



Michigan Appeals Court Rules Invalid New Environmental Regulations

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Foster Swift Agricultural Law News

September 5, 2023

On August 22, 2023, in a decision that reinforces the need for Michigan regulatory agencies to strictly follow rule setting requirements in the Administrative Procedures Act ("APA")^[1], a majority of a Michigan Court of Appeals panel ruled invalid a series of new rules issued by the Michigan Department of Environment, Great Lakes, and Energy (EGLE), which sought to impose new drinking water limits and groundwater cleanup criteria for PFAS chemicals^[2]. The decision, in 3M Company v. Department of Environment, Great Lakes, and Energy^[3], affirmed a prior ruling of the Michigan Court of Claims that invalidated the same rules for failure of EGLE to "address any cleanup or compliance costs that a business or group would incur as a result of the PFAS rules"^[4].

In its decision, the Court of Appeals examined EGLE's rulemaking process leading up to the new PFAS rules to determine if the agency complied with Section 45 of the APA, which requires state agencies to "prepare a regulatory impact statement (RIS) that includes an estimate of how much compliance with the proposed rules will cost `businesses and other groups.'"^[5] The Court also said that since EGLE's changes to the PFAS drinking water regulations would automatically trigger changes to the state's PFAS groundwater cleanup standards, it needed to examine both the drinking water and groundwater rulemaking processes to determine APA compliance.

In its summary of the EGLE rulemaking processes, the Court noted that EGLE issued an RIS for the new PFAS drinking water rules but did not issue an RIS for the resulting automatic changes to the PFAS groundwater cleanup standards. In defense of its decision not to issue an RIS for the groundwater standards, EGLE argued that a separate RIS for groundwater was not required under the APA, and that issuance of the second RIS was also impractical "because it lacked the necessary information to make an estimate"^[6].

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The Court's majority rejected both of EGLE's arguments, concluding that EGLE's failure to issue the second RIS for groundwater cleanup standards left both sets of rules in violation of the APA. In particular, the Court held that:

"[T]he proposed rule[s]" resulted in modified groundwater criteria, which triggered the possibility of additional "statewide compliance costs." It is that triggering effect from adoption of "the proposed [drinking water]" rules that brought into play EGLE's statutory obligation to provide "an estimate of the actual statewide compliance costs" of any required groundwater cleanup resulting from adoption of the proposed drinking water rules.

Although EGLE identified the estimated actual statewide compliance costs of the proposed drinking-water rule on businesses and groups, it did not estimate costs that these changes automatically imposed on groundwater cleanup. Failing to do so resulted in EGLE's noncompliance with MCL 24.245(3)(n), which in turn means the rules were not promulgated in compliance with the APA, and are invalid.[7]

The Court also reviewed an EGLE claimed exception to the Section 45 RIS requirement, under which the agency argued it "was permitted to determine that it was factually incapable of making an estimate" and that the Court should defer to its administrative expertise in that determination. The Court explicitly rejected EGLE's claimed exception, saying that no such exception to the estimate requirement exists in the APA, and that "if EGLE cannot provide one, then it cannot propose the rule in a way that complies with the APA".[8]

The Court also noted that the earlier Court of Claims decision included a temporary stay of its holding to allow for appellate review of its decision. Recognizing that EGLE will likely seek an appeal of this decision to the Michigan Supreme Court, the Court of Appeals disturbed the stay, meaning that the new PFAS standards remain in effect until EGLE exhausts its rights of appeal.

Conclusion

The 3M decision is an important reminder to Michigan regulatory agencies to carefully adhere to the requirements of the APA when developing and issuing new or revised regulations. The case also offers guidance to regulated businesses on the importance of monitoring the development of regulations by state agencies, the value that businesses can realize by participating in the regulation development process, and where necessary the steps regulated businesses can take to challenge regulations that are not compliant with the Michigan APA requirements.

For additional assistance in your organization's management of state and federal regulatory issues, please contact Chuck Barbieri or another member of Foster Swift's environmental litigation practice group.

[1] Administrative Procedures Act of 1969, MCL 24.201 et seq.

[2] The PFAS chemicals were perfluoroalkyl and polyfluoroalkyl.

[3] Opinion available at

https://www.courts.michigan.gov/siteassets/case-documents/uploads/OPINIONS/FINAL/COA/20230822_C364067_43_364

The majority opinion was issued by Justices Christopher Murray and Michael Gadola, with a dissent by Justice



Allie Maldonado.

[4] 3M Company v. Michigan Department of Environment, Great Lakes, and Energy, Court of Claims Case No. 21-000078-MZ, available at <https://www.cmbg3.com/library/Michigan-Ruling.pdf>.

[5] MCL 24.245(3)(n)

[6] Court of Appeals opinion, page 6.

[7] Id., pages 4-5.

[8] Id., page 6.