

## Viewpoint: Rules by Another Name: EGLE’s Use of the CAFO General Permit Process to Impose Farm Standards Outside of the Administrative Procedures Act



*Michael J. Pattwell & Zachary C. Larsen*<sup>1</sup>  
Clark Hill PLC<sup>2</sup>



Few areas of environmental law apply a more comprehensive set of regulations on relatively small businesses than those imposed on livestock farms that produce beef, milk, pork, poultry, eggs, and other staple foodstuffs—known in regulatory vernacular as Concentrated Animal Feeding Operations (“CAFOs”). Under the auspices of preventing discharges of excess nutrients or bacteria derived from farms applying manure to crop fields or from water that might come into contact with the animals stabled on site, the State of Michigan governs nearly everything happening on (and off) the farm in excruciating detail. The State’s standards range from when and how animal manure can be applied to crops to how much storage space farms must keep for manure and animal bedding to how animal remains are disposed of and to whom manure can be transferred. The Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) applies these to farms by compiling the labyrinth of state and federal rules into a mandatory 35-page (recently grown to 44-page), single-spaced “general permit” issued every five years.

But, although general permits are intended to be mere administrative tools,<sup>3</sup> EGLE has increasingly turned the CAFO General Permit into a means of circumventing the regulatory process. In its 2020 CAFO General Permit issued earlier this year, EGLE has taken license to not just assemble existing state and federal regulations but to write new ones outside of the Administrative Procedures Act’s rulemaking process. Those new standards create sweeping mandates for the industry, banning the land application or transfer of manure three months a year, vastly reducing the acreage of land available to receive manure, and even demanding that farms plant useless vegetation throughout acres of their crop fields. Though purporting to base these conditions on the agency’s permitting authority (EGLE’s directive and power to assure that each

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<sup>1</sup> Michael J. Pattwell and Zachary C. Larsen are attorneys with the Environment, Energy, and Natural Resources Practice Group at Clark Hill PLC. In addition to representing individual farms and other businesses on CAFO permitting and regulatory questions, they are presently representing over 165 farms and the state’s largest livestock farming associations in challenging Michigan’s 2020 CAFO General Permit. The views expressed are those of the authors and not necessarily of Clark Hill PLC.

<sup>2</sup> In accordance with the MELJ’s mission statement regarding publication of viewpoint articles, the positions and opinions advanced within this piece are those of the authors; they do not purport to represent the Environmental Law Section’s position on any legal issue.

<sup>3</sup> U.S. Environmental Protection Agency, *NPDES Permit Writers’ Manual* (Sept 2010), Ch 3.1.2, p 3-2 (“Where a large number of similar facilities require permits, a general permit allows the permitting authority to allocate resources in a more efficient manner and to provide more timely permit coverage than issuing an individual permit to each facility.”).

permit meets state and federal standards),<sup>4</sup> EGLE’s General Permit is not a quasi-adjudicative act like when the agency finds facts or applies the law to individual circumstances in deciding individual permit applications. Instead, EGLE’s policymaking by permit—issuing conditions that govern 92.4% of farms directly and the other 7.6% indirectly—is a quasi-legislative act that requires, at a minimum, that the agency adhere to the quasi-legislative APA process.

Based on that foundational observation, the authors of this article have filed suit on behalf of over 165 CAFOs seeking a determination that EGLE has overstepped its authority. This article gives an overview of CAFO regulation and the nature of the livestock farms’ current challenge. We will start with the CAFO state regulations, the background Clean Water Act requirements, and the permitting scheme. Then we will detail the most significant of the new requirements EGLE has written into the 2020 General Permit and their anticipated impact on livestock farms. Finally, we will explain the nature of the challenges currently pending in the Michigan Court of Claims and the Michigan Office of Administrative Hearings and Rules (“MOAHR”).

### **CAFO Permitting: Family Farms Meet the Regulatory State**

A “CAFO” is a lot or facility where any of various types of animals—dairy cows, cattle, pigs, chickens, turkeys, and others—are stabled or confined for more than 45 days per year,<sup>5</sup> and that is also defined as either a “large CAFO,” “medium CAFO,” or is “designated by the department” as a small CAFO or medium CAFO.”<sup>6</sup> “Large CAFOs” are those facilities meeting the “CAFO” definition that maintain over 1,000 animal units.<sup>7</sup> The “animal unit” metric is a method of achieving some level of uniformity across animal types by applying a multiplier for each species of animal.<sup>8</sup> For example, 1,000 animal units translates into 700 mature dairy cows, 1,000 cattle, 2,500 swine of over 55 pounds each, 10,000 sheep, 55,000 turkeys, or 125,000 chickens (and so on).<sup>9</sup> “Medium CAFOs” are those facilities with significantly reduced animal numbers<sup>10</sup> that either (1) have been “designated by the department as a CAFO,” (2) discharge pollutants from their “production area” (where animals are kept) to the waters of the state via a manmade conveyance, or (3) discharge water directly into the waters of the state “from the production area which originate outside of and pass over, across, or through the facility or that otherwise come into direct contact with the animals confined in the operation.”<sup>11</sup>

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<sup>4</sup> MCL 324.3106.

<sup>5</sup> Mich Admin Code, R 323.2102(b).

<sup>6</sup> Mich Admin Code, R 323.2102(i).

<sup>7</sup> Mich Admin Code, R 323.2103(g).

<sup>8</sup> See 411 FR 11468-01, *Concentrated Animal Feeding Operations*, Final Rule, Mar. 18, 1976 at 41 CFR 124.82(a)(3) (defining “animal unit”).

<sup>9</sup> Mich Admin Code, R 323.2103(g).

<sup>10</sup> Mich Admin Code, R 323.2103(m)(ii).

<sup>11</sup> Mich Admin Code, R 323.2103(m)(i).

Due to economies of scale, larger farms (which include many defined as CAFOs) are responsible for nearly half of all farm production.<sup>12</sup> Still, 99% of farms in America are family-owned farms.<sup>13</sup> And that obviously includes the vast majority of CAFOs. Because the USDA defines a “large-scale” farm as those with \$1 million or more in gross receipts,<sup>14</sup> most CAFOs are relatively speaking still “small businesses” and are defined as such using the 250 employee-size and \$6 million revenue-size definitions of Michigan’s APA.<sup>15</sup>

Even aside from the EGLE’s new mandates, CAFOs are subject to extensive environmental regulation under both state and federal statutory and regulatory regimes. The Clean Water Act<sup>16</sup> defines CAFOs as “point sources.”<sup>17</sup> Because discharges from point sources must be permitted under the National Pollutant Discharge Elimination System (“NPDES”),<sup>18</sup> CAFOs must also be permitted under that program as well if they discharge to a water of the state.<sup>19</sup> And though CAFOs are defined by regulation as only the “*lot or facility where . . . : (i) [a]nimals . . . 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*”<sup>20</sup>—and not the entirety of the livestock farming operation—courts have divined that discharges “from” a CAFO include any discharge caused by a CAFO’s land-application of manure (the process of spreading manure onto crops as a fertilizer).<sup>21</sup> So the rules governing CAFOs are directed not only to the actions taking place at the CAFO site but also to land application of manure<sup>22</sup> that happens often at multiple locations far removed from the CAFO site, such as neighboring crop fields that can use the manure’s nutrients for agronomical purposes, as long as such activities are under the control of the permitted CAFO.<sup>23</sup>

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<sup>12</sup> U.S. Department of Agriculture Economic Research Service. 2020. Farming and Farm Income. *Ag and Food Statistics: Charting the Essentials*.

<sup>13</sup> U.S. Department of Agriculture Economic Research Service. 2016. *America’s Diverse Family Farms: 2016 Edition*. Economic Information Bulletin Number 164.

<sup>14</sup> U.S. Department of Agriculture Economic Research Service. 2020. Farming and Farm Income. *Ag and Food Statistics: Charting the Essentials*.

<sup>15</sup> MCL 24.207a. (defining small business as a business with “fewer than 250 full-time employees” or “gross annual sales of less than \$6,000,000.00.”).

<sup>16</sup> 33 USC 1251 *et seq.*

<sup>17</sup> 33 USC 1362(14).

<sup>18</sup> 33 USC 1311(a); 33 USC 1342(a)(1).

<sup>19</sup> Mich Admin Code, R 323.2196(1)(b); *National Pork Producers Council v. US EPA*, 635 F3d 738, 751 (CA5 2011).

<sup>20</sup> 40 CFR 122.23(b)(1) (emphasis added).

<sup>21</sup> *Waterkeeper Alliance, Inc v. Environmental Protection Agency*, 399 F3d 486, 510 (CA2 2005).

<sup>22</sup> 40 CFR 122.23(b)(3) & (e).

<sup>23</sup> *Id.*

Because of the State of Michigan’s grant of administrative primacy under the Clean Water Act,<sup>24</sup> CAFOs are subject to permitting under Part 31 of NREPA.<sup>25</sup> State regulations require CAFO permits to go beyond setting effluent limitations (i.e., the maximum allowable rates for the discharge of a pollutant) for discharges from the physical site of a CAFO. In lieu of effluent limitations, the rules for CAFO permits require Comprehensive Nutrient Management Plans (“CNMPs”) that set standards to govern nearly every aspect of the farm’s operations—from setting parameters for controlling the use of water in the production area,<sup>26</sup> to setting limitations on where animals may roam,<sup>27</sup> to mandating storage requirements for the waste produced by the animals and prescribing rules for the maintenance and operation of storage facilities,<sup>28</sup> to mandating the type of record-keeping a farm must maintain,<sup>29</sup> and also to 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<sup>30</sup>—and much more.<sup>31</sup>

Michigan’s primary means of applying these regulations to farms has been through use of a general permit. Michigan requires CAFO owners or operations to obtain either an individual NPDES permit or a certificate of coverage under the general permit unless exempted<sup>32</sup>—and approximately 256 of 277 non-exempt CAFOs are subject to the general permit.<sup>33</sup> Michigan administrative rules allow EGLE to issue “general permits” for categories of discharge “[u]pon a determination by the department that certain discharges are appropriately and adequately controlled by a general permit . . . .”<sup>34</sup> Michigan has done so for CAFOs for at least 15 years,<sup>35</sup> revising its CAFO General Permit every five years.<sup>36</sup> The general permit incorporates many of the existing regulatory requirements

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<sup>24</sup> 33 USC 1342(b).

<sup>25</sup> MCL 324.3101, *et seq.*

<sup>26</sup> Mich Admin Code, R 323.2196(5)(a)(iii).

<sup>27</sup> Mich Admin Code, R 323.2196(5)(a)(iv).

<sup>28</sup> Mich Admin Code, R 323.2196(5)(a)(i).

<sup>29</sup> Mich Admin Code, R 323.2196(5)(a)(x).

<sup>30</sup> Mich Admin Code, R 323.2196(5)(a)(viii) & (5)(a)(ix).

<sup>31</sup> See Mich Admin Code, R 323.2196(5)(a).

<sup>32</sup> Mich Admin Code, R 323.2196(1)(b).

<sup>33</sup> Data compiled via EGLE’s [MI-Waters database](#), accessed on May 4, 2020.

<sup>34</sup> Mich Admin Code, R 323.2191(1).

<sup>35</sup> [General Permit MIG440000](#), issued January 1, 2003, last accessed on October 7, 2020; [General Permit MIG010000](#), issued April 30, 2015, last accessed on October 7, 2020; [General Permit MIG010000](#), issued March 27, 2020, last accessed on October 7, 2020.

<sup>36</sup> *Id.*; Mich Admin Code, R 323.2150.

referenced above.<sup>37</sup> In other words, most of the existing general permit conditions are “rules” that have been adopted as state or federal administrative rules before being incorporated into the permit.

### **What EGLE’s Revised 2020 CAFO General Permit Means for Farms**

Following its five-year revision schedule, EGLE issued its 2020 CAFO General Permit on March 27, 2020. Leading up to its final issuance, EGLE held three “stakeholder meetings” with certain groups, released a draft of the permit in December 2019, held three public meetings to receive comments, and also received written comments on that draft.<sup>38</sup> But EGLE completely bypassed APA rulemaking procedures. Among other procedures required for rulemakings that EGLE ignored in drafting its wholly new regulatory requirements for CAFOs: (1) EGLE did not obtain pre-approval for rulemaking from an agency under the direct control of the Governor;<sup>39</sup> (2) EGLE did not conduct a cost-benefit analysis that is required to evaluate the impacts of regulations on small businesses, local governments, and others;<sup>40</sup> (3) EGLE’s process was not subject to Legislative oversight;<sup>41</sup> and (4) EGLE escaped review by the Environmental Rules Review Committee—which includes members of both the agricultural industry and environmental groups.<sup>42</sup> The rulemaking process also substantively limits what an agency can do in rulemaking. For example, the APA requires that any exceedance of federal standards must be justified by “a clear and convincing need” for the departure.<sup>43</sup> And that determination can be later challenged in a suit under MCL 24.264.<sup>44</sup> Thus, though EGLE’s process incorporated a minimal amount of public input, EGLE did not comply with the many APA mandates for “rules” that would subject its regulations to more significant public input, direct political oversight and accountability, and stricter judicial scrutiny.

Substantively, EGLE’s recent General Permit goes far beyond the already extensive requirements of state and federal regulations. Among the more significant determinations, the 2020 General Permit prohibits the land application of manure between January and March each year, except where the permittee meets specific limited exceptions and notifies EGLE beforehand.<sup>45</sup> In other words, the permit presumptively bans applying manure to crops for a quarter of the year regardless of the field or weather conditions. Environmental groups have several times sought to enact this

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<sup>37</sup> *Id.*

<sup>38</sup> See [MI Waters documents](#), last accessed on October 7, 2020.

<sup>39</sup> MCL 24.239(1).

<sup>40</sup> MCL 24.245(3).

<sup>41</sup> MCL 24.245.

<sup>42</sup> MCL 24.265; MCL 24.266.

<sup>43</sup> MCL 24.232(8).

<sup>44</sup> *Slis v. Dep’t of Health and Human Servs.*, \_\_ Mich App \_\_, issued May 21, 2020 (Docket Nos. 351211 & 351212).

<sup>45</sup> 2020 CAFO General Permit, Part I.B.3.f.3.

prohibition into law, but the Legislature rejected each attempt.<sup>46</sup> Yet EGLE passed such a requirement without the quasi-legislative APA rulemaking process. Additionally, in conjunction with its ban on land application, EGLE similarly bans the transfer of manure during those same months.<sup>47</sup> So, although cows (or pigs or chickens) continue to produce manure all winter long, farms have no outlet for that ongoing production of waste and will be forced to build larger on-site storage lagoons. Another significant condition of the General Permit requires permittees to “install and maintain” “35-foot wide permanent vegetated buffer[s] along any surface water of the state, open tile line intake structures, sinkholes, [or] agricultural well heads” bordering or located on fields where CAFO waste is land applied if they use the predominant method for testing phosphorous in soil.<sup>48</sup> (Additionally, if they use an alternative approved method, the fact that they do not have such a buffer counts significantly against them in determining whether they can land-apply manure to the point of making the buffer virtually mandatory.)<sup>49</sup> EGLE has also reduced the amount of allowable phosphorus that may be in soil to which manure is applied from 150 ppm to 135 ppm.<sup>50</sup> Practically, this means that farms have fewer fields—all year around—where they will be allowed to land apply manure. Additionally, farms within Total Maximum Daily Load (“TMDL”) watersheds are subject to even further restrictions, including that fields to which manure is applied must have phosphorus levels that test below 120 ppm<sup>51</sup> or below 60 ppm in the winter,<sup>52</sup> and that EGLE may write additional, unspecified conditions into the permits of those farms as it sees fit.<sup>53</sup> These and other conditions that EGLE added to its recent permit go far beyond the existing federal or state regulatory requirements for CAFOs. Indeed, EGLE’s added conditions are effectively new laws for CAFOs applicable to those farms through the General Permit (or an equivalent individual permit) which they are mandated to obtain.<sup>54</sup>

### **A “Rule” By Another Name: EGLE’s Regulation of CAFOs by General Permit**

The principal challenge our group of livestock farms and agricultural associations has brought against the 2020 CAFO General Permit is that the new conditions EGLE inserted into the 44-page permit are “rules.” EGLE, like any state administrative agency, is subject to the rulemaking requirements of the APA. Thus, where it adopts policies, standards, or regulations of general applicability that implement or apply the laws that it administers—i.e., when the agency creates

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<sup>46</sup> 2019 SB 247; 2019 HB 4418; 2017 SB 639; 2017 HB 5185.

<sup>47</sup> General Permit MIG010000, Part I.B.3.f.4.

<sup>48</sup> General Permit MIG010000, Part I.B.3.h.

<sup>49</sup> General Permit MIG010000, Part I.B.3.c.; Michigan Phosphorus Risk Assessment (“MPRA”) Application Spreadsheet Example, last accessed October 7, 2020.

<sup>50</sup> General Permit MIG010000, Part I.B.3.c.1.a.

<sup>51</sup> General Permit MIG010000, Part I.B.3.c.1.a. & Part I.B.3.c.2.a.

<sup>52</sup> General Permit MIG010000, Part I.B.3.f.3.d.

<sup>53</sup> General Permit MIG010000, Part I.C.9.

<sup>54</sup> Mich Admin Code, R 323.2196(1)(b).

“rules”<sup>55</sup>—it must do so through the rulemaking process.<sup>56</sup> Moreover, case law is clear that the label or name that an agency gives to a rule does not govern whether it is, in fact, a “rule.”<sup>57</sup> In passing the APA, the Legislature intended for the definition of “rule” to be broadly construed and any exceptions to be narrowly construed.<sup>58</sup> That approach effectuates the Legislature’s purpose in prescribing the rulemaking process, which is “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.’”<sup>59</sup>

Our coalition believes that the new conditions EGLE placed into the 2020 CAFO General Permit fit exactly the definition of a “rule” and compelling EGLE to follow the rulemaking process will serve the APA’s purpose of subjecting agency policymaking to democratic checks. Rules are “policies, standards, [or] regulations” that are “general[ly] applicab[le]” to CAFOs and that purport to implement or apply the laws enforced by EGLE (Part 31 of NREPA). By issuing its 2020 CAFO General Permit, EGLE has set agency policy regarding and issued standards for CAFOs. Further, the agency’s issuance of the permit inherently declares that its conditions are generally applicable—they are intended to “cover a category of discharge[s],”<sup>60</sup> namely, discharges from CAFOs.<sup>61</sup> Moreover, the policies purport to administer or apply the law enforced by EGLE under Part 31 as EGLE has cited MCL 324.3103 and MCL 324.3106 as the basis for the General Permit’s issuance and claims that these permit conditions are authorized extensions of the state and federal laws applicable to discharges. Accordingly, these conditions meet all three prongs of the definition of a “rule,” and before incorporating its conditions into the General Permit, EGLE should have run any new regulatory mandates through the rulemaking process.

That conclusion is consistent with federal law, which considers nationwide permits to be exercises in rulemaking that must be promulgated like administrative rules under the federal APA<sup>62</sup> and requires general permits to be promulgated as rules.<sup>63</sup> It is also consistent with a recent

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<sup>55</sup> MCL 24.207.

<sup>56</sup> *Mich State AFL-CIO v. Secretary of State*, 230 Mich App 1, 6 (1998).

<sup>57</sup> *Detroit Base Coalition for Human Rights of the Handicapped v. Dep’t of Social Servs*, 431 Mich 172, 183 (1988) (the Legislature has intentionally “defined ‘rule’ broadly so as to defeat the inclination of ‘agencies to label as ‘bulletins,’ ‘announcements,’ ‘guides,’ [or] ‘interpretive bulletins,’ [policies] ‘which, in legal operation and effect, really amount to rules . . .’”).

<sup>58</sup> *AFSCME, AFL-CIO v. Dep’t of Mental Health*, 452 Mich 1, 10 (1996).

<sup>59</sup> *Detroit Base Coalition*, 431 Mich at 178–79 & 183.

<sup>60</sup> Mich Admin Code, R 323.2191(1).

<sup>61</sup> General Permit MIG010000, Part I.A.1 & Part I.A.3.

<sup>62</sup> *Nat’l Assoc of Home Builders v. US Army Corps of Eng’rs*, 417 F3d 1272, 1284–85 (2005); *Lakes Carriers Ass’n v. US EPA*, 652 F3d 1, 6 n 3 (CADDC 2011).

<sup>63</sup> *NRDC v. US EPA*, 279 F3d 1180, 1183 (2002); *Alaska Cmty Action on Toxics v. Aurora Energy Servs, LLC*, 765 F3d 1169, 1172 (9th Cir 2014).

administrative decision in North Carolina addressing conditions of that State’s general permit for CAFOs, which held that the challenged conditions of the general permit were “rules” that must be promulgated.<sup>64</sup> Further, it is consistent with the general case law in Michigan governing what constitutes administrative “rules”—particularly in the context of form documents or conditions attached to licenses.

In *AFSCME, AFL-CIO v. Department of Mental Health*,<sup>65</sup> for example, the Michigan Supreme Court analyzed 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.<sup>66</sup> 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.<sup>67</sup> And the Department’s contract was inflexible, offered to the providers without negotiation.<sup>68</sup> Therefore, the Court held that the contract terms were “rules” requiring promulgation.<sup>69</sup>

Likewise, in *Delta County v. Department of Natural Resources*, the Michigan Court of Appeals held that conditions of a license requiring adherence to 31 departmental guidelines and policies were “rules.”<sup>70</sup> The Court observed that conditioning a license on acceptance of such guidelines made the guidelines “effectively . . . rules under the guise of guidelines and policies.”<sup>71</sup> The Court rebuked that “[t]he rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies.”<sup>72</sup> And the Court admonished that “[t]he rulemaking procedures of the APA may not be circumvented.”<sup>73</sup> As occurred in both of these cases, EGLE here seeks to fold mandatory standards into a form document and condition a permit on acceptance of those standards. Those standards are therefore “rules.”

EGLE’s chief response to this allegation has been to defend its authority to issue general permits and the policy determinations incorporated into this particular permit. But neither of those

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<sup>64</sup> *North Carolina Farm Bureau Federation, Inc. v. NC Dep’t of Environmental Quality, Division of Water Resources*, 19 EHR 02739, Order on Motions for Partial Summary Judgment, issued May 8, 2020.

<sup>65</sup> *AFSCME, AFL-CIO*, 452 Mich at 9.

<sup>66</sup> *Id.* at 5–6.

<sup>67</sup> *Id.* at 7–8.

<sup>68</sup> *Id.* at 5–6.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> *Delta Co v. Dep’t of Nat Res*, 118 Mich App 458 (1982).

<sup>71</sup> *Id.* at 468.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

questions are at issue in this litigation.<sup>74</sup> The question is not whether EGLE can issue general permits but instead whether, as a prerequisite to incorporating mandatory standards into its CAFO general permit, EGLE must submit its quasi-legislative policymaking judgments to rulemaking. As described above, the APA requires EGLE to do so. EGLE has also said that its decision to issue a general permit is discretionary, thus falling within the exception for rules under MCL 24.207(j) for “a decision . . . to exercise or not to exercise a permissive statutory power . . . .” Again, whether EGLE decides to issue a general permit is not the question but rather the status of new standards that it writes into that permit. Further, in a similar case, the Michigan Court of Appeals has held that substantive policy decision by an agency does not fall within that exception.<sup>75</sup> Accordingly, EGLE’s writing of regulations for CAFOs does not escape rulemaking merely because it is cloaked within a general permit.

### **Conclusion**

EGLE’s use of the General Permit to write new regulations for CAFOs has circumvented the important procedural protections of the APA process. These new regulations have far-reaching impact for Michigan’s livestock farms and add to the existing maze of requirements imposed on these small businesses. Because the APA is intended to maintain the essentials of the legislative process when agencies issue regulatory mandates, EGLE should promulgate these standards through rulemaking. Our coalition is committed to ensuring that they do so.

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<sup>74</sup> The authors note that the administrative appeal, if required to move forward, will address the scientific and factual basis for EGLE’s general permit conditions. However, because the rulemaking question is a threshold legal issue that would moot those factual questions if decided in the agricultural plaintiffs’ favor, those issues are not at issue in the Court of Claims proceeding.

<sup>75</sup> *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).