value of cattle sold, hog farms with herd sizes over 2,000 hogs account for 88% of the value of hogs sold, and egg farms with a flock size of over 50,000 account for roughly 98% of the value of poultry sold.[7]

152. These larger farms benefit from economies of scale that allow both costs and regulatory burdens to be more efficiently distributed and that reduce the cost per unit to meet global competition for production of farm products that meet the price demands of the end-users who consume the farm's products: you and me.

153. By way of example, within the typical dairy organization, the cost of production falls as herd size increases. A farm with more than 2,000 head of dairy cows has an average of 16% lower cost per head than a dairy farm with 1,000 to 1,999 head and 24% lower cost per head than a farm with 500 to 999 head.[8]

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[6] U.S. Department of Agriculture Economic Research Service. 2020. Farming and Farm Income. *Ag and Food Statistics: Charting the Essentials*. Retrieved from: https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/.

[7] U.S. Department of Agriculture National Agriculture Statistics Service. 2019. *2017 Census of Agriculture: Michigan State and County Data, Volume 1, Geographic Area Series Part 22*. Retrieved from: https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/.

[8] MacDonald, J. M., Cessna, J., and Mosheim, R. 2016. Changing Structure, Financial Risks, and Government Policy for the U.S. Dairy Industry. U.S. Department of Agriculture Economic Research Service Report Number 205. Retrieved from: https://www.fb.org/files/2019FMMO/USDA_ERS_-_Changing_Structure__Financial_Risks__and_Government_Policy_for_the_U.S._Dairy_Industry.pdf.

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154. Similarly, a pig-farming operation with over 2,000 pigs is able, on average, to achieve a cost-per-animal that is 35% less than the cost for a similar farming operation with 500 or fewer pigs.[9]

155. These cost savings are necessary to compete with other states and countries for a food-buying market that demands high quality and low prices typical in American markets, where an average of only 9.5% of income is spent on food.[10]

156. Thus, large livestock farms are a vital part of Michigan's broader agricultural community and ensuring that community's ability to both feed and employ Michiganders.

Regulation of CAFOs under the Clean Water Act and Part 31

157. Michigan's largest livestock farms are also subject to extensive existing environmental regulation under the statutory and regulatory regimes of both the Clean Water Act, 33 USC 1251 *et seq*, and Part 31 of NREPA, MCL 324.3101, *et seq*.

158. Per the terms of the Clean Water Act, large livestock farms are designated as CAFOs and CAFOs are regulated as point sources. 33 USC 1362(14) (defining "point source" as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel . . . from which pollutants are or may be discharged.") (emphasis added).

159. As point sources, CAFOs are defined as the "*lot or facility where . . . : (i) Animals . . . have been, are, or will be stabled, or confined,* and fed or maintained for a total of 45 days or

[9] McBride, W.D. and Key, N. 2004. Characteristics and Production Costs of U.S. Hog Farms, 2004. U.S. Department of Agriculture Economic Research Service Bulletin Number 32. Retrieved from: https://www.ers.usda.gov/webdocs/publications/44212/12879_eib32.pdf?v=0.

[10] U.S. Department of Agriculture Economic Research Service. 2020. Food Prices and Spending. *Ag and Food Statistics: Charting the Essentials*. Retrieved from: https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/.

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more in any 12-month period . . . ." 40 CFR 122.23(b)(1) (emphasis added). In other words, for regulatory purposes, a CAFO is the physical location where animals are stabled or confined—not the entirety of the livestock farming operation.

160. Because discharges from point sources must be permitted under the National Pollutant Discharge Elimination System (NPDES), 33 USC 1311(a); 33 USC 1342(a)(1), CAFOs must also be permitted under that program as well.

161. Michigan has primacy under the Clean Water Act to administer its NPDES program, meaning that MEGLE is the agency charged with issuing and administering permits, its program must be no less stringent than federal standards, and a state-issued permit satisfies the federal permitting requirements.

162. But, by legislative decree, Michigan standards may not be any more stringent than federal standards unless the director of the agency that is promulgating the rules has made specific findings that there is a "clear and convincing need" justifying an exceedance of federal standards. MCL 24.232(8).

163. Permits for CAFOs go well beyond setting effluent limitations (the rates for the discharge of a pollutant below which the operations may lawfully discharge) for discharges from the physical site of a CAFO.

164. Instead, CAFO permits require Comprehensive Nutrient Management Plans ("CNMPs") that in turn govern nearly every aspect of the farm's operation:

(a) from setting parameters for controlling the use of water in the production area, Mich Admin Code, R 323.2196(5)(a)(*iii*), to setting the boundaries where animals may roam, Mich Admin Code, R 323.2196(5)(a)(*iv*);

(b) from mandating storage requirements for the manure produced by the animals and prescribing rules for the maintenance and operation of storage facilities, Mich Admin Code, R 323.2196(5)(a)(*i*), to mandating the type of records a farm must maintain, Mich Admin Code, R 323.2196(5)(a)(*x*); and

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(c) even regulating the CAFO operator's activities outside of the area that is designated as the "CAFO," such as the land application of manure onto farm fields off site and not owned by the CAFO, Mich Admin Code, R 323.2196(5)(a)(*viii*) & (5)(a)(*ix*)—and much more. See Mich Admin Code, R 323.2196(5)(a).

165. This extraordinarily broad assertion of regulatory authority over farms is purportedly premised on the State's grant of administrative primacy under the Clean Water Act, 33 USC 1251 *et seq.*, an act that is focused on preventing pollution from pipes and other methods of conveying pollutants into the nation's waters. 33 USC 1362(12); 33 USC 1342(a).

166. And both federal and state law set, by statute or rule, conditions to be required within a CAFO's NPDES permit.

167. Federal law specifies many conditions to be included in the farms' CNMPs and permits through promulgated regulations that address CAFOs and are codified under the Code of Federal Regulations. 40 CFR 122.23(h)(1); 40 CFR 122.42(e); & 40 CFR 412.4(c).

168. Likewise, Michigan's law does the same, providing by promulgated administrative rules many conditions that must be included within the NPDES permits for CAFOs. Mich Admin Code, R 323.2196(5)(a).

169. To comply with these regulatory mandates and to prevent pollution from entering into the State's surface waters, Michigan's family farms already expend significant sums of money annually.

170. For instance, dairy CAFOs spend between $116 and $129 per cow per year on hauling manure for agronomic land application for total annual costs ranging between $81,000 and $450,000.[11]

[11] Harrigan, T. 2011. Economics of Liquid Manure Transport and Land Application. *Michigan Dairy Review, 16*(4), retrieved from: https://www.canr.msu.edu/uploads/234/76582/liquidmanure.pdf.

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171. Constructing manure storage structures that meet permitting requirements costs between $0.50 per cubic foot for a typical dairy structure, and $1.50 per cubic foot for a typical hog structure for total costs ranging between $160,000 and $1.4 million.[12]

172. Manure has great value as a nutrient source, providing up to 16 pounds each of nitrogen and phosphorus per ton for dairy manure, up to 20 pounds of nitrogen and 13 pounds of phosphorus for beef manure, up to 27 pounds of nitrogen and 62 pounds of phosphorus for swine manure, and up to 111 pounds of nitrogen and 96 pounds of phosphorus from poultry manure.[13]

173. Manure is additionally a complete nutrient, supplying micronutrients and building soil carbon, which also carry significant costs if they must instead be supplied with fertilizer inputs.

174. Fertilizer costs vary widely depending on the formulation and timing of purchase, but Michigan State University recently reported averages of $517 per ton for phosphorus and $417 for nitrogen.[14]

175. Therefore, on Michigan's average-sized farm of 205 acres[15] applying at crop removal rates, if a farmer must use phosphorus and nitrogen fertilizer instead of manure, the farmer might need to spend $10,000 to $12,000 more per year for crop nutrients.

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[12] Kammel, D. W. 2015. Building Cost Estimates – Dairy Modernization. University of Wisconsin Extension. Retrieved from: https://fyi.extension.wisc.edu/dairy/files/2015/11/Building-Cost-Estimates-Dairy-Modernization.pdf.

[13] Warncke, D., Dahl, J. and Jacobs, L. 2009. Nutrient Recommendations for Field Crops in Michigan. *Michigan State University Extension Bulletin E2904*, retrieved from: http://www.soils.msu.edu/wp-content/uploads/2014/06/MSU-Nutrient-recomdns-field-crops-E-2904.pdf.

[14] Silva, 2018. Year-End Fertilizer Prices. Michigan State University Extension, retrieved from: https://www.canr.msu.edu/news/year-end-fertilizer-prices.

[15] U.S. Census of Agriculture: Michigan. United States Department of Agriculture, retrieved from:

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176. Despite these existing, all-encompassing regulatory mandates that are identified in promulgated rules and the agency's incorporation of those rules into its CAFO General Permits (and the associated significant regulatory costs), MEGLE now seeks to insert into the General Permit legislatively rejected and never-before promulgated substantive legal requirements as a way of regulating farm operations without adhering to rigorous APA procedure or the constitutional separation of powers.

177. These added requirements are nowhere mandated by law, they are far beyond federal and state regulatory requirements, and in some cases, they are contrary to those requirements.

MEGLE's Use of General Permits to Impose Additional Mandates

178. An NPDES general permit is an administrative tool that is intended to serve the convenience of the regulator and the regulated entities by establishing the conditions under which a certain category of discharges will be permitted.

179. A general permit contrasts with an individual permit in that it does not adjudicate a permit applicant's individual circumstances.

180. Rather, with a general permit, the regulator issues a single permit intended to cover a broad category of discharges that the agency has determined "can be appropriately and adequately controlled by a general permit," and the regulator authorizes regulated entities to discharge if they obtain coverage under that permit. Mich Admin Code, R 323.2191(1).

181. The agency then determines who may obtain coverage under the general permit by granting or denying an applicant's request for coverage under the general permit. Mich Admin Code, R 323.2191(3)–(6).

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https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Michigan/.

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182. Importantly, MEGLE controls whether a regulated entity who applies for coverage under a general permit will receive coverage under the general permit or will be required to obtain coverage under an individual permit. Mich Admin Code, R 323.2191(3) & (4).

183. Where the agency determines that an individual is ineligible for coverage under a general permit, it is generally because the agency believes an individual applicant's circumstances require greater behavioral restrictions or higher standards than those included in that general permit. See Mich Admin Code, R 323.2191(3)(a) & (3)(b) (allowing MEGLE to require an individual permit in cases where "[t]he discharge is a significant contributor to pollution as determined by the department on a case-by-case basis" or where "[t]he discharger is not complying, or has not complied, with the conditions of the general permit.")

184. CAFOs who exceed 5,000 animal units, for example, move outside of an exemption for regulating groundwater discharges, so those CAFOs trigger a groundwater discharge standard different from that legally required for CAFOs under the General Permit, Mich Admin Code, R 323.2210(f), and cannot obtain coverage under a general permit.

185. Moreover, MEGLE also holds unbridled discretion to require even a regulated entity who generally qualifies for and *prefers* to be covered by an individual permit to seek coverage under an applicable general permit.

186. For example, Michigan Administrative Code, Rule 323.2191(5) explains that "[t]he department may deny an application for an individual national permit *if [MEGLE] determines that the general permit is more appropriate*." (Emphasis added).

187. Likewise, Michigan Administrative Code, Rule 323.2192(d) provides that "[t]he department may terminate the individual national permit and include the discharge under the

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coverage of the general permit *if the department determines that the general permit is more appropriate*." (Emphasis added).

188. Farms in Michigan obtain coverage under the CAFO General Permit by applying for a "certificate of coverage" under the General Permit. Mich Admin Code, R 323.2196(1)(b).

189. Once granted, a certificate of coverage modifies the General Permit only to the limited extent specified under the terms of the certificate of coverage.

190. As with all permits, a general permit is an act of licensing, and it is not exempt from the limitations on an agency's licensing authority.

191. A permit may only contain such conditions as are either required by law or are "necessary to achieve compliance" with the law. See MCL 324.1307(5).

192. For NPDES permits, that means that the terms of the permit must reflect the requirements of Part 31 of NREPA. See MCL 324.3106.

193. Per MEGLE's practice, the CAFO General Permit is issued every five years and offers regulated entities coverage for a five-year period under the conditions specified within the permit.

194. MEGLE's CAFO General Permit governs nearly all large farms who are regulated as "CAFOs" within the livestock industry.

195. Some very large farms are regulated as "Super CAFOs" and are therefore required by MEGLE to submit to individual permits, principally for the reasons of the groundwater discharge permit requirements identified above.

196. Twelve such farms in Michigan are regulated as "Super CAFOs."

197. MEGLE has also required a few other farms to apply for individual permits because of compliance disputes with the agency. See Mich Admin Code, R 323.2191(3) & (4).

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198. And just a very few other farms are under individual permits because they either manifest all of their waste for land application to fields that are not under their operational control or because they use waste treatment systems.

199. All told, 256 of the 277 largest livestock farms that are regulated as CAFOs as of April 1, 2020 (or 92.4%) are covered under and are governed by the terms of the General Permit.[16]

200. Moreover, those farms that are covered under individual permits are not governed by less strict permit conditions than the conditions placed in the General Permit. The individual permit requirements are ordinarily *more* strict.

201. Consequently, when MEGLE writes a condition into the CAFO General Permit other than those that are mandated by federal or state statute or regulation, it is setting a policy of general applicability on the agency's implementation or enforcement of Part 31 of NREPA.

202. MEGLE's adoption of such conditions represent generally-applicable policy as such conditions govern the vast majority of CAFOs whom the agency expects and requires to be permitted under the General Permit.

203. By writing conditions into the General Permit that are not mandated by statute or regulation, MEGLE is making an affirmative policy statement that such conditions implement or apply the underlying law (Part 31 of NREPA); otherwise, MEGLE has no authority to act.

204. And, by such conditions, the agency has effectively set a minimum floor for the behaviors and the requirements MEGLE demands of all large livestock farms that are regulated as CAFOs in order for those farms to receive a permit.

[16] An additional 10 farms have been determined to have "no potential to discharge" and therefore do not currently need an NPDES permit. Mich Admin Code, R 323.2196(1)(b) & (4).

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205. Some such farms may have to do *more* or may have the rule adapted to a unique circumstance. But these General Permit conditions nonetheless set MEGLE's default policy, standards, and regulatory requirements for CAFOs.

Requirements of the Michigan APA

206. Michigan's Administrative Procedures Act ("APA"), MCL 24.101 *et seq*, applies to all agencies of the executive branch of Michigan's government.

207. Though agencies are creatures of statute and thus inherently limited to those functions authorized by the Legislature, the APA further limits agencies' ability to exercise regulatory authority by imposing both procedural and substantive restrictions on their exercise of those powers that have been granted to them.

208. One such limitation is that administrative agencies may not adopt regulations, statements, standards, policies, rulings, or instructions of general applicability that implement or apply the law enforced or administered by the agency without following prescribed procedures. MCL 24.207; MCL 24.243(1).

209. Such a "regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency" is termed a "rule" under the APA. MCL 24.207.

210. And a "rule" must be promulgated through the rulemaking process. *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 178–79 & 183; 428 NW2d 335 (1988); *American Federation of State, Co & Muni Employees (AFSCME), AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 3-4, & 13; 550 NW2d 190 (1996).

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211. That process is intended "to 'ensure that none of the essential functions of the legislative process are lost in the course of the performance by agencies of many law-making functions once performed by our legislatures.'" *Detroit Base Coalition*, 431 Mich at 178.

212. Thus, the process includes pre-approval for rulemaking by a central office with direct accountability to the Governor, stakeholder notice and comment, legislative oversight, attempts to minimize the impact of the rules on small business, cost-benefit analyses requiring estimates of the regulatory burdens on those subject to the rules and expected benefits to the citizens, analysis of the effect of rules on the revenue of state and local government, and more. (Ex B, Rulemaking Process Summary); see MCL 24.239, MCL 24.239a, MCL 24.240, MCL 24.241, MCL 24.242, 24.245, & MCL 24.245a.

213. It does not matter whether an agency refers to its standards or policies as a "rule," places some other label on its action, or adopts such policies by some other procedure. *Detroit Base Coalition*, 431 Mich at 183.

214. Because the intent of the APA is to constrain and regulate an agency's exercise of authority, the definition of a "rule" is intended to apply broadly to all agency action of whatever label if that action sets generally applicable policy. *Id.*

215. Indeed, the APA buttresses the definition of "rule" by prohibiting agencies from adopting non-binding documents that set generally applicable policy, such as by issuing "a guideline in lieu of a rule." MCL 24.226.

216. Accordingly, if an agency sets generally applicable policy, it must follow the rule-promulgation process in order to ensure that the procedural protections provided to stakeholders are fully complied with and that the substantive restrictions on the agency's authority are not exceeded. *AFSCME, AFL-CIO*, 452 Mich at 9.

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MEGLE's 2020 CAFO General Permit Revisions

217. MEGLE has used the vehicle of the General Permit to set regulations, standards, and policies of general applicability that purport to implement or apply Part 31 of NREPA—a law administered by the agency.

218. Nonetheless, the agency wholly failed to follow the legislatively prescribed mandates of the APA.

219. Egregiously, in doing so, MEGLE has even set requirements and regulations, standards, and policies on large livestock farms that the Legislature has previously considered and repeatedly rejected.

220. MEGLE has thus wielded quasi-legislative power to set such standards while circumventing the quasi-legislative procedures required for the agency to do so.

221. And it has done so in express contravention to the will of the People's representatives in the Legislature.

222. Those regulations, standards, and policies of general applicability include but are not limited to:

(a) Presumptively banning CAFOs from land-applying agriculturally beneficial manure to crop fields during a three-month period every year;

(b) Outright prohibiting CAFOs from transferring their manure to other entities that land-apply such nutrient-enhancing substances during those same three months;

(c) Arbitrarily restricting the amount of phosphorus permitted in soil to which manure may be land applied without any scientific support for its determination;

(d) Mandating that CAFOs and any farms that receive manure both install *permanent*, 35-foot vegetated buffer strips *and* prevent application of manure within 100 feet of every surface water, tile-line intake, drain, and roadside ditch located on any land to which their manure is applied, thus severely limiting the amount of land that can be crop farmed or, alternatively, denying CAFOs the ability to use the nutrients in manure for crop production in an environmentally and agriculturally beneficial manner;

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(e) Superseding the Michigan Agriculture Environmental Assurance Program ("MAEAP") by denying environmentally conscious and legally compliant farms the promised benefit of the MAEAP program and imposing additional restrictions based on such farms' location within a Total Maximum Daily Load ("TMDL") watershed;

(f) Vastly expanding the jurisdictional reach of CAFO permitting to govern the activities of wholly separate legal entities that are not regulated as CAFOs; and

(g) Writing a blank check to MEGLE to impose additional conditions on CAFOs based on their location within a TMDL watershed, thereby transforming coverage under the General Permit into what is akin to an individual permit for such farms.

223. Each of these requirements in turn is discussed as only exemplary of MEGLE's improper exercise of legislative authority in writing conditions of the General Permit that extend beyond the requirements of Part 31 and its implementing regulations.

MEGLE's Presumptive Ban on Land Application During the Winter Months

224. First, MEGLE has wielded legislative authority and acted both arbitrarily and beyond its administrative powers in presumptively banning the land application of manure during the months of January through March.

225. In prior general permits, MEGLE allowed land application at any time during the year, depending on the condition of the field receiving the waste, and subject to condition-specific procedures.

226. For example, the 2015 CAFO General Permit required manure to be incorporated or injected if applied to frozen or snow-covered ground unless it was land applied in compliance with the Department's 2005 "Technical Standard for the Surface Application of CAFO Waste on Snow-Covered Ground Without Incorporation or Injection" and in accordance with the Manure Application Risk Index ("MARI"). (2015 General Permit, Part I.B.3.e.3.)

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227. The same standard had been applied in MEGLE's 2005 and 2010 General Permits, thus governing farm practices for 15 years, and the 2020 permit still directs farmers to apply this standard for application on frozen or snow covered ground any month outside January through March.

228. This approach looked to the condition of the field—"a field-specific assessment of the potential for nitrogen and phosphorus transport from the field," 40 CFR 412.4(c)(1) & (c)(2)—to determine when land application may occur, consistent with the federal standard.

229. In its 2020 CAFO General Permit, MEGLE has taken an approach that is both much more restrictive than and, in fact, contrary to this federal regulatory requirement.

230. Rather than determining a CAFO's ability to apply manure based on a "field-specific assessment of the potential for [nutrient] transport," MEGLE has crafted a different standard that effectively creates a presumptive ban on the application of manure "during the months of January, February, or March . . . ." (2020 General Permit, Part I.B.3.f.3.)

231. MEGLE has allowed exceptions to this presumptive ban during January through March only if CAFOs meet extremely restrictive conditions, including (1) demonstrating the field receiving manure has soil phosphorus concentrations below 68 parts per million (i.e., half the standard for all other times of year); (2) requiring that there is less than two inches of frost and four inches of snow on site; (3) requiring that the manure is immediately incorporated or injected; and (4) insisting that the farm submits to MEGLE 24-hour prior notification of their intent to land apply manure—onerous requirements that are inconsistent with the existing (and still required) standard to land apply manure to fields during other times of the year. (*Id.*)

232. The soil phosphorous concentration requirement alone disqualifies a significant percentage of land from receiving land application during these months.

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233. MEGLE's industry-wide, presumptive ban on land application for three months each year ignores both the existing standard for reducing risk of runoff on frozen or snow-covered ground and the field-specific conditions that may exist during those months, despite Michigan Legislature's rejection of manure application bans on at least two prior occasions. See, e.g., 2019 SB 247; 2019 HB 4418; 2017 SB 639; 2017 HB 5185.

234. This is a particularly egregious end-run around the will of the People's elected representatives as MEGLE has forbid via permit, and without adherence to the Legislature's mandated procedures (which include legislative oversight), a practice that the Legislature has repeatedly refused to proscribe.

235. And it is plainly an exercise of quasi-legislative authority by setting generally applicable policy presumptively banning an essential agricultural activity (land application of manure) industrywide for nearly a quarter of the year.

236. The presumptive ban on spreading manure during winter months is also far afield from MEGLE's regulatory authority.

237. MEGLE has presumptively forbidden the act of fertilizing the soil through the land application of manure under authority that is limited to controlling discharges of pollution into waters of the State. See MCL 324.3109(1)(a) & MCL 324.3112(1).

238. And MEGLE has done so in a plainly arbitrary manner by establishing an entirely different standard during certain times of the year—regardless of the field-specific conditions—for farms to take actions that are otherwise allowed under similar conditions using an existing standard during the rest of the year.

239. The 2020 CAFO General Permit admits that manure may be land applied to frozen ground and allows CAFOs to do so during other times of the year when there may be

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frozen or snow covered ground so long as certain practices are followed to prevent discharge of manure into surface waters, like assessing the field using the Manure Application Risk Index[17] to ensure it has a low risk of runoff. (General Permit, Part I.B.3.g.)

240. But MEGLE's General Permit presumptively prohibits the same actions in January, February, or early March.

241. Similarly, ground temperatures during the blocked-out months can (and often *do*) exceed freezing.

242. For instance, based on data from the Michigan State University's East Lansing weather station, soil temperatures at two inches' depth between January and March 2020 dropped below freezing temperatures *only* between February 20 through February 22 (i.e., for just three days).

243. In 2019, two-inch depth soil temperatures dropped below freezing on January 10 through February 3, February 9 through February 23, and February 25 through March 9 during the same months. And in 2018, two-inch soil depth temperatures *only* dropped below freezing between January 1 and January 7 during those months.[18]

244. This means that, during the last three years, the majority of the days in the months of January through March would have been appropriate to land apply manure in the mid-Michigan area using the typical management practices already required for permitted farms to

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[17] U.S. Department of Agriculture Natural Resources Conservation Service. 2013. Manure Application Risk Index (MARI) Spreadsheet 4.0 and the Procedure - Determining Land Available for Winter Spreading of Manure. Agronomy Technical Note #35. Retrieved from: https://efotg.sc.egov.usda.gov/references/public/MI/No_35_MARI_Spreadsheet_4_and_Winter_Spreading_Manure_2013.pdf.

[18] Michigan State University. 2020. Enviroweather: East Lansing Soil Conditions. Retrieved from: https://enviroweather.msu.edu/run.php?stn=msu&mod=w_sc&da1=1&mo1=1&da2=31&mo2=3&yr=2018&mc=397&ds=cd.

prevent discharges such as using soil tests and manure tests to set proper land application rates, not applying on saturated ground, during precipitation events, or when rain is predicted in the next 24 hours, and incorporating the manure into the soil within 24 hours of application. (General Permit, Part I, Section B).

245. Nonetheless, MEGLE has presumptively banned land application during these months on days where the soil presents precisely the same condition as it is at other times of the year. And MEGLE has done so for no reason other than the day's location on the calendar and despite the fact that the risk of discharge is no greater on such a day than the risk of discharge in a comparable day in the fall or spring months.

246. Reducing the risk of a discharge is already addressed in MEGLE's previous general permits by establishing management practices for applying manure on thawed soils, and a separate standard for frozen soils. But MEGLE's arbitrary, date-based restrictions has prevented farms from making rational waste-management decisions that account for changing weather conditions without sound reason.

247. MEGLE has thus acted wholly arbitrarily and without regard to any governing principle in setting a virtual land-application ban for a quarter of the year.

248. Indeed, even some environmental groups that have otherwise sought to restrict the land-application of manure by farms have expressed their opinion that MEGLE's calendar-based ban is "arbitrary."

249. And it is likely to result in the unintended consequence of more application as soon as the calendar allows application instead of being responsive to the local conditions.[19]

[19] MEGLE. 2020. National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) General Permit MIG010000, April 2020-2025: Response to Public Comment Document from the Public Meetings Held on December 3, 5, and 9, 2019, and the Public Comment Period from October 30, 2019 to December 18, 2019: Prohibitions (Winter

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250. Further, MEGLE has admitted that this rule banning land application for three months a year is not required by any aspect of federal law.

251. Rather, MEGLE has both exceeded and, in fact, contradicted the federal regulatory standards that require land-application rates to be governed by field-specific assessments rather than the progress of the earth's rotation around the sun.

MEGLE's Ban on Manifesting Manure During the Winter Months

252. In addition to its presumptive ban on land-applying manure in January, February, and March, MEGLE has outright banned CAFOs from transferring manure to persons other than a CAFO for land application during those same months. (General Permit, Part I.B.3.f.4.)

253. In other words, while CAFOs have a limited ability to land-apply manure *themselves* to the fields they either control or have access to, they cannot transfer waste to another person for land application—such as crop-servicing companies or crop farmers who wish to receive manure from CAFOs as fertilizer—during those time periods no matter the field condition when the waste is applied.

254. MEGLE has thus wholly banned the transfer of manure within the state by such farms for three months of each year by the allegedly "administrative" act of assembling a general permit and purportedly under authority that is directed at preventing water pollution.

255. The detrimental effects of this ban on CAFO's operations cannot be overstated.

256. Livestock does not stop producing manure for three months each year merely because the farms are unable to land apply it for crop production. And while CAFOs are required to have six months of storage available for livestock manure, there are frequently occasions in which it makes more sense to apply manure or transfer it to another farmer for land application

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Spreading). Retrieved from: https://miwaters.deq.state.mi.us/nsite/map/results/detail/8418558114575098770/documents.

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during winter months: spring rains may make spring application more difficult, manure handling equipment may break down, unusually high precipitation may reduce available space in manure storage structures, or farmers may encounter difficulties with the timing of application in the spring when they are busy with many other farm tasks.

257. Instead, MEGLE's decision effectively requires farms either to build greater storage capacity for manure at significant expense on already limited farm facilities *or* to attempt to obtain land—if available within an economic distance (typically, less than 2 miles from the farm)[20]—to which they can themselves apply manure under the narrow circumstances that MEGLE will allow farms to do so during those months.

258. Either imposes catastrophic costs on Michigan's already stretched farmers during a time when Americans depend upon the viability of our farms even more than ever.

259. And the potentially industry-altering consequences of this ban on transferring waste demonstrates that MEGLE's unilateral imposition of this condition by the stroke of a pen or strike of a computer keyboard is not the place for such drastic policy decisions. Those decisions belong at the Legislature or—at a minimum—within the quasi-legislative setting of an APA rulemaking process.

MEGLE's Expansion of Regulatory Jurisdiction to Non-CAFOs ("Co-Permitting")

260. Further restricting farms' economical options for disposing of manure, MEGLE has also attempted to significantly expand its jurisdictional authority under Part 31 to non-CAFOs.

[20] Harrigan, T. 2011. Economics of Liquid Manure Transport and Land Application. *Michigan Dairy Review, 16*(4), retrieved from: https://www.canr.msu.edu/uploads/234/76582/liquidmanure.pdf.

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261. MEGLE has done so by going beyond existing requirements for farms to maintain records of manure transferred to other farms in order to account for the distribution of the total amount of manure produced on the farm, to treating the land application of manure on farms owned by wholly separate legal entities to whom manure has been manifested as the land application of manure by the CAFO itself.

262. MEGLE has thereby asserted that activities that are conducted on land that is neither farm-owned nor farm-controlled must nonetheless be brought within a CAFO permit's CNMP.

263. In these instances, MEGLE has asserted that the land-application activities are within the "operational control" of the CAFO. (General Permit, Part I.C.8.)

264. But MEGLE has not defined the parameters of what constitutes "operational control"—often asserting that a farm has operational control by reason of some vague connection between the CAFO and the entity receiving the manure.

265. MEGLE's assertion of authority over such farms and activities are beyond the authority conferred on MEGLE by Part 31 of NREPA.

266. Moreover, MEGLE's application of the "operational control" standard is so vague and undefined as to be contrary to the due-process clauses of the Michigan and U.S. constitutions.

267. And, as a matter of impact, MEGLE's attempt to include non-CAFO farms or crop-servicing companies within a farms' permit—just to do business with a CAFO—greatly discourages such non-CAFOs from accessing the valuable nutrients in manure and from helping CAFOs land apply their waste in an agronomically beneficial manner at a reasonable hauling distance and cost.

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MEGLE's Arbitrary Reduction of Phosphorus Levels

268. MEGLE's 2020 CAFO General Permit further limits the available land to which CAFOs may land apply manure by reducing the threshold for phosphorus concentration in the soil to which manure is applied. (General Permit, Part I.B.3.c.1.a.)

269. The agency's prior general permits have uniformly held that, if using a Bray P1 soil test, land may receive manure if the test results indicate less than 150 parts per million (ppm) of phosphorus within the soil. (2015 General Permit, Part I.B.3.c.1.a.)

270. This standard was originally set based on scientific data conducted extensively throughout Michigan comparing Michigan's soil types and finding that soil test results in excess of 150 ppm present a risk that phosphorus in the soil could be transported off site into surface waters.[21]

271. No research has recommended a different soil phosphorus concentration limit for Michigan soils, and the 150-ppm limit has been adopted for Michigan State University crop nutrient guidance[22] and Michigan's Generally Accepted Agricultural and Management Practices.[23]

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[21] Warncke, D., Dahl, J. and Jacobs, L. 2009. Nutrient Recommendations for Field Crops in Michigan. *Michigan State University Extension Bulletin E2904*, retrieved from: http://www.soils.msu.edu/wp-content/uploads/2014/06/MSU-Nutrient-recomdns-field-crops-E-2904.pdf, and personal communication with Dr. Lee Jacobs, May 27, 2020.

[22] Warncke, D., Dahl, J. and Jacobs, L. 2009. Nutrient Recommendations for Field Crops in Michigan. *Michigan State University Extension Bulletin E2904*, retrieved from: http://www.soils.msu.edu/wp-content/uploads/2014/06/MSU-Nutrient-recomdns-field-crops-E-2904.pdf, and personal communication with Dr. Lee Jacobs, May 27, 2020.

[23] Michigan Department of Agriculture and Rural Development. 2020. Generally Accepted Agricultural and Management Practices for Manure Management and Utilization. Retrieved from: https://www.michigan.gov/documents/mdard/Manure_Management_and_Utilization_2020_GAAMPs_682465_7.pdf.

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272. But in MEGLE's 2020 CAFO General Permit, the agency has nonetheless lowered the amount of phosphorus that is allowed in soil to which manure is land applied from 150 ppm to 135 ppm (and from 135 ppm to 120 ppm for fields within a TMDL watershed). (General Permit, Part I.B.3.c.1.a.)

273. This reduction is not supported by science. Rather, it was a wholly arbitrary reduction of the allowable amount of phosphorus by 10% without regards to either the nutrient needs of the crops receiving manure or an evaluation of the likely effect of such reduction on the contaminant fate and transport of phosphorus.

274. MEGLE's insertion of this arbitrary standard once again usurps the law-making authority of the Legislature as well as the APA rulemaking process, both of which would have subjected the reduction to more significant public scrutiny, an explicit cost-benefit analyses, and additional oversight of the agency's decision.

MEGLE's Mandate to Install Permanent 35-Foot Vegetated Buffer Strips

275. Next, in what is perhaps the broadest reach of the agency's asserted authority, MEGLE has mandated that farms who use the currently standard soil test method (the "Bray P1" test) to establish application limits based on soil phosphorus concentration must both install permanent, 35-foot vegetated buffer strips and apply manure no closer than 100 feet between farmland receiving manure and every surface water, tile-line intake, or roadside ditch that is adjacent to such land. (General Permit, Part I.B.3.h.1.b.)

276. This means that MEGLE is requiring the "permanent" installation of non-crop yielding vegetation throughout a vast and unquantifiable amount of farmland—often on more than one side of a parcel of farmland or directly through the middle of the parcel.

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277. For example, if a field is adjacent to a road on two sides, a farm must install perennial shrubbery and other vegetation the width of many homes—not just on one border but on both.

278. Moreover, in some instances, a county drain or drainage tile outlet bisects a farm field. In that case, a farm must install a "permanent strip of dense perennial vegetation" 35-feet wide *on each side* of the drain or tile outlet (a total of a 70-foot wide strip straight through a farm for the length of the drain or outlet).

279. The result of the State's demand is to convert significant amounts of crop-yielding acreage into economically unusable wilderness.

280. Many CAFOs provide non-livestock farmers manure for agronomically beneficial purposes (i.e., to serve as crop fertilizer). Many CAFO owners further rent land to grow crops for their livestock, and land apply the manure on that rented land to supply it with nutrients.

281. Those crop farmers who receive manure do so as a means of obtaining lower costs for crop nutrients, and the practice can additionally save the CAFO owner from having to spend additional time and money hauling manure further to other fields they own or rent to utilize those manure nutrients.

282. But, if the State conditions their receipt of such fertilizer on the destruction of the beneficial use of a large fraction of their land, it will not make economic sense for crop farmers to receive manure or for landowners to rent land to CAFO owners, and many will refuse to accept such conditions and simply decline renting the land or receiving the manure as fertilizer.

283. Practically, this means that CAFOs will have fewer places to use their manure nutrients in an environmentally, agriculturally, and economically beneficial manner, making it costlier for livestock farms to operate.

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284. The requirement is also unnecessary and duplicative: under the General Permit, farms are also barred from applying manure within 100 feet of such borders. The reasoning is that each practice—establishing a vegetated buffer *or* keeping manure application away from surface waters—reduces the likelihood that manure will discharge to those waterways. Adding a mandate to require *both* setbacks and the conversion of productive farmland into unusable wilderness is a belt-and-suspenders approach with little (if any) additional value.

285. The requirement is also not only much more restrictive than federal standards but also contrary to them.

286. Federal regulations offer farmers a choice, denominated as "a compliance alternative." Farms may either comply with 100-foot setbacks and simply not apply manure within 100 feet of their borders to surface waters, tile intakes, and other structures that might transport it (as described above) *or* they can install permanent vegetated buffer strips. 40 CFR 412.4(c)(5)(*i*).

287. MEGLE's illegal mandate has effectively removed and negated that federal "compliance alternative"—instead demanding that farms do both.

288. MEGLE's mandate to convert productive farmland into unproductive wilderness is not a merely administrative act. It is a legislative (or at least quasi-legislative) act that requires either the passage of a law by the Legislature or, at the very minimum, promulgating a rule through the APA's rulemaking process.

289. As such, it is an illegal usurpation of legislative authority and a violation of the APA as an unpromulgated rule.

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MEGLE Has Superseded the Legislatively Adopted MAEAP Program

290. Additionally, MEGLE's increased standards for farms within TMDL watersheds—without an exception for MAEAP-verified farms—has superseded the legislatively adopted MAEAP program by denying environmentally conscious and compliant farms the promised benefit of the MAEAP program.

291. Under MCL 324.3109d and MCL 324.8710, the Legislature established the MAEAP-verification program as a means of encouraging good environmental stewardship by members of the agricultural community.

292. To obtain MAEAP verification, farms voluntarily undertake additional steps to demonstrate their commitment to environmental protection and stewardship, such as completing educational requirements, developing and implementing conservation plans, and having the Michigan Department of Agriculture and Rural Development (MDARD) conduct an on-site evaluation of the farm. MCL 324.8710(2).

293. As part of the MAEAP-verification bargain, "[i]f a MAEAP-verified farm is in compliance with all MAEAP standards applicable to the farming operation, the farm is considered to be implementing conservation and management practices needed to meet total maximum daily load [TMDL] implementation for impaired waters pursuant to 33 USC 1313." MCL 324.3109d(1)(c).

294. In other words, the farm should not be subjected to additional measures to address TMDL concerns.

295. Nonetheless, MEGLE's 2020 CAFO General Permit does exactly that and imposes additional measures on even MAEAP-verified farms within TMDLs. (General Permit, Part I.B.3.c.1.a, I.B.3.c.2.a, I.B.3.c.2.b, & I.C.9.)

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296. Thus, MEGLE has, through its general permit process, attempted to override the policy prerogatives of the Legislature by contradicting the purpose of MAEAP verification and the benefits promised to MAEAP-verified farms.

MEGLE's Delegation of Authority to Itself to Write Further Conditions for Farms in TMDL Watersheds Contradicts the Purpose of the General Permit

297. MEGLE's unpromulgated new standards in the General Permit also includes writing itself a blank check to require *additional*, unspecified conditions for farms in TMDL watersheds at some point in the future—thus undermining the premise and administrative purpose of the general permit and transforming the general permit for such farms into individual permits.

298. Under Paragraph I.C.9.b. of the General Permit, MEGLE has required farms within E coli, biota, or dissolved oxygen TMDL watersheds to evaluate the need for "additional pollutant control measures" that must be "implemented to meet the permittee's pollutant loading" or "concentration" capacities in the approved TMDL. (General Permit, Para. I.C.9.b.3.)

299. MEGLE then refers farmers with identified needs for additional pollutant control measures to a "guidance" document for a list of onerous required practices that may meet MEGLE's requirements or which may require "other best management practices approved by the Department."[24]

300. Effectively, MEGLE has written itself a blank check to require these farms to make further operational changes without any real parameters for when they must be employed, what those may entail and without any standards for how MEGLE will determine when a farm has satisfied its requirements.

[24] MEGLE. 2020. Total Maximum Daily Load (TMDL) Guidance for Concentrated Animal Feeding Operations (CAFO). Retrieved from: https://www.michigan.gov/documents/egle/wrd-cafo-tmdlguidance_670009_7.pdf

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301. These additional conditions undermine the purpose of the General Permit, which is intended to "cover a category of discharge" based on a determination that "certain discharges are appropriately and adequately controlled" by a general permit. Mich Admin Code, R 323.2191(1).

302. Instead, MEGLE's proposal to require each individual farm to propose and adopt further unspecified control measures transforms each such farms' certificate of coverage under the General Permit into an individual permit without the due-process protections afforded to the process of setting conditions of an individual permit.

303. MEGLE's self-delegation of this authority to require any further conditions of farms that it may later deem necessary exceeds its legal authority under Part 31 of NREPA.

The Challenged General Permit Conditions Are APA Rules

304. Each of the newly-added conditions of the CAFO General Permit detailed above constitute "rules" under MCL 24.207.

305. By adopting conditions in the General Permit that are not already mandated by law, MEGLE has set an agency policy and established an agency standard that CAFOs must meet as a condition of obtaining coverage under the General Permit.

306. MEGLE's decisions do not represent an agency exercise of quasi-adjudicative power—such as determining facts or the application of law to facts (as is often the case in setting the conditions of an individual permit).

307. Nor is the addition of legal requirements developed by MEGLE a purely administrative function of determining what acts must be performed to meet existing legal standards.

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308. Rather, MEGLE's adoption of wholly new legal mandates through its general permit process represents the exercise of legislative power properly belonging to the Legislature or, at a minimum, the kind of quasi-legislative power that is governed by the APA's rulemaking procedures.

309. Nearly all farms that are regulated as CAFOs are covered under and are governed by the terms of the General Permit.

310. Thus, MEGLE's policy determinations in establishing these new conditions of the General Permit are ones of "general applicability" in that MEGLE has set requirements for a class of cases.

311. MEGLE mandates that large livestock farms become permitted as CAFOs or else they face severe penalties in the event of a discharge.

312. Those penalties can reach up to "$25,000 per day of violation." MCL 324.3115(1)(a).

313. And the way in which MEGLE reads and administers this statute, the agency often seeks to impose multiple violations per day.

314. Consequently, an unpermitted CAFO risks severe financial consequences and effectively cannot operate without an NPDES permit.

315. Further, MEGLE exercises unbridled control over which farms are issued a General Permit. Mich Admin Code, R 323.2191(5); and Mich Admin Code, R 323.2192(d).

316. A CAFO that wishes to opt out of the General Permit and obtain a permit under an individual permit may not do so without MEGLE's permission. *Id.*

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317. And, as a practical matter, MEGLE does not permit CAFOs under individual permits unless the CAFOs operations require *more* burdensome restrictions on operations. There is not a less-burdensome alternative to obtaining coverage under the General Permit.

318. Moreover, MEGLE has likewise applied the policies reflected in the General Permit to even those CAFOs who have applied for and obtained individual permits, such as "Super CAFOs," i.e., those with more than 5,000 animal units on the farm.

319. Though the conditions of the General Permit qualify as "rules" under MCL 24.207 regardless of this fact, MEGLE's actions on individual permits nonetheless further demonstrate that these conditions reflect generally applicable standards, and policies.

320. Those individual permit determinations indicate that the General Permit conditions establish a floor and set minimum requirements for CAFOs.

321. While MEGLE has been willing to impose *more restrictive* conditions within individual permits, those conditions noted above are incorporated into such permits as baseline requirements.

322. All of these changes, individually and collectively, will impose cost burdens on the industry that are difficult, if not impossible, to compute, that impair the viability of some CAFOs, and that will cause some CAFOs a loss of going concern.

323. Accordingly, Plaintiffs request that this Court enter a judgment declaring the conditions of the general permit to be procedurally and substantively invalid rules, to have been adopted contrary to the constitutional requirements of due process, separation-of-powers, and the Takings Clauses of the Michigan and United States' constitutions, and enjoining their enforcement.

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COUNT I – PROCEDURAL VIOLATIONS OF THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT

324. Plaintiffs incorporate by reference all preceding allegations set forth above as if fully stated herein.

325. MCL 24.264 provides that "*the validity or applicability of a rule*, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, *may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff.*" (Emphasis added).

326. MCL 24.243(1) further states that "a rule is not valid unless it is processed in compliance with section 66, if applicable, section 42, and in substantial compliance with section 41(2), (3), (4), and (5)."

327. And MCL 24.243(2) recognizes that an affected party may challenge the procedural validity of a rule within 2 years of when the rule becomes effective.

328. MCR 2.605(A)(1) additionally allows that, "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

329. On March 27, 2020, MEGLE issued its 2020 CAFO General Permit setting forth the conditions with which CAFOs must comply to obtain a Certificate of Coverage under the General Permit.

330. MEGLE has, by the terms of its General Permit, established regulations, standards, and policies of general applicability that implement or apply Part 31 by setting the

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minimum conditions that MEGLE has required or will require for CAFOs to obtain an NPDES permit.

331. Those regulations, standards, and policies have general applicability as they will govern *all* of the CAFOs who are regulated by MEGLE under the General Permit—which currently represents the vast majority of CAFOs (and represents at least a substantial subset of CAFOs in any conceivable circumstance).

332. Those regulations, standards, and policies of general applicability are not mandated by statutory or other law and are thus reflective of the agency's exercise of quasi-legislative power that is procedurally limited by the APA.

333. Without an NPDES permit, a large livestock farm that has been defined or designated as a CAFO may not operate without facing significant financial penalties under Part 31 and the Clean Water Act for discharging without a permit.

334. Per MCL 24.207, a "regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency" is a "rule."

335. An agency must promulgate its "rules" through the prescribed rulemaking process, and the agency may not circumvent the Legislature's prescribed process for doing so.

336. Where an agency has failed to follow the procedures mandated by the APA in establishing a "rule," the rule is invalid and may not be enforced against regulated entities.

337. MEGLE has wholly failed to follow the APA's mandated process for rulemaking in this instance as it did not request to engage in rulemaking prior to incorporating these policies into the General Permit nor otherwise follow rulemaking procedures.

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338. Because MEGLE did not even purport to follow rulemaking procedures, the agency has avoided such APA procedural strictures as: (1) making findings "that there is a clear and convincing need to exceed the applicable federal standard" for each exceedance of the federal standard, MCL 24.232(8); (2) evaluating how to minimize the impact of its policies on small business, MCL 24.240; (3) engaging in a regulatory impact statement and cost-benefit analysis that estimates the industry, governmental, and fiscal impact of its policies, MCL 24.245(3); (4) submitting its policies to the Joint Committee on Administrative Rules at the Legislature for legislative input and review, MCL 24.245a; and (5) providing its proposed rules to an Environmental Rules Committee composed of scientific, governmental, and industry experts for their input, MCL 24.266.

339. The failure to follow these procedures in adopting generally applicable regulations, standards, and policies violates the APA.

340. These significant procedural violations of the APA, individually and on the aggregate, render MEGLE's adoption of such rules and incorporation of its newly established rules into the General Permit invalid and unenforceable. MCL 24.243(1) and MCL 24.264.

COUNT II – SUBSTANTIVE VIOLATIONS OF THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT

341. Plaintiffs incorporate by reference all preceding allegations set forth above as if fully stated herein.

342. MCL 24.264 provides that "*the validity or applicability of a rule*, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, *may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs,*

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or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff." (Emphasis added).

343. MCR 2.605(A)(1) additionally allows that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

344. Under Michigan law, a rule is substantively invalid if it is: (a) outside of the scope of the enabling statute; (b) contrary to the underlying legislative intent; or (c) arbitrary and capricious. *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984).

345. For the reasons alleged above, the new requirements MEGLE has added to the General Permit are arbitrary and capricious.

346. Additionally, those requirements are beyond MEGLE's delegated authority to regulate discharges of waste to waters of the state under Part 31 and the Clean Water Act.

347. Moreover, the requirements are contrary to the intent and purpose of Part 31 and the Clean Water Act.

348. Accordingly, such requirements should be declared to be substantively invalid rules and this Court should enjoin their enforcement.

COUNT III – DEPRIVATION OF DUE PROCESS UNDER THE U.S. CONSTITUTION AND MICHIGAN CONSTITUTION

349. Plaintiffs incorporate by reference all preceding allegations set forth above as if fully stated herein.

350. MEGLE's adoption of standards, regulations, and policies of general applicability as described above qualify as "rules" per MCL 24.207.

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351. Though MEGLE is required to process administrative rules through the rule-promulgation process, it has not done so.

352. MEGLE's circumvention of the rule-making process has deprived stakeholders, including but not limited to those industry organizations and permit applicants serving as plaintiffs in this matter, of the procedures the Legislature has prescribed under the APA. MCL 24.101 *et seq*.

353. That deprivation of statutorily mandated process is a violation of procedural due-process contrary to the guarantees of the United States Constitution, US Const, Amend XIV, and the separate guarantees of Michigan's Constitution of 1963. Mich Const 1963, Article 1, Section 17.

354. The Due Process Clause of the United States Constitution and the separate due-process guarantee of the Michigan Constitution each additionally prohibit the executive branch of government from acting arbitrarily in a manner that deprives its citizens of liberty or property interests.

355. The policies adopted by MEGLE are constitutionally arbitrary as detailed in the preceding allegations.

356. The policies adopted by MEGLE have affected the property interests of the permit applicants as detailed in the preceding allegations.

357. Accordingly, those policies are contrary to the substantive due process guarantees of the United States Constitution and the Michigan Constitution.

COUNT IV – VIOLATION OF THE SEPARATION OF POWERS AND NON-DELEGATION DOCTRINE UNDER THE MICHIGAN CONSTITUTION

358. Plaintiffs incorporate by reference all preceding allegations set forth above as if fully stated herein.

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359. Michigan's constitution explicitly imposes a separation of powers among the branches of government by declaring that "[t]he powers of government are divided into three branches: legislative, executive, and judicial" and forbidding any "person exercising powers of one branch" from "exerc[ising] powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art III, § 2.

360. Bolstering this neat division of authority, the Constitution elsewhere declares that "[e]xcept to the extent limited or abrogated by article IV, section 6 or article V, section 2, the legislative power of the State of Michigan is vested in a senate and house of representatives." Const 1963, art IV, § 1.

361. Accordingly, aside from those few and limited provisions where legislative power is expressly delegated by constitution, the executive branch of Michigan's government may not wield legislative (law-making) authority.

362. To guard against the exercise of legislative authority by the executive branch of Michigan's government, Courts have recognized that any delegation of power to the executive branch from the Legislature must contain "reasonably precise" standards for the exercise of such authority. *State Conservation Dep't v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976).

363. By promulgating purportedly binding mandates against CAFOs through its 2020 CAFO General Permit that are not otherwise required by any law, MEGLE has usurped legislative authority and violated the separation-of-power doctrine.

364. To the extent that MEGLE purports to do so based on authority delegated by the Legislature under Part 31 of NREPA, any such delegation violates the non-delegation doctrine as nothing in Part 31 sets sufficiently precise standards to govern MEGLE's issuance of binding mandates through its CAFO General Permit process.

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COUNT V – INVALIDITY OF CO-PERMITTING REQUIREMENTS AND VOID FOR VAGUENESS VIOLATION

365. Plaintiffs incorporate by reference all preceding allegations set forth above as if fully stated herein.

366. Within the CAFO General Permit, MEGLE allows for CAFOs to transfer waste to a person other than the CAFO owner for land application if "the land application of the CAFO waste is no longer under the operational control of the CAFO owner or operator that generates the CAFO waste . . . ." (CAFO General Permit, Part I.C.8.)

367. Conversely, in enforcing the CAFO General Permit, MEGLE has adopted an unwritten policy that requires CAFOs to include within their CNMP and as part of their permit all land-application activities under their "operational control," including land-application that occurs by legally separate third parties who themselves do not meet the regulatory definition of "CAFOs" or on land owned by non-CAFOs.

368. Nowhere in the permit has MEGLE specified what constitutes "operational control" over the land-application of manure nor identified what factors MEGLE considers in determining when a wholly separate legal entity that does not qualify as "CAFOs" must be subjected to a CAFO permit.

369. Nowhere in the law governing Part 31 or NREPA is there an "operational control" standard that MEGLE relies on by incorporation.

370. Due to a lack of legal authority supporting its policy and a failure to specify the standards for its own conduct, MEGLE has engaged in arbitrary enforcement attempts against CAFOs—seizing on its self-created ambiguity to require CAFOs to include within their CNMPs and permits the activities of non-CAFOs based on tenuous claims of connection to the permitted CAFOs.

371. This includes both companies that are wholly separate legal entities from the CAFOs and non-CAFO farms that receive CAFO waste.

372. MEGLE's policy thus has attempted to vastly expand its regulatory authority by requiring the activities of non-CAFOs to be pulled under the permit of an unrelated CAFO without any clearly defined justification for such a significant expansion of its authority and without any clearly defined standard for its exercise.

373. MEGLE's policy is without legal support, and it is both outside of and contrary to their statutory jurisdiction under Part 31 of NREPA.

374. The Due Process Clauses of the United States Constitution, Amendment XI and of the Michigan Constitution, Art I, Section 17, prohibit the government from relying on laws or policies that do not provide fair notice of the conduct that they regulate or allow for arbitrary and discriminatory enforcement.

375. To the extent that MEGLE relies on language in its CAFO General Permit referencing a CAFO's "operational control" as the basis for asserting jurisdiction over non-CAFOs, see General Permit I.C.8, that provision is unconstitutionally vague and is therefore void.

COUNT VI – VIOLATION OF TAKINGS CLAUSE OF THE MICHIGAN CONSTITUTION AND UNITED STATES CONSTITUTION

376. Plaintiffs incorporate by reference all preceding allegations set forth above as if fully stated herein.

377. Both the United States Constitution, Amendment V and the Michigan Constitution, Article X, Section 2 prohibit the taking of private property for public use without just compensation.

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378. MEGLE's 2020 CAFO General Permit requires certain CAFOs to "install and maintain a 35-foot wide *permanent vegetated buffer* along any surface water of the state, open tile line intake structures, sinkholes, [and] agricultural well heads, including but not limited to any roadside or any ditches that are conduits to surface waters of the state . . . ." (General Permit, Para. I.B.h.1.b) (emphasis added).

379. MEGLE's General Permit thus mandates the conversion of an incalculable amount of crop-farm acreage into non-farmable "permanent vegetated buffer[s]" along each side of a parcel of property that is adjacent to a surface water, an open tile intake, a sinkhole, an agricultural well head, or a roadside ditch.

380. MEGLE's mandate is unnecessary and arbitrary because it additionally requires CAFOs to implement mandatory setbacks, which prohibits farms from applying manure within 100 feet of such features, (General Permit, Para. I.B.h.1.a.), a duplicative requirement of two practices that serve the same purpose.

381. MEGLE's additional mandate to convert farmland into non-farmable and otherwise economically unusable strips of vegetation is also unconstitutional as a taking of private property without just compensation. US Const, Am V; Mich Const 1963, Art X, Sec. 2.

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RELIEF REQUESTED

WHEREFORE, Plaintiffs demand a judgment:

(a) Declaring that the conditions of the 2020 CAFO General Permit added by Defendant MEGLE are "rules" requiring promulgation under Michigan's APA;

(b) Declaring that those conditions of the General Permit are invalid because of MEGLE's failure to follow the procedures required under the APA to promulgate those conditions as administrative rules;

(c) Declaring that the same conditions are substantively invalid rules because they are arbitrary and capricious, beyond MEGLE's regulatory authority, and/or contrary to the intent of Part 31 of NREPA;

(d) Declaring that MEGLE's incorporation of these conditions into the permit violates Plaintiffs' procedural and substantive due process rights under the U.S. Constitution and the Michigan Constitution;

(e) Declaring MEGLE's adoption of such rules as violative of the Separation of Powers Clause of Michigan's Constitution, Art. III, § 2 and/or declaring any statutory authority relied on by MEGLE for such adoption to be in violation of the non-delegation doctrine;

(f) Declaring MEGLE's assertion of control over non-CAFOs to be *ultra vires* as beyond its statutory authority under Part 31 of NREPA and declaring its standard for determining such authority to be unconstitutionally void for vagueness;

(g) Declaring MEGLE's mandate to install 35-foot permanent vegetated buffer strips to be an unconstitutional taking in violation of Article X, Section 2 of the Michigan Constitution, and Amendment V of the U.S. Constitution;

(h) Granting a preliminary injunction to stay the enforcement of the challenged conditions of the General Permit for the duration of this suit;

(i) Permanently enjoining MEGLE's enforcement of the General Permit or any individual permit containing such conditions;

(j) Granting Plaintiffs their attorney fees; and

(k) Granting any other relief as this Court may deem just and proper.

Respectfully submitted,

CLARK HILL PLC

/s/ Michael J. Pattwell
Michael J. Pattwell (P72419)
Zachary C. Larsen (P72189)
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Dated: August 6, 2020

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VERIFICATION

Per the requirements of MCL 600.6434(2), I, Laura Campbell, being first duly sworn, depose and say the following:

1. I hold the position of Manager of the Agricultural Ecology Department with the Michigan Farm Bureau, and I am duly authorized to sign this Verification for and on behalf of all of the Plaintiffs in this matter.

2. Pursuant to MCR 1.109(D)(3)(b), I declare under the penalties of perjury that this Verified Complaint has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Michigan Farm Bureau

Laura A. Campbell
Manager
Agricultural Ecology Department
Michigan Farm Bureau

Subscribed and sworn to before me
this 6th day of August 2020
Nicole M. Bohnett, Notary Public
Ingham County, Michigan
My Commission expires: 02-19-2027
Acting in the county of Ingham

NICOLE M. BOHNETT
NOTARY PUBLIC, STATE OF MI
COUNTY OF INGHAM
MY COMMISSION EXPIRES Feb 19, 2027
ACTING IN COUNTY OF Ingham

Notarized using electronic/
remote technology

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EXHIBIT LIST

A. 2020 General Permit for Concentrated Animal Feeding Operations

B. Rulemaking Process Summary

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EXHIBIT A

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PERMIT NO. MIG010000

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
WASTEWATER DISCHARGE GENERAL PERMIT

CONCENTRATED ANIMAL FEEDING OPERATIONS

In compliance with the provisions of the federal Clean Water Act (federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, as amended); Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA); Part 41, Sewerage Systems, of the NREPA; and Michigan Executive Order 2019-06, Concentrated Animal Feeding Operations (CAFOs) are authorized to operate facilities specified in individual Certificates of Coverage (COCs) in accordance with effluent limitations, monitoring requirements and other conditions set forth in this general National Pollutant Discharge Elimination System (NPDES) permit (permit).

The applicability of this permit shall be limited to CAFOs that have not been determined by the Michigan Department of Environment, Great Lakes, and Energy (Department) to need an individual NPDES permit. New swine, poultry, and veal facilities with contaminated areas of the production area exposed to precipitation, including waste storage structures, are not eligible for this permit. "New" means populated after January 20, 2009. Egg processing, egg washing, and duck facilities are not eligible for this permit. Discharges which may cause or contribute to a violation of a water quality standard are not authorized by this permit.

In order to constitute a valid authorization to discharge, this permit must be complemented by a COC issued by the Department and copies of both must be kept at the permitted CAFO. The following will be identified in the COC (as appropriate):

- The rainfall event magnitude at the production area (Part I.B.1.a.2.)
- Data for the application rate table for crops not listed in the permit (Part I.B.3.c.2.)
- Notification of a Total Maximum Daily Load ( ) if the permittee's production or land application areas are located within a watershed(s) covered by an approved *Escherichia coli (E. coli)*, and/or biota, and/or dissolved oxygen, and/or nutrient (nitrogen or phosphorus) TMDL (Part I.C.9.)
- The date by which the permittee must provide documentation of Natural Resources Conservation Standard (NRCS) 313 environmental equivalency for waste storage structures not meeting NRCS 313 and procured after the effective date of the COC
- Percent of outside materials allowed in the anaerobic digester associated with the CAFO permitted under the COC, if that percentage is greater than five (Part I.C.10.)

Unless specified otherwise, all contact with the Department required by this permit shall be to the position indicated in the COC.

This permit takes effect on April 1, 2020. The provisions of this permit are severable. After notice and opportunity for a hearing, this permit may be modified, suspended, or revoked in whole or in part during its term in accordance with applicable laws and rules.

This permit shall expire at midnight, **April 1, 2025.**

Issued: March 27, 2020.

Original signed by Christine Alexander
Christine Alexander, Manager
Permits Section
Water Resources Division

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PERMIT FEE REQUIREMENTS

In accordance with Section 324.3120 of the NREPA, the permittee shall make payment of an annual permit fee to the Department for each October 1 the permit is in effect regardless of occurrence of discharge. The permittee shall submit the fee in response to the Department's annual notice. Payment may be made electronically via the Department's MiWaters system. The MiWaters website is located at https://miwaters.deq.state.mi.us. Payment shall be submitted or postmarked by January 15 for notices mailed by December 1. Payment shall be submitted or postmarked no later than 45 days after receiving the notice for notices mailed after December 1.

CONTESTED CASE INFORMATION

Any person who is aggrieved by this permit may file a sworn petition with the Michigan Administrative Hearing System within the Michigan Department of Licensing and Regulatory Affairs, c/o the Michigan Department of Environment, Great Lakes, and Energy, setting forth the conditions of the permit which are being challenged and specifying the grounds for the challenge. The Department of Licensing and Regulatory Affairs may reject any petition filed more than 60 days after issuance as being untimely.

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PART I

Section A. Effluent Limitations and Monitoring Requirements

1. Authorized Discharges and Overflows

During the period beginning on the effective date of this permit and lasting until the expiration of this permit, overflows and discharges are authorized per the following:

a. Overflows from CAFO Waste Storage Structures
Overflows from CAFO waste storage structures for cattle, horses, sheep, and existing swine, poultry, and veal facilities identified in Part I.B.1. are properly designed, constructed, and are operated and maintained in accordance with the requirements of this permit, the overflow is caused by precipitation events, and do not cause or contribute to an exceedance of Michigan's water quality standards.

b. Discharges from Land Application Areas
Discharges of CAFO waste to surface waters of the state that do not cause or contribute to an exceedance of Michigan's water quality standards are authorized from the land application areas managed in accordance with the Nutrient Management Plan (NMP) requirements set forth in Part I.B.3.

2. Monitoring Requirements

The discharge authorized in Part I.A.1. above, shall be monitored by the permittee as specified below.

Parameter	Units	Daily Maximum	Sample Type	Monitoring Frequency
Storage Structure Overflow				
Volume	Gal	(report)	Report Total Daily Volume	See Part I.A.2.b.
Discharge to Surface Waters of the State				
Volume	Gal	(report)	Report Total Daily Volume	See Part I.A.2.b.
5-Day Carbonaceous Biochemical Oxygen Demand (CBOD5)	mg/l	(report)	Grab	See Part I.A.2.b.
Escherichia coli (*E.coli*)	counts/100ml	(report)	Grab	See Part I.A.2.b.
Total Phosphorus (as P)	mg/l	(report)	Grab	See Part I.A.2.b.
Ammonia Nitrogen (as N)	mg/l	(report)	Grab	See Part I.A.2.b.
Total Suspended Solids (TSS)	mg/l	(report)	Grab	See Part I.A.2.b.

a. Narrative Standard
The receiving water shall contain no turbidity, color, oil films, floating solids, foams, settleable solids, or deposits as a result of a discharge which are or may become injurious to any designated use.

b. Monitoring Frequency
Discharges and overflows shall be monitored once daily by the permittee as specified above on any day on which a discharge occurs. The first sample shall occur within the first six hours of discharge, and then daily thereafter, until the end of the discharge event. All monitoring shall be in accordance with Part II.B.2. of this permit.

c. Monitoring Location and Reporting Requirements
Samples, measurements, and observations of all discharges and overflows shall be taken in compliance with the monitoring requirements in Part I.A.2., be representative of the discharge and are taken prior to the discharge entering surface waters. The permittee shall notify the Department in accordance with the reporting requirements set forth in Part II.C.6. of this permit and shall submit the monitoring requirements set forth in Part I.C.1. of this permit.

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3. Prohibited Discharges

a. This permit does not authorize any discharge to the groundwaters of the state. Such discharge may be authorized by a groundwater discharge permit issued pursuant to Part 22, Groundwater Quality, of the NREPA.

b. This permit does not authorize dry weather discharge or a discharge of CAFO waste and/or runoff that fails to meet the requirements of Part I.A.1. of this permit. Discharges due to overflows from storage structures at new swine, poultry, or veal facilities are prohibited. Discharges from land application activities that do not meet the requirements of Part I.A.1. of this permit or that cause an exceedance of Michigan's Water Quality Standards are prohibited. Any unauthorized discharges shall be monitored in accordance with Part I.A.2.

c. This permit does not authorize a discharge from new sand bedding.

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The permittee shall implement the following requirements.

1. CAFO Waste Storage Structures

a. Volume Design Requirements
The permittee shall have distinct CAFO waste storage structures designed for each waste type (liquid, as defined in NRCS Standard 313 (2017), or solid, stackable manure) in place and operational at all times that are adequately designed, constructed, maintained, and operated as per Part I.B.1. to contain the total combined volume of all of the following:

1) All CAFO waste generated from the operation of the CAFO, in a six-month or greater time period, including residual solids in waste storage structures designed for liquids, normal precipitation and runoff, and drifted snow accumulation in the production area during the same time period. For under-barn storages, inaccessible concrete lined storages, soil lined storages (either earthen or natural clay base), or synthetic lined storages that receive manure, the residual solids shall be at least six inches, unless the permittee demonstrates annually a lesser amount is achievable. This is the operational volume of the storage structure.

2) For cattle, horses, and sheep, and existing (populated prior to January 20, 2009) swine, poultry, and veal facilities, all production area waste and all runoff and direct precipitation generated from the 25-year 24-hour rainfall event. The magnitude of the rainfall event will be specified in the COC. This is an emergency volume to be kept available to contain large rainfall events.

3) New (populated on or after January 20, 2009) swine, poultry, and veal facilities shall be designed to have all contaminated areas of the production area, including waste storage structures, totally enclosed and not subject to precipitation and, therefore, not needing room for the emergency volume in their storage structures.

4) An additional design capacity of a minimum of 12 inches of freeboard for storage structures that are subject to precipitation-caused runoff. For storage structures that are not subject to precipitation-caused runoff, the freeboard shall be a minimum of 6 inches. This is the freeboard volume.

5) Records documenting the current design volume of every CAFO waste storage structure, including volume for residual solids, design treatment volume, total design volume, volumes of the operational, emergency, and freeboard volumes, and approximate number of days of storage capacity shall be kept in the permittee's (CNMP) for a minimum of five years from the date of creation.

b. Physical Design and Construction Requirements

1) Depth Gauge
CAFO waste storage structures shall include an easily visible, clearly marked depth gauge. Clear, major divisions shall be marked to delineate the operational, emergency (if applicable), and freeboard volumes as specified above in Part I.B.1.a. The top mark of the gauge shall be placed level with the lowest point on the top of the storage structure wall or dike. The elevation for the gauge shall be re-established as necessary but not less than every five years to adjust for any movement or settling. Materials used must be durable and able to withstand freezing and thawing (e.g. large chain, heavy-duty PVC, steel rod). Any depth gauges that are destroyed or missing must be replaced immediately. Under-barn storages may be measured with a dipstick or similar device. For solid stackable CAFO waste storage, depth gauge levels may be permanently marked on sidewalls.

2) Structural Design
Records documenting or demonstrating the current structural design as required below, including as-built drawings and specifications, of any CAFO waste storage structures, whether or not currently

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in use, shall be kept with the permittee's CNMP for a minimum five years from the date of creation. Included in the CNMP submitted to the Department shall be a short description of the structural design of each structure (type of structure; dimensions including depth; liner material, thickness, and condition; depth from the design bottom elevation to the seasonal high water table), a statement whether a professional engineer's evaluation has been completed or not, and a brief description of the results of the evaluation (meets Natural Resources Conservation Service (NRCS) 313 2017 or provides environmental performance equivalent to NRCS 313 2005, 2014, or 2017).

a) New Storage Structures (constructed after the effective date of the COC)
Except as otherwise required by this permit, CAFO waste storage structures shall, at a minimum, be constructed in accordance with NRCS 313 2017.

b) Existing Storage Structures at Newly Permitted CAFOs (facilities without prior NPDES permit coverage)

In a permit application for coverage under this permit, the applicant shall either:

(a) For each existing storage structure document through an evaluation by a professional engineer that each structure is constructed in accordance with NRCS 313 2014 or 2017. Submit to the Department documentation signed by a professional engineer verifying that each structure is constructed in accordance with NRCS 313 2014 or 2017. Complete as-built plans, specifications, drawings, etc. shall be kept at the facility with the CNMP and do not need to be submitted unless requested by the Department, or

(b) For each existing storage structure, on a form provided by the Department and submitted to the Department, demonstrate environmental performance equivalent to NRCS 313 2014. The demonstration shall be accomplished through an evaluation by a professional engineer.

i. The applicant for a Newly Permitted CAFO must provide the documentation or demonstration required by (a) or (b) above prior to populating livestock to the numbers which would require an NPDES permit (per the definition of Part II.A. Large CAFO).

ii. Previously evaluated storage structures at permitted CAFOs shall have documentation demonstrating that the structure was constructed to, or provides equivalent environmental protection to, NRCS 313 2003, 2005, or 2014.

c) For Previously Permitted CAFOs acquiring previously constructed waste storage structures from an unpermitted facility, the COC shall specify the date by which the permittee shall meet the requirements of i) or ii) below, but that date shall be no more than two years from the acquisition of the structures.

i) For each existing storage structure, document through an evaluation by a professional engineer that each structure is constructed in accordance with NRCS 313 2014 or 2017. Submit to the Department documentation signed by a professional engineer verifying that each structure is constructed in accordance with NRCS 313 2014 or 2017. Complete as-built plans, specifications, drawings, etc. shall be kept at the facility with the CNMP and do not need to be submitted unless requested by the Department, or

ii) For each existing storage structure, on a form provided by the Department and submitted to the Department, demonstrate environmental performance equivalent to NRCS 313 2014. The demonstration shall be accomplished through an evaluation by a professional engineer.

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d) Waste Storage Structures for Solid Stackable Manure Not Subject to Precipitation
Waste storage structures that will hold solid stackable manure that is totally enclosed and not subject to precipitation, will also be designed and constructed so that storage shall, at a minimum, include the following:

i) All CAFO waste generated from the operation of the CAFO in a six-month or greater time period;

ii) CAFO waste shall be covered or stored inside a structure such that it is protected from wind and will not be contacted by precipitation;

iii) All wood in contact with litter should be pressure treated;

iv) The permittee shall include the basis and method for documenting six months storage capacity in accordance with Part I.B.1.d.2.

1) To determine storage capacity, the permittee may use any of the following methods, or in combination, to verify six months of poultry litter storage capacity:

A) Completed as-build drawings; or

B) Certified CNMP provider calculations which include information from the animal waste management report or CAFO facility calculations. The information at a minimum shall include stack characteristics, such as maximum stack heigth, maximum stack angle, and wall height.

2) To determine litter production, the permittee may use any of the following methods, or in combination, to verify six months of poultry litter storage capacity:

A) A three-year average of reported production (i.e., CAFO waste in cubic feet) in the CAFO facility's annual report. The three-year average shall consist of data from the highest three years during the last five years; or

B) If reported production is not available, data from the Midwest Plan Service (MWPS-18, Section 1 (2004)) shall be used in combination with any previous year's data.

v) All documentation and certification of six months of storage capacity shall be submitted to the department as part of the CNMP, and submitted to the department via MiWaters (https://miwaters.deq.state.mi.us), with the exception of the completed as-built drawings that shall be kept on site at the CAFO facility.

vi) storm water shall not run onto or under the stored CAFO waste; and

vii) a minimum of two feet separation distance to the seasonal high-water table or a minimum of one-foot separation if an impermeable barrier is used under the stored CAFO waste. Impermeable barriers must be constructed of at least 12 inches of compacted clay, at least four inches of concrete, or another material of similar structural integrity.

e) Existing Storage Structures Not Meeting Standards
Existing storage structures that do not meet the requirements above in Part I.B.1. and will not be upgraded to meet NRCS 313 Standards shall be maintained or permanently closed in accordance with Part I.C.3. Records of usage, maintenance, or closure shall be kept in the CNMP. A notification of discontinued use shall be made via MiWaters (https://miwaters.deq.state.mi.us). If a waste storage structure is to be closed, this shall be completed within six months from the notification.

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c. Inspection Requirements
The permittee shall develop a Storage Structure Inspection Plan to be kept in the CNMP. CAFO waste storage structures shall be inspected weekly. The results of the inspection shall be recorded on the "CAFO Inspection Record" form provided by the Department and kept in the CNMP for a minimum of 5 years from the date of creation. The plan shall include all of the following weekly inspections:

1) The CAFO waste storage structures for cracking, inadequate vegetative cover, woody vegetative growth, evidence of overflow, leaks, seeps, erosion, slumping, animal burrowing or breakthrough, and condition of the storage structure liner or stacking pad.

2) The depth of the CAFO waste in the storage structure and the available operating capacity as indicated by the depth gauge.

3) The collection system, lift stations, mechanical and electrical systems, transfer stations, control structures, and pump stations to ensure that valves, gates, and alarms are correctly set and all are properly functioning.

4) Any deficiencies found as a result of these inspections shall be corrected as soon as possible. Deficiencies and corrective actions taken shall be documented on the CAFO Inspection Record and kept in the CNMP for a minimum of 5 years from the date of creation.

d. Operation and Maintenance Requirements
The permittee shall implement a Storage Structure Operation and Maintenance Program that incorporates all the following management practices. The permittee shall initiate steps to correct any condition that is not in accordance with the Storage Structure Operation and Maintenance Program. A copy of the program shall be included in the CNMP. Specific records below shall be kept with the CNMP for a minimum of 5 years from the date of creation, unless specified otherwise below.

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1) In the event the level of CAFO waste in the storage structure rises above the maximum operational volume level and enters the emergency volume level, the Department shall be notified. The level in the storage structure shall be reduced and the emergency volume restored within one week, unless a longer time period is authorized by the Department. The removed CAFO waste shall be land applied in accordance with this permit or the Department shall be notified if another method of disposal is to be used. Descriptions of such events shall be recorded and kept in the CNMP for a minimum of 5 years from the date of creation.

2) During the period of November 1 to December 31 of each year, there shall be an available operational volume in the CAFO waste storage structures equal to the volume of CAFO waste generated from the operation of the CAFO in a six-month or greater time period (including normal precipitation and runoff in the production area during the same time period). The date of this determination shall be kept in the CNMP for a minimum of 5 years from the date of creation and shall be certified via MiWaters (https://miwaters.deq.state.mi.us) to the Department by January 14 of the next calendar year, in accordance with Part II.C.5.

3) Vegetation shall be maintained at a height that stabilizes earthen CAFO waste storage structures, provides for adequate visual inspection of the storage structures, and protects the integrity of the storage structure liners. The vegetation shall have sufficient density to prevent erosion. Woody vegetation shall be removed promptly from waste storage berms and other areas where roots may penetrate or disturb waste storage facility liners or waste treatment facilities.

4) Dike damage caused by erosion, slumping, or animal burrowing shall be corrected immediately and steps taken to prevent occurrences in the future.

5) The integrity of the CAFO waste storage structure liner shall be protected. Liner damages shall be corrected immediately, and steps taken to prevent future occurrences.

6) Problems with the collection system, lift stations, mechanical and electrical systems, transfer stations, control structures, and pump stations shall be corrected as soon as possible. Records of these inspections and records documenting any actions taken to correct deficiencies shall be kept with the CNMP for a minimum of five years from the date of creation. Deficiencies not corrected within 30 days must be accompanied by an explanation of the factors causing the delayed correction.

7) CAFO waste shall be stored only in storage structures as described in Part I.B.1.a., b., and d.

8) CAFO waste storage structures shall not contain human sanitary waste.

2. Best Management Practices Requirements

The following are designed to achieve the objective of preventing unauthorized discharges to surface waters of the state from production areas and land application activities.

a. Conservation Practices

The permittee shall maintain specific conservation practices near or at production areas, land application areas, and heavy use areas within pastures associated with the CAFO that are sufficient to control the runoff of pollutants to surface waters of the state in quantities that may cause or contribute to a violation of water quality standards. These practices shall be consistent with NRCS Conservation Practices and in compliance with the requirements of this permit. The permittee shall include within the CNMP a list of conservation practices used near or at production areas and land application areas. This list does not need to include temporary practices or other practices already required by this permit. Records documenting the inspection of the conservation practices (with the exception of those utilized on land application areas) shall be kept in the CNMP for a minimum of 5 years from the date of creation. Conservation practices on land application areas receiving CAFO waste shall be inspected and reported on the "Daily Manure Application Record."

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b. Divert Clean Water
The permittee shall design and implement structures and management practices to divert clean storm water to prevent contact with contaminated portions of the production areas. Clean storm water may include roof runoff, runoff from adjacent land, and runoff from feed or silage storage areas where such runoff has not contacted feed, silage, or silage leachate. The permittee shall describe in the CNMP structures and management practices used to divert clean water from the production area and/or beneficial uses of diverted water if it will be collected for reuse.

c. Prevent Direct Contact of Animals with Surface Waters of the State
There shall be no access of animals to surface waters of the state at the production area of the CAFO. The permittee shall develop and implement appropriate controls to protect water quality by preventing access of animals to surface waters of the state and shall describe such controls in the CNMP. Records documenting the proper implementation of controls preventing access of animals to surface waters of the state shall be recorded on the "CAFO Inspection Report" form and kept in the CNMP for a minimum of 5 years from the date of creation.

d. Animal Mortality
The permittee shall handle, store, or dispose of dead animals in a manner that prevents contamination of surface waters of the state. Mortalities, including but not limited to any animal refuse (including but not limited to entrails and viscera or parts other than excrement), must not be disposed of in any liquid CAFO waste storage structure or storm water storage structure that is not specifically designed to treat animal mortalities, with the exception of leachate from properly designed and operated composting structures. Records documenting the proper management of animal mortalities shall be reported on the "CAFO Inspection Report" form and kept in the CNMP for a minimum of 5 years from the date of creation.

e. Chemical Disposal
The permittee shall prevent introduction of hazardous or toxic chemicals (for purposes of disposal) into CAFO waste storage structures. Examples of hazardous and toxic chemicals are pesticides and petroleum products/by-products. Identify in the CNMP appropriate practices that ensure chemicals that are not part of the normal agricultural practice at the production site and other contaminants handled at the CAFO are not disposed of in any CAFO waste or storm water storage or treatment system. Records documenting the proper management of chemicals to prevent their introduction into the CAFO waste storage structures, storm water storage, or treatment system, shall be reported on the "CAFO Inspection Report" and kept in the CNMP for a minimum of 5 years from the date of creation.

f. Inspection, Proper Operation, Maintenance, and Reporting
The permittee shall develop and implement an Inspection, Operation, and Maintenance Program that includes periodic visual inspections, proper operation, and maintenance of all CAFO waste-handling equipment including piping and transfer lines, and all runoff management devices (e.g., cleaning separators, barnyards, catch basins, screens) to prevent unauthorized discharges to surface waters and groundwaters of the state. A copy of the program shall be included in the CNMP. Specific inspection requirements include, but are not limited to, all of the following:

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1) Weekly visual inspections of all clean storm water diversion devices and runoff diversion structures and practices as described in Part I.B.2.b.

2) Daily visual inspections of water lines, including drinking water and cooling water lines, and above-ground piping and transfer lines, or an equivalent method of checking for water line leaks that incorporates the use of water meters, pressure gauges, or some other monitoring method.

3) Weekly inspections of all CAFO waste-handling equipment including piping and transfer lines, all runoff management devices, and devices channeling contaminated stormwater to storage and containment structures shall be accessible such that required visual inspections may occur. This may necessitate frequent removal of vegetation, snow, or other obstructions.

4) Any deficiencies shall be corrected as soon as possible.

5) Records of these inspections and records documenting any actions taken to correct deficiencies shall be recorded on the "CAFO Inspection Record" form provided by the Department and shall be kept in the CNMP for a minimum of five years from the date of creation. Deficiencies not corrected within 30 days must be accompanied by an explanation of the factors causing the delayed correction.

3. Land Application of CAFO Waste

a. Field-by-Field Assessment

The permittee shall conduct a field-by-field assessment of all land application areas. Each field shall be assessed prior to use for land application of CAFO waste. The assessment shall include field maps with location information (section, township, county, and crossroads, latitude and longitude of field center), and identify field-specific conditions, including, but not limited to, slopes, soil type, locations of tile outlets, tile risers and tile depth, conservation practices, and offsite conditions, such as buffers and distance or conveyance to surface waters of the state. The assessment shall also identify areas which, due to topography, activities, or other factors, have a potential for erosion. The assessment shall also identify fields, or portions of fields, that will be used for surface application of CAFO waste without incorporation or injection to frozen or snow-covered ground in accordance with Part III, Department 2005 Technical Standard for the Surface Application of CAFO Waste on Frozen or Snow-Covered Ground Without Incorporation or Injection. The results of this assessment, along with consideration of the form and source of the CAFO waste and all nutrient inputs in addition to those from CAFO waste, shall be used to ensure that the amount, timing, and method of application of CAFO waste:

1) does not exceed the capacity of the soil to assimilate the CAFO waste;

2) is in accordance with field-specific nutrient management practices that ensures appropriate agricultural utilization of the nutrients in the CAFO waste;

3) does not exceed the maximum annual land application rates specified in Part I.B.3.c. of this permit; and the basis (technology, or sampling methods and results) of any planned use of additional nitrogen above that rate shall be provided with the field by field assessment, and submitted and kept in the CNMP.

4) will not result in unauthorized discharges.

All assessments shall be kept in the CNMP for a minimum of 5 years from the date of creation. A particular field may be deleted from the CNMP once the field is no longer used for land application of CAFO waste; however, the field assessments must be kept in the CNMP for 5 years from the date created.

Any new fields shall be assessed prior to their use for land application activities. The Department shall be notified of the new fields prior to their use through submittal of a permit modification request via

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MiWaters (https://miwaters.deq.state.mi.us) that includes the field-by-field assessment required above, current (within the last three years) soil tests, planned crops, and realistic crop yield goals. The request will be public noticed for 15 calendar days via MiWaters (https://miwaters.deq.state.mi.us). The permittee may use the field 18 calendar days after submittal of the request unless notified otherwise by the Department.

b. Field Inspections
Prior to conducting land application of CAFO waste to fields determined to be suitable under Part I.B.3.a. above, the permittee shall perform the following inspections at the indicated frequency to ensure that unauthorized discharges do not occur as a result of the land application of CAFO waste. Records of inspections, monitoring, and sampling required by this section shall be recorded in the Land Application Log required by Part I.B.3.d.

1) CAFO waste shall be sampled a minimum of once per year to determine nutrient content and analyzed for total kjeldahl nitrogen (TKN), ammonium nitrogen, and total phosphorus. CAFO waste shall be sampled in a manner that produces a representative sample for analysis. Guidance for CAFO waste sampling protocols can be found in the North Central Regional Extension Publication 567 (1995) available from Michigan State University Extension. Analytical methods shall be as required by Part II.B.2. The CAFO waste test results shall be used to determine land application rates as described in Part I.B.3.c. below. Records of the nutrient levels and analysis methods shall be kept in the Land Application Log and in the CNMP for a minimum of 5 years from the date of creation.

2) Soils at land application sites shall be sampled a minimum of once every three years, analyzed to determine phosphorus levels, and the soil test results shall be used to determine land application rates as described in I.B.3.c. below. Sample soil using an 8-inch vertical core and take 20 or more cores in a random pattern spread evenly over each uniform field area. A uniform field area shall be no greater than 20 acres or it can be up to 40 acres if that field has one soil map unit and has been managed as a single field for the last ten years. The 20 cores shall be composited into one sample and analyzed using the Bray P1 method.

Grid or zone sampling are also acceptable methods for sampling soils at land application sites. If grid or zone sampling methods are used, methods shall follow Michigan State University Extension Bulletin E498S (2006). The permittee shall include individual soil sample results and information documenting how soil sample zones are determined, and manure application rates are calculated.

Records of the phosphorus levels shall be kept in the Land Application Log and in the CNMP for a minimum of 5 years from the date of creation.

3) The permittee shall inspect each field no earlier than 48 hours prior to each land application of CAFO waste to that field to evaluate the current suitability of the field for application. This inspection shall include, at a minimum, the state of all tile outlets, evidence of soil cracking, the moisture-holding capacity of the soil, crop maturity, and the condition of designated conservation practices (i.e., grassed waterways, buffers, diversions). Results and findings of all inspections shall be recorded in the Daily Manure Application Record.

4) The permittee shall visually inspect all tile outlets draining a given field immediately prior to the land application of CAFO wastes to that field. Tile outlets shall be inspected again upon completion of the land application to the field, or at the end of the working day should application continue on that field for more than one day. Include in the Daily Manure Application Record written descriptions of tile outlet inspection results and observe and compare color and odor of tile outlet effluents before and after land application.

5) All tiled fields to which CAFO wastes have been applied in the prior 30 days shall be visually inspected within 24 hours after the first rain event of one-half inch or greater, for signs of a discharge of CAFO waste. Written descriptions of tile inspection results shall be recorded in the Daily Manure Application Record. If an inspection reveals a discharge with color, odor, or other characteristics

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Indicative of an unauthorized discharge of CAFO waste, the permittee shall immediately notify the Department in accordance with the reporting procedures set forth in Part I.C.1. and monitor the discharge in accordance with Part I.A.2. of the permit. A copy of the Daily Manure Application Record shall be kept with the Land Application Log.

6) The permittee shall inspect all land application equipment daily during use for leaks, structural integrity, and proper operation and maintenance. Land application equipment shall be calibrated annually to ensure proper application rates. Written records of inspections, date of inspections, and calibrations according to the manufacturer's specifications shall be retained in the Daily Manure Application Record.

c. Maximum Annual Land Application Rates

The permittee may use either the Bray P1 numerical limits or the Michigan Phosphorus Risk Assessment (MPRA) tool (Version 2.0, Nov. 2012) and the EGLE MPRA Guidance Document to determine maximum annual land application rates. The permittee must use one system for all land application areas. For purposes of this permit, the MPRA is for rate calculations only and "Distance to surface water and/or surface inlets" is interpreted as described in Part I.B.3.h. below. The permittee shall comply with all of the following land application rates:

1) Land Application Rate Prohibitions and Restrictions
All of the following land application rate prohibitions apply.

a) If the Bray P1 soil test result is 135 parts per million (ppm) phosphorus (P) or more, and the fields are not located within a watershed(s) covered by an approved phosphorus or nitrogen Total Maximum Daily Load (TMDL), CAFO waste applications shall be discontinued until nutrient use by crops reduces the Bray P1 soil test result to less than 135 ppm P including when MPRA is used. If the Bray P1 soil test result is 120 ppm P or more, and the fields are located in a watershed(s) covered by an approved phosphorus or nitrogen TMDL, CAFO waste applications shall be discontinued, until nutrient use by crops reduces the soil test result to less than 120 ppm P including when MPRA is used.

b) Fields where the MPRA risk is HIGH, CAFO waste shall not be applied.

c) The application rate shall not exceed the nitrogen (N) fertilizer recommendation (removal value for legumes) for the first crop year grown after the CAFO waste is applied as specified in Part I.B.3.c.2) b) below.

d) The application rate shall not exceed four years of P for each of the four crops planned for the next four years as calculated in Part I.B.3.c.2) b) below.

e) The total amount of N and P, regardless of source (manure, organic waste, commercial fertilizer, etc.), shall not exceed the first crop year nutrient requirements unless applying multiple crop years of P as allowed in 2) below. Only one year of N can be applied as stated in c) above, unless samples or other relevant data shows additional N is needed for or will be beneficial to the crop. Documentation justifying additional N must be kept in the CNMP for a minimum of 5 years from the date of creation.

2) Phosphorus Levels

a) If the Bray P1 soil test result is 68 ppm P or more, but less than 135 ppm P and the fields are not located within a watershed(s) covered by an approved phosphorus or nitrogen TMDL, or a MPRA risk of MEDIUM, application rates shall be based on the maximum rates of P in annual pounds per acre as calculated using the method described below. If the Bray P1soil test result is 60 ppm P or more, but less than 120 ppm P and the fields are located in a watershed(s) covered by an approved phosphorus or nitrogen TMDL, or a MPRA risk of LOW, application rates shall be based on the maximum rate of P in annual pounds per acre as calculated using the method described below.

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The realistic yield goal per acre, using the units specified in Table 1 below, for the planned crop multiplied by the number in the P column for that crop. The maximum annual application rates as calculated above shall be achieved by using the CAFO waste test results for P to determine the amount of CAFO waste that may be land applied per acre per year.

The result is the maximum annual pounds per acre of P that may be applied for the first crop planned after application of CAFO waste. If the one-year rate is impractical due to spreading equipment or crop production management, the permittee may apply up to two years of P at one time, but no P may be applied to that field for the second year. The two-year P application rate shall be the results calculated using the formula in Part 1.B.3.c.3)a)(3) below for each of the two crops planned for the next two years and those two annual results shall be added together to determine the maximum P application rate. In no case may the application rate exceed the N application rate as specified below.

b) If the Bray P1 soil test result is less than 68 ppm P and the fields are not located within a watershed(s) covered by an approved phosphorus or nitrogen TMDL, or 60 ppm P and the fields are located in a watershed(s) covered by an approved phosphorus or nitrogen TMDL, or a MPRA risk of LOW, the annual rate of CAFO waste application shall not exceed the N fertilizer recommendation (removal value for legumes) for the first crop year grown after the CAFO waste is applied. Information to determine N fertilizer recommendations or removal values can be found in Michigan State University Extension Bulletin E2904. The University of Minnesota Extension Bulletin "Guidance for Manure Application Rate" (2019) and University of Wisconsin Bulletin A2809 (2012) may be used for N fertilizer recommendations or removal rates for legumes. In no case may the application rate exceed four years of P calculated using the method described in Part I.B.3.c.2)a) above for each of the four crops planned for the next four years and those four annual results shall be added together to determine the maximum application rate. The maximum annual application rates as calculated above shall be achieved by using the CAFO waste test results for N to determine the amount of CAFO waste that may be land applied per acre per year.

3) Additionally, only one year of N can be applied as stated in Part I.B.3.c.1) c) above, unless samples or other relevant data demonstrate additional N is needed for, or will be beneficial to, the crop. Prior to application, the demonstration justifying additional N must be submitted to the Department via MiWaters (https://miwaters.deq.state.mi.us) for review. The demonstration will be public noticed for a period of 15 calendar days. The demonstration shall be kept in the CNMP for a minimum of 5 years from the date of creation. The permittee may apply the additional N following 18 calendar days after submittal of the request, unless notified otherwise by the Department.

a) Risk Assessment

(1) If using MPRA, CAFO waste may only be applied on fields that achieve a MPRA score of LOW or MEDIUM.

(2) In accordance with Part I.C.9., if the field is located in a watershed(s) covered by an approved phosphorus and nitrogen TMDL, CAFO waste may not be applied unless the MPRA risk is LOW.

(3) Allowable application rates of P shall be based on the rates of P in annual pounds (lbs.) per acre (ac) as calculated using the following formula:

Phosphorus Amount (lbs. P/ac) = Realistic Crop Yield Goal/ac x P (lb./unit yield for planned crop)

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The annual application rates allowable as calculated above shall be achieved by using the CAFO waste test results (required per Part I.B.3.b.1) for P to determine the amount of CAFO waste that may be land applied per acre per year as calculated using MPRA.

Three and four years of P may only be applied on fields with an MPRA score of LOW. A multi-year P application rate shall be the results calculated using the formula above for each of the crops planned for the specified years and those annual results shall be added together to determine the maximum P application.

Table 1.		Phosphate (P_2O_5) values are included for reference purposes.		
Planned Crop	**Harvest Form**	**Unit of Realistic Yield Goal per Acre**	**P**	**P_2O_5**
			- - lb./unit of yield - -	
Alfalfa	Hay	ton	5.72	13.1
Alfalfa	Haylage	ton	2.38	5.45
Apple	Fruit	ton	0.19	0.44
Asparagus	Shoots	ton	1.1	2.51
Barley	Grain	bushel	0.17	0.38
Barley	Straw	ton	1.41	3.2
Beans (dry edible)	Grain	cwt	0.53	1.2
Beans (green, fresh)	Pods	ton	1.22	2.8
Blueberry	Fruit	ton	0.20	0.46
Bromegrass	Hay	ton	5.72	13
Buckwheat	Grain	bushel	0.11	0.25
Canola	Grain	bushel	0.40	0.91
Carrots	Root	ton	0.79	1.81
Cherries (sour)	Fruit	ton	0.3	0.69
Cherries (sweet)	Fruit	ton	0.37	0.85
Clover	Hay	ton	4.4	10
Clover-grass	Hay	ton	5.72	13
Corn	Grain	bushel	0.16	0.37
Corn	Stover	ton	3.61	8.2
Corn	Silage	ton	1.45	3.3
Corn	Sweet	ton	1.23	2.8
Cucumbers	Fruit	ton	0.47	1.1
Grapes	Fruit	ton	0.26	0.6
Millet	Grain	bushel	0.11	0.25
Mint	Hay	Ton	3.81	8.72
Oats	Grain	bushel	0.11	0.25
Oats	Straw	ton	1.23	2.8
Onions	Bulb	ton	1.14	2.6
Orchard grass	Hay	ton	7.48	17
Peaches	Fruit	ton	0.24	0.55
Pears	Fruit	ton	0.23	0.53
Peas	Fruit	ton	2.01	4.6
Peppers, Green	Fruit	Ton	0.6	1.37
Plums	Fruit	ton	0.2	0.46
Potato	Tubers	cwt	0.06	0.13
Rye	Grain	bushel	0.18	0.41
Rye	Straw	ton	1.63	3.7
Rye	Silage	ton	0.66	1.5
Sorghum	Grain	bushel	0.17	0.39
Sorghum-Sudangrass	Hay	ton	6.6	15
Sorghum-Sudangrass	Haylage	ton	2.02	4.6
Soybean	Grain	bushel	0.35	0.8
Spelts	Grain	bushel	0.17	0.38

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Table 1. Phosphate (P_2O_5) values are included for reference purposes.				
Planned Crop	Harvest Form	Unit of Realistic Yield Goal per Acre	P	P_2O_5
			- - lb./unit of yield - -	
Squash	Fruit	ton	0.76	1.74
Sugar beets	Roots	ton	0.57	1.3
Sunflower	Grain	bushel	0.53	1.2
Timothy	Hay	ton	7.48	17
Tomatoes	Fruit	ton	0.57	1.3
Triticale	Silage	Ton	3.08	7.0
Wheat	Grain	bushel	0.28	0.63
Wheat	Straw	ton	1.45	3.3

For crops not listed in Table 1, the permittee shall provide in the permit application, the harvest form, unit of realistic yield goal per acre, P lb./unit of yield (in a format similar to that of Table 1) and supporting data. The Department will review the proposal, and upon approval, will list the approved numbers in the COC. The permittee may propose alternate land application rates and methodologies in the permit application. The Department will review the proposal and acceptable rates and methods, and upon approval, will public notice the proposal via MiWaters (https://miwaters.deq.state.mi.us) for a 15 day period. The alternate land application rates and methodologies will be included in the COC issued under this permit.

Methodology and calculations consistent with this Part I.B.3.c. and their results, shall be recorded in the Land Application Log.

d. Land Application Log

The results of land application inspections, monitoring, testing, and recordkeeping shall be recorded in the Department provided forms, "Daily Manure Application Record" and the "Land Application Summary for Previous Crop Year" which shall be kept up-to-date and kept in the CNMP for a minimum of 5 years from the date of creation. The permittee shall document in the log in writing, at a minimum, records required by Part I.B.3, and all of the following information and inspection results in the specified documents:

1) Daily Manure Application Record
   a) The time, date, quantity, method, location (Section, Township, County, latitude and longitude of field center), crop grown, and application rate for each location at which CAFO wastes are land applied.
   b) The description of the forecast and of the weather conditions at the time of application and for 24 hours prior to and following application based on visual observation.
   c) A review of the condition of conservation practices.
   d) A statement whether the land was frozen or snow-covered at the time of application.

2) Land Application Summary for Previous Crop Year
   a) The crop, the realistic yield goal, and actual yield for each location at which CAFO wastes are land applied, and the second-year crop (if applicable).
   b) Methodology and calculations showing the total nitrogen and phosphorus actually applied to each field receiving CAFO waste, identifying each source of manure used to calculate the application rate, identify all sources of nutrients, including sources other than CAFO waste.
   c) The total amount of nitrogen and phosphorus actually applied to each field receiving CAFO waste, irrespective of source, including documentation of calculations for the total amount applied.

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d) The reporting of additional N applied under the demonstration per Part I.B.3.c.3)a).

3) Forecast Records
Printouts or electronically maintained records of weather forecasts from the time of land application. Weather forecasts may also be saved as electronic files, in which case the files do not need to be physically located in the Land Application Log, but the log shall reference the location where the files are stored and shall be made available upon Department request.

e. Land Application Summary
The permittee shall submit the required "Land Application Summary" form via MiWaters (https://miwaters.deq.state.mi.us) within 30 days from each quarter ending March 31, June 30, September 30, and December 31 of each year and will include the following for each field on which CAFO waste was applied:

1) Dates of Application;

2) Field name and Location (latitude and longitude coordinates of center of field);

3) Acres applied;

4) Amount and units of manure applied per acre.

f. Prohibitions
Appropriate prohibitions, in compliance with the following, shall be included in the CNMP:

1) CAFO waste shall not be applied on land that is flooded or saturated with water at the time of land application.

2) CAFO waste shall not be applied during rainfall events.

3) CAFO waste shall not be applied during the months of January, February, or March unless the permittee submits a notification and meets the following conditions:

(a) CAFO waste shall only be applied when waste can be incorporated immediately following application, or injected;

(b) CAFO waste shall not be applied when two or more inches of frost and/or four or more inches of snow are present at the land application site at the time of application;

(c) CAFO waste shall not be applied within 100 feet of any surface water of the state, open tile line intake structures, sinkholes, agricultural well heads, included but not limited to roadside ditches that are conduits to surface waters of the state (with the exception of surface waters of the state that are up-gradient of the land application).

(d) Manure application on fields receiving CAFO waste must have a soil sample Bray P1 of no greater than 68 ppm P, or 60 ppm P if fields are located in watershed(s) covered by an approved phosphorus or nitrogen TMDL.

(e) Twenty-four (24) hours prior to the land application of CAFO waste, the Department shall be notified, through a Department form via MiWaters (https://miwaters.deq.state.mi.us). The notification must include all of the following:

i) a topographic map of the specific land application location showing the directional flow to surface waters;

ii) the planned application rate, with no more than 1 crop year of P that can be applied;

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iii) the current total storage structure capacity in days at the CAFO facility.

(f) All land application practices shall follow the requirements per Part I.B.3.

4) CAFO waste shall not be transferred to a recipient for land application of the CAFO waste during the months of January, February, or March. Land application does not mean CAFO waste that is transferred out of state, to a treatment facility, or composting facility.

5) CAFO waste application shall be delayed if rainfall exceeding one-half inch, or less if a lesser rainfall event is capable of producing an unauthorized discharge, is forecasted by the National Weather Service (NWS) during the planned time of application and within 24 hours after the time of the planned application. Forecast models to be used can be found on the Internet at http://www.weather.gov/mdl/synop/products.php. Model data to be used for one-half inch shall be the following:

GFS MOS (MEX) Text Message by Station Forecast: If the Q24 is 4 and the P24 is 70 or more for the applicable time period, or the Q24 is 5 or greater (with any P24 number), then CAFO waste land application shall be delayed until the Q24 is less than 5, or both the Q24 is less than 4 and the P24 is less than 70 for the applicable time period. If the first two Q12 values are 4 and the corresponding P12 values are 70 or more for the applicable time period, or the Q12 values are 5 or greater (with any P12 numbers), then CAFO waste land application shall be delayed until the first two Q12 values are less than 5 or both the Q12 values are less than 4 and the corresponding P12 values are less than 70 for the applicable time period. For further details and instructions, utilize the "Instructions for Determining Precipitation Forecasts for CAFO Permits" located at https://www.michigan.gov/documents/deq/wrd-npdes-CAFO-PrecipitationInstructions_513072_7.pdf. The station to be used shall be that which is closest to the land application area. If no station is close, then use the closest 2 or 3 stations.

Different model data shall be used if it is determined that rainfall less than one-half inch on a particular field is capable of causing an unauthorized discharge. For example, using a Q24 rating of 3 or greater may be appropriate on higher risk fields. If the NWS website is revised and the required forecast models are not available, the permittee shall contact the Department for information on which forecast models to use. Instructions for using this website are available from the Department. Other forecast services may be used upon approval of the Department.

g. Methods

CAFO waste shall be subsurface injected or incorporated into the soil within 24 hours of application. CAFO waste subsurface injected into frozen or snow-covered ground shall have substantial soil coverage of the applied CAFO waste. During January, February, March all CAFO waste shall be incorporated immediately following application, or injected. The following exceptions apply during the period April 1 through December 31:

1) Injection or incorporation may not be feasible where CAFO wastes are applied to pastures, perennial crops such as alfalfa, cover crops, or where no-till practices are used. CAFO waste may be applied to pastures or perennial crops such as alfalfa, cover crops, or where no-till practices are used, only if the CAFO waste will not enter surface waters of the state. CAFO waste shall not be applied if the waste may enter surface waters of the state.

2) CAFO waste may be surface applied and not incorporated within 24 hours on ground that is frozen or snow-covered only if there is a field-by-field demonstration conducted within 48 hours prior to application. The demonstration shall be conducted in accordance with Part III. Department 2005 Technical Standard for the Surface Application of CAFO Waste on Frozen or Snow-Covered Ground Without Incorporation or Injection, showing that such land application will not result in a situation where CAFO waste may enter surface waters of the state. The demonstration shall be submitted to

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the Department 24 hours prior to application on frozen or snow-covered ground. Demonstrations shall be kept with the Land Application Log. CAFO waste surface applied to ground that is frozen or snow-covered shall be limited to no more than 1 crop year of P per winter season, including pastures, perennial crops such as alfalfa, cover crops, or where no-till practices are used.

h. Setbacks

1) If using the numerical Bray P1 method, the permittee shall comply with the setback requirements in a) and b) below.

a) CAFO waste shall not be applied within 100 feet of any surface water of the state, open tile line intake structures, sinkholes, agricultural well heads, including but not limited to roadside ditches that are conduits to surface waters of the state (with the exception of surface waters of the state that are up-gradient of the land application),

b) The permittee shall install and maintain a 35-foot wide permanent vegetated buffer along any surface water of the state, open tile line intake structures, sinkholes, agricultural well heads, including but not limited to roadside or any ditches that are conduits to surface waters of the state (with the exception of surface waters of the state that are up-gradient of the land application). CAFO waste shall not be applied within the 35-foot buffer.

2) The permittee may demonstrate an alternative practices compliance alternative consistent with 40 CFR 412.4(c)(5)(i) and (c)(5)(ii) that minimize risk of transport of nutrients to surface waters. The demonstration shall be submitted via MiWaters (https://miwaters.deq.state.mi.us) and be approved by the department and implemented per Department approval. This approved demonstration becomes a part of the CNMP.

3) If using MPRA, setbacks and/or permanent vegetative buffers shall be identified in the MPRA scoring worksheet, field-by-field assessment, and field maps. The permittee may choose from a) or b) below.

a) CAFO waste shall not be applied within 100 feet of any surface water of the state, open tile line intake structures, sinkholes, agricultural well heads, including but not limited to roadside ditches that are conduits to surface waters of the state (with the exception of surface waters of the state that are up-gradient of the land application), or

b) The permittee may choose to install and maintain a 35-foot wide permanent vegetated buffer as a substitute for 1) b) above. CAFO waste shall not be applied within the 35-foot permanent vegetated buffer.

4) CAFO waste shall not be applied within grassed waterways and swales that are conduits to surface waters of the state.

5) Setbacks and vegetated buffer widths shall be measured from the ordinary high-water mark, where applicable, or from the upper edge of the bank if the ordinary high-water mark cannot be determined. Setbacks and vegetated buffers for each field shall be shown on the CNMP field maps.

i. Non-Production Area Storm Water Management

The permittee shall implement practices including preventative maintenance, good housekeeping, and periodic inspections of at least once per year, to minimize and control pollutants in storm water discharges associated with the following areas:

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1) Immediate access roads and rail lines used or traveled by carriers of raw materials, waste material, or by-products used or created by the facility.

2) Sites used for handling material other than CAFO waste.

3) Refuse sites.

4) Sites used for the storage and maintenance of material handling equipment.

5) Shipping and receiving areas.

Records and descriptions of non-production area storm water management practices shall be kept in the CNMP for a minimum of 5 years from the date of creation.

4. Comprehensive Nutrient Management Plan (CNMP)

The CNMP shall apply to both production areas and land application areas and shall be a written document that describes the practices, methods, and actions the permittee takes to meet all of the requirements of the Nutrient Management Plan (NMP) per Part I.B.

a. Approval
The CNMP shall be certified by a Certified CNMP Provider.

b. Submittal
The CNMP shall be submitted to the Department with the application for coverage under this permit. All or parts of the CNMP shall be submitted via MiWaters (https://miwaters.deq.state.mi.us) on the template provided by the Department.

c. Contents
The CNMP submitted to the Department shall include all of the information and requirements specified in the NMP Section per Part I.B., an Executive Summary (a general description of the operation), and a map of the production area that includes all of the items specified in the permit application, the animal confinement area, the manure storage area, the raw materials storage area, treatment systems, and the waste containment areas, and that shows all clean water and production area waste flow paths, contaminated collection areas, pipes, control structures, valves, etc. The location of any areas used for storage of raw materials, including new sand bedding, shall be located in such a manner as to prohibit runoff to surface waters of the state.

d. Annual Review and Report
The permittee shall annually review the CNMP and update the CNMP as necessary to meet the requirements of Part I.B.

The permittee shall submit an annual report for the preceding January 1 through December 31 (reporting period) to the Department by April 1 of each year. The annual report shall be submitted via MiWaters (https://miwaters.deq.state.mi.us) on the "Annual Report Form for Concentrated Animal Feeding Operations (CAFO)" provided by the Department. The annual report shall include, but is not limited to, all of the following:

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1) the average number of animals, maximum number of animals at any one time, and the type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, turkeys, other);

2) estimated amount of total CAFO waste generated by the CAFO during the reporting period (tons or gallons);

3) estimated amount of total CAFO waste transferred to other persons (manifested waste) by the CAFO during the reporting period (tons or gallons);

4) total number of acres for land application covered by the CNMP developed in accordance with this permit;

5) total number of acres under control of the CAFO that were used for land application of CAFO waste during the reporting period;

6) a field-specific spreading plan which identifies where and how much CAFO waste will be applied to fields for the upcoming 12 months, what crops will be grown on those fields, and the realistic crop yield goals of those crops. The plan must account for all CAFO waste expected to be generated in the upcoming 12 months including waste to be transferred under manifest;

7) the Land Application Summary for Previous Crop Year per Part I.B.3.d.2.;

8) a statement indicating whether the current version of the CAFO's CNMP was approved by a certified CNMP provider; and

9) a summary of all CAFO waste discharges from the production area that have occurred during the reporting period, including date, time, and approximate volume.

e. CNMP Revisions
Prior to revisions to the CNMP, the CAFO owner or operator must provide the most current version of the CNMP and identify changes from the previous version to the Department for review. If the Department determines the revisions are significant, the Department must notify the public and make the changes available for review and comment. Significant revisions of the CNMP shall be public noticed for a period of 15 calendar days and may result in a permit modification. The CNMP shall be submitted via MiWaters (https://miwaters.deq.state.mi.us). Significant change includes the following:

1) Addition of new land application areas not previously included in the CAFO's CNMP per Part I.B.3.a.

2) Any changes to the maximum field-specific annual rates of application or to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as expressed in accordance with the narrative rate approach per Part I.B.3.c.

3) Addition of any crop or other uses not included in the terms of the CAFO's CNMP and corresponding field-specific rates of application per Part I.B.3.c.3).

4) Changes to site-specific components of the CAFO's CNMP, where such changes are likely to increase the risk of nitrogen and phosphorus transport from the site to surface waters of the state per Part I.B.3.c.

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5) An increase in the number of animals that results in a 10 percent or greater increase in the volume of either the manure alone or the total CAFO waste generated per year as compared to the volumes identified in the application or the most recently submitted Significant Change due to this Part I.B.4.e.5).

6) An increase in the number of animals that results in a 10 percent or greater decrease in the waste storage capacity time, as identified in the application or the most recently submitted Significant Change due to this Part I.B.4.e.6) or results in a waste storage capacity of less than 6 months.

7) The construction or procurement of a new animal housing facility or waste storage facility.

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Section C. Other Requirements

1. Reporting of Overflows and Discharges from CAFO Waste Storage Structures and Land Application

If, for any reason, there is an overflow from CAFO waste storage structures and/or a discharge of pollutants to a surface water of the state from CAFO waste storage structures, production areas, or land application areas, the permittee shall report the overflow and/or discharge to the Department in accordance with the reporting requirements set forth in Part II.C.6. Discharges to surface waters shall also be reported to the Clerk of the local unit of government and the County Health Department within 24 hours after the discharge begins. The permittee shall also submit the completed "CAFO Discharge Monitoring Report" form to the Department via MiWaters (https://miwaters.deq.state.mi.us). In addition, the permittee shall keep a copy of the report in the CNMP for a minimum of 5 years from the date of creation. The report shall include all of the following information:

a. a description of the overflow and/or discharge and its cause, including a description of the flow path to the surface water of the state;

b. the period of overflow and/or discharge, including exact dates and times, the anticipated time it is expected to continue, and steps taken or planned to reduce, eliminate, and prevent recurrence of the overflow and/or discharge;

c. monitoring results as required by Part I.A.2.;

d. in the event of a discharge through tile lines, the permittee shall identify and document, for field(s) from which the discharge occurred, the location of tile and depth of tile. The permittee shall also document field conditions at the time of the discharge, determine why the discharge occurred, and how to prevent future discharges; and

e. if the permittee believes that the discharge is an authorized discharge, the permittee shall include a demonstration that the discharge meets the requirements of Part I.A.1.a. and/or Part I.A.1.b., as appropriate.

2. Construction or Procurement of New Waste Storage Structures or Facilities

Before the construction, alteration, or within 30 days of procurement of a waste storage structure, facility, or portions thereof, notification shall be submitted to the Department via MiWaters (https://miwaters.deq.state.mi.us). New waste storage and transfer structures shall be built to NRCS 313 2017 Standard. Complete as-built plans, specifications, drawings, etc. shall be kept in the CNMP. As-built plans must be signed and stamped by a licensed professional engineer and state that the structure was built to the NRCS 313 2017 standard. Signed and stamped design drawings do not constitute as-built plans. Required supporting documentation may include soils reports documenting suitability of liner material, groundwater investigations reports, pictures, survey notes, concrete batch tickets, etc.

3. Closure of Structures and Facilities

The following conditions shall apply to the closure of lagoons, CAFO waste storage structures, earthen or synthetic lined basins, other manure and wastewater facilities, and silage facilities (collectively referred to as "structure(s)" for the remainder of this Part I.C.3.

No structure shall be permanently abandoned. Structures shall be maintained at all times until closed in compliance with this section. All structures must be properly closed if the permittee ceases operation. In addition, any structure that is not in use for a period of twelve (12) consecutive months must be properly closed, unless the permittee intends to resume use of the structure at a later date and either: (a) maintains the structure as though it were actively in use, to prevent compromise of structural integrity and ensure compliance with final effluent limitations, or (b) removes CAFO waste to a depth of one foot or less and refills the structure with clean water to preserve the integrity of the synthetic or earthen liner. In either case, the permittee shall conduct routine inspections, maintenance, and recordkeeping in compliance with this permit as though the structure were in use. The permittee shall notify the Department via MiWaters (https://miwaters.deq.state.mi.us) 30 days prior

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Section C. Other Requirements

to closing structures, or upon deciding that the structures will be maintained as specified in (a) or (b) above. Thirty days prior to restoration of the use of the structure, the permittee shall notify the Department via MiWaters (https://miwaters.deq.state.mi.us) and provide the opportunity for inspection.

The permittee shall accomplish closure by removing all waste materials to the maximum extent practicable. This shall include agitation and the addition of clean water as necessary to remove the waste materials. The permittee shall utilize as guidance the closure techniques contained in NRCS Conservation Practice Standard No. 360, Waste Facility Closure. All removed materials shall be utilized or disposed of in accordance with the permittee's approved CNMP, unless otherwise authorized by the Department.

Unless the structure is being maintained for possible future use in accordance with the requirements above, completion of closure for structures shall occur as promptly as practicable after the permittee ceases to operate or, if the permittee has not ceased operations, 12 months from the date on which the use of the structure ceased, unless otherwise authorized by the Department.

4. Standards, Specifications and Practices

The published standards, specifications, and practices referenced in this permit are those which are in effect upon the effective date of this permit, unless otherwise provided by law. NRCS Conservation Practice Standards referred to in this permit are currently contained in Section IV, Conservation Practices and Michigan Construction Specifications, of the Michigan NRCS Field Office Technical Guide.

5. Facility Contact

The "Facility Contact" was specified in the application. The permittee may replace the facility contact at any time and shall notify the Department via MiWaters (https://miwaters.deq.state.mi.us) within 10 days after replacement (including the name, address, and telephone number of the new facility contact). The Department shall be notified in writing within 10 days after a change in any of the contact information (such as address or telephone number) from what was specified in the application.

a. The facility contact shall be any of the following (or a duly authorized representative of this person):
   - For a corporation or a company, a principal executive officer of at least the level of vice president, or a designated representative, if the representative is responsible for the overall operation of the facility from which the discharge described in the permit application or other NPDES form originates.
   - For a partnership, a general partner.
   - For a sole proprietorship, the proprietor.
   - For a municipal, state, or other public facility, either a principal executive officer, the mayor, village president, city or village manager or other duly authorized employee.

b. A person is a duly authorized representative only if both of the following requirements are met:
   - The authorization is made in writing to the Department by a person described in paragraph a. of this section.
   - The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the facility (a duly authorized representative may thus be either a named individual or any individual occupying a named position).

Nothing in this section obviates the permittee from properly submitting reports and forms as required by law.

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6. Expiration and Reissuance

On or before October 1, 2024 a permittee seeking continued authorization to discharge under this permit beyond the permit's expiration date shall submit to the Department an application for reissuance via MiWaters (https://miwaters.deq.state.mi.us). Without a timely application for reissuance, the permittee's authorization to discharge will expire on April 1, 2025. With a timely application for reissuance, the permittee shall continue to be subject to the terms and conditions of the expired permit until the Department takes action on the application, unless this permit is terminated or revoked. Upon determination by the Department to grant or deny coverage under this permit, the proposed decision will be public noticed for a period of 15 calendar days via MiWaters (https://miwaters.deq.state.mi.us)

If this permit is terminated or revoked, the Department will notify the permittee in writing and all authorizations to discharge under the permit shall expire on the date of termination or revocation. If this permit is modified, the Department will notify the permittee in writing of any required action. Upon the effective date of the modified permit, the permittee shall be subject to the terms and conditions of the modified permit, unless the Department notifies the permittee otherwise.

If the discharge authorized under this permit is terminated, the permittee shall submit to the Department an NPDES Permit Notice of Termination request via MiWaters (https://miwaters.deq.state.mi.us). However, the permittee may submit a request for termination via MiWaters (https://miwaters.deq.state.mi.us) if all the following are met:

a. the facility has ceased operation; and/or is no longer a CAFO;

b. the permittee has demonstrated to the satisfaction of the Department that there is no remaining potential for a discharge of CAFO waste that was generated while the operation was a CAFO.

7. Requirement to Obtain Individual Permit

The Department may require any person who is authorized to discharge by a COC and this permit to apply for and obtain an individual NPDES permit if any of the following circumstances apply:

a. the discharge is a significant contributor to pollution as determined by the Department on a case-by-case basis;

b. the discharger is not complying, or has not complied, with the conditions of the permit;

c. a change has occurred in the availability of demonstrated technology or practices for the control or abatement of waste applicable to the point source discharge;

d. effluent standards and limitations are promulgated for point source discharges subject to this permit; or

e. the Department determines that the criteria under which the permit was issued no longer apply.

Any person may request the Department to take action pursuant to the provisions of Rule 2191 (Rule 323.2191 of the Michigan Administrative Code).

8. Requirements for Land Application Not Under the Control of the CAFO Permittee

In cases where CAFO waste is sold, given away, or otherwise transferred to another person (recipient) such that the land application of that CAFO waste is no longer under the operational control of the CAFO owner or operator that generates the CAFO waste (generator), the "Manifest for CAFO Waste" form shall be completed and used to track the transfer and use of the CAFO waste. The "Manifest for CAFO Waste" form shall be kept with the CNMP for 5 years from the date of creation. CAFO waste shall not be transferred to a recipient for land application of that waste during the months of January, February, or March.

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a. Prior to transfer of the CAFO waste, the CAFO owner or operator shall utilize the "Manifest for CAFO Waste" form provided by the Department to record all of the following:

1) a manifest document number;

2) the generator's name, mailing address, and telephone number;

3) the name, address, and contact information of the recipient of the CAFO waste;

4) the generator shall provide to the recipient, the nutrient content of the CAFO waste to be transferred, in sufficient detail to be used in determining the agronomic land application rates;

5) the total quantity, by units of weight or volume, and the number and size of the loads or containers used to transfer that quantity of CAFO waste;

6) a statement that informs the recipient of his/her responsibility to properly manage the land application of the CAFO waste as necessary to ensure there is no illegal discharge of pollutants to surface waters of the state;

7) the following certification by the generator: "I hereby declare that the CAFO waste is accurately described above and is suitable for land application";

8) other certification statements as may be required by the Department;

9) the latitude and longitude center of the site or sites used by the recipient for land application or other disposal or use of the CAFO waste; and

10) signatures of the generator and recipient with dates of signature.

b. Prior to manifesting CAFO waste, the generator shall receive from the recipient, the soil phosphorus levels using the Bray P1 test method, no older than three years, that the recipient will use to determine the agronomic rates of land application of the CAFO waste.

c. The generator shall do all of the following with respect to the manifest:

1) sign and date the manifest certification prior to transfer of the CAFO waste;

2) obtain a dated signature of the recipient on the manifest and the date of acceptance of the CAFO waste;

3) obtain a copy of the completed signed "Manifest for CAFO Waste" form;

4) obtain the completed "Daily Manure Application Summary" from the recipient for each field on which the generator's CAFO waste was applied;

5) provide a signed copy to the recipient; and

6) advise the recipient of his or her responsibilities to complete the "Manifest for CAFO Waste" form; if not completed at time of delivery, obtain a copy of the "Manifest for CAFO Waste" form from the recipient within 30 days of the transfer of the CAFO waste.

d. One "Manifest for CAFO Waste" form may be used for multiple loads or containers of the same CAFO waste transferred to the same recipient. The "Manifest for CAFO Waste" form shall list separately each address or location (latitude and longitude of field center) used by the recipient for land application or other disposal or use of the CAFO waste. Each separate address or location listing shall include the quantities of CAFO waste transferred to that location and dates of transfer.

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Section C. Other Requirements

e. The generator shall not sell, give away, or otherwise transfer CAFO waste to a recipient if any of the following are true:

1) the recipient fails or refuses to provide accurate and complete information on the manifest in a timely manner;

2) the "Manifest for CAFO Waste" form indicates improper land application, use, or otherwise transferred;

3) the generator learns that there has been improper land application, use, or otherwise transferred of the manifested CAFO waste; and/or

4) appropriate jurisdiction has determined that the recipient has improperly land applied, used, or otherwise transferred of a manifested CAFO waste.

f. If the generator has been prohibited from selling, giving, or otherwise transferring CAFO waste to a particular recipient under Part I.C.8.e, above, and the generator wishes to resume selling, giving, or otherwise transferring CAFO waste to that particular recipient, then one of the following shall be accomplished:

1) For improper paperwork only, such as incomplete or inaccurate information on the "Manifest for CAFO Waste" form, the recipient must provide the correct, complete information.

2) For improper land application, use, or disposal of the CAFO waste by the recipient, the generator must submit a demonstration, to the Department via MiWaters (https://miwaters.deq.state.mi.us), that the improper land application, use, or disposal has been corrected, and the Department has responded to the demonstration with its approval of the demonstration.

g. The CAFO generator shall submit the required "Land Application Summary" form for fields on which the recipient applied the generator's CAFO waste via MiWaters (https://miwaters.deq.state.mi.us) within 30 days from each quarter ending March 31, June 30, September 30, and December 31 of each year and will include the following:

1) recipient name and phone or e-mail contact information;

2) date of transfer; and

3) If CAFO waste is used for land application of manure:

a) dates of land application;

b) field location (latitude and longitude of center of field);

c) soil test results (and year of test) of fields;

d) amount (and units) of manure applied; and

e) manure source; or

f) and number of acres applied.

4) If CAFO waste is not used for land application of manure:

a) other use (digestor, composting, broker, etc.);

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Section C. Other Requirements

b) volume or tons of CAFO waste transferred.

h. The requirements of Part I.C.8. do not apply to quantities of CAFO waste less than one (1) pickup truck load, one (1) cubic yard, or one (1) ton per recipient per day.

9. Total Maximum Daily Load (TMDL) Waters

a. Nitrogen or Phosphorus TMDL
The Department expects that full compliance with the conditions of this permit will allow the permittee to meet the pollutant loading capacity(ies) set forth for nitrogen or phosphorus in an approved Total Maximum Daily Load (TMDL). The permittee's COC will indicate if the permittee's production area or land application areas are located within a watershed(s) covered by an approved nitrogen or phosphorus TMDL.

b. *E. coli*, Biota, Dissolved Oxygen TMDL
The permittee's COC will indicate if the permittee's production area or land application areas are located within a watershed(s) covered by an approved *E. coli*, biota, or dissolved oxygen TMDL. The Department has developed and published the "Total Maximum Daily Load (TMDL) Guidance for Concentrated Animal Feeding Operations (CAFO)" regarding how to evaluate operations and determine additional pollutant control measures. The permittee shall complete the following actions within 24 months of receiving notification from the Department:

1) Conduct a comprehensive evaluation of its operations. A comprehensive evaluation shall identify sources of pollutants that have the potential to reach surface waters from production areas and/or land application areas.

2) Determine whether additional pollutant control measures need to be identified and implemented to meet the permittee's pollutant loading (or "concentration" in the case of *E. coli*) capacity(ies) set forth in the approved TMDL. Pollutant control measures, shall at a minimum, include those that prevent surface runoff and subsurface drainage of CAFO waste from land application areas.

3) Submit a written TMDL Evaluation Report via MiWaters (https://miwaters.deq.state.mi.us) to the Department based on one of the following:

a) If the permittee, based on the comprehensive evaluation, determines that the pollutant loading or concentration allocation(s) established in the approved TMDL are being met, then the written TMDL Evaluation Report justifying that determination shall be submitted to the Department for approval, or

b) If the permittee determines that the pollutant loading or concentration allocation(s) established in the approved TMDL is being exceeded, then the written TMDL Evaluation Report submitted to the Department shall identify additional pollutant control measures that need to be implemented by the permittee to achieve compliance with the pollutant loading or concentration allocation(s) established in the approved TMDL. The permittee's written TMDL Evaluation Report shall also include an implementation schedule for each identified additional pollutant control measure.

Upon approval of the Department, and if the written report identifies needed additional pollutant control measures, the permittee shall implement the additional pollutant control measures according to the implementation schedule. The approved written TMDL Evaluation Report detailing the additional pollutant control measures and the associated implementation schedule shall be kept in the CNMP for a period of 5 years from the date of creation, and shall be an enforceable part of this permit.

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Section C. Other Requirements

10. Treatment System

The CAFO may include an anaerobic digester-based treatment system. The application for coverage under this permit shall include a description of the construction and operation of the anaerobic digester-based treatment system, including a schematic or flow diagram of the process, a listing of all outside materials (non-CAFO waste) to be added to the digester, the percentage input to the digester comprised of outside materials, and a contingency plan in the event of system failures including computer malfunctions. The contingency plan shall address the actions to be taken by the permittee if the digester-based treatment system must be bypassed for any reason, including handling and storage of partially digested contents, and notifications per Part II.C.9.c. and d. of this permit.

Outside materials up to 20 percent the total digester volume may be added to the digester to enhance operation. Quantities of outside materials more than 5 percent of the total digester volume will be listed in the COC issued under this permit. The Department may prohibit the use of certain outside materials. The permittee shall keep in the CNMP for a minimum of 5 years from the date of creation, the reports of the quantities and identity of outside materials added to the digester. Outside materials not listed in the application shall not be added to the digester without prior approval from the Department. The outputs from the treatment system shall be stored and managed in accordance with the permit. The digester shall be operated consistently with the information provided in the application for coverage under this permit.

11. Document Availability

Copies of all documents required by this permit, including the CNMP, Land Application Log, inspection records, soil tests received by the recipient of manifested CAFO waste, etc., shall be kept at the permitted facility for a minimum of 5 years from the date of creation and made available to the Department upon request.

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PART II

Section A. Definitions

Animal Feeding Operation (AFO) means a lot or facility that meets both of the following conditions:

1. Animals, other than aquatic animals, have been, are, or will be stabled or confined and fed or maintained for a total of 45 calendar days or more in any 12-month period.
2. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over the portion of the lot or facility where animals are confined. Two or more AFOs under common ownership are considered to be a single AFO if they adjoin each other or if they use a common area or system for the disposal of wastes. Common area includes land application areas.

Concentrated Animal Feeding Operation (CAFO) means any AFO that requests coverage under the permit for which the Department determines that this permit is appropriate for the applicant's operation. A CAFO includes both production areas and land application areas.

CAFO Process Wastewater means water directly or indirectly used in the operation of a CAFO for any of the following:

1. Spillage or overflow from animal or poultry watering systems.
2. Washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities.
3. Direct contact swimming, washing, or spray cooling of animals.
4. Dust control.
5. Any water which comes into contact with, or is a constituent of, any raw materials, products, or byproducts, including manure, litter, feed, milk, eggs, or bedding.

CAFO Waste *means CAFO process wastewater, manure, production area waste, effluents from the properly* and successfully operated treatment system, or any combination thereof.

Certificate of Coverage (COC) is a document, issued by the Department, which authorizes a discharge under a general permit.

Certified CNMP Provider is a person that attains and maintains certification requirements through a program approved by the United States Department of Agriculture Natural Resources Conservation Service (NRCS).

CNMP means Comprehensive Nutrient Management Plan and is the plan developed by the permittee to implement the requirements of the NMP.

Department means the Michigan Department of Environment, Great Lakes, and Energy (Formerly Michigan Department of Environmental Quality).

Discharge *as used in this permit means the addition of any waste, waste effluent, wastewater, pollutant, or any* combination thereof to any surface water of the state.

Grassed Waterway means a natural or constructed channel for storm water drainage that originates and is located within a field used for growing crops, and that is used to carry surface water at a non-erosive velocity to a stable outlet and is established with suitable and adequate permanent vegetation.

Incorporation means a mechanical operation that physically mixes the surface-applied CAFO waste into the soil so that a significant amount of the surface-applied CAFO waste is not present on the land surface within one hour after mixing. Incorporation also means the soaking into the soil of "liquids being used for irrigation water" such that liquids and significant solid residues do not remain on the land surface. "Liquids being used for irrigation water" are contaminated runoff, milk house waste, or liquids from CAFO waste treated to separate liquids and solids. "Liquids being used for irrigation water" does not include untreated liquid manures.

Land Application *means spraying or spreading of biosolids, CAFO waste, wastewater and/or derivatives onto* the land surface, injecting below the land surface, or incorporating into the soil so that the biosolids, CAFO waste, wastewater and/or derivatives can either condition the soil or fertilize crops or vegetation grown in the soil.

Land Application Area means land under the control of an AFO owner or operator, whether it is owned, rented, leased, or subject to an access agreement to which CAFO waste is or may be applied. Land application area includes land not owned by the AFO owner or operator but where the AFO owner or operator has control of the land application of CAFO waste.

PART II

Section A. Definitions

Large CAFO is an AFO that stables or confines as many as or more than the numbers of animals specified in any of the following categories:

1. 700 mature dairy cattle (whether milked or dry cows)
2. 1,000 veal calves
3. 1,000 cattle other than mature dairy cows or veal calves. Cattle include heifers, steers, bulls, calves, and cow/calf pairs
4. 2,500 swine each weighing 55 pounds or more
5. 10,000 swine each weighing less than 55 pounds
6. 500 horses
7. 10,000 sheep or lambs
8. 55,000 turkeys
9. 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system
10. 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system
11. 82,000 laying hens, if the AFO uses other than a liquid manure handling system
12. 30,000 ducks, if the AFO uses other than a liquid manure handling system
13. 5,000 ducks, if the AFO uses a liquid manure handling system

Large CAFOs are required to obtain NPDES permits under Michigan Rule No. 323.2196.

Manure means animal excrement and is defined to include bedding, compost, and raw materials, or other materials commingled with animal excrement or set aside for disposal.

Maximum Annual Phosphorus Land Application Rate means the maximum quantity, per calendar year, of phosphorus (usually expressed in pounds per acre) that is allowed to be applied to crop fields where CAFO waste is spread, including the phosphorus contained in the CAFO waste.

New CAFO means a CAFO that is newly built and was not in production (i.e., animals were not on site) prior to January 30, 2004. New CAFO also means existing facilities where, due to expansion in production, the process or production equipment is totally replaced or new processes are added that are substantially independent of an existing source at the same site, after February 27, 2004. This does not include replacement due to acts of God or upgrades in technology that serve the existing production. This definition does not apply to "New" as used for swine, poultry, and veal facilities in Part I.B.1.a.3).

NMP means Nutrient Management Plan and is the section in the permit that sets forth requirements and conditions to ensure that water quality standards are met.

No-Till Practices means where the field will not receive tillage from time of land application until after harvest of the next crop.

NRCS means the Natural Resources Conservation Service of the United States Department of Agriculture.

NRCS 313 means the NRCS Michigan Statewide Technical Guide, Section IV, Conservation Practice No. 313, Waste Storage Facility, dated either June 2003, November 2005,August 2014, or November 2017.

Overflow means a release of CAFO waste resulting from the filling of CAFO waste storage structures beyond the point at which no more CAFO waste or storm water can be contained by the structure.

Pastureland is land that is primarily used for the production of forage upon which animals graze. Pastureland is characterized by a predominance of vegetation consisting of desirable forage species. Sites such as loafing areas, confinement areas, or feedlots which have animal densities that preclude a predominance of desirable forage species are not considered pastureland. Heavy-use areas within pastures adjacent to, or associated with, the CAFO are part of the pasture and are not part of the production area. Examples of heavy-use areas include animal travel lanes and small areas immediately adjacent to feed and watering stations.

Perennial means a plant that has a life cycle of more than two years.

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PART II

Section A. Definitions

Production Area is the portion of the CAFO that includes all areas used for animal product production activities. This includes but is not limited to the animal confinement area, the manure storage area, the raw materials storage area, treatment systems, and the waste containment areas. The animal confinement area includes open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milk rooms, milking centers, cow yards, barnyards, medication pens, walkers, animal walkways (not within pasture areas), and stables. The manure storage area includes lagoons, runoff ponds, storage sheds, stockpiles, under-house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes feed silos, silage bunkers, and bedding materials (including new sand used for bedding). The waste containment area includes settling basins and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of "production area" is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities. Production areas do not include pasture lands or land application areas.

Production Area Waste means manure and any waste from the production area and any precipitation (e.g., rain or snow) which comes into contact with, or is contaminated by, manure or any of the components listed in the definition for "production area." Production area waste also includes treatment system feedstock and runoff from treatment system areas. Production area waste does not include clean water that is diverted, nor does it include water from land application areas.

Realistic Crop Yield Goals means expected crop yields based on soil productivity potential, the crop management practices utilized, and crop yield records for multiple years for the field. Yield goals shall be adjusted to counteract unusually low or high yields. When a field's history is not available, another referenced source shall be used to estimate yield goal. A realistic crop yield goal is one which is achievable in three out of five crop years. If the goal is not achieved in at least three out of five years, then the goal shall be re-evaluated and revised.

Regional Administrator is the Region 5 Administrator, United States Environmental Protection Agency (USEPA), located at R-19J, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Silage Leachate means a liquid, containing organic constituents, that results from the storage of harvested plant materials, which usually has a high-water content.

Solid Stackable Manure means manure and manure mixed with bedding that can be piled up or stacked and will maintain a piled condition. It will also have the characteristic that it can be shoveled with a pitchfork.

Swale means a shallow, channel-like, linear depression within a field used for growing crops that is at a low spot on a hillslope and is used to transport storm water. It may or may not be vegetated.

Waste Storage Structure means both pond-type storage structures and fabricated storage structures.

Tile means a conduit, such as corrugated plastic tubing, tile, or pipe, installed beneath the ground surface to collect and/or convey drainage water.

Vegetated Buffer means a narrow, permanent strip of dense perennial vegetation, established parallel to the contours of and perpendicular to the dominant slope of the field, for the purposes of slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential nutrients or pollutants from leaving the field and reaching surface waters of the state.

Water Quality Standards means the Part 4 Water Quality Standards developed under Part 31 of Act No. 451 of the Public Acts of 1994, as amended, being Rules 323.1041 through 323.1117 of the Michigan Administrative Code.

25-year, 24-hour rainfall event or **100-year, 24-hour rainfall event** means the maximum 24-hour precipitation event with a probable recurrence interval of once in 25 years or 100 years, respectively as determined by the "NOAA ATLAS-14 Precipitation Frequency Data Server (PFDS)" https://hdsc.nws.noaa.gov/hdsc/pfds/).

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PART II

Section B. Monitoring Procedures

1. Representative Samples

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge.

2. Test Procedures

Test procedures for the analysis of pollutants shall conform to regulations promulgated pursuant to Section 304(h) of the Federal Act (40 CFR Part 136 – Guidelines Establishing Test Procedures for the Analysis of Pollutants), unless specified otherwise in this permit. Test procedures used shall be sufficiently sensitive to determine compliance with applicable effluent limitations. Requests to use test procedures not promulgated under 40 CFR Part 136 for pollutant monitoring required by this permit shall be made in accordance with the Alternate Test Procedures regulations specified in 40 CFR 136.4. These requests shall be submitted to the Manager of the Permits Section, Water Resources Division, Michigan Department of Environment, Great Lakes, and Energy, P.O. Box 30458, Lansing, Michigan, 48909-7958. The permittee may use such procedures upon approval.

The permittee shall periodically calibrate and perform maintenance procedures on all analytical instrumentation at intervals to ensure accuracy of measurements. The calibration and maintenance shall be performed as part of the permittee's laboratory Quality Control/Quality Assurance program.

3. Instrumentation

The permittee shall periodically calibrate and perform maintenance procedures on all monitoring instrumentation at intervals to ensure accuracy of measurements.

4. Recording Results

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information: 1) the exact place, date, and time of measurement or sampling; 2) the person(s) who performed the measurement or sample collection; 3) the dates the analyses were performed; 4) the person(s) who performed the analyses; 5) the analytical techniques or methods used; 6) the date of and person responsible for equipment calibration; and 7) the results of all required analyses. Records shall be kept in the CNMP for a minimum of five years from the date of creation.

5. Records Retention

All records and information resulting from the monitoring activities required by this permit including all records of analyses performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of five (5) years from the date of creation, or longer if requested by the Regional Administrator or the Department.

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PART II

Section C. Reporting Requirements

1. Start-up Notification

If the permittee will not populate with animals during the first 60 days following the effective date of the certificate of coverage issued under this permit then the permittee shall notify the Department within 14 days following the effective date of the certificate of coverage issued under this permit. Subsequently, the Department shall be notified 60 days prior to population with animals.

2. Submittal Requirements for Self-Monitoring Data

Part 31, of the NREPA, (specifically Section 324.3110(7)), and R 323.2155(2) of Part 21, Wastewater Discharge Permits, promulgated under-Part 31, of the NREPA, allows the Department to specify the forms to be utilized for reporting the required self-monitoring data. Unless instructed on the effluent limitations page to conduct "Retained Self-Monitoring" the permittee shall submit self-monitoring data via the Department's MiWaters system.

The permittee shall utilize the information provided on the MiWaters website at https://miwaters.deq.state.mi.us, to access and submit the electronic forms. Both monthly summary and daily data shall be submitted to the Department no later than the 20th day of the month following each month of the authorized discharge period(s). The permittee may be allowed to submit the electronic forms after this date if the Department has granted an extension to the submittal date.

3. Retained Self-Monitoring Requirements

If instructed on the effluent limits page (or otherwise authorized by the Department in accordance with the provisions of this permit) to conduct retained self-monitoring, the permittee shall maintain a year-to-date log of retained self-monitoring results and, upon request, provide such log for inspection to the staff of the Department. Retained self-monitoring results are public information and shall be promptly provided to the public upon request.

The permittee shall certify, in writing, to the Department, on or before January 10th (April 1st for animal feeding operation facilities) of each year, that: 1) all retained self-monitoring requirements have been complied with and a year-to-date log has been maintained; and 2) the application on which this permit is based still accurately describes the discharge. With this annual certification, the permittee shall submit a summary of the previous year's monitoring data. The summary shall include maximum values for samples to be reported as daily maximums and/or monthly maximums and minimum values for any daily minimum samples.

Retained self-monitoring may be denied to a permittee by notification in writing from the Department. In such cases, the permittee shall submit self-monitoring data in accordance with Part II.C.2., above. Such a denial may be rescinded by the Department upon written notification to the permittee. Reissuance or modification of this permit or reissuance or modification of an individual permittee's authorization to discharge shall not affect previous approval or denial for retained self-monitoring unless the Department provides notification in writing to the permittee.

4. Additional Monitoring by Permittee

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified above, the results of such monitoring shall be included in the calculation and reporting of the values required in the Discharge Monitoring Report. Such increased frequency shall also be indicated.

Monitoring required pursuant to Part 41, Sewerage Systems, of the NREPA, or Rule 35 of the Mobile Home Park Commission Act (Public Act 96 of 1987) for assurance of proper facility operation shall be submitted as required by the Department.

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PART II

Section C. Reporting Requirements

5. Compliance Dates Notification

Within 14 days of every compliance date specified in this permit, the permittee shall submit a notification to the Department via MiWaters (https://miwaters.deq.state.mi.us) indicating whether or not the particular requirement was accomplished. If the requirement was not accomplished, the notification shall include an explanation of the failure to accomplish the requirement, actions taken or planned by the permittee to correct the situation, and an estimate of when the requirement will be accomplished. If a report is required to be submitted by a specified date and the permittee accomplishes this, a separate notification is not required.

6. Noncompliance Notification

Compliance with all applicable requirements set forth in the Federal Act, Parts 31 and 41 of the NREPA, and related regulations and rules is required. All instances of noncompliance shall be reported as follows:

a. 24-Hour Reporting
Any noncompliance which may endanger health or the environment (including maximum and/or minimum daily concentration discharge limitation exceedances) shall be reported, verbally, within 24 hours from the time the permittee becomes aware of the noncompliance. A submission via MiWaters (https://miwaters.deq.state.mi.us) shall also be provided within five (5) days.

b. Other Reporting
The permittee shall report, via MiWaters (https://miwaters.deq.state.mi.us), all other instances of noncompliance not described in a. above at the time monitoring reports are submitted; or, in the case of retained self-monitoring, within five (5) days from the time the permittee becomes aware of the noncompliance.

Reporting shall include: (1) a description of the discharge and cause of noncompliance; and (2) the period of noncompliance, including exact dates and times, or, if not yet corrected, the anticipated time the noncompliance is expected to continue, and the steps taken to reduce, eliminate and prevent recurrence of the noncomplying discharge.

7. Spill Notification

The permittee shall immediately report via MiWaters (https://miwaters.deq.state.mi.us) any release of any polluting material which occurs to the surface waters or groundwaters of the state, unless the permittee has determined that the release is not in excess of the threshold reporting quantities specified in the Part 5 Rules (R 324.2001 through R 324.2009 of the Michigan Administrative Code), by calling the Department at the number indicated on the second page of this permit (or, if this is a general permit, on the COC); or, if the notice is provided after regular working hours, call the Department's 24-hour Pollution Emergency Alerting System telephone number, 1-800-292-4706.

Within ten (10) days of the release, the permittee shall submit to the Department via MiWaters (https://miwaters.deq.state.mi.us), a full written explanation as to the cause of the release, the discovery of the release, response (clean-up and/or recovery) measures taken, and preventative measures taken or a schedule for completion of measures to be taken to prevent reoccurrence of similar releases.

8. Upset Noncompliance Notification

If a process "upset" (defined as an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee) has occurred, the permittee who wishes to establish the affirmative defense of upset, shall notify the Department by telephone within 24 hours of becoming aware of such conditions; and within five (5) days, provide in writing, the following information:

a. that an upset occurred, and that the permittee can identify the specific cause(s) of the upset;

b. that the permitted wastewater treatment facility was, at the time, being properly operated and maintained (note that an upset does not include noncompliance to the extent caused by operational error;

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PART II

Section C. Reporting Requirements

improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation); and

c. that the permittee has specified and acted on all responsible steps to minimize or correct any adverse impact in the environment resulting from noncompliance with this permit.

No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

In any enforcement proceedings, the permittee, seeking to establish the occurrence of an upset, has the burden of proof.

9. Bypass Prohibition and Notification

a. Bypass Prohibition
Bypass is prohibited, and the Department may take an enforcement action, unless:

1) bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

2) there were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass; and

3) the permittee submitted notices as required under 9.b. or 9.c. below.

b. Notice of Anticipated Bypass
If the permittee knows in advance of the need for a bypass, it shall submit prior notice to the Department, if possible, at least ten (10) days before the date of the bypass and provide information about the anticipated bypass as required by the Department. The Department may approve an anticipated bypass, after considering its adverse effects, if it will meet the three (3) conditions listed in 9.a. above.

c. Notice of Unanticipated Bypass
The permittee shall submit notice to the Department of an unanticipated bypass by calling the Department at the number indicated on the second page of this permit (if the notice is provided after regular working hours, use the following number: 1-800-292-4706) as soon as possible, but no later than 24 hours from the time the permittee becomes aware of the circumstances.

d. Written Report of Bypass
A written submission shall be provided within five (5) working days of commencing any bypass to the Department, and at additional times as directed by the Department. The written submission shall contain a description of the bypass and its cause; the period of bypass, including exact dates and times, and if the bypass has not been corrected, the anticipated time it is expected to continue; steps taken or planned to reduce, eliminate, and prevent reoccurrence of the bypass; and other information as required by the Department.

e. Bypass Not Exceeding Limitations
The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to ensure efficient operation. These bypasses are not subject to the provisions of 9.a., 9.b., 9.c., and 9.d., above. This provision does not relieve the permittee of any notification responsibilities under Part II.C.11. of this permit.

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PART II

Section C. Reporting Requirements

f. Definitions

1) Bypass means the intentional diversion of waste streams from any portion of a treatment facility.

2) Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

10. Bioaccumulative Chemicals of Concern (BCC)

Consistent with the requirements of R 323.1098 and R 323.1215 of the Michigan Administrative Code, the permittee is prohibited from undertaking any action that would result in a lowering of water quality from an increased loading of a BCC unless an increased use request and antidegradation demonstration have been submitted and approved by the Department.

11. Notification of Changes in Discharge

The permittee shall notify the Department, via MiWaters (https://miwaters.deq.state.mi.us), as soon as possible but no later than 10 days of knowing, or having reason to believe, that any activity or change has occurred or will occur which would result in the discharge of: (1) detectable levels of chemicals on the current Michigan Critical Materials Register, priority pollutants or hazardous substances set forth in 40 CFR 122.21, Appendix D, or the Pollutants of Initial Focus in the Great Lakes Water Quality Initiative specified in 40 CFR 132.6, Table 6, which were not acknowledged in the application or listed in the application at less than detectable levels; (2) detectable levels of any other chemical not listed in the application or listed at less than detection, for which the application specifically requested information; or (3) any chemical at levels greater than five times the average level reported in the complete application (see the first page of this permit, for the date(s) the complete application was submitted). Any other monitoring results obtained as a requirement of this permit shall be reported in accordance with the compliance schedules.

12. Changes in Facility Operations

Any anticipated action or activity, including but not limited to facility expansion, production increases, or process modification, which will result in new or increased loadings of pollutants to the receiving waters must be reported to the Department by a) submission of an increased use request (application) and all information required under R 323.1098 (Antidegradation) of the Water Quality Standards or b) by notice if the following conditions are met: (1) the action or activity will not result in a change in the types of wastewater discharged or result in a greater quantity of wastewater than currently authorized by this permit; (2) the action or activity will not result in violations of the effluent limitations specified in this permit; (3) the action or activity is not prohibited by the requirements of Part II.C.10.; and (4) the action or activity will not require notification pursuant to Part II.C.11. Following such notice, the permit or, if applicable, the facility's COC may be modified according to applicable laws and rules to specify and limit any pollutant not previously limited.

13. Transfer of Ownership or Control

In the event of any change in control or ownership of facilities from which the authorized discharge emanates, the permittee shall submit to the Department via MiWaters (https://miwaters.deq.state.mi.us) within 30 days of the actual transfer of ownership or control a written agreement between the current permittee and the new permittee containing: (1) the legal name and address of the new owner; (2) a specific date for the effective transfer of permit responsibility, coverage and liability; and (3) a certification of the continuity of or any changes in operations, wastewater discharge, or wastewater treatment.

If the new permittee is proposing changes in operations, wastewater discharge, or wastewater treatment, the Department may propose modification of this permit in accordance with applicable laws and rules.

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PART II

Section C. Reporting Requirements

14. Operations and Maintenance Manual

For wastewater treatment facilities that serve the public (and are thus subject to Part 41 of the NREPA), Section 4104 of Part 41 and associated Rule 2957 of the Michigan Administrative Code allow the Department to require an Operations and Maintenance (O&M) Manual from the facility. An up-to-date copy of the O&M Manual shall be kept at the facility and shall be provided to the Department upon request. The Department may review the O&M Manual in whole or in part at its discretion and require modifications to it if portions are determined to be inadequate.

At a minimum, the O&M Manual shall include the following information: permit standards; descriptions and operation information for all equipment; staffing information; laboratory requirements; record keeping requirements; a maintenance plan for equipment; an emergency operating plan; safety program information; and copies of all pertinent forms, as-built plans, and manufacturer's manuals.

Certification of the existence and accuracy of the O&M Manual shall be submitted to the Department at least sixty days prior to start-up of a new wastewater treatment facility. Recertification shall be submitted sixty days prior to start-up of any substantial improvements or modifications made to an existing wastewater treatment facility.

15. Signatory Requirements

All applications, reports, or information submitted to the Department in accordance with the conditions of this permit and that require a signature shall be signed and certified as described in the Federal Act and the NREPA.

The Federal Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

The NREPA (Section 3115(2)) provides that a person who at the time of the violation knew or should have known that he or she discharged a substance contrary to this part, or contrary to a permit, COC, or order issued or rule promulgated under this part, or who intentionally makes a false statement, representation, or certification in an application for or form pertaining to a permit or COC or in a notice or report required by the terms and conditions of an issued permit or COC, or who intentionally renders inaccurate a monitoring device or record required to be maintained by the Department, is guilty of a felony and shall be fined not less than $2,500.00 or more than $25,000.00 for each violation. The court may impose an additional fine of not more than $25,000.00 for each day during which the unlawful discharge occurred. If the conviction is for a violation committed after a first conviction of the person under this subsection, the court shall impose a fine of not less than $25,000.00 per day and not more than $50,000.00 per day of violation. Upon conviction, in addition to a fine, the court in its discretion may sentence the defendant to imprisonment for not more than 2 years or impose probation upon a person for a violation of this part. With the exception of the issuance of criminal complaints, issuance of warrants, and the holding of an arraignment, the circuit court for the county in which the violation occurred has exclusive jurisdiction. However, the person shall not be subject to the penalties of this subsection if the discharge of the effluent is in conformance with and obedient to a rule, order, permit, or COC of the Department. In addition to a fine, the attorney general may file a civil suit in a court of competent jurisdiction to recover the full value of the injuries done to the natural resources of the state and the costs of surveillance and enforcement by the state resulting from the violation.

16. Electronic Reporting

Upon notice by the Department that electronic reporting tools are available for specific reports or notifications, the permittee shall submit electronically via MiWaters (https://miwaters.deq.state.mi.us) all such reports or notifications as required by this permit, on forms provided by the Department.

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PART II

Section D. Management Responsibilities

1. Duty to Comply

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit, more frequently than, or at a level in excess of, that authorized, shall constitute a violation of the permit.

It is the duty of the permittee to comply with all the terms and conditions of this permit. Any noncompliance with the Effluent Limitations, Special Conditions, or terms of this permit constitutes a violation of the NREPA and/or the Federal Act and constitutes grounds for enforcement action; for permit or Certificate of Coverage (COC) termination, revocation and reissuance, or modification; or denial of an application for permit or COC renewal.

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

2. Facilities Operation

The permittee shall, at all times, properly operate and maintain all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit. Proper operation and maintenance include adequate laboratory controls and appropriate quality assurance procedures.

3. Power Failures

In order to maintain compliance with the effluent limitations of this permit and prevent unauthorized discharges, the permittee shall either:

a. provide an alternative power source sufficient to operate facilities utilized by the permittee to maintain compliance with the effluent limitations and conditions of this permit; or

b. upon the reduction, loss, or failure of one or more of the primary sources of power to facilities utilized by the permittee to maintain compliance with the effluent limitations and conditions of this permit, the permittee shall halt, reduce or otherwise control production and/or all discharge in order to maintain compliance with the effluent limitations and conditions of this permit.

4. Adverse Impact

The permittee shall take all reasonable steps to minimize or prevent any adverse impact to the surface waters or groundwaters of the state resulting from noncompliance with any effluent limitation specified in this permit including, but not limited to, such accelerated or additional monitoring as necessary to determine the nature and impact of the discharge in noncompliance.

5. Containment Facilities

The permittee shall provide facilities for containment of any accidental losses of polluting materials in accordance with the requirements of the Part 5 Rules (R 324.2001 through R 324.2009 of the Michigan Administrative Code). For a Publicly Owned Treatment Work (POTW), these facilities shall be approved under Part 41 of the NREPA.

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PART II

Section D. Management Responsibilities

6. Waste Treatment Residues

Residuals (i.e. solids, sludges, biosolids, filter backwash, scrubber water, ash, grit, or other pollutants or wastes) removed from or resulting from treatment or control of wastewaters, including those that are generated during treatment or left over after treatment or control has ceased, shall be disposed of in an environmentally compatible manner and according to applicable laws and rules. These laws may include, but are not limited to, Part 31, Water Resources Protection; Part 55, Air Pollution Control; Part 111, Hazardous Waste Management; Part 115, Solid Waste Management; Part 121, Liquid Industrial By-Products; Part 301 Inland Lakes and Streams; and Part 303 Wetlands Protection, of the NREPA. Such disposal shall not result in any unlawful pollution of the air, surface waters, or groundwaters of the state.

7. Right of Entry

The permittee shall allow the Department, any agent appointed by the Department, and the Regional Administrator or their designee, upon the presentation of credentials and, for animal feeding operation facilities, following appropriate biosecurity protocols:

a. to enter upon the permittee's premises where an effluent source is located or any place in which records are required to be kept under the terms and conditions of this permit; and

b. at reasonable times to have access to and copy any records required to be kept under the terms and conditions of this permit; to inspect process facilities, treatment works, monitoring methods and equipment regulated or required under this permit; and to sample any discharge of pollutants.

8. Availability of Reports

Except for data determined to be confidential under Section 308 of the Federal Act and Rule 2128 (R 323.2128 of the Michigan Administrative Code), reports prepared in accordance with the terms of this permit and required to be submitted to the Department, shall be available for public inspection via MiWaters (https://miwaters.deq.state.mi.us). As required by the Federal Act, effluent data shall not be considered confidential. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the Federal Act and Sections 3112, 3115, 4106 and 4110 of the NREPA.

9. Duty to Provide Information

The permittee shall furnish to the Department via MiWaters (https://miwaters.deq.state.mi.us), within a reasonable time, any information which the Department may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or the facility's COC, or to determine compliance with this permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by this permit.

Where the permittee becomes aware that it failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or in any report to the Department, it shall promptly submit such facts or information.

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PART II

Section E. Activities Not Authorized by this Permit

1. Discharge to the Groundwaters

This permit does not authorize any discharge to the groundwaters. Such discharge may be authorized by a groundwater discharge permit issued pursuant to the NREPA.

2. POTW Construction

This permit does not authorize or approve the construction or modification of any physical structures or facilities at a POTW. Approval for the construction or modification of any physical structures or facilities at a POTW shall be by permit issued under Part 41 of the NREPA.

3. Civil and Criminal Liability

Except as provided in permit conditions on "Bypass" (Part II.C.9. pursuant to 40 CFR 122.41(m)), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance, whether or not such noncompliance is due to factors beyond the permittee's control, such as accidents, equipment breakdowns, or labor disputes.

4. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee may be subject under Section 311 of the Federal Act except as are exempted by federal regulations.

5. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authority preserved by Section 510 of the Federal Act.

6. Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize violation of any federal, state or local laws or regulations, nor does it obviate the necessity of obtaining such permits, including any other Department of Environment, Great Lakes, and Energy permits, or approvals from other units of government as may be required by law.

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PART III

Technical Standard for the Surface Application of Concentrated Animal Feeding Operations Waste on Frozen or Snow-Covered Ground Without Incorporation or Injection

When Concentrated Animal Feeding Operation (CAFO) waste is surface-applied to frozen or snow-covered ground, without incorporation or injection, and that application is followed by rainfall or temperatures rising above freezing, the CAFO waste can run off into lakes, streams, or drains. Documented evidence shows that this runoff can cause resource damage to the surface waters of the state. Therefore, in accordance with Title 40 of the Code of Federal Regulations, Section 123.36, Establishment of Technical Standards for Concentrated Animal Feeding Operations, and State Rule 323.2196(5), CAFO Permits, the Michigan Department of Environmental Quality, (DEQ), Water Bureau, establishes the following Technical Standard. This Technical Standard shall be used for field-by-field assessments, as required by National Pollutant Discharge Elimination System permits issued to CAFOs, to ensure that the land application of CAFO waste to frozen or snow-covered ground, without incorporation or injection, will not result in CAFO waste entering the waters of the state.

Based on the frozen and/or snow-covered conditions, the minimal settling and breaking down of the waste during these conditions, and the inability to predict or control snowmelt and rainfall, there are no practices that can ensure the runoff from fields with surface-applied waste on frozen or snow-covered ground will not be polluted. This standard assumes that surface runoff from snowmelt and/or rainfall will occur, and that the runoff will be polluted if CAFO waste is surface-applied on frozen or snow-covered ground. Therefore, the way to prevent these discharges is to apply CAFO waste only to fields, or portions of fields, where the runoff will not reach surface waters.

A field-by-field assessment must be completed, and all of the following requirements must be met and documented:

1. The Natural Resources Conservation Service's Manure Application Risk Index (MARI)* has been completed to identify fields, or portions of fields, that scored 37 or lower on the MARI.

2. An on-site field inspection of the entire field, or portion of field, that scored 37 or lower under the MARI has been completed. The inspection will take into consideration the slope and location of surface waters, tile line risers, and other conduits to surface water.

3. Based on the on-site field inspection, the Comprehensive Nutrient Management Plan (CNMP) will include documentation on topographic maps, the fields or portions of fields where the runoff will not flow to surface waters, and designate those areas as the only areas authorized for surface application without incorporation to frozen or snow-covered ground.

4. The findings of the inspection and documentation in the CNMP will be approved by a certified CNMP provider.

This assessment must be incorporated into the CNMP, and submitted as part of the CNMP Executive Summary each year.

* Grigar, J., and Lemunyon, J. A Procedure for Determining the Land Available for Winter Spreading of Manure in Michigan. NRCS publication. (Available on the EGLE NPDES website)

ORIGINAL SIGNED — April 19, 2005

Richard A. Powers, Chief
Water Bureau

Date

EXHIBIT B

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Rulemaking Process Summary

The process for creating, amending, and rescinding administrative rules is governed by the Administrative Procedures Act, 1969 PA 306, MCL 24.201 to 24.328. (Note this is an overview and does not include all required provisions). Revised April 2019.

RFR	▲ A department's Regulatory Affairs Officer (RAO) must submit a Request for Rulemaking (RFR) to the MOAHR to begin the rulemaking process. ▲ The MOAHR reviews and approves the RFR, and notifies the Joint Committee on Administrative Rules (JCAR).
Draft Rules	▲ Rules are drafted and submitted by the RAO to the MOAHR to review for legal authority. ▲ The MOAHR approves the draft and notifies JCAR. The MOAHR sends the draft to the Legislative Service Bureau (LSB) for informal editing according to format and style requirements. ▲ The department makes the suggested LSB edits to the draft rules and sends to the MOAHR.
RIS & Public Hearing	▲ A Regulatory Impact Statement & Cost-Benefit Analysis (RIS) is prepared by the department and sent to the MOAHR for approval 28 days prior to the public hearing. The MOAHR notifies JCAR. ▲ A Notice of Public Hearing is prepared by the department and sent to the MOAHR. The MOAHR notifies JCAR. ▲ The Notice is published in 3 newspapers, including 1 in the UP, not less than 10 days but no more than 60 days prior to the hearing. ▲ The MOAHR publishes the Notice and draft rules in the *Michigan Register*. ▲ The department holds a public hearing for public comment.
JCAR Report	▲ The RAO submits the final draft of the rules and the JCAR Report to the MOAHR. ▲ The MOAHR submits the final draft to LSB to formally certify the rules. ▲ The MOAHR legally certifies the rules and sends the JCAR Report, including the final draft of the rules, certifications, RFR, and RIS to JCAR.
JCAR	▲ The JCAR Report and rules must be submitted to JCAR within 1 year after the public hearing, or there must be a subsequent public hearing. ▲ The JCAR Report summarizes the purpose of the draft rules and any comments made at the public hearing or submitted in writing. ▲ The rules must be before JCAR for 15 session days, unless JCAR grants a waiver of the remaining days. ▲ During those 15 days, JCAR may object to the rules, but then must introduce legislation within another 15 session days to stop or delay the rules. ▲ Rules can be filed by the MOAHR with the Office of the Great Seal after 15 session days expire or after JCAR has waived the 15 session day requirement.
Filing with Office of the Great Seal	▲ The department director confirms the intent to adopt the rules by submitting a Certificate of Adoption to the MOAHR. ▲ The MOAHR files the final rules with the Office of the Great Seal. ▲ The rules may become effective immediately upon filing, or at a later date specified by the department in the rules. ▲ On the effective date, the MOAHR amends the Michigan Administrative Code to reflect the new language of the rules.

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STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN FARM BUREAU, *et al,*

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY (F/K/A DEPARTMENT OF ENVIRONMENTAL QUALITY),

Defendant.

No. 2020-000148-MZ

HON. CYNTHIA D. STEPHENS

DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S 9/8/20 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) AND (C)(8) AND BRIEF IN SUPPORT

ORAL ARGUMENT REQUESTED

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MOTION

Under MCR 2.116(C)(4) and (8), through undersigned counsel, the Department of Environment, Great Lakes, and Energy (Department) hereby moves this Court for summary disposition because, as more fully explained in the attached brief, this Court does not have subject matter jurisdiction over this matter because Petitioners have not exhausted their administrative remedies. Moreover, even if this Court has subject matter jurisdiction, Petitioners fail to state a claim for which relief may be granted because the Department developed and issued the 2020 General Permit for Concentrated Animal Farming Operations (CAFOs) in accordance with state law, including the Michigan state constitution. The Department respectfully request that this Court dismiss this case with prejudice. Pursuant to Local Rule 2.119(2), undersigned counsel contacted counsel for Plaintiffs on September 9, 2020 seeking concurrence for the requested relief. That request was declined.

Although Plaintiffs ostensibly moved this Court for a preliminary injunction, (Compl, ¶ 18), they make no argument or showing in support of such motion, and it should be denied.

DEPARTMENT OF MICHIGAN ENVIRONMENT, GREAT LAKES, AND ENERGY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) AND 2.116(C)(8)

INTRODUCTION

CAFOs are not farms in the ordinary sense of the word. They are large-scale industrial facilities that house and feed animals, either to fatten them up for slaughter or to extract commercial products like milk or eggs from them. As their name implies, their primary industrial process is feeding animals. As a result, their primary waste is animal feces. Untreated, that waste can contain pathogens such as E. coli and salmonella, nutrients, and other harmful components like heavy metals and antibiotics. The facilities party to this case reported

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producing over 1.3 billion gallons of liquid waste and 400,000 tons of solid waste last year alone. By law, the Department must safeguard Michigan's water resources from that waste. This case is about whether the Department has lawful authority to protect the public health by preventing manure and other dangerous pollution from entering Michigan's waterways. The Department unquestionably does. The challenged 2020 General Permit is a scientifically based periodic update that the Department issued in accordance with both state and federal law, after significant public involvement, including with Plaintiffs.

Plaintiffs are also challenging this same general permit before the Michigan Office of Administrative Hearings and Rules (Hearings Office). Instead of allowing that administrative process to play out, Plaintiffs filed this redundant and premature lawsuit. This Court does not have subject matter jurisdiction over this case and should dismiss it for that reason alone. But even if this Court retains jurisdiction, it should still dismiss this case because Plaintiffs state no claim for which they are entitled to legal relief. They are wrong that the 2020 General Permit is an improperly promulgated rule. And none of their claims of constitutional error carry any water. This Court should dismiss their meritless complaint.

STATEMENT OF FACTS

Under Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq.* (Part 31), the Department is bound to "protect and conserve the water resources of the state" and to "control" pollution of underground water, surface water, and the Great Lakes. MCL 324.3103(1). The Department is also responsible for taking "all appropriate steps" to "prevent" water pollution that the Department understands to be unreasonable and harmful to the public interest. MCL 324.3106. These are "broad powers to

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regulate the pollution of Michigan's waters[.]" *Mich Farm Bureau v Mich Dep't of Environmental Quality*, 292 Mich App 106, 140 (2010).

Among other things, the Department must develop and maintain a permitting program to allow otherwise prohibited discharges to Michigan's waters to occur in a proscribed manner. MCL 324.3106 and 324.3109; see also 33 USC § 1311. That permitting program includes both individual permits developed on a case-by-case basis and general permits developed for use at specified types of facilities. Mich Admin Code R 323.2106 and 323.2191. See also 33 USC § 1342(a) and 40 CFR 122.1 *et seq*. General permits, like individual permits, are subject to rigorous public notice and comment before the Department may issue them. Mich Admin Code R 323.2191(2). The Department must reissue all permits, including general permits, every five years. Mich Admin Code R 323.2150.

Since 2000, Michigan CAFOs have been obligated to apply for individual permits or coverage under a general permit, except facilities that demonstrate "no potential to discharge." Mich Admin Code R 323.2196(1)(b). Although the Department updates the CAFO general permit every five years, each iteration of the general permit must contain specified requirements, including comprehensive nutrient management plans, adequate waste storage, testing protocols, and conservation practices and land application specifications that keep CAFO waste out of waters of the state. Mich Admin Code R 323.2196(5). In addition to CAFOs, the Department also issues general permits under Part 31 for other discharges such as stormwater from municipal separate storm sewer systems. Mich Admin Code R 323.2161a. The Department also issues general permits outside of Part 31. See, e.g., MCL 324.30108. General permits make the permitting process more efficient. Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 Envtl L 1215, 1222 (2008).

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In this case, the Department held the 2020 General Permit out for public comment for 45 days, even though only 30 days is required, held three public meetings and hearings statewide, and responded to over 2,400 public comments. Before the public comment period began, the Department held meetings with stakeholder groups and individual CAFO owners and trade groups, including multiple Plaintiffs. As a result, the 2020 General Permit represents both the Department's scientific assessment of how to best control harmful water pollution from CAFOs and a negotiated approach towards doing so. (Exhibit A.)

Individual facilities may choose to apply for a general or individual permit, but the Department ultimately determines which type of permit is appropriate for each facility. Mich Admin Code R 323.2191(3) and (5). No conditions in a general permit are binding until a CAFO applies for and receives a Certificate of Coverage. Mich Admin Code R 323.2192(b). As a result of the pending contested case proceeding regarding the 2020 General Permit, and consistent with past policy, although not mandated by law, the Department has not issued Certificates of Coverage under the new permit. CAFOs that applied for such coverage must comply with prior General Permit certificates of coverage or individual permits.

Although the Department's authority to issue permits derives from Michigan state law, it exists in relation to the federal Clean Water Act. 33 USC § 1251 *et seq.* Like other federal statutes, the Clean Water Act authorizes states to control in-state pollution sources in lieu of the federal government if the state programs meet certain requirements. 33 USC 1342(b). Relevant to this case, the Clean Water Act requires all point source (*i.e.,* direct) discharges to regulated waters to have permits. 33 USC § 1311. Those permits, referred to as National Pollution Discharge Elimination System (NPDES) permits, may be either individual or general permits. 33 USC § 1342(a) and 40 CFR 122.1 *et seq*. The EPA delegated authority to Michigan to

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implement an NPDES program in 1973, but EPA retains oversight over the program. *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 535 (2008).

The Department developed the 2020 General Permit to respond to increasing water pollution of Michigan's waters and the Great Lakes, and with an understanding that the 2015 General Permit had been insufficient to meet those challenges. CAFO pollution includes fecal matter containing nutrients such as nitrogen and phosphorous and pathogens such as E. coli. Although fecal matter can be used to fertilize crops, anything the land and crops cannot absorb eventually ends up in surface waters, where it can kill fish, cause algae blooms, and generally harm water quality. Recent studies confirm that toxic algal blooms are associated with agricultural runoff[1] and E. coli water pollution is correlated with the density of agricultural land.[2] Humans can also become sick after recreating in water contaminated with E. coli. Allowing facilities to apply manure to the ground, without proper incorporation, during the winter presents greater threats of runoff than other times of the year. Recent studies also confirmed the importance of analyzing the phosphorous level of a potential manure application location because land containing a certain amount of phosphorous cannot hold more.[3] In short, when manure produced by CAFOs is not properly maintained, handled, or applied as fertilizer, it pollutes Michigan's surface water. The Department's revised general permit responds to the fact that earlier permits were insufficient to control that water pollution.

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[1] Department Staff Report, Algal Toxin Monitoring in Michigan Inland Lakes: 2016-2018 Results (August 2019), available at: https://www.michigan.gov/documents/egle/egle-wrd-swas-habs-1618results_663053_7.pdf

[2] Appendix 4.3 to Michigan's Statewide *E. coli* TMDL (July 2019), available at: https://www.michigan.gov/documents/egle/egle-wrd-swas-ecolitmdl-final_662072_7.pdf

[3] Michigan State University Extension Bulletin E2904, August 2009, available at: https://soil.msu.edu/wp-content/uploads/2014/06/MSU-Nutrient-recomdns-field-crops-E-2904.pdf

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Among other things, the 2020 General Permit presumptively prohibits land-applying manure during January, February, and March, when frozen ground is less able to absorb waste. (General Permit (B)(3)(f)(3).) Relatedly, it also prohibits manifesting manure then so that CAFOs may not offload their waste onto third parties to land-apply it during the presumptively prohibited time. (General Permit (B)(3)(f)(4).) The Department has observed unlawful wintertime discharges of manure associated with land-application by CAFOs and recipients of manifested waste, including by several Plaintiffs. For example, in March 2019, Brook View Dairy, LLC discharged manure-laden water to Coldwater Creek. (Exhibit C.) That same month, Holloo Farms, LLC discharged manure-laden water runoff from its land-applied waste to Huckleberry Drain. (Exhibit D.) In March 2015, waste manifested from VDS Farms, LLC to M&C Farming, LLC resulted in discharges of manure-laden water to Bear Creek. (Exhibit E.)

The 2020 General Permit also establishes recordkeeping and reporting requirements for manure manifested during other times of the year so that CAFOs remain responsible for their waste. (General Permit (C)(8)(a).) The Department decreased the allowable concentration of phosphorus in fields that could receive manure from CAFOs, in part due to studies demonstrating that the level allowed under previous general permits allowed unreasonable water pollution.[4] The Department also added a condition requiring CAFOs to have a thirty-five-foot buffer strip between where they apply manure and waters of the state, consistent with 40 CFR 122.42(e)(1)(vi). This decision was based in part on studies showing a relationship between water pollution and agriculture,[5] and is consistent with neighboring states' requirements.[6]

[4] *Id.*

[5] *Supra,* n1.

[6] See, e.g. Ohio CAFO NPDES General Permit, available at https://epa.ohio.gov/Portals/35/cafo/CAFO_NPDES_PARTVII.pdf, at p 7.

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Similar to prior general permits, this General Permit directs CAFOs to evaluate additional control measures, with reference to an external guidance document. (General Permit (C)(9)(b).)

On May 26, 2020, Plaintiffs filed a contested case with the Hearings Office challenging the 2020 General Permit. (Exhibit B.) Two and a half months later, they filed this case, repeating the claims pending before the Hearings Office, albeit via a more voluminous pleading, adding a claim that the permit is an unlawfully promulgated rule, and expanding their constitutional allegations. The Administrative Law Judge assigned to the case held a scheduling conference last month and the Department is preparing the administrative record in that matter.

ARGUMENT

I. This Court does not have subject matter jurisdiction over this case because Petitioners have not exhausted their administrative remedies.

This Court lacks subject matter jurisdiction over disputes that have not ripened into final agency decisions. Const 1963, art 6, § 28; MCL 24.301; *WA Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 521 (1995). Absent subject matter jurisdiction, any action a court takes on a case, besides outright dismissal, is void as a matter of law. *Bowie v Arder*, 441 Mich 23, 56 (1992). Under Part 31, any party who wishes to challenge the Department's decision to issue a permit may only challenge that decision administratively because Part 31 does not authorize judicial review. MCL 324.3112. The Department does not arrive at a final decision on a challenged permit until after the conclusion of the contested case proceeding. MCL 24.271–278; MCL 24.285; MCL 324.1317. After that point, all administrative avenues have been exhausted and the Department's decision becomes a final agency action subject to judicial review. Const 1963, art 6, § 28; MCL 24.301-306; *WA Foote Mem Hosp*, 210 Mich App at 522. Until then, however, the decision is not ripe for review. *Hendee v Putnam*, 486 Mich 556, 573 (2010); *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 79 (1989).

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There are exceptions to the general rule that no judicial review may occur without first exhausting administrative remedies if such remedies would be futile, such as in a case where facts need not be developed, and an agency's technical expertise is unnecessary. *Int'l Business Machines Corp v Dep't of Treasury*, 75 Mich App 604, 610 (1977). Generally speaking, however, exhausting administrative remedies is a prerequisite to seeking judicial review. *Id.*

Moreover, making constitutional arguments does not allow a plaintiff to sidestep an administrative process, even though such questions cannot be resolved administratively. See *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 665 (2003) (concluding that plaintiffs failed to show futility and were required to exhaust administrative remedies "notwithstanding their claims of constitutional violations."). So long as there are factual issues to resolve, administrative exhaustion is required before judicial review. *Mich Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 578 (1995).

Here, just a few months after filing a petition for a contested case hearing challenging the Department's decision to issue the 2020 General Permit, Plaintiffs filed this suit. No facts have been developed before the administrative tribunal, and Plaintiffs bring a highly technical challenge that involves nuanced scientific arguments about whether the permit conditions appropriately protect Michigan's surface waters. This is hardly the type of case where bypassing the agency's technical expertise would result in a better outcome. This Court should dismiss this case under MCR 2.116(C)(4) because Plaintiffs did not exhaust their administrative remedies and, as a result, this Court lacks subject matter jurisdiction.

II. This Court should dismiss this case because Petitioners are wrong that the Department unlawfully issued the 2020 General Permit.

Assuming *arguendo* that this Court has subject matter jurisdiction over Plaintiff's premature attempt at judicial review, they fail to state a claim for which relief should be granted,

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and this Court should dismiss their case under MCR 2.116(C)(8). First, the 2020 General Permit is not an unlawfully promulgated rule, but instead is permissive agency action authorized by Part 31. Second, none of Plaintiffs' varied constitutional claims have any merit.

A. The 2020 General Permit is not an unlawfully promulgated rule.

The Administrative Procedures Act, MCL 24.201 *et seq.*, (APA), establishes procedural requirements that agencies must follow when promulgating rules. MCL 24.231-24.266. Rules do not include "a decision by an agency to exercise or not exercise a permissive statutory power, although private rights are affected." MCL 24.207(j). So long as an agency action is based on "permissive statutory power," it is not a rule subject to the APA. *Village of Wolverine Lake v Mich State Boundary Comm*, 79 Mich App 56, 60 (1977).

As an initial matter, Part 31 authorizes the Department to issue general permits. First, Part 31 grants the Department "broad powers to regulate the pollution of Michigan's waters[.]" *Mich Farm Bureau*, 292 Mich App at 140. Indeed, these powers include issuing general permits that are more stringent than federal general permits. *Id.* at 131 (citing 40 CFR 123.1(i)(l) and *W Va Highlands Conservancy, Inc v Huffman*, 625 F3d 159, 162 (CA 4, 2010); see also MCL 324.3106 and MCL 324.3120(11)(h). Moreover, a general permit is not binding until a facility requests and the Department issues coverage under it. Mich Admin Code R 323.2196(1)(b).

Part 31 also authorizes the Department to issue permits, general or individual, containing each of the conditions that Plaintiffs decry as unlawful. The Department determined that land applying manure during January, February, and March presents an unreasonable risk that the manure and its harmful components will discharge to surface water, so the agency crafted a general permit condition to address this risk. (General Permit (B)(3)(f)(3) and (4).) This was

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driven by academic studies[7] as well as observed unlawful discharges, including by Plaintiffs Brook View Dairy, LLC; Hoolloo Farm, LLC; and VDS Farms, LLC, that could have been prevented if this condition were already in effect. (Exhibits C, D, and E.) This requirement is also consistent with industry standards.[8] MCL 324.3106 authorizes this decision because it is an "appropriate step" to "prevent" pollution that the Department "considers to be unreasonable and against public interest," understood against the reality that there is a correlation between agricultural land and both toxic algal blooms and E. coli contamination in streams. Plaintiffs are wrong that Part 31's "broad powers," *Mich Farm Bureau*, 292 Mich App at 132, do not authorize the Department to issue a general permit that presumptively bans wintertime manure application.

Relatedly, that same statutory provision also authorizes the Department's decision to issue a general permit that does not allow CAFOs to transfer the manure they cannot land-apply. Without this requirement, CAFOs could manifest waste to third parties who could then land-apply the manure, obviating any environmental gains of the first permit condition. As a general proposition, eliminating loopholes is an appropriate way to ensure requirements have "teeth." *Gauthier v Alpena Co Prosecutor*, 267 Mich App 167, 175 (2005).

In a similar vein, MCL 324.3106 also authorizes the Department's decision to require CAFOs to maintain certain records about manure that they manifest, not only manure that they land-apply themselves. This permit condition ensures that the Department receives adequate

[7] Todd D. Stuntebeck et al, Precipitation-runoff relations and water-quality characteristics at edge-of-field stations, Discovery Farms and Pioneer Farm, Wisconsin, 2003–8: U.S. Geological Survey Scientific Investigations Report 2011–5008, available at: https://pubs.usgs.gov/sir/2011/5008/.

[8] Michigan Natural Resources Conservation Service (NRCS) Conservation Practice Standard 590: Nutrient Management December 2019, available at: https://www.michigan.gov/documents/mdard/Manure_Management_and_Utilization_2020_GAAMPs_682465_7.pdf.

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information about where and how manure is land-applied. Although Plaintiffs style this condition as applying to the third-party entities that accept CAFO waste, this condition applies to the CAFOs themselves. It is like other waste requirements the Department enforces, such as state and federal regulations requiring contractors that demolish buildings containing asbestos to keep records confirming that such toxic waste goes to landfills authorized to accept it. Mich Admin Code R, 336.1942 (incorporating 40 CFR 61, subpart M); 40 CFR 61.150(d) (establishing requirements for asbestos-containing waste transported off-site.)

Additionally, the Department may reduce the threshold of phosphorous in land that can receive manure. Whether that threshold is 60 parts per million (ppm), 100 ppm, or 150 ppm, for that matter, is a technical question to be addressed after developing the record in front of the Hearings Office. But the general requirement of limiting manure placement on land with too much phosphorous in it to hold any more is within the Department's statutory authority.

One of the more hotly contested provisions of the 2020 General Permit is its requirement that facilities using the phosphorous standard applicable under the prior general permit, less sensitive than the soon-to-be applicable standard, plant vegetative buffers and refrain from applying manure within 100 feet of Michigan waters. Buffers reduce the risk of manure reaching waterways and setbacks minimize its impact if buffers are not wholly effective. This requirement is within the Department's permissive authority under Part 31.

Finally, the 2020 General Permit references additional measures that permittees may take, upon consideration of the Total Maximum Daily Load (TMDL) for the watershed to which they discharge pollutants. This is within the Department's statutory authority, whether it is in the form of a permit condition or a directive to all CAFOs located in a particularly polluted watershed. Mich Admin Code R 323.2137. Part 31 unambiguously states that the Department

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"shall" take "appropriate steps" to prevent "any" pollution the Department considers "unreasonable" and "against public interest," with reference to local water body conditions. MCL 324.3106. This means that the Department is not only allowed, but obligated, to prevent permittees who discharge to polluted waters from unreasonably further polluting those waters. A permit condition that requires CAFOs to perform their own analysis of whether they ought to pollute less, considering a TMDL, is hardly outside the Department's authority.

Still, Plaintiffs claim that this permit requirement specific to TMDLs is forbidden because it conflicts with Michigan Agriculture Environmental Assurance Program (MAEAP), MCL 324.8710. MAEAP is a voluntary program recognizing farmers who use cost-effective methods to comply with state and federal laws. A farmer who is MAEAP verified is "not liable for groundwater contamination" absent gross negligence or failure to follow state or federal law. MCL 324.8710(8). However, MAEAP "does not modify or limit any obligation, responsibility, or liability imposed by any other provision of state law." *Id*. Section 3109d of Part 31 plainly states that MAEAP "does not modify or limit any obligation to obtain a permit." MCL 324.3109d(2). Thus, nothing in MAEAP or Part 31 prohibits the Department from preventing pollution from MAEAP-verified facilities located in polluted watersheds by requiring them to consider adopting additional pollution prevention practices. This argument, too, must fail.

B. The 2020 General Permit is facially constitutional.

1. The 2020 General Permit is not void for vagueness because an ordinary person of reasonable intelligence knows "operational control" of land application means deciding when, where, and how to apply manure.

The void for vagueness doctrine is a subset of substantive due process jurisprudence. *State Treasurer v Wilson (On Remand)*, 150 Mich App 78, 80 (1986), citing US Const, Am XIV; Const 1963, art 1, § 17. Although most stringently applied with First Amendment rights at issue,

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the doctrine establishes that the substantive due process clause requires the government to (1) provide "fair notice" of regulated conduct; and (2) give a trier of fact "unstructured and unlimited discretion" to determine whether conduct is unlawful. *Dep't of State Compliance & Rules Div v Mich Ed Ass'n-NEA*, 251 Mich App 110, 116-117 (2002) (internal citation omitted). "Fair notice" occurs when a "person of ordinary intelligence" has "reasonable notice" about prohibited conduct. *People v Noble*, 238 Mich App 647, 652 (1999) (internal citation omitted).

Under the 2020 General Permit, CAFOs may not wash their hands of the manure their operations produce by selling or transferring it to another entity. Instead, they must maintain records of where, when, and how their waste is land applied. (General Permit (C)(8).) Plaintiffs ask this Court to deem this provision void for vagueness because the phrase "operational control" is undefined and does not provide them the necessary fair notice of what conduct is required of them. (Compl, ¶¶ 263-266, 369.) But, by its plain and ordinary meaning, "operational control" means overseeing important decisions. See, e.g., *Plummer v Bechtel Constr Co,* 440 Mich 646, 662 (1992) (internal citation omitted) (explaining that "operational control" means having the ability to give orders, distinguished from taking "an active interest in," which means only being able to provide suggestions.)

Here, used in a generally applicable permit issued under the Department's authority to control water pollution, lacking "operational control" over land application of manure plainly means lacking the ability to decide where, how, and when to put manure on or in the ground. This can occur in a variety of fact-specific scenarios that need not be catalogued to explain why the phrase is not vague. Including this language in a general permit, which subsequently binds CAFOs that apply for coverage under it, is "fair notice." *People v Noble*, 238 Mich App at 652.

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Plaintiffs also claim that the Department has adopted an "unwritten policy" regarding how it enforces the General Permit, (Compl, ¶ 367), but, because the Department has not issued a Certificate of Coverage under the General Permit and is not, as a result, enforcing it yet, this assertion is both premature and unfounded. To the extent that Plaintiffs challenge how the Department enforces other permits, that is beyond the scope of this litigation.

2. The mandated buffer strip condition in the 2020 General Permit is not a prohibited regulatory taking.

Both the federal and state constitutions forbid the government from "taking" private property without just compensation. US Const, Am V; Const 1963, art 10, § 2. A regulatory takings claim is not ripe until the landowner has received "a final decision regarding the application of a regulation to his property." *Oceco Land Co v Dep't of Natural Resources*, 216 Mich App 310, 314 (1996). Moreover, the applicable analysis is performed with respect to specific parcels of property, not general agency action. Nonetheless, even performing this analysis generically, the buffer strip condition in the 2020 General Permit is not a regulatory taking. Whether government action constitutes a forbidden taking under either constitution depends upon a three-part test. *K & K Const, Inc v. Dep't of Environmental Quality*, 267 Mich App 523, 528 (2005) (citing *Penn Central Transp Co v New York*, 438 US 104, 98 (1978)). That test looks to (1) whether the challenged prohibition is universal; (2) what reasonable use the landowner should have for the property, given the law at the time of property acquisition; and (3) whether the landowner can still make valuable use of the land. *Id.* at 528-529.

First, the complained of prohibition will be universal to all CAFOs covered by the 2020 General Permit under individual certificates of coverage. Second, regulation of discharges to state and federal waters is both "widespread and ubiquitous" and "serves the public interest." *K & K Constr*, 267 Mich App at 553. Even though this permit condition is new, the state's

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obligation to protect waters of the state from pollutants is not. Given the extent to which Michigan's water pollution is related to agricultural land use, and Michigan's longstanding efforts to rein in that pollution, it is unreasonable for landowners to believe that they are entitled to put manure right next to Michigan's public water resources. Finally, this prohibition applies to relatively small strips of land and leaves the remainder for valuable economic use. Thus, even without the benefit of the site-specific analyses required by law, applying the three-factor test to the buffer strip permit condition confirms that it is not a regulatory taking. Instead, it is a universal and reasonable restriction that benefits the public interest in clean water and does not rob would-be-permittees of the valuable use of their parcels.

3. The Department did not violate the Separation of Powers Clause by issuing a general permit because Part 31 gives the Department broad authority to issue general permits that prevent water pollution.

The Separation of Powers Clause provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. However, Michigan law does not interpret this to wholly preclude any overlap of functions between branches. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752 (1982). In fact, the legislative branch can delegate quasi-legislative power to executive branch agencies so long as they do so with standards "reasonably as precise as the subject matter requires or permits" and those standards provide due process. *Westervelt v Natural Resources Comm*, 402 Mich 412, 439, 447 (1978). First, the precision of the standards depends on the complexity and detail of the subject matter. *Id*. at 446. The complexity and detail of managing natural resources means "that it is impractical for the Legislature to provide specific regulations," thus delegating the task to the Department. *Id*. Second, due process is satisfied because permitting is reviewable under the APA. *Id.* at 448.

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Under Part 31, the Legislature delegated to the Department the responsibility to "protect and conserve the water resources of the state" by "establishing pollution standards" and "issu[ing] permits that will assure compliance with state standards" and "applicable federal law." MCL 324.3103(1); MCL 324.3106. "[A]pplicable federal law" refers to the Clean Water Act, which includes broad authority to regulate and permit point source discharges. This broad delegation of authority has reasonably precise standards that the Department must follow in a complex and ever-changing regulatory world related to natural resources. And each permit that the Department issues, whether a general or individual permit, is subject to administrative review in accordance with the APA, which satisfies the second prong of this analysis involving due process protections. MCL 324.3112(5). Part 31 provides sufficiently detailed standards for the Department to use in its permitting program, in accordance with related administrative rules, and affords permittees and members of the public sufficient due process via contested cases.

Specific to the 2020 General Permit, the Department acted within the confines of the legislative standards of Part 31 when it crafted the permit conditions that minimize the amount of pollution entering Michigan's waters from CAFOs. These conditions were developed in accordance with the requirements of the CAFO Rule, which the Court of Appeals previously upheld as consistent with the Department's authority to "to prevent any pollution" of the waters of the state. MCL 324.3106; see *Mich Farm Bureau*, 292 Mich App at 113. Plaintiffs' argument to the contrary is baseless. (Compl, ¶ 364.) The Legislature authorized the Department to develop a permitting program in Part 31 and under the federal Clean Water Act and gave it "broad powers" to prevent pollution against the public interest. *Mich Farm Bureau*, 292 Mich App at 132. There is no separation of powers concern when an agency authorized to develop and issue technical permits to prevent pollution, in fact, issues technical permits to prevent pollution.

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Plaintiffs' allegation that the Department may not issue a general permit with conditions "not otherwise required by any law" is similarly baseless and out of touch with the reality of environmental permitting frameworks. (Compl, ¶ 363.) The Legislature is not expected to anticipate and describe every aspect of environmental harm that an environmental agency must address – that is why the legislative body creates an environmental agency, staffed with scientists and engineers, in the first place. That an environmental agency develops a permit condition that is not expressly described by the law authorizing permits does not reflect a flaw in the legislative scheme, it highlights that the legislative scheme is working. The Legislature lawfully authorized the Department to develop the 2020 General Permit and all of its conditions.

4. The 2020 General Permit was issued with due process, even though CAFOs are not entitled to a permit and the Department is not required to afford them due process when issuing a general permit.

Despite the significant public involvement leading up to the issuance of the 2020 General Permit, Plaintiffs claim that the Department violated both their substantive and procedural due process rights because the 2020 General Permit limits how they can use their private property. Their arguments have no merit. Substantive due process protects against arbitrary government action while procedural due process is aimed at "ensuring constitutionally sufficient procedures" to protect property interests. *Bonner v City of Brighton*, 495 Mich 209, 224 (2014). Both claims presume there is a cognizable right and plaintiffs have failed to state what right is at issue here.

a. The Department issued the 2020 General Permit in accordance with procedural due process requirements.

Both federal and state constitutions guarantee procedural due process. US Const, Am XIV; Mich Const 1963, art 1, § 17. The underlying tenet of procedural due process is "the opportunity to be heard." *Dow v State*, 396 Mich 192, 205 (1976). Procedural due process is not required when there is "no interference with life, liberty, or a vested property right." *Sherwin v*

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Mackie, 364 Mich 188, 199 (1961). In the permit application process, when the applicant is given notice and an opportunity to be heard, there is no due process violation because the only thing a party could be deprived of is "perhaps a second bite of the permit-negotiating apple." *Detroit Edison Co v Mich Air Pollution Control Comm*, 167 Mich App 651, 661 (1988). There is no right to pollute. *Andrews v Jackson Co*, 43 Mich App 160, 164 (1972).

The Department issued the 2020 General Permit under MCL 324.3106, exceeding public notice requirements in the related administrative rules. Mich Admin Code R323.3115 *et seq*. Specifically, the Department held a 45-day public comment period, hosted three public hearings during which it shared water quality concerns and took feedback, had several discussions with stakeholders, and responded to public comments by incorporating them into the revised permit. Plaintiffs had an opportunity to be heard and, in fact, the Department made several of their requested changes to the final permit. And Plaintiffs will be heard again through the contested case proceedings. Their claim of insufficient due process is disingenuous. It is also wrong, as a matter of law, because there is no cognizable right either to a permit or to pollute Michigan's waters without limit. Plaintiffs fail to state a procedural due process claim for which this Court could grant relief and, as a result, this Court should dismiss this allegation.

b. The Department did not violate Plaintiffs' substantive due process rights by issuing a general permit that prevents pollution because Plaintiffs have no right to a permit or to pollute Michigan's waters.

Substantive due process protections attach where an individual has a protectable right. A protectable right is "more than an abstract need, desire or unilateral expectation of the right. *Detroit Edison Co*, 167 Mich App at 661. Rather, there must be "a legitimate claim of entitlement to it." *Id*. Property owners do not have the fundamental right to use their property in any way they choose, particularly when doing so endangers public health and safety. *Bonner v*

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City of Brighton, 495 Mich 209, 228 (2014). In fact, courts have recognized that "there exists no right to pollute," and, accordingly, that no substantive due process is owed when the state halts pollution. *Detroit Edison Co*, 167 Mich App at 661, citing *Andrews*, 43 Mich App at 164.

Where a protected right is at issue, substantive due process requires an agency to utilize only "reasonably precise standards" when performing legislatively delegated tasks. *Detroit Edison Co*, 167 Mich App at 662. The action must "reasonably relate to a legitimate governmental purpose." *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 655 (2015). Indeed, only the most egregious executive action is "arbitrary" in the constitutional sense and must "shock the conscience." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197, 198-199 (2008); see also *Rochin v California*, 342 US 165 (1952) (determining that forced pumping of a suspect's stomach offended due process because it shocked the conscience).

Plaintiffs fail to make the requisite preliminary showing that a "liberty or property" interest is involved in the issuance of a general permit. *Detroit Edison Co*, 167 Mich App at 661. The General Permit requirements do not prevent the Plaintiffs from using their property, rather, they allow CAFOs to operate in accordance with effluent limitations that comport with Part 31 and the federal Clean Water Act. Plaintiffs have no right to use their property unfettered by lawful restrictions. Nor are they entitled to pollute state waters with as much manure as they choose. To the extent that they try to bootstrap their APA claim into a substantive due process claim, (Compl, ¶ 353), those are distinct and unrelated.

Assuming *arguendo* that Plaintiffs state a protected property interest, the conditions contained in the 2020 General Permit are rationally related to a legitimate government purpose. None of the permit conditions illustrate agency actions that would "shock the conscience." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197, 198-199 (2008). They are much

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more like zoning restrictions than forced stomach pumping. The permit conditions further the legislative mandate "to protect and conserve the water resources of the state." MCL 324.3103(1). The permit requirements are thus rationally related to Part 31's goal of attaining and maintaining clean water. Plaintiffs make no due process claim for which this Court can grant relief and this claim should be dismissed.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs filed this case prematurely, despite a pending administrative challenge. This Court has no subject matter jurisdiction and should dismiss this case under MCR 2.116(C)(4). Moreover, it should dismiss Plaintiffs' case under MCR 2.116(C)(8) because Plaintiffs state no claim for which relief can be granted. The Department issued the 2020 General Permit in accordance with its permissive statutory authority. Moreover, Plaintiffs' claims of constitutional error are meritless. For these reasons, the Department requests that this Court grant its motion for summary disposition and dismiss Plaintiffs' complaint with prejudice.

Respectfully submitted,

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LF: Michigan Farm Bureau, et al (v EGLE) COC; AG# 2020-0297963-A/EGLE's MSD 2020-09-08

Appellant's App'x 000263

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STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN FARM BUREAU, *et al.*

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant.
_____/

No. 20-000148-CZ

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PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S 09/08/2020 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) AND (C)(8)

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case is about which branch of government may create industry-altering policies and the procedural constraints on administrative agencies when they make generally applicable policy decisions. Plaintiffs, a coalition of Michigan's livestock farms and associations, contend that sweeping policy decisions imbedded in the Michigan Department of Environment, Great Lakes, and Energy's ("MEGLE's") 44-page single-spaced 2020 General Permit for Concentrated Animal Feeding Operations ("CAFOs") belong to the Legislature (which has repeatedly rejected one such policy). Or, at a minimum, MEGLE must develop its policies consistent with the Administrative Procedures Act's ("APA") process for promulgating administrative rules, which considers cost-benefit analyses, the Legislature's input, and is overseen by a board of representatives from agriculture, government, and environmental groups. But MEGLE's 2020 CAFO General Permit is neither a product of the Legislative process nor the APA's quasi-legislative process.

Instead, MEGLE claims vast unilateral authority to issue mandates such as barring farms from using manure as crop fertilizer for three months a year or ordering farms to convert countless acres of usable farmland into economically-worthless wilderness. That type of authority is legislative in nature—the kind that cannot be delegated to an agency without intelligible standards to guide its exercise—and MEGLE points to nothing in Part 31 that either delegates such authority or (if it does) guides MEGLE's exercise of such authority. Moreover, MEGLE claims that it need not even follow legislatively-prescribed APA processes in doing so. MEGLE is mistaken. An agency's generally-applicable policies and standards are "rules" under MCL 24.207 that must be promulgated before they may be imposed on regulated entities like the livestock farms in this case. Because MEGLE has not done so, certain generally-applicable conditions MEGLE unilaterally planted in its 2020 CAFO General Permit are invalid.

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Seeking to trade this Court's prompt review of threshold legal questions for a lengthy and unnecessary administrative process, MEGLE urges this Court to decline jurisdiction. MEGLE says the livestock farms and agricultural groups must first exhaust a trial-like administrative appeal on factual issues that are immaterial to the threshold question of whether MEGLE even has authority to issue these industry-altering decrees. Not so. This Court can provide a pure legal ruling on threshold questions such as whether MEGLE has violated the APA. And it should do so where such a ruling might moot Plaintiffs' administrative appeal and save the parties the time and expense of litigating the lack of factual and scientific support for MEGLE's policies. Additionally, MEGLE has told many of the farms in this action that they *cannot* appeal to MOAHR. MEGLE cannot now demand they first pursue an appeal that MEGLE contends they have no right to take.

Accordingly, because MEGLE's exhaustion arguments are unfounded and MEGLE improperly wielded legislative authority in contravention of the APA rulemaking process, this Court should deny MEGLE's motion and instead grant summary disposition to Plaintiffs under MCR 2.116(I)(2) on Count I and/or Count IV.

STATEMENT OF FACTS

The facts are set forth in Plaintiffs' Verified Complaint. Though MEGLE's arguments set out external, contrary facts, Plaintiffs' view must be accepted as true for this motion. *Bailey v Schaaf*, 494 Mich 595, 603 (2013). Just a few highlights and additions are necessary here.

On March 27, 2020, MEGLE issued its 2020 CAFO General Permit—a document intended to govern the vast majority (or 92.4%) of CAFOs and set the tone for the remainder for the next five years. (Compl ¶¶ 194–205). Among its new and sweeping mandates, the General Permit: (1) presumptively bans CAFOs from applying agriculturally beneficial manure to crop fields for three months every year; (2) prohibits the transfer of manure to other entities during those months; (3)

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cuts the allowable amount of phosphorous in soil that receives manure (thus significantly reducing the land available to receive manure); (4) mandates the conversion of vast acreage of crop farmland into non-usable wilderness; and (5) vastly expands MEGLE's jurisdictional reach under Part 31. (Compl ¶ 2.) Significantly, though MEGLE received comments and held "stakeholder meetings" before issuing such mandates, MEGLE completely bypassed the APA process for adopting these new "rules."

That process requires MEGLE to justify its policies through a cost-benefit analysis assessing the financial impact on businesses (like Plaintiffs), local governments, and others, MCL 24.245(3)(a)–(3)(dd); to submit its proposals to legislative review, MCL 24.245a; to receive approval of an environmental rules committee that includes agricultural interests, MCL 24.266; and to justify any standard more stringent than federal standards by a "clear and convincing need" for its departure, MCL 24.232(8). Egregiously, MEGLE not only bypassed these safeguards but also adopted a "winter manure spreading ban" even though the Legislature has repeatedly rejected the same proposal. See 2019 SB 247; 2019 HB 4418; 2017 SB 639; & 2017 HB 5185.

Following MEGLE's issuance of the General Permit, the Association Plaintiffs and a total of 165 farms—including many Permit-Applicant Plaintiffs here—filed a protective administrative appeal within the 60-day statutory window on May 26, 2020. MCL 324.3112(5). Though now more than four months along, the administrative record for that appeal has not yet been settled. And that is not scheduled to occur until November at earliest. Thus, Plaintiffs expect that process to take another year or more to resolve before a decision and any appeal. MCL 24.301–306.

On August 6, 2020, Plaintiffs filed this suit seeking threshold legal determinations under the APA, the U.S. Constitution, and the Michigan Constitution. Because this Court's resolution of such issues is in the interest of judicial economy, Plaintiffs sought a stay of their protective

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administrative appeal during the initial status conference and intend to further pursue a stay if this Court maintains jurisdiction over this challenge. Though MEGLE derides Plaintiffs here as "not farms in the ordinary sense of the word," (MEGLE Br at 1),[1] Plaintiffs are by definition the "ordinary" farm. Plaintiffs' family-owned farms represent roughly half of the livestock farming industry in Michigan. (Compl ¶¶ 147, 150–51.) Plaintiffs maintain herd sizes large enough to "benefit from economies of scale that allow both costs and regulatory burdens to be more efficiently distributed" and to reduce the cost per unit to keep our farms competitive in providing food to consumers. (*Id.* ¶ 152.) Those economies of scale are necessary due to increasingly restrictive regulation, (*id.*), which demonstrates why submitting regulations like those at issue here to the deliberative rulemaking process is necessary before making further changes.

STANDARD OF REVIEW

MEGLE moves under MCR 2.116(C)(4) and (C)(8) but cites no standard of review. A motion or summary disposition under MCR 2.116(C)(4) asks whether "[t]he court lacks subject matter jurisdiction." Subject-matter jurisdiction is "a court's power to hear and determine a cause or matter." *In re Wayne Treasurer*, 265 Mich App 285, 291 (2005). Whether a court possesses jurisdiction is a question of law. *Davis v Dep't of Corr*, 251 Mich App 372, 374 (2002).

A motion under (C)(8) tests the legal sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159–60 (2019). This Court accepts all factual allegations as true and may only grant MEGLE's motion if "a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* If this Court grants summary disposition under MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings . . . ."

[1] MEGLE's pejorative tone toward livestock farming throughout its brief further underscores the necessity of the safeguards provided by the APA process, which bring legislative oversight and more significant industry input to agency decision making. MCL 24.265; MCL 24.266.

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MCR 2.116(G)(5). Finally, if "the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

ARGUMENT

I. There is no exhaustion required before the livestock farms can obtain this Court's guidance on threshold issues of law.

MEGLE first asks this Court to punt in the name of "exhaustion of administrative remedies," claiming this Court lacks jurisdiction until an administrative appeal runs its course. Not so. MEGLE's claim is fundamentally founded on the APA, and that Act expressly gives this Court jurisdiction to determine the procedural validity of administrative rules by a declaratory judgment action. MCL 24.264. Moreover, even if applicable to some farms, notable exceptions to exhaustion apply here for pure legal issues and facial constitutional claims. Finally, MEGLE cannot seriously contend that exhaustion applies to farms whom it has claimed have no administrative remedy.

a. The APA and MCR 2.605 give this Court jurisdiction to determine whether MEGLE has exceeded its authority and violated the APA.

MEGLE argues that this Court lacks subject matter jurisdiction based on MCL 24.301,[2] which requires a person to "exhaus[t] all administrative remedies available within an agency" before it may seek review of the agency decision in the courts. (MEGLE Br at 7.) That provision applies to appeals from administrative decisions. But this is not such an appeal. Rather, this is an original action under MCL 24.264 and MCR 2.605. (Compl ¶¶ 140–42, 325–28, 342–43.) That statute authorizes this Court to determine "the validity . . . of a rule . . . in an action for declaratory judgment . . . " *Id.* And MCR 2.605(A)(1) permits this Court to "declare the rights and other legal relations of an interested party" and notes that "the existence of another adequate remedy does not

[2] MEGLE argues this issue as an "exhaustion" requirement but also refers to ripeness and finality, and cites cases relating to those doctrines. Those doctrines are distinct. See LeDuc, Michigan Administrative Law (2013 Ed.), § 10:20–10:24, pp. 777–791. Because MEGLE frames the issue as exhaustion, Plaintiffs confine their response to that defense.

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preclude a judgement for declaratory relief . . . ." MCR 2.605(C). Thus, this Court has subject-matter jurisdiction over this dispute as expressly provided by the APA and by court rule.[3]

To decide otherwise would be to effectively prejudge the substantive question presented here: whether the conditions challenged in MEGLE's 2020 CAFO General Permit are "rules." MEGLE's exhaustion argument requires this Court to conclude that they are not and that this is merely a challenge to a permit—which needs to run its administrative course. Plaintiffs contend the opposite. The conditions at issue are "rules," MCL 24.264 applies, and the rules are procedurally and substantively invalid. Moreover, no exhaustion is required for a declaratory judgment action challenging a rule's *validity*. Where the *applicability* of a rule is at issue, a party must first seek a ruling from the agency. *Mich Farm Bureau v Dep't of Envtl Quality*, 292 Mich App 106, 119 n7 (2011). That is not the type of action here. Thus, because MCL 24.264 and MCR 2.605 provide this Court with jurisdiction, MEGLE's motion must be denied.

b. If this Court views the exhaustion of remedies doctrine as applicable, this suit fits within the exceptions for pure legal issues and constitutional claims.

Yet even if the doctrine of exhaustion applied generally, that doctrine is flexible, *Int'l Bus Mach Corp v Dep't of Treasury*, 75 Mich App 604, 610 (1977) (noting exhaustion "is not an inflexible condition precedent to judicial consideration"), and it is riddled with exceptions. LeDuc, Michigan Administrative Law (2013 Ed.), § 10:31, p 806 ("If there is an administrative law doctrine with more exception than exhaustion of administrative remedies, it does not readily come to mind."). At least two of those exceptions apply here.

First, exhaustion is unnecessary where a plaintiff challenges an agency's authority to act. *Int'l Bus Mach Corp*, 75 Mich App at 610; see also *Universal Am-Can Ltd v Att'y Gen*, 197 Mich

[3] As noted in the Complaint, MCL 24.264 refers to circuit courts as having jurisdiction, but that jurisdiction has shifted to this Court due to the legislative changes in 2013 PA 264. See, e.g., *Telford v Michigan*, 327 Mich App 195, 198–201 (2019).

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App 34, 38 (1992) ("[B]oth judicial economy and the interests of justice" militated again requiring exhaustion where "Plaintiff claimed that the PSC lacked the statutory authority to regulate it . . . ."); *Mich Waste Sys, Inc v Dep't of Nat Res,* 157 Mich App 746, 759 (1987). That is especially the case where the issue is "clearly framed for the court as one of law (statutory interpretation) that [does] not call for extensive findings of fact or technical expertise" and requiring exhaustion would be "nothing more than a formal step on the way to the courthouse." *Huggett v Dep't of Nat Res*, 232 Mich App 188, 192 (1998).

Plaintiffs' APA challenges (Counts I & II) and Separation of Powers claim (Count IV) present threshold legal questions on MEGLE's authority to include certain conditions in the General Permit. No "highly technical" factual issues or "nuanced scientific arguments" are at issue here. (MEGLE Br at 8.) Plaintiffs do not seek to challenge the wisdom of these conditions here but only the agency's power to issue them. The questions raised are thus legal. They ask whether certain generally-applicable conditions placed in the General Permit constitute "rules" that must be promulgated per APA procedure, whether MEGLE lacks the statutory authority for such rules, or, if it possesses such authority, whether the statute contains sufficient guidelines for the exercise of that authority under separation-of-powers principles. (Compl ¶¶ 304–48, 358–64.) Since no facts need to be developed to decide such issues, the rationale for exhaustion is not present. *Mich Supervisors Union OPEIU Local 512 v Dep't of Civil Serv*, 209 Mich App 573, 578 (1995).

Second, constitutional claims that do not need factual development are exempt. *Id.* at 578 (the "decisive issue" is if "there are factual issues for the agency to resolve"); *Universal Am-Can Ltd*, 197 Mich App at 38. Agencies generally cannot decide constitutional challenges to statutes. *Wikman v Novi,* 413 Mich 617, 646–47 (1982). And Plaintiffs' Separation of Powers claim (Count

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IV) does not require any factual development. Thus, exhaustion is unnecessary and futile. Indeed, MOAHR cannot decide this claim, and that process will not alter MEGLE's authority to act.

c. The exhaustion requirement is not applicable to farms without standing to pursue an administrative appeal, as MEGLE claims in part here, and for the organizations who have representative standing for such farms.

Finally, MEGLE cannot seriously contend that individually-permitted farm Plaintiffs and no-potential-to-discharge farm Plaintiffs—whom MEGLE says have no ability to take an administrative appeal—must "exhaust" a purportedly non-existent remedy. In the Plaintiffs' pending protective appeal, MEGLE has demanded that such farms be dismissed for lack of standing. (Ex A, Email from E Morrisseau Re: Petitioners Without Standing). MEGLE now asks this Court to dismiss the same Plaintiffs based on a purported lack of exhaustion. But where there is no available remedy, how can exhaustion be required? It cannot. LeDuc, § 10:27, p 797 (noting exhaustion "applies *only when there is actually a remedy to exhaust*") (emphasis added). Therefore, at a minimum, MEGLE's exhaustion argument fails on all claims for these Plaintiffs. And it also fails for the Association Plaintiffs who represent individually permitted farms through representative standing. *Lansing Schools Ed Assoc v Lansing Bd of Ed*, 487 Mich 349, 373 (2018) ("[A]n organization has standing to advocate for the interests of its members . . . .")

II. MEGLE's establishment of mandatory standards applicable to nearly all large livestock farms are "rules" requiring promulgation under the APA.

Next, MEGLE sets up a strawman in contending that Plaintiffs' APA procedural challenge should be dismissed because "*the General Permit* is not an unlawfully promulgated rule." (MEGLE Br at 9) (emphasis added).[4] Plaintiffs did not say it was, and Plaintiffs do not challenge MEGLE's authority to issue general permits. Rather, the Complaint challenges "[e]ach of the

[4] MEGLE's motion for summary disposition does not attempt to address Count II (substantive invalidity under the APA), which requires an analysis of the factors under *Luttrell v Dep't of Corr*, 421 Mich 93, 100; 365 NW2d 74 (1984). Thus, this response likewise does not address that claim.

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newly-added conditions of the CAFO General Permit" as "rules" under MCL 24.207 that must be promulgated. (Compl ¶¶ 17, 304, 308, 323, 330—337). MEGLE ignores the definition of a "rule" under MCL 24.207, relies on an inapposite exception, and lists its policy justification for adopting generally applicable standards outside of APA procedures. (MEGLE Br at 9–12.) Yet mandatory permit conditions that apply to nearly the entire livestock industry are certainly "rules."

The APA defines a "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 (emphasis added.) Thus, an agency policy constitutes a "rule" if it is: (1) a "regulation, statement, standard, policy, ruling or instruction, of general applicability"; (2) "that implements or applies law enforced or administered by the agency"; and (3) it is not excepted. *Id.*; *AFSCME, AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 9 (1996). "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *Id.* at 10. An agency's decision to set general policy is an exercise of quasi-legislative powers that requires adherence to rulemaking processes. *In re Complaint of Rovas*, 482 Mich 90, 98 (2008). Thus, the "elaborate procedure for rule promulgation" serves to "ensure that none of the essential functions of the legislative process are lost in the course of performance by agencies of many law-making functions once performed by our legislatures." *Detroit Base Coal for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 178–79 (1988).

The conditions of the General Permit challenged here are indeed "rules." *First*, the conditions set standards and regulations "of general applicability." MCL 24.207. CAFOs are mandated to have an NPDES permit with very few exceptions. Mich Admin Code, R 323.2196(1)(b). "Nearly all" (or "92.4%") of CAFOs are governed by the General Permit. (Compl

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at ¶¶ 199 & 309). Almost all remaining CAFOs are regulated under MEGLE's individual permits which reflect the terms of MEGLE's General Permit as a minimum standard. (*Id.* ¶¶ 317–321.) And MEGLE exercises unbridled control over which farms are issued a General Permit. Mich Admin Code, R 323.2191(5) and R 323.2192(d). Thus, these conditions apply broadly to a class of farms and have "general applicability." *Hinderer v Dep't of Social Servs*, 95 Mich App 716, 725 (1980) (lag budgeting system met this requirement because it affected benefit recipients generally). To that point, MEGLE even calls these conditions an exercise of "quasi-legislative power," (MEGLE Br at 15)—the very type of action that must be submitted to rulemaking. *Detroit Base Coal*, 431 Mich at 178. *Second*, these conditions "implemen[t] or appl[y] law enforced or administered by the agency"—Part 31 of NREPA, MCL 324.3101 *et seq*, as MEGLE itself maintains in its brief. *Third*, no statutory exemption applies.

On this last prong, MEGLE attempts to rely on MCL 24.207(j): That subsection exempts "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." *Id.* But the exemption, which must be narrowly construed, *AFSCME, AFL-CIO*, 452 Mich at 9, protects only an agency's decision *whether* to exercise a permissive statutory authority and does not shield agencies from being required to promulgate rules justifying or exemplifying *how* they apply such power. *Spear v Mich Rehab Servs*, 202 Mich App 1, 4 (1993) (deciding to employ a welfare needs test was covered by the exemption but the agency needed to promulgate a rule explaining its test). Thus, deciding to employ a General Permit is a "decision . . . to exercise . . . a permissive statutory power," MCL 24.207, but the substantive standards MEGLE writes into the General Permit are not.

This conclusion is consistent with the Michigan court decisions considering whether agency actions are "rules." For example, in *AFSCME, AFL-CIO*, the Supreme Court analyzed

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whether the terms of a standard-form contract used by the Department of Mental Health in contracting with a few hundred group home providers constituted "rules" under the APA. 452 Mich at 5–6. The contract delegated to these private entities functions otherwise assigned to the Department and subjected their provision of such services to standards for care and staff training via contract. *Id.* at 7–8. And the Department's contract was inflexible, offered to the providers without negotiation. *Id.* at 5–6. Therefore, the Court held the contract terms were "rules" requiring promulgation. *Id.* at 3. Likewise, in *Delta Co v Dep't of Nat Res*, 118 Mich App 458 (1982), the Court of Appeals held that conditions of a license requiring adherence to 31 departmental guidelines and policies were "rules." The Court observed that conditioning a license on acceptance of such guidelines made the guidelines "effectively . . . rules under the guise of guidelines and policies." *Id* at 468. The Court rebuked that "[t]he rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies." *Id.* And the Court admonished that "[t]he rulemaking procedures of the APA may not be circumvented." As in both of those cases, MEGLE here seeks to fold mandatory standards into a form document. Those standards are rules.

Further buttressing this analysis, several courts have found either general permits or the conditions thereof to be "rules." In *Nat'l Assoc of Home Builders v US Army Corps of Eng'rs*, 417 F3d 1272 (2005), the U.S. Court of Appeals for the D.C. Circuit held that nationwide permits issued by the Army Corps under the Clean Water Act, see 33 USC 1344(e)(1), constituted "rules" subject to the rulemaking provisions of the federal APA. *Id.* at 1284. That court explained:

> Each [nationwide permit] easily fits within the APA's definition of a 'rule.' This is so because each [nationwide permit], which authorizes a permittee to discharge . . . is a legal prescription of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA. As such, each [nationwide permit] constitutes a rule: An 'agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.' [*Id.* at 1284–85.]

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The D.C. Circuit reaffirmed this holding in *Lakes Carriers Ass'n v US EPA*, 652 F3d 1, 6 n 3 (CADC 2011). See also *NRDC v US EPA*, 279 F3d 1180, 1183 (2002) ("[g]eneral permits . . . are issued pursuant to administrative rulemaking procedures"); *Alaska Cmty Action on Toxics v Aurora Energy Servs, LLC*, 765 F3d 1169, 1172 (9th Cir 2014) ("general permits are considered to be rulemakings."). Similarly, an Administrative Law Judge in North Carolina recently reached the exact same conclusion suggested here—that conditions of that State's CAFO General Permit were rules that require promulgation. (Ex B, NC ALJ Decision.)

MEGLE's attempt to justify the policy rationale for these new standards simply confirms the obvious: MEGLE adopted generally-applicable standards it will apply to the livestock farm industry on a widespread basis. The merits of those policies are not at issue here—only the process. The APA requires MEGLE to follow a process. *Detroit Base Coal*, 431 Mich at 178–79 (1988); MCL 24.226; MCL 24.243. MEGLE admittedly did not.

For those reasons, this Court should not only deny MEGLE's motion but also grant summary disposition in Plaintiffs' favor under MCR 2.116(I)(2) on Count I and declare that the conditions at issue are procedurally invalid "rules" because they have not been promulgated according to the APA. Notably, if the Court does so, it need not reach Plaintiffs' remaining claims. *Alternatively*, this Court should set a briefing schedule for Counts I, II, and IV.

III. If construed to grant MEGLE authority to unilaterally ban or control farming practices, Part 31 violates the Separation of Powers Clause.

This Court need not address Plaintiffs' Separation of Powers claim if it agrees that MEGLE violated the APA's procedures. But, if this Court accepts MEGLE's argument that MCL 324.3106 enables the agency to bypass such procedures and exercise unbridled discretion to control farming practices, mandate land uses, and otherwise take any action it deems justified to prevent perceived pollution, then the law violates the non-delegation doctrine.

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Michigan's constitution contains an express separation of powers, Const 1963, art III, § 2, and vests legislative power exclusively in the Legislature. Const 1963, art IV, § 1. Administrative "agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *Rovas*, 482 Mich at 98. Thus, Michigan's non-delegation doctrine demands that legislative delegations to administrative agencies be accompanied by reasonably precise standards to guide and constrain the agency in its implementation of any delegated authority. See, e.g., *BCBSM v Milliken*, 422 Mich 1, 51–55 (1985) ("[a] complete lack of standards is constitutionally impermissible"); *Oshtemo Charter Twp v Kalamazoo Co Rd Comm'n*, 302 Mich App 574, 592 (2013), *lv den*, 495 Mich 977 (2014) (a statute conferring "unlimited discretion, without guiding standards," is unlawful). In determining whether a standard is reasonably precise, courts consider the level to which the matter was susceptible to guidance or constraint from the Legislature. *State Conservation Dep't v Seaman*, 396 Mich 299, 310 (1976).

MEGLE here points to just two provisions as the purported delegation for it to exert extraordinary control over livestock farming practices. The first, MCL 324.3103(1), is no more than a generic announcement that MEGLE is responsible for "protect[ing] and conserv[ing] the water resources of the state and shall have control of the pollution of surface or underground waters of the state . . . ." This merely identifies the purpose and method of Part 31. The second, MCL 324.3106, provides MEGLE with the limited authority to "issue permits that will assure compliance with state standards" and to "assure compliance with applicable federal law and regulations" regarding discharges that "may affect the waters of the state." By its terms, issuing permits to "*assure compliance with* state standards" or "federal law and regulations" involves the quasi-adjudicative act of applying "state standards" to a particular set of circumstances. Yet MEGLE does not explain how any of the challenged standards tie to a particular "state standard"

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(statute or administrative rule) or "federal law and regulation." Nor does the general permit process involve applying a regulation to an individual permittee's circumstances. Rather, MEGLE made general policy determinations that go far beyond existing state or federal regulations. Put succinctly, MEGLE is not just adding flesh to bones but is engaged in creation whole cloth.

Moreover, if—as MEGLE contends—these provisions allow the agency unrestricted authority to exercise any measures necessary to control pollution, then such delegations involve a "[a] complete lack of standards," and are not "as reasonably precise as the subject matter . . . permits," *BCBSM*, 422 Mich at 52 & 55. Indeed, a "delegation" that merely hands discretionary policymaking authority on *an entire subject matter* completely over to an administrative agency without providing factors or guiding standards is impermissible. *Oshtemo Charter Twp*, 302 Mich App at 592. And the farming practices at issue are much more susceptible to guidance from the Legislature than issuing a general delegation to MEGLE allowing unfettered discretion to "control pollution." To that point, the Legislature has repeatedly rejected MEGLE's "winter ban" and clearly knows how to provide guidance with respect to the permissible uses of and allowable controls on the use of manure. See 2019 SB 247; 2019 HB 4418; 2017 SB 639; & 2017 HB 5185; MCL 324.8501 *et seq* (regulating fertilizer including certain manure-based products).

IV. Plaintiffs stated a claim as to whether MEGLE's "operational control" standard is void for vagueness.

Plaintiffs stated a claim under the void-for-vagueness doctrine sufficient to survive a motion under MCR 2.116(C)(8). The Due Process Clauses of both the U.S. Constitution, Amendment XI, and of the Michigan Constitution, Article I, § 17, prohibit the government from relying on vague laws or standards. *State Treasurer v Wilson (On Remand),* 250 Mich App 78, 80 (1986). A law is unconstitutionally vague if "(1) it is overbroad . . . (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured or unlimited

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discretion on the trier of fact to determine whether an offense has been committed." *Brang, Inc v Liquor Control Comm'n*, 320 Mich App 652, 663 (2017). Vagueness challenges that do not involve First Amendment issues "must be examined in light of the facts at hand." *Ron's Last Chance, Inc v Liquor Control Comm'n*, 124 Mich App 179, 182 (1983). Further, due process requires administrative agencies to use standards that are "as reasonably precise as the subject matter requires or permits." *Adkins v Dep't of Civil Serv*, 140 Mich App 202, 214 (1985). The question is whether a standard "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Allison v Southfield*, 172 Mich App 592, 595–596 (1988).

The CAFO General Permit allows CAFOs to transfer waste to a person other than the CAFO owner for land application if "the land application of the CAFO waste is no longer under *the operational control* of the CAFO owner or operator that generates the CAFO waste . . . ." (CAFO General Permit, Part I.C.8.) (emphasis added). But MEGLE nowhere specified what constitutes "operational control" over land-application activities. Instead, MEGLE adopted an unwritten policy requiring CAFOs to include within their CNMP and as part of their permit land-application that occurs by legally separate third parties. MEGLE further sought to penalize farms if they did not include such entities. Thus, the lack of definition for the term "operational control" has both failed to "provide fair notice of the conduct proscribed" and left the legal standard "so indefinite that it confers unstructured or unlimited discretion on the trier of fact to determine whether an offense has been committed." *Brang, Inc*, 320 Mich App at 663. Plaintiffs will prove "in light of the facts at hand," *Ron's Last Chance, Inc*, 124 Mich App at 182, that this standard is therefore unconstitutionally vague. See, e.g., *Brang, Inc*, 320 Mich App at 668–69 (holding that the term "narcotics paraphernalia" was unconstitutionally vague); *People v Boomer*, 250 Mich

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App 534, 540 (2002) (finding statute criminalizing "indecent, immoral, obscene, vulgar, or insulting language" unconstitutionally vague).

MEGLE claims that the phrase "operational control" is not vague because "its plain and ordinary meaning" refers to "overseeing important decisions" or having "the ability to decide where, how, and when to put manure on or in the ground." (MEGLE Br at 13.) But that is not how MEGLE applies its standard. Rather, MEGLE has asserted in particular instances that farms maintain "operational control" simply because an owner of a farm maintains minority interests in an entity that spreads manure or merely because two or more discrete entities are owned by family members, or on any infinite number of factual scenarios by which MEGLE attempts to draw some vague inferential leap from the entity who applies manure to the entity who generates the manure far short of determining whether the permitted farm "oversees important decisions" on land application of the manure. (Ex C, Redacted Compliance Letters.)

MEGLE's self-contradiction undermines its claim that the term's meaning is self-evident. Indeed, MEGLE's actions demonstrate that the standard is not clear even to MEGLE staff members. Moreover, the fact that MEGLE's brief articulates a much more defined (and limited) standard than its field staff applies indicates that the General Permit's broad reference to "operational control" is not "as reasonably precise as the subject matter requires or permits," *Adkins*, 150 Mich App 214, and has led to arbitrary enforcement. *Allison*, 172 Mich App at 596. This Court should deny MEGLE's motion on this claim.

V. Plaintiffs adequately stated a constitutional claim for violation of due process.

The Due Process Clause of the U.S. Constitution and Michigan's equivalent provision contain both procedural and substantive components. US Const, Am XIV; Const 1963, Art I, § 17; *Grimes v Van Hook-Williams*, 302 Mich App 521, 531 (2013). "[T]he touchstone of due process . . . 'is the protection of the individual against arbitrary action of government . . . .'" *Bonner v*

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Brighton, 495 Mich 209, 223 (2014). Thus, substantive due-process forbids the "arbitrary exercise of governmental power," and procedural due-process ensures "sufficient procedures for the protection of life, liberty, and property interests." *Id.*

Plaintiffs have protected property interests in their ownership of land and operation of their business and have adequately plead both claims. On the first, Plaintiffs' Complaint shows how the challenged conditions are constitutionally "arbitrary,"[5] (Compl ¶¶ 224–288), including that MEGLE: (1) banned land-application of manure during *identical* field conditions simply because of the date on the calendar, (*id.* ¶¶ 238, 245); (2) banned transferring manure during the same months regardless of field conditions, (*id.* at ¶¶ 253, 256–257); (3) applied an across-the-board phosphorus reduction without scientific basis, (*id.* at ¶¶ 269–273); and (4) required the installation of 35-foot vegetative buffers from ditches, streams, and waters despite an existing prohibition on spreading manure within 100 feet of such features. (*Id.* at ¶ 284.)

On the second, the APA exists to ensure procedural due process safeguards. *In re Turner v Dep't of Mental Health*, 108 Mich App 583, 589 (1981). Thus, failure to comply with the APA can indicate a lack of due process. *Seaman*, 396 Mich at 313 ("the actual development of specific regulations by those charged with the task by the Legislature must be accompanied with due process protection.") Here, MEGLE circumvented APA procedures altogether. Despite MEGLE pointing to stakeholder meetings or receipt of comments, several of the conditions of the General Permit challenged here were brand new in March 2020 or significantly altered without any notice to Plaintiffs whatsoever. Plaintiffs adequately plead a due-process claim.

[5] MEGLE inaccurately applies a "shocks the conscience standard" here. That standard concerns individual actors, *Cummins v Robinson Twp*, 283 Mich App 677, 701 (2009)—and not challenges to statutes or regulations.

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VI. Plaintiffs adequately stated a Takings Clause claim.

Finally, Plaintiffs adequately stated a Takings Clause claim under either a *Loretto*, *Nollan/Dolan*, or *Penn Central* framework based on MEGLE's mandate that farms install 35-foot wide vegetative buffers effectively converting cropland into wilderness. MEGLE does not address either *Loretto* or *Nollan/Dolan*—for that reason alone, its motion should be denied. Further, MEGLE generously misstates the *Penn Central* test, which is fact-intensive inquiry not amenable to resolution on a (C)(8) basis, and this Court cannot conclude that "no factual development could possibly justify recovery." *El-Khalil*, 504 Mich at 159–60.

Both the state and federal constitutions prohibit takings of private property without just compensation. US Const, Am V; Const 1963, art X, § 2. "[A]ny permanent physical occupation [of property] is a taking." *Loretto v Teleprompter Manhattan CATV Corp*, 458 Mich 419, 432 (1982). So, for instance, in *Loretto*, a city mandate that landlords install cable television connections on rental properties was considered a *per se* taking. *Id.* Likewise, when the government requires land-use conditions via permit, to avoid a taking: (1) there must be an "essential nexus" between the exaction and the impact the use of property has on the public; and (2) the exaction must be "roughly proportional" to the impact. *Dolan v City of Tigard*, 512 US 374, 391 (1994). Proportionality determinations cannot be made in the abstract but rather require the government to make an "individualized determination" establishing site-specific evidence that the mitigation it seeks is "related both in nature and extent to the impact of the [property use]." *Id.* Further, "regulatory takings" can also be shown based on "essentially ad hoc, factual inquiries" reviewing facts relevant to: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Murr v Wisconsin*, 137 S Ct 1933, 1943 & 1954

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(2017); *Penn Cent Transp Co v New York*, 438 US 104, 124 (1978); *K&K Constr, Inc v Dep't of Envtl Quality*, 267 Mich App 523, 528 (2005).

Plaintiffs stated *prima facie* cases for a *Nollan/Dolan* and *Loretto* takings here. MEGLE seeks to require a "35-foot wide, *permanent* vegetated buffer" on farmland that receives manure. (*Id.* at Part I.B.3.h.1.b.) (emphasis added). MEGLE's mandate to permanently install vegetation on farmland is, like the cable mandated to be installed in *Loretto*, a *per se* taking. Moreover, under *Nollan/Dolan*, the government has done so without requiring an "individualized determination" using site-specific evidence of the need for such an exaction. *Dolan*, 512 at 391. Nor could it establish proportionality where MEGLE has already forbidden the spread of manure within 100 feet of any roadside ditch, stream, or other water. (General Permit, Part I.B.3.h.1.a.)

Finally, because *Penn Central* is based on "essentially ad hoc, factual inquiries," *Murr*, 137 S Ct at 1954, it is not fit for decision on a (C)(8) basis. But Plaintiffs nonetheless state a *Penn Central* claim. *First*, MEGLE's prohibition is not "universal." The relevant question is whether "the benefits and burdens of the land-use regulation fall relatively equally among all, including the complaining party . . . ." *K&K Const, Inc*, 267 Mich App at 528–29. They do not. Rather, farms who receive CAFO waste are singled out among landowners, required to convert their land to economically useless purposes whereas other land owners are not. *Second*, farmers could "reasonably expect to make" use of their land for growing crops at the time they purchased it. *Id.* at 529. The question is not whether they could "believe they are entitled to put manure right next to Michigan's public water resources," (MEGLE Br at 15)—indeed, CAFOs are *already* required to have 100-foot setbacks (meaning they cannot land apply manure within 100 feet of waters regardless of whether they must *also* install economically useless vegetation). They could reasonably expect productive farming use from their land, which they are being deprived of by

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permanent vegetation. *Finally*, the challenged regulation deprives farmers of ***all valuable use*** of that portion of their land that is converted. These are not "relatively small strips" but rather significant swaths up to 70-feet wide and hundreds of feet long—larger than most suburban parcels. A *Penn Central* claim can be proven.

CONCLUSION AND RELIEF REQUESTED

MEGLE's industrywide mandates in its 2020 General Permit forbidding standard farm practices and converting vast acreage of farmland into wilderness constitute "rules," and the failure to promulgate such "rules" violates the APA. Not only should this Court deny MEGLE's motion for summary disposition, but it should also grant Plaintiffs' summary disposition under MCR 2.116(I)(2) on Count I and/or Count IV. Alternatively, the Court should schedule briefing to decide the threshold legal claims presented by Counts I, II, and IV. Further, because Plaintiffs bring this action based on MCL 24.264 and MCR 2.605 and those claims present pure legal issues, no exhaustion is required. Nor can exhaustion be used to defeat the Individual Permit and Association Plaintiffs whom MEGLE says *cannot* appeal to MOAHR. Finally, Plaintiffs adequately stated claims on which relief can be granted for their remaining claims.

Respectfully Submitted,

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Attorneys for Plaintiffs

Dated: September 30, 2020

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EXHIBIT A.1

Email from E. Morrisseau Re: Petitioners Without Standing

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From: Morrisseau, Elizabeth (AG) <MorrisseauE@michigan.gov>
Sent: Friday, July 24, 2020 2:42 PM
To: Larsen, Zachary C.
Cc: Rosa, Jennifer (AG)
Subject: List of petitioners without standing
Attachments: Petitioners without standing.pdf

Follow Up Flag: Follow up
Due By: Monday, September 14, 2020 8:00 AM
Flag Status: Flagged

[External Message]

Hi Zach,

I hope you are well. I am following up with the list of petitioners that we believe do not have standing. One group has individual NPDES permits, the other group have no potential to discharge determinations. We previously only mentioned the permitted petitioners but we also see no way that petitioners with no potential to discharge determinations have any standing either.

Best,
Elizabeth Morrisseau
Assistant Attorney General
Environment, Natural Resources,
and Agricultural Division
Michigan Attorney General's Office
6th Floor, G. Mennen Williams Building
525 West Ottawa Street
PO Box 30755
Lansing, MI 48933
(517) 335-7664
Teleworking due to COVID-19 emergency

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EXHIBIT A.2

List of Petitioners Without Standing

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List of Petitioners with Individual Permits

Name	Permit Number
Medina Dairy, LLC	MI0057473
Hartland Farms, Inc.	MI0057536
Konos, Inc	MI0058561
Hudson Dairy, LLC	MI0058888
Bakerlads Farm	MI0059009
Nobel Family Dairy, LLC	MI0059149
Mayflower Dairy, LLC	MI0059294
Stutzman Poultry Farms, LLC,	MI0059636
Konos, Inc-Martins Organics	MI0059676
Flower Creek Swine, LLC	MI0060245

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List of petitioners with No Potential to Discharge Determinations

High Lean Pork-Parker Rd	MINPTD002
DeWeerdt Poultry Farm, LLC	MINPTD003
Crockery Creek – 74th	MINPTD010
Crockery Creek – 80th	MINPTD004

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EXHIBIT B

NC ALJ DECISION

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OFFICE OF ADMINISTRATIVE HEARINGS
05/08/2020 1:35 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EHR 02739, 19 EHR 02740, 19 EHR 02741

North Carolina Farm Bureau Federation Inc, Petitioner, v. NC Department of Environmental Quality, Division of Water Resources, Respondent.	**ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of the North Carolina Department of Environmental Quality ("Department"), Division of Water Resources ("Division") Respondent's Motion for Partial Summary Judgment filed pursuant to Rule 56 of the North Carolina Rules of Civil Procedure filed with the Office of Administrative Hearings ("OAH") on March 20, 2020, with accompanying brief and attachments. Also, under consideration is North Carolina Farm Bureau Federation, Inc. ("NCFB") Petitioner's Motion for Partial Summary Judgment filed pursuant to Rule 56 of the North Carolina Rules of Civil Procedure also filed with OAH on March 20, 2020, with accompanying brief and documentation, as well as Petitioner's Supplemental Brief filed with OAH on March 23, 2020. Subsequent filings also being considered are: Respondent's Response to the Petitioner's Motion for Partial Summary Judgment filed with OAH on April 13, 2020; Petitioner's Brief in Opposition to Respondent's Motion for Summary Judgment filed with OAH on April 13, 2020; Third Party Intervenor's Response to the Cross-Motions for Summary Judgment filed with OAH on April 17, 2020; Respondent's Reply Regarding Cabarrus County filed with OAH on April 24, 2020; Respondent's Third Affidavit for Lawson filed with OAH on April 24, 2020; Respondent's Motion to Strike with accompanying Brief filed with OAH on April 24, 2020; and Petitioner's Response in Opposition to Respondent's Motion to Strike filed with OAH on May 4, 2020.

STANDARD OF REVIEW

The purpose of summary judgment is to bring litigation to an expeditious and efficient decision on the merits "where only a question of law on the indisputable facts is in controversy." McNair v. Boyette, 282 N.C. 230, 234-35, 192 S.E.2d 457, 460 (1972). The test is whether there is any genuine issue of any material fact.

Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. See Lee v. Shor, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). To entitle one to summary judgment, the movant must conclusively establish a legal bar to the non-movant's

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claim or complete defense to that claim. See Virginia Elec. And Power Co. v. Tillett, 80 N.C. App. 383, 343 S.E. 2d 188, cert. denied, 317 N.C. 715, 347 S.E. 2d 457 (1986).

Summary judgment is only proper under Rule 56 of the North Carolina Rules of Civil Procedure if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. The North Carolina Rules of Civil Procedure apply to proceedings in the Office of Administrative Hearings ("OAH") unless otherwise specified. 26 NCAC 03 .0101(b).

> A motion for summary judgment "shall be" granted "if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

Estate of Williams v. Pasquotank County Parks & Rec. Dep't, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)).

The burden is on the movant to establish the lack of a triable issue of fact. Boudreau v. Baughman, 322 N.C. 331, 338 S.E. 2d 849 (1988). The non-movant does not have a burden of coming forward until the movant produces sufficient evidence which negates the claims of the non-moving party to the degree of necessary certainty required. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

In this contested case, Respondent and Petitioner have filed motions for partial summary judgment. The parties have acknowledged in their pleadings that there is no genuine issue of material fact and that this matter should be disposed by partial summary judgment as to the issue of whether the Animal Waste Permits at issue herein should have been developed and comply with the North Carolina Administrative Procedure Act ("APA"), set forth in N.C. Gen. Stat. § 150B *et. seq.*, including the requirements for the adoption of generally applicable rules.

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well settled law that Findings of Fact are not required, and are in fact surplusage, in an Order for Summary Judgment. The following mixed Findings of Fact and Conclusions of Law are not intended as a full discourse to address all factual assertions from the submissions of the parties. The following mixed Findings of Fact and Conclusions of Law address the principle legal issues before this Tribunal in the cross-motions for partial summary judgment.

The issue for consideration by this Tribunal in the cross motions for partial summary judgment is whether the General Assembly intended to relieve Respondent from the necessity of compliance with the rulemaking provisions contained in the Administrative Procedure Act in adopting General Permits including three special conditions ("special conditions" or "conditions") within the General Permits, which are Phosphorus Loss Assessment Tests (PLAT evaluations), ground-water monitoring, and annual reporting.

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From the outset, it is important to note that the General Assembly, in enacting the applicable organic statues at issue, stated its intentions and ultimate goal in its "Legislative Findings and Intent." N.C. Gen. Stat. § 143-215.10A. It was of critical importance to the General Assembly to protect water quality and, in order to do so, enact prudent environmental safeguards based on the General Assembly's finding "that animal operations provide significant economic and other benefits to this State." N.C. Gen. Stat. § 143-215.10A. Balancing the benefits to the State of "animal operations" with environmental concerns, the General Assembly found it of vital concern to balance the growth of animal operations with environmental concerns. To address these concerns, the General Assembly stated its intention was to "establish a permitting program for "animal waste management systems" that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden." N.C. Gen. Stat. § 143-215.10A (emphasis added). N.C. Gen. Stat. § 143-215.1, entitled "Control of Sources of Water Pollution; Permits Required," further illustrates the importance of controlling water pollution at the heart of this permitting process.

The issues presented in these three consolidated contested cases address how best to procedurally accomplish the intentions of the General Assembly.

I. Rulemaking: General Applicability

In its Motion, Petitioner seeks summary judgment on the issue of whether certain conditions appearing in the Swine General Permit ("Swine Permit"), the Cattle General Permit ("Cattle Permit"), and the Wet Waste Poultry General Permit ("Poultry Permit") (collectively "Ag Permits" or "the Permits") constitute rules under the North Carolina Administrative Procedure Act and whether Respondent had authority to include these conditions in the Ag Permits without having secured appropriate authorization to do so through the APA's rulemaking procedures. In particular, Petitioner contests the requirement for the three special conditions that are contained in the three General Ag Permits.

Conversely, Respondent contends that the Ag Permits are not "rules," that the Division correctly concluded that the APA's rulemaking procedures did not apply to the Permits, and that judgment should be rendered for Respondent on the "rules" issues.

N.C. Gen. Stat. § 150B-1(a) sets forth the over-arching purpose of the General Assembly in enacting the Administrative Procedure Act ("APA"). It states that the purpose of the APA is to establish "a uniform system of administrative rule making and adjudicatory procedures for agencies," getting away from the sometimes archaic procedures used prior to its enactment. N.C. Gen. Stat. § 150B-1(b) makes an important point that the APA "confers procedural rights" on those to whom the Act applies.

N.C. Gen. Stat. § 150B-1(c) very specifically sets out the agencies that are granted a full exemption from all aspects of the APA in stating that "[t]his Chapter applies to every agency except . . . ." Only five agencies are listed. Respondent is not included in that list.

N.C. Gen. Stat. § 150B-1(d) very specifically lists the agencies that are exempt from rulemaking. It states, "Exemptions for Rule Making—Article 2A of this Chapter does not apply

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to the following . . . ." Twenty-three agencies are specifically enumerated. Respondent is not included in that list. Article 2A is entitled "Rules." Since Respondent is not listed in either N.C. Gen. Stat. § 150B-1(c) or § 150B-1(d), then it must be determined if Respondent is otherwise exempted from rulemaking.

A "rule" is defined in N.C. Gen. Stat. § 150B-2(8a) as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency." The General Permits, and more particularly the three special conditions, are agency regulations or standards that implement an enactment of the General Assembly.

Based upon the statutory definition, an initial question is whether the permits are of "general applicability." It is worth noting that the first line of the Swine General Permits in effect from October 1, 2014 until September 30, 2019 states that the "General Permit . . . may apply to any swine facility in the State of North Carolina" as defined by statute and meets particular criteria, indicative of general applicability.

N.C. Gen. Stat. § 143-215.10A, as referenced above, uses specific terminology, which is defined by statute. "Animal operation" is defined in part as

> [a]ny agricultural feedlot activity involving 250 or more swine, 100 or more confined cattle, 75 or more horses, 1,000 or more sheep, or 30,000 or more confined poultry with a liquid animal waste management system, or any agricultural feedlot activity with a liquid animal waste management system that discharges to the surface waters of the State.

N.C. Gen. Stat. § 143-215.10B(1).

"Animal waste management system" is defined by statute to mean "a combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste." N.C. Gen. Stat. § 143-215.10B(3).

N.C. Gen. Stat. § 143-215.10C(a) states:

> No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system for a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations . . . without first obtaining an individual permit or a general permit under this Article. The Commission shall develop a system of individual and general permits for animal operations and dry litter poultry facilities based on species, number of animals, and other relevant factors.

(Emphasis added)

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Thus, when the General Assembly stated its intention in N.C. Gen. Stat. § 143-215.10A was to "establish a permitting program" for "animal waste management systems" that will protect water quality, it was speaking to a very specific and well defined group of entities. All that fit within the definitions of "animal operations" with "animal waste management systems" are required to be permitted either by a general permit or by an individual permit. N.C. Gen. Stat. § 143-215.10C(a). The General Assembly's stated intention was that most would be by General Permit, but all will be permitted. N.C. Gen. Stat. § 143-215.10C(a). Individual permits are generally issued to a particular entity with the terms of the permit tailored to specific activities of the entity.

In its brief, Respondent acknowledges that individual permitting may be administratively inefficient where substantial numbers of entities are engaged in similar activities requiring permitting. See Resp.'s Brief, p. 3. In other words, it makes sense to cover as many as possible with General Permits. The General Assembly stated that its intent and preference was that most animal waste management systems would be permitted under a general permit, but nevertheless, all will be permitted. N.C. Gen. Stat. § 143-215.10C(a).

The General Assembly gave the EMC discretion to require some systems to be permitted under an individual permit. N.C. Gen. Stat. § 143-215.10C(a) It is acknowledged that an applicant always has some discretion to apply for individual permits. Respondent correctly notes that an operator may opt out of the General Permit; indeed, theoretically, every operator could opt out of the General Permit, but such would completely circumvent the intent and purpose of the General Assembly and the General Permitting process. There is no prohibition to these same questioned conditions being added to the individual permit.

Petitioner contends that the three special provisions being included in the General Permits are the product of a tainted process derived from a Settlement Agreement reached by Respondent from a Title VI lawsuit filed in federal court. The complainants in that lawsuit had filed suit in federal court rather than challenge the 2014 Ag Permits. The genesis of the terms of the special conditions under review are part of the Settlement Agreement reached in order to end the Title VI lawsuit.

Petitioner does not contend that all general permits for animal waste management systems should be adopted through the rulemaking process. It is the three special conditions that came from the Settlement Agreement that Petitioner contends contain substantive conditions and requirements that are generally applicable and should be adopted through rulemaking in accordance with the APA.

Respondent contends that the holding of Cabarrus Cty. Bd. of Educ. v. Bd of Trustees Teachers and State Employees' Ret. Sys., No. 371PA18, 2020 WL 1650903 (N.C., Apr. 3, 2020) does not apply to these consolidated cases. In Cabarrus Cty, the issue before the court concerned the applicability of a salary cap factor which applies to every retiree from state government service. Under the facts of Cabarrus Cty, every retiree's salary may be subject to a salary cap factor, although it is recognized that the cap factor will only actually apply to and affect a very small percentage of retirees. Similarly, in this instant case, permitting will be applied to every animal operation meeting the statutory definition, requiring an animal waste management

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system. Most will be through the General Permitting process, but all will be permitted. The actual numbers of farm operations to which the three conditions may apply may be relatively small, but such a fact is similar to the application of the salary cap in Cabarrus Cty. The actual numbers of applicability of the three conditions are not known but being relatively small does not negate the applicability of rulemaking. Just as in Cabarrus Cty, the conditions apply to all but do not affect all.

Based on the foregoing, it is concluded that statutes applicable to the three contested cases at issue herein are clear and unambiguous. It is further concluded that, indeed, the three special conditions are substantive conditions, which are agency regulations or standards that implement an enactment of the General Assembly. It is further concluded that the three conditions under review for inclusion in the General Permits are of "general applicability" and therefore meet the statutory definition of a "rule."

II. Rulemaking: Exemption

Respondent contends that Cabarrus Cty does not apply to these consolidated cases since there was no issue in that case concerning if the cap factor was a rule, but only an issue of implicit exemption from the rulemaking provisions of the APA. Cabarrus Cty. Bd. of Educ. v. Bd of Trustees Teachers and State Employees' Ret. Sys., No. 371PA18, 2020 WL 1650903 (N.C., Apr. 3, 2020). It is true that the Superior Court concluded in Cabarrus Cty that the cap factor meets the definition of rule and that conclusion is not disturbed by either the Court of Appeals or the North Carolina Supreme Court. However, Respondent's argument that since there is an issue in these cases as to whether the permit conditions are rules, then the rest of Cabarrus Cty does not apply is without merit. It is illogical to ignore the holding of the North Carolina Supreme Court in addressing an implicit exemption from rule. In this contested case, an issue to be determined is whether the special conditions meet the definition of rule so that the provisions of rulemaking in the APA apply to the conditions as discussed above. Having a separate issue does not negate the applicable provisions of the North Carolina Supreme Court decision in Cabarrus Cty.

The North Carolina Supreme Court observed that the sole issue for its determination was "whether the General Assembly intended to relieve the Board of Trustees from the necessity for compliance with the rule making provisions contained in the Administrative Procedure Act." Cabarrus Cty, p. 25. The Court further refined the issue as whether the facts of that case established that the General Assembly clearly intended that there was an implicit exemption from the rulemaking provisions of the APA.

Likewise, in this consolidated contested case, the inquiry does not end with a determination of general applicability and a determination that the conditions within the General Permits are rules. The further inquiry is to determine whether the Respondent is exempt from the APA.

The provisions of Chapter 150B are very clear about explicit exemption from rulemaking. It is without question that the General Assembly did not explicitly exempt Respondent from the Administrative Procedure Act in N.C. Gen. Stat. § 150B-1. Therefore, in

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this matter, it must be determined if the General Assembly intended to implicitly exempt Respondent from the APA just as in Cabarrus Cty.

The North Carolina Supreme Court "has consistently refused to recognize the existence of any implicit exemption from the provisions of the Administrative Procedure Act in the absence of a clearly stated legislative intent to the contrary." Cabarrus Cty, p. 29. The Court has made clear that implicit exemptions are "very much the exception rather than the rule and should only be recognized in the event that it is abundantly clear that the General Assembly intended such a result . . ." Cabarrus Cty, p. 25.

Respondent makes the point that the General Assembly is capable of expressly and specifically requiring an agency to be exempt from the provisions of the APA. While the Court in Cabarrus Cty agrees with that premise as far as it goes, the Court's decision is contrary to the contention of Respondent that it is exempt because the General Assembly did not avail itself of the opportunity to specifically exempt Respondent. The Court held conversely that had the General Assembly intended for Respondent to have been excluded from the APA, then the General Assembly would have inserted a specific provision in the statutes expressly stating that intention. Cabarrus Cty, p. 28-29.

The Court further observed in Cabarrus Cty "that 'implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be,' and that '[a]n intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation.'" Cabarrus Cty, p. 26 (quoting Empire Power Co. v. N.C. Dep't of Env't, Health and Nat. Res., 337 N.C. 569 at 591, 447 S.E.2d 768 at 781 (1994)). Thus, the intent should be abundantly clear from the four corners of the legislation itself.

Empire is the seminal case in administrative law for the State of North Carolina. The North Carolina Supreme Court in Empire describes the relationship between statutes of specific application, or "organic" statutes, versus statutes of general application such as the APA.

In reconciling the provisions of the Administrative Procedure Act with "organic" statutes, the North Carolina Supreme Court held that it will adopt the construction of organic statutes that harmonize with the APA and will reject such statutes only where the terms of the statutes are "so repugnant . . . that they cannot stand together." Cabarrus Cty, p. 27. This is consistent with the holding in Empire which held that when an agency's organic statute can be read in *pari materia* with the APA, then the Court must give effect to both. Empire, at p. 569.

In Cabarrus Cty, the Court refers often to Bring v. N.C. State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998). In Bring the North Carolina State Bar stands as a lone example of an agency to which the rulemaking provisions of the Administrative Procedure Act do not apply. The Court observed that the procedures for the State Bar are "distinct, thorough, complete and self-contained" and that the dictates of the applicable statute were so complete that there was no necessity to apply the APA. Cabarrus Cty, p. 9, 28.

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Thus, the question in the instant contested cases becomes whether the procedure set forth by the Respondents for the General Permits is sufficient so that the Respondent is implicitly exempt and the substantive and procedural safeguards of the APA should not apply.

The organic statutes at issue herein are N.C. Gen. Stat. §143-215.10A, -215.10B, -215.10C as discussed briefly above, as well as § 143-215.1. That General Permits may be issued under rules adopted in accord with Chapter 150B is established in N.C. Gen. Stat. §143-215.1(b)(3). That statute goes further to state that "[s]uch rules may provide that minor activities may occur under a general permit issued in accordance with conditions set out in such rules." N.C. Gen. Stat. §143-215.1(b)(4)d directs the Commission to consider various factors prior to determining what activities are "minor activities" for which a general permit may be issued.

The rules properly promulgated pursuant to N.C. Gen. Stat. §143-215.1 are in 15A NCAC 02T entitled "Waste Not Discharged to Surface Waters." 15A NCAC 02T .0101 et. seq. The rule establishing the conditions for issuing General Permits is 15A NCAC 02T .0111. Thus, it is these organic statutes and accompanying rules which must be read in *pari materia* and harmonized with the APA, giving effect to both, to determine if the Respondent is impliedly exempt from rulemaking.

The process set forth in 15A NCAC 02T .0111 bears some resemblance to procedures set forth in the APA. For example, 15A NCAC 02T .0111 provides for notice similar to the notice requirement for rulemaking in the APA. However, the notice requirements of 15A NCAC 02T .0111 are not as extensive as the requirements of the APA. The rule provides for public hearings as well, similar to the requirements of APA.

The process used by Respondent in this contested case allows for considerable public input from public hearings and both oral and written comments. The public input provides the Respondent with considerable information in making its decisions concerning the General Permits, in this instance for consideration of the proposed special conditions within the General Permits. In fact, during this process, Respondent received 6,500 written comments compared to 6 (six) written comments received during the previous review cycle. The General Permits were then issued approximately one month later, which begs the question of whether the agency considered "fully all written and oral comments received" as required in N.C. Gen. Stat. § 150B-21.2(f). Rhetorically, was there a meaningful review and to what degree was any credence given to the comments received; was there abuse of discretion—issues which are not before this Tribunal for determination at this juncture and are yet to be resolved. The numbers may in fact be entirely meaningless, the value of which would be determined as a matter of fact in a hearing on the merits.

The North Carolina Supreme Court observed in Cabarrus Cty that the discretionary decision made in that case should not be treated as though it is a ministerial decision. Cabarrus Cty, p. 37. Likewise, in these Animal Waste General Permits, the decision to add special conditions are not ministerial decisions.

In trying to reconcile the organic statutes and rules with the more general provisions of the APA, a remaining issue is the financial impact caused by the three questioned conditions within the General Permit.

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Respondent correctly observes that there is no requirement under current law as interpreted by the agency for it to have prepared a fiscal note or any amount of detailed financial impact on the farmers. Under the controlling statutes and promulgated rules in effect, there is no requirement to prepare a fiscal note or produce financial impact such as required in the APA.

There is information of record that Respondent has provided some information on the impact on farmers subject to the three questioned conditions in the General Permit. It is not determined if the financial information that the Respondent has offered is sufficient and meaningful, but it is not necessary to do so in order to determine summary judgment. It is obvious from the matters of record that the financial information is not equivalent to the financial and economic impact information that would be determined if following the APA and preparing a fiscal note. The absence of meaningful financial impact information is a major deviation from the provisions of APA.

As the North Carolina Supreme Court noted in Cabarrus Cty, the use of the rulemaking procedures in considering the economic impact causes the ultimate decision-maker to give serious consideration to the consequences of the rulemaking. Cabarrus Cty, p. 23. Thus, rulemaking makes a more definitive and certain determination of the financial impact.

It is not necessary to further dissect the organic statutes and applicable rules to determine how they equate with the safeguards of the APA. The provision of more detailed notice and the need for the financial impact are examples of how the organic statues and rules do not provide the substantive and procedural safeguards necessary to stand alone and not abide by the safeguards of the APA. 15A NCAC 02T .0111 does not equate with the substantive and procedural safeguards in rulemaking provisions of APA.

The North Carolina Supreme Court held in Cabarrus Cty that "[a]s long as there is 'a fair and reasonable construction of the organic statute that harmonizes it with the provisions of the [Administrative Procedure Act,] . . . it is our duty to adopt that construction.'" Cabarrus Cty, p. 27. (citing Empire at p. 593). Empire also holds that if the more specific organic agency statute can be read in *pari materia* with the more general statutes of the APA, then the Court "must give effect to both if possible." In these contested cases, there is a fair and reasonable construction of the statutes that harmonizes with the APA. The more specific statutes of the Respondent agency can be read in *pari materia* with the APA and both can be given effect. The two can peacefully coexist.

The General Assembly did not express or in any way make manifestly clear an intent to not apply the rulemaking provisions of the APA to the General Permits and the three special conditions. As addressed in Empire, in these contested cases, there is no such repugnancy between the organic statutes at issue and the APA to create an implied exemption from the APA rulemaking provisions. Empire, p 591. The organic statutes can indeed stand together with the APA. There is nothing in the organic statutes that suggests or implies that the General Assembly intended to dispense with the necessity for compliance with the rulemaking provisions of the APA. Cabarrus Cty, p. 30.

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Further, the organic statutes in these contested cases are not sufficiently detailed such as in Bring to suggest that the General Assembly intended to create an implicit exemption from rulemaking. Cabarrus Cty, p. 32.

The process used by Respondent in issuing the General Permits with these special conditions does not suffice to provide those who may be affected with the substantive and procedural protections that are inherent in APA-compliant rulemaking proceedings.

It is noted that the fact that the process for General Permits has been used by Respondent for quite some time and is perhaps the Respondent's interpretation of applicable statutes and rules, is not controlling. "It is ultimately the duty of courts to construe administrative statutes." State ex rel. Utils. Comm'n Staff, 309 N.C. 195, 306 S.E.2d 435 (1983).

Based upon the foregoing, it is not "manifestly clear" that the General Assembly intended that there is an implied exemption from rulemaking. Therefore, it is concluded that the provisions upon which Respondent relies in support of their argument for an implicit exemption lacks the substantive and procedural safeguards that are present in the rulemaking provisions of the Administrative Procedure Act. Cabarrus Cty, p. 36 (citing Bring at N.C. 659, S.E.2d at 91). The organic statutes and rules at 15A NCAC 02T .0101 et. seq. also lacks the procedural detail to recognize an implicit exemption from the rulemaking provisions of the APA. Cabarrus Cty, p. 36.

It is therefore concluded that the General Assembly did not clearly intend that Respondent was implicitly exempt from the rulemaking provisions of the APA. The General Assembly did not intend to relieve Respondent from the necessity to comply with the rulemaking provisions contained in the Administrative Procedure Act.

Now, therefore, the rulemaking provisions of the Administrative Procedures Act apply to Respondent and before any conditions may be added to the Animal Waste General Permits, Respondent shall submit such conditions to rulemaking pursuant to the Administrative Procedures Act.

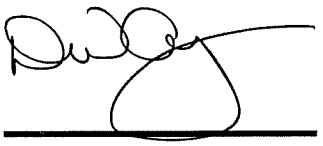
DECISION

Now, therefore, it is hereby ORDERED that Petitioner's Motion for Partial Summary Judgment is **ALLOWED**. The three conditions at issue in the three consolidated cases that are contained in the General Permits are rules, and Respondent is not exempt from rulemaking. Respondent erred by not adopting those conditions as rules as a matter of law. It is further ORDERED that Respondent's Motion for Partial Summary Judgment is **DENIED**.

SO ORDERED, this the 8th day of May, 2020.

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Donald W Overby
Administrative Law Judge

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CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 8th day of May, 2020.

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STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN FARM BUREAU, *et al,*

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY (F/K/A DEPARTMENT OF ENVIRONMENTAL QUALITY),

Defendant.

No. 2020-000148-MZ

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/

DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S 10/05/2020 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Each year, Michigan waters are threatened by millions of gallons of liquid waste and over a million tons of solid waste produced by industrial facilities called concentrated animal feeding operations (CAFOs). Most Michigan livestock operations are not CAFOs and do not produce waste on such a dangerous scale. Fewer than 300 of over 14,000 livestock operations raise half of all livestock in-state, underscoring the importance of controlling the large amount of waste produced by the relatively small number of CAFOs. The Michigan Department of Environment, Great Lakes, and Energy (Department) is authorized and obligated to control that pollution.

Plaintiffs ask this Court to find that the Department acted unlawfully in issuing the most recent iteration of a general permit under which CAFOs may seek coverage. And they ask this Court to do so before they finish a related contested case seeking the same relief, claiming that they need not exhaust the pending administrative remedy for at least three of their six claims.

The Department is entitled to summary disposition because Plaintiffs failed to exhaust their administrative remedies and state no claims for which they are entitled to relief. None of the gloss they apply through their response brief changes this unavoidable conclusion.

ARGUMENT

I. Plaintiffs may not bring this case before the contested case concludes.

The threshold question before this Court is whether Plaintiffs are required to exhaust their administrative remedies under Part 31 before they bring this action. They must.

First, Plaintiffs bring this case under MCL 24.264 and MCR 2.605. MCL 24.264 only applies to challenges to "rules," which the 2020 General Permit is not. Even so, that statute expressly requires exhausting administrative remedies before judicial review. MCL 24.264. Similarly, MCR 2.605's requirement for an "actual controversy" cannot be met because the

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Department "issues a ruling" after the contested case. *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 55 (2000). Meanwhile, Plaintiffs "risk" nothing because the Department has issued no certificates of coverage under the challenged permit yet. *Sterling Secret Serv, Inc v Mich Dep't of State Police*, 20 Mich App 502, 511 (1969).

Second, Plaintiffs are wrong that if exhaustion is required, they are exempt from its application. Through Claim IV, Plaintiffs assert that the new conditions in the General Permit are "not otherwise required by any law." (Compl, ¶ 363.) They are correct that no law exists specifically directing the Department to include specified conditions in CAFO permits. However, MCL 324.3101 requires the Department to develop permit conditions to assure compliance with state and federal standards. Explaining those standards, statewide compliance, and the relation between CAFOs and noncompliance is a complex and fact-driven analysis. Countering this claim requires significant briefing on the federal Clean Water Act and state water quality standards, better suited to the administrative proceeding.

Finally, Plaintiffs are wrong that parties who lack standing in the contested case proceeding would have standing here, leaving them without an administrative remedy to exhaust. The facilities that have no discharge subject to permitting or are covered under individual permits (and the organizations who represent them) need not apply for coverage under the 2020 General Permit and have no standing to challenge it in either case.

II. The challenged permit conditions are not generally applicable rules.

Plaintiffs concede that Part 31 authorizes the Department to issue general permits to various source categories of industrial pollution but claim that specific permit conditions are unlawful "rules" within the meaning of MCL 24.207. First, those conditions are not generally applicable to all livestock operations. Instead, they apply to a subset of highly polluting livestock operations, and even then, only to those that have applied for and received a certificate

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of coverage. Whether a facility must even permit its operations in the first place depends on operational decisions entirely within its control such as the number of animals it maintains and whether it handles waste in a way that presents no potential to discharge.

Plaintiffs cite to inapposite case law about when regulatory details contained in form agency documents must be promulgated as rules. For example, in *Spear v Michigan Rehabilitative Servs,* 202 Mich App 1 (1993), the Michigan Court of Appeals concluded that a Michigan state agency could not take a discretionary act referenced in federal law without first promulgating it as a rule. But that is not the same as the relationship between Michigan's Part 31 program and the federal Clean Water Act. If the Department does not establish and enforce permits sufficiently protective of water quality, it will fail its legislative mandate to safeguard Michigan's waters and fail to comply with the federal Clean Water Act. MCL 324.3103(1).

III. Part 31 does not violate the separation of powers doctrine.

Although the Department relies on succinct provisions of Part 31 for its authority to issue the general permit and all of its conditions, those provisions incorporate highly technical assessments of the health of Michigan's waterbodies and a complex federal statutory framework – hardly the kind of standard-less delegation susceptible to a separation of powers challenge. General permits include "appropriate" safeguards "to prevent unreasonable pollution that is against the public interest," and "assure compliance" with both state and federal standards. MCL 324.3106. Many Michigan watersheds do not comply with state water quality standards under Mich Admin Code, R 323.1041 *et seq.* By law, the Department must include conditions in the CAFO General Permit to prevent pollution from those industrial facilities into impaired waters.

IV. Plaintiffs fail to state a claim that the 2020 General Permit is void for vagueness.

Condition (I)(C)(8) of the General Permit establishes requirements for land application of manure by third parties. (Exhibit A.) Under that condition, CAFO owners must use manifest

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forms to "track the transfer and use of the CAFO waste," when the "waste is no longer under the operational control of the CAFO owner" generating the waste. Thus, the owner is responsible for the waste that it produces, including waste it transfers to third parties. The phrase "operational control" is not void for vagueness because, in context, it is "reasonably precise." *Shepherd Montessori Ctr Milan v. Ann Arbor Charter Twp*, 259 Mich App 315, 343 (2003).

Additionally, redacted communications related to the Department's enforcement of the 2015 General Permit are irrelevant. If anything, the complete communications show that the Department thoroughly investigates CAFOs to ensure enforcement is fair. (Exhibit B.)

V. Plaintiffs fail to state a due process claim.

Plaintiffs claim "protected property interests in their ownership of land and operation of their business" (Pls' Br, p 17), but those are not fundamental rights giving rise to due process claims. Even if they are, the permit conditions further a legitimate state interest and do not impact Plaintiffs in a way that would "shocks the conscience." *Mettler Walloon, LLC v Melrose Twp,* 281 Mich App 184, 198 (2008).

Regarding procedural due process, because the General Permit standards are not rules requiring formal APA rule-promulgating procedures, the extensive process the Department followed in developing the new permit conditions withstands constitutional challenge.

VI. Plaintiffs fail to make a takings claim.

To ensure compliance with state and federal standards regarding phosphorous pollution, CAFO permits contain requirements ensuring that CAFOs test the phosphorous level of fields before applying manure to them to ensure they are not oversaturating soils, which will result in water pollution. Condition (I)(B)(3)(h)(3) of the 2020 General Permit allows CAFOs to select which phosphorous assessment tool to use, either the Bray-P1, which was used in the 2015 General Permit, or the Michigan Phosphorous Risk Assessment (MPRA), which is better suited

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for water protection purposes. The Department included the first option after Michigan Farm Bureau and others provided public comment explaining why they preferred not to use the MPRA exclusively. (Exhibit C, pp 7-8.) To accommodate this choice, condition (I)(B)(3)(h)(1) requires CAFOs that use the Bray-P1 test to install a vegetative buffer and comply with setback requirements. Under condition (I)(B)(3)(h)(3), CAFOs that use the MPRA need only do one of the two. Even then, regardless of which testing condition a facility selects, condition (I)(B)(3)(h)(2) allows it to "demonstrate alternative practices" that "minimize the risk of transport of nutrients to surface waters" in lieu of a setback or vegetated buffer strip.

This is hardly Plaintiffs' complained of mandated wilderness conversion. Allowing phosphorous testing options and providing a protective condition as a backstop only for facilities that elect to use the less sensitive testing method is not an unconstitutional taking of property. *Loretto, Nollan/Dolan*, and *Penn Central* do not apply to such flexible conditions.

CONCLUSION AND RELIEF REQUESTED

For these reasons, along with the reasons articulated in its earlier brief, and, if scheduled, at oral argument, the Department requests that this Court grant its motion for summary disposition and dismiss Plaintiffs' complaint with prejudice. Alternatively, the Department asks this Court to hold this case in abeyance pending the resolution of the contested case proceeding.

Respectfully submitted,

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STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN FARM BUREAU, et al.,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000148-MZ

Hon. Cynthia Diane Stephens

Pending before the Court is defendant's motion for summary disposition filed pursuant to MCR 2.116(C)(4) and (C)(8). Because plaintiffs did not follow the available administrative process to its completion, the Court lacks subject-matter jurisdiction, and the motion is GRANTED as a result. This matter is being decided without oral argument. See LCR 2.119(A)(6).

I. BACKGROUND

The group of plaintiffs in this case is comprised of various organizations of farmers as well as numerous livestock farms. The farms at issue are regulated as Concentrated Animal Feeding Operations (CAFOs). Defendant in this case is the Department of Environment, Great Lakes, and Energy which, pursuant to statute, "shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by waste disposal of any person." MCL 324.3103(1). As

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part of its statutory role, defendant is charged with developing and maintaining a permitting system to ensure certain environmental standards are met. MCL 324.3106.

At issue in this case is what is known as the 2020 CAFO General Permit issued in accordance with Mich Admin Code, R 323.2191(1), which authorizes defendant to issue a general permit if it determines that "certain discharges are appropriately and adequately controlled by a general permit." Defendant's issuance of general permits is subject to conditions set forth in the Administrative Code. Mich Admin Code, R 323.2192(2). Permits issued by defendant have a fixed term of not more than five years. Mich Admin Code, R 323.2150. The general permit at issue in this case was first issued in 2000 and it is reissued every five years. The version of the CAFO General Permit at issue in this case was subject to notice and public comment earlier this year.

A person who seeks to be covered by a general permit must apply for coverage under the permit. Mich Admin Code, R 323.2192(a). After defendant receives an application, it must determine whether the applicant meets the criteria for coverage under the general permit. Mich Admin Code, R 323.2192(b). A person is not covered under a permit until after defendant issues a "notice of coverage" stating that the person meets the criteria set forth in the general permit. *Id.* Anyone who is "aggrieved by the coverage may file a sworn petition for a contested case hearing on the matter" with the department as provided in the Administrative Procedures Act (APA). Mich Admin Code, R 323.2192(c). See also MCL 324.3113(3).

Defendant has not issued any certificates of coverage under the 2020 CAFO General Permit. Instead, given the existence of a currently pending contested case proceeding regarding

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the 2020 CAFO General Permit—discussed below—defendant has declined to issue new coverage certificates, meaning that applicants are currently covered by prior permitting requirements.

Attached to defendant's motion for summary disposition as Exhibit B is a Petition for Contested Case Hearing submitted by plaintiff Michigan Farm Bureau and many of the named plaintiffs in the instant action. The petition states that it is an appeal of 2020 CAFO General Permit. The petition seeks "a hearing to evaluate the legality of certain conditions imposed by the General Permit that have a tenuous relation to water quality and cumulatively will have a significant adverse impact on food production in Michigan." The petition raises many of the same provisions of the General Permit that are at issue in the instant case, save for plaintiffs' claims—discussed below—that the permit is a rule promulgated without compliance with the APA, as well as constitutional claims.

As is the case with the currently pending contested case hearing, the 2020 CAFO General Permit is the parties' focus in the instant action. According to the allegations contained in plaintiffs' complaint, the 2020 CAFO General Permit imposes costly and burdensome requirements on this state's agricultural economy by implementing certain changes to CAFOs, including implementing a three-month ban on applying manure to crop fields during the winter. Plaintiffs filed a six-count complaint in this Court in which they allege a number of shortcomings by defendant under the APA, as well as constitutional violations.

II. ANALYSIS

Defendant has asked this Court to grant summary disposition in its favor pursuant to MCR 2.116(C)(4), for the reason that plaintiffs failed to pursue available administrative remedies to their completion. "Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when

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a plaintiff has failed to exhaust its administrative remedies." *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

"The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009). If the Legislature has expressed an intent to grant a state agency exclusive jurisdiction over a particular type of dispute, "courts must decline to exercise jurisdiction until all administrative proceedings are complete." *L & L Wine & Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citation and quotation marks omitted). Courts are to presume "that an administrative agency will correct its errors if given a chance to do so." *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 664; 669 NW2d 326 (2003).

At issue in this case is the 2020 CAFO General Permit. Under MCL 324.3112(5) of the Natural Resources and Environmental Protection Act, any person who is aggrieved by "the reissuance, modification, suspension, or revocation of an existing permit of the department executed pursuant to this section may file a sworn petition with the department setting forth the grounds and reasons for the complaint and requesting a contested case hearing on the matter pursuant to the" APA. The APA sets forth procedures for contested cases under MCL 24.271-MCL 24.288, as well as for the issuance of final decisions that are subject to judicial review. Regarding the right to judicial review under the APA, MCL 24.301 expressly requires the exhaustion of available administrative remedies and states that "[w]hen a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law." Until a petitioner pursues

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an administrative challenge to the issuance of a final decision, exhaustion has not occurred, and the administrative claim is not subject to judicial review. See *Hendee v Putman Twp*, 486 Mich 556, 573; 786 NW2d 521 (2010).

In the instant case, plaintiffs have not exhausted their available administrative remedies, as evidenced by the petition for contested-case hearing attached to defendant's motion for summary disposition as Exhibit B. By all accounts, that contested-case hearing remains pending at this time, meaning that the administrative process has not run its course. And because the administrative process has not run its course, plaintiffs failed to exhaust all available administrative remedies. The failure to exhaust administrative remedies deprives this Court of jurisdiction and requires dismissal. See *Cummins*, 283 Mich App at 691.

In response to the above analysis, plaintiffs contend that they are entitled to file the instant case as an original action under the express terms of the APA. They argue that MCL 24.264 of the APA gives this Court jurisdiction to determine the validity of administrative rules by issuing a declaratory judgment. The Court does not agree with plaintiffs' assertions. MCL 24.264 provides in pertinent part that:

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

The manner for seeking declaratory judgment under MCL 24.264 does not apply to the instant case. By all accounts, the requirements contained in the 2020 CAFO General Permit were not formally promulgated in accordance with the APA's procedures. Indeed, plaintiffs fault the

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2020 CAFO General Permit for this very (alleged) shortcoming. This is significant, because the Court of Appeals has held that only rules that have been formally promulgated as "rules" under the APA may be subjected to a challenge under MCL 24.264. See *Jones v Dep't of Corrections*, 185 Mich App 134, 138; 460 NW2d 575 (1990). See also *Slis v State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 351211; 351212), slip op at 15 ("In our view, MCL 24.264 reveals a general legislative intent to provide an avenue for a party to challenge a rule promulgated by an agency . . . ."). In other words, plaintiffs may not simply characterize the 2020 CAFO General Permit's requirements as "rules" and thereby invoke MCL 24.264. See *Jones*, 185 Mich App at 138.

Plaintiffs also argue that MCR 2.605, the Declaratory Judgment rule, allows them to maintain an original action in this Court against defendant. MCR 2.605(A)(1) applies in "a case of actual controversy" and it permits a court to "declare the rights and other legal relations of an interested party seeking declaratory judgment . . . ." Here, as defendant points out, there is no actual controversy for purposes of the Court Rule because the available administrative process has not yet run its course. See *Citizens for Common Sense in Gov't*, 243 Mich App at 55.

Next, and in the alternative, plaintiffs argue that if the exhaustion requirement would ordinarily apply, it should be excused in this case. They first contend that exhaustion of administrative remedies is unnecessary because they are challenging defendant's authority to act. See *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 192; 590 NW2d 747 (1998). However, the Court finds plaintiffs' citation to *Huggett* and the principle recognized therein to be inapposite. In *Huggett*, the plaintiffs' failure to exhaust administrative remedies was excused because the plaintiffs "did not challenge the propriety of defendant's denial of the permit but sought a declaration that defendant had no statutory authority to require a permit in the first place."

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The plaintiffs in that case argued that the Legislature "exempted the proposed activity from defendant's regulation." *Id*. Here, by contrast, there is no dispute that defendant has statutory authority to require and to issue the permits. There is also no dispute that defendant has statutory authority to regulate plaintiffs. The dispute raised by plaintiffs concerns the *manner* of that regulation. That dispute does not implicate defendant's authority to regulate plaintiffs in the first instance, and it does not excuse plaintiffs' failure to exhaust available administrative remedies.

Plaintiffs next argue that they are raising pure legal questions that do not require the development of a factual record, meaning that one of the typical rationales for exhaustion—deferring to an agency's ability to employ its technical expertise in a complex factual setting—is not present in this case. This state's jurisprudence recognizes an exception to the exhaustion requirement when judgment is sought on undisputed facts. See *L & L Wine & Liquor Corp*, 274 Mich App at 361-362. Here, though, plaintiffs' complaint raises factual issues which should first be examined during the administrative process. In this respect, plaintiffs are essentially questioning the necessity and efficacy of certain matters included within the 2020 CAFO General Permit. These allegations are typified, among many others, in ¶¶ 332, 338, 345, 347, and 355 of their complaint. These fact-intensive issues require the development of a factual record. Plaintiffs have also alleged in ¶ 363 of their complaint that some of the permit requirements are not "required by any law," such that defendant lacked the authority to issue them. However, defendant points out that MCL 324.3101 requires it to develop standards to assure certain regulatory goals are met. Comparing the statutory goals to the permitting conditions and determining whether the permitting conditions further those goals will also require the development of a factual record that is best suited for the administrative process.

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Next, plaintiffs argue that the presence of their constitutional claims excuses the exhaustion of administrative remedies. The assertion of constitutional questions can excuse a failure to exhaust available administrative remedies. See *Papas*, 257 Mich App at 664. However, merely characterizing an issue by using constitutional terms does not excuse the exhaustion requirement, particularly where there remain factual issues for the agency to resolve. See *id*. Here, the presence of the factual issues noted above convinces the Court that the presence of plaintiffs' constitutional claims does not excuse exhaustion. In addition, it must be remembered that plaintiffs are alleging that they suffered constitutional violations as part of the permitting process. This permitting process has not yet run its course, meaning that any errors that have allegedly occurred have not been submitted to defendant for correction. Again, "[i]t is presumed that an administrative agency will correct its errors"—if any—"if given a chance to do so." *Papas*, 257 Mich App at 664.

Finally, plaintiffs argue that exhaustion is not applicable to the farm plaintiffs who lack standing to pursue an administrative appeal in the first instance. These are plaintiffs that, according to defendant, are "individually-permitted" and who are not regulated under general permits. According to plaintiff, if there is no remedy to exhaust in the administrative proceeding due to these plaintiffs' lack of standing in the pending administrative process, there can be no exhaustion requirement. This argument is unconvincing. As an initial matter, plaintiffs have not specifically identified these purported plaintiffs. Furthermore, plaintiffs have failed to explain how plaintiffs who are not subject to general permits would have standing—either in the administrative process or in this Court, for that matter—to challenge general permits to which they are not subject. See *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (describing standing, in general). And in any event, where plaintiffs have not meaningfully developed this

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argument, the Court declines to find that it represents a reason to excuse the exhaustion of administrative remedies.

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED under MCR 2.116(C)(4) and this matter is DISMISSED because plaintiffs failed to exhaust available administrative remedies.[1]

December 30, 2020

Cynthia Diane Stephens
Judge, Court of Claims

[1] Because the Court lacks subject-matter jurisdiction, it will not address defendant's contentions regarding whether plaintiffs can state a claim on which relief can be granted.

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STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN FARM BUREAU, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant-Cross-Appellee.

Supreme Court No. 165166

Court of Appeals No. 356088

Court of Claims No. 20-000148-MZ

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

APPELLANT'S APPENDIX VOLUME THREE

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Dated: July 26, 2023

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

MICHIGAN FARM BUREAU, ET AL.,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

Defendant-Appellee.
_____/

Court of Appeals No. 356088

Court of Claims No. 20-000148-MZ

BRIEF OF APPELLEE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The jurisdictional statement of Plaintiffs-Appellants Michigan Farm Bureau *et al.* (Plaintiffs) is complete and correct. This Court has jurisdiction over this matter under MCL 600.309 and MCR 7.203(A)(1). Defendant-Appellee Michigan Department of Environment, Great Lakes, and Energy (Department) does not dispute that Plaintiffs timely filed their claim of appeal.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Under MCL 24.301, Plaintiffs must exhaust all administrative remedies before seeking judicial review of a permit issued by the Department. Plaintiffs sought judicial review of conditions in a general permit the Department issued for Concentrated Animal Feeding Operations (CAFOs) while their challenge to those conditions is pending in a contested case before an administrative tribunal. Does the Court of Claims lack subject matter jurisdiction over this case because Plaintiffs have failed to exhaust their administrative remedies?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Yes.

2. MCL 24.264 authorizes an action for a declaratory judgment to challenge administrative rules. The conditions in the general permit the Department issued for CAFOs are not promulgated rules and do not meet the definition of "rule" in Section 7 of the Administrative Procedures Act, MCL 24.207. Can Plaintiffs file a declaratory judgment action under MCL 24.264 to challenge the permit conditions?

   Appellants' answer: Yes.

   Appellee's answer: No

   Trial court's answer: No.

3. MCR 2.605(A) authorizes a court to issue a declaratory judgment to declare the rights and legal obligations of a party in a case of "actual controversy." Plaintiffs' contested case before the administrative tribunal remains pending and the Department has not made a final permit decision. Can Plaintiffs file a complaint for a declaratory judgment regarding their rights and legal obligations when the permit is not yet final and there is no actual controversy?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

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STATUTES AND RULES INVOLVED

Statutes

MCL 24.301:

When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. . . . A preliminary, procedural, or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

MCL 324.3112:

(5) A person who is aggrieved by . . . the reissuance, modification, suspension, or revocation of an existing permit of the department executed pursuant to this section may file a sworn petition with the department setting forth the grounds and reasons for the complaint and requesting a contested case hearing on the matter pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

Court Rule

MCR 2.605:

(A) Power to Enter Declaratory Judgment.

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

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INTRODUCTION

Make no mistake, what looks like a duck, walks like a duck, and quacks like a duck is a duck, not a rabbit, no matter how you dress it up. This case is a premature challenge to the same general permit Plaintiffs are currently challenging in a contested case before an administrative law judge. Plaintiffs dressed up the allegations in their petition for a contested case hearing by, among other things, calling the conditions in the general permit "rules" and filing the revised petition as a complaint for a declaratory judgment in the Court of Claims less than two and a half months after they filed their petition. This is the same case, and the Court of Claims correctly dismissed it to allow the administrative process to first play out.

Plaintiffs are not entitled to two simultaneous challenges to the conditions of the general permit the Department issued in 2020 for concentrated animal feeding operations (CAFOs). MCL 24.301 requires all would-be challengers to exhaust administrative remedies before filing suit in court. The Court of Claims properly granted the Department's motion for summary disposition because the court had no subject-matter jurisdiction to hear the case.

The Court of Claims also correctly rejected Plaintiffs' attempt to mischaracterize as administrative rules the conditions in the 2020 CAFO General Permit. The permit conditions are not promulgated rules and do not meet the definition of a rule under MCL 24.207 because they are not standards of general applicability and are an exercise of the Department's permissive statutory authority. This Court should affirm the lower court's decision to dismiss Plaintiffs' case because they failed to exhaust their administrative remedies.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Background–Part 31, Water Resources Protection

Under Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq.* (Part 31), the Department is bound to "protect and conserve the water resources of the state" and to control pollution of underground water, surface water, and the Great Lakes. MCL 324.3103(1). The Department is also responsible for taking "all appropriate steps" to "prevent" water pollution that the Department "consider[s] to be unreasonable" and harmful to the public interest. MCL 324.3106. These are "broad powers to regulate the pollution of Michigan's waters[.]" *Mich Farm Bureau v Mich Dep't of Environmental Quality*, 292 Mich App 106, 140 (2010).

Although the Department's authority to issue permits derives from Michigan state law, it exists in relation to the federal Clean Water Act. 33 USC § 1251 *et seq.* Like other federal statutes, the Clean Water Act authorizes states to control pollution sources in lieu of the federal government if the state programs meet certain requirements. 33 USC § 1342(b). Relevant to this case, the Clean Water Act requires all point source (i.e., direct) discharges to regulated waters to have permits. 33 USC § 1311. Those permits, referred to as National Pollution Discharge Elimination System (NPDES) permits, may be either individual or general permits. 33 USC § 1342(a) and 40 CFR 122.1 *et seq.* Individual permits are site-specific, whereas general permits are issued to permittees with similar operations or types of discharge and require a certificate of coverage to operate. The

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United States Environmental Protection Agency (EPA) delegated authority to Michigan to implement an NPDES program in 1973, and the EPA retains oversight over the program. *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 535 (2008).

The Department developed the 2020 CAFO General Permit to respond to increasing pollution of Michigan's waters and the Great Lakes from CAFOs, in light of its determination that the 2015 CAFO General Permit had been insufficient to meet those challenges. CAFO pollution includes fecal matter containing nutrients such as nitrogen and phosphorous and pathogens such as E. coli. Although manure can be used to fertilize crops, anything the land and crops cannot absorb eventually ends up in surface waters, where it can kill fish, cause algae blooms, and generally harm water quality. When manure produced by CAFOs is not properly maintained, handled, or applied as fertilizer, it pollutes Michigan's surface water. This is a serious threat to Michigan's waters and the Great Lakes. The Department's revised General Permit responds to the fact that earlier permits were insufficient to protect water quality threatened by CAFOs and water pollution.

Among other things, Part 31 requires that the Department develop and maintain a permitting program to allow otherwise prohibited discharges to Michigan's waters to occur in a proscribed manner. MCL 324.3106 and 324.3109; see also 33 USC § 1311 (prohibiting pollutant discharges under the Clean Water Act except in compliance with effluent limitations). That permitting program includes both individual NPDES permits developed on a case-by-case basis and general

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NPDES permits developed for use at specified types of facilities. Mich Admin Code, R 323.2106 and 323.2191. See also 33 USC § 1342(a) and 40 CFR 122.1 *et seq*. General permits, like individual permits, are subject to public notice and comment before the Department may issue them. Mich Admin Code, R 323.2191(2). The Department must reissue all NPDES permits, including general permits, every five years. Mich Admin Code, R 323.2150.

Since 2000, pursuant to a promulgated administrative rule for CAFO permits, Michigan CAFOs have been obligated to apply for individual permits or coverage under a general permit, except facilities that demonstrate "no potential to discharge." Mich Admin Code, R 323.2196(1)(b). Large CAFOs are defined as those with at least, among other animals, 700 dairy cows, 1000 cattle, 10,000 swine, 125,000 chickens, or 30,000 ducks. Mich Admin Code, R 323.2103(g). Medium CAFOs are those businesses with 200 to 699 cows, 300 to 999 cattle, 3,000 to 9,999 swine, 37,500 to 124,999 chickens, 10,000 to 29,999 ducks, or other animals designated in the rule. Mich Admin Code, R 323.2103(m). If the feeding operations house the animals for less than 45 days or have less than the designated number of animals, they are not subject to a CAFO permit. Mich Admin Code, R 323.2102(b). Although the Department updates the general permit every five years, each iteration of the general permit must contain specific requirements, including comprehensive nutrient management plans, adequate waste storage, testing protocols, as well as conservation practices and land application specifications that keep CAFO waste out of waters of the state. Mich Admin Code, R 323.2196(5).

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In addition to CAFOs, the Department issues general permits under Part 31 for other discharges such as wastewater stabilization lagoons, stormwater from municipal separate storm sewer systems, ballast water control, non-contact cooling water, and groundwater discharges including hydrostatic test water. Mich Admin Code R 323.2161a. General permits make the permitting process more efficient by allowing the Department to issue one permit for a category of facilities with similar operations and discharge characteristics, rather than having to issue hundreds of duplicative individual permits. Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 Envtl L 1215, 1222 (2008). In total, the Department issues approximately 31 general permits for various surface water discharges.[1]

Section 3112(5) of Part 31, MCL 324.3112(5), states that a person who is aggrieved by the Department's reissuance of a permit may seek a review of that decision by requesting a contested case hearing. The statute provides: "A person who is aggrieved by . . . the reissuance . . . of an existing permit of the department executed pursuant to this section may file a sworn petition with the department setting forth the grounds and reasons for the complaint and requesting a contested case hearing on the matter pursuant to the administrative procedures act[.]"

[1] https://www.michigan.gov/egle/0,9429,7-135-3313_71618_3682_3713-10252--,00.html

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2020 CAFO General Permit

The 2020 CAFO General Permit is a scientifically based periodic update that the Department issued in accordance with both state and federal law, after significant public involvement, including input from Plaintiffs.

Whether you call them large-scale industrial facilities or, as Plaintiffs call them, "family-owned farms," CAFOs are businesses that house and feed animals either to fatten them up for slaughter or for milk or eggs. (Appellants' Appendix #044, Complaint, ¶ 146). Because their primary industrial process is feeding animals, their primary waste is animal feces that frequently makes its way into the water. Untreated, that waste can contain pathogens such as E. coli and salmonella, nutrients, and other harmful components like heavy metals and antibiotics.

In this case, the Department put the 2020 CAFO General Permit out for public comment, held three public meetings and hearings statewide, and responded to over 2,400 public comments. (Appellants' Appendix #145, Department MSD, p 4.) Before the public comment period began, the Department held meetings with stakeholder groups and individual CAFO owners and trade groups, including multiple Plaintiffs. (*Id.*) As a result, the 2020 CAFO General Permit represents both the Department's scientific assessment of how to best control harmful water pollution from CAFOs and a negotiated approach towards doing so.

Individual facilities may choose to apply for a general or individual permit, but the Department ultimately determines which type of permit is appropriate for each facility. Mich Admin Code, R 323.2191(3) and (5). The conditions of an individual permit may be similar to those in the general permit and reflect the

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variability of the farms. No conditions in a general permit are binding until a CAFO applies for and receives a Certificate of Coverage. Mich Admin Code, R 323.2192(b). As a result of the pending contested case proceeding regarding the 2020 CAFO General Permit, the Department has not issued Certificates of Coverage under that permit. CAFOs that applied for such coverage must comply with prior General Permit Certificates of Coverage or individual permits.

Among other things, Plaintiffs object to conditions of the 2020 CAFO General Permit, particularly that it presumptively prohibits land-applying manure during January, February, and the first two weeks of March, when frozen ground is less able to absorb waste. (Appellants' Appendix #106, General Permit (B)(3)(f)(3).) They also object to a related condition that prohibits transferring manure to third parties for land application during that time so that CAFOs may not offload their waste onto third parties during the presumptively prohibited time. (Appellants' Appendix #107, General Permit (B)(3)(f)(4).)

In addition, Plaintiffs object to recordkeeping and reporting requirements for manure transferred during other times of the year so that CAFOs remain responsible for their waste. (Appellants' Appendix #115, General Permit (C)(8)(a).) Finally, Plaintiffs object to a condition requiring CAFOs to have a thirty-five-foot buffer strip between where they apply manure and waters of the state, consistent with 40 CFR 122.42(e)(1)(vi). (Appellants' Appendix #108, General Permit (B)(3)(h).)

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Michigan Office of Administrative Hearings and Rules Proceeding

As a result of their dissatisfaction with the conditions of the 2020 CAFO General Permit, Plaintiffs filed a petition for a contested case hearing in the Hearings Office on May 26, 2020. (Appellants' Appendix #148, Department MSD, p 7.) The contested case hearing "remains pending" and a hearing is scheduled for August 2021. (Appellants' Appendix #218, Opinion and Order, p 5.)

Proceedings Below

Two and a half months after Plaintiffs filed their petition for a contested case hearing, on August 6, 2020, Plaintiffs filed this case in the Court of Claims. Plaintiffs filed a 73-page complaint including 381 assertions, repeating the claims pending before the administrative tribunal, albeit via a more voluminous pleading. (Appellants' Appendix #012–085, Complaint.)

The claims include allegations that many of the conditions of the 2020 CAFO General Permit were substantively invalid because they were arbitrary and capricious, (Appellants' Appendix #077, Complaint, ¶ 345), they violated due process, (Appellants' Appendix #077–078, Complaint, ¶¶ 349–357), and the Department violated the Administrative Procedures Act, (Appellants' Appendix #074–077, Complaint, ¶¶ 324–340). The complaint specifically challenged several permit conditions such as the winter ban on land application of manure (Appellants' Appendix #057–062, Complaint, ¶¶ 224–251), a ban on manifesting manure during the winter months, (Appellants' Appendix #062–063, Complaint, ¶¶ 252–259), an alleged arbitrary reduction of phosphorus levels, (Appellants' Appendix #065–066,

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Complaint, ¶¶ 268–274), and a perceived requirement of thirty-five-foot buffer strips (Appellants' Appendix #066–068, Complaint, ¶¶ 275–289). In the associated contested case, Plaintiffs submitted pre-filed direct testimony addressing these same conditions and the effects on their operations.

The Department filed a motion for summary disposition in the Court of Claims on the grounds that the court lacked jurisdiction because Plaintiffs failed to exhaust their administrative remedies and they failed to state a claim upon which relief can be granted. (Appellants' Appendix #134, Department's MSD.) In its motion, the Department also argued that the 2020 CAFO General Permit was lawfully issued and is not, as Plaintiffs assert, a rule. (Appellants' Appendix #150, Department's MSD, p 9.)

Plaintiffs responded to the motion for summary disposition and alleged, among other things, that they were not required to exhaust their administrative remedies before bringing the case in the Court of Claims because they were challenging the validity of the permit conditions as unpromulgated administrative rules and, under Section 64 of the Administrative Procedures Act, MCL 24.264 and MCR 2.605, the court had jurisdiction over the case. (Appellants' Appendix #162–186, Pls' Br in Resp to MSD.)

The Court of Claims granted the Department's motion for summary disposition on December 30, 2020. It dismissed the case because "plaintiffs failed to exhaust available administrative remedies," since the contested case hearing is pending. (Appellants' Appendix #222, Opinion and Order, p 9.) The court rejected

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Plaintiffs' claim that they were excused from the requirement to exhaust administrative remedies because they were challenging the Department's "authority to act." (Appellants' Appendix #219 #, Opinion and Order, p 6.) The court stated that "there is no dispute that defendant has statutory authority to require and to issue the permits," and "[t]here is also no dispute that defendant has statutory authority to regulate plaintiffs." (Appellants' Appendix #220, Opinion and Order, p 7.) Rather, Plaintiffs challenge "the *manner* of that regulation" in the conditions of the general permit. (*Id.*) The court noted that Plaintiffs' claims raise "fact-intensive issues" regarding the "necessity and efficacy of certain matters included within the 2020 CAFO General Permit," and that comparing the specific conditions in relation to the Department's statutory goals was better suited for the administrative process. *(Id.*)

Finally, the court found unpersuasive Plaintiffs' argument that those businesses that are not subject to the 2020 CAFO General Permit had standing to challenge it. (Appellants' Appendix #221, p 8.) Plaintiffs "failed to explain how plaintiffs who are not subject to general permits would have standing—either in the administrative process or in this Court, for that matter—to challenge general permits to which they are not subject. (*Id.*)

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STANDARD OF REVIEW

The standard of review for a lower court's grant of summary disposition is *de novo* "to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118 (1999). See also *Spiek v Mich Dep't of Transportation*, 456 Mich 331, 337 (1998). Courts also review jurisdictional determinations *de novo* as questions of law. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556 (2002).

ARGUMENT

The Department's motion for summary disposition was properly granted pursuant to MCR 2.116(C)(4) because the Court of Claims lacked subject-matter jurisdiction. Plaintiffs failed to exhaust their administrative remedy of a contested case hearing available to them under MCL 324.3112(5) to challenge conditions in the 2020 CAFO General Permit. Plaintiffs filed a petition for a contested case hearing, and that hearing is not yet concluded. Under the plain language of the Administrative Procedures Act, Plaintiffs are required to exhaust "all administrative remedies" before they can seek judicial review. MCL 24.301. The Court of Claims therefore granted the motion for summary disposition. This Court should affirm.

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I. This Court should affirm the Court of Claims' grant of summary disposition because the Court of Claims has no subject-matter jurisdiction until Plaintiffs exhaust their administrative remedies.

An aggrieved party is prohibited from seeking judicial review until the person "has exhausted all administrative remedies available within an agency." MCL 24.301. The courts must move "very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency," and decline to act until the administrative remedies have been pursued to completion. *Citizens for Common Sense in Gov't*, 243 Mich App 43, 52 (2000), quoting *Judges of 74th Judicial Dist v Bay Co*, 385 Mich 710, 727 (1971).

A. Plaintiffs' administrative remedy is a contested case that is pending in the administrative tribunal.

The administrative remedy available to an aggrieved person challenging the agency's issuance of a permit is, as clearly set forth in MCL 324.3112(5), to file a petition for "a contested case hearing under the administrative procedures act." The administrative law judge hears the evidence, including technical documentary evidence and witness testimony, and determines if the permit was lawfully issued. MCL 324.1317(1).

If any party is dissatisfied with the outcome, it can seek review by an environmental permit review panel under MCL 324.1317(1). After the panel's review of the final decision, it "may adopt, remand, modify, or reverse" the tribunal's decision, and it then becomes the final decision of the Department. MCL 324.1317(4). Only after the agency issues a final determination is it subject to

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judicial review. *Id.*; Const 1963, art 6, § 28; MCL 24.301–306; *WA Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 522 (1995).

The purpose of exhausting administrative remedies is to avoid disrupting the administrative scheme, to provide an opportunity to develop a full factual record before the agency, and to offer the agency's technical competence. *Citizens for Common Sense in Gov't*, 243 Mich App at 53, citing *Int'l Business Machines Corp v State of Mich, Dep't of Treasury*, 75 Mich App 604, 610 (1977); see also *Judges of 74th Judicial Dist v Bay Co*, 385 Mich 710, 727–728 (1971). If given the chance, an administrative agency can correct any mistakes and will not fail to perform its duty. *Hutson v City of Royal Oak*, 28 Mich App 393, 395 (1970); *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 664 (2003).

When the Legislature expresses an intent to give an administrative tribunal exclusive jurisdiction to resolve initially any challenges to an agency action, even if not explicitly stated, the trial court should not exercise jurisdiction over the same areas until the administrative procedures are complete. *Papas v Mich Gaming Control Bd,* 257 Mich App at 658. For example, in *Papas*, the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq.*, vested the Gaming Control Board with the power to administer the act "for the purpose of licensing, regulating, and enforcing the system of casino gambling," and gave the Board jurisdiction over all gaming operations governed by the act, including non-Indian casinos. *Id.* at 659. The Court of Appeals held that the legislative intent was a clear delegation of authority, even though the statute did not use the phrase "exclusive jurisdiction," so

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the plaintiffs were required to exhaust administrative remedies with the Board before invoking the court's jurisdiction. *Id.* at 665–666. See also *L & L Wine and Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356 (2007) (holding that because the Michigan Liquor Control Code gave the Liquor Control Commission sole power to control the alcoholic beverage traffic and sales in the state, the parties were required to exhaust administrative remedies by seeking a declaratory ruling from the commission before invoking the court's jurisdiction).

Here, the lower court correctly held that Plaintiffs failed to exhaust their administrative remedies and were thus precluded from bringing this case in the Court of Claims. (Appellants' Appendix #222, Opinion and Order, p 9.) Under MCL 324.3112(5), Plaintiffs appropriately challenged the Department's issuance of the 2020 CAFO General Permit by filing a petition for a contested case hearing on May 26, 2020, under the Administrative Procedures Act. Two and a half months later, however, Plaintiffs filed this case in the Court of Claims, repeating the claims pending before the administrative tribunal, albeit in a more voluminous pleading, and adding a claim that the permit is an unlawfully promulgated rule and expanding their constitutional allegations. (Appellants' Appendix #012–084, Complaint.) Pre-filed direct testimony has been submitted to the administrative tribunal, and the contested case hearing is scheduled for August.

In other words, Plaintiffs have not yet exhausted their administrative remedies by completing the contested case hearing and then appealing the administrative law judge's decision, if desired, to the environmental permit review

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panel. MCL 324.1317. Only then is there a final decision by the Department that is subject to judicial review. MCL 24.301.

Plaintiffs claim that exhaustion of remedies is not required here because the Legislature did not grant an administrative tribunal exclusive jurisdiction to review the Department's decision to issue permits under Part 31. (Pls' Appeal Br, pp 28–32.) They are wrong. The Legislature unambiguously granted the Department authority in Part 31 to "protect and conserve the water resources of the state" and to control pollution of underground water, surface water, and the Great Lakes." MCL 324.3103(1). The Department is responsible for taking "all appropriate steps" to prevent water pollution including issuing permits to assure compliance with state standards and promulgating rules. MCL 324.3106. The Legislature also clearly stated in MCL 324.3112(5) that a "person who is aggrieved by . . . the reissuance . . . of an existing permit of the department executed pursuant to this section may file a sworn petition *with the department* setting forth the grounds and reasons for the complaint and requesting a *contested case hearing* on the matter pursuant to the *administrative procedures act*[.]" (emphases added).

Moreover, the Administrative Procedures Act plainly requires the Plaintiffs to exhaust their right to a contested case that the Legislature provided under MCL 324.3112(5): "When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case . . . , the decision or order is subject to direct review by the courts as provided by law. MCL 24.301. Taken together, the statutory scheme is analogous to the

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statutory grant of authority given to the Liquor Control Commission over sales and transport of liquor in *L & L*, and to the Gaming Control Board over non-Indian casinos in *Papas*. The delegation of authority in both cases required the parties to exhaust administrative remedies, just as it does here. Although Part 31 does not use the express term "exclusive jurisdiction," the legislative intent is clear, and Plaintiffs are required to exhaust administrative remedies before invoking the court's jurisdiction.

B. Plaintiffs may not circumvent the administrative exhaustion doctrine by claiming that their technical and fact-based challenges are pure legal questions.

The requirement to exhaust administrative remedies does not apply when a challenge involves a pure legal question. *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 192–193 (1998). Here, however, plaintiffs bring technical, fact-based claims that they attempt to style as pure legal questions. None of the cases they cite are on-point to excuse their obligation to exhaust administrative remedies before bringing this case.

This case does not present solely a legal question of the Department's "authority to act" as Plaintiffs allege. (Pls' Appeal Br, p 32.) They cite *Huggett v Dep't of Natural Resources*, 232 Mich App at 188, but in that case, the issue involved statutory interpretation, and the plaintiffs challenged the agency's authority to require a permit. The case "did not call for extensive findings of fact or technical expertise," as in this case. *Id.* at 193. Similarly, in *IBM Corp v State Dep't of Treasury, Revenue Div*, 75 Mich App 604, 610 (1977), and *Universal Am-*

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Can Ltd v Attorney General, 197 Mich App 34, 38 (1992), cited in Plaintiffs' brief, the plaintiffs challenged the statutory authority of the agency to regulate them. (Pls' Appeal Br, p 32.)

These cases are inapposite because, by their own admission, Plaintiffs do not challenge the Department's statutory authority to regulate CAFOs and issue general permits. Plaintiffs acknowledge that the Department's decision "to employ a General Permit is a 'decision . . . to exercise . . . a permissive statutory power.'" (Pls' Brief, p 23, quoting MCL 24.207.) They claim the "new substantive standards" in the 2020 CAFO General Permit are inappropriate. (*Id.*) In other words, Plaintiffs challenge the substantive conditions of the 2020 CAFO General Permit. As the Court of Claims emphasized, Plaintiffs "are essentially questioning the necessity and efficacy of certain matters included within the 2020 CAFO General Permit." (Appellants' Appendix #220, Opinion and Order, p 7.)

The specific permit conditions Plaintiffs are challenging involve detailed, fact-based scientific arguments about whether they appropriately protect Michigan's surface waters from CAFO manure and other pollution. For example, Plaintiffs challenge the efficacy of vegetated buffers or setback requirements (Appellants' Appendix #066–068, Complaint, ¶¶ 275–289), and the phosphorus restrictions on soil to which manure may be applied (Appellants' Appendix #065-066, Complaint ¶¶ 268–274), both of which involve technical expert testimony. They also challenge winter restrictions on land application of manure, which requires testimony from water quality experts to address runoff and the danger of

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E. coli and excess nutrients in water. (Appellants' Appendix #057–062, Complaint, ¶¶ 224–251.) In addition, the complaint alleges the conditions of the 2020 CAFO General Permit are "arbitrary and capricious," which necessarily requires analyzing the conditions and the scientific necessity for their inclusion in the permit. (Appellants' Appendix #077, Complaint, ¶ 345.) And in Count II of their complaint, Plaintiffs challenge the General Permit conditions as "substantively invalid." (*Id.* at ¶ 344.)

The complaint includes 136 assertions and seven counts, mixing legal and factual issues together. (Pls' Appeal Br, p 35, Complaint.) None are pure legal questions. No matter how Plaintiffs now frame the argument, their complaint challenges the substantive requirements of the 2020 CAFO General Permit. Contesting the conditions of the permit requires factual development for which administrative review is both appropriate and necessary before the Court of Claims has jurisdiction.

Plaintiffs argue that the question of the permit conditions' substantive validity is whether conditions are "rules" and "whether the rules at issue are outside of the scope of the enabling act or contrary to legislative intent." (*Id.* at 35–36.) Although Plaintiffs style these issues as "legal questions," the Court of Claims correctly characterized them as requiring analysis of Part 31 and the permit conditions to determine if they help protect water quality by limiting harmful discharges, thus falling within the Department's authority to develop water quality standards to meet regulatory goals. (Appellants' Appendix #220, Opinion and

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Order, p 7.) This necessarily requires scientific expertise with respect to water quality and pollutants.

Plaintiffs rely on *IBM* in their argument, but their reliance on the case is misplaced. (Pls' Appeal Br, p 33, citing *IBM*, 75 Mich App at 610.) In its holding, this Court noted that the issues did not require the agency's technical expertise or factual analysis. *IBM Corp*, 75 Mich App at 610.

The Court of Claims was correct when it determined "plaintiffs are essentially questioning the necessity and efficacy of certain matters included within the 2020 CAFO General Permit." (Appellants' Appendix #220, Opinion and Order, p 7.) It was also correct when it stated that "plaintiffs' complaint raises factual issues which should first be examined during the administrative process." (*Id.*) Because Plaintiffs refused to allow the administrative process to come to completion before filing this case, the Court of Claims had no jurisdiction.

II. MCL 24.264 prohibits Plaintiffs from bringing a declaratory judgment action because it authorizes challenges only to promulgated rules, and the 2020 CAFO General Permit conditions are not promulgated rules and do not meet the definition of a "rule" under the Administrative Procedures Act.

Section 64 of the Administrative Procedures Act provides for a declaratory judgment action to determine "the validity or applicability of a rule . . . if the court finds that the rule or its threatened application interferes with or impairs" the rights of the plaintiff. MCL 24.264. The statute is inapplicable if "an exclusive procedure or remedy is provided by a statute governing the agency." *Id.*

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The Court of Claims correctly determined that Section 64 of the Administrative Procedures Act does not provide the court with jurisdiction over this declaratory judgment action because the conditions in the 2020 CAFO General Permit that Plaintiffs challenge are not formally promulgated rules. (Appellants' Appendix #218, Opinion and Order, p 5.) The court did not address the related question of whether the conditions of the 2020 CAFO General Permit meet the definition of a "rule" under the Administrative Procedures Act and should be promulgated. They are not. For both reasons, Plaintiffs' complaint should be dismissed.

A. MCL 24.264 provides a declaratory judgment action to challenge only promulgated rules, not any Departmental action that Plaintiffs characterize as a "rule."

In a declaratory judgment action under MCL 24.264, a plaintiff challenges rules that have been "formally promulgated as a rule" after exhausting administrative remedies. *Jones v Dep't of Corrections*, 185 Mich App 134, 137 (1990). See also *Slis v State*, 332 Mich App 312, 342 (2020) (determining that MCL 24.264 provides "an avenue for a party to challenge a rule promulgated by an agency"). The statute does not provide for challenges to unpromulgated rules, nor does it include the ability to challenge "*any*" Departmental action that Plaintiffs characterize as a rule. (Pl's Appeal Br, p 18).

Here, there is no dispute that the Department did not include the conditions of the 2020 CAFO General Permit as promulgated rules, nor is there a need to do so. Thus MCL 24.264 is inapplicable. If Plaintiffs' assertion were true that MCL

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24.264 includes "*any* challenge" to the validity of an agency action that a party chooses to call a "rule" under MCL 24.207, then virtually every action the Department takes would be subject to review under this statute. See *City of Romulus*, 260 Mich App 54, 83 (2003) (suggesting that an agency "cannot be required to promulgate a rule regarding everything that it will *not* consider before issuing a permit. If this were the case, an agency would never be able to take any action."). All Plaintiffs would have to do to bring a declaratory judgment action challenging the Department's action is to characterize it as a "rule." This cannot be what the Legislature intended in defining a rule and this Court should interpret the definition of "rule" to include only promulgated rules, not any Department action a plaintiff calls a rule in a pleading.

Furthermore, the Court of Claims correctly relied on *Jones v Dep't of Corrections*, 185 Mich App 134 (1990), for its determination that only promulgated rules may be challenged. Plaintiffs maintain that *Jones* is not binding precedent on lower courts. (Pls' Appeal Br, p 1.) In furtherance of their argument, Plaintiffs cite MCR 7.215(J)(1) to claim that *Jones* is not binding on the Court of Claims because it was heard prior to November 1, 1990. Plaintiffs are wrong for two reasons. First, MCR 7.215(J)(1) establishes the precedential effect of appellate decisions on a "panel of the Court of Appeals," not the lower courts. Second, under MCR 7.215(C)(2), a published opinion of the Court of Appeals has precedential effect unless and until the Supreme Court alters the decision or questions the court's

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rationale. The Court of Claims committed no error in relying on this Court's decision in *Jones*.

Here, *Jones* is applicable and limits a declaratory judgment action under MCL 24.264 to challenges to promulgated rules. Because the conditions in the 2020 CAFO General Permit are not promulgated rules, Plaintiffs cannot bring an action in court pursuant to this statute.

Finally, Plaintiffs incorrectly assert that if the complaint is dismissed, they have no recourse to challenge the agency's action. (Pls' Appeal Br, p 22.) After the contested case has concluded, an appeal to the environmental permit review panel is heard, and the Department issues a final decision. Then, and only then, Plaintiffs can appeal to the circuit court.

B. The conditions in the 2020 CAFO General Permit are not rules.

The Administrative Procedures Act defines a 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. The definition excludes a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). See, e.g., *Village of Wolverine Lake v Mich State Boundary Comm*, 79 Mich App 56, 60 (1977). An agency does not need to promulgate a rule for every action or nonaction before issuing a permit. *City of Romulus*, 260 Mich App at 83.

Here, the conditions of the 2020 CAFO General Permit are not "rules" and thus Plaintiffs cannot invoke the court's jurisdiction pursuant to MCL 24.264. (Pls'

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Appeal Br, p16.) The conditions do not fit the definition of "rule" in MCL 24.207 for two reasons. First, they are not "generally applicable" standards for all CAFOs. The 2020 CAFO General Permit applies only to those that have applied for and received a certificate of coverage. Whether to seek a certificate of coverage depends on operational decisions that are entirely within a CAFO's control such as the number of animals it feeds, the length of time they remain on-site, and whether it handles waste in a way that presents no potential to discharge.

Furthermore, the conditions of the 2020 CAFO General Permit are excluded from the definition of "rule" because they represent the Department's decision to "exercise a permissive statutory power." MCL 24.207(j). The Department is charged with statutory authority to protect the waters of the state and to develop rules to carry out the legislative mandate. See MCL 324.3101 *et seq*., Part 31, NREPA. The Department chose to promulgate the CAFO Permit rule, Mich Admin Code, R 323.2196, to regulate CAFOs as point sources for water pollution and to provide CAFOs the option of operating under either an individual permit or under a certificate of coverage for a general permit. Issuing the 2020 CAFO General Permit is an exercise of permissive authority in furtherance of its statutory obligations and the conditions included within the permit are necessarily an exercise of that permissive authority as well.

Plaintiffs admit that the 2020 CAFO General Permit "is a decision to exercise permissive statutory power" and therefore is not a rule. (Pls' Appeal Br, p 23.) Yet they maintain that the conditions in the permit are rules. (*Id.*) Plaintiffs cannot

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have it both ways. The 2020 CAFO General Permit is a collection of permit conditions that protect public health and the environment. The conditions that make up the General Permit are an exercise of the Department's permissive statutory power.

In addition, if, as Plaintiffs assert, the conditions in general permits are rules, then all 31 general permits the Department issues would be null and void because they contain specific conditions in furtherance of water quality that were not promulgated as individual rules. As a practical matter, this argument would strip the Department of its authority to issue general permits. The Legislature clearly gave the Department the power to issue general permits. See, e.g., MCL 324.30304b; MCL 324.3112; MCL 324.3104. Plaintiffs' attempt to negate that authority should be rejected.

This Court's prior decisions reinforce the conclusion that the Department's decision to issue the 2020 CAFO General Permit is not a rule because it is an exercise of permissive statutory power. For example, in *City of Romulus*, the Department decided not to consider, for the purpose of issuing permits for underground injection wells for waste disposal, whether there was a market-driven need for a well. 260 Mich App at 72. The court determined that Part 111 of the NREPA, MCL 324.11101 *et seq.*, did not require the Department to promulgate a rule reflecting its decision not to consider the need for a proposed facility when making permitting decisions, and thus the Department's decision *not* to promulgate such a rule was an exercise of a permissive statutory power and was not a rule

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under MCL 24.207. *Id.* at 82. It noted that if the agency had to promulgate a rule for every action or nonaction before issuing a permit, it would never be able to take any action. *Id.* at 83. Thus, the permit was properly issued even though the agency did not promulgate a rule when making its permitting decision. *Id.* at 84.

Similarly, in *Faircloth v Family Indep Agency*, 232 Mich App 391, 394 (1998) the agency established an eligibility standard and criteria for considering applications for a disability assistance program that was created by statute. *Id.* The court determined the policy interpreted the statute or rule and as such, the agency did not need to promulgate it as a rule, even though it had a "substantial effect on the rights of a class of people." *Id.* at 404.

The cases cited in Plaintiffs' brief are inapposite because the cases do not involve the conditions of the general permits, but rather, focus on whether a nationwide permit is a rule. See *Nat'l Assoc of Home Builders v US Army Corps of Engineers*, 417 F3d 1272 (CA Fed, 2005)*; Alaska Comm Action v Aurora Energy*, 765 F3d 1169, 1172 (CA 9, 2014) (analyzing whether a discharge was covered under the general permit). Here, there is no question that the Department has authority to issue general permits. The agency promulgated the CAFO Permit rule in furtherance of its statutory authority to regulate waters of the state and Plaintiffs do not challenge the Department's authority to do so now. The conditions in the 2020 CAFO General Permit are an exercise of the Department's permissive statutory authority and are therefore not rules that Plaintiffs may challenge by filing an action for declaratory judgment.

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III. MCR 2.605(A) does not allow Plaintiffs to bring a declaratory judgment action because there is not an actual controversy yet.

Plaintiffs cannot bring a declaratory judgment action under MCR 2.605(A) because there is no actual controversy yet. The Court of Claims was correct when it ruled there is no actual controversy "because the available administrative process has not yet run its course." (Appellants' Appendix #218, Opinion and Order, p 5.)

A court has the power to enter a declaratory judgment to determine the parties' rights if there is an "actual controversy" within its jurisdiction. MCR 2.605(A)(1). While the rule is broadly construed, the existence of an actual controversy is a condition precedent to this relief so that the court does not decide "hypothetical issues." *Shavers v Kelley*, 402 Mich 554, 588–589 (1978). An actual controversy is not based on speculation regarding how an agency will act. See *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55–56 (2000) (holding that the court lacked jurisdiction to issue a declaratory judgment because the plaintiff's claim was not based on actual harm but on speculation concerning how the Secretary of State would have acted if called on). A court will not determine the interest of the party when it is merely contingent upon an event happening or in anticipation of conditions that may never occur. See *State Farm Mut Auto Ins v Wise*, 277 Mich 643, 646–647 (1936) (noting that a court cannot determine parties' rights "upon a state of facts which has not yet arisen, or upon a matter which is speculative, future, contingent, or uncertain").

Here, the Court of Claims was correct in determining that MCR 2.605 is inapplicable because there is no actual controversy yet. The Department issued the

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2020 CAFO General Permit on March 27, 2020. However, because there is a contested case pending in the administrative tribunal, the Department has not yet made a final decision on the permit. The Department has issued no certificates of coverage, and Plaintiffs are guided by the conditions of their prior permits. Until there is either a final determination by the tribunal regarding the contested case, or a final decision and order issued by the environmental permit review panel if Plaintiffs file a petition for review, there is no actual controversy for a court to decide. Even then, the EPA can still review any revised general permit and rescind its prior approval before the permit is final.

In addition, any alleged injury to Plaintiffs is speculative because there are contingencies that must be resolved before the permitting process is final. For example, not all Plaintiffs may be affected because not all CAFOs may be required to obtain coverage under the 2020 CAFO General Permit if they reduce livestock and fall under the requisite number to be categorized as large or medium CAFOs. In addition, some Plaintiffs could request an individual permit in lieu of coverage under the general permit. Mich Admin Code, R 323.2196(1)(b). Moreover, after the tribunal issues a final decision and order in the contested case hearing, the environmental permit panel can "adopt, remand, modify, or reverse" the determination if it is challenged by Plaintiffs. MCL 324.1317(4). Only after all these contingencies are met and the steps are completed is the Department's decision final. Then Plaintiffs can allege they are injured by the permit. Filing a declaratory judgment action now is premature.

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Further, Plaintiffs are unpersuasive in arguing that "[t]here is no reason to suspect that [the Department] will suddenly change [its] mind." (Pls' Appeal Br, p 26.) The contested case hearing gives Plaintiffs the opportunity to challenge conditions in the 2020 CAFO General Permit and for the Department to correct any errors and revise them. It is "mere speculation" for Plaintiffs to assume how the Department would act just as in *Citizens for Common Sense in Gov't*, 243 Mich App 43, 47 (2000). In that case, there was no actual controversy because the lawsuit was based on the assumption that the Secretary of State would not enforce the law. In addition, the plaintiffs did not first seek a declaratory ruling at the Secretary of State to test whether their assumption was accurate. *Id.* at 54. Here, Plaintiffs cannot simply assume the Department will not revise the 2020 CAFO General Permit. Since there is no decision by the tribunal and the environmental permit review panel has not acted, there is no actual controversy.

Plaintiffs also argue that an actual controversy exists because a declaratory judgment is "necessary to guide a plaintiff's future conduct in order to preserve his legal rights," but Plaintiffs have failed to demonstrate this need. (Pls' Appeal Br, p 25, quoting *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 624 (2014).) Currently, the prior certificates of coverage under the 2015 CAFO General Permit provide the conditions for Plaintiffs to follow. Plaintiffs are not yet subject to the terms of the 2020 CAFO General Permit until certificates of coverage are issued to facilities. Thus, they are wrong in stating that if they fail to abide by the Department's "maze of new

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conditions and restrictions, they are subject to drastic civil (or even criminal) consequences." (Pls' Appeal Br, p 26.) They are still subject to their prior permits. While they may eventually be subject to the new conditions, any alleged injury is speculative at best. Without being subject to the 2020 CAFO General Permit, Plaintiffs suffer no actual harm. There is therefore no actual controversy and MCR 2.605 does not allow them to bring a declaratory judgment action.

CONCLUSION AND RELIEF REQUESTED

The Court should affirm the lower court's grant of summary disposition and dismiss the case because Plaintiffs have failed to exhaust their administrative remedies and thus, the court lacked subject matter jurisdiction over the case. There is no applicable statute or court rule allowing Plaintiffs to bring a declaratory judgment action. For these reasons, the Department requests that this Court affirm the lower court's order granting judgment in favor of the Department pursuant to MCR 2.116(C)(4).

Respectfully submitted,

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STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN FARM BUREAU, *et al.*

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellee.
_____/

Court of Claims Case No: 20-000148-MZ

Hon. Cynthia Diane Stephens

Court of Appeals Docket No:

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Farm Plaintiffs' case presents a threshold legal question of whether MEGLE violated the Administrative Procedures Act, MCL 24.201 *et seq*., by adopting industry-altering mandates in its 2020 General Permit for CAFOs outside of the mandatory and quasi-legislative rulemaking process. That question is purely legal, as it addresses only APA procedure. MEGLE's response seeks to avoid any scrutiny of whether the agency circumvented the Legislature's required procedures by effectively making law. If adopted by this Court, MEGLE's position would create an intolerable loophole in the APA—allowing an agency to avoid scrutiny of its adherence to statutorily-required rulemaking procedures any time an agency completely circumvents them. Michigan law does not allow this.

MEGLE argues that if an agency does not promulgate a "rule," as required by the APA, it's failure to do so cannot be challenged under MCL 24.264. But MCL 24.264 applies to *all* "rules" as defined by the Legislature. MCL 24.207. And there is no exhaustion requirement before filing suit determine the *validity* of a rule. *Mich Farm Bureau v Dep't of Env't Quality*, 292 Mich App 106; 807 NW2d 106 (2011). Because Plaintiffs' Complaint properly alleges that the conditions of the 2020 General Permit for CAFOs are "rules" under MCL 24.264, the lower court erred in dismissing the case for exhaustion rather than deciding the legal questions presented here, namely: whether the new conditions EGLE imposes on the industry are "rules" under MCL 24.207; and, if so, whether those rules are "valid."

In defending the trial court's exhaustion demand, MEGLE attempts to rewrite Plaintiffs' Complaint as challenging the scientific justifications for these conditions. That, however, is not the case Plaintiffs filed. Rather, Plaintiffs' Complaint challenged the agency's unilateral imposition of a new "rule" outside of the APA's promulgation requirements. Because Plaintiffs are masters of their Complaint, MEGLE may not rewrite it as the trial court allowed them to do.

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Accordingly, because the Legislature in MCL 24.264 required courts to police agencies adherence to the APA and did not delegate agencies the power to self-police, the trial court erred in dismissing Plaintiffs' case. This Court should reverse.

ARGUMENT

I. Because MCL 24.264 applies to all "rules" as defined by MCL 24.207, an agency may not deprive a person of a cause of action by its non-compliance with the APA.

The Legislature created a cause of action allowing affected persons to challenge "the validity . . . of a rule," MCL 24.264, and defined what constitutes a "rule." MCL 24.207. Yet MEGLE asks this Court to limit MCL 24.264 by redefining the term "rule" in a way that allows a state agency to deprive a person of the ability to challenge the agency's non-compliance by evading the APA's rule-promulgation process altogether. MEGLE's circular position is contrary to a plain-language reading of the statute, non-sensical, and, if adopted, would leave persons affected by quasi-legislative agency actions that are not promulgated as rules without the ability to challenge the agency's adherence to the APA.

a. A rule by another name is still a "rule."

Whether an agency has promulgated a "rule" has no bearing on whether the agency action is a "rule." The APA ensures that "none of the essential functions of the legislative process are lost in the course of performance by agencies of many law-making functions once performed by our legislatures." *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 178; 428 NW2d 335 (1988). So, a "rule" is defined "broadly," *id*. at 183, exceptions are construed "narrowly," *AFSCME AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996), and an agency must follow APA procedures any time it imposes a "rule." *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015). That is true regardless of the name the agency gives its action: whether it calls rules "guidelines," MCL

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24.226, "standards," *Genetski v Benson*, Ct. of Claims Dkt. No. 20-0216-MM (Ex A), "form contracts," *AFSCME AFL-CIO*, 452 Mich at 10, or "permit conditions." *Delta Cty v Dep't of Nat Res*, 118 Mich App 458; 325 NW2d 455 (1982); (Ver. Compl., ¶¶ 304–323.) Indeed, the Legislature defined "rule" broadly to address the labeling issue. *Detroit Base Coalition*, 431 Mich at 183 ("The Legislature has defined 'rule' broadly so as to defeat the inclination of 'agencies to label as 'bulletins,' 'announcements,' 'guides,' 'interpretive bulletins,' . . . which, in legal operation and effect, really amount to rules . . . .'"). So, a "rule," as the Legislature defined it, is a "rule" no matter what an agency calls it or how an agency issues it. MCL 24.207. And the word "rule" in MCL 24.264 means what the Legislature defined it to mean in MCL 24.207. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

MEGLE's response to this plain-text reading of the APA is to claim that an agency gets to define whether a "rule" is a "rule" by whether the "rule" is promulgated. MEGLE argues that, unless it promulgates the rule, the rule's procedural validity cannot be challenged. In other words, an agency can evade scrutiny under MCL 24.264 by committing a grievous APA violation (i.e., not promulgating a "rule"), because MCL 24.264 is reserved for less-serious APA violations like failing to include a proper Regulatory Impact Statement. See *Mich Charitable Gaming Ass'n*, 310 Mich App at 559. This attempted evasion of scrutiny contradicts the plain text of the APA. MEGLE's omissions do not define a "rule"; the Legislature has already done so.

MEGLE also submits its sky-is-falling argument that if MCL 24.264 applies to any "rule" defined by MCL 24.207, then "[a]ll Plaintiffs would have to do to bring a declaratory judgment action challenging the Department's action is to characterize it as a 'rule.'" (MEGLE Br., p. 21.) But what constitutes a "rule" is judged by an objective, legal definition. Thus, an agency's defense that an *alleged* "rule" is *not* a "rule" under MCL 24.264 can be argued by an agency as a failure to

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state a claim under that section. Moreover, even if the Legislature's vehicle for policing agency compliance with the APA is subject to abuse, that is no reason to gut the statutory cause of action. And an agency's potential to diminish private rights by an abuse of the APA is a greater concern than MEGLE's bogeyman of meritless lawsuits.

b. The *Jones* case is non-binding, contrary to the plain language of MCL 24.207, and built on circular logic.

Lastly, MEGLE contends that the cause of action under MCL 24.264 is unavailable because this Court's decision in *Jones v Department of Corrections*, 185 Mich App 134 (1990) limits that action to "*promulgated* rules." MEGLE offers little response to Farm Plaintiffs' arguments that *Jones* is both non-binding and contrary to the statute. There is none.

On the question of whether *Jones* binds this Court, MEGLE argues both that: (1) *Jones* is precedential under MCR 7.215(J)(1) because that subrule applies only to this Court, *not the lower court*; and (2) MCR 7.215(J)(2) requires *this Court* to follow a panel decision until altered by the Supreme Court. (MEGLE Br., p. 21.) In other words, this Court is bound to *Jones* because the lower court was bound by it—even though this court would not be bound under MCR 7.215(J)(1)—and MCR 7.215(J)(2) binds this Court to apply *Jones* until overruled by the Supreme Court despite its lack of precedential value under MCR 7.215(J)(1). Confused? That is because MEGLE's argument misreads the court rules. The simple answer is that *Jones* is not precedential because "cases decided before November 1, 1990, *are not binding precedent*." *In re Stillwell Trust*, 299 Mich App 289, 299 n1; 829 NW2d 353 (2012) (emphasis added); MCR 7.215(J)(1).

Not only is *Jones* non-binding, but it is also wrong. *Jones* incorrectly defined "rule" under MCL 24.264 differently than the Legislature did under MCL 24.207. That should end the inquiry. But *Jones* is further problematic because its substituted definition of "rule"—borrowed from *Bentley v Department of Corrections*, 169 Mich App 264; 425 NW2d 78 (1988)—presumes that a

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rule must be a "*valid* rule" and reasoned that "a rule must be promulgated to be valid." *Jones*, 185 Mich App at 137 (citing *Bentley*); *Bentley*, 169 Mich App at 270. This logic falls apart given that MCL 24.264 is intended to provide a means of challenging "the *validity* . . . of a rule." (Emphasis added); (Appell. Br., pp. 20–21.) MEGLE's brief makes no effort to address either Plaintiffs' plain-language argument or the circular logic of *Bentley/Jones*.

Accordingly, MEGLE provides no basis for this Court to redefine "rule" under MCL 24.264 in a manner inconsistent with the Legislature's definition. The lower court erred by accepting such a rewrite of the statute.

II. The conditions of the General Permit are generally applicable standards of MEGLE that qualify as "rules."

Next, MEGLE contends that the conditions of the General Permit are not "rules" because: (1) they are not automatically applicable to *all* CAFOs; (2) the permit falls within the exception for discretionary authority; or (3) the caselaw from other jurisdictions holding that General Permits or their conditions are "rules" is inapplicable. MEGLE is mistaken on all counts.

First, a "rule" includes any "agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency." MCL 24.264. "[G]eneral applicability" distinguishes quasi-legislative action from quasi-adjudicative acts. *In re Rovas*, 482 Mich 90; 754 NW2d 259 (2008) (explaining the difference between quasi-legislative and quasi-judicial action). MEGLE here has agreed that these conditions are an exercise of "quasi-legislative" agency power. (Appell. App. # 156, MEGLE MSD at 15.) MEGLE now argues that the conditions are not generally applicable because they do not apply to "all CAFOs." (MEGLE Br., p. 23.) That is irrelevant. The conditions are standards of "general applicability" by applying to a class of persons, see *Hinderer v Dep't of Social Servs*, 95 Mich App 716; 291 NW2d 672 (1980), versus an individual adjudication. MEGLE is also mistaken—its

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General Permit conditions apply to all CAFOs whether directly through the permit or indirectly through identical standards in individual permits. Plaintiffs have adequately alleged those facts in their verified complaint. (Ver. Compl., ¶¶ 304–323.) It is not a basis for dismissal on a motion under MCR 2.116(C)(8).

Second, MEGLE misleadingly frames its argument that the conditions of the General Permit falls within the exception for an agency exercise of discretion under MCL 24.207(j). MEGLE asserts that "Plaintiffs admit that the 2020 CAFO General Permit 'is a decision to exercise statutory power' and therefore is not a rule." (MEGLE Br., p. 23.) Farm Plaintiffs made no such admission. Rather, Plaintiffs argued that "*deciding to employ a General Permit* is" a discretionary agency decision "[b]ut *MEGLE's new substantive standards*, written into the General Permit, *are not.*" (Appell. Br., p. 23) (emphasis added). Issuing a General Permit does not inherently require MEGLE to write new substantive standards that go beyond existing statutory law or promulgated administrative rules. Writing new standards of general applicability is thus not merely the choice to exercise a discretionary power (i.e., whether to use a General Permit or not)—it is a quasi-legislative act of rulemaking that must follow rulemaking procedures. Cf. *Spear v Mich Rehab Servs*, 202 Mich App 1, 4; 507 NW2d 761 (1993).

Third, MEGLE's attempt to distinguish the numerous cases that have held that General Permits or conditions of general permits are rulemaking proves Plaintiffs' point. *Nat'l Ass'n of Home Builders v US Army Corps of Eng'rs*, 417 F3d 1272 (CADC 2005); *Lakes Carriers Ass'n v USEPA*, 652 F3d 1 (CADC 2011); *NRDC v US EPA*, 279 F3d 1180 (CA9 2002); *Alaska Cmty Action on Toxics v Aurora Energy Servs, LLC*, 765 F3d 1169, 1172 (CA9 2014); (Ex. B to Pls.' Resp. Br, NC ALJ Decision.) MEGLE says these cases "do not involve the conditions of the general permit, but rather, focus on *whether a nationwide permit is a rule*." (MEGLE Br., p. 25) (emphasis

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added). In other words, MEGLE concedes these cases establish that a nationwide permit (the federal equivalent of a general permit) is a "rule" under the similar federal definition. 5 USC 551(4). But MEGLE argues that the constituent parts of a permit are not. MEGLE's position makes no sense. If a nationwide permit requires rulemaking in *whole,* its parts must be promulgated as well. In other words, if a permit is a "agency statement of general . . . applicability," *Id.*; *Nat'l Ass'n of Home Builders*, 417 F3d at 1284, the conditions that make up that permit are, too. Accordingly, the conditions of the General Permit are "rules." Farm Plaintiffs appropriately challenged them under MCL 24.264.

III. The Legislature has not required exhaustion of remedies to challenge an agency's adherence to the APA's rulemaking procedure.

MEGLE's position that Plaintiffs must "exhaust remedies" in the administrative appeal before filing this suit is likewise built on a false premise. This suit is not about the substance of or justification for the conditions of MEGLE's General Permit. It is a question of APA procedure.

The sole exhaustion required for an action under MCL 24.264 is a declaratory ruling request if the declaratory action asks the "applicability" of rules. *Mich Farm Bureau*, 292 Mich App at 106. There is none for an action challenging the "validity" of rules. *Id.* MEGLE's brief does not address this already-decided dispute between these same exact parties.

An administrative appeal of the permit via MCL 324.3112 allows a challenge to the agency's substantive positions. But MCL 24.264 requires that courts police APA procedure. The alternative is to allow agencies grade themselves on APA compliance. Nowhere has the Legislature committed a self-policing role to the agencies. Nor is MCL 24.301—addressed to quasi-judicial agency actions, LeDuc, Mich Admin Law (2013 Ed.), § 8:11—relevant to MEGLE's quasi-legislative actions here. Thus, exhaustion is not required because the Legislature's intent to allow for an action challenging adherence to APA procedure is clear.

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IV. Even if exhaustion applies, whether the General Permit conditions are "rules" within the meaning of MCL 24.207 is a pure legal question.

Even if this Court were to hold that the exhaustion doctrine requires a plaintiff ordinarily to pursue a lengthy administrative appeal before challenging an agency's noncompliance with the APA, the exception for legal issues applies. This matter involves legal questions under the APA.

MEGLE improperly seeks to reframe Plaintiffs' case as challenging the substance of the General Permit rather than the procedure of writing quasi-legislative, mandatory conditions. (MEGLE Br., p. 17.) MEGLE's argument ignores the longstanding rule that a plaintiff is the master of its own complaint. *Trowell v Providence Hosp and Med Centers, Inc*, 502 Mich 509, 540; 918 NW2d 645 (2018). Farm Plaintiffs have repeatedly averred that: "Plaintiffs do not seek to challenge the wisdom to [the General Permit] conditions here *but only the agency's power to issue them*." (Appell. Appx. # 173 and Br., p. 34). The legal questions here are simple: (1) are the General Permit conditions "rules" under MCL 24.207; and (2) has MEGLE failed to follow APA procedures or otherwise overstepped its legal authority in their issuance? No "extensive findings of fact or technical expertise" is required to discern compliance with the APA. *Hugget v Dep't of Nat Res*, 232 Mich App 188, 192; 590 NW2d 747 (1998). Those are legal questions that fall within the longstanding exception form exhaustion. *Int'l Bus Machines Corp v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977).

V. There is an actual controversy sufficient for Farm Plaintiffs to bring a declaratory action under MCR 2.605.

MEGLE next argues that there is "no actual controversy" because there is an ongoing administrative appeal and it is "speculative" what MEGLE may do. Hardly. MEGLE issued its 2020 General Permit, defended the *process or lack thereof* in this litigation, and defended the substance in the administrative appeal. The administrative appeal concerns the substantive justification for the permit (i.e., those "detailed, fact-based scientific arguments" about the necessity of such

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conditions). (MEGLE Br., p. 17.) This case is a matter of process. MEGLE took a final agency action by issuing its General Permit in March 2020. It is fantastical to suggest that it is "speculative" whether MEGLE may now reconsider and promulgate these conditions as rules.

Further, the "actual controversy" requirement does not mandate that Farm Plaintiffs negate every possibility that something might change that moots the litigation. It requires *only* that they "plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Shavers v Att'y Gen*, 402 Mich 554, 588–589; 267 NW2d 72 (1978). By pleading and supporting its allegations that MEGLE's issuance of the General Permit is a circumvention of rulemaking procedures, Farm Plaintiffs have met this requirement.

VI. MEGLE wholly ignores that it has repeatedly argued that several Farm Plaintiffs have no administrative remedy.

Lastly, MEGLE's response brief says nothing about the fact that it has repeatedly argued that a number of the Farm Plaintiffs have no administrative remedy that could be exhausted. (See Pls. Br., pp. 36–37.) Nor does it address the trial court's alternative standing rationale and the due-process concerns raised by its ruling without giving Farm Plaintiffs an opportunity to respond to that argument. (*Id.*, pp. 37–39.) At a minimum, these Plaintiffs are entitled to reversal, and the trial court must substantively determine their claims under MCL 24.264 and MCR 2.605.

Axiomatically, an exhaustion requirement cannot be applied if a party has no remedies to exhaust. *Att'y Gen v Diamond Mortgage Co*, 414 Mich 604, 611; 327 NW2d 805 (1982); *Great Lakes Gas Transmission Co v State Treasurer*, 140 Mich App 635; 364 NW2d 773 (1985). MEGLE has repeatedly, affirmatively argued that at least ten of the individual plaintiffs have no remedies to exhaust. (Appell. Appx. #187–191, Pls. Resp. Br., Ex. A; Appell. Appx #040–42, Ver. Compl. ¶¶ 126–135.) Further, the Association Plaintiffs represent those individuals and many others like them. These Plaintiffs' dismissal was inappropriate for this additional reason.

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Moreover, to the extent the trial court raised standing concerns not raised in MEGLE's motion for summary disposition and to which Farm Plaintiffs had no opportunity to respond, that *sua sponte* dismissal violated due process.

CONCLUSION AND RELIEF REQUESTED

MCL 24.264 allows affected persons to challenge the "validity . . . of a rule" as defined by the Legislature in MCL 24.207. Plaintiffs properly averred that MEGLE's legislated conditions of the 2020 General Permit are "rules." There is no need to conclude an appeal on the substantive, scientific merits of those conditions to present this threshold legal challenge concerning APA compliance. Alternatively, the issuance of the 2020 General Permit created a live controversy allowing Plaintiffs to sue under MCR 2.605(A). And, in any event, those Plaintiffs whom MEGLE has vehemently contended have no ability to participate in an administrative appeal may proceed with their challenge under both the statute and court rule.

For the reasons stated in Farm Plaintiffs' brief on appeal and in this reply, the Court should reverse the lower court's dismissal for lack of subject matter jurisdiction and remand for a determination on the merits.

Respectfully Submitted,

CLARK HILL PLC

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Dated: August 4, 2021

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EXHIBIT A

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STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT GENETSKI, County of Allegan Clerk, individually and in his official capacity, and MICHIGAN REPUBLICAN PARTY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity, and JONATHAN BRATER, Director of Elections, in his official capacity,

Defendants.
_____/

OPINION AND ORDER GRANTING SUMMARY DISPOSITION IN PART TO PLAINTIFFS AND GRANTING SUMMARY DISPOSITION IN PART TO DEFENDANTS

Case No. 20-000216-MM

Hon. Christopher M. Murray

Before the Court is defendants' January 20, 2021 motion for summary disposition filed pursuant to MCR 2.116(C)(4) and (C)(8), as well as plaintiffs' February 3, 2021 cross-motion for summary disposition filed pursuant to MCR 2.116(C)(8). Plaintiffs' cross-motion will be GRANTED in part with respect to Count II of the amended complaint because the challenged signature-matching standards were issued in violation of the Administrative Procedures Act. As a result of the grant of summary disposition in plaintiffs' favor on Count II, Count I of the amended complaint will be dismissed without prejudice. In addition, defendants' motion for summary disposition will be GRANTED in part with respect to Counts III and IV of the amended complaint.

I. BACKGROUND

The issues raised implicate signature-matching requirements for absent voter ballot applications and absent voter ballot return envelopes contained in this state's election law. MCL

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168.759 and MCL 168.761 require voters to sign applications for absent voter ballots in order to receive a ballot. In addition, this state's election laws require voters who choose to vote by absent voter ballot to sign their absent voter ballot return envelopes in order to have their ballots counted. MCL 168.764a. The signatures on the applications and the return envelopes are compared against signatures in the qualified voter file or those that appear on the "master registration card" in order to determine whether the signatures match. Signatures on applications or return envelopes that do not "agree sufficiently" with those on file are to be rejected. MCL 168.761(2). As of October 6, 2020, MCL 168.761(2)[1] was amended by 2020 PA 177 to give notice to voters' whose signatures do not "agree sufficiently" with those on file that their absent voter ballot application has been rejected. The purpose of the notice is to give voters the opportunity to correct inaccuracies with absent voter ballot signatures. The same notice requirements also apply to rejected signatures for absent voter ballots. MCL 168.765a(6). There is no dispute that this state's election law does not define what it means for signatures to "agree" or to "agree sufficiently" for purposes of comparing the signature on file with the signature on a received absent voter ballot application or absent voter ballot.

On the day PA 177 became effective, defendant Jocelyn Benson issued what defendants refer to as "guidance" for local clerks who are charged with inspecting signatures on absent voter ballot applications and ballots. The document, which was entitled "Absent Voter Ballot Processing: Signature Verification and Voter Notification Standards" largely mirrored guidance

[1] 2020 PA 302 further amended MCL 168.761 and other provisions of this state's election law. Those amendments do not become effective until June 27, 2021. This opinion and order only examines those provisions of the statute that are currently in effect at this time. And no issues have been raised with respect to the yet-to-be-effective statutory requirements.

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defendant Benson had previously issued. This guidance regarding signature verification forms the heart of the issues in the present case and it requires additional examination.

The stated purpose of the at-issue document was to "provide[ ] standards" for reviewing signatures, verifying signatures, and curing missing or mismatched signatures. Under a heading entitled "Procedures for Signature Verification," the document stated that signature review "begins with the presumption that" the signature on an absent voter ballot application or envelope is valid. Further, the form instructs clerks to, if there are "any redeeming qualities in the [absent voter] application or return envelope signature as compared to the signature on file, treat the signature as valid." (Emphasis in original). "Redeeming qualities" are described as including, but not being limited to, "similar distinctive flourishes," and "more matching features than nonmatching features." Signatures "should be considered questionable" the guidance explained, only if they differ "in multiple, significant and obvious respects from the signature on file." (Emphasis in original). "[W]henever possible," election officials were to resolve "[s]light dissimilarities" in favor of finding that the voter's signature was valid.[2]

The section on signature-verification procedures goes on to repeat the notion that "clerks should presume that a voter's [absent voter] application or envelope signature is his or her genuine signature, as there are several acceptable reasons that may cause an apparent mismatch." (Emphasis omitted). Next, the guidance gave excuses or hypothetical explanations for why signatures on absent voter ballot applications and absent voter ballots might not be an exact match to those that are on file. Finally, the document again mentioned the presumption when, in

[2] The guidance included a chart with what were deemed to be acceptable and unacceptable "defects" in signatures.

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conclusion, it stated that clerks "*must perform* their signature verification duties with the presumption that the voter's [absent voter] application or envelope signature is his or her genuine signature." (Emphasis added). By all accounts, the guidance set forth in that document was not limited to the then-upcoming November 2020 general election, nor has it been rescinded. Rather, it appears that the guidance remains in effect for local clerks with respect to upcoming elections.

II. PLAINTIFFS' COMPLAINT

Plaintiff Robert Genetski is the Allegan County Clerk. He, along with plaintiff Michigan Republican Party, filed a complaint alleging that defendant Benson's October 6, 2020 guidance is unlawful. The December 30, 2020 amended complaint alleges that the presumption in favor of finding valid signatures is unlawful, as is the directive to find "any redeeming qualities" for signatures. They contend that the presumption contained in the guidance issued by defendant Benson will allow invalid votes to be counted. Plaintiff Genetski has not, however, alleged that this guidance caused him to accept a signature that he believed was invalid.

The four-count amended complaint asks the Court to issue declaratory and injunctive relief with respect to future elections. Count I alleges that defendant Benson violated various provisions of this state's election law by issuing the challenged guidance regarding signature-matching requirements which allegedly conflicts with this state's election law. They ask the Court to issue injunctive relief to remedy the allegedly unlawful guidance. Additionally, they seek a declaratory ruling regarding the validity of defendant Benson's guidance.

Count II of the amended complaint alleges that defendant Benson's guidance was a "rule" as defined by the Administrative Procedures Act (APA) that was issued without compliance with the APA. Plaintiffs allege that the guidance is in fact a rule because it is generally applicable and

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requires local election officials to apply a mandatory presumption of validity to signatures. Plaintiffs ask the Court to declare that the "rule" is invalid.

Count III alleges a violation of Const 1963, art 1, §§ 2 and 5, as defendant Benson's guidance will result in the counting of invalid absent voter ballots which will ultimately result in the dilution of valid votes cast by this state's electorate. They argue that defendant Benson's guidance is so vague and imprecise that it cannot be applied uniformly throughout the state.[3]

Count IV alleges that plaintiff Genetski had a right to request an audit of his choosing under Const 1963, art 2, § 4(1)(h) as it relates to absent voter ballots. Plaintiffs acknowledge that defendants have announced and/or completed a state-wide audit of the November 2020 general election; however, according to plaintiffs, the audit does not address plaintiffs' concerns because it did not review whether signatures on absent voter ballots were properly evaluated. Plaintiffs ask the Court to declare that the right to request an audit under art 2, § 4(1)(h) encompasses the type of absent-voter-ballot review requested in the amended complaint. Plaintiff also suggests the manner in which such an audit should be conducted.

III. ANALYSIS

A. MOOTNESS AND RIPENESS

Defendants argue that this Court should refrain from evaluating the merits of plaintiffs' complaint because the issues are either moot or not ripe. With respect to mootness, there is no dispute that Count III, which raises an equal protection claim arising out of the November 2020

[3] Plaintiffs' briefing has conceded that this claim is now moot, with the November 2020 election having already come and gone. As a result, the Court will not address this claim in any additional detail.

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general election, is moot and must be dismissed. However, the Court declines to find that plaintiffs' remaining challenges are either moot or not ripe. Those issues concern the validity of guidance that is still in effect (Counts I and II), or an audit (Count IV) that, according to the plain text of art 2, § 4(1)(h) and MCL 168.31a, may be requested after the election has occurred. Moreover, defendants have not advanced a specific mootness/ripeness argument with respect to the audit claim. As a result, the Court declines to find that the issues raised in Counts I, II, and IV of the amended complaint would have no practical effect on an existing controversy or that it would be impossible to render relief. Cf. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016) (describing the mootness doctrine).

The Court also rejects defendants' contention that there is no actual controversy. As noted, plaintiffs seek declaratory relief. MCR 2.605(A)(1) requires that there be "a case of actual controversy" for the issuance of declaratory relief. "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). Here, plaintiffs—particularly plaintiff Genetski, who is a local clerk subject to the guidance at issue—sought a declaration regarding whether he is and will continue to be subject to guidance that by all accounts remains in effect at this time. This clearly presents an actual controversy that is appropriate for declaratory relief. See *id.*

Defendants argue that no actual controversy exists because the Legislature could change the applicable law, or because defendant Benson could decide to revoke the guidance. That argument would seek to turn the requirements of declaratory relief on their head and would eviscerate the purpose of declaratory relief. If the Court were to adopt the view that no actual controversy exists because the law could change, there could be no limit to the number of cases

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that could be dismissed as moot. Here, plaintiffs have sought a declaration as to their legal rights with respect to the validity of a currently existing directive issued by defendant Benson in advance of the next election. That the law could hypothetically change in the future is not a reason to avoid issuing a declaration of the parties' currently existing legal rights, as plaintiffs have sought here. Indeed, the ability to seek an advance declaration of legal rights on an existing policy is one of the very reasons why the declaratory judgment rule was adopted in the first instance. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012) (discussing the purposes of the declaratory judgment rule).

B. WHETHER DEFENDANT'S ACTIONS VIOLATED THE APA

The dispositive issue, as the Court see it, concerns the APA and whether defendant Benson was required to comply with the APA when she issued the "Signature Verification and Voter Notification Standards." The Secretary of State has authority, under MCL 168.31(1)(a), to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state." Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."[4] MCL 24.207. A "rule" not promulgated in accordance with the

[4] There is no dispute that defendant Benson is subject to the APA, generally. See MCL 24.203(2) (defining "agency" in a way that includes the Secretary of State). The only dispute is whether this particular action is subject to the APA.

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APA's procedures is invalid. MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205; 323 NW2d 652 (1982).

An agency must utilize formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002).

As for whether the guidance or directive at issue is a "rule" subject to the APA, the Court must look beyond the labels used by the agency and make an independent determination of whether the action taken by the agency was permissible or whether it was an impermissible rule that evaded the APA's requirements. *AFSCME*, 452 Mich at 9. In other words, the Court "must review the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id*. (citation and quotation marks omitted).

Examining the "Signature Verification and Voter Notification Standards" through that lens, the Court agrees with plaintiffs that the same constitutes a "rule" that should have been promulgated pursuant to the APA's procedures. The standards are generally applicable to all absent voter ballot applications and absent voter ballots, and it contains a mandatory statement from defendant, this state's chief election officer, see MCL 168.21, declaring that all local clerks

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"*must perform* their signature verification duties" in accordance with the instructions. (Emphasis added). In addition, clerks must presume that signatures are valid. That this presumption is mandatory convinces the Court that it is not merely guidance, but instead is a generally applied standard that implements this state's signature-matching laws. See MCL 24.207 (defining "rule"); *AFSCME*, 451 Mich at 8 (describing what constitutes a "rule" under the APA); *Spear v Mich Rehab Servs*, 202 Mich App 1, 5; 507 NW2d 761 (1993) (focusing on the mandatory nature of policies in support of the conclusion that the same constituted a "rule" under the APA).

Defendants cite three statutory exceptions to rulemaking—MCL 24.207(g), (h), and (j)—but the Court is not persuaded that the standards are saved by any of these exceptions. The first argument is that MCL 24.207(j), which is sometimes referred to as the "permissive power exception," applies and exempts the standards from the APA's rulemaking requirements. MCL 24.207(j) exempts from the APA's definition of "rule," a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." Here, defendant Benson points to MCL 168.31(1)(a) as the source of her "permissive statutory power." That statute provides that the Secretary of State "shall" "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state." MCL 168.31(1)(a). According to defendant Benson, MCL 168.31(1)(a) allows her to eschew the rule-making process in order to issue "instructions" like the standards at issue.

The Court disagrees. First, the Court disagrees with defendants' characterization of the standards at issue, for the reasons stated above. Second, the cited statutory authority requires defendant Benson to issue instructions that are "in accordance with the laws of this state." MCL 168.31(1)(a). Here, it is not apparent that the mandatory presumption of signature validity is "in

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accordance with the laws of this state."[5] To that end, nowhere in this state's election law has the Legislature indicated that signatures are to be presumed valid, nor did the Legislature require that signatures are to be accepted so long as there are any redeeming qualities in the application or return envelope signature as compared with the signature on file. Policy determinations like the one at issue—which places a thumb on the scale in favor of a signature's validity—should be made pursuant to properly promulgated rules under the APA or by the Legislature. See *AFSCME*, 452 Mich at 10.

Third, a review of the plain language of MCL 168.31(1) and of caselaw discussing the permissive-power exemption does not support defendants' argument.[6] The primary problem with defendant Benson's argument is that the language in MCL 168.31(1) is too generic to support her positions. MCL 168.31(1)(a) simply states that the secretary shall "issue instructions and promulgate rules pursuant to the" APA "for the conduct of elections." If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the APA rule-making process, then defendants would never have to issue APA-promulgated rules for any election-related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw. See, e.g., *AFSCME*, 452 Mich at 12. That is, while defendant has statutory discretion to decide whether to take certain actions, the implementation of her discretionary decisions—absent a more precise directive than is contained in the statutes at issue—

[5] Given that the standards are invalid for being enacted without compliance with the APA, the Court declines, for now, to determine whether the mandatory presumption imposed is contrary to the law, as plaintiffs have alleged in Count I. Resolution of that issue becomes unnecessary in light of the decision to grant relief to plaintiffs on Count II of the complaint.

[6] The Court incorporates and restates its reasoning and discussion of a similar issue from *Davis v Benson*, (Docket Nos. 20-000207-MZ & 20-000208-MM).

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must still adhere to the APA if that implementation takes the form of a rule. See *id*. (recognizing that the Department of Mental Health did not need to take a certain action; however, once the Department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule."); *Spear*, 202 Mich App at 5 (holding that while the agency's "decision to employ a needs test represents the discretionary exercise of statutory authority exempt from the definition of a rule under [MCL 24.207(j)], the test itself, which is developed by the agency, is not exempt from the definition of a rule and, therefore, must be promulgated as a rule in compliance with the Administrative Procedures Act."). Thus, while defendant Benson undoubtedly has discretion under MCL 168.31 to issue guidance or to instruct local clerks regarding signature validity requirements, the implementation of her discretionary decision can still be subject to the APA's requirements.

Furthermore, the caselaw relied on by defendants in arguing for a different conclusion is easily distinguishable, and, in some cases, even lends support for the Court's conclusion. See e.g., *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 187-188; 428 NW2d 335 (1988); *Mich Trucking Ass'n v Mich Pub Serv Comm*, 225 Mich App 424, 430; 571 NW2d 734 (1997); *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 47; 703 NW2d 822 (2005). In the cases cited above, the pertinent agency's enabling statute expressly or impliedly authorized the specific action later taken by the administrative agency; additionally, and significantly, those statutes also permitted the specific action to be achieved either through rulemaking *or* other means. See *Detroit Base Coalition*, 428 Mich at 187-188 ("The situations in which courts have recognized decisions of [an agency] as being within the [MCL 24.207(j)] exception are those in which explicit or implicit authorization for the actions in question has been found."). Here, MCL 168.31(1) provides generalized authority to defendant, and it lacks

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specificity with respect to the action taken (implementation of a mandatory presumption of signature validity), making the statute distinguishable from the statutes at issue in cases such as *Detroit Base Coalition, Mich Trucking Ass'n*, and *By Lo Oil Co.*[7]

Defendants raise concerns that this Court's interpretation of MCL 168.31(1)(a) would leave the term "instructions" without any practical effect. According to defendants, this Court's view would raise questions regarding whether defendant Benson could do anything when advising and directing local election officials as to the proper methods of conducting elections. The Court disagrees with the premise of defendants' position because, regardless of what is permissible under MCL 168.31, it is apparent that that which occurred here is not permissible, absent compliance with the APA. Here, defendant issued a mandatory directive and required local election officials to apply a presumption of validity to all signatures on absent voter ballot applications and on absent voter ballots. The presumption is found nowhere in statute. The mandatory presumption goes beyond the realm of mere advice and direction, and instead is a substantive directive that adds to the pertinent signature-matching statutes. And for similar reasons, defendants' arguments about efficiency and the need for quick action do not change the Court's decision. That is, nothing about the Court's opinion should be read as limiting the Secretary of State's ability to take quick action when she so desires. However, when that action takes the form of a rule, then the APA and MCL 168.31 require that the APA be invoked. In other words, the statute gives the Secretary of State

[7] Remarkably, defendants continue to place reliance on the conclusions of the majority in *Pyke v Dep't of Social Servs*, 182 Mich App 619; 453 NW2d 274 (1990). But as noted in prior opinions, Judge Shepard's dissent in *Pyke* was later adopted by the *Palozolo* Court, and as that Court noted, its decision was binding under what is now MCR 7.215(J)(1). *Palozolo v Dep't of Social Servs*, 189 Mich App 530, 533-534 & n 1; 473 NW2d 765 (1991). The *Pyke* Court's view on MCL 24.207(j) is irrelevant.

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the authority and the ability to meet the needs of a situation. But when the action taken constitutes a "rule" under MCL 24.207, the appropriate procedures must be followed.

Defendants' citation to the rule-making exceptions contained in MCL 24.207(g) and (h)—which are the primary exemptions cited in their reply briefing—are no more convincing. Turning first to MCL 24.207(g), this subsection is an exception to the APA's rule-making requirements for an "intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public." This exception is inapplicable, however, because the at-issue standard involves a mandatory presumption that directly affects local election officials' duties with respect to the determination of whether a voter's signature on either an absent voter ballot or a returned ballot will be deemed to be valid. Cf. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563; 609 NW2d 593 (2000) (finding that a directive fit within the exception where it did not create any obligations or require compliance).

Nor is defendants' citation to the exception contained in MCL 24.207(h) convincing. That exception applies to a "form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). This exception "must be narrowly construed and requires that the interpretive statement at issue be merely explanatory." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 248; 501 NW2d 88 (1993) (citation and quotation marks omitted). If the purported "interpretive" statement changes the requirements of the law it is alleged to have interpreted, the exception does not apply. *Id*. See also *Schinzel v Dep't of Corrections*, 124 Mich App 217, 221; 333 NW2d 519 (1983). Here, because nothing in this state's election law refers to a presumption of validity, let alone a mandatory presumption, the standards at issue cannot be

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deemed to be merely explanatory. See *Clonlara*, 442 Mich at 248, 251. That is, rather than merely explaining existing obligations under the law, the standards have imposed new obligations that do not appear within the plain language of this state's signature-matching statutes.

In sum, the standards issued by defendant Benson on October 6, 2020, with respect to signature-matching requirements amounted to a "rule" that should have been promulgated in accordance with the APA. And absent compliance with the APA, the "rule" is invalid. Whether defendant Benson had authority to implement that which she did not need not be decided at this time because it is apparent the APA applied to the type of action taken in this case. Accordingly, plaintiffs are entitled to summary disposition on Count II of the complaint, and the Court will dismiss Count I without prejudice as a result.

C. PLAINTIFFS' AUDIT CLAIMS ARE WITHOUT MERIT

Finally, the Court examines Count IV of the complaint, which concerns plaintiffs' request for an audit. Const 1963, art 2, § 4(1)(h), provides that a qualified Michigan voter has the right to have "*the results* of statewide elections audited" in a manner prescribed by law. (Emphasis added). MCL 168.31a, amended after adoption of the aforementioned audit language, provides as follows:

> (1) In order to ensure compliance with the provisions of this act, after each election the secretary of state may audit election precincts.
>
> (2) *The secretary of state shall prescribe the procedures for election audits* that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. *The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures*. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. *An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results*

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> *of at least 1 statewide race or statewide ballot question in a precinct selected for an audit*. An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.
>
> (3) Each county clerk who conducts an election audit under this section shall provide the results of the election audit to the secretary of state within 20 days after the election audit. [Emphasis added.]

Plaintiffs acknowledge that an audit of the November 2020 general election results was conducted. They argue that they have the right to request an audit with respect to the subject of their choosing—signatures on absent voter ballot applications and on absent voter ballots—and in the manner of their choosing. For at least two reasons this claim is not supported by art 2, § 4 or the implementing statute, MCL 168.31a. First, the constitution speaks of an audit of election *results*, not signature-matching procedures. Second, while the statute allows for an audit that includes "reviewing the documents, ballots, and procedures" used in the election, the statute plainly leaves it to the Secretary of State to "prescribe the procedures for election audits" and mandates that the Secretary of State shall conduct audits "as set forth in the prescribed procedures." In other words, there is no support in the statute for plaintiffs to demand that an audit cover the subject of their choosing or to dictate the manner in which an audit is conducted. MCL 168.31a(2) leaves that to the Secretary of State. As a result, plaintiffs have failed to state a claim on which relief can be granted as it concerns Count IV, and this count will be dismissed with prejudice pursuant to MCR 2.116(C)(8).

IV. CONCLUSION

IT IS HEREBY ORDERED that pursuant to MCR 2.116(C)(10), plaintiffs' cross-motion for summary disposition is GRANTED in part with respect to Count II of the amended complaint because the guidance issued by the Secretary of State on October 6, 2020, with respect to signature-matching standards was issued in violation of the Administrative Procedures Act.

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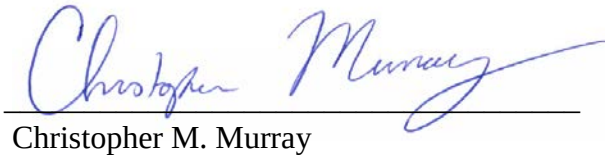
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IT IS FURTHER ORDERED that pursuant to MCR 2.116(C)(8) defendants' motion for summary disposition is GRANTED in part on Counts III and IV of the amended complaint.

IT IS FURTHER ORDERED that Count I of the amended complaint is dismissed without prejudice, for the reason that the at-issue standards are invalid under the Administrative Procedures Act.

This is a final order that resolves the last pending claim and closes the case.

Date: March 9, 2021



Christopher M. Murray
Judge, Court of Claims

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN FARM BUREAU, MICHIGAN MILK PRODUCERS ASSOCIATION, MICHIGAN PORK PRODUCERS ASSOCIATION, MICHIGAN ALLIED POULTRY INDUSTRIES, DAIRY FARMERS OF AMERICA, SELECT MILK PRODUCERS, INC., MICHIGAN CATTLEMEN'S ASSOCIATION, SNIDER FARMS, LLC, doing business as AIRPORT VIEW TURKEYS, ALPINE PORK, LLC, ATE FARMS, LLC, BEBOW DAIRY FARM, INC., doing business as BEBOW DAIRY FARM, BENNETT FARMS LIVESTOCK, LLC, doing business as BENNET FARMS LIVESTOCK, BLEICH DAIRY, BROOK VIEW DAIRY, LLC, doing business as BROOK VIEW DAIRY, BURNS POULTRY FARMS, INC., CAR-MIN-VU FARMS, LLC, doing business as CAR-MIN-VU DAIRY, CARY DAIRY FARM, INC., CARY'S PIONEER FARM, INC., CENTERWOOD FARMS, LLC, CENTRAL MICHIGAN MILK PRODUCERS, LLC, doing business as CENTRAL MILK PRODUCTION, CLOVER FARMS, doing business as CLOVER FAMILY FARMS, CONTRACT FINISHERS, INC., COURTER FARMS EAST FEEDLOT, LLC, doing business as COURTER FARMS EAST, COURTER FARMS WEST FEEDLOT, LLC, doing business as COURTER FARMS WEST, CROSSROADS DAIRY, LLC, D & K FARMS, DEN DULK DAIRY FARM, LLC, DEYOUNG PORK, INC., doing business as DEYOUNG PORK, INC., PLAINWELL, DOUBLE QUAD FARMS, LLC, doing business as DOUBLE QUAD FARMS, DUTCH MEADOWS DAIRY, LLC, doing business as DUTCH MEADOWS DAIRY, DYKHUIS FARMS, INC., doing business as BASELINE FARM, EHINGER FARM, RIVERBEND FARM, SHAMROCK FARM, and VILLAGE CENTRAL SANDY RIDGE, EDGE

FOR PUBLICATION
September 15, 2022
9:10 a.m.

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WOOD DAIRY, LLC, doing business as EDGE WOOD DAIRY, FAIRGROVE FARMS, INC., doing business as FAIRGROVE FARMS, GERNAAT FAMILY FARMS, GW DAIRY, LLC, HALBERT DAIRY, LLC, doing business as HALBERT DAIRY, DJN CATTLE FARMS, INC., doing business as HALLIWILL FARMS, HICKORY GABLES, INC., doing business as HICKORY GABLES, HIGH LEAN PORK, INC., doing business as HIGH LEAN PORK 3, HIGHLAND DAIRY, LLC, doing business as HIGHLAND DAIRY, GEERLINGS HILLSIDE FARMS, LLC, doing business as HILLSIDE FARMS-FENNVILLE, HILLSIDE FARMS-OVERISEL, and HILLSIDE FARMS-OVERISEL HOG BARNS, HARVEST HILL FARM, HASS FEEDLOT, LLC, doing business as HASS FEEDLOT HOME FARM and HASS FEEDLOT 2, HOLLOO FARMS, LLC, doing business as HOLLOO FARMS, HURON PORK, LLC, INGLESIDE FARMS, J&J RUSSCHER PROPERTIES, LLC, J AND A PORK, LLC, doing business as J AND A PORK, JMAX, LLC, doing business as JMAX DAIRY, KARNEMAATS, LLC, KOBER FARMS, LLC, KY-10 FARMS, LLC, doing business as KY-10 FARMS, LAIER FARMS, INC., doing business as LAIER FARMS, LUCKY 7 DAIRY, LLC, LUCKY 7 FARMS, LLC, MYERS FARMS, LLC, doing business as MYERS FARMS, NEW FLEVO DAIRY, INC., doing business as NEW FLEVO DAIRY, NOBIS FARMS, LLC, doing business as NOBIS DAIRY FARMS, NVF, INC., OOMEN BROTHERS, INC., doing business as OOMEN BROTHERS HOGS, PACKARD FARMS, LLC, doing business as PACKARD FARMS, PAYLA MEADOWS, LLC, PEACEFUL ROAD FARM, LLC, doing business as PEACEFUL ROAD FARMS, PERFORMANCE FARMS, LLC, PETRO FARMS, LLC, POLL FARMS, INC., PRAIRIE VIEW DAIRY, LLC, PRECISION PORK FARM, INC., doing business as PRECISION PORK FARM, PREFERRED HOG FARMS, INC., doing business as PREFERRED HOG 146th, THE PRESTON FARMS, LLC, doing business as PRESTON HOG FARMS, PRIDGEON FARMS, LLC, doing business as PRIDGEON FARMS, PSY FARMS, R & R PORK, LLC, doing business as R & R PORK,

RAPID RIDGE FARMS, LLC, doing business as RAPID RIDGE, RED ARROW DAIRY, LLC, doing business as RED ARROW DAIRY, RUGGLES BEEF FARMS, LLC, doing business as RUGGLES BEEF FARMS, S & T BARNS, LLC, doing business as S & T BARNS-BOOTH, S & T BARNS-FAWN RIVER, S & T BARNS-TSC, and S & T BARNS-HAENNI, SAND CREEK DAIRY, LLC, SCENIC VIEW DAIRY, LLC, doing business as SCENIC VIEW DAIRY, SCHURING SWINE, LLC, doing business as SCHURING FARMS, SCOTT MCKENZIE FARMS, SELDOM REST HOG FARM, LLC, doing business as SELDOM REST HOG FARM, SIDE STREET PORK, LLC, doing business as SIDE STREET PORK, SKINNER FARMS, LLC, doing business as SKINNER FARMS, STEENBLIK DAIRY, INC., STEWART FARMS, LLC, doing business as STEWART FARMS, STOREY FARMS, LLC, STOUGHTON CREEK FARMS, LLC, doing business as STOUGHTON CREEK FARMS, SWISSLANE DAIRY FARMS, INC., doing business as SWISSLANE FARMS, TERREHAVEN FARMS, INC., doing business as TERREHAVEN FARMS, VALLEY VIEW PORK, LLC, doing business as VALLEY VIEW PORK, VAN OEFFELEN FARM SERVICES, VANDERPLOEG HOLSTEINS, LLC, doing business as VANDERPLOEG HOLSTEINS, VDS FARMS, LLC, doing business as VDS FARMS-FULTON and VDS FARMS-S AVENUE, VELD FARMS, LLC, doing business as VELD FARMS, WALNUTDALE FARMS, INC., doing business as WALNUTDALE FARMS DORR TWP, WIL-LE-FARMS, INC., doing business as WIL-LE FARMS, WILLOW CREEK FARMS, WILLOW POINT DAIRY, LLC, doing business as WILLOW POINT DAIRY, WILSON CENTENNIAL FARM, LLC, BAKERLADS FARM, DEER CREEK POULTRY FARM, HARTLAND FARMS, INC., doing business as HARTLAND FARMS, HUDSON DAIRY, LLC, doing business as HUDSON DAIRY, MAYFLOWER DAIRY, LLC, MEADOW ROCK, LLC, doing business as MEADOW ROCK DAIRY, MEDINA DAIRY, LLC, doing business as MEDINA DAIRY, NOBEL FAMILY DAIRY, LLC, OTTAWA TURKEY FARM, doing business as

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OTTAWA TURKEY FARM 112TH, and
CROCKERY CREEK TURKEY FARMS, LLC,
doing business as CROCKERY CREEK - 80TH,

Plaintiffs-Appellants,

v

No. 356088
Court of Claims
LC No. 20-000148-MZ

DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellee.

Before: GADOLA, P.J., and SERVITTO and REDFORD, JJ.

REDFORD, J.

Plaintiffs appeal as of right the Court of Claims opinion and order granting defendant, Michigan Department of Environment, Great Lakes, and Energy's (EGLE), motion for summary disposition and dismissal of plaintiffs' case for lack of jurisdiction because plaintiffs failed to follow the available administrative process to its completion. For the reasons stated in this opinion, we conclude the trial court achieved the correct result, albeit for different reasons, and we therefore affirm the order which granted EGLE's motion for summary disposition and dismissal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are several farmers associations and numerous livestock farms. The farms are regulated as concentrated animal feeding operations (CAFOs) under the federal Clean Water Act, 33 USC 1251 *et seq*. and state law pursuant to Part 31 (Water Resources Protection), MCL 324.3101 *et seq*., of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. CAFOs are lots or facilities where animals are confined and fed or maintained for 45 days or more in any 12-month period, 40 CFR 122.23(b)(1), which are regulated as point sources from which pollutants are or may be discharged. 33 USC 1362(14). Discharges from point sources are permissible pursuant to permits under the National Pollutant Discharge Elimination System (NPDES). 33 USC 1311(a); 33 USC 1342(a)(1). Michigan administers the NPDES within this state pursuant to the Clean Water Act and NREPA. With few exceptions, persons who discharge waste into the surface or groundwaters, or on the ground of this state, as a point source discharge, must apply for and obtain from EGLE a valid permit. Mich Admin Code R 323.2106; R 323.2109.[1]

[1] " 'Discharge' means any direct or indirect discharge of any waste, waste effluent, wastewater, pollutant, or any combination thereof into any of the waters of the state or upon the ground." Mich Admin Code, R 323.2102(n).

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Mich Admin Code, R 323.2191(1), authorizes EGLE to issue a general permit if it determines that "certain discharges are appropriately and adequately controlled by a general permit." EGLE's issuance of general permits is subject to conditions set forth in the Administrative Code. Mich Admin Code, R 323.2192(2). Such permits have a fixed term of not more than five years but reissuance is permitted. Mich Admin Code, R 323.2150. CAFOs are point sources that require permits for discharges related to "all animals in confinement at the operation and all production area waste and CAFO process wastewater generated by those animals or the production of those animals, regardless of the type of animal." Mich Admin Code, R 323.2196(1)(a). CAFOs must apply for coverage under a general permit. Mich Admin Code R 323.2192(a). After receipt of an application, EGLE must determine whether the applicant meets the criteria for coverage under the general permit, and if so it issues a "notice of coverage." Mich Admin Code R 323.2192(b). Anyone "aggrieved by the coverage may file a sworn petition for a contested case hearing on the matter" with EGLE pursuant to the Administrative Procedures Act, MCL 24.201 *et seq*. MCL 324.3113(3); Mich Admin Code R 323.2192(c). A party may also challenge the validity or applicability of a rule by seeking a declaratory ruling under MCL 24.264.

The NPDES Wastewater Discharge General Permit issued by EGLE on March 27, 2020 (the 2020 general permit), gave rise to plaintiffs' dispute. Plaintiffs first petitioned for a contested case hearing under Mich Admin Code R 323.2192(c)[2] to appeal the 2020 general permit and the legality of certain new conditions imposed by the permit. Plaintiffs objected to EGLE's reduction of the limit on the amount of phosphorus that may be applied to land and the reduction of such limits for farms located within a Total Maximum Daily Load (TMDL) watershed. Plaintiffs also objected to the requirement that farms avoid applying waste within 100 feet of any surface water, open tile line intake structures, sinkholes, agriculture wellheads, or roadside ditches that are conduits to surface waters of the state. Plaintiffs further objected to EGLE's presumptive three-month ban on applying waste on land during winter months January through March and its ban on transferring waste to other entities that apply waste to land during those months.

Plaintiffs alleged that the added conditions banned the application of beneficial manure to fields and arbitrarily limited the amount of phosphorous in soil on which CAFO waste may be applied. Plaintiffs also took exception to EGLE's mandate that CAFOs and any farms that receive manure from CAFOs install permanent 35-foot vegetated buffer strips and prevent application of manure within 100 feet of every surface water, tile line intake, drain, and roadside ditch located on any land to which their manure is applied because doing so would severely limit land use for crop farming. Plaintiffs alleged that the added conditions exceeded EGLE's statutory authority and were contrary to state and federal law regulating CAFOs, lacked factual justification under the standard for setting conditions under Part 31 of NREPA, were arbitrary and capricious, and unconstitutional. Plaintiffs sought to have each of the challenged conditions struck from the 2020 general permit.

[2] As a result, EGLE did not issue any certificates of coverage under the 2020 general permit, and CAFOs that applied for such coverage had to comply with previous general permit certificates of coverage or individual permits.

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Before a contested case hearing could be held, however, plaintiffs filed the present complaint for declaratory and injunctive relief in the Court of Claims, with the 2020 general permit the focus of the complaint. Plaintiffs made allegations similar to their contested case petition but asked the court to declare: (1) the conditions invalid because of EGLE's failure to follow the procedures required under the Administrative Procedures Act (APA), MCL 24.201 *et seq*., to promulgate the conditions as rules; (2) the conditions are substantively invalid rules because they were arbitrary and capricious, beyond EGLE's regulatory authority, and/or contrary to the intent of Part 31 of NREPA; (3) EGLE's incorporation of the conditions into the 2020 general permit a violation of plaintiffs' constitutionally guaranteed procedural and substantive due-process rights; (4) EGLE's adoption of such rules constituted a violation of the constitution's Separation of Powers Clause, and/or that any statutory authority relied on by EGLE for such adoption violated the constitutional nondelegation doctrine; (5) EGLE's assertion of control over non-CAFOs went beyond its statutory authority and that its standard for determining such authority was unconstitutionally void for vagueness; and (6) that the mandate to install 35-foot permanent vegetated buffer strips and requirement to have 100-foot setbacks converted cropland acreage to nonfarmable land, an unconstitutional taking without just compensation in violation of US Const, Am V, and Mich Const 1963, Art X, § 2.

EGLE moved for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (C)(8) (failure to state a claim) on the ground that plaintiffs failed to exhaust available administrative remedies such that the Court of Claims lacked jurisdiction. EGLE asserted that the court would not have jurisdiction until EGLE made a final decision at the conclusion of the contested case proceeding, and only then would plaintiffs have exhausted all administrative remedies available to them rendering EGLE's final decision subject to judicial review pursuant to Const 1963, art 6, § 28 and MCL 24.301-MCL 24.306. Plaintiffs opposed EGLE's motion on the grounds that their complaint challenged "rules" that were not promulgated under the APA, and sought a declaratory judgment to determine the procedural validity of the "rules" under MCL 24.264 and MCR 2.605, which gave the Court of Claims jurisdiction. Plaintiffs maintained that exhaustion was unnecessary because plaintiffs challenged EGLE's authority to include the new conditions in the general permit, involving legal issues that did not require factual development and exempted the issues from the exhaustion requirement. Plaintiffs also argued that, if Part 31 is construed to grant EGLE authority to control farming practices, it would violate the Separation of Powers Clause. Plaintiffs argued that neither MCL 324.3103(1) nor MCL 324.3106 allowed EGLE to make general policy determinations that go "beyond existing state or federal regulations." EGLE replied that plaintiffs had to exhaust their administrative remedies before bringing this action and that they brought this case under MCL 24.264 and MCR 2.605, which apply to challenges to "rules." EGLE also argued that MCL 24.264 expressly required the exhaustion of administrative remedies before judicial review, and that the requirement in MCR 2.605 for an "actual controversy" could not be met because EGLE had not yet issued a ruling after a contested case hearing. EGLE conceded that no law specifically directed it to include specific conditions in CAFO permits but asserted that defending plaintiffs' separation of powers and nondelegation doctrine claim required fact-driven analysis and explanation of the standards and permit conditions it developed to fulfill its obligations under MCL 324.3101 *et seq*., which requires it to develop permit conditions to assure compliance with state and federal standards, all of which were better suited to an administrative proceeding.

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The Court of Claims concluded that it lacked subject-matter jurisdiction "[b]ecause plaintiffs did not follow the available administrative process to its completion." The court observed that plaintiffs had not exhausted their administrative remedies and their contested case remained pending, and consequently the court lacked jurisdiction requiring dismissal. The court disagreed with plaintiffs' contention that MCL 24.264 gave the court jurisdiction to determine the validity of the conditions by issuing a declaratory judgment because the 2020 general permit's conditions were not formally promulgated rules under the APA's procedures and "plaintiffs may not simply characterize the 2020 CAFO General Permit's requirements as 'rules' and thereby invoke MCL 24.264."

The court noted that MCR 2.605(A)(1) applies in a "case of actual controversy." The court held that no actual controversy existed for purposes of the court rule because the available administrative process had not yet run its course. Respecting plaintiffs' contention that their challenge to EGLE's authority to act made exhaustion unnecessary, the court found that the dispute did not implicate defendant's authority to regulate plaintiffs and did not excuse plaintiffs' failure to exhaust available administrative remedies. The court explained that plaintiffs' complaint raised factual issues that necessitated examination during the administrative process of the necessity and efficacy of certain matters within the permit which constituted fact intensive issues requiring development of a record that would enable comparing the statutory goals to the permitting conditions to determine whether the permitting conditions further those goals. The court concluded that development of a factual record is best suited for the administrative process. The court acknowledged that the assertion of constitutional questions can excuse a failure to exhaust available administrative remedies, but noted that "merely characterizing an issue by using constitutional terms does not excuse the exhaustion requirement, particularly where there remain factual issues for the agency to resolve." The court held that

> the presence of the factual issues noted above convinces the Court that the presence of plaintiffs' constitutional claims does not excuse exhaustion. In addition, it must be remembered that plaintiffs are alleging that they suffered constitutional violations as part of the permitting process. This permitting process has not yet run its course, meaning that the errors that have allegedly occurred have not been submitted to defendant for correction. Again, "[i]t is presumed that an administrative agency will correct its errors"—if any—"if given a chance to do so."

The court concluded that plaintiffs failed to exhaust administrative remedies and their contested case remained pending such that the court lacked jurisdiction requiring dismissal. This appeal followed.

II. STANDARDS OF REVIEW

A motion for summary disposition under MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction. We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(4). *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). To the extent that resolution of this issue involves statutory interpretation, we review de novo whether the trial court properly interpreted and applied the relevant statutes. *Makowski v Governor*, 317 Mich App 434, 441; 894 NW2d 753 (2016). The primary goal of judicial interpretation is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v*

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Secretary of State (On Rehearing), 489 Mich 194, 217; 801 NW2d 35 (2011). We review de novo a court's interpretation of court rules under the same principles that govern the construction of statutes. *Dawley v Hall*, 501 Mich 166, 169; 905 NW2d 863 (2018). Questions of law are reviewed de novo. *Christenson v Secretary of State*, 336 Mich App 411, 417; 970 NW2d 417 (2021).

III. ANALYSIS

A. WATER RESOURCES PROTECTION

EGLE's authority to issue permits derives from state law, but exists in relation to the federal Clean Water Act (CWA), 33 USC 1251 *et seq*. Relevant to this case, the CWA requires that all point source discharges to regulated waters must have an NPDES permit. The CWA includes CAFOs in its definition of the term "point source" "from which pollutants are or may be discharged." 33 US 1362(14.) "Michigan promulgated its own administrative rules specific to the NPDES for CAFOs[.]" *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 536; 747 NW2d 321 (2008). Mich Admin R 323.2196(1)(b) provides that "[a]ll CAFO owners or operators shall apply either for an individual NPDES permit, or a certificate of coverage under an NPDES general permit unless the owner or operator has received a determination from the department made after providing notice and opportunity for public comment, that the CAFO has 'no potential to discharge' . . . ." See also *Sierra Club*, 277 Mich App at 536-537.

B. THE 2020 GENERAL PERMIT

Mich Admin Code, R 323.2191(1), authorizes EGLE to issue a general permit if it determines that "certain discharges are appropriately and adequately controlled by a general permit[.]" Under Mich Admin Code, R 323.2137, a permit issued by EGLE "shall contain terms and conditions deemed necessary by the department to ensure compliance with effluent standards and limitations" and may feature stringent limitations it deems necessary to meet applicable water quality standards.[3] A person who seeks to be covered by a general permit must apply for coverage under the permit. Mich Admin Code, R 323.2192(a). After EGLE receives an application for coverage under an existing general permit, it shall determine if the discharge meets the criteria for coverage under the general permit. Mich Admin Code, R 323.2192(b). A person is not covered under a general permit until after EGLE issues a notice of coverage stating that the discharge meets the criteria for coverage. *Id*.

C. RESOLUTION OF DISPUTES REGARDING PERMITS

Plaintiffs argue that the court erred by ruling that it lacked jurisdiction because they contend that MCL 24.264 grants the court jurisdiction over declaratory judgment actions. We

[3] Other Part 21 rules permit EGLE to impose requirements under the terms and conditions of a state or national permit to achieve water quality compliance. See generally Mich Admin Code, Rules 323.2138; 323.2139; 323.2142; 323.2145; 323.2146; and 323.2149.

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agree with this, however, plaintiffs in this matter failed to fulfill MCL 24.264's presuit requirement to first seek a declaratory ruling before commencing an action for declaratory judgment, which deprived the court of jurisdiction and required dismissal.

A person who is aggrieved by the coverage under a general permit may file a sworn petition for a contested case hearing on the matter with EGLE as provided under MCL 324.3113(3) and MCL 24.201 to MCL 24.328.[4] An interested person may also seek a declaratory ruling as to the applicability of a rule to an actual state of facts under MCL 24.263. The validity or applicability of a rule may be challenged by seeking a court's declaratory judgment under MCL 24.264 which provides:

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his or her principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. 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. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

MCL 24.264 reveals a general legislative intent to provide an avenue for a party to challenge an agency rule. *Slis v State*, 332 Mich App 312, 342; 956 NW2d 569 (2020).

In this case, plaintiffs filed a declaratory judgment action under MCL 24.264 regarding the validity of the new conditions imposed in the 2020 general permit on the ground that EGLE failed to follow the procedures to promulgate rules as required under the APA. Plaintiffs essentially contend that EGLE circumvented the rulemaking procedures by incorporating the new conditions in the 2020 general permit. EGLE moved for summary disposition on the ground that the Court of Claims lacked subject-matter jurisdiction because plaintiffs failed to exhaust their administrative remedies.

[4] See also Mich Admin Code, R 323.2192(c) which provides in relevant part that a "person who is aggrieved by the coverage may file a sworn petition for a contested case hearing on the matter with" EGLE in accordance with MCL 324.3113.

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The Court of Claims relied on *Jones v Dep't of Corrections*, 185 Mich App 134, 460 NW2d 575 (1990)[5] for the proposition that only rules that have been formally promulgated as "rules" under the APA may be subject to a challenge under MCL 24.264. The court held that MCL 24.264 did not apply in this case because the conditions in the 2020 general permit were not formally promulgated as rules under the APA. We conclude that MCL 24.264 applied in this case.

In *Jones*, a case involving policy directives, institutional procedures, and employee guidelines of the Michigan Department of Corrections and the Michigan Civil Service Commission, the plaintiff requested a declaratory ruling from the defendants as to whether the directives, procedures, and guidelines were promulgated as rules pursuant to § 33 of the APA, MCL 24.233, and, if not, whether his discharge pursuant to unpromulgated rules deprived him of due process of law. *Id*. at 135-136. The defendants failed to respond to the plaintiff's request for a declaratory ruling and the plaintiff commenced the action for declaratory judgment under MCL 24.264. *Id*. at 136. The defendants moved for summary disposition and admitted that the directives, procedures, and guidelines were not promulgated as rules pursuant to § 33 of the APA. The defendants, however, contended that the circuit court lacked subject-matter jurisdiction because the plaintiff failed to exhaust his administrative remedies. The defendants also contended that the plaintiff was foreclosed from pursuing relief in the form of a declaratory judgment pursuant to MCL 24.264 because the plaintiff did not challenge the applicability of the directives, procedures, and guidelines. *Id*. The circuit court agreed with the defendants' rationale and granted the defendants' motion for summary disposition under MCR 2.116(C)(4) and (8). *Id*.

In addressing the plaintiff's contention that he was denied due process of law when discharged for violating directives, procedures, and guidelines, that were not promulgated as rules, the *Jones* court concluded that they could not be challenged under MCL 24.264 because they were not rules. The court further held that plaintiff failed to exhaust all available administrative remedies, precluding judicial review because he had available two additional levels of administrative relief. *Id*. at 137-138. We do not find the reasoning in *Jones* persuasive or applicable in this case.

Under the APA, the term "rule" is defined as follows:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. [MCL 24.207.]

Among other things, the term "rule" does not include a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). The APA contains standards for rulemaking. See MCL 24.231 through MCL 24.266.

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[5] Cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), but they may be considered as persuasive authority. *Aroma Wines & Equip, Inc v Columbian Dist Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013). This Court decided *Jones* during May 1990. Therefore, it is not binding precedent.

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To adopt a rule, an agency must fulfill among other things the APA's procedural requirements set forth in MCL 24.241, MCL 24.242, MCL 24.245, MCL 24.246, subject to the environmental rules review committee's oversight of all of EGLE's rulemaking under MCL 24.265 and MCL 24.266. " 'Processing of a rule' means the action required or authorized by this act regarding a rule that is to be promulgated, including the rule's adoption, and ending with the rule's promulgation." MCL 24.205(j). " 'Promulgation of a rule' means that step in the processing of a rule consisting of the filing of the rule with the secretary of state." MCL 24.205(k). A " guideline" by contrast "means an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7). Under MCL 24.226, an agency may not adopt a guideline in lieu of a rule.

Numerous administrative rules have been promulgated respecting water resource protection and water discharge permits pursuant to NREPA, MCL 324.3103, and MCL 324.3106. Relevant to this case, Mich Admin Code R 323.2196 governs CAFO permits and defines the scope of regulation specifying how and to what extent CAFOs and recipients handle, use, apply, dispose, and transport CAFO production area waste and CAFO process wastewater. Mich Admin Code R 323.2196(5) provides in relevant part:

> CAFO NPDES permits shall include all of the following:
>
> (a) A requirement to develop and implement a comprehensive nutrient management plan (CNMP). The CNMP shall be approved by a certified CNMP provider. At a minimum, a CNMP shall include best management practices and procedures necessary to implement applicable effluent limitations and technical standards established by the department including all of the following:
>
> * * *
>
> (*viii*) Conduct a field-by-field assessment of land application areas and address the form, source, amount, timing, rate, and method of application of nutrients to demonstrate that land application of production area waste or CAFO process wastewater is in accordance with field-specific nutrient management practices that ensures proper agricultural utilization of the nutrients in the production area waste or CAFO process wastewater. The assessment shall take into account field-specific conditions including locations of tile outlets, tile risers, and tile depth before land application to determine suitability of land application and to prevent discharge of any potential polluting material.
>
> (*ix*) Ensure proper land application by complying with all of the following conditions:
>
> (A) Production area waste and CAFO process wastewater shall not be land-applied on ground that is flooded, saturated with water, frozen, or snow-covered where the production area waste and CAFO process wastewater may enter waters of the state.
>
> (B) Production area waste and CAFO process wastewater shall not be applied to frozen or snow-covered ground unless it is subsurface injected and there

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is substantial soil coverage of the applied production area waste and CAFO process wastewater, or it is surface-applied and incorporated within 24 hours.

(C) Production area waste and CAFO process wastewater may be surface-applied to frozen or snow-covered ground and not incorporated within 24 hours only if there is a field-by-field demonstration in the CNMP showing that such land application will not result in a situation where production area waste and CAFO process wastewater may enter waters of the state.

(D) Production area waste and CAFO process wastewater shall not be applied when precipitation exceeding ½ inch is forecast within 24 hours or if precipitation is forecast that may cause the production area waste and CAFO process wastewater to enter waters of the state.

(E) On ground that is not frozen or snow-covered, production area waste and CAFO process wastewater, if not subsurface-injected, shall be incorporated into the soil within 24 hours of application except on no-till fields.

* * *

(*x*)(c) A prohibition on dry weather discharges from the CAFO except in accordance with 40 C.F.R. §412.31(a)(2) (2003) or 40 C.F.R. §412.46(d) (2003).

(d) Storm water discharges from land areas under the control of a CAFO where production area waste or CAFO process wastewater has been applied in compliance with field-specific nutrient management practices developed in accordance with R 323.2196(5)(a), and such discharges do not cause or contribute to a violation of water quality standards, are in compliance with this rule, provided such discharges are authorized by an NPDES permit.

(e) Unless the department determines otherwise, in cases where production area waste or CAFO process wastewater is sold, given away, or otherwise transferred to other persons (recipient) and the land application of that production area waste or CAFO process wastewater is not under the operational control of the CAFO owner or operator that generates the production area waste or CAFO process wastewater (generator), a manifest shall be used to track the transfer and use of the production area waste or CAFO process wastewater.

The rule also specifies in detail that the permit must set forth all of the things the CAFO owner or operator shall do respecting preparation of a manifest for tracking CAFO production area waste and CAFO process wastewater, and its transport to recipients including its final destination, and restricts the sale or transfer of such if recipients have improperly applied, used, or disposed of such. Mich Admin Code R 323.2196(5)(a)(*x*)(e) and (f).

The 2010 general permit and the 2015 general permit governing CAFOs set forth conditions as specified in Mich Admin Code R 323.2196(5)(a)(*ix*)(A)-(E) and permitted what the

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rule permits.[6] In the 2020 general permit, however, EGLE incorporated additional conditions, including in its prohibitions section, Part I, Section B(3)(f)(3), prohibiting application of CAFO waste during January through March unless certain conditions are met; Part I, Section B(3)(f)(4) prohibiting transfer of CAFO waste to a recipient for land application during January through March, and incorporated conditions regarding methods of application during January through March, Part I, Section B(3)(g). The previous permits specified setback conditions prohibiting application within 100 feet of ditches that are conduits to surface waters, but permitted substitution of 35-foot vegetated buffers for such 100-foot setback areas.[7] In the 2020 general permit, EGLE changed those provisions to prohibit application of CAFO waste within 100 feet of surface water, open tile line intake structures, sinkholes, agricultural wellheads, and roadside ditches that are conduits to surface waters. Part I, Section B(3)(h)(1)(a). The new conditions do not permit substitution of vegetated buffers, but mandate installation of 35-foot-wide permanent vegetated buffers along any surface water, open tile line intake structures, sinkholes, agricultural wellheads, and roadside ditches that are conduits to surface waters. Part I, Section B(3)(h)(1)(b).

Close analysis of the new conditions indicates that they go beyond the scope of the promulgated rule, Mich Admin Code R 323.2196. That which formerly was authorized by the promulgated rule and permitted under the 2010 and 2015 general permits is now barred by unpromulgated general permit conditions. As such the new conditions expand the regulatory restrictions generally applicable to CAFOs that implement and apply the CWA and NREPA. The new conditions set rigid standards with which CAFOs and CAFO waste recipients must comply. The new conditions are not merely guidelines but have the force and effect of "rules" not formally promulgated. The record indicates that EGLE chose not to follow the applicable APA procedures to adopt a new rule or amend the existing rule pertaining to CAFO permits. Instead, it essentially created an agency regulation, standards, and instructions of general applicability that implements or applies law enforced or administered by the agency.

The issue in this case is not whether EGLE has authority to create or amend rules with provisions like the new conditions, but whether it has and may circumvent the rule promulgation procedure and expand the scope of generally applicable regulatory standards and restrictions by requiring compliance with conditions without promulgation of them as rules. We conclude that an affected party may challenge the validity and applicability of conditions imposed by EGLE as permit conditions as in this case when such conditions prohibit what the existing rule permits. An interested person seeking to challenge the validity or applicability of such conditions may do so under MCL 24.264.

Under MCL 24.264, however, 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." (Emphasis added.) The plain language of MCL 24.264 does not impose further administrative remedy exhaustion requirements. To be clear, the statute does not require persons seeking to challenge the validity or applicability

[6] See 2010 general permit Part I, Section A(7)(e), (f) and 2015 general permit Part I, Section B(3)(e), (f).

[7] See 2010 general permit Part I, Section A(7)(g) and 2015 general permit Part I, Section B(3)(g).

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of a rule to challenge EGLE action in a contested case under MCL 24.271, by petitioning for a contested case hearing, or under MCL 24.263 by seeking a declaratory ruling as to the applicability to an actual state of facts. But the Legislature made clear that the prerequisite to commencing an action for a declaratory judgment under MCL 24.264 is a request for a declaratory ruling from the agency. The statute makes clear this must first be done or the court lacks jurisdiction to hear the case.

In this case, the record indicates that plaintiffs never first requested a declaratory ruling from EGLE. Accordingly, plaintiffs failed to meet the statutory prerequisite for filing and commencing a declaratory judgment action. Consequently, plaintiffs' action for declaratory judgment could not be commenced and the Court of Claims lacked jurisdiction, which required dismissal. The trial court concluded that it lacked jurisdiction and dismissed the case because plaintiffs had not exhausted all administrative remedies available related to their contested case. While this was factually correct and the trial court reached the correct result, the trial court's legal reasoning was erroneous. Accordingly, we affirm the trial court's dismissal of the case because it reached the right result, albeit for the wrong reason. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Plaintiffs argue that a footnote in *Mich Farm Bureau*, 292 Mich App 106, makes compliance with MCL 24.264's presuit requirement unnecessary. We disagree.

In *Mich Farm Bureau*, the plaintiffs had formally requested from the DEQ[8] a declaratory ruling under MCL 24.263,[9] that an administrative rule requiring CAFOs to apply for and obtain NPDES permits did not apply to CAFOs that had not had, and did not propose to have, an actual discharge of pollutants. *Id*. at 117-118. The DEQ granted the plaintiffs' request and issued a ruling. *Id*. at 118. Later, the plaintiffs commenced an action by filing a complaint for declaratory relief in the circuit court. *Id*. at 116. In its motion for summary disposition, the DEQ contended that, rather than commencing the declaratory judgment action in circuit court, the APA required the plaintiffs to seek judicial review of the DEQ's declaratory ruling pursuant to MCL 24.263. *Id*. at 118. The circuit court determined that the plaintiffs' request to the DEQ had, in reality, been a challenge to the *validity* of the rule rather than a request for a ruling on the *applicability* of the rule

[8] EGLE was formerly known as the Department of Environmental Quality (DEQ).

[9] MCL 24.263 provides:

> On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

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to "an actual state of facts" within the meaning of MCL 24.263. *Id*. The circuit court observed that the plaintiffs' request for a declaratory ruling had raised only a question of law with no need for factual development, and that no statutory authority permitted the DEQ to make rulings or pronouncements concerning the "substantive validity" of its own rule. The circuit court concluded that the proper mechanism for challenging the substantive validity of the rule was an action for declaratory relief in the circuit court under MCL 24.264, and denied the DEQ's motion for summary disposition. *Id*. at 119.[10]

Plaintiffs in this appeal rely on the following footnote in *Mich Farm Bureau*:

> We perceive no error in the circuit court's ruling on this matter. As the circuit court properly concluded, plaintiffs did not truly request "a declaratory ruling as to the applicability to an actual state of facts of a . . . rule . . . of the agency" within the meaning of MCL 24.263. Instead, and more accurately, what plaintiffs actually requested was a simple declaration that Rule 2196 was invalid. As Dean LeDuc has explained in his treatise on Michigan administrative law, MCL § 24.263 "empowers an agency to issue a declaratory ruling only as to the applicability of a rule, not as to its validity." LeDuc, Michigan Administrative Law (2001), § 8:13, p 576 (emphasis added). "The reason for this is obvious, an agency is unlikely to find its own rules invalid and those rules are presumed to be valid anyway. Courts will ultimately determine the validity of a rule." *Id*. Because plaintiffs sought to challenge the validity of Rule 2196 rather than its applicability to a particular state of facts, they were not required to ask the DEQ for a declaratory ruling under MCL § 24.263 in the first instance, and were instead entitled to directly commence this declaratory judgment action in the circuit court pursuant to MCL 24.264. Nor did the exhaustion requirement of MCL 24.264 apply to plaintiffs given that they sought to challenge the validity of Rule 2196 rather than its applicability. See LeDuc, § 8:13, p 577. "The exhaustion requirement of [MCL 24.264] (requiring resort first to the submission of a [request for a] declaratory ruling) applies only when a plaintiff wishes to challenge the applicability of a rule to an actual state of facts." *Id*. [*Id*. at 119 n 7.]

The footnote cites statements from a treatise that neither has precedential value nor reflects the primacy of Michigan law regarding statutory interpretation, which requires courts to enforce the unambiguous legislative intent as expressed in the plain language of a statute. MCL 24.264's prerequisite to commencing a declaratory judgment action cannot be ignored even if an agency is unlikely to find its own rules invalid. The footnote is dicta, and therefore, not binding precedent, because it was "unnecessary to determine the case at hand . . . ." *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011). Moreover, *Mich Farm Bureau* is distinguishable from the case

[10] The plaintiffs thereafter moved for summary disposition, arguing in part that the administrative rule at issue, Mich Admin Code, R 323.2196, was an invalid regulation and that the promulgation of the rule exceeded the scope of the DEQ's statutory rulemaking authority under Part 31 of the NREPA and that the rule was arbitrary, capricious, and inconsistent with the intent of the Legislature. *Id*. at 120.

at bar because in that case, the plaintiff had sought a declaratory ruling under MCL 24.263, and received such a ruling from the agency before filing suit. Further, in *Mich Farm Bureau* this Court considered the *substantive* validity of a *rule* actually promulgated by the agency. *Mich Farm Bureau* and its footnote in particular is not dispositive in this case.

We hold that the Court of Claims achieved the right result albeit for the wrong reason. This case could not be commenced in the trial court because plaintiffs failed to first seek a declaratory ruling from EGLE before filing their declaratory judgment action, as required by MCL 24.264. Because this ruling is dispositive, we decline to address the other issues raised by plaintiffs on appeal. This ruling is without prejudice to plaintiffs' ability to seek a declaratory ruling from the agency under MCL 24.264.

Affirmed.

/s/ James Robert Redford
/s/ Michael F. Gadola
/s/ Deborah A. Servitto

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

MICHIGAN FARM BUREAU, *et al.*

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellee.
_____/

Court of Appeals No. 956088

Court of Claims No. 20-000148-MZ

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PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR SUPPLEMENTAL BRIEFING AND ORAL ARGUMENT CONCERNING THE ISSUE RAISED BY THE COURT'S SEPTEMBER 15, 2022 OPINION

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INTRODUCTION

Much of this Court's recent opinion was correctly decided. The Court properly recognized that MCL 24.264 provides an avenue to challenge an agency's unpromulgated rules. *Mich Farm Bureau, et al v Dep't of Env't, Great Lakes, and Energy*, __ Mich App __; __ NW2d __ (2022) (Docket No 356088); slip op at 8–10 (Ex. A, Opinion). It rightly held that EGLE's 2020 CAFO General Permit conditions are unpromulgated "rules" under MCL 24.207. *Id.*, slip op at 10–13. But the Court nonetheless palpably erred when it affirmed on a "right-result-but-wrong-reason" rationale, analyzing an issue that was neither briefed nor argued by EGLE and requiring Farm Plaintiffs to exhaust a remedy that ***does not exist***. *Id.*, slip op at 13–16.

That result is directly contrary to this Court's prior, published opinion in *Michigan Association of Home Builders v Director of the Department of Labor & Economic Growth*, 276 Mich App 467; 741 NW2d 531 (2007), vac'd in part at 481 Mich 496; 750 NW2d 593 (2008) ("*Home Builders*"), which rejected any exhaustion requirement under MCL 24.264 for challenges to the validity of rules. That precedent binds this panel. MCR 7.215(J)(1). The Court's holding is also contrary to longstanding law in Michigan that exhaustion cannot be required when there is no available remedy. See, e.g., *Att'y Gen v Diamond Mortg Co*, 414 Mich 604, 611; 327 NW2d 805 (1982). And the Court's decision leaves Farm Plaintiffs in the untenable position of having to ask the agency to invent and prescribe a process to declare its rules invalid (which, before this Court's opinion, the agency vehemently contended were not "rules") when everyone involved knows that request is an exercise in futility. In other words, Farm Plaintiffs have been faulted for failing to

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take a detour down a road that leads nowhere. This Court was obviously unaware of *Home Builders* and unaware that the process it prescribed does not exist when it issued its opinion.[1]

Because this Court has never before required a party to exhaust non-existent remedies, the Court committed palpable error. MCR 7.215(I)(1); MCR 2.119(F)(3). It should correct its mistake. Alternatively, this Court should grant supplemental briefing and argument on this issue as doing so is consistent with due process. *Al-Maliki v LaGrant*, 286 Mich App 483, 486; 781 NW2d 853 (2009) (noting due process requirements when a court considers an issue *sua sponte*).

STANDARD OF REVIEW

This Court has discretion to reconsider its opinions under MCR 7.215(I)(1). That rule generally borrows from the "palpable reconsideration" standard of MCR 2.119(F)(3). MCR 7.215(I)(1). That "rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000).

ARGUMENT

I. This panel's opinion directly conflicts with *Home Builders*—a precedentially binding and published decision of this Court.

This Court's opinion should be reconsidered because it is contrary to binding, published authority holding MCL 24.264 does not have a separate exhaustion requirement. This panel's decision created an accidental conflict outside of the procedures of MCR 7.215(J). The Court should correct that conflict to avoid jurisprudential confusion and maintain consistency in the law. See, e.g., *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App

[1] The Court's affirmance also dismissed the case despite a distinct basis for jurisdiction under MCR 2.605 that was never analyzed. (Farm Plaintiffs' Br., pp. 25–27; Reply Br., pp. 8–9.) Due to word limits, Farm Plaintiffs rely on their earlier briefs on that issue.

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264, 285–86; 769 NW2d 234 (2009). And this Court's prior decision in *Home Builders* is justified by reading the APA as a consistent whole.

A. This Court was bound by *Home Builders'* holding that exhaustion is not required on a challenge to the validity of a rule.

In *Michigan Association of Home Builders v Director of the Department of Labor & Economic Growth*, a panel of this Court, including Judges Talbot, Cavanagh, and Meter, rejected the identical argument that a "plaintiff was required by the plain language of MCL 24.264 to request a declaratory ruling from the agency before commencing this action" under that statute. 276 Mich App at 480. The Court reasoned: "MCL 24.263 governs requests for declaratory rulings"—*i.e.*, it is the sole statute prescribing a method for such a process—and that "requires that an interested person have 'an actual state of facts' to bring before the agency for its consideration." *Id*. at 480–81. Consequently, the Court rejected any exhaustion requirement on the basis of MCL 24.264 for a challenge to the validity of a rule. *Id*. That prior binding, published authority requires the same result in this case. MCR 7.215(C)(2).

Because EGLE did not argue that exhaustion was required under MCL 24.264 and this issue was neither presented to the Court nor fully briefed by either party, this Court appears to have been unaware of *Home Builders* when issuing its decision.[2] The panel did not address the case. Regardless, it was bound by its holding. MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*."); *People v Zitka*, 335

[2] Though this Court considered the discussion of MCL 24.264 in *Michigan Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106; 807 NW2d 866 (2011) to be *dicta*, the Court considered *Home Builders* and agreed with the trial court's analysis that a declaratory ruling request was not required. *Id*. at 118–19 & 119, n 7.

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Mich App 324, 336; 966 NW2d 786 (2020); *WA Foote Mem'l Hosp v City of Jackson*, 262 Mich App 333, 341; 696 NW2d 9 (2004).[3]

Exemplifying respect for *stare decisis*, this Court follows a "first out" rule. MCR 7.215(J)(1). As this Court explained, "[u]nder the 'first out' rule of MCR 7.215(J)(1), we must follow the rule of law established by a prior published opinion of this Court issued on or after November 1, 1990." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 285–86. Thus, later panels must follow an earlier decision or declare a conflict under MCR 7.215(J)(2). *Id*. If they do not, the later decisions are non-binding. *Id*.

The conflict panel process was not followed here. Instead, this Court engaged in a *sub silentio* overruling of *Home Builders* without a conflict panel and without addressing that decision's reasoning. By doing so, the Court created an unintended conflict with existing, binding authority. Effectively, that leaves the final issue addressed by this Court's 16-page, published opinion a nullity for purposes of precedent. That is not only an injustice to the more than 100 named plaintiffs in this suit, but it also creates unnecessary jurisprudential uncertainty for every future litigant suing under MCL 24.264. Plaintiffs therefore urge this Court to reconsider, reverse the trial court in whole, and remand the matter for further proceedings on the merits.

B. The ruling in *Home Builders* is consistent with the statutory text.

Even if this Court were not bound by *Home Builders*, that decision more accurately reads the APA as a consistent whole. This Court must read statutes "as a whole" and a "provision that

[3] The Michigan Supreme Court later vacated that decision in part *only* as to "the portion of [this Court's] judgment stating that *Westervelt v Natural Resources Comm'n*, 402 Mich 412; 263 NW2d 564 (1978) is not binding." *Home Builders*, 481 Mich 496, 501; 750 NW2d 593 (2008). But the relevant holding remains precedentially binding. *Stein v Home-Owners Ins Co*, 303 Mich App 382, 892; 843 NW2d 780 (2013) (partial reversal on other grounds leaves other holdings "intact"); *People v Carson*, 220 Mich App 662, 372; 560 NW2d 657 (1996) ("an overruled proposition in a case is no reason to ignore all other holdings in the case.").

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may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014). This is embodied in the "whole text" interpretation canon. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp. 167–69 ("Context is a primary determinant of meaning.").

Applied here, the statement in MCL 24.264 (declaratory judgment actions) concerning making declaratory ruling requests to an agency before filing for a declaratory judgment cannot be read in isolation. Rather, it must be read consistent with MCL 24.263 (declaratory ruling requests). See, e.g., *McCahan v Brennan*, 492 Mich 730, 740; 822 NW2d 747 (2012) (reading subsections of Court of Claims act in conjunction). MCL 24.264 governs actions for declaratory judgments and states only generally the need to make a "declaratory ruling" request (assuming applicable). It neither establishes the grounds for such a request nor directs the form or procedure for that request.

By contrast, MCL 24.263 sets parameters for making a declaratory ruling request and limits those to "the applicability *to an actual state of facts of a statute administered by the agency or of a rule or order of the agency*." (Emphasis added). For that limited set of "applicability" challenges, the statute declares that "[a]n agency *shall prescribe by rule* the form for such a request and procedure for its submission, consideration, and disposition." *Id.*[4] There is no similar statement of the grounds, form, or procedure for a "validity" challenge under either MCL 24.263 *or* MCL 24.264. No separate process exists by statute. Thus, MCL 24.264's reference to declaratory ruling requests must be applied to the statutory process outlined in MCL 24.263.

[4] EGLE's rule for declaratory ruling requests found at Mich Admin Code, R 324.81 ("Rule 81").

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II. This Court palpably erred by requiring Plaintiffs to "exhaust" a declaratory ruling request "remedy" because EGLE has no process for challenging the validity of a rule.

Beyond the conflict with *Home Builders*, the Court's conclusion that Plaintiffs should have exhausted the "remedy" of a declaratory ruling request before filing suit is mistaken because ***such remedy does not exist***. EGLE's administrative rule for declaratory rulings make that clear. Mich Admin Code, R 324.81 (providing for declaratory rulings but only with respect to the applicability of a rule or statute to "actual state of uncontested facts"). And in practice, EGLE has repeatedly told the public that it will not address requests for declaratory rulings as to the validity of a rule. (Ex. B, Exemplary Denial Letter.)

In other words, this Court mistakenly directed Farm Plaintiffs down a road leading nowhere. But both common sense and the law dictate that a plaintiff cannot be required to exhaust remedies that do not exist. This constitutes palpable error. MCR 7.215(J); MCR 2.119(F)(3); *Kokx*, 241 Mich App at 658–59. For that reason, too, Farm Plaintiffs ask the Court to reconsider its opinion.

A. The law has long held that a party cannot be required to exhaust remedies that do not exist.

Common sense dictates that a party cannot be required to exhaust remedies that do not exist as a condition to filing suit. Settled law agrees. *Diamond Mortgage Co*, 414 Mich at 611 ("[T]there is . . . no basis for requiring that administrative remedies . . . be exhausted" when "there were no administrative remedies available in that agency"); *Great Lakes Gas Transmission Co v State Treasurer*, 140 Mich App 635, 644–45; 364 NW2d 773 (1985) (exhaustion does not apply where the available remedies are inapplicable to the relief sought); *Holly Twp v Dep't of Nat'l Resources*, 189 Mich App 581, 585; 473 NW2d 778 (1991) ("before one can be required to exhaust administrative remedies, he must have administrative remedies available to him"); see also LeDuc,

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Mich Admin Law (2013 Ed.), § 10:28, p 797–98 (exhaustion "applies *only where there is actually a remedy to exhaust*") (emphasis added).

This makes sense: without a remedy, "exhaustion" is impossible. And exhausting a non-existent remedy is an exercise in futility. Therefore, the purposes underlying the exhaustion doctrine are not served by requiring a party to pursue a "remedy" that an agency has not bothered to establish. *Diamond Mortgage Co*, 414 Mich at 611 ("[N]one of the relief which the plaintiff sought was available in the Department of Licensing and Regulation. There is, therefore, no basis for requiring that administrative remedies . . . be exhausted."). That is the case here.

B. EGLE has never provided a remedy for a declaratory ruling request regarding the validity of a rule. Thus, no exhaustion is exhausted.

No remedy exists for a declaratory ruling challenging the *validity* of a rule. EGLE had not argued that this process must be exhausted; EGLE instead argued that the contested case was a prerequisite to suit, which this Court rightly rejected. (EGLE Br., pp. 12–19.) And Farm Plaintiffs only briefly touched on this question in a preemptive manner given that EGLE had not made such an argument. (Pls.' Br., p. 28.) Accordingly, because the parties did not directly brief the question of exhaustion under a separate process under MCL 24.264, this Court apparently was unaware when it issued its opinion that ***no such process exists***. Plaintiffs cannot be faulted for failing to exhaust a non-existent process.

This Court's opinion assumed that two separate procedures exist for obtaining a declaratory ruling from EGLE: one for questions of a rule's *applicability* under MCL 24.263, and another for questions of a rule's *validity* under MCL 24.264. It explained that:

> To be clear, the statute does not require persons seeking to challenge the validity or applicability of a rule to challenge EGLE action in a contested hearing, ***or under MCL 24.263*** by seeking a declaratory ruling as to the applicability to an actual statement of facts. But the Legislature made clear that the prerequisite to commencing an action for a declaratory judgment under MCL 24.264 is a request for a declaratory ruling from the agency. [Emphasis added.]

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That assumption was inaccurate. The only statutorily prescribed process for a declaratory ruling request is under MCL 24.263 (as explained above). MCL 24.264 neither identifies a process for declaratory ruling nor prescribes a procedure for requests like MCL 24.263 does. In other words, MCL 24.264 does not establish *any* process; it merely sets a requirement regarding an existing process—the process set forth under MCL 24.263.

Consistent with MCL 24.263, EGLE established a process for questions about the *applicability* of a rule. Using its authority under MCL 24.263, EGLE promulgated Rule 81. That process is limited to *applicability* challenges. *Id.* ("An interested person requesting a declaratory ruling *as to the applicability of licensing statute, rule, or order* administered by the department to an actual state of uncontested facts . . . .") (emphasis added). EGLE has not established any distinct process for validity challenges. Indeed, EGLE's website for "administrative procedures" addresses both contested cases and declaratory ruling requests. (Ex. C.) Yet the agency points *only* to Rule 81 and a form for declaratory ruling requests. (*Id.*; Ex. D, Form EQP0203.) That form cites Rule 81 as the authority for the procedure. (*Id.*) And it notes that it is limited to challenges based on an "actual uncontested state of facts"—*i.e.*, applicability concerns. (*Id.*)

In practice, EGLE uniformly rejects the use of that Form or the process under Rule 81 as a basis for challenging the validity of a rule. For instance, one response from EGLE notes: "Because this Request seeks a determination that [rules] are invalid, rather than a determination as to the applicability of those rules to an actual state of facts, the relief sought is beyond [EGLE's] authority under the APA." (Ex. B.) Thus, EGLE has agreed in practice that the *only* avenue for relief on a declaratory ruling request is for "a determination as to the applicability of . . . rules to an actual state of facts . . . ." (*Id.*)

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Consequently, no avenue exists for a declaratory ruling request regarding the validity of an administrative rule. Therefore, exhaustion cannot be required. *Diamond Mortgage Co*, 414 Mich at 611. This Court palpably erred and should reconsider. MCR 7.215(J); MCR 2.119(F)(3).

III. Even if a process existed for a declaratory ruling from EGLE on the *validity* of a rule, requiring a party to ask an agency to invalidate its rules is futile.

Even if Plaintiffs were required to request a declaratory ruling (and a process existed to do so), any failure to exhaust should be excused as futile. Everyone knows how that story ends. Indeed, EGLE has already told us. Recently responding to media inquiries about this Court's opinion, **EGLE claimed it intends to "continu[e] to make our case supporting the CAFO permit" in the administrative appeal**. (Ex. E.) EGLE does not intend to follow the APA rulemaking process no matter what this Court says.

Exhaustion is not required when doing so is an exercise in futility. *Trojan v Taylor Twp*, 352 Mich 636, 640; 91 NW2d 9 (1958); *Turner v Lansing Twp*, 108 Mich App 103, 108–09; 310 NW2d 287 (1981). For example, in *Township of Holly v Department of Natural Resources*, this Court rejected a claim that challengers to a permit needed to "exhaust" administrative remedies by asking the Department to invalidate its permit because doing so was futile. 189 Mich App at 585. The Court reasoned "[i]nvalidating the permit would require the DNR to admit it erred in issuing the permit." *Id*. Therefore, "plaintiffs were not required to exhaust administrative remedies under either the SWMA or the MEPA." *Id*. That result makes sense because the exhaustion doctrine is justified in part by efficiency concerns. *Judges of the 74th Judicial Dist v Bay Cty*, 385 Mich 710; 190 NW2d 219 (1971) (justifying exhaustion based on, *inter alia*, "[t]he expediency of permitting the administrative process to function" and "the need to lessen the burden on judicial resources"). And it is wholly inefficient to require parties to pursue administrative remedies that are a mere formality.

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The same reasoning applies here. Asking EGLE to invalidate its unpromulgated rules would be futile. EGLE has repeatedly rejected similar requests. (See Ex. B, Denial Letter.) EGLE has argued from the very outset of this and the affiliated contested case that the challenged conditions in its 2020 CAFO General Permit are not constrained by the APA. And even now, despite this Court's recent opinion to the contrary, EGLE announced that it has no intention to invalidate its rules or do anything other than continue to move forward with the 2020 CAFO General Permit via the pending contested case. (Ex. E.) That is the definition of a "futile" process—one with a guaranteed outcome. But, if there is any doubt about futility as a factual matter, this Court should remand rather than dismiss.

CONCLUSION AND RELIEF REQUESTED

Because this Court palpably erred in requiring Plaintiffs to "exhaust" a non-existent remedy contrary to its own prior, published opinion, this Court should reconsider and correct its mistake. Alternatively, at a minimum, this Court should grant supplemental briefing and argument on an issue that was not previously argued by EGLE as a basis to affirm.

Respectfully Submitted,

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

MICHIGAN FARM BUREAU, ET AL.,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

Defendant-Appellee.
_____/

Court of Appeals No. 356088

Court of Claims No. 20-000148-MZ

APPELLEE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S ANSWER CONCURRING WITH APPELLANTS' REQUEST FOR RECONSIDERATION OF SEPTEMBER 15, 2022, OPINION FOR DIFFERENT REASONS

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B. This panel wrongly stated that the challenged permit conditions are unlawful. 7

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INTRODUCTION

Appellee Michigan Department of Environment, Great Lakes, and Energy (Department) agrees with Appellants that this panel should reconsider its opinion, but for different reasons. This panel mistakenly adopted Appellants' flawed characterization of the challenged permit conditions as unpromulgated rules, and in doing so created an avenue for administrative review that conflicts with the plain language of the Administrative Procedures Act, MCL 24.101 *et seq*. (APA). Upending this carefully crafted statutory framework disrupts this case and has significant implications for all types of agency action.

The APA, which governs executive branch agencies, establishes a framework to challenge varied types of final agency action. Under the APA, the sole avenue to challenge any part of a permit is MCL 24.291, which authorizes challenges to "licenses"—a term that includes permits, MCL 24.205(a). The subsection specific to contested cases applies to Department-issued permits. MCL 24.288. Contested cases are the exclusive remedy to challenge those permits.

Contested cases are a means to develop robust factual records supporting or opposing permits. Here, this panel weighed in on the same legal challenges developed and presented in the pending contested case, without the benefit of a factual record, and without analyzing the entire regulatory framework or applicable water quality standards. Showcasing the wisdom of the APA's stepwise framework for permit challenges, this premature judicial review resulted in an erroneous conclusion that the permit conditions are unlawful. This panel should vacate its opinion so the contested case may proceed in accordance with the APA.

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STANDARD OF REVIEW

Under MCR 7.215(I)(1), this Court can hear a motion for reconsideration and "grant further or different relief as the case may require." MCR 7.216(A)(7). The rule does not prevent the court "from revisiting an issue even when the motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes." *Macomb Co DHS v Anderson*, 304 Mich App 750, 754 (2014).

ARGUMENT

I. This panel's opinion conflicts with the plain language of the APA.

The Legislature, in developing the APA, laid out a framework specifying how to challenge various types of final agency action. In doing so, the Legislature defined two words: "rule" and "license." Importantly, the term "license" includes permits, but "rule" does not. The Legislature also established two distinct pathways for challenging "rules" and "licenses." Contrary to this statutory language, this panel mistakenly concluded that portions of the 2020 General Permit are rules, and, as a result, wrongly directed Appellants to exhaust a non-existing remedy.

A. The APA defines the term "rule," and under that definition, a license is not a rule.

This Court "must enforce clear and unambiguous statutory provisions as written." *In re Certified Question (Preferred Risk Mut Ins Co v Mich Catastrophic Claims Ass'n*), 433 Mich 710, 721 (1989). Importantly, when the Legislature uses

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different words, they mean different things. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14 (2009).

This panel must strictly adhere to the APA's definition of "rule," which includes an "instruction of general applicability that implements or applies law enforced or administered by the agency[.]" MCL 24.207. However, the definition of "rule" excludes an agency's decision to exercise a "permissive statutory power, although private rights or interests are affected." MCL 24.207(j). Permissive statutory powers that affect private rights and interests include taxation, zoning, and licensing.

The APA defines the term "license" as "the whole or part of an agency permit . . . required by law." MCL 24.205(a). A "license" is not a "rule" because the statutory definition of rule cannot encompass the statutory definition of license. A generally applicable rule cannot grant individual permission required by law, like a license can. Further, the definition of "rule" excludes the decision whether to exercise permissive statutory power to issue a "license." MCL 24.207(j).

Moreover, there are two distinct administrative bodies overseeing the Department's rulemaking and permitting. The APA established the environmental rules review committee, which oversees all Department rulemaking. MCL 24.265. One of its obligations is to review regulatory impact statements developed by the Department, along with proposed rules. MCL 24.266(3). But it has no authority regarding permitting decisions, distinct from rulemaking. The Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.* (NREPA) established a

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second oversight body, the environmental permit review commission, related to permitting disputes. MCL 324.1313(1). It has no authority over rulemaking, only permitting. The Legislature created these two distinct oversight bodies because rulemaking is distinct from permitting. This panel wrongly conflated the two.

B. A contested case is the exclusive remedy to challenge permits.

Though the APA does not define the term "permit," the provisions specific to contested cases reference MCL 324.1301(g). MCL 24.288. That subsection of the NREPA defines "permit" as any permit or operating license the Department issues to a non-state permittee under the NREPA and rules promulgated thereunder. MCL 324.1301(g). This definition encompasses the 2020 General Permit. Because this permit, like all Part 31 permits, must be preceded by notice and an opportunity for a hearing under Mich Admin Code, R 323.2117, challenges to it are controlled by the provisions of the APA governing contested cases, MCL 24.271 to MCL 24.288. MCL 24.291(1). Further, the APA states that in contested cases regarding "permits" as defined in MCL 324.1301(g), MCL 324.1315 and 324.1317 control the "availability of other administrative remedies." MCL 24.288. Neither section authorizes declaratory actions. Thus, a contested case is the exclusive administrative remedy for Appellants, who challenge a "permit," as defined in MCL 324.1301(g).

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C. Declaratory actions under MCL 24.264 apply only to rules, not any other agency action.

In contrast to challenging a "permit," interested persons can challenge the validity or applicability of a "rule" by declaratory action under MCL 24.264. Rules that are not promulgated in accordance with the APA may also be challenged under MCL 24.264, pursuant to MCL 24.243, which lays out procedural deficits that can be raised in a declaratory action. But MCL 24.264 may not be used to challenge licenses, as it is only available where there is no exclusive remedy under law. MCL 24.264 ("Unless an exclusive procedure or remedy is provided by a statute governing the agency . . ..")

The plain language of MCL 24.264 provides a remedy specific to rules, and no other agency actions. It exclusively applies to "the validity or applicability of a rule." MCL 24.264. The subsection also includes the right to challenge an agency's failure to accurately assess regulatory impact in advance of rule promulgation, as required by MCL 24.245(3). *Id.* This additional language ensures that MCL 24.264 can be used to challenge both rules and the regulatory impact statement created during rulemaking. Nothing in MCL 24.264 suggests that it may apply to anything that is not a rule or a regulatory impact statement.

D. Declaratory ruling requests may not encompass challenges to the text of issued permits.

MCL 24.263 applies broadly to "the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency." MCL 24.263. This text, unlike the text of MCL 24.264, does not reach the "validity" of a

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rule. When the Department issued the first general permit for CAFOs, it used the permit to authorize discharges without first publicly noticing individual comprehensive nutrient management plans (CNMPs). A local environmental group properly sought a declaratory ruling from the Department under MCL 24.263 alleging that authorizing CAFO discharges under MCL 324.3106 without first publicly noticing individual CNMPs was unlawful. *Sierra Club Mackinac Chapter v DEQ*, 277 Mich App 531, 540–541 (2008). The Court of Appeals held that the Department's administration of the CAFO permitting program did not meet Clean Water Act requirements. *Id.* at 555. Here, where Appellants challenge the text of a permit, without reference to an actual state of facts, MCL 24.263 does not apply.

II. This panel wrongly adopted Appellants' misleading characterization of the 2020 General Permit, without regard for the applicable regulatory framework and water quality standards.

Because this case was brought as a legal challenge, the record was scant. As a result, this panel mistakenly adopted Appellants' incorrect claim that the 2020 General Permit is generally applicable, and its false assertion that the 2020 General Permit requires all permittees to maintain setbacks and buffers. These errors led this panel to wrongly conclude that certain challenged permit conditions exceed a portion of the relevant regulatory framework. In reconsidering its opinion, this panel should vacate these erroneous conclusions and allow the ALJ to make findings of fact and conclusions of law based on the factual record in the pending contested case under MCL 24.285.

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A. The 2020 General Permit is not generally applicable because the Department must publicly notice each CNMP before authorizing each discharge.

Under the applicable regulatory framework, a general permit cannot authorize discharges absent the issuance of a certificate of coverage. Mich Admin Code, R 323.2196(1)(b). No certificate of coverage can be issued without first publicly noticing the individually applicable CNMP. *Sierra Club,* 277 Mich App at 554–555. Each permittee develops its own CNMP containing "effluent limitations that [the Department] must incorporate into the general permit." *Id.* at 553. As a result, the 2020 General Permit is not generally applicable.

B. This panel wrongly stated that the challenged permit conditions are unlawful.

The Department may issue National Pollutant Discharge Elimination (NPDES) permits to authorize otherwise unlawful pollution. MCL 324.3106. It may do so via individual or general permits. MCL 324.3120(g). But it may not issue NPDES permits that do not "assure compliance" with state water quality standards. MCL 324.3106. This panel correctly cited Mich Admin Code, R 323.2137(a) for the proposition that the Department "shall" issue permits that ensure compliance with effluent standards and limitations. *Mich Farm Bureau v EGLE,* __ Mich App __ (2022) (Docket No. 356088); slip op at 8. (Exhibit A.) But this panel's cursory treatment of Mich Admin Code, R 323.2137(d) was wrong. That duly promulgated rule states in pertinent part:

> When applicable, a permit issued by the department shall contain terms and conditions deemed necessary by the department to ensure compliance with at least the following effluent standards and

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> limitations: . . . (d) *Any other more stringent limitation deemed necessary by the department to meet applicable water quality standards . . . including applicable requirements necessary to meet maximum daily loads established by and incorporated into the state's continuing planning process required pursuant to section 303 of the federal act.*

Mich Admin Code, R 323.2137(d) (emphasis added). Without knowing how many CAFOs seek permits to discharge pollutants to waters exceeding applicable water quality standards, or addressing complex total maximum daily load planning, this Court could not analyze whether this rule authorizes the new permit conditions. Nonetheless, this panel dismissed the conditions out of hand, describing them as "beyond the scope of" Mich Admin Code, R 323.2196. *Mich Farm Bureau* at *13.

But even looking only at Rule 323.2196, this conclusion is wrong. This panel adopted Appellants' false claim that the 2020 General Permit established a new condition requiring all permittees to maintain buffers and setbacks. The actual permit condition directs permittees, when developing CNMPs, to choose between evaluating phosphorus runoff risk by either soil testing or field-specific assessment. Only permittees that choose soil testing must maintain buffers and setbacks. Thus, the 2020 General Permit does not establish a universal buffer and setback requirement. Moreover, the scientific basis for this new condition is not in the record before this panel. Accordingly, it is premature (and impossible without evidence) for this Court to determine whether this new permit condition is authorized by Mich Admin Code, R 323.2196(5)(a), which includes broad requirements for CNMPs regarding waste and soil testing, field-specific analyses, and conservation practices to prevent runoff.

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Without a factual record, this panel cannot meaningfully analyze the challenged permit conditions. Instead of acknowledging the lack of a record, this panel mistakenly adopted Appellants' unfounded arguments about challenged permit conditions—with selective reference to the regulatory framework and without any reference to applicable water quality standards—and concluded that the challenged permit conditions prohibited what the promulgated rules allow. *Mich Farm Bureau* at *13. This was a wrong result, driven by the wrong analysis, and demonstrates the Legislature's wisdom in requiring permit challenges to be made in contested case proceedings before judicial review.

III. Appellants must exhaust administrative remedies before seeking judicial review.

In their request for reconsideration, Appellants cite *Homebuilders* to argue that exhaustion is not required here. (Appellants' Mot for Recons 3.) But *Homebuilders* held that judicial review of rules is limited to the administrative record, which may not be expanded by remanding to the rulemaking agency. *Mich Ass'n of Homebuilders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 501 (2008). And the Michigan Supreme Court made clear that the APA requires exhaustion only for contested cases, *id.* at 499, which is why the Court of Claims correctly dismissed this case.

Practically speaking, the exhaustion requirement limits only where, and in which order, parties make arguments. During a contested case, parties may make arguments based on law, policy, and fact. MCL 24.272(3). For example, in a

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contested case challenging an NPDES permit, the ALJ found that MCL 324.3106 did not authorize the Department to require the permittee to obtain a surety bond and, moreover, that the petitioner had not established a record supporting this proposed condition. *In re Sierra Club and Anglers of the Au Sable on the Permit Issued to Harrietta-Grayling Fish Hatch (consolidated cases*), DEQ Final Decision & Order (Case No. 14-020647), issued May 1, 2018, at *72. ALJs grant motions for summary disposition before witness testimony if dispositive legal issues obviate the need for testimony. See *As Amended Petition of Paul and Julie McNeilly*, DEQ Final Determination & Order (Case No. MI0058237), issued April 30, 2008, at *2 (dismissing late-filed petition for contested case challenging NPDES permit.)

Here, the only pathway to judicial review is after the ALJ rules in the contested case. MCL 324.1317(7). Parties may also first seek additional administrative review by an environmental permit panel, MCL 324.1317(1), and then seek judicial review. MCL 324.1317(4). But in no instance may parties sidestep the contested case entirely and challenge the issued permit as if it were a rule, subject to a declaratory action under MCL 24.264.

CONCLUSION AND RELIEF REQUESTED

The 2020 General Permit is a license that the Department may use to authorize CAFOs to discharge pollution to surface water. Under the APA, it is not a rule subject to MCL 24.264. This panel reviewed permit conditions without reference to the appropriate regulatory framework or any factual record, and wrongly stated that certain challenged permit conditions are unlawful.

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For these reasons, the Department respectfully requests that this Court grant Appellants' motion for reconsideration, vacate its September 15, 2022, opinion, and issue an opinion consistent with the APA, upholding both the lower court's decision to dismiss this case and its reasoning.

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WORD COUNT STATEMENT

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Court of Appeals, State of Michigan

ORDER

Michigan Farm Bureau v Dept of Environment Great Lakes and Energy

Docket No. 356088

LC No. 20-000148-MZ

Michael F. Gadola
Presiding Judge

Deborah A. Servitto

James Robert Redford
Judges

Appellants' motion to file a reply brief in support of their motion for reconsideration is GRANTED and the reply brief filed with the motion is accepted.

Appellants' motion for reconsideration is DENIED. We remain unpersuaded that appellants could circumvent MCL 24.264's requirement that they must first seek a declaratory ruling before commencing an action for declaratory relief. As we previously found, this requirement does not impose further administrative remedy exhaustion requirements. Rather, the requirement is a legislatively imposed prerequisite to suit, i.e., a condition precedent to a court's exercise of subject-matter jurisdiction over a claim of the invalidity of a rule. To accept appellants' position and conclude otherwise would allow appellants to avoid the Administrative Procedures Act's (APA) expressly and clearly stated rule promulgation requirements. We are unpersuaded that *Mich Ass'n of Home Builders v Dir of Dept of Labor and Econ Growth*, 276 Mich App 467; 741 NW2d 531 (2007), requires a different result. *Mich Ass'n of Home Builders* is distinguishable from this case in several important regards. The former case presented as a challenge to a newly promulgated set of rules at their inception. It did not present as a challenge to an unpromulgated rule. The instant case does. The case at bar presents as a procedural challenge to the validity of a new set of "conditions" that were attached to a preexisting general permit. Those conditions were not promulgated as rules, but should have been. The agency sidestepped its statutory obligation to promulgate them as required under the APA. Moreover, this Court concluded in *Mich Ass'n of Home Builders* that the plaintiffs did not need first to seek a declaratory ruling from the agency before seeking a declaratory judgment in circuit court because the plaintiffs did not have an "actual state of facts" to bring before the agency. The general permit had been in place for many years before this case arose, and there was an actual state of facts (the application of the 2020 conditions to plaintiffs) that was susceptible to being determined in a request for declaratory ruling. Because this case is substantively distinguishable from *Mich Ass'n of Home Builders*, our resolution of this appeal does not conflict with it, overturn it, require a conflict panel's resolution, or create any uncertainty.

Appellee's concurrence seeking reconsideration for reasons different than those of appellants is also DENIED because appellee has not demonstrated a palpable error requiring a different disposition of the case. See MCR 7.215(I)(1) and 2.119(F)(3).

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 17, 2022
Date

Chief Clerk

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