STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT FOR THE COUNTY OF GENESEE

CITY OF FLINT,

Appellant,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, and LIESL EICHLER CLARK,

Appellees,

and

AJAX MATERIALS CORPORATION,

Intervenor.

CASE NO. 2022-116871-AA

HON. DAVID J. NEWBLATT

CONSOLIDATED WITH CASES
No. 2022-116880-AA
No. 2022-117201-AA

FLINT RISING; ENVIRONMENTAL TRANSFORMATION MOVEMENT OF FLINT; ST. FRANCIS PRAYER CENTER; MICHIGAN UNITED; C.A.U.T.I.O.N,

Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY and LIESL CLARK,

Appellees,

and

AJAX MATERIALS CORPORATION,

Intervenor.

No. 2022-116880-AA

HON. DAVID J. NEWBLATT

OPINION AND ORDER REGARDING CONSOLIDATED APPEALS OF PERMIT TO INSTALL HOT MIX ASPHALT PLANT IN GENESEE TOWNSHIP

A. Introduction

On November 15, 2021, the Michigan Department of Environment, Great Lakes and Energy (EGLE) issued a Permit to Install (PTI), which allowed for the building and operation of a hot mix asphalt manufacturing facility (HMA Plant) in an industrial-zoned area of Genesee Township. The plant abuts the City of Flint.

A series of lawsuits were filed challenging the permit by several entities—Ajax Materials Corporation (Ajax), the permit applicant; the City of Flint (City), an abutting municipality; and several community organizations (Community Groups), which consist of Flint Rising, Environmental Transformation Movement of Flint, St. Francis Prayer Center, Michigan United and CAUTION. All the lawsuits have been consolidated into this litigation.

In general terms, Ajax challenges the permit as being too restrictive, while the City and Community Groups litigants assert that EGLE failed in its duty to properly assess the application prior to issuance. Meanwhile, EGLE urges this Court to uphold the permit as issued.

The Court has received the complete record of the permitting process. It has also been supplied with extensive briefing as well as oral argument.

B. Nature of Circuit Court Review

This is an appeal of an administrative agency's decision to the circuit court. The decision at issue is EGLE's action taken with regard to Ajax's permit application to install an HMA Plant in Genesee Township, which was to issue a PTI. This matter is governed by the interaction of various federal and state statutes as well as administrative codes relating to the regulation of air quality.

The federal Clean Air Act (CCA) protects the country's air quality. The administration and enforcement of the act is tasked to the Environmental Protection Agency (EPA). The EPA does this, in part, by setting maximum concentrations in the air for specific criteria pollutants, which are known as National Ambient Air Quality Standards (NAAQS). It then has a process for controlling whether there are allowed new sources of emissions or major modifications of existing sources. This is a New Source Review (NSR). The purpose is to ensure that new emissions will not cause an area to go into "non-attainment" as to the NAAQS. This is called Prevention of Significant Deterioration. (PSD).

As to air quality, EPA delegates its regulatory authority to Michigan through its State Implementation Plan (SIP). This is contained within Michigan's air pollution statute, Part 55 of the Natural Resources and Environmental Protection Act (NREPA). MCL 324.5501 *et seq*. EGLE is the agency that administers air permitting as to NAAQS, NSR and PSD pursuant to rules it has adopted, which are at least as stringent as the EPA's. In addition, Michigan has also adopted rules that regulate specific Toxic Air Contaminants (TACs) as well as Volatile Organic Compounds (VOCs).

The construction and operation of a facility that emits pollution cannot occur without a permit issued by EGLE. EGLE's rules regarding permitting in this area are codified within Mich Admin Code, R 336.1201 *et seq*. Rule 201 prohibits creation of a source of emissions without a permit issued by EGLE. Rule 203 mandates that an application for a permit "shall include information required by the department," which "may include, as necessary, any of [items listed as subsections a through h]." These include:

a) "A complete description, in appropriate detail, of each emission unit or process covered by the application."
b) Description or applicable regulations and a method of complying.
c) Description of anticipated air contaminants.
d) Description of how emissions will be controlled or minimized.
e) Description of stacks and vents.
f) Scale drawings.
g) Information for an environmental impacts statement.
h) "Data demonstrating that the emissions from the process will not have an unacceptable air quality impact in relation to all federal, state, and local air quality standards."

Rule 201 gives EGLE the discretion to approve a permit. In addition, subsection 3 gives EGLE the authority to include within a permit, "any condition, specified in writing, that is reasonably necessary to assure compliance with all applicable requirements." On the other hand, Rule 207 provides that EGLE "shall deny an application" when "in the judgment of the department" certain conditions apply. Among these are an inability to comply with rules, interference with an area's attainment and where "sufficient information has not been submitted."

Any person can appeal EGLE's decision with regard to its action on a permit application. MCL 324.5505(8) and MCL 600.631. When a statute does not provide for a contested case hearing, as is the case here,

> [T]he circuit court may not review the evidentiary support underlying the agency's determination. Judicial review is 'limited in scope to a determination whether the action of the agency was authorized by law.' The agency's action was not authorized by law if it violated a statute or constitution, exceeded the agency's statutory authority or jurisdiction, materially prejudiced a party as a result of unlawful procedures, or was arbitrary and capricious. *Natural Resources Defense Council v DEQ*, 300 Mich App 79, 87-88 (2013).

In reviewing an action, "great deference should be given to an agency's administrative expertise." *Huron Behavioral Health v Dept of Community Health*, 293 Mich App 491, 497 (2011). As such, "The relationship between the courts and administrative agencies is one of restraint, and courts must exercise caution when called upon to interfere with the jurisdiction of an administrative agency." *Basic Prop Ins Assoc v OFIR*, 288 Mich App 552, 561 (2010).

The Court is aware that the permit is controversial. However, given the above law, the Court's role is a narrow one. It is not to decide whether issuing the permit was right or wrong. It is not the role of the Court to determine proper policy as to the regulatory burden affecting businesses. Nor is the Court authorized to judge whether the decision was environmentally just or fair to Flint and its residents in the moral sense. Rather, in this appeal, the Court is *only* to determine whether EGLE's decision was authorized by law.

C. Relevant History

Ajax submitted its application to install a new HMA Plant for Genesee Township on December 21, 2020. It was for construction of a plant that would be a synthetic minor source, which meant that it would voluntarily lower its emissions below a certain capacity so as not to be regulated as a major source.

HMA Plants in general, and Ajax's in particular, mix aggregates and heated asphalt cement to make asphalt to be used for construction projects. The aggregates and heated asphalt, and sometimes recycled asphalt, are heated and mixed in a counterflow drum mixer/dryer. The plant also has raw material storage, which consists of aggregate storage piles and asphalt cement storage units. Finished product is transported from the mixer to storage silos where it remains until transferred into trucks. Ajax proposed to use natural gas as its heating fuel with backup sources consisting of propane, fuel oils and recycled use oil (RUO). Ajax's application proposed a number of emission controls, which included a fabric baghouse filter, silo and loadout capture and control and a vapor condensation and recovery system for the asphalt tanks. As required, Ajax provided modeling it had performed in order to demonstrate that its expected emissions would be below the limits in EGLE's rules, which is necessary to ensure that the plant would not interfere with NAAQS attainment.

EGLE began its evaluation of Ajax's permit application. This is reflected in Permit File 527. This included analyzing Ajax's proposed operations, equipment specifications and modeling. It performed additional modeling based upon the provided data. In doing so, EGLE utilized EPA's air emission factors which apply to asphalt plants. EGLE's initial modeling confirmed that the proposed emissions would not interfere with that attainment of NAAQS. Ajax proposed terms requiring monitoring of wind speeds to ensure that no emissions would occur at wind speeds less than 12 miles per hour. This was based upon a procedure known as the Wisconsin method. EGLE rejected this approach and instead required Ajax to utilize a more conservative approach developed by EPA. After extensive evaluation and negotiation, EGLE issued a draft permit on July 1, 2021.

Because it was clear to EGLE that the project would constitute a "known public controversy," it was required to engage in a public hearing and public comment protocol pursuant to MCL 324.5511(3). As such, EGLE held a Zoom hearing on August 3, an in-person session on August 11 and another on September 1. By granting extensions, it kept the public comment period open for 83 days. 242 comments were submitted. These included comments from citizens, organizations and businesses. They also include comments from the EPA, US

Department of Housing and Urban Development (HUD), the Flint Housing Commission and Flint's mayor and city council.

In addition, because of the high level of low income and minority population in the area, there were environmental justice concerns. This was manifested in EPA's EJSCREEN, which is a mapping and screening tool that provides an Environmental Justice Index. This tool was created using a consistent dataset and approach for combining environmental and demographic indicators. The index for eight of the eleven EJSCREEN indicators in the one-mile area around the proposed Ajax site exceeded the 90th percentile in the State of Michigan.

A further issue was that the proposed Ajax site is in an area that is already heavily populated by industrial facilities along Dort highway and is in close proximity to residential housing and community centers. This included the Genesee Power Station, which was very controversial ever since it was first approved in 1992. A complaint pursuant to Title VI of the Civil Rights Act led to an investigation scrutinizing the permitting process. It concluded that "the totality of the circumstances" established that "race discrimination was more likely than not the reason why African Americans were treated less favorably than non-African Americans." Also in the area is Universal Coating, a controversial major source of hazardous pollutants that had been cited for violations.

EPA made it clear in a letter accompanying its public comments for EGLE's consideration that environmental justice concerns were to be taken very seriously in the review of Ajax's permit application. It stated:

> EPA is committed to advancing environmental justice and incorporating equity considerations into all aspects of our work. This commitment includes improving our assessment and considerations of the impacts of permits on communities already overburdened by pollution. As described below in more detail, we appreciate that EGLE shares this commitment and has taken steps to mitigate potential impacts from the proposed facility.

The letter stated, "Like EPA, EGLE recognizes the challenges faced by this community." EPA articulated that these environmental justice issues called for more scrutiny than is usually the case: "EPA acknowledges the work EGLE has already undertaken on this permitting action, work that may go beyond what is usually required in Michigan for issuing a minor source air pollution control construction project." It noted: "We understand that EGLE requested Ajax to consider alternative sites for this asphalt plant, but that the company declined to do so." It added: "we encourage the company, EGLE, and local authorities to consider again whether construction at an alternative site would avoid the potential for such impacts."

EPA provided 27 "comments and recommendations" for EGLE's consideration in determining the terms for the final permit. Among them were recommendations with regard to expanded modeling and analysis as well as more extensive permit requirements relating to testing and monitoring. It also included a suggestion that EGLE consider a ban on RUO,

because, "eliminating the use of RUO as a fuel could reduce air toxics and sulfur impacts on the local community."

After considering all the comments, EGLE prepared a document summarizing them and providing responses. This is contained within Hearing File 266. The comments resulted in several changes from the draft permit. These include:

- Ban on the use of RUO as a backup fuel
- Improvement of dust control measures
- More stringent opacity monitoring
- Increased stack testing for specific criteria pollutants and toxics
- Additional record keeping regarding recycled asphalt pavement (RAP)
- Additional language regarding emissions calculations
- Additional VOC limits
- Addition of a leak detection system to the baghouse

On November 15, 2021, EGLE approved the final permit to install to Ajax, which included all of the above new terms.

D. Ajax's Criticisms

Ajax agreed to the terms within the draft permit. However, it objects to the changes contained within the final permit as being unnecessary, overburdensome and not authorized by law. Specifically, Ajax objects to the ban of RUO as a backup fuel source and the more stringent limits on emissions. Further, it claims that EGLE overreached with regard to testing and monitoring requirements.

1. Ban of RUO and Reduction of Emissions

Ajax asserts that EGLE lacked a valid legal justification to ban the use of RUO and the reduction of emissions. It argues that because the interim permit anticipated emissions that complied with NAAQS and did not put the area out of attainment, this meant that it was in "compliance with all applicable requirements" for purposes of Rule 201. And because Rule 201 is a "procedural rule" only, Ajax argues that it cannot be used to justify any further restrictions. Ajax argues that EGLE can only change a term in the final permit in response to the following situations: 1) a change in the law, 2) a change in fact or 3) a mistake. While Ajax acknowledged that EGLE had an obligation to "consider" public comments, it argues that they cannot be the genesis of any substantive changes to the draft permit unless it is to address one of these situations.

According to Ajax, what happened since the draft permit was that EGLE buckled in response to political pressure and responded by arbitrarily coming up with a bunch of harsher terms just to appease an angry public. As such, EGLE's changes, Ajax argues, were not based upon any "applicable requirements" as identified in Rule 201. In support of its position, Ajax offered a slippery-slope argument, positing that the same justification (a general desire to reduce the emission of pollution in order to appease a community) could be used to restrict the plant to

solar power only. It is for these reasons that Ajax argues that EGLE's actions regarding the final permit were not authorized by law.

EGLE denies Ajax's narrative and instead attributes the difference between the draft and final permits to the seriousness with which it engaged in the "public controversy" process and its obligation to consider environmental justice concerns. As EGLE explained in its response to comments, echoing the sentiments expressed in EPA's letter, "EGLE is committed to achieving equity and transparency as we interact with the public. Both EGLE's public comment and hearing processes have evolved to provide greater access and to be more inclusive." This is consistent with what EPA made clear in its letter, which was that environmental concerns *required* it to elevate its scrutiny of the project. As such, it was dedicated to "improving our assessment and considerations of the impacts of permits on communities already overburdened by pollution." This would include "steps to mitigate potential impacts from the proposed facility." As such, most of the changes to the draft permit were a result of EGLE accepting EPA's "steps to mitigate potential impacts" that were birthed through the process of "improving [EPA's] assessment and consideration" of the project.

And so there are two battling narratives—Ajax's of an agency responding to public pressure by the willy-nilly imposition of arbitrary restrictions versus EGLE's of an agency taking seriously its obligation to consider environmental justice dynamics in the context of the public comment process. The Court agrees with Ajax that environmental justice concerns, by themselves, are not recognized by the law as providing justification for substantive regulation. However, they can be a basis of a more robust process which can affect the result. The Court disagrees with Ajax's pejorative characterization of this process as a bunch of loud noise that EGLE must suffer, but that it may not "consider" it in a way that results in substantive change. The key question is whether a permit term is based upon authority. Therefore, the determination of which narrative is correct depends upon the foundation on which EGLE acted in determining the terms of the final permit.

With this in mind, the Court turns to an analysis of the added restrictions. The impetus to ban RUO and lower emissions came from EPA comment number 27, which was a suggestion made with the goal to "reduce air toxics and sulfur impacts on the local community." EGLE took this suggestion and banned RUO in final permit. EGLE had the authority to restrict fuels pursuant to Rule 205. EGLE explained this decision in its response to comments: "The use of RUO is not fundamental to the process or operation of the facility and yet increases potential emissions including toxic air contaminants (TAC). The RUO is being removed from the permit to demonstrate compliance with Rule 224." The result of the ban of RUO did in fact reduce several pollutants, many of which were air toxics. This resulted in the reduction of emissions in the final permit.

It was through the public comment process that EGLE was able to receive EPA's suggestion, which identified an opportunity to reduce the impact of air toxics on a community that it recognized as having suffered from environmental injustice. This was permissible, not because of a failure to achieve NAAQS, but through air toxics regulation pursuant to Rule 224. Rule 224 requires that air toxics be limited to the maximum allowable emission rate based upon the best available control technology for toxics (T-BACT). T-BACT is defined as "the maximum

degree of emission reduction" that is "reasonably achievable for each process that emits toxic air contaminants." The phrase "reasonably achievable" is key here. T-BACT does not target a specific limit. Rather, with the assumption that any amounts of toxics are bad, toxics regulation aims to lower the levels as much as "reasonably achievable." As such, EPA was suggesting that, because Ajax proposed RUO as a backup fuel source only, it was reasonable to eliminate it in an effort to achieve a reduction of the emission of toxics that would be further protective of a community that was recognized to have environmental justice concerns. This would constitute an improvement to the permit based upon the authority granted under Rules 224 and 205, which was made possible by the contribution of an idea that EGLE had not thought of prior to the draft permit.

In this context, EGLE's assertion that there is no authority to restrict pursuant to the NAAQS standards is a strawman argument. While it is correct as far as it goes, it goes nowhere because that is not the authority upon which EGLE relies. Rather, the real issue is whether EGLE's determination that to achieve further reduction in toxic emissions through the RUO ban and stricter limits was reasonable pursuant to Rule 224.

Having argued that EGLE did not have authority for the ban of RUO, Ajax does not directly address the issue of reasonability of the BACT analysis other than to point out that the ban would place it at a competitive disadvantage depending on the price of fuel, as other asphalt plants are not precluded from using RUO as a backup fuel. EGLE, however, counters this by pointing out that the primary fuel source proposed was natural gas and that RUO was only one of a number of backup fuels that were anticipated (In fact, Ajax's application did not even propose the installation of RUO tanks). As such, if natural gas should become too expensive, it still has other alternatives for a backup fuel. Given this, the Court can see why EGLE did not prioritize Ajax's claim of a financial disadvantage over the reduction in negative impacts for the community.

The Court also finds it useful to consider Ajax's argument that allowing EGLE to ban RUO is somehow equivalent to a ban of all energy sources other than solar power. The Court can easily identify this as a slippery slope argument. However, it is one that backfires against Ajax by giving an example that contrasts so drastically with what was actually done in this case—it makes the banning of one backup fuel seem even more reasonable. The Court would agree with Ajax that a decision by EGLE that it would be reasonable to ban all but solar power to achieve emission reductions would be unreasonable, and thus arbitrary and capricious. The Court can also see a problem if EGLE banned the primary fuel source. But thankfully, EGLE has done neither of these obviously unreasonable things.

Despite numerous requests by the Court, Ajax was unable to provide any authority that would preclude EGLE's action. Ajax was only able to cite the Court to *Lafarge Midwest Inc v Mich Dept of Environmental Quality*, No 05-538-AA (Alpena County Circuit Court, Oct 2006). First off, this opinion, from a circuit judge, is not binding on this Court. But more importantly, it is distinguishable. In *Lafarge*, the court ruled that there was no authority in the rules for the regulation of mercury; a point that the defendant acknowledged. That is not the case here; as indicated above, authority is granted through Rule 224 and Rule 205.

In conclusion, the Court finds that EGLE had authority to make material changes to the draft permit in the final permit pursuant to Rule 224. Further, its determination that it was reasonable to reduce the impact of toxic pollutants through a ban of RUO and more stringent limits was not arbitrary and capricious.

2. Testing Requirements

Ajax challenges the testing requirements in the final permit as being arbitrary and capricious. Specifically, Ajax objects to these increased stack testing requirements for being too stringent and beyond what other facilities are subjected to. As it states in its brief:

> These conditions go far beyond what is required for other HMA facilities in Michigan. Further, the absurdity of the conditions is confirmed by the fact that they also go well beyond that which is required for nearby major sources, ie, sources subject to [regulations] because they emit more than minor sources like the Plant.

EGLE added stack testing requirements to the final permit at the suggestion of EPA in order to "determine compliance" and to "further ensure" that "the local community is not subjected to emissions exceeding the corresponding limit." Ajax does not challenge that EGLE has the authority to institute testing requirements to accomplish these goals. However, it argues that the disparate treatment it received establishes that EGLE's stringent testing requirements go too far, and thus are arbitrary and capricious.

Ajax proposes to make its case by comparing its permit to those of other asphalt plants and other emitting sources. In doing so, it provides the Court tables in its briefs of other facilities and citations to several links to allow the Court to peruse the corresponding permits. Of course, this only makes sense if the comparisons are similar in all relevant aspects. Ajax claims that they are and urges this Court to either take its word for it, or for the Court to do an extensive amount of investigation and research so that it can come to that conclusion itself.

There are a number of problems with Ajax's approach. The first is that it necessarily invites the Court to go outside of the "closed universe" of the administrative record in this case, which has already been provided to the Court. The Court's role here is to review that record in the context of an appeal of an agency decision, not to litigate claims in a lawsuit pursuant to a record developed through the discovery process.

The more existential problem with Ajax's proposed exercise, however, is that it ignores the concept that every permit must be considered within the context of its own unique situation. This point is energetically made by EGLE in its brief: "How a particular facility compares to other previously permitted facilities in the same geographic area, or other facilities in the same industry, is irrelevant. Such apples-to-apples comparison is not possible because no two sites are the same." This was well demonstrated to the Court at oral argument, where after Ajax's counsel propounded extensively as to the relevant similarities, EGLE's counsel was able to, off the top of

her head, offer her understanding as to the significant differences. From this, the Court was convinced that this is a rabbit hole into which it should not descend.

A review of the circumstances involving this permit is instructive to the point. The Ajax site is situated along the same industrial corridor that already has several controversial polluting facilities. This includes the Genesee Power Station, which was very controversial ever since it was first approved in 1992 and led to a finding that the permitting process was discriminatory. It also includes Universal Coating, a controversial major source of hazardous pollutants that has been cited for violations. There are also two metal recyclers present, one of which has received 42 complaints since 2007 with regard to odor, open burning and other issues. All of these sources of pollution are directly adjacent to the City of Flint. It is within close proximity to private residences as well as a public housing complex. It is also near St. Francis Prayer Center, community buildings and a park. Based upon all of this, the Environmental Justice Index for eight of the eleven EJSCREEN indicators in the one-mile area around the proposed Ajax site exceeds the 90th percentile in the State of Michigan.

It is also important to consider this in the context of the larger historical and societal issues affecting Flint and Genesee County. These dynamics include structural corporate disinvestment and loss of tax base, racial segregation and injustice, and rampant poverty and crime. They also include a history of the loss of local political control through the appointment of a series of emergency managers. All of this manifested in the devastating tragedy that has become known as the Flint Water Crisis. The City of Flint described the effect this crisis has on the situation as follows in its brief:

> Ajax claims [nothing is unusual/justifies onerous restrictions]. However, it is no secret that the City of Flint and nearby communities have endured an almost decades long public health and environmental crisis related to the contamination of the residents' drinking water. With this most recent crisis still not fully mitigated or remedied, Ajax's proposed HMA Plant (especially with its proximity to these same affected residents) drew significant controversy and public outcry at the time Ajax submitted its application and EGLE issued the Draft Permit. In this context, Ajax's proposed HMA Plant is far from 'usual.'

It could hardly be more foreseeable that these dynamics—historical economic and racial injustice along with the worst public health crisis in history—would create an inhospitable environment for the siting of an asphalt in an area already inundated with polluting sources in close proximity to a predominantly low income and minority population. It only stands to reason that these dynamics could cause the exertion of more energy and scrutiny in the permitting process, which in turn, could manifest in substantive differences between the terms of this permit and those of others without these specific dynamics.

Of course, the foreseeable happened—there was groundswell of public opposition to the project which featured protests and negative publicity. This caused EGLE to recognize the permit as creating a "public controversy," which triggered the public hearings and public

comments that garnered 242 comments from citizens, organizations and businesses as well as a slew of governmental entities and officials. This brought with it the scrutiny that comes to a project from being identified has having environmental justice concerns. EPA made it clear that these concerns required it to elevate its scrutiny of the project. In the letter accompanying its comments, it dedicated itself to "improving our assessment and considerations of the impacts of permits on communities already overburdened by pollution." This would include "steps to mitigate potential impacts from the proposed facility." Testing requirements fall within that purview.

Needless to say, all of the above is totally unique to the Ajax project in Genesee Township. As such, Ajax's argument that the very fact that the Genesee Township permit is more restrictive in comparison with other facilities establishes that EGLE's decision was arbitrary and capricious is without merit.

E. Community Groups' Criticisms

The Community Groups assert that EGLE failed in its duty to properly assess the HMA Plant and so made its decision to issue a permit without sufficient information. Specifically, the Community Groups claim that EGLE did not factor in emissions for the AC tanks, that it made incorrect assumptions about the plant's capacity to operate and that it used the wrong air monitoring data for its assessment of the ambient air quality. As such, they argue that the issuance of the permit was arbitrary and capricious.

1. Consideration of Emissions from AC Tanks

The Community Groups assert that EGLE failed to consider emissions from six 30,000 gallons liquid cement storage tanks that are a part of Ajax's HMA Plant operations. In support of this contention, they point out that the information is missing from the tables submitted by Ajax that summarize the emissions in Permit File 527. They further asserts that a lack of emissions information renders EGLE unable to assess VOCs so that it can engage in the required BACT analysis.

EGLE is required to ensure that a permit application is supported by sufficient information for it to consider. Rule 203 requires, "A complete description, in appropriate detail, of each emission unit or process covered by the application." Rule 207 states that an application shall be denied if, "Sufficient information has not been submitted by the applicant to enable the department to make reasonable judgments." In reviewing EGLE's judgment about what information it determined was necessary in order to properly evaluate the permit application, it is entitled to "great deference" because of its "administrative expertise." *Huron Behavioral Health*, 293 Mich App at 497.

EGLE acknowledges that the emission information regarding the tanks was missing from the tables. However, it claims that it knew about this omission from the start and took appropriate steps to quantify the emissions in other ways and then factor them into the analysis. It notes that the final evaluation document shows that TAC modeling was performed, which

included emissions from the tanks and the tank heater and that this is included in the AQD evaluation in the permit file.

Specifically with regard to VOCs, EGLE considered them by estimating the emissions at less than two tons per year. By observing that the tank emission estimation was higher than Ajax's estimation of emissions from the load-out process (which should be substantially lower), EGLE was able to conclude that the 2 tons per year figure was an overestimation; which would actually provide for a more stringent limit. Ajax did submit, and EGLE reviewed a BACT analysis which included overestimated level of emissions, which is contained on page 126 of the Permit File 527.

EGLE has sufficiently explained why it determined that it had a "complete description" such that it had "sufficient information" regarding the tank emissions. While it is true that the information about tank emissions was not included in the table, the oversight was known and accounted for in other ways. EGLE had good reasons to conclude that the emissions were quantified in those ways. As such, the emissions from the AC tanks were included in the modeling and BACT analysis. The Court is required to give EGLE's administrative expertise great deference.

It is for these reasons that the Court finds that EGLE had sufficient information about the tank emissions such that its decision was not arbitrary and capricious.

2. Potential to Emit Calculations

The Community Groups assert that EGLE failed to properly review the emissions from the HMA Plant because it did not use the maximum throughput given the plant's design and processing capacity. Specifically, they claim that the modeling underrepresented the throughput because it assumed that the plant will not exceed 550 tons per hour and 12,000 tons per day when the plant is actually designed to operate at a maximum of 600 tons per hour and 14,000 tons per day. Interestingly, the City does not raise the throughput calculation issue as being a concern.

EGLE denies that it failed to properly review the emissions impact. It pointed out that it did evaluate the maximum design-based throughput amount before issuing the draft permit. For the final permit, however, it considered a lesser amount because it approved an operating limit which was legally enforceable. Rule 205 allows for the issuance of a synthetic minor permit so long as it establishes production or operation limits that are enforceable. This is perfectly acceptable pursuant to Appendix W, which contain the instructions for how to conduct air quality modeling. As EGLE correctly points out, the emissions inputs for "NAAQS Compliance in PSD Demonstrations" uses "maximum allowable limits" and "enforceable limits" interchangeably.

The Community Groups assert that the use of the enforceable limit is inappropriate because it "does not reflect how the company intends to operate the plant." They cite the Court to *In re Polymet*, 955 NW2d 258 (Minn 2021) for the idea that enforceable limits can be abused by a company that is so inclined to go beyond them. And to what do the Community Groups point

to suggest that Ajax has designs to operate the plant beyond the enforceable limits? A letter from the manufacturer of the plant that states that the tonnage processed can vary by 15% based upon changes in the moisture content of the aggregate material.

However, *Polymet* is a case that considered the obligation of an agency to prospectively investigate a "sham" synthetic minor permit where the real intention was to operate at the level of a major source. In *Polymet*, a permit applicant that had submitted a report elsewhere about its intent to produce beyond the limits of a synthetic minor source, and the agency had knowledge of it. Even in that situation, however, the court concluded that there was no obligation to forecast violations. Rather, any violations are properly addressed through enforcement measures after the fact.

There is nothing analogous to *Polymet* in the present situation. The 15% variation letter can hardly suffice as an indication that Ajax intends to violate the permit such that it can be considered a sham permit. First off, the 15% variance can be either above or below the level. Further, as EGLE pointed out in its brief, it accounted for this moisture variability within Executive File 204. Finally, as articulated in *Polymet*, any violations can be addressed through enforcement measures.

Based upon all of this, the Court finds that it is appropriate to defer to EGLE's expertise as to its assessment of the throughputs in its emissions modeling. *Polymet* does not require EGLE to assume that the enforceable limits are insufficient. As such, EGLE's assessments are not arbitrary and capricious.

3. Applicability of Air Quality Monitoring Data

EGLE was required to calculate the ambient air quality of the area in order to determine whether the proposed HMA Plant's emissions would cause a violation of air quality standards. The Community Groups assert that EGLE used improper air quality data in this assessment, which in turn made it impossible to determine whether the proposed emissions would cause a violation. Interestingly, the City does not identify EGLE's use of the air monitoring data as a concern.

Specifically, the Community Groups assert that EGLE was wrong to conduct its analysis using monitoring data for nitrogen dioxide from Lansing and data for PM-10 and sulfur dioxide from Grand Rapids. They claim that EGLE cherrypicked this data and then just assumed it to be "representative" of the air quality in Genesee Township. It argues that this practice goes against EPA's guidelines for the use of air monitoring data. This is the Ambient Monitoring Guidelines for Prevention of Significant Deterioration (May 1987). The Community Groups argue that this failure renders EGLE's decision to grant the permit as arbitrary and capricious.

EGLE responds by pointing out that the Community Groups' argument betrays a lack of understanding of what it did to assess air quality. The crux of the problem, EGLE states, is that the Community Groups conflate guidelines for monitoring with the requirements for how to conduct modeling. Modeling is required to determine ambient air, as explained by EGLE in its brief:

> Modeling is a distinct process required by 40 CFR Part 51 to be employed by a State Implementation Plan in the prevention of significant deterioration of air quality. States develop models in accordance with Appendix W to Part 51, and then site-specific inputs are entered into the model to develop emission limits and demonstrate compliance with PSD increments and the NAAQS for individual permits.

EGLE points out that the EPA guidelines the Community Groups cite indicate that modeling is required to assess air quality and then cites to the precursor to Appendix W. EGLE further notes that the EPA guidelines referred to by the Community Groups, as guidelines, lack the force of law, whereas compliance with Appendix W is required by law.

EGLE asserts that it complied with the modeling process as articulated within Appendix W and that is all that was required by the law. Appendix W's modeling process calls for three sets of data: emissions from the facility alone, the cumulative emissions from all sources in the area and the facility's emissions and the background concentration. The background concentration, in turn, consists of two subsets of data: "nearby sources" and "other sources." As to how to calculate "other sources," Appendix W allows for the use of data from a representative "regional site" where local air monitoring is not available. Due to unavailability of monitoring data available for some of the pollutants, EGLE chose to use data from monitors in Lansing and Grand Blanc. As noted in its brief, EGLE explained how it chose this data in a hearing file as follows:

> The Lansing monitor used in the NOx analysis and the Grand Rapids monitor used for PM10 and SO2 are considered representative since the monitors are both located upwind of the proposed facility, have similar geography, and with a predominant southwest wind flow over the region, the monitors represent regional transport of more distant sources, and background attributable to natural sources, traveling into the Flint region.

EGLE asserts that this explanation is appropriate to justify the use of the Lansing and Grand Rapids data as "other source" data to input into its modeling.

The Court agrees with EGLE as to use of the Lansing and Grand Rapids data. EGLE was required to assess the ambient air quality using the modeling prescribed by Appendix W. It did so. Its use of the data from Lansing and Grand Rapids was limited to its calculations of "other sources," which is permissible by Appendix W.

Based upon the above, the Court disagrees with the allegation of the Community Groups—that EGLE cherrypicked air monitoring data and then just assumed it to be "representative" of Genesee Township. Rather, EGLE has sufficiently explained that its use of the Lansing and Grand Rapids monitoring data was consistent with the modeling requirements as

set forth within Appendix W. As such, EGLE's assessment of the ambient air is not arbitrary and capricious.

F. The City of Flint's Criticisms

The City challenges EGLE's decision to issue the permit without sufficient information about emissions and the correct modeling regarding emissions in low-wind conditions. Additionally, it alleges that EGLE did not comply with the requirements of environmental justice.

1. Consideration of All Necessary Air Emission Sources

The City asserts that EGLE failed to consider all the emissions from the HMA Plant. Namely, it asserts that EGLE failed to consider emissions from the liquid asphalt storage tanks, hot oil heaters and the aggregate storage operations. Interestingly, the Community Groups do not cite these omissions as being a concern.

EGLE denies this and asserts that, in fact, all the emissions were considered. In its brief and in oral argument, it cited the Court to chapter and verse with the permit file (Permit File 527). The estimations of the liquid storage tanks emissions are on pages 105-106. The "hot oil heater" information is on page 62 as the "AC Tank Heater." The materials storage and handling information is identified as "EUYARD" and is contained on page 18. Modeling was done as to this, which is shown on page 19. Consideration of the emissions is also manifested in correspondent between EGLE and Ajax's consultant.

EGLE has sufficiently explained why it determined that it had a "complete description" such that it had "sufficient information" regarding the emissions from all aspects of the project. The Court is required to give EGLE's administrative expertise great deference.

The Court is satisfied that the City is in error in its assertion that the emissions were not considered. As such, the City's argument that the decision to issue the permit was arbitrary and capricious is without merit.

2. Local Impacts Due to Low-Wind Conditions

The City asserts that EGLE failed to adequately assess emissions impacts during low wind conditions by allowing the use of "hypothetical and contrived conditions" in Ajax's modeling that is not representative of actual conditions. The problem is, according to the City, that EGLE allowed Ajax to use a modeling approach allowed by the Wisconsin Department of Natural Resources, which it criticizes as deficient. This situation is described by the City as "failure to match the theoretical models with real world conditions." Interestingly, the Community Groups do not cite the low-wind impact issue as being a concern in its challenge to the permit.

The City argues that EGLE's failure misses the effect of the low-wind conditions, which will result in less dispersal of emission and thus higher concentrations of pollutants locally. It

believes this will negatively impact the City, which is situated on the border of Genesee Township, where the plant is located.

Once again, EGLE maintains that the City's position is based upon a misunderstanding of what happened. EGLE notes that Ajax initially submit modeling that used the Wisconsin approach, but that EGLE rejected it. Rather, EGLE required Ajax to model based upon the more conservative modeling approach developed by the EPA.

The Permit File 527 on page 82 confirms EGLE's position. A note to Table 5.6b—Proposed Yard Emissions—Wind Emissions from Continuously Active Piles states in this regard:

> Emissions conservatively calculated based on Control of Open Fugitive Dust Sources. AP-42 Section 13.2.5 Industrial Wind Emission methodology indicates a maximum potential emissions of 1,315 pounds per year, not taking into account control, snow, rain and frozen conditions.

This approach calculates emissions from wind erosion based on the assumption that there are no emissions when wind speeds are below 12 miles per hour. This is based upon EPA's research about the effect of lower wind speeds on emissions. In addition, EGLE adjusted the modeling to provide even more protection. As explained in the response to comments:

> To be conservative, both the dispersion modeling and the emission calculations from wind erosion on the storage piles included in the application were based upon wind erosion happening at a minimum of 11.5 mph wind speed rather than the default 12 mph. However, the draft permit prohibited visible emissions at wind speeds less than 12 mph. This is more restrictive than allowing visible emissions at wind speeds of at leas 11.5 mph since visible emissions would not be allowed between 11.5 mph and 12.0 mph.

From the above, the Court finds that EGLE rejected Ajax's attempt to utilize the Wisconsin approach and instead required the use of the more conservative and long-standing EPA approach. As such, it appropriately considered the emissions effects in low-wind conditions.

For these reasons, the Court finds that EGLE used the correct modeling procedure for assessment of emissions during low-wind conditions and thus its decision to issue the permit was not arbitrary and capricious.

3. Environmental Justice Requirements

All litigants agree that EGLE had a duty to consider environmental justice concerns. However, the City alone asserts that EGLE's failure to do so constitutes a reason for the Court to find that the permit decision is not supported by law.

All agree, even the City, that environmental justice is an emerging area of the law with little direct legal precedent. We know that it is rooted in the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964. However, as to what environmental justice specifically requires, it is unclear. The City cites to the language of *Sierra Club v Fed Energy Comm*, 867 F3d 1357, 1368 (DC Cir 2017), which states: "an agency is not required to select the course of action that best serves environmental justice, only to take a 'hard look' at environmental justice issues." EGLE cites to *Baltimore Gas & Elec Co v Natural Resources Defense Council, Inc*, 462 US 87, 97-98 (1983), which states: The "role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious."

So, what did EGLE do to comply with environmental justice concerns? EGLE identified the permit as a "known public controversy," which required it to engage in a public hearing and public comment protocol. This consisted of a Zoom hearing on August 3, an in-person session on August 11 and another on September 1. Regarding public comment, it granted extensions which resulted in public comment period being kept open for 83 days. 242 comments were received, considered and responded to. These included comments from citizens, organizations and businesses. They also included comments from the US Department of Housing and Urban Development (HUD), the Flint Housing Commission and Flint's mayor and city council. EPA's contribution consisted of 27 comments.

EPA's letter accompanying the comments articulated a commitment to environmental justice concerns by highlighting the following:

- There was a legal obligation to consider environmental justice concerns in a meaningful way
- According to EJSCREEN, the environmental demographic indicators for the project exceeded the 90th percentile in the state
- The proposed site already was already heavily populated by other polluting industrial facilities and within close proximity to residential housing and community centers and on the border of the City
- The situation necessitated "work that may go beyond what is usually required in Michigan for issuing a minor source air pollution control construction project"

EGLE took EPA's comments, along with all the others, and considered and responded to them. This manifested in a final permit that was more stringent than the draft permit. This included lower emissions limits, a ban on RUO and more arduous testing requirements. In fact, these changes from what was required in the draft permit have motivated Ajax to appeal EGLE's final permit.

Given this record, the Court wonders exactly what EGLE failed to do that it should have done. It appears that the City's theory is encapsulated in the following sentence on page 19 of its brief:

> While EGLE extended the comment period and took other steps to allow for increased public engagement related to the permit review process, the outcome simply does not reflect a rational or meaningful connection to the facts on the whole record.

Unpacking this, the Court interprets the first clause of the sentence is an acknowledgement that EGLE's process and procedure of engaging the public and accepting input is not being criticized. Rather, it is the second clause that contains the theory—failure to consider all emissions and us of the wrong low-wind modeling— establish *ipso facto* a failure to comply with environmental justice requirements. In so doing, it waved off any significant changes to the final permit as "mere window-dressing." As it states on page 20:

> EGLE's decision to proceed with issuing the Permit despite these circumstances and despite EGLE's statutory authority and duty to deny a permit in exactly such circumstances, demonstrates an absence of adjustment with reference to principles, circumstances, or significance.

It then cites the Court to *South Dearborn Environment Improvement Assoc v Department of Environmental Quality*, 336 Mich App 490 (2021). The City also made it clear during its oral argument that its environmental justice claim solely rests upon the argument that the flaws per se establish the environmental justice violation.

The City's argument reduces the concept of environmental justice to a tautology—the permit is unjust because it is flawed, which makes it flawed because it is unjust. Another way of saying it is that the City considers the words "flawed" and "unjust" as synonymous in this context. According to this logic, it does not matter whether EGLE hosted zero meetings or a thousand—the failure to consider emissions, along with the wrong low-wind modeling, are per se a violation of environmental justice requirements. The City offers no authority for this position. *South Dearborn* certainly does not provide it.

Even if the City was correct in its position—that permit flaws *ispo facto* establish an environmental justice violation—it would still not prevail in the appeal. This is because the Court has already rejected the City's two substantive challenges to the permit per the above analysis.

For these reasons, the Court finds that the City has failed to establish environmental justice violations on the part of EGLE as to the permit.

G. Conclusion

The final permit issued by EGLE allowing for the construction and operation of an asphalt plant in Genesee Township on the border of Flint is surely controversial. As such, there was much energy invested in this litigation challenging EGLE's decision, both in and out of the courtoom. However, the Court's role is actually quite limited. It is not the Court's place to determine the proper policy as to the regulatory burden affecting businesses. Nor is the Court empowered to judge whether the permit was environmentally just or fair to Flint and its residents. It is not even to pass judgment on whether EGLE was right or wrong to do what it did. Rather, the Court is *only* to determine whether EGLE's decision was authorized by law.

Mindful of its role and based upon the above analysis of the arguments of the respective appellants, the Court makes the following determinations:

- EGLE did not exceed its statutory authority when it utilized ideas generated from public comments to improve the final permit over the draft permit by banning RUO and setting lower emissions limits. In doing so, it was acting pursuant to its authority under Rules 224 and 205. Further, the decision was not arbitrary and capricious because it balanced the benefit to the community against the detrimental effect the more restrictive terms would have on Ajax's operations.
- Ajax's argument that the permit's testing requirements are arbitrary and capricious because they are more arduous than other asphalt plants and local emitting sources lacks merit. Those comparisons are irrelevant because the circumstances involving Ajax's Genesee Township permit are unique.
- Claims that the permitting decision was arbitrary and capricious because EGLE lacked complete information about emissions, made the wrong assumptions about plant capacity, used incorrect data for modeling or used the wrong procedure for estimating emissions during low-wind conditions are without merit. The Court finds that EGLE's determination that it had a "complete description" such that it had "sufficient information" to assess the application was reasonable and thus entitled to deference.
- EGLE complied with environmental justice requirements.

For the above reasons, the Court rejects all the claims of all appellants in the consolidated appeals and upholds the final permit as issued by EGLE.

IT IS SO ORDERED.

June 20, 2023

David J. Newblatt, P-45366
Circuit Court Judge