

STATE OF MICHIGAN
GENESEE COUNTY CIRCUIT COURT

SAINT FRANCIS PRAYER CENTER.
FLINT RISING, THE ENVIRONMENTAL
TRANSFORMATION MOVEMENT OF FLINT,
MICHIGAN UNITED, and C.A.U.T.I.O.N.,
Michigan not-for-profit
community organizations headquartered and
having membership in Genesee Cty, Michigan.

No. 2022-116871-AA
Hon. David J. Newblatt
Consolidated with Case Nos.
2022-116880-AA and
2022-117201-AA

Appellants,

v

MICHIGAN DEPARTMENT OF
ENVIRONMENT, GREAT LAKES,
AND ENERGY (“EGLE”), an agency of the Executive
Branch of the State of Michigan, and
LIESL EICHLER CLARK in her official
capacity as Director of EGLE.

**REPLY BRIEF FOR
APPELLANT COMMUNITY GROUPS**
ORAL ARGUMENT REQUESTED

Appellees

and

AJAX MATERIALS CORPORATION, a Michigan corporation,

Intervening Appellee.

AJAX MATERIALS CORPORATION, a Michigan corporation,

Appellant,

v

MICHIGAN DEPARTMENT OF
ENVIRONMENT, GREAT LAKES,
AND ENERGY (“EGLE”), an agency of the Executive
Branch of the State of Michigan, and
LIESL EICHLER CLARK in her official
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No. 2022-116871-AA
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Appellee,

and

CITY OF FLINT,
Intervenor,

and

SAINT FRANCIS PRAYER CENTER

FLINT RISING, THE ENVIRONMENTAL
TRANSFORMATION MOVEMENT OF FLINT,
MICHIGAN UNITED AND C.A.U.T.I.O.N.,
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**REPLY BRIEF FOR APPELLANT
COMMUNITY GROUPS ST. FRANCIS PRAYER CENTER, FLINT RISING,
ENVIRONMENTAL TRANSFORMATION MOVEMENT OF FLINT,
MICHIGAN UNITED, AND C.A.U.T.I.O.N.**

ORAL ARGUMENT REQUESTED

***THIS APPEAL INVOLVES A RULING THAT A
STATE GOVERNMENTAL ACTION IS INVALID***

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INTRODUCTION

EGLE failed to comply with the Clean Air Act (“CAA”), Part 55 of the Natural Resources and Environmental Protection Act (“NREPA”), and the agency’s own rules when it authorized the Ajax asphalt plant.¹ EGLE is required to fully evaluate and mitigate the impacts of new sources of pollution before authorizing their construction. The Ajax plant’s emissions add to the cumulative health burdens facing this low-income and predominantly African American community.

EGLE did not follow its rules when it approved the Ajax permit. The record shows that EGLE (1) failed to evaluate a “complete description” of the Ajax asphalt plant’s emissions units; (2) failed to evaluate the best available control technology for controlling volatile organic compounds and toxic air contaminants; (3) arbitrarily selected non-representative off-site air quality monitors to conduct compliance modeling and analysis; and (4) failed to explain how Ajax will comply with the terms of the permit based on the plant’s maximum operating capacity. Rather than respond to the sound legal arguments in the Community Groups’ opening brief, EGLE asserts that the Community Groups misunderstand the legal requirements and asks the Court to simply defer to EGLE’s technical expertise. The Court should not heed EGLE’s call, and instead, should meaningfully review EGLE’s compliance, or lack of compliance, with the law. This review will

¹ Separate from this permit appeal, three of the Community Groups—Environmental Transformation Movement of Flint, Flint Rising, and St. Francis Prayer Center—initiated a civil rights administrative complaint with the United States Environmental Protection Agency pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, alleging that EGLE violated Title VI when issuing the Ajax permit because the asphalt plant’s emissions will have a disparate impact on the African American residents in Flint. Br of EGLE at Exh. F. The Community Groups agree with EGLE that the Title VI violations are not before this Court.

reveal that EGLE’s approval of the Ajax permit to install was arbitrary and capricious and unauthorized by law. The Court should vacate and remand the Ajax permit accordingly.

ARGUMENT

I. DEFERENCE TO EGLE’S INTERPRETATION OF ITS DUTIES IS NOT APPROPRIATE IF THE RULES ARE UNAMBIGUOUS.

The Court’s inquiry into the legal issues in this case must be guided by the text of Michigan’s State Implementation Plan (“SIP”) and EGLE’s CAA implementing regulations. *See Nat Res Def Council v Dep’t of Env’t Quality*, 300 Mich App 79, 88 (2013). Throughout its response brief, EGLE asserts that this Court should defer wholesale to the agency’s “expertise” about the permit’s legal compliance with the text of its duly promulgated rules. Br of EGLE at 49, 66. The Court should reject this plea.

The agency overstates the doctrine of administrative deference as though it means that the Court should simply trust EGLE’s judgment about whether it had adequate information to make a decision regardless of what information the law requires it to consider. But, in *Huron Behav Health v Dep’t of Cmty Health*, the Michigan Court of Appeals firmly states that questions of law are reviewed *de novo* by courts. 293 Mich App 491, 497 (2011). “[T]he possibility of deference can arise only if a regulation is genuinely ambiguous.” *Kisor v Wilkie*, 139 S Ct 2400, 2414 (2019); *see also Saginaw Chippewa Indian Tribe of Michigan v Blue Cross Blue Shield of Michigan*, 32 F4th 548, 557–58 (6th Cir 2022). The Court must exhaust traditional tools of interpretation before deferring to the agency’s interpretation. *Kisor*, 139 S Ct at 2414 (“And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.”)

Michigan federal courts analyzing the scope of regulations under the federal Administrative Procedures Act have applied this framework to complex insurance regulations, *Saginaw Chippewa*, 32 F4th at 558, Michigan regulations governing the vapor content of gas, *Ammex, Inc v McDowell*, 24 F4th 1072, 1080 (6th Cir 2022), and Medicare regulations concerning the calculation and use of hospital cost data, *William Beaumont Hosp - Royal Oak v Price*, 455 F Supp 3d 432, 441 (ED Mich 2020). Although the courts interpreting these regulations did not have technical expertise in hospital administration and chemical engineering, such technical expertise is not needed to interpret the plain meaning of the law.

II. EGLE FAILED TO COMPLY WITH ITS RULES BY NOT REQUIRING A “COMPLETE DESCRIPTION” OF EMISSIONS FROM THE AJAX PLANT’S ASPHALT CEMENT STORAGE TANKS.

EGLE approved the Ajax permit without a complete description of Ajax’s six 30,000 gallon asphalt cement storage tanks (“AC Tanks”), a regulated emissions unit, as well as a complete description of the nature, concentration, size, pressure, or temperature of the AC Tanks’ emissions for all air contaminants. EGLE ignored Rules 203 and 207, two mandatory provisions, that required it to deny the permit as a result of this missing information. Mich Admin Code R 336.1203; R 336.1207. The plain language of EGLE’s rules require a complete description of each emissions unit, including a description of the quantity of all air contaminants anticipated to be emitted by the emissions unit. Mich Admin Code R, 336.1203(1)(c). The AC Tanks will emit many air contaminants, among them are volatile organic compounds (“VOCs”) and toxic air contaminants (“TACs”), but the agency failed to properly evaluate and control these emissions consistent with its rules.

EGLE and Ajax’s responses fail. EGLE and Ajax argue that they measured the AC Tanks’ emissions because Ajax stated in a report it submitted after the close of public comment that the

AC Tanks will emit two tons of VOCs per year. However, Ajax and EGLE provide no basis in the record for how Ajax calculated this figure. Ajax also misleadingly reported that the AC Tanks will have zero TAC emissions and EGLE took no action to correct Ajax's error. EGLE and Ajax argue that the company's "oversight" to properly evaluate all air contaminants from the AC Tanks is inconsequential, but EGLE's rules do not have a de minimis exception from their mandatory requirements. These emissions are consequential for the families that live around this plant. EGLE has failed to follow its rules in this case and the agency's decision to approve the Ajax permit was not authorized by law.

A. EGLE's rules required the agency to deny the Ajax permit because Ajax's application lacked key information.

EGLE failed to comply with its rules requiring it to deny a permit if it lacked "sufficient information" needed to make reasonable judgments about the permit. Mich Admin Code, R 336.1207(1)(d). Specifically, EGLE lacked a "complete description" of each emissions unit for the Ajax asphalt plant. Mich Admin Code, R 336.1203(1)(a), (c); Permit to Install Application, EGLE, 2022.

First, Rule 203 requires that the applicant "shall include information required by the department on the application form." Mich Admin Code R 336.1203(1). That information includes a specific and "complete description" of "each emission unit or process covered by the application . . . including any air pollution control equipment" and "the uncontrolled and controlled quantity of all air contaminants that are reasonably anticipated due to the operation of the proposed process equipment." Mich Admin Code R 336.1203(1)(a), (c); Permit to Install Application, EGLE, 2022. The application form—and by extension, Rule 203—requires that the applicant, "summarize these emissions calculations in tabular form for all equipment covered by the application and for each stack/vent." *Id.* In other words, these rules make it mandatory that

applicants submit (1) a complete description of each emissions unit, and (2) description of the nature, concentration, particle size, pressure, temperature, and the uncontrolled and controlled quantity of *all air contaminants*, including toxic air contaminants (TACs) before EGLE may approve a permit.

Second, Rule 207 mandates that “the department shall deny an application for a permit to install if . . . (d) sufficient information has not been submitted by the applicant to enable the department to make reasonable judgments about subdivisions (a) to (c) of this subrule.”² Mich Admin Code, R 336.1207(1)(d). Rule 207 must be read in conjunction with Rule 203. If the applicant has not submitted the information required by the text of Rule 203 and the permit application, EGLE necessarily lacks sufficient information and shall deny the permit. Considering that Ajax did not comply with Rule 203 or the application form, EGLE lacked “sufficient information.” Accordingly, in approving the permit without this information, EGLE did not act in a reasoned manner and its permitting decision is arbitrary and unauthorized by law.

B. EGLE and Ajax’s responses are meritless.

EGLE asserts that its “technical experts had sufficient information and expertise to make reasonable judgments as to the AC tank’s TAC and VOC emissions to assure compliance with state and federal law.” Br of EGLE at 49. EGLE’s assertion is unsupported. The record lacks a specific and complete description of the AC Tanks’ VOC emissions and Ajax provides no indication how it arrived at two tons of VOC emissions per year. Ajax also failed to report the

² Subparts (a) and (c) in turn require that EGLE “shall” deny a permit to install if “(a) [t]he equipment for which the permit is sought will not operate in compliance with the rules of the department or state law[,]” “(b) [o]peration of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air contaminant,” or “(c) [t]he equipment for which the permit is sought will violate an applicable requirement of the clean air act.” *Id* at (a)-(c).

amount of TAC emissions from the AC Tanks and EGLE did not have complete information about these emissions before issuing the permit. Ajax and EGLE also fail to detail if there are other contaminants of concern emitting from the AC Tanks.

EGLE directly acknowledges that Ajax did not submit a formal analysis assessing VOC emissions, but tries to brush away this error. *See* Br of EGLE at 50 (“Environmental Appellants make much of the fact that Ajax did not include printouts showing how it calculated VOC emissions (Env’tl App Br, p 33), **this oversight** is inconsequential . . .”). In reality, Ajax did not include “printouts” (“emissions calculations in tabular form for all equipment covered by the application”) for its emissions calculations for “all air contaminants” from the AC Tanks because no such analysis exists. Permit to Install Application, EGLE, 2022. The AC Tanks are the only emissions unit for this new proposed source without a summary of “all air contaminant[]” “emissions calculations in tabular form.” Permit File, Item 527 at 60-81; Permit to Install Application, EGLE (2022); Mich Admin Code 336.1203. Under its own rules, EGLE should have denied the permit. Mich Admin Code R 336.1207(1)(d).

EGLE’s own citations to the record underscore that it issued the permit without reviewing the required information. The agency points to air contaminant projections for a completely different emissions unit—the hot-mix asphalt storage silos—to say it measured emissions of “all air contaminants” from the AC Tanks. Br for EGLE at 49 (citing Permit File, Item 527, 71-73). The guidance EGLE uses to measure emissions from a new source provides distinct processes for measuring emissions from AC Tanks and from the asphalt storage silos. *Compare* AP42, 11.1.2.1 (tank emissions) *and* AP42 11.1.2.4 (silo emissions). But EGLE, in its brief, treats these separate emissions units as one and the same. That EGLE itself seems to confuse what it assessed in

evaluating the emissions from this facility in its presentation to this Court is indicative of the dearth of care that the agency brought to this permitting process.

Additionally, EGLE inappropriately points to Table 12.1 for toxic air contaminants to argue that it fully reviewed the “nature, concentration, particle size, pressure, temperature, and the uncontrolled and controlled quantity of all air contaminants, *including* all toxic air contaminants” from the AC Tanks. Br of EGLE at 49-50 (citing Permit File, Item 527, at 90); *see* Mich Admin Code R 336.1203(1)(c) (emphasis added). To give this regulatory language full effect, it is clear that “all air contaminants” includes more than just “toxic air contaminants” otherwise “including all toxic air contaminants” would be meaningless surplusage. *See S Dearborn Env't Improvement Ass'n, Inc v Dep't of Env't Quality*, 502 Mich 349, 361 (2018) (requiring that the plain language of statutes be given full effect). Table 12.1 does not include any information about the “nature, concentration, particle size, pressure, temperature, and the uncontrolled and controlled quantity” of the total VOC emissions from the AC Tanks. Mich Admin Code, R 336.1203(1)(a).

Like EGLE, Ajax similarly contends that its TAC emissions tables (Table 12.1 and 12.2) evaluate “all air contaminants” from the AC Tanks and represent a complete description of its industrial process. Br of Ajax Materials Corp at 5; Permit File, Item 527 at 90-95. However, these tables are for only a select number of air contaminants, and nowhere does Ajax provide a sum total of VOC emissions, let alone “all air contaminants” from the AC Tanks. Flatly, “all” does not mean “some.” While Ajax cries that VOCs are incorporated into Table 12.2 (summary of TAC impacts) and can be deduced from the measurements therein, that does not remedy the applicant’s or the agency’s legal failure to provide a “complete description” of the AC Tanks and the “nature, concentration, particle size, pressure, temperature, and the uncontrolled and controlled quantity of

all air contaminants.” Br of Ajax Materials Corp at 5. None of the other tables provide this information either. Permit File, Item 527 at 95-96.

Not only did the record lack key information about VOCs, the information that was available in the tables Ajax cites was incomplete and misleading. Ajax reports that the AC Tanks will have “0.00” toxic air contaminant emissions “because the spreadsheet format for the figures only displayed two decimal places.” Br of Ajax Materials Corp at 5; *Id* at 88-89. While Ajax contends that these emissions are so small that it need not actually report what they are, EGLE’s rules provide no such exception. *See* Mich Admin Code R 336.1203(1).³ Ajax has reported its emissions calculations using scientific annotation for numerous contaminants and emissions from the AC Tanks are misreported as “0.0”.⁴ *See eg*, Permit File, Item 527 at 96. EGLE did nothing to correct Ajax’s error, and, instead, approved the permit without a “complete description of each emissions unit” and “all air contaminants, including toxic air contaminants.” Mich Admin Code R 336.1203(1)(a), (c).

Both Ajax and EGLE attempt to minimize the legal failings of the AC Tank emissions analysis with post-hoc justifications. EGLE and Ajax submit that because Ajax states in its analysis of the best available control technology (“BACT”) for the AC Tanks that VOC emissions from the tanks will be under two tons per year (tpy) that it had “complete” information about these

³ It is telling that such an exception is provided for in other rules and not here, indicating that the absence of such exemptions in the permitting context is intentional. *See*, Mich Admin Code, R 336.2801(qq) (for determining applicability of PSD new source review program regarding modifications to existing sources); R 336.2809(5) (de minimis exemptions for the preconstruction monitoring requirements).

⁴ Notably, on a separate chart, Ajax provided the true emissions calculations for hydrogen sulfide (0.00000103 or 1.03E-05 in scientific annotation); if the hydrogen sulfide emissions had been included in the larger table—with the rounding to the second digit—it would have been rounded to zero and inappropriate and misleading. EGLE failed to pursue accurate accounting of the emissions calculations, by allowing the TAC table to stand as is, and drew its conclusions on faulty numbers.

emissions. Br of EGLE at 51; Br of Ajax Materials Corp at 8-9. But neither EGLE nor Ajax can point to anywhere in the record showing how Ajax arrived at this figure, which specific air contaminants are volatile, or if there are any other contaminants of concern emitting from the AC Tanks. Ajax's lone sentence buried in a BACT analysis it submitted after the close of the public comment period does nothing to describe the "nature, concentration, particle size, pressure, temperature, and the uncontrolled and controlled quantity of" VOC emissions from the AC Tanks. See Permit File, Item 527 at 116 (reflecting October 22, 2022, submission). Most importantly, EGLE has left the public in the dark about the Ajax plant's total emissions, their impacts to air quality, and the surrounding community's health.

EGLE's attempt to dismiss the harm of this "oversight" as "inconsequential" exemplifies the agency's approach to permitting new sources of pollution: The agency preferences customer service to industry, and expediency of the permitting process, over protecting public health through strict adherence to the text of its rules and fully accounting for "all" emissions. As discussed in the Community Group's initial brief, controlling VOC emissions is *very* consequential in terms of safeguarding public health and the environment. Br of Community Groups at 34. Public health and air quality will suffer a death by one-thousand cuts if EGLE can read its regulations to empower it to ignore whole classes of emissions for new sources like the Ajax plant simply because the agency arbitrarily deems them "inconsequential." While it is true that the AC Tanks Ajax plans to build are significantly smaller than the tanks at issue in *United States v Sprague Resources LP*, Case No. 1:20-cv-11026 (D Mass), the point is that EGLE is failing to measure these emissions in a formal and complete way as required by the text of its duly promulgated rules. Moreover, here, EGLE is acting in a permitting capacity that distinguishes its actions from EPA acting in an enforcement capacity in *Sprague*. EGLE has jurisdiction over all AC Tanks in the state and its

rules require the agency to evaluate emissions from each new source, no matter how small. These emissions are consequential to the people who have to breathe the contaminated air around potential new sources of pollution.

Here, the mandatory language of Rules 203, 207, and EGLE's permit to install application form require EGLE to consider specific and "complete" information of "all air contaminants" "in tabular form for all equipment covered by the application" before issuing a permit to install to Ajax. EGLE cannot exempt the AC Tanks from this permit to install requirement and the agency did not follow the process for doing so. Mich Admin Code, R 336.1289(2)(b). Because EGLE did not have the required information, its approval of the Ajax permit is unauthorized by law and arbitrary and capricious.

III. EGLE FAILED TO COMPLY WITH ITS RULES WHEN IT APPROVED THE AJAX PERMIT BECAUSE AJAX DID NOT PROPERLY EVALUATE BACT.

Not only did the agency fail to provide specific and complete information about "all air contaminants" emitting from the AC Tanks, EGLE also did not review, and Ajax did not submit, any information regarding the efficiency, removal rate, and efficacy of various designs of the vapor condensation and recovery system, ostensibly the best available control technology for the AC Tanks. As a result, EGLE's approval of the Ajax plant was not authorized by law.

Rule 203 mandates that the applicant shall "provide the capture and removal efficiency of any air pollution control devices." Mich Admin Code, R 336.1203(1)(a). In addition, Rule 702(1)(a) requires:

A person who is responsible for any new source of volatile organic compound emissions shall not cause or allow the emission of volatile organic compound emissions from the new source in excess of the lowest maximum allowable emission rate . . . based upon the application of the best available control technology.

Mich Admin Code, R 336.1702.

To comply with these mandates, Ajax is required to undertake a five step analysis to determine which technology is the “best” to control VOC emissions. *Instructions for Conducting a BACT Analysis*, EGLE, (2011). EPA has previously overturned an EGLE BACT analysis for failure to adequately discuss each control technology, its benefits and detriments, and alternatives. In reversing EGLE’s approval of the Northern Michigan University Ripley power plant, EPA stated:

A BACT analysis calls for a searching review of industry practices and control options, a careful ranking of alternatives, and a final choice able to stand as first and best. If reviewing authorities let slip their rigorous look at “all” appropriate technologies, if the target ever eases from the “maximum degree of reduction” available to something less or more convenient, the result . . . will not be BACT.

In re: Northern Michigan University Ripley Heating Plant, 15 EAD 163, at *10 (2009).

Ajax conducted an extremely cursory analysis of the vapor condensation and recovery system that is nowhere near appropriate for evaluating BACT. Under the header “control effectiveness” the company stated, “AC tanks are being controlled” and nothing more. Permit File, Item 527 at 124. Ajax then presented a two ton per year VOC emissions figure without providing any basis for that figure in the record. *Id* at 123. Based on this bare-bones BACT analysis, there is no assurance that the AC Tanks’ VOC emissions will be controlled adequately. Because the VOC BACT analysis is legally flawed, the company also fails to comply with the T-BACT requirement for controlling toxics from the AC Tanks. Mich Admin Code, R 336.1224(1)(c) (exempting emissions units with adequate BACT for VOCs from T-BACT requirements). These errors render the permit unlawful, as approved.

EGLE and Ajax both contend that the vapor condensation and recovery system is “well established” as the BACT for controlling VOC emissions from the AC Tanks but the record demonstrates that there are multiple designs for this system that EGLE and Ajax do not discuss.

Br of EGLE at 23; Br of Ajax Materials Corp at 2. Neither Ajax nor EGLE specifically compared the effectiveness of each system to control VOC emissions from the AC Tanks. Permit File, Item 527 at 123, 127.

An email from EGLE’s chief inspector for the Ajax facility, Mr. Dan McGeen, to another inspector, Ms. Diane Kavanaugh-Vertort, speaks for itself:

Over the years, I have seen *more than one design* of condensation and recovery system on liquid asphalt cement storage tanks. In the 1990s or the 2000s, I saw some relatively primitive designs of downward sloping pipes, where asphaltic vapors could condense, and the liquid would be collected. Now I seem to mainly see vertically designed condensers. . .

District File, Item 136 at 1 (emphasis added). Ms. Kavanaugh-Vertort was unsure which system constituted BACT for the Ajax plant because EGLE never evaluated the comparative propriety of each system. *See Id* at 1-2 (“I just saw the [initial] Ajax [public notice] as well and see it includes 6 asphalt cement tanks with the referenced ‘A vapor condensation and recovery system on each liquid asphalt cement storage tank.’ . . . [A]re there multiple designs? . . . I haven't found any details on this yet.”) (July 01, 2021). Nowhere in Ajax’s BACT analysis does it discuss the “capture and removal efficiency of any air pollution control devices” such as the “primitive design” or the “vertical design” Mr. McGeen references; there is no telling what type of system Ajax plans to install and how it will function. Moreover, the public had no way to contest Ajax’s BACT analysis before EGLE issued the permit because Ajax did not submit this analysis until after the close of public comment. *See* Permit File, Item 527 at 116 (reflecting submittal October 22, 2022).

The failure of the agency to assess the removal efficiency of the various designs of the vapor condensation and recovery system against a formal assessment of VOC emissions violates the textual requirements of Rules 203 and 702. Therefore, EGLE’s decision to approve the Ajax permit is arbitrary and unauthorized by law.

IV. EGLE ARBITRARILY SELECTED AIR MONITORS IN GRAND RAPIDS AND LANSING TO ESTABLISH BACKGROUND AIR QUALITY IN GENESEE COUNTY.

EGLE was required to utilize its air modeling analysis in conjunction with air quality monitoring data that is “representative” of air quality in Genesee County to establish a baseline of air pollution prior to construction of the Ajax plant. Establishing an accurate baseline of current pollution levels in the area where the Ajax plant will be located⁵ is essential to answering the central question regarding any permit to install: Will it ensure emissions from the plant do not cause or contribute to violations of an air quality standard? Mich Admin Code, R 336.1207(1)(b). If the agency does not have representative air quality data in its compliance models, it has failed to accurately establish the baseline of current pollution levels and thus cannot accurately evaluate the impact and compliance of Ajax’s proposed emissions. No party contests this standard. Br of EGLE at 70; Br of Ajax at 18. In this case, EGLE failed to provide any analysis of whether the Grand Rapids and Lansing monitors sufficiently represent air quality in Genesee County before approving this permit. Consequently, the permit EGLE issued is unauthorized by law and arbitrary and capricious.

Throughout its brief, EGLE obfuscates the interplay between its modeling analysis and monitoring data to demonstrate compliance with the CAA. According to EPA guidance, monitoring data in the context of a permitting decision serves two functions: to establish

⁵ In addition to failing to accurately measure the background air quality for the location of the Ajax plant, EGLE incorrectly indicates that *location of the proposed emissions sources* is not a basis to deny a permit; in making that argument, EGLE fails to acknowledge its Title VI obligations, which supersede state law. In an effort to support its statement, EGLE points to an opinion of the Michigan attorney general. The Michigan attorney general’s opinion neither contemplates EGLE’s Title VI obligations, nor indicates that EGLE cannot take location into account in a permitting decision; the Michigan attorney general’s opinion states, instead, that EGLE cannot deny a permit because the proposed activity fails to comply with local zoning ordinances. Br of EGLE at Exh B. The attorney general’s opinion is irrelevant here.

background air quality concentrations in the vicinity of the proposed source and to validate the accuracy of an air modeling analysis. US EPA, *Ambient Monitoring Guidelines for Prevention of Significant Deterioration* (PSD), May 1987. When considered together the modeling analysis and monitoring data should account for air pollution from nearby major industrial facilities and smaller stationary sources, natural sources, mobile sources (such as cars and trucks) and pollution traveling into the area from distant sources. Only with all that information can EGLE provide an accurate picture of the air quality where a proposed source is to be located. *See*, 40 CFR Part 51, Appendix W, Section 7.2.3, 8.3.1.

Only if the existing data is “representative” can it be used “as an alternative to preconstruction monitoring data.” *Sierra Club v Dep't of Env't, Great Lakes, & Energy*, No 350083, 2021 WL 69788 at 4 (Mich Ct App Jan 7, 2021); *See* 40 CFR Pt 51, App W 8.3. EPA has previously overturned an EGLE-issued permit to install for failure to fully evaluate an off-site monitors representativeness of local air quality conditions. *In re: Ripley Heating Plant*, 14 EAD 283, 38 (2009) (“[EGLE] abruptly dismissed [comments arguing that the monitors EGLE used were not representative] in its response-to-comments document with the vague three-sentence answer . . . permit issuers [have] an obligation to provide meaningful responses to significant comments that articulate with reasonable clarity the facts and circumstances supporting the permit issuers' decisions.”).

This case is just like *Ripley*. EGLE made no findings that the air quality conditions in Lansing and Grand Rapids and the “other sources” that affect that air quality—such as the industrial sources not included in the modeling analysis, mobile sources (cars), and natural sources of emissions—are similar to Genesee County’s air quality and the “other sources” that affect it. The only “analysis” that EGLE forwards to defend its position that the Lansing and Grand Rapids

monitors are representative of Genesee County's air quality conditions comes from the response to comments where the agency states:

The Lansing monitor used in the NO_x 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.

Hearing File, Item 266 at 49. This single, conclusory sentence does *not* explain how Lansing, Grand Rapids, and Genesee County all share “similar geography,” describe the significance of prevailing winds, or explain how EGLE concluded that emissions attributable to other sources (mobile, distant, unpermitted and natural sources) in Lansing and Grand Rapids are representative of those that affect air quality in Genesee County. No such analysis is in the record.

EGLE must explain how it concluded that the off-site monitors used in this case are reflective of air pollution conditions in Genesee County. Representative monitoring of local air quality conditions is best accomplished by using on-site monitoring. Even if off-site monitors are used, EPA guidance plainly states that the use of “regional monitors” to establish local air quality for a permitting decision—which EGLE has done here—should only be done when the proposed facility at issue is an “isolated single source” and is not appropriate when a facility is to be located in a multisource area such as the one at issue. US EPA, *Ambient Monitoring Guidelines for Prevention of Significant Deterioration* (PSD), at 6-7 May 1987; *See also, In re: Vulcan Constr Materials, LP*, 15 EAD 163 (2011) (remanding permit and instructing state agency to reevaluate whether the use of regional monitoring data was appropriate given that the proposed facility may be in a multisource area).

Additionally, EGLE's concern regarding “double counting” nearby sources if it uses site-specific data to evaluate “other sources” is overblown. 40 CFR Part 51 Appendix W, Section 8.3.

The agency is fully capable of separating its assessment of “other sources” and “nearby sources” in its compliance models as it extensively discusses in its brief. Br of EGLE at 67-69. At bottom, the CAA requires that in lieu of on-site monitoring, EGLE must sufficiently explain exactly *why* the monitors it selected to evaluate Ajax’s compliance are representative of air quality in Genesee County; conclusory statements are not enough.

Ajax’s arguments fare no better than EGLE’s. Ajax offers a single statement in a transcript from one of EGLE’s online public information sessions to support its contention that EGLE adequately analyzed the Lansing and Grand Rapids monitors for representativeness. Hearing File, Item 89 at 12. In that public information session, Ms. Stephanie Hengesbach, EGLE’s lead modeler for the Ajax permit,⁶ states the following:

We’ll kind of evaluate most of the monitors and [it is] a little bit of a judgment call I guess on our part but we’ll deem what we feel is most representative of the area . . . I’m not sure I answered all that to be honest, I’m sorry, I kind of lost track.

Id. This is not a “meaningful response . . . that articulate[s] with reasonable clarity the facts and circumstances supporting the permit issuers’ decisions.” *In re: Ripley Heating Plant*, 14 EAD 283, 38. EGLE’s rules, the CAA, and foundational principles of administrative law, require that EGLE’s judgments be based on reasoned analysis, not on what EGLE “feel[s] is most representative of the area.” EGLE did not comply with the law because it failed to consider whether the monitors were representative of the many sources of air pollution that were not included in its modeling analysis but nevertheless affect air quality in Genesee County.

⁶ Note that Ajax confuses Ms. Hengesbach with its consultant Ms. Stephanie Jarrett throughout its brief. R Br of Ajax Materials Corp at 18, 20.

V. EGLE RELIED ON ARBITRARY THROUGHPUT LIMITS AND MODELING TO APPROVE THE AJAX PERMIT.

EGLE modeled emissions and set permit limits for this new source of pollution using arbitrary throughput rates that are unreasoned and contradictory. First, while EGLE argues that synthetic minor source permits can incorporate permit limits into the design of a facility, it fails to address the lack of explanation for its conclusions that the new source will comply with these limitations. EGLE has not explained how the Ajax plant will comply with the limits contained in its permit given the company's stated intention to operate its plant in excess of 550 tons per hour. Second, EGLE must evaluate the maximum possible impact of the plant and provide that information to the public so that communities surrounding new sources of pollution are aware of the kinds of impacts they can expect from the new source. EGLE arbitrarily selected throughput rates that inconsistently model emissions from the various emissions units Ajax plans to build. This confusing presentation of this plant's emissions fails to comport with the informational requirements of EGLE's rules and is arbitrary.

A. EGLE's insistence that Ajax will comply with its permit is not supported by the record.

EGLE fails to support its statement that Ajax will comply with the terms of its permit. The record clearly indicates that Ajax will operate its plant in excess of the limits imposed in the permit. Ajax has expressly indicated throughout the process that, to account for variation in processing rates that it cannot control, and that are inherent in the design of its plant, the company needs to be able to process up to 600 tons per hour. District File, Item 76, at 2; Item 77; EGLE Executive File, Item 204 at 5. EGLE needs to explain how it expects Ajax to comply with its permit given this

information about the plant's maximum operating capacity. 40 CFR App W, § 8.2.2(d) (“maximum emissions impact [] analysis reflect the plant's design and processing capacity.”).

This is akin to the situation in *PolyMet*. In its response brief, EGLE acknowledges the applicable standard: The agency is obliged to explain its conclusion that Ajax will comply with its permit limits. See *Matter of PolyMet Mining, Inc*, 965 NW2d 1, 10 (Minn Ct App 2021); Br of EGLE at 60. This is not a question of prospective enforcement or investigation. Rather, the CAA and Michigan's rules require that synthetic minor source permits set their limits consistent with the intended operation of a new source. Mich Admin Code, R 336.1205. EGLE has failed to explain how the limits it set reflect Ajax's intended operation and support its conclusion that the company will comply, just as in *PolyMet*.

EGLE may be able to take retroactive steps to bring the company back into compliance once violations occur, but this puts the cart before the horse in terms of *setting* synthetic limits and pre-emission operational restrictions at the beginning of the permit process that actually reflect how the plant will operate. Ajax has made clear that variation in processing that it cannot control will require it to, at times, operate the drum dryer in excess of the 550 ton per hour limit in the permit. EGLE Executive File, Item 204 at 5. Far from asking it to “prognosticate,” the Community Groups simply ask EGLE to explain its conclusion that the permit will be complied with in light of the information it has in the record and take steps to ensure compliance with the permit through additional pre-emissions restrictions if not. Rule 205 requires EGLE to do just that.

Additionally, as a practical matter, the consequences that flow from EGLE's interpretation of its responsibility under Rule 205 are disturbing. Br of EGLE at 57 (“In short, the 100 percent load reflected in the modeling guidance means the maximum amount of emissions allowed under the permit—in this case 12,000 tons per day.”). Following EGLE's logic, if a permit imposed a

limit of one ton per hour on a massive industrial operation, even though it intends to process 600 tons per hour, the agency could ignore this information because it could later take steps to penalize the new source. Br of EGLE at 57. That does not make any sense and does not further the purpose of the CAA: to protect public health. Communities that live around synthetic minor sources cannot unbreathe unpermitted emissions even if EGLE can later takes steps to address the exceedances going forward. EGLE must explain why it concluded that Ajax would comply with permit limits in light of clearly contradictory evidence the agency had before it when it issued the permit and how it will ensure compliance with the permit before unpermitted emissions occur.

B. EGLE used “mistaken” and arbitrary throughput modeling.

EGLE is hiding the ball with respect to this plant’s impacts. At times, the agency models the emissions from this plant at 500 tons per hour, 550 tons per hour, and 600 tons per hour. *See* Permit File, Item 527 at 61–74 (analysis of the plant’s impacts at an hourly production rate of 550 tons per hour), 75-82 (analysis of impacts at 500 tons per hour), 100 (analyzing HCI emissions at a throughput rate of 600 tons per hour). In its brief, the agency characterizes this unexplained variation as a “mistake.” Br of EGLE at 64. Ensuring that this information is both consistent and accurate is important to setting permit limits that reflect actual emissions impact scenarios. Here, the public that actually has to breathe the contaminated air associated with this controversial project is left with inconsistent information about how the plant will operate and the impacts that it will inflict on their community. The Community Groups ask this Court to order EGLE to model throughput rates consistently or explain why it selected the varied, mistaken, throughput rates and how it will ensure compliance.

VI. THE APPROPRIATE REMEDY IN THIS MATTER IS VACATUR AND REMAND.

The Court should vacate the Ajax permit and remand this matter to the EGLE for further consideration. Direct modification of the permit is inappropriate in this case because it would require the Court to go outside of the applicable standard of review, under which the court is permitted to consider whether EGLE's decision is authorized by law. The Court can, and should, order EGLE to make findings of fact that it is required to make under the text of its rules and CAA, but it would be inappropriate for the Court to directly rewrite the permit. The Court should remand this matter to the agency and order it to make the legally required findings of fact it failed to make before approving the Ajax permit. Additional public comment on these new facts is also warranted if the Court remands this permit.

CONCLUSION

For the foregoing reasons, we request that the Court vacate Permit to Install 90-21 as unauthorized by law and arbitrary and capricious and remand this matter to EGLE.

Sincerely,

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PROOF OF SERVICE

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