



January 20, 2022

*Sent via Email*

**Re: Ajax Materials Corporation v Michigan Department of Environment Great Lakes and Energy, Case No. 22-116871-AA**

Dear Counsel,

Intervenors Saint Francis Prayer Center, Flint Rising, Environmental Transformation Movement of Flint, Michigan United, and C.A.U.T.I.O.N. provide the enclosed courtesy copy of their Response Brief in the above captioned matter. This brief responds to the initial appeal brief of appellant Ajax Materials Corporation challenging PTI-90-21. Great Lakes Environmental Law Center and Earthjustice are the counsel for the intervening Community Groups.

Enclosed please find the following documents: Response Brief of Intervenor Community Groups, Response Brief Appendix, and the Proof of Service. These documents have also been sent via Fedex. If you have any questions or concerns, please do not hesitate to reach out.

Sincerely,

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STATE OF MICHIGAN  
GENESEE COUNTY CIRCUIT COURT

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  
capacity as Director of EGLE.

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

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.,  
Michigan not-for-profit  
community organizations headquartered and  
having membership in Genesee Cty, Michigan.

**RESPONSE BRIEF FOR INTERVENOR  
COMMUNITY GROUPS**

Intervenors.

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SAINT FRANCIS PRAYER CENTER  
FLINT RISING, THE ENVIRONMENTAL  
TRANSFORMATION MOVEMENT OF FLINT,  
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**RESPONSE BRIEF FOR INTERVENOR COMMUNITY GROUPS  
SAINT 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

St. Francis Prayer Center, the Environmental Transformation Movement of Flint, Flint Rising, Michigan United (also known as the “Michigan Organizing Project”), and C.A.U.T.I.O.N (collectively the “Community Groups”) urge the Court to reject all of Ajax Materials Corporation’s (“Ajax”) arguments because they are substantively and procedurally flawed. Ajax would have the Court rewrite the permit to eliminate pollution control measures—deemed necessary to protect public health in an overburdened community—all to reduce the burden on Ajax. Ajax’s arguments are unsupported by the law or the facts.

First, contrary to Ajax’s assertions, the Michigan Department of Environment, Great Lakes and Energy (“EGLE”) may modify a permit after it preliminarily determines that the *draft* permit’s conditions “meet all applicable requirements.” In this case, the United States Environmental Protection Agency’s (“EPA”) comments, comments from the public, and the Community Groups’ comments all revealed critical flaws in the draft permit that prompted the changes. If EGLE could not change the draft permit in response to public comments, public comments would be rendered meaningless. Indeed, Ajax has offered no support for its argument that, after EGLE makes a preliminary determination that the permit meets all applicable requirements, any changes to the permit are arbitrary and capricious.

Second, as a substantive matter, as EGLE articulated in the record, stronger opacity testing requirements and enhanced stack testing requirements were needed to reasonably assure compliance with the Clean Air Act (“CAA”). The Court should not reverse these findings solely because Ajax has cried that the conditions are unfair or burdensome. Ajax also fails to support its arguments against these requirements with appropriate citations to the record and therefore the Court should decline to consider them.

Third, EGLE's decision to ban the use of recycled used oil ("RUO") at the Ajax plant was entirely consistent with its authority to determine the best available control technology for air toxics ("T-BACT") under Rule 224. EGLE made this determination, in part, based on Ajax's own analysis showing that use of RUO was not fundamental to the company's manufacturing process. The Court should not upset EGLE's determination that banning RUO was the best way to control toxic pollution that could harm the surrounding community.

Fourth, any notion that Ajax was subjected to prejudicial "differential treatment" during this permitting process is unsupported by the facts in the record.

Finally, the Court should decline to grant Ajax's requested relief because it would require the Court to substitute its judgment for EGLE's analysis and go beyond the narrow scope of review in this case which only permits the Court to determine if EGLE's actions were authorized by law. Instead, as requested by the Community Groups in their initial brief, the Court should order vacatur and remand of the Ajax permit so that EGLE can undertake the appropriate analyses to determine whether or not to issue the permit.

## ARGUMENT

### I. **EGLE WAS AUTHORIZED BY LAW TO AMEND THE DRAFT PERMIT TO PROVIDE STRONGER PERMIT CONDITIONS IN RESPONSE TO PUBLIC COMMENT.**

EGLE has the authority to amend a draft permit to install when it receives public comments pointing out critical compliance shortcomings. Ajax argues that EGLE acted contrary to law when it changed the draft permit after it “preliminarily determined that the installation of new equipment [for the Plant] will not violate any of EGLE’s rules nor the [NAAQS]” and that “[b]ased on the analyses conducted to date, AQD staff concludes that the proposed project would comply with all applicable state and federal air quality requirements.” Br of Ajax Materials Corp at 13; *see also* Permit File, Item 123 at 40. Ajax contends that once EGLE utters the magic words “comply with all applicable state and federal air quality requirements,” the agency is locked into that preliminary determination and may not change it based on the comments it receives from the public. *Id.*; Br of Ajax Materials Corp at 13. Under Ajax’s reasoning, EGLE is barred from making changes even to remedy severe deficiencies in the permit pointed out during the public comment period. Ajax contends that stricter conditions in the final permit are solely the result of misinformed public pressure and that they are unnecessary to protect public health and unlawful. Br of Ajax Materials Corp at 1. Ajax argues that because the draft permit did enough to reasonably assure compliance with the CAA, EGLE overstepped its authority in tightening the permit after public comment. *Id.*

Ajax is wrong on the facts and law. Ajax ignores the fact that EGLE’s compliance determination was “preliminary,” concerned a “draft permit,” and was only based on the “analyses conducted to date.” Permit File, Item 123 at 40. Part 55 (Air Pollution Control) of the Natural Resources and Environmental Protection Act (“NREPA”) and the CAA contemplate EGLE may change draft permit conditions in response to public comments it receives even when it

preliminarily determines that a draft permit will reasonably assure CAA compliance. In some instances, EGLE is required to remedy compliance flaws raised in public comments by modifying the conditions of the draft permit. In this case, it was procedurally appropriate for EGLE to change the permit conditions in the draft permit after the agency received comments on it from the public and the EPA.

***A. Part 55's public participation requirements, and substantive public comments, supported EGLE's decision to modify the draft permit.***

EGLE was required to provide for public comment on the Ajax draft permit and it had the authority to alter the permit in response to that public comment. Under Part 55, the State of Michigan requires enhanced public participation when EGLE considers controversial permits. MCL 324.5511(3) (EGLE “shall not issue a permit for which there is a known public controversy without providing public notice including an opportunity for public comment and public meeting.”) Part 55 also contemplates that during this process of evaluating a controversial permit, like the Ajax permit, the public should have an opportunity to “raise issues” pertinent to the decisionmaking process. *Id* at (3)(d). These issues can include, for example, health impacts that the agency is failing to consider, impacts to the environment it overlooked, or other special considerations that bear on the agency’s ultimate permitting determination under the CAA. *See eg, Wolverine Power Coop v DEQ*, 285 Mich App 548, 555–56 (2009) (noting the technical nature of public comment); *S Dearborn Env't Improvement Ass'n, Inc v Dep't of Env't Quality*, 336 Mich App 490, 520 (2021) (noting EGLE’s practice of conducting “detailed study” as part of the public comment process). EGLE has the statutory and regulatory authority to take action in response to public comment. MCL 324.5503 (b), (c), (u).

In addition, public comment is a vehicle for implementing EGLE’s duty to consult with EPA regarding controversial permits to install. Mich Admin Code, R 336.1205(1)(b). The

Michigan Legislature also directs EGLE to cooperate with EPA, in exercising its permitting authority. MCL 324.5503(o). EPA can provide expert advice to EGLE on a permit's compliance with the CAA. The consultation that EGLE is required to undertake for controversial permits, such as this one, would not be effective if the agency could not change its preliminary compliance determination based on feedback from EPA.

Courts roundly agree that public comment is more than a *pro forma* requirement aimed at informing the public of a decision the agency has already made; rather, public comment provides the agency with “the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.” *Guardian Federal Savings and Loan Ass'n v Federal Savings and Loan Insurance Corp*, 589 F2d 658 (DC Cir 1978) (distinguishing between rules that are exempt and not exempt from the federal Administrative Procedure Act's notice and comment requirements); *see Wolverine Power Coop* 285 Mich App at 555–56 (discussing Michigan's additional notice and comment procedures for permits of “public controversy”); *United States v Nova Scotia Food Prods Corp*, 568 F2d 240, 251-252 (2d Cir 1977) (requiring agency to explain underlying reasoning and respond to significant comments); *Sierra Club v EPA*, 705 F3d 458, 469 (DC Cir 2013) (reasoning that the need for EPA to “allow for informed participation” supports the statutory requirement that air monitoring data be provided to the public in the permitting process). Ajax's argument ignores all of this jurisprudence detailing how the agency must receive and process comments and the significance of the comment process to the agency's determination of CAA compliance.

The very point of public comment is to improve the permit and safeguard air quality. If EGLE were locked into preliminary compliance determinations prior to noticing a draft permit for comment, air quality would suffer because the public would have no opportunity to check EGLE's

work and inform it of aspects of the permit it is failing to consider. In this matter, the public and expert federal agencies pointed out severe legal deficiencies with the draft PTI that required the agency to make changes to the permit. Without these changes, the permit to install for the Ajax plant would not have complied with Part 55 and EGLE's rules.

Ajax is attempting to restrict EGLE from making changes to draft permits based on public comments. Ajax's support for this new restriction is a single statement in the record. Ajax not only mischaracterizes the facts surrounding EGLE's preliminary compliance determination in this matter, but it also attempts to undermine Part 55 and the CAA's public participation requirements for new sources of pollution like the Ajax plant. Ultimately, EGLE's modest adjustments to the permit after receiving public comment were clearly authorized under Part 55 and the CAA. EGLE did not act arbitrarily and capriciously by reversing its preliminary compliance determination after receiving comments on the Ajax permit.

**II. EGLE WAS AUTHORIZED BY PART 55 AND THE CAA TO INCLUDE SPECIAL CONDITIONS V.2-V.4 AND V.6 IN AJAX'S FINAL PERMIT TO INSTALL.**

EGLE acted consistently with its CAA obligations when it decided to include Special Conditions V.2-V.4 (expanded emissions testing beyond particulates and nitrogen oxides) and Special Condition V.6 (strengthened opacity testing) (together, the "Opacity and Testing Conditions") in the final permit. Ajax contends that EGLE does not have the legal authority to impose these conditions in its final permit to install because they are distinct from what is required of other asphalt plants in Michigan. Br of Ajax Materials Corp at 34-46. Ajax also contends that it is "materially prejudiced" by the Opacity and Testing Conditions because implementing these conditions will be expensive and unfair. *Id* at 37.

Ajax's arguments against the Opacity and Testing Conditions are wrong for three reasons. First, these conditions are necessary to assure compliance with the CAA. Without the Opacity and Testing Conditions the permit would not be practicably enforceable, as required by EGLE's rules. Second, EGLE possesses the authority to determine that these conditions were necessary to assure the Ajax facility would not detrimentally impact public health and air quality. The fact that these conditions are distinct from other asphalt plants and expensive is not a valid legal reason to reject them. Third, Ajax fails to support its arguments against the Opacity and Testing Conditions with relevant evidence in the record with appropriate citations and the Court should decline to consider them. For these reasons, the Court should reject Ajax's arguments concerning the Opacity and Testing Conditions.

***A. The Opacity and Testing Conditions are reasonably necessary to assure compliance with the CAA and without them the final permit to install would not be enforceable as a practical matter.***

Ajax contends that EGLE has failed to provide reasons to support its imposition of the Opacity and Testing Conditions and has thus acted arbitrarily and capriciously; Ajax claims that, consequently, EGLE did not issue this permit in accordance with law. Br of Ajax Materials Corp at 33. This is not correct. EGLE detailed the regulatory basis for the conditions and stated that the conditions are necessary to assure compliance with the CAA and their enforceability. Permit File, Item 526 at 23-27, 122, 125. Because EGLE's reasons for imposing the Opacity and Testing Conditions are based on compliance with the CAA and the recommendations of EPA, the Court cannot now reverse EGLE's determination based on Ajax's subjective view of what is sufficient to ensure compliance. *See Henderson v Civ Serv Comm'n*, 321 Mich App 25, 44-45 (2017) (holding that Courts may not reverse agency decisions because they disagree with their "objective



correctness” and must uphold agency decisions that are reasoned and tied to the agency’s mandate).

The draft permit for the Ajax plant required the company to submit stack testing data only for particulate matter and nitrogen oxides.<sup>1</sup> Permit File, Item 526 at 29. Special Conditions V.2-V.4 in the final permit require Ajax to provide EGLE with testing data for all of the pollutants for which EPA has established a National Ambient Air Quality Standard upon request. *Id.* at 28-32. Special Conditions V.2-V.4 also require “startup testing” for all criteria pollutants and for toxic air contaminants such as arsenic, benzene and formaldehyde. *Id.* The testing conditions mandate annual stack testing for these pollutants thereafter, but only until Ajax is able to perform three consecutive compliant emissions tests at which point Ajax may cease conducting the required emissions tests. *Id.* Finally, these conditions require that the company must perform stack tests for a variety of pollutants within 60 days upon the initial burning of fuel oil, but does not have a requirement to conduct further emission tests beyond the initial fuel oil emission test. *Id.*

As for special condition V.6, the final permit mandates that Ajax must monitor visible emissions from its industrial operations—referred to as “opacity testing”—at least once a day. *Id.* This requires the company to use a specific method to measure if the emissions from its operation exceed 20% opacity, and if so, requires Ajax to take steps to reduce visible emissions. *Id.* Visible emissions can include smog, particulate matter, and other contaminants that deteriorate air quality. This requirement is rooted in the opacity limits established by EPA. 40 CFR 60.92(a)(2). That provision requires that “no owner or operator subject to the provisions of this subpart shall discharge or cause the discharge into the atmosphere from any affected facility any gases which. .

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<sup>1</sup> “Stack testing” refers to monitoring the pollution that comes out of the smoke stack of the plant. For this plant, the drum dryer exhausts pollutant emissions through a “baghouse” and then out a smokestack into the ambient air.

. exhibit 20% opacity or greater.” *Id.* EGLE made these changes to assure CAA compliance, the permit’s enforceability, and in response to issues with the draft permit’s compliance pointed out by EPA and the Community Groups. *See* Mich Admin Code, R 336.1205(1)(a) (requiring that permits to install be “enforceable as a practical matter”).

Comments submitted by numerous parties and EPA highlighted that the draft permit failed to protect air quality and public health. Hearing File, Item 234 at 27; Permit File, Item 376; AQDD File, Item 23 at 3-4; Hearing File, Item 248 at 4. In particular, EPA and the Community Groups urged EGLE to modify the permit to account for the existing exposures and demographic considerations of the community surrounding the proposed asphalt plant. Hearing File, Item 234 at 5-8. Permit File, Item 381 at 3-5. Ajax plans to construct its asphalt plant in the middle of a low income and minority community that is already overburdened by air, water, and ground contamination. *See generally* Hearing File, Item 234 (comments of Community Groups). This is the reason EPA recommended that EGLE take additional measures to ensure that the permit would be enforceable as a practical matter. Permit File, Item 381 at 6. Without these measures, EPA warned that the plant may exceed its opacity limits, emit toxic air contaminants in excess of relevant limits, and most importantly, worsen the health and endanger the welfare of the vulnerable community surrounding the plant. *Id.* (questioning whether the permit as written would comply with federal opacity limits set forth in 40 CFR 60.92(a)(2)); *Id.* at 7 (taking issue with the limited requirements for stack testing and the exclusion of certain NAAQS pollutants from the requirements). The community cannot “unbreathe” harmful emissions. Instead, EGLE must take measures to ensure that public health is safeguarded, including imposing additional enforcement monitoring requirements in the first instance.

When issuing the final permit, EGLE specifically justified its decision to impose the opacity limit based on the draft permit's failure to comply with federal opacity requirements. Permit File, Item 526 at 27 (citing 40 CFR 60.92(a)(2)). EGLE further stated that the testing conditions are necessary to demonstrate compliance with each NAAQS pollutant. *Id* at 28. Indeed, EPA stated in its comments that without them the permit would not be “enforceable as a practical matter.” Permit File, Item 381 at 6; *see also* Mich Admin Code, R 336.1205(1)(a).

Ajax asks the Court to second guess EGLE and rewrite the permit consistent with its subjective view that the Opacity and Testing Conditions are regulatory overreach. Holding for Ajax would mean that the Court overturns the expert conclusions of EGLE, and EPA, two environmental agencies, that the Opacity and Testing Conditions are necessary to reasonably assure compliance and the practicable enforceability of the permit. EGLE appropriately decided to require additional enforcement guarantees in the form of monitoring and testing conditions. Rather than being arbitrary, these conditions are aimed at the reasonable goal of ensuring that the Ajax plant complies with the CAA in a community that is disproportionately exposed to environmental harm.

***B. The Opacity and Testing Conditions in the Ajax permit are necessary to protect public health and assure CAA compliance and they are not unlawful simply because they are distinct from conditions in other permits and costly.***

Next, Ajax argues that EGLE acted arbitrarily and capriciously by imposing distinctive and costly conditions on the company that do not apply to other asphalt plants. Ajax contends that EGLE may not lawfully require the company to conduct “draconian testing” because it is too expensive and will interfere with Ajax’s ability to compete on the asphalt market in Michigan. *Br of Ajax Materials Corp* at 46. The economic burdens created by this arbitrary and differential regulation, Ajax contends, materially burden the company and amount to unlawful action. *Id* at

45-46. Ajax’s arguments regarding “disparate and prejudicial treatment” resulting in “material prejudice” miss the mark. *Id* at 45. EGLE is not responsible for preserving Ajax’s bottom line. Rather, the agency’s legal responsibility is to ensure that air quality is protective of public health and welfare.

To the extent the Opacity and Testing Conditions at SC V.2-4 and V.6 impose unique costs on Ajax that other asphalt plants are not subject to, that is not a valid reason to vacate these conditions as arbitrary and capricious. Contrary to Ajax’s framing of EGLE’s duty, EGLE lacks the authority to modify permit conditions based solely on the economic burdens they will inflict on a regulated industry. MCL 324.5503. At most, EGLE has the duty to *consider* the costs of compliance as a general administrative obligation, but it cannot let costs to the regulated industry be outcome determinative in a permitting decision. *See Michigan v EPA*, 135 S Ct 2699 (2015). Indeed, EGLE will run afoul of its statutory authority if it only thinks about the industrial costs of a permit to the detriment of other statutory factors. *See Whitman v American Trucking*, 531 US 457 (2001).

The CAA and Part 55 require that permits be responsive to local air quality conditions at the time of permitting. The fact that permits have diverse conditions that are responsive to the location of a new source and the timing of its installation is a feature, not a bug, of the CAA. *See eg*, Mich Admin Code, R 336.1241 (requirements for “site specific” air quality dispersion modeling to determine permit compliance and conditions). The CAA is designed this way to ensure that government can respond to changing air quality conditions. Accordingly, EGLE must be able to include permit conditions that are responsive to site-specific considerations. For example, sources in nonattainment areas must comply with stricter requirements than sources in areas that have attained NAAQS. *See* 42 USC 7470 (requirements for sources in attainment areas);

*see also* 42 USC 7501 (requirements for sources in nonattainment areas). Similarly, sources permitted at a time when an area was not in attainment with NAAQS will have to comply with stricter requirements than a new source seeking to install after attainment is achieved. As air pollution control technology develops, the requirements in permits for adopting new technology will change. *See* Mich Admin Code, R 336.1224. Diverse industrial practices may also require EGLE to tailor permit conditions accordingly. *See eg*, AP-42, Ch 1.11, Waste Oil Combustion, Table 2-1 (reflecting varied emissions limits based on the fuel an industrial operation plans to burn). A company may have to comply with facility-specific restrictions as a result of the fuel it intends to burn, how many emissions units it intends to build, the topography of where the applicant intends to locate, the sensitivity of the local population, and numerous other factual circumstances that vary across time and space.

Ajax is wrong that EGLE must distribute the economic burdens of regulation uniformly and equitably. Such a task would also be impossible to implement and would frustrate the purpose of Part 55 and the CAA. Moreover, here, the record shows that some asphalt plants must comply with *stricter* emissions limits than what are imposed in the Ajax permit, so it is not at all clear that Ajax is actually placed at a disadvantage in relation to its competitors. Permit File, Item 442 at 3 (reflecting that certain emissions limits for the Ajax plant are more liberal than for other plants for certain pollutants). Ultimately, the touchstone of EGLE's permitting decisions must always be its own rules, authorizing legislation, and its mission to assure that air quality is sufficient to protect public health. That mandate does not include the uniform distribution of economic burdens resulting from regulation, and such a requirement would greatly interfere with implementation of the CAA in Michigan.

The Court should reject Ajax's request, unsupported by the law, that EGLE preserve Ajax's bottom line and competitive advantage.

***C. Other permits to install in Michigan are irrelevant to whether the Ajax permit complies with the law and Ajax's references to other permits to install are not supported by citations to the record and should not be considered.***

EGLE crafted the Opacity and Testing Conditions in light of the site-specific circumstances of the area in which Ajax seeks to construct a new source of air pollution emissions. Mich Admin Code, R 336.1241 (requiring that all compliance modeling rely on site-specific factors). Ajax contends that EGLE has unlawfully treated it in a prejudicial manner because Ajax has to comply with conditions that are stricter than other plants. Br of Ajax Materials Corporation at 30-38. Ajax cites numerous other permits to install in support of this argument. *Id* at fn 158, 171-177, 180-184, 192-201. However, the conditions present in other permits for asphalt plants in different areas of the State are of limited relevance in determining whether the conditions in this permit are arbitrary and capricious. Moreover, Ajax provides no citations to the record for these various permits to install and the Court should decline to consider them as a result.

EGLE's duty is to regulate new sources of air emissions to protect air quality and public health. MCL 324.5503. That sometimes requires imposing onerous conditions and other times allows more permissive conditions. *See eg*, 42 USC 7470 *et seq* (requirements for sources in attainment areas); *see also* 42 USC 7501 *et seq* (requirements for sources in nonattainment areas). The touchstone of this analysis, though, is air quality and public health and not uniform regulation and competitive fairness between regulated entities. To the extent that other permits, not before the Court, mirror the exact conditions present in the location where Ajax seeks to construct, they might be relevant. But Ajax provides no explanation about the site-specific circumstances in compliance modeling for these other sources that may have led EGLE to impose different

conditions and how those circumstances are mirrored here. In crafting the permit conditions for the Ajax plant, EGLE was required to account for the air quality and public health in the surrounding area. While the agency failed to do that in this case for the reasons in the Community Groups brief, it is certain that EGLE has the legal authority to impose differing conditions among sources based on site-specific considerations. The permits to install that Ajax contends are evidence of unlawful prejudice are not relevant to this dispute because they do nothing to inform the Court of the propriety of the Ajax permit in light of site-specific considerations.

Ajax's arguments against the Opacity and Testing Conditions are not only incorrect on the merits, but they are also not supported by appropriate citations to material in the record. *See* Br of Ajax Materials Corp at fn 158, 171-177, 180-184, 192-201. Ajax's only support for this argument are various permits to install for other asphalt plants in Michigan. Ajax fails to provide record citations for all of these permits. *See id.* Considering Ajax's failure to provide the Court with proper support for its arguments, the Court should decline to consider Ajax's argument that EGLE is unauthorized by law to treat the Ajax plant differently than other asphalt plants in Michigan.

Judicial review of administrative actions is limited to the record developed by the agency and parties may not supplement the record on appeal. *Michigan Ass'n of Home Builders v Dir of Dep't of Lab & Econ Growth*, 481 Mich 496, 500 (2008); *see also Citizens to Pres Overton Park, Inc v Volpe*, 401 US 402 (1971) (reviewing agency decision on its record); *SEC v Chenery Corp (Chenery I)*, 318 US 80 (1943) (reviewing agency decision based on reasons stated by agency). This rule exists to prevent prejudice to the other parties and to ensure that regulated entities do not blindsides the agency, and overwhelm the courts, with lawsuits based on information that the agency has not had a chance to consider. The Court should therefore decline to consider Ajax's

arguments against the Opacity and Testing Conditions that rely on brand-new information presented for the first time on appeal.

All parties that challenge or defend an administrative action have the burden to support their arguments with accurate citations to the record; Courts do not engage in a self-directed inquiry into the facts. *Zizzo v Commissioner of Social Security*, 2013 WL 5291663 at \*8 (ED Mich, Sept 19, 2013) (Zatkoff, J.) (“[J]udges are not like pigs, hunting for truffles buried in” the administrative record) (quoting *United States v Dunkel*, 927 F2d 955, 956 (7th Cir 1991)). It is Ajax’s burden to present the Court and the parties with accurate citations to the administrative record. Because the company did not do so, the Court should not consider its arguments challenging the Opacity and Testing Conditions as arbitrary and capricious due to what Ajax calls “differential treatment.”

Ultimately, Ajax is attempting to cut corners in this judicial process designed to review a closed administrative record by asking the Court to do its work. The Court should decline to entertain Ajax’s improper supplementation of the record with the permits to install it cites in footnotes 158, 171-177, 180-184, 192-201 and the arguments that rely on these permits. These permits to install are irrelevant to the legal question at issue in any event.

### **III. EGLE WAS AUTHORIZED BY LAW TO BAN RUO AND LOWER TAC EMISSIONS LIMITS ACCORDINGLY BECAUSE THE BAN WAS NECESSARY TO COMPLY WITH THE AIR TOXICS REQUIREMENTS OF PART 55.**

The CAA and Part 55, and its implementing regulations, authorize EGLE to determine the best way to control the emissions of toxic air contaminants (“TACs”), including determining that the combustion of RUO was not appropriate here. *See* Mich Admin Code, R 336.1224; *see also* MCL 324.5512(a). RUO emits numerous toxic air contaminants that are regulated under EGLE’s rules. Mich Admin Code, R 336.1226 (“TAC list”). The agency is well within its authority to



determine that banning RUO use was the best available control technology (“T-BACT”) to control the toxic air contaminants that burning RUO creates. EGLE also determined that Ajax could feasibly implement the RUO ban as an industrial practice based on Ajax’s own T-BACT analysis. Ajax incorrectly argues that EGLE acted contrary to law when it banned the company from combusting RUO as part of its industrial operation. Br of Ajax Materials Corp at 25-32.

***A. EGLE is authorized to ban RUO as T-BACT under Part 55 and Rule 224.***

EGLE has authority to ban RUO under Rule 224 and Part 55. Michigan’s air toxics rules are stronger than federal standards because they apply to more pollutants and to a broader category of sources. Mich Admin Code, R 336.1226. Under Michigan’s air toxics rules, whenever a source applies to EGLE for a permit to install a new source of toxic emissions, it must comply with the lowest achievable emissions rate (“LAER”) through the application of T-BACT. Mich Admin Code, R 336.1224. Ajax’s argument that EGLE cannot ban the combustion of RUO at its asphalt facility is not legally sound and cherry picks facts from the record. Ajax argues that the only reason that EGLE provided for banning RUO is that it would reduce lead emissions. Br of Ajax Materials Corp at 26-27. But Ajax ignores EGLE’s statements in the record that it was banning RUO in order to reduce the impacts of toxic air contaminants and because use of RUO is not fundamental to the asphalt manufacturing process. Permit File, Item 527 at 20.

RUO is among the most toxic fuel types that an industrial facility can burn. RUO consists of oil collected from various sources such as automotive shops, manufacturing facilities, and other industrial operations that use the oil for mechanical purposes and for fuel. *See* AP-42, Ch 1.11, Waste Oil Combustion at 7. EGLE’s rationale for eliminating RUO was that the reduction of toxics—such as acrolein, chromium, and cadmium—was required by law. Permit File, Item 467 at 1; *see also* Mich Admin Code, R 336.1226. Without the reduction of these toxics, Ajax would

not be able to comply with the emissions limits in its permit. *See* Permit File, Item 464 at 1 (questioning compliance of the PTI’s emissions limits given that an RUO ban could significantly reduce toxic air contaminant emissions). EPA similarly recommended this measure to reduce the impact of toxic contamination in the surrounding community and guarantee compliance with Michigan’s air quality rules. Permit File, Item 381 at 12.

In its response to comments, EGLE states that “the use of RUO is not fundamental to the process or the operation of the facility and *yet increase the potential emissions including toxic air contaminants . . .* RUO is being removed from the permit to demonstrate compliance with Rule 224 [T-BACT requirements for toxics].” Permit File, Item 526 at 23 (emphasis added). The agency then went on to lower the emissions limits in the permit to reflect the RUO ban as T-BACT—that is, those TACs that RUO would have emitted if burned were limited in the permit to the point where Ajax cannot burn RUO and still comply with the permit (i.e., the “lowest achievable emissions rate”). *Id* at 6-7. This is an appropriate determination of the best available control technology for controlling these toxic emissions.

EGLE also noted in the administrative record, and in the response to comments, the importance of reducing lead as part of the agency’s overall effort to ensure that this permit will not unduly impact the health and welfare of the community or its use and enjoyment of the environment. *See* Permit File, Item 526 at 39; Permit File, Item 454 at 2. Reducing lead exposure for Flint residents in order to safeguard their health and welfare is a perfectly valid regulatory consideration under the agency’s rules and CAA mandate. *See eg*, Mich Admin Code, R 336.1901 (general proscription on emitting air contaminants injurious to public health). Additionally, while Ajax paints a picture that it is atypical to restrict RUO as a fuel for asphalt plants, the reality is that EGLE frequently places emissions limits on asphalt plants that require minimizing or eliminating

RUO use. Permit File, Item 442 at 1; *see also* Permit File, Item 153 at 2; Permit File, Item 450 at 12. In all, EGLE’s decision to prohibit the burning of RUO was based on the recommendations of the EPA and its own determination that doing so would benefit public health and be feasible for Ajax to implement.

While the agency noted that the RUO ban would have the added benefit of reducing lead emissions, that was not the only reason the agency decided to ban the fuel. Permit File, Item 5 at 6. Whenever the agency mentions lead in the context of eliminating RUO as a fuel, it also mentions toxics reduction, including in its response to comments. Permit File, Item 475 at 5; Permit File, Item 33 at 11; Permit File, Item 442 at 1, Permit File, Item 526 at 23. Ajax’s reading of EGLE’s authority under its toxics rules to ban RUO is too constrained and must be rejected. Determining RUO is T-BACT for controlling toxics is within EGLE’s authority because RUO emits numerous toxic air contaminants.

***B. EGLE properly determined that banning RUO was feasible for Ajax to implement based on Ajax’s own analysis.***

Part 55 assigns the responsibility for identifying technologies and examining their feasibility on the applicant. Mich Admin Code, R 336.2801(f);<sup>2</sup> *see also Guidelines for*

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<sup>2</sup> “(f) ‘Best available control technology’ or ‘BACT’ means an emissions limitation, including a visible emissions standard, based on the maximum degree of reduction for each regulated new source review pollutant, which would be emitted from any proposed major stationary source or major modification which the department—on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs—determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of the pollutant. Application of best available control technology shall not result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61, adopted by reference in R 2801(a). If the department determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, then a design, equipment, work practice, operational standard, or combination thereof, may be prescribed

*Conducting a Rule 224 T-BACT Analysis*, EGLE, 2004. Ajax made its case that it would be infeasible to ban RUO to EGLE. *See* Permit File, Item 527 at 120-128. Ultimately, EGLE determined, based on this analysis, that banning RUO would be feasible and any private costs to Ajax associated with the ban are outweighed by the benefits to the public of reducing toxic emissions. The Court should not upset the determination the agency made simply because Ajax disagrees that the benefits to the public outweigh the costs to its bottom line.

In determining what constitutes T-BACT for any specific source, EGLE requires the regulated entity to submit a T-BACT analysis for a new source of toxic emissions. *Guidelines for Conducting a Rule 224 T-BACT Analysis*, EGLE, 2004. That analysis sets forth information on a variety of economic, environmental, energy, and technological considerations that the applicant thinks are important for the agency to consider in determining T-BACT. EGLE has limited jurisdiction to consider costs as a factor in setting permit conditions, but the determination of T-BACT is one such area. *Id* at 2; *see also*, PSD Workbook at 88; Mich Admin Code, R 336.2801(f).

Economic cost is just one of several factors in setting the T-BACT: environmental impacts and energy use are other considerations. *Id*. The applicant is responsible for identifying the costs and effectiveness of each technology to inform the feasibility of implementing T-BACT to lower its toxic emissions to the lowest rate achievable. *Guidelines for Conducting a Rule 224 T-BACT Analysis*, EGLE, 2004; *see also* PSD Workbook, Ch 7 at 86-89. Once the applicant completes the T-BACT analysis, it is submitted to the agency which then determines what technology or industrial practice will best limit the amount of TAC emissions. One of the key purposes of placing

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instead to satisfy the requirement for the application of best available control technology. The standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of the design, equipment, work practice, or operation, and shall provide for compliance by means which achieve equivalent results.

the burden to prepare a T-BACT analysis on the applicant is that regulated industries are generally in the best position to inform the agency about the feasibility of implementing any given control technology. *See* Mich Admin Code, R 336.1801(f). A T-BACT analysis can present data on the costs of operating a control technology—for example, the costs associated with replacing filters, the fuel or electricity required to run control equipment, or operational concerns related to implementation. *Guidelines for Conducting a Rule 224 T-BACT Analysis*, EGLE, 2004 at 3; *See also* PSD Workbook Ch 7 at 88. EGLE properly reached its decision to ban RUO as T-BACT based on Ajax’s own analysis showing that it would be both feasible and beneficial, and the Court should not reverse the agency’s assessment on appeal simply because it will cost Ajax money.

Ajax disagrees and asserts that EGLE incorrectly claimed that “the use of RUO as one of many fuel options is not fundamental to the process or operation of the facility.” Br of Ajax Materials Corp at 25. However, Ajax provided only a vague explanation of its determination of T-BACT as “good combustion practices” and entirely failed to analyze why that could not feasibly include fuel restrictions on RUO. Permit File Item 527, at 126. Nowhere does Ajax even acknowledge the public benefits of reducing RUO compared to its private costs. The only reason that the company gives as to why it would be infeasible to not burn RUO is because of the comparative price of natural gas. *Id* at 122-124. Ajax fails to mention the fact that it has numerous other fuel options aside from RUO that can replace natural gas should it become prohibitively expensive. *See id* at 6. Ajax does nothing to show why eliminating RUO is infeasible given the flexibility in fuel switching that is present in the final permit. *Id.* EGLE is authorized by law to assess Ajax’s T-BACT analysis and determine what constitutes T-BACT in light of the information the company provided.

At bottom, it is improper for the Court to rule that banning RUO was unlawful when EGLE followed the appropriate steps to evaluate whether RUO was fundamental to the company's process. The proper place for evaluating these reasons was before the administrative agency and in the public comment process. The Court does not have the same expertise as EGLE when it comes to evaluating whether a certain control technology is the "best," "feasible," or "good." These functions are assigned to EGLE for a reason. The Court cannot now decide to weigh the competing considerations of cost, air quality, and public health differently under the narrow standard of review or allow Ajax to redo its T-BACT analysis on appeal. For these reasons, the Court should reject Ajax's argument that EGLE's decision to restrict RUO is unlawful.

**IV. AJAX'S CONTENTION THAT IT WAS SUBJECT TO PREJUDICIAL "DIFFERENTIAL TREATMENT" IS CONTRADICTED BY THE FACTUAL RECORD.**

EGLE's Part 55 authority only concerns the protection of public health and air quality through regulating sources of air pollution. MCL 324.5503. This mandate requires EGLE to prioritize the health and welfare of communities surrounding a proposed facility. Here, the agency failed to adequately protect the community's health by prioritizing "customer service" to Ajax instead. Ajax claims that EGLE unlawfully discriminated against the company and therefore the permit should be vacated and revised consistent with its preferences. Br of Ajax Materials Corp at 10, 16 (arguing that environmental justice is not a valid consideration for EGLE); *id* at 49 (complaining of "differential treatment"); *id* at 30 ("EGLE's decision to ban RUO . . . unfairly prejudices Ajax.").<sup>3</sup> This argument is ironic, because, in reality, this case is about the ongoing harm to a low-income, African American, community caused by the issuance of a permit that fails to protect public health. Br of Community Groups at 28-46. It is worth noting, again, that EPA

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<sup>3</sup> The Community Groups address the legal flaws with these arguments in Section II and III.

found in 2017 that EGLE violated the civil rights of local African American residents through its expedient permitting of the neighboring Genesee Power Station. *Id* at 18. In this case, EGLE again prioritized an expedient permit process and consistently acquiesced to Ajax’s preferences to the detriment of public health and a robust participation process. Ajax’s assertions to the contrary are wrong.

When EGLE accepted Ajax’s application, it indicated that it would only be providing minor “tweaks” to the permit in order to ensure that the agency could accommodate the applicant’s production schedule and issue the permit by May 2021. District File, Item 1 at 1. There was no formal evaluation of environmental justice or disparate impacts to minorities in the surrounding community at the initial stage of application. *Id*. From the start, EGLE’s priority in processing this facility’s permit application was “customer service.” Modeling File, Item 22 at 1. For example, the lead modeler reviewing this permit was praised for accepting a modification to her technical model from Ajax’s compliance consultant. *Id*. The modification conveniently rendered the company’s projected emissions from its aggregate piles compliant with federal standards where they were previously noncompliant under the agency’s review. *See* Modeling File, Item 24 (accepting the consultant’s assumptions of no emissions from aggregate piles when winds are under 12 mph). The change to the model was praised by a senior EGLE official as “much appreciated” and “excellent customer service” to Ajax and its compliance consultant. Modeling File, Item 22 at 1. This same change was criticized extensively in the comments of EPA. Permit File, Item 381 at 9.

The company has been able to shape almost every aspect of EGLE’s action in determining the appropriate conditions to impose in this permit. Through negotiation, the company achieved many of its objectives: loosened emissions limits for particulate matter from the aggregate storage

piles, the minimization of the total potential to emit by excluding the AC Tanks, and the selection of highly favorable air quality monitors to pass compliance testing. District File, Item 127, 1-2 (reflecting that the agency was more than ready to accept Ajax's rebuttable presumption framework for controlling excessive dust emissions from piles because it was "the best we are going to get"); Permit File, Item 1 (reflecting that there are no estimates for the AC Tanks).

Ajax would have the Court believe that EGLE unfairly bent to public pressure in the public participation process. Br of Ajax Materials Corp at 1 ("[P]ublic perception do[es] not change the legal basis for issuing a PTI."). The record demonstrates, however, that the public participation process was flawed and ineffective. EGLE Executive File, Item 48 (requesting an in person comment session); EGLE Executive File, Item 52 (discussing issues with the virtual information sessions and feedback provided that it was held during election day); EGLE Executive File, Item 67 (alerting EGLE to link showing incorrect information for the public hearing). Indeed, many individual households, families, and organizations were not even notified that the draft permit was published until the comment period was almost over. Hearing File, Item 234 at 30-33. The participation process largely happened as a result of community pressure, even though it was legally required. District File, Item 259 (request to extend the comment period to September 7, 2021); AQDD File, Item 7 (request to extend the public comment period to September 21, 2021); Permit File, Item 140 (requesting in person hearing and information session). As discussed in the Community Groups' brief, the final permit that resulted from this flawed process does not adequately protect public health.

At bottom, EGLE placed customer service, expediency for Ajax, and cost effectiveness above public health, air quality, and public participation throughout the permitting process. The facts contradict Ajax's contentions that it was treated in an unfair and prejudicial manner.



**V. THE STANDARD OF REVIEW IN THIS CASE PRECLUDES GRANTING AJAX’S REQUESTED RELIEF BECAUSE THE COURT CANNOT REWRITE THE PERMIT.**

The standard of review requires the Court to determine whether EGLE’s action was “authorized by law.” Const 1963, art 6, § 28. An agency decision “in violation of [a] statute, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or [that] is arbitrary and capricious” is not authorized by law. *Henderson*, 321 Mich App at 44, (2017) (citing *Brandon Sch Dist v Mich Ed Special Serv Ass’n*, 191 Mich App 257, 263 (1991)). Michigan courts adopted this particular formulation of the “authorized by law” standard, in part, because “it focuses on the agency's power and authority to act rather than on the objective correctness of its decision.” *Id* (citing *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 489 (1998)) (emphasis added). “A ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance.” *Wescott v Civil Serv Comm*, 298 Mich App 158, 161-162 (2012).

Under this standard of review, the Court cannot rewrite the permit as Ajax suggests it should. Instead, if the Court determines that EGLE did not take all of the legally required steps or follow appropriate processes prior to issuing the Ajax permit, it can remand the permit back to EGLE as the Community Groups request. The Community Groups contend that EGLE failed to make legally required factual findings concerning the AC Tanks, failed to follow specific legal requirements for air quality model selection, and modeled a throughput that patently does not reflect the design of the proposed source.

*A. The “authorized by law” standard of review is narrow and precludes the Court from evaluating the evidentiary support for EGLE’s conclusions.*

Ajax asks the court to overturn EGLE’s determination that the Opacity and Testing Conditions and banning RUO as T-BACT are necessary to reasonably assure compliance with the CAA. It also requests that this Court judicially impose Ajax’s preferred conditions based on Ajax’s assessment the current permit conditions are unnecessary and expensive. The Court should reject Ajax’s arguments because they are beyond this Court’s limited scope of review in this case.

EGLE’s decision to impose Opacity and Testing Conditions V.2-4 and V.6 and ban the combustion of RUO at the Ajax plant were not arbitrary and capricious and were authorized by law. Ajax contends that the Opacity and Testing Conditions are arbitrary because such conditions are unnecessarily stronger than other asphalt plants and nearby major sources. Br of Ajax Materials Corp at 34-39. Accepting Ajax’s arguments would require the Court to redo the analysis that EGLE undertook in reaching its decision to impose those conditions. Ajax asks the Court to go far beyond its scope of review and to reassess the substantive propriety of these technical conditions based on economic factors that are not within the scope of the CAA. That is a bridge too far. The Court cannot substitute its judgment for EGLE’s assessment of what is needed to protect air quality.

Similarly, Ajax’s contentions that Special Condition V.6’s opacity testing requirements are “ambiguous and confusing” and “unprecedented when compared to other HMA facilities [and] major sources,” and therefore arbitrary and capricious, fails for similar reasons. Br of Ajax Materials Corp at 42. The company asks the Court to evaluate the method of opacity testing that EGLE is requiring Ajax to undertake and compare it to other methods of testing. This is not within the scope of the Court’s review because it requires the Court to engage in substantive analysis of the benefits and detriments of various opacity testing methods. It is not the place of this Court to

evaluate the comparative propriety of opacity testing methods across sources. These methods may be different for a variety of reasons previously articulated by the Community Groups: the timing of permitting, the location of permitting, the fuel type that the applicant plans to use, and so on. Determining what the best opacity testing method is for the Ajax plant would require the Court to not only reevaluate the facts in the record but also replace EGLE's judgment with its own view of what opacity testing method is sufficient. Again, the Court should not entertain Ajax's invitation to expand the scope of review beyond what is permitted in this case.

***B. While the Court lacks the authority to rewrite the permit, it should remand the permit and order EGLE to undertake legally required analysis.***

Contrary to Ajax's arguments, the Community Groups' contentions are rooted in EGLE's clear violations of law. Rather than ask the Court to substitute its judgment for EGLE's, the Community Groups ask the Court to remand the permit to EGLE so that EGLE can correct its errors: (1) failing to include the AC Tanks in its potential to emit for the facility; (2) following improper procedures for determining that certain off-site air monitors were "representative" of air quality in Genesee Township under the agency's rules; and (3) approving the permit without modeling its maximum impacts. EGLE's actions were arbitrary and capricious because they reflect an absence of legally required consideration before issuance of a permit to install. *Wescott*, 298 Mich App at 161-162; *Nova Scotia Food Prod Corp*, 568 F2d at 251 ("Though a reviewing court will not match submission against counter-submission to decide whether the agency was correct in its conclusion on scientific matters (unless that conclusion is arbitrary), it will consider whether the agency has taken account of all relevant factors and whether there has been a clear error of judgment.") (internal quotes omitted).

1. EGLE's failure to assess the AC Tanks' emissions "reflects an absence of consideration" that it is legally required to make before issuing the final permit to install.

EGLE issued this permit in a manner not authorized by law because it was arbitrary and capricious. In conflict with the agency's mandate to measure all pollutants the facility will emit, EGLE failed to require Ajax to submit any information on the emissions from the company's proposed asphalt cement storage tanks. Br of Community Groups at 28-35. This "absence of consideration" resulted in an arbitrary and capricious permit with conditions that do not reflect the facilities full potential to emit. *Wescott*, 298 Mich App at 161-162 ("A ruling is arbitrary and capricious . . . **when it reflects an absence of consideration.**") (emphasis added). Without accurate estimates, EGLE is not fulfilling its mandate to control air pollution. Further, the agency failed to follow the legal process for exempting Ajax's AC Tanks from the scope of its review. Mich Admin Code, R 336.1289, 336.1278. The permit was not authorized by law because it failed to fully assess Ajax's potential to emit.

2. EGLE's assessment of the plant's maximum throughput is without reference to the significant fact that plant is designed to process 600 tons of asphalt per hour.

EGLE also failed to evaluate this plant's maximum impact because it did not model the operational design of Ajax's plant to process 600 tons of asphalt per hour and 14,400 tons per day. Br of Community Groups at 37-42; *see also* Mich Admin Code, R 336.1902(1)(b)(viii) (incorporating 40 CFR pt 51 App W § 8.2.1 (b) (requiring that air quality models account for a plant's operating conditions in order to accurately measure "maximum potential impacts.")). It did so without considering the facts in the record; there is clear evidence that the agency is aware that it incorrectly modeled the maximum throughput rate, but it did not correct this error.

The plant is designed to accommodate a throughput rate of 600 tons per hour for 24 hours a day to account for up to 15% variation in tonnage. EGLE Executive File, Item 204 at 5. Yet,

EGLE only modeled emissions at a rate of 550 per hour and an average of 12,000 tons per day. This modeled throughput rate fails to account for the plant's true design capacity to accommodate up to 600 tons per hour and 14,400 tons per day. The Court need only notice that this fact exists in the record, rather than reweigh or evaluate it, to conclude that the agency did not evaluate the plant's maximum impacts prior to issuing the permit. This relief is wholly consistent with the Court of Appeals order in *DTE St Clair*, in which it did not upset the agency's factual conclusions, but did order the lower court to take notice of significant record evidence and explain how it considered that evidence given that it strongly contradicted its ultimate determination. *Sierra Club v Dep't of Env't, Great Lakes, & Energy*, No 350083, 2021 WL 69788 (Mich Ct App Jan 7, 2021).

3. EGLE is attempting to unlawfully redesignate the Lansing and Grand Rapids monitors as "regional" without making specific findings required under its rules.

EGLE is also improperly attempting to redesignate various air quality monitors without following the process for doing so in its rules. Br of Community Groups at 44-50. EGLE claimed in the permitting process for the Ajax plant that the Lansing and Grand Rapids monitors are "regional monitors" and are thus representative of air quality in the Flint region. Permit File, Item 526 at 66. But this determination conflicts with the agency's rule incorporating the federal definition of "regional monitor." 40 CFR Part 58, Appendix D, Section 1.2. Those rules describe specific criteria for regional monitors. *Id* at 1.2 (b) (3), (5). EGLE evaluated these criteria and determined that the Lansing and Grand Rapids monitors are not regional scale monitors, but neighborhood scale monitors, in a separate regulatory determination. *Annual Ambient Air Monitoring Network Review Plan for 2023*, EGLE, at 55, 67, and 73 (Jul. 1, 2022). The agency now seeks to change that determination for this specific case to facilitate permitting Ajax and ignoring clear regulations establishing the criteria for a "regional monitor" and its previous regulatory determinations. Allowing EGLE to switch that determination in an ad hoc case-by-case

fashion allows it to flout clear criteria for evaluating the suitability of air monitors in its regulations.  
Br of Community Groups at 44-50.

For these reasons, the Court should remand the Ajax permit to EGLE so that it can remedy these legal errors consistent with the rigorous process laid out in its regulations.

### **CONCLUSION**

For the foregoing reasons the Court should reject Ajax Materials Corporation's arguments. The Court should vacate and remand the Ajax permit because its issuance was not authorized by law for the reasons stated in the Community Groups' appeal.

Sincerely,

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**PROOF OF SERVICE**

I, John Petoskey, certify that I served the intervenor community groups' response brief on the following parties via first class mail and electronic mail:

*For Appellee Michigan Department of Environment Great Lakes and Energy*

Gillian E. Wener (P81427)  
Rebecca M. Smith (P72184)  
Michigan Department of Attorney General  
Environment, Natural Resources, and Agriculture Division  
P.O. Box 30755  
Lansing, MI 48909  
517-335-7664

*For Appellant Ajax Materials Corporation:*

Kurt A. Kissling (P61937)  
Ashley G. Chrysler (P80263)  
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Warner Norcross + Judd LLP  
2715 Woodward Ave., Ste. 300  
Detroit, MI 48201-3030  
313-546-3030

*For Intervenor-Appellant City of Flint*

Douglas R. Kelly (P49856)  
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Benjamin L. Shipper (P77558)  
Clark Hill PLC  
151 S. Old Woodward Ave., #200  
Birmingham, MI 48009  
248-642-9692

Date: January 20, 2023.

STATE OF MICHIGAN  
GENESEE COUNTY CIRCUIT COURT

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  
capacity as Director of EGLE.

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

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.,  
Michigan not-for-profit community  
organizations headquartered and  
having membership in Genesee Cty, Michigan.

**APPENDIX FOR INTERVENOR  
COMMUNITY GROUPS'  
RESPONSE BRIEF  
ORAL ARGUMENT REQUESTED**

Intervenors.

---

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.

Appellees,

and

AJAX MATERIALS CORPORATION, a Michigan corporation,

Intervenor.

---

CITY OF FLINT,

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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Consolidated with Case Nos.  
2022-116880-AA and  
2022-117201-AA

Appellees,

and

AJAX MATERIALS CORPORATION, a Michigan corporation,

Intervenor.

---

**INTERVENOR COMMUNITY GROUPS' APPENDIX**

**ORAL ARGUMENT REQUESTED**

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

<b>Exhibit #</b>	<b>Document Name</b>	<b>Page Number</b>
Exhibit 1	AP-42, Ch. 1.11, Waste Oil Combustion	1
Exhibit 2	Air Quality Division Director File, Item 007	3
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Exhibit 22	<i>Zizzo v Commissioner of Social Security</i> , 2013 WL 5291663	61

Exhibit 1: AP-42, Ch.  
1.11, Waste Oil  
Combustion

Table 1.11-4. EMISSION FACTORS FOR SPECIATED METALS FROM WASTE OIL COMBUSTORS<sup>a</sup>

EMISSION FACTOR RATING: D

Pollutant	Small Boilers Emission Factor (lb/10 <sup>3</sup> gal) <sup>b</sup> (SCC 1-03-013-02)	Space Heaters: Vaporizing Burner Emission Factor (lb/10 <sup>3</sup> gal) <sup>c</sup> (SCC 1-05-001-14, 1-05-002-14)	Space Heaters: Atomizing Burner Emission Factor (lb/10 <sup>3</sup> gal) <sup>c</sup> (SCC 1-05-001-13, 1-05-002-13)
Antimony	BDL	3.4 E-04	4.5 E-03
Arsenic	1.1 E-01	2.5 E-03	6.0 E-02
Beryllium	BDL	BDL	1.8 E-03
Cadmium	9.3 E-03	1.5 E-04	1.2 E-02
Chromium	2.0 E-02	1.9 E-01	1.8 E-01
Cobalt	2.1 E-04	5.7 E-03	5.2 E-03
Manganese	6.8 E-02	2.2 E-03	5.0 E-02
Nickel	1.1 E-02	5.0 E-02	1.6 E-01
Selenium	BDL	BDL	BDL
Phosphorous	ND	3.6 E-02	ND

<sup>a</sup> Pollutants in this table represent metal species measured for waste oil combustors. Other metal species may also have been emitted but were either not measured or were present at concentrations below analytical detection limits. Units are lb of pollutant/10<sup>3</sup> gallons of waste oil burned. To convert from lb/10<sup>3</sup> gallons to kg/m<sup>3</sup>, multiply by 0.12. BDL = below detection limit. SCC = Source Classification Code. ND = no data.

<sup>b</sup> Reference 4.

<sup>c</sup> References 4-5.

Exhibit 2: Air Quality  
Division Director File,  
Item 007

**Shooltz, Lisa (EGLE)**

---

**From:** Ted Zahrfeld <zahrfeldt@gmail.com>  
**Sent:** Friday, September 3, 2021 12:33 PM  
**To:** Dolehanty, Mary Ann (EGLE)  
**Cc:** EGLE-assist; Regina Strong; Alan Walts; Lilian S. Dorka; Switzer, Annette (EGLE)  
**Subject:** New hot asphalt plant in Flint minority neighbor  
**Attachments:** AjaxLtrEGLE hearingEXT9-21Rev1.docx

**Categories:** Admin Record Ajax

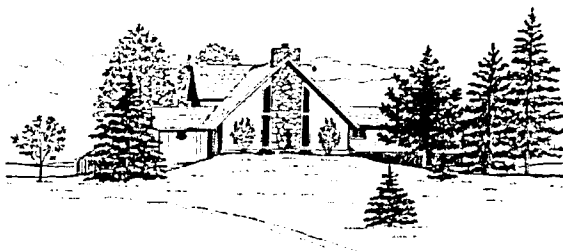
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Hello Ms. Dolehanty,

Please act upon these urgent requests.

Thank you.

Ted Zahrfeld  
Board Chair  
St Francis Prayer Center



## St. Francis Prayer Center

G-2381 E. Carpenter Rd. • Flint, MI 48505 • Phone 810-787-5330 • Fax 810-787-5399  
E-mail: stfrancisflint@comcast.net • Web: <http://www.stfrancisprayerflint.com>

September 1, 2021

Mary Ann Dolehanty  
Air Quality Division Director  
Michigan Department of Energy, Great Lakes, and Energy (EGLE)

Dear Ms. Dolehanty,

Re: Ajax Materials Corp permit (PTI appl, No. APP-2021-0019) to build and operate a new hot mix asphalt plant at 5088 Energy Drive Flint, Michigan.

On behalf of the North Flint residences and Flint Coalition for Environmental Justice, we request a **Public Comment period extension until September 21, 2021**. We recognize that the requested extension would give EGLE a week to consider additional public comments. EGLE and Ajax can enter into a longer permit extension or EGLE can deny the permit and Ajax can reapply.

In addition to the Sept 1 virtual meeting, an **in person Public Hearing in the neighborhood of the proposed plant** is requested.

These requests are made based on the following:

\*EGLE and Ajax have already agreed to permit processing period extension until September 28, 2021.

\* There is a depth of technical data in the 6 months EGLE took to review Ajax's application for a permit. The concerned community needs more time to do its due diligence.

\* Even with EGLE scheduling a second **virtual** public hearing September 1, this process is a discrimination against a minority neighborhood which has limited internet access and difficulty in registering to be heard. EGLE should schedule an **in person Public Hearing** at a location in the neighborhood of the proposed Ajax plant.

The need for EGLE to provide a more robust and accessible public participation process in the permitting of the Ajax Materials air permit is particularly important because the United States Environmental Protection Agency ("EPA") has previously recognized EGLE's inadequate and discriminatory public participation practices.

First in a January 19, 2017 letter (EPA File No.01R-94-R5) from EPA to MDEQ (now EGLE) MDEQ violated Title VI of the Civil Rights Act:

"...a finding of discriminatory treatment of African-Americans by MDEQ in the public participation process for the GPS (Genesee Power Station) permit considered and issued from 1992 to 1994." The GPS is located in the identical neighborhood in which the proposed Ajax asphalt plant is requesting a permit.

"In the same letter, EPA provides next steps regarding actions that EPA will expect MDEQ to take in its resolution of the Flint Complaint, and which were previously conveyed to MDEQ, which focus on: (1) improving MDEQ's public participation program to reduce the risk of future disparate treatment; (2) improving MDEQ's development and implementation of a foundational non-discrimination program that establishes appropriate procedural safeguards while addressing civil rights complaints as well as policies and procedures for ensuring access for persons with disabilities and limited-English proficiency to MDEQ programs and activities; and (3) ensuring that MDEQ has an appropriate process in place for addressing environmental complaints. In addition, in this letter EPA makes specific recommendations to MDEQ regarding the GPS facility."

Second, in December 2019, EPA entered into resolution agreements—one with EGLE (Complaint No. 17RD-I 6-R5) and one with Genesee County (Complaint No. 18RD-I 6-R5)—to informally resolve two additional Title VI complaints alleging discrimination in public participation processes for permitting polluting facilities in Genesee County. In the resolution agreements, EPA called on EGLE and Genesee County, respectively, to improve its public participation processes. For instance, the EPA and EGLE agreement provides:

Therefore EGLE will ensure its public involvement process is available to all persons regardless of race. color. national origin (including limited-English proficiency), age, disability, and sex. In addition, EGLE will ensure that the factors used to determine the appropriate time. place. location. duration, and security at public meetings are developed and applied in a nondiscriminatory manner.<sup>1</sup>

In the aftermath of the EPA Title VI letters, EGLE has committed on paper to an improved public participation process and has developed a Limited English Proficiency

---

<sup>1</sup> December 4, 2019 Resolution Agreement Letter for Complaint No. 17RD-I 6-R5, [https://www.epa.gov/sites/default/files/2019-12/documents/resolution\\_letter\\_and\\_agreement\\_for\\_complaint\\_17rd-1-6-r5.pdf](https://www.epa.gov/sites/default/files/2019-12/documents/resolution_letter_and_agreement_for_complaint_17rd-1-6-r5.pdf)



("LEP") plan,<sup>2</sup> but the public participation process in the Ajax permitting process has not safeguarded against discriminatory practices. For example, EGLE did not engage the public early in the process, including identifying the methods of engagement which are most likely to meet the needs of the community. Evaluate the LEP needs of the impacted community and make clear the opportunity for translator/interpreter services.

The concerned community strongly suggests that EGLE comply with the terms of the 2017 EPA Title VI order and the 2019 resolution agreements by taking immediate steps to ensure that the public has an adequate opportunity to have meaningful input into this permitting decision.

Sincerely,

Ted Zahrfeld  
Board Chair  
[zahrfeldt@gmail.com](mailto:zahrfeldt@gmail.com)  
810.240.0717

Debra Hawley  
Director

CC: Liesl Eichler Clark, Director, EGLE  
Regina Strong, Environmental Justice Public Advocate, EGLE  
Alan Walts, Director Region 5, US EPA  
Lilian S. Dorka, Director External Civil Rights Compliance US EPA  
James A. Cunningham Deputy Regional Administrator, Region 5, HUD  
Annette Switzer, Permit Section Manager, AQD, EGLE

Come with joy into the presence of the Lord.  
Psalm 100:2b

---

<sup>2</sup> See EGLE LEP Plan, [https://www.michigan.gov/documents/egle/Limited\\_English\\_Proficiency\\_Plan\\_710255\\_7.pdf](https://www.michigan.gov/documents/egle/Limited_English_Proficiency_Plan_710255_7.pdf). Note that St. Francis Prayer Center was one of the groups that signed on to collective comments on the draft LEP plan.

# Exhibit 3: District File, Item 001

**McGeen, Dan (EGLE)**

---

**From:** Mark Boden <mboden@ajaxpaving.com>  
**Sent:** Tuesday, January 19, 2021 1:24 PM  
**To:** Brown, Ambrosia (EGLE)  
**Cc:** Jarrett, Stephanie; Kathleen T. Anderson  
**Subject:** RE: Ajax Materials PTI Genesee Township


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Good afternoon Ambrosia,

Thank you very much for the timely response.

Regards,

Mark

<p><b>Mark E. Boden</b> Vice-President</p> <p><b>Ajax Materials Corporation</b> w: (248) 244-3327 m: (248) 388-5639 f: (248) 244-3483 www.ajaxpaving.com</p> <p><b>The Future is Riding on Ajax</b></p>	
---	--

**From:** Brown, Ambrosia (EGLE) <BrownA39@michigan.gov>  
**Sent:** Tuesday, January 19, 2021 12:42 PM  
**To:** Mark Boden <mboden@ajaxpaving.com>  
**Cc:** Jarrett, Stephanie <sajarrett@fishbeck.com>; Kathleen T. Anderson <kanderson@ajaxpaving.com>  
**Subject:** RE: Ajax Materials PTI Genesee Township

Hello Mark,

As we discussed this morning, we will try our best to meet your May 1<sup>st</sup> date.

Pertaining to your public comment question: Unless there is an unknown issue that would make this a controversial project, we would only require public notice if the proposed limits would result in emissions on a facility-wide basis of at least 90% of Title V thresholds. However, when that happens we usually just tweak the annual throughput limit to fix the issue.

I may make some tweaks to the emission calculations during the review. However, I will run anything by you which would result in a change to what would be in your permit.

**Ambrosia Brown, P.E.**  
Environmental Engineer  
Air Quality Division - Permit Section

# Exhibit 4: District File, Item 127

**McGeen, Dan (EGLE)**

---

**From:** Mitchell, Mark (EGLE)  
**Sent:** Tuesday, June 29, 2021 8:25 AM  
**To:** Dolehanty, Mary Ann (EGLE); Switzer, Annette (EGLE); Brown, Ambrosia (EGLE); McGeen, Dan (EGLE); Myott, Brad (EGLE)  
**Subject:** RE: Ajax PTI Draft PTI conditions for Public Notice

All,

Not having been in the conversation yesterday afternoon, I am not sure of the thought process up until now. If we add this new language are we completely eliminating the requirement for the wind gage or just the requirement to monitor it?

As far as this language goes, I think it is the best we are going to get.

Thanks,

Mark

June 29, 2021

---

**From:** Dolehanty, Mary Ann (EGLE) <DOLEHANTYM@michigan.gov>  
**Sent:** Tuesday, June 29, 2021 8:19 AM  
**To:** Switzer, Annette (EGLE) <SWITZERA2@michigan.gov>; Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>; Brown, Ambrosia (EGLE) <BrownA39@michigan.gov>; McGeen, Dan (EGLE) <MCGEEND@michigan.gov>; Myott, Brad (EGLE) <MYOTTB@michigan.gov>  
**Subject:** FW: Ajax PTI Draft PTI conditions for Public Notice

Thoughts?

---

**From:** Kissling, Kurt <kkissling@wnj.com>  
**Sent:** Monday, June 28, 2021 9:07 PM  
**To:** Dolehanty, Mary Ann (EGLE) <DOLEHANTYM@michigan.gov>  
**Cc:** Keatley, Aaron (EGLE) <KeatleyA@michigan.gov>; Mark Boden <mboden@ajaxpaving.com>; Kathleen T. Anderson <kanderson@ajaxpaving.com>; David Grabowski <dgrabowski@ajaxpaving.com>; Stephanie A. Jarrett <sajarrett@fishbeck.com> <sajarrett@fishbeck.com>; Switzer, Annette (EGLE) <SWITZERA2@michigan.gov>; Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>; Brown, Ambrosia (EGLE) <BrownA39@michigan.gov>  
**Subject:** RE: Ajax PTI Draft PTI conditions for Public Notice

---

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Mary Ann:

Thank you for responding and providing an alternative to the wind speed monitoring (EUYARD § IV.1) and recording (EUYARD § VI.4) conditions that were previously proposed in the draft PTI.

For purposes of proceeding to public comment tomorrow/Tuesday morning, Ajax is inclined to accept the proposed alternative language as a substitute for the continuous wind speed monitoring and recording conditions identified above, but requests clarification of how AQD proposes to include the alternative language.

Specifically, Ajax suspects that AQD's alternative language would be integrated into the emission limit at EUYARD § 1.2, as a new middle sentence, and suggests repeating a portion of the first sentence for consistency. With this understanding, EUYARD § 1.2 would be revised to state:

*The permittee shall not allow any visible emissions from any aggregate storage pile in EUYARD unless the visible emissions are the direct result of activity on the applicable pile or wind speeds of at least 12 miles per hour. In the absence of corresponding on-site wind speed data, any VEs from the aggregate storage piles that are not the direct result of activity on the applicable pile will be assumed to be occurring at wind speeds less than 12 mph, unless the permittee can prove otherwise. The visible emissions when there is activity on the pile or the wind speeds are at least 12 miles per hour shall not exceed 20% opacity as specified in GC11. (40 CFR 52.21(c) & (d))*

The highlighted language is what you proposed as the alternative, but with the additional blue-font text that Ajax suggested repeating from the first sentence of the condition (i.e., to preserve consistency with the preceding and following sentences of § 1.2, which remain unchanged).

If this language is acceptable to AQD, Ajax proposes that AQD initiate public comment tomorrow morning with this revised language in § 1.2 instead of the prior language in § IV.1 and § VI.4. The attached copy of the PTI also reflects these changes.

Hopefully this is clear and comports with AQD's proposed alternative, but please advise with any questions or concerns. If helpful, Ajax is also available to talk tomorrow/Tuesday morning, ideally before we lose Stephanie Jarrett around 9:30am.

Thanks, Kurt



Kurt A. Kissling | d 313.546.6142 | [kkissling@wnj.com](mailto:kkissling@wnj.com)

**From:** Dolehanty, Mary Ann (EGLE) <[DOLEHANTYM@michigan.gov](mailto:DOLEHANTYM@michigan.gov)>

**Sent:** Monday, June 28, 2021 5:07 PM

**To:** Kissling, Kurt <[kkissling@wnj.com](mailto:kkissling@wnj.com)>

**Cc:** Keatley, Aaron (EGLE) <[KeatleyA@michigan.gov](mailto:KeatleyA@michigan.gov)>; Mark Boden <[mboden@ajaxpaving.com](mailto:mboden@ajaxpaving.com)>; Kathleen T. Anderson <[kanderson@ajaxpaving.com](mailto:kanderson@ajaxpaving.com)>; David Grabowski <[dgrabowski@ajaxpaving.com](mailto:dgrabowski@ajaxpaving.com)>; Stephanie A. Jarrett <[sajarrett@fishbeck.com](mailto:sajarrett@fishbeck.com)> <[sajarrett@fishbeck.com](mailto:sajarrett@fishbeck.com)>; Switzer, Annette (EGLE) <[SWITZERA2@michigan.gov](mailto:SWITZERA2@michigan.gov)>; Mitchell, Mark (EGLE) <[MITCHELLM7@michigan.gov](mailto:MITCHELLM7@michigan.gov)>; Brown, Ambrosia (EGLE) <[BrownA39@michigan.gov](mailto:BrownA39@michigan.gov)>

**Subject:** RE: Ajax PTI Draft PTI conditions for Public Notice

Kurt –

AQD has evaluated the option proposed by Ajax and finds it is not substantially different than the last proposed language which AQD found lacking from an enforceability perspective for the permit limit of no VEs at less than 12mph.

# Exhibit 5: District File, Item 259

**McGeen, Dan (EGLE)**

---

**From:** Switzer, Annette (EGLE)  
**Sent:** Thursday, August 12, 2021 12:26 PM  
**To:** Ethridge, Christopher (EGLE); Myott, Brad (EGLE); McGeen, Dan (EGLE); Mitchell, Mark (EGLE); Brown, Ambrosia (EGLE); Dixon, Jenifer (EGLE)  
**Cc:** Dolehanty, Mary Ann (EGLE)  
**Subject:** FW: PTI appl. No.APP-2021-0019 - Draft response

FYI

**Annette Switzer**  
517-643-3847

---

**From:** Switzer, Annette (EGLE)  
**Sent:** Thursday, August 12, 2021 12:25 PM  
**To:** zahrfeldt@gmail.com  
**Cc:** directordeb@stfrancisprayerflint.com; Mary Ann Dolehanty <DOLEHANTYM@michigan.gov>  
**Subject:** RE: PTI appl. No.APP-2021-0019 - Draft response

Dear Mr. Zahrfeld,

I am responding to your email on behalf of Mary Ann Dolehanty, Air Quality Division Director.

Thank you for your interest and expressing your concerns about the time allowed to review the proposal from Ajax Materials Corporation. We have considered your request and have granted an extension of the comment period until September 7, 2021.

We look forward to your continued engagement in this process.

Sincerely,  
Annette Switzer

**Annette Switzer**  
Permit Section Manager  
Air Quality Division  
Michigan Department of Environment, Great Lakes, and Energy  
517-643-3847 | [SwitzerA2@Michigan.gov](mailto:SwitzerA2@Michigan.gov)  
**Follow Us | [Michigan.gov/EGLE](https://Michigan.gov/EGLE)**

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**From:** Ted Zahrfeld <[zahrfeldt@gmail.com](mailto:zahrfeldt@gmail.com)>  
**Sent:** Wednesday, July 28, 2021 2:56 PM  
**To:** Dolehanty, Mary Ann (EGLE) <[DOLEHANTYM@michigan.gov](mailto:DOLEHANTYM@michigan.gov)>  
**Cc:** Debra Hawley <[directordeb@stfrancisprayerflint.com](mailto:directordeb@stfrancisprayerflint.com)>  
**Subject:** PTI appl. No.APP-2021-0019

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Dear Ms Dolehanty,  
Re: Ajax Corp proposed new hot mix asphalt plant

For the North Side Flint neighborhood we request an extension of the comment period from August 16 to September 16, 2021.

Since the "interested party" letter dated July 1 was only recently received it will be a hardship for our minority neighborhood to respond by August 16.

In the interest of Environmental Justice and even with the new in person public hearing on August 11, we need more time to gather comments/testimonies from those affected and submit them in writing.

Sincerely,  
Ted Zahrfeld  
Board Chair  
St Francis Prayer Center  
G-2381 Carpenter Rd  
Flint, Mi 48505

Exhibit 6: EGLE  
Executive File, Item  
052

**From:** Clark, Liesl (EGLE) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CB3B257F547249D9A0BC1A30E9CF922A-CLARK LIESL]  
**Sent:** 8/19/2021 4:14:58 PM  
**To:** Keatley, Aaron (EGLE) [KeatleyA@michigan.gov]  
**Subject:** FW: Canceled: Michigan Advisory Council on Environmental Justice - Monthly Meeting

**From:** Environmental Transformation Movement of Flint <etmflint@gmail.com>  
**Sent:** Thursday, August 19, 2021 4:12 PM  
**To:** Frantz, Kimber (EGLE) <FrantzK@michigan.gov>  
**Cc:** nicholas.leonard@glelc.org; Bryan Lewis <lewisbryanm@gmail.com>; Keith Cooley <keithwcooley@gmail.com>; monica@wethepeopleofdetroit.com; Fadi K Mourad <fadi.mourad@dteenergy.com>; Salah.Ali215@gmail.com; Nicki Britten (Berrien) <nbritten@bchdmi.org>; Frank Houston <fhouston@bluegreenalliance.org>; Joel Howrani Heeres <howraniheeresj@detroitmi.gov>; Theresa Landrum <t\_landrum05@yahoo.com>; Whitney Gravelle <WGravelle@baymills.org>; Paul Mohai <pmohai@umich.edu>; jonwenu14@gmail.com; smorduno@gmail.com; petosjoh@umich.edu; treames@umich.edu; Sutter, Alison <asutter@grand-rapids.mi.us>; lwilliams@cfgf.org; Vertrice Allen <allen@wmenergy.com>; riser@wmenergy.com; Strong, Regina (EGLE) <StrongR1@michigan.gov>; Cook, Kara <CookK14@michigan.gov>; Clark, Liesl (EGLE) <ClarkL20@michigan.gov>; Kruse, Katherine (EGLE) <KruseK2@michigan.gov>; Thelen, Mary Beth (EGLE) <THELENM2@michigan.gov>; LaForte, Lindsey <LaForteL1@michigan.gov>; Brown, Brandy (EGLE) <BrownB3@michigan.gov>; Bunting, Anna (EGLE-Contractor) <BuntingA1@michigan.gov>; mckinneydonavan@gmail.com  
**Subject:** Re: Canceled: Michigan Advisory Council on Environmental Justice - Monthly Meeting

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Hi Everyone,

I am disappointed that our meeting today was cancelled. Given that there are still many committee members who *could* attend the meeting today and there are *time-sensitive/controversial topics* such as the Ajax Asphalt Plant permit on the agenda, I can draw no other conclusion that the cancellation of today's meeting was to prevent MAC-EJ discussion about these matters.

Here is what I wanted to share with the MAC-EJ at today's meeting:

- **Governor Whitmer's priority to "Fix the Damn Roads" is spurring yet another environmental injustice in Flint.** Ajax Paving Industries is planning to build another smelly, polluting asphalt plant next to a hard-fought incinerator on the border of Flint in close proximity to a large neighborhood with public housing and other low-income housing and a senior independent living facility on the Genesee Township side. The area is also lined with numerous polluting industries along Dort Highway to the west. Residents already report unusually high incidence of asthma and cancer in the neighborhood (even prior to the Flint water crisis) and EGLE is turning a blind eye to the added cumulative burden of this proposed plant. A key strategy for mitigating the physical effects of lead poisoning in Flint is access to recreation, and the proposed plant site is also bordered by Genesee County Parks which are highly used; local parks are where low-income Flint families get away and these parks are some of the most frequented. People will be exposed to Ajax's pollution. Yes, the roads need to be fixed, but asphalt plants should be built far away from where people are living and the State of Michigan should care where asphalt plants are located. Once again, the lives of Flint residents are being thrown away to make a buck. Here's [EGLE's Proposed Project Summary](#), containing EGLE's recommendation that it approve Ajax's permit.
- **EGLE's public comment process is a sham and reminiscent of MDEQ's treatment of Flint residents opposing the Genesee Power Station incinerator in the 1990s, which caused the [EPA to rule that the MDEQ was violating Title 6 of the 1964 Civil Rights Act](#).** This time around, the only public info session and official public hearing were held on

election day which curtailed participation, residents were told they had to very narrowly limit their comments to technical language about the permit despite (i.e. EJ concerns from a non-technical perspective) the permit saying that the plant must not cause "unreasonable interference with the comfortable enjoyment of life and property," EGLE gave pat answers rather than substantial ones to the few residents who were able to participate, and residents are reporting that the public hearing was generally unfriendly to participants who are not technical experts. Last week, EGLE held an in-person opportunity for residents to provide public comment on an individual basis (again curtailing any kind of group engagement that would allow people to hear each other speak), at a location to which there was no public transportation, and at least my comment (after I invested 30-40 minutes writing it) was found after the fact to have been lost. While we are very grateful that EGLE granted a brief extension of the public comment period from Aug. 16th to Sept. 7th, we asked EGLE to hold one in-person, outdoor, socially distant information session to the public to make up for the fact that the last one was not accessible, and our reasonable request was declined. EGLE appears to have learned little from the EPA's ruling, because little has changed. It took EGLE 6 days to update its website with official notice of the extension. And yet EGLE wants a pat on the back for doing the minimum public engagement necessary.

- **EJ policies under the Whitmer Administration are ineffective and do not address the practical nature of pollution exposure in Michigan communities.** For example, the issue of cumulative burden, which has been raised numerous times in the MAC-EJ, makes no difference in the permitting process and its public participation efforts for it. Furthermore, if this administration truly cares about environmental justice, Michigan environmental regulations would embrace the precautionary principle in its regulatory framework.
- **Flintstones want the solidarity of MAC-EJ members to stand with Flint against EGLE's approval of the proposed Ajax permit (PTI Application No. APP-2021-0019). We ask that you join us by submitting public comment and join us in future actions.**
- Finally, this experience raises front and center in my mind another issue that MAC-EJ members have raised numerous times through this body: **the need for our meeting minutes to be posted online for transparency and for the MAC-EJ to offer regular opportunities to hear from residents in EJ communities on the environmental issues they are facing.** We could easily do a mini version of NEJAC's format, by cutting the long time period reserved for the check in question and adding an hour for public comments from 4:30-5:30 pm. We don't have to do a lot of organizing to make this happen. Just make our meetings transparent and provide a call-in number for the public. (I'm not saying to forgo the in-person sessions, but they are taking a long time to organize and it would be better to provide some opportunity for community input than none at all.)

Thank you,

Mona Munroe-Younis

Executive Director  
Environmental Transformation Movement of Flint  
<https://www.etmflint.org/>  
(810) 845-4633

My pronouns are she/her/hers.

On Thu, Aug 19, 2021 at 2:30 PM Frantz, Kimber (EGLE) <[FrantzK@michigan.gov](mailto:FrantzK@michigan.gov)> wrote:

Due to a number of vacations and scheduling conflicts, we're cancelling today's meeting. Look for updated information soon.

==

Updating to attach this afternoon's agenda.

---

# Microsoft Teams meeting

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Exhibit 7: EGGLE  
Executive File, Item  
067

**Sent:** 9/1/2021 9:01:29 AM  
**To:** Environmental Transformation Movement of Flint [etmflint@gmail.com]; Brown, Ambrosia (EGLE) [BrownA39@michigan.gov]; EGLE-AQD-PTIPublicComments [EGLE-AQD-PTIPublicComments@michigan.gov]  
**CC:** Switzer, Annette (EGLE) [SWITZERA2@michigan.gov]  
**Subject:** RE: Correction Needed to EGLE Calendar

**Regina R. Strong, MS APR**

Environmental Justice Public Advocate  
 Office of the Environmental Justice Public Advocate – Executive Office  
 Michigan Department of Environment, Great Lakes and Energy  
 517-284-6727 office  
 517-614-0278 cell  
[Strongr1@michigan.gov](mailto:Strongr1@michigan.gov)  
[Michigan.gov/EnvironmentalJustice](http://Michigan.gov/EnvironmentalJustice)

**From:** Environmental Transformation Movement of Flint <etmflint@gmail.com>  
**Sent:** Wednesday, September 1, 2021 1:47 AM  
**To:** Brown, Ambrosia (EGLE) <BrownA39@michigan.gov>; Strong, Regina (EGLE) <StrongR1@michigan.gov>; EGLE-AQD-PTIPublicComments <EGLE-AQD-PTIPublicComments@michigan.gov>  
**Subject:** Correction Needed to EGLE Calendar

**CAUTION: This is an External email. Please send suspicious emails to [abuse@michigan.gov](mailto:abuse@michigan.gov)**


Hi Amber,

I hope all is well with you. I just pulled up the EGLE calendar to get the info on tomorrow's public hearing and found that both links (in the body of the announcement and in the "Link" listing at the bottom) go the EGLE project summary for the wrong permit!

- Both links open "Grand Haven Board of Light and Power – Permit to Install Application No. APP-2021-0054" at [https://www.deq.state.mi.us/aps/downloads/permits/PubNotice/NSR\\_PTIs\\_Open\\_for\\_Comment.pdf](https://www.deq.state.mi.us/aps/downloads/permits/PubNotice/NSR_PTIs_Open_for_Comment.pdf)
- Please see screen images below, so you can see what I'm seeing.
- This means that public participation for the Ajax permit has again been (unintentionally?) curtailed. No one who visits EGLE's calendar will be able to use the calendar listing to access the background information and the info for how to join the public hearing. The only people getting the right information from EGLE are those who have already been engaged.
- I was going to also say that the only people who might have received EGLE's announcement about the Sept. 1 public hearing with correct information are those who EGLE has already communicated with directly, such as through the August 20th email with the subject line "EGLE: Additional online public hearing set for 6 p.m. Sept. 1 regarding proposed air permit for Ajax Materials Co." or unless they know how to find the the correct EGLE Proposed Project Summary. However...
  - o In the August 20th email, where the email says "More information about the proposed air permit can be found on EGLE's website" it also links to the Grand Haven project summary.
  - o I'm wondering who all is getting these notification emails from EGLE, even among those who have been in communication with EGLE. I only received EGLE's August 20th email as a forward from another





 The linked image cannot be displayed. The file may have been moved, renamed, or deleted. Verify that the link points to the correct file and location.

# Exhibit 8: Guidelines for Conducting a Rule 224 T-BACT Analysis

 **Michigan Department of Environmental Quality - Air Quality Division****GUIDELINES FOR CONDUCTING A RULE 224 T-BACT ANALYSIS****General Requirements**

- A. Best Available Control Technology for Toxics (T-BACT) means the maximum degree of emission reduction which the Department determines is reasonably achievable for each process that emits toxic air contaminants (TACs), taking into account energy, environmental, and economic impacts, and other costs.
- B. The analysis must be specific to the process and the TACs subject to a T-BACT review.
- C. The evaluation must identify the entire range of demonstrated options. Control alternatives that may be transferable or innovative must at least be considered.
- D. The level of detail in the control options analysis should vary with the relative magnitude of the emissions reduction achievable. The T-BACT analysis is the responsibility of the permit applicant as part of a complete permit application.
- E. Emission limits should be expressed in pounds/hour, based on maximum process capacity, and also in terms of process variables such as material processed, fuel consumed, or pollutant concentrations. Acceptable units include lbs/MMBtu, lbs/gal of solids applied, and g/dscm.
- F. Emission limits and work practice standards resulting from the T-BACT analysis must be enforceable as a practical matter. Permit conditions will specify appropriate stack testing, continuous emission monitoring, continuous process monitors, recordkeeping, etc.

For technical questions pertaining to this document, contact the AQD Permit Section at 517-373-7074.

**Procedure****1. Pollutant Applicability**

Determine which TACs are to be evaluated in the T-BACT analysis. Rule 224(2) lists exemptions from the T-BACT requirement. For example, carcinogens with an Initial Risk Screening Level (IRSL) greater than 0.1 microgram per cubic meter and non-carcinogens with an Initial Threshold Screening Level (ITSL) greater than 200 micrograms per cubic meter are exempt from T-BACT if their maximum allowable emission rates are less than 0.1 lb/hr and 1.0 lb/hr, respectively.

**2. Identify Process Emissions**

Determine all potential process emissions including fugitive emissions. (i.e., each stack or vent, relief valves, pumps, storage piles or tanks, conveyors, valves)

**3. Identify Available Control Options**

- a) Determine the "base case." The base case is the control option that, in the absence of T-BACT decision-making, would normally have been applied. Examples are New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, emission limits in state or local air pollution regulations, or the level of control that is generally used in practice.

- b) Identify alternative control options that afford greater control than the base case and are available at the time of the submittal of a complete permit application. Include:
  - i) Transferable and innovative control technologies,
  - ii) Processes or alternate modes of operation that inherently produce less pollution, and
  - iii) Various configurations of the same technology that achieve different control efficiencies (i.e., one-field and five-field electrostatic precipitators, 95% and 99% efficient scrubbers).
- c) The following sources of information should be investigated to ensure that all alternative control options are identified.
  - i) Technical Literature
  - ii) Industrial Publications
  - iii) RACT/BACT/LAER Clearinghouse (RBLC)
  - iv) EPA/State/Local air pollution control agency surveys

#### 4. Impact Analysis

Determine if the control option that provides the greatest emission reduction is not reasonable because of energy, economic or environmental impacts, or other costs. Consideration of these collateral impacts is used to demonstrate whether or not the control option is appropriate. If this control option is found to be unreasonable, repeat the evaluation for the less effective alternatives. The following are examples when energy, economic, or environmental impacts may make an alternative not reasonable.

- a) Energy – Natural gas for operating an afterburner is not available based on local regulations or use of liquid propane gas as an alternative may be eliminated as inappropriate based on its relative cost. Most energy-based demonstrations work themselves out under the economic evaluation.
- b) Economic -
  - i) The increased cost of the process or project would be unreasonable.
  - ii) The increased cost is out of proportion to the environmental benefit. For example, the increased cost of going from 93% to 94% control increases the capital cost from \$2,000,000 to \$4,000,000 and the operating costs from \$500,000/year to \$1,000,000/year, while only reducing the emissions of acetone by 20 tons per year.
- c) Environmental – Certain control options may result in detrimental environmental impacts (i.e., generation of solid or liquid waste, impacts to surface or ground water).

The capital cost, the amortized capital cost, and the annual operating costs of the emission control system should be submitted for each different economic control cost evaluation performed. A 7% interest rate should be used unless interest rates change significantly, and the life of the control equipment is assumed to be at least 10 years unless a demonstration to the contrary is provided. Provide all supporting assumptions, calculations and other documentation. The standard method used to determine the aforementioned costs is contained within the USEPA OAQPS Control Cost Manual which is available on the following website: [www.epa.gov/ttn/catc/products.html#cccinfo](http://www.epa.gov/ttn/catc/products.html#cccinfo).

#### 5. Select T-BACT

T-BACT is the most effective control alternative that is not eliminated in Step 4.

# Exhibit 9: Modeling File, Item 022

**Hengesbach, Stephanie (EGLE)**

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**From:** Hengesbach, Stephanie (EGLE)  
**Sent:** Friday, May 28, 2021 7:35 AM  
**To:** Mitchell, Mark (EGLE)  
**Subject:** RE: Ajax 24-hour PM10 impacts

No problem! Let me know me know if you have questions on what I sent. I'm online for a bit...

Stephanie M. Hengesbach  
Meteorologist  
Air Quality Division  
Michigan Department of Environment, Great Lakes, and Energy  
**NEW Work Cell 517-648-7015** | [hengesbachs1@michigan.gov](mailto:hengesbachs1@michigan.gov)  
**Follow Us** | [Michigan.gov/EGLE](https://www.michigan.gov/EGLE)

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**From:** Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>  
**Sent:** Friday, May 28, 2021 7:33 AM  
**To:** Hengesbach, Stephanie (EGLE) <HENGESBACHS1@michigan.gov>  
**Subject:** RE: Ajax 24-hour PM10 impacts

Thank You Stephanie!!

Much Appreciated & Excellent Customer Service,

Mark

May 28, 2021

---

**From:** Hengesbach, Stephanie (EGLE) <HENGESBACHS1@michigan.gov>  
**Sent:** Thursday, May 27, 2021 9:30 PM  
**To:** Brown, Ambrosia (EGLE) <BrownA39@michigan.gov>; Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>  
**Subject:** Ajax 24-hour PM10 impacts

Hi Ambrosia,

Attached is a spread sheet showing the Ajax impacts with the original design and also impacts with moving the pile towards the west property and the stack. I also have individual stack impacts. Impacts with 'Pile' represent the original location and impacts with 'Pile2' the updated location towards the rest property. Impacts are quite a bit higher when moving the pile towards the west property.

I'll check email tomorrow morning before 8 am so send me an email if you want to talk about my modeling before your 8 am meeting. I'd have time to talk.

Let me know if you have questions.

Stephanie

Stephanie M. Hengesbach  
Meteorologist

# Exhibit 10: Modeling File, Item 024

**Hengesbach, Stephanie (EGLE)**

**From:** Kuieck, Sue <slkuieck@fishbeck.com>  
**Sent:** Tuesday, June 1, 2021 6:57 AM  
**To:** Hengesbach, Stephanie (EGLE)  
**Subject:** RE: Ajax Modeling

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OK, thank you! If your results match mine, then having it moved closer to the property line and the stack won't change the impacts so hopefully we can work with them on removing that restriction. Thanks for taking the time to look into this so early this morning!!

**From:** Hengesbach, Stephanie (EGLE) <HENGESBACHS1@michigan.gov>  
**Sent:** Tuesday, June 1, 2021 6:35 AM  
**To:** Kuieck, Sue <slkuieck@fishbeck.com>  
**Subject:** RE: Ajax Modeling

**EXTERNAL EMAIL**

When talking to Mark and Ambrosia they wanted it closer to the west property and the stack so that's why I picked that location. It wasn't exactly on the property line, but it was just to the west of the stack. As far as how they are handling it in the permit, I'm not sure. That wasn't something they talked to me about.

Stephanie M. Hengesbach  
 Meteorologist  
 Air Quality Division  
 Michigan Department of Environment, Great Lakes, and Energy  
**NEW Work Cell 517-648-7015** | [hengesbachs1@michigan.gov](mailto:hengesbachs1@michigan.gov)  
**Follow Us | [Michigan.gov/EGLE](https://www.michigan.gov/EGLE)**

**From:** Kuieck, Sue <slkuieck@fishbeck.com>  
**Sent:** Tuesday, June 1, 2021 6:32 AM  
**To:** Hengesbach, Stephanie (EGLE) <HENGESBACHS1@michigan.gov>  
**Subject:** RE: Ajax Modeling

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BTW – just noticing an email from the attorney from late on Friday. I had sent him the location of the new pile you had in the revised model that you sent me (approximately 25 m from the fence) and he is concerned that because the distance to the property line was not 0 that the distance you currently had it set from the property will be their new restriction. To me, it looked like you had it as close to the receptors as you really should have it, based on how the model over predicts when receptors are closer than 25 m. Did you go through that location at all with Ambrosia?



---

**From:** Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Sent:** Tuesday, June 1, 2021 6:15 AM  
**To:** Kuieck, Sue <[slkuieck@fishbeck.com](mailto:slkuieck@fishbeck.com)>  
**Subject:** RE: Ajax Modeling

EXTERNAL EMAIL

Hi Sue,

I have the updated run going. Sorry as I didn't realize you were doing emission factors for the piles. It will take maybe an hour or so to run. I'll get a hold of you after its finished.

Stephanie

Stephanie M. Hengesbach  
Meteorologist  
Air Quality Division  
Michigan Department of Environment, Great Lakes, and Energy  
**NEW Work Cell 517-648-7015** | [hengesbachs1@michigan.gov](mailto:hengesbachs1@michigan.gov)  
**Follow Us** | [Michigan.gov/EGLE](http://Michigan.gov/EGLE)

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**From:** Kuieck, Sue <[slkuieck@fishbeck.com](mailto:slkuieck@fishbeck.com)>  
**Sent:** Friday, May 28, 2021 3:31 PM  
**To:** Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Subject:** RE: Ajax Modeling

**CAUTION: This is an External email. Please send suspicious emails to [abuse@michigan.gov](mailto:abuse@michigan.gov)**

Hi Stephanie

I just spoke with Kurt Kissling and found out that they have to agree on conditions for Ajax before noon on Tuesday. I will be working soon after I drop my son off Tuesday morning at 6:30ish. Feel free to let me know when you are around and we discuss early.

**Sue Kuieck | Air Quality Engineer**  
Fishbeck | w: 616.464.3721 | c: 616.446.2496 | [Fishbeck.com](http://Fishbeck.com)

---

**From:** Kuieck, Sue  
**Sent:** Friday, May 28, 2021 10:43 AM  
**To:** 'Stephanie Hengesbach ([HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov))' <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Subject:** RE: Ajax Modeling

Hi Stephanie

I pulled in my bpip file, assuming you didn't make any significant changes to it. I took a look at the file you sent and when I first looked at the input file you sent, I didn't see anything out of the ordinary but when I imported it into our system, the emission factors didn't show up on the second file. I wasn't sure if this was just a disconnect since we don't use

Lake's. Just compared the input files and here's what I saw when I put it in the same emission factor group as the first pile

This was from your input file

```
** Variable Emissions Type: "By Wind Speed (WSPEED)"
** Variable Emission Scenario: "Scenario 1"
  EMISFACT PILE      WSPEED 0.0 0.0 0.0 0.0 1.0 1.0
  SRCGROUP Pile      PILE
  SRCGROUP Pile2     PILE2
```

This was in the input once I pulled pile2 into the group with the emission factors based on the windspeed

```
SO EMISFACT PILE WSPEED 0 0 0 0 1 1
SO EMISFACT PILE2 WSPEED 0 0 0 0 1 1
```

Since the piles only have emissions on higher wind days, they should both have these factors applied. Let me know if you want to discuss on Tuesday. Thanks for updating when you should have been watching baseball. At least the games usually last long enough where I'm sure you still got to see plenty of baseball 🍪

Enjoy your holiday!

**Sue Kuieck | Air Quality Engineer**

Fishbeck | w: 616.464.3721 | c: 616.446.2496 | [Fishbeck.com](http://Fishbeck.com)

---

**From:** Kuieck, Sue  
**Sent:** Friday, May 28, 2021 9:03 AM  
**To:** Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Subject:** RE: Ajax Modeling

Can you also send the bpip? Thank you!

---

**From:** Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Sent:** Friday, May 28, 2021 8:45 AM  
**To:** Kuieck, Sue <[slkuieck@fishbeck.com](mailto:slkuieck@fishbeck.com)>  
**Subject:** RE: Ajax Modeling

EXTERNAL EMAIL

Here you go... I have my work cell on so you can call if you have questions.

Stephanie M. Hengesbach  
 Meteorologist  
 Air Quality Division  
 Michigan Department of Environment, Great Lakes, and Energy  
**NEW Work Cell 517-648-7015** | [hengesbachs1@michigan.gov](mailto:hengesbachs1@michigan.gov)  
**Follow Us** | [Michigan.gov/EGLE](https://Michigan.gov/EGLE)

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**From:** Kuieck, Sue <[slkuieck@fishbeck.com](mailto:slkuieck@fishbeck.com)>  
**Sent:** Friday, May 28, 2021 8:40 AM  
**To:** Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Subject:** RE: Ajax Modeling

**CAUTION: This is an External email. Please send suspicious emails to [abuse@michigan.gov](mailto:abuse@michigan.gov)**

Thank you! They said you were doing it at a baseball game last night. That's dedication! I think maybe the emission factors that go with the pile might not have copied over when you copied the pile and adjusted the coordinates.

---

**From:** Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Sent:** Friday, May 28, 2021 8:38 AM  
**To:** Kuieck, Sue <[slkuieck@fishbeck.com](mailto:slkuieck@fishbeck.com)>  
**Subject:** Re: Ajax Modeling

EXTERNAL EMAIL

I'm checking email from my phone. I'll log in and send you the files?

---

**From:** Kuieck, Sue <[slkuieck@fishbeck.com](mailto:slkuieck@fishbeck.com)>  
**Sent:** Friday, May 28, 2021 8:35:13 AM  
**To:** Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>  
**Subject:** Ajax Modeling

**CAUTION: This is an External email. Please send suspicious emails to [abuse@michigan.gov](mailto:abuse@michigan.gov)**

Hi Stephanie

I know you are out today, but if you get this email, can you please send me your input files for the revised Ajax modeling you ran?

Thank you!

**Sue Kuieck | Air Quality Engineer**  
Fishbeck | w: 616.464.3721 | c: 616.446.2496 | [Fishbeck.com](http://Fishbeck.com)

# Exhibit 11: Permit File, Item 005

Notes From Call Between Ajax Modeler and EGLE Staff

Currently proposed fuel types: natural gas, propane, fuel oil, and recycled used oil (RUO)

Noticed issues:

Their current CO EF different SCC and not use the lowest but <AP-42. Asked to explain SO2 assumed reduction from RAP usage, asked to demonstrate compliance (testing?)

**Based on the same source of EF's per pollutant...**

No change in CO regardless of fuel (but they used a different SCC for CO)

No change to PM/PM10/PM2.5 because based on grain loading and AP-42 EF not impacted by fuel

Significant reduction of lead. Currently based on 100 ppm maximum from RUO where fuel oils and natural gas contain a negligible amount

No change in VOC in AP-42

sulfur content of oil is highest for No 6 but RUO may contain less sulfur. No change if still allowed to use #6 fuel oil, 50% reduction if only allowed diesel fuel

CO2e and CH4 = used AP-42, No change regardless of fuel

# Exhibit 12: Permit File, Item 033

2. The permittee shall not burn in EUHMAPLANT any hazardous waste (as defined in state or federal law), blended fuel oil or specification recycled used oil (RUO) containing any contaminant that exceeds the following concentrations or for which the flash point, ash content, or acidity vary from the standards specified in the following table. (R 336.1225)

Contaminant	Limit	Units
Arsenic	5.0	ppmw
Cadmium	2.0	ppmw
Chromium	10.0	ppmw
Lead	100.0	ppmw
PCBs	1.0	ppmw
Total Halogens	4000/4000.0	ppmw
Sulfur	1.5	Weight %
Minimum Flash Point	100.0	°F
Maximum Ash Content	1.0	Weight %
Acidity	Minimum pH = 4 Maximum pH = 10	N/A

**Commented [JS1]:** We updated the emission calculations based on 4000 ppmw RUO; HCl emissions continue to pass screening levels.  
The updated HCl emission rate is 14.84 lb/hr

3. The permittee shall not use any asbestos tailings or waste materials containing asbestos in EUHMAPLANT pursuant to the National Emission Standards for Hazardous Air Pollutants, 40 CFR Part 61, Subpart M. (R 336.1225, 40 CFR Part 61 Subparts A & M)
4. The permittee shall limit the asphalt mixture processed in EUHMAPLANT to a maximum of 50 percent RAP material based on a monthly average. (R 336.1224, R 336.1225, R 336.1702)
5. The permittee shall not process more than 876,322 tons of HMA paving materials in EUHMAPLANT per 12-month rolling time period as determined at the end of each calendar month. (R 336.1205(1)(a), R 336.1205(3))
6. The permittee shall not process more than 500 tons of HMA paving materials in EUHMAPLANT per hour as determined at the end of each hour based on a daily average, which shall be determined by dividing the daily HMA production by the daily operating hours. (R 336.1224, R 336.1225, R 336.1702)

**Commented [JS2]:** This change is consistent with our Brighton permit.

The PM10 and PM2.5 standards are 24-hour and annual averaging periods. While the PM10 impacts are close to the 24-hr increment, which is based on future growth in the area, the impacts are well under the national ambient air quality standards (NAAQS), which are protective of health. Since the PM10 and PM2.5 standards do not have hourly averaging periods, a daily average production rate is acceptable.

Both NOX and SO2 have 1-hr averaging periods, but the short-term impacts for NOX and SO2 are less than 33% of the NAAQS standard for the plant itself, and less than 60% of the NAAQS standard for the plant and background combined.

For air toxics – there are 23 air toxics with averaging periods less than 24-hours, but the highest impact from these toxics is 8% of the screening level.

**III. PROCESS/OPERATIONAL RESTRICTION(S)**

1. The permittee shall not operate EUHMAPLANT unless the Fugitive Dust Control Plan for EUYARD specified in Appendix A has been implemented and is maintained. (R 336.1371, R 336.1372, Act 451 324.5524)
2. The permittee shall not operate EUHMAPLANT unless the Preventative Maintenance Program specified in Appendix B has been implemented and is maintained. (R 336.1910, R 336.1911)
3. The permittee shall not operate EUHMAPLANT unless the Emission Abatement Plan for Startup, Shutdown and Malfunctions specified in Appendix C has been implemented and is maintained. (R 336.1911, R 336.1912)
4. The permittee shall not operate EUHMAPLANT unless the Compliance Monitoring Plan (CMP) for Recycled Used Oil (RUO) specified in Appendix D, or an alternate plan approved by the AQD District Supervisor, is implemented and maintained. (R 336.1225, R 336.1371, R 336.1372, R 336.1910, R 336.1911, Act 451 324.5521, 40 CFR 279.55)
5. The permittee shall maintain the efficiency of the EUHMAPLANT drum mix burners, to control CO emissions, by fine tuning the burners for proper burner operation and performance. The permittee shall fine tune the

# Exhibit 13: Permit File, Item 140



**Brown, Ambrosia (EGLE)**

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**From:** Brown, Ambrosia (EGLE)  
**Sent:** Friday, July 9, 2021 5:28 PM  
**To:** Switzer, Annette (EGLE); Dixon, Jenifer (EGLE); Dolehanty, Mary Ann (EGLE); Williams, Keisha (EGLE); Kilmer, Susan (EGLE); Hengesbach, Stephanie (EGLE); McGeen, Dan (EGLE); Mitchell, Mark (EGLE); Olaguer, Jay (EGLE); Myott, Brad (EGLE)  
**Cc:** Assendelft, Nick (EGLE); Greenberg, Jill (EGLE); Strong, Regina (EGLE); Kruse, Katherine (EGLE)  
**Subject:** RE: MLive News Article - Ajax Proposed Location

FYI:

I just got off the phone with a member of the public who had concerns about the virtual/internet requirements for access to the Ajax public notice information.

The interested party letter he received did not contain the call in number (or link) for the hearing, nor the phone number to the voicemail for making comments. He was not happy that he had to call me to get a copy of the information (proposed project summary, technical fact sheet, and copy of draft) mailed to him. He also did not like that the zoom meeting required name and email address to register. However, if you call in, you would miss the visual slides part of the presentation. He believes that there are many people in the surrounding community have lower income and do not have internet access so this public notice information and virtual hearing would not easily accessible to them. I believe he is going to call the voicemail to leave a comment requesting the hearing to be held in person.

Although he wanted the instructions to be able to navigate to the needed information on our website to share with others, he wants that information mailed to him as well. (I will be contacting Laura with his mailing information).

**Ambrosia Brown, P.E.**

Environmental Engineer

Air Quality Division - Permit Section

Michigan Department of Environment, Great Lakes, and Energy (EGLE)

517-648-6216 | [Browna39@Michigan.gov](mailto:Browna39@Michigan.gov)

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**From:** Brown, Ambrosia (EGLE)  
**Sent:** Friday, July 9, 2021 1:46 PM  
**To:** Switzer, Annette (EGLE) <SWITZERA2@michigan.gov>; Dixon, Jenifer (EGLE) <DIXONJ2@michigan.gov>; Dolehanty, Mary Ann (EGLE) <DOLEHANTYM@michigan.gov>; Williams, Keisha (EGLE) <WilliamsK29@michigan.gov>; Kilmer, Susan (EGLE) <KILMERS@michigan.gov>; Hengesbach, Stephanie (EGLE) <HENGESBACHS1@michigan.gov>; McGeen, Dan (EGLE) <MCGEEND@michigan.gov>; Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>; Olaguer, Jay (EGLE) <OlaguerJ@michigan.gov>; Myott, Brad (EGLE) <MYOTTB@michigan.gov>  
**Cc:** Assendelft, Nick (EGLE) <AssendelftN@michigan.gov>; Greenberg, Jill (EGLE) <GreenbergJ@michigan.gov>; Strong,

Regina (EGLE) <StrongR1@michigan.gov>; Kruse, Katherine (EGLE) <KruseK2@michigan.gov>  
**Subject:** RE: MLive News Article - Ajax Proposed Location

Another one:

[Genesee Township residents concerned about possible asphalt plant moving in \(abc12.com\)](#)

**Ambrosia Brown, P.E.**  
Environmental Engineer  
Air Quality Division - Permit Section  
Michigan Department of Environment, Great Lakes, and Energy (EGLE)  
517-648-6216 | [BrownA39@Michigan.gov](mailto:BrownA39@Michigan.gov)  
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**From:** Switzer, Annette (EGLE) <[SWITZERA2@michigan.gov](mailto:SWITZERA2@michigan.gov)>  
**Sent:** Friday, July 9, 2021 7:04 AM  
**To:** Dixon, Jenifer (EGLE) <[DIXONJ2@michigan.gov](mailto:DIXONJ2@michigan.gov)>; Dolehanty, Mary Ann (EGLE) <[DOLEHANTYM@michigan.gov](mailto:DOLEHANTYM@michigan.gov)>; Brown, Ambrosia (EGLE) <[BrownA39@michigan.gov](mailto:BrownA39@michigan.gov)>; Williams, Keisha (EGLE) <[WilliamsK29@michigan.gov](mailto:WilliamsK29@michigan.gov)>; Kilmer, Susan (EGLE) <[KILMERS@michigan.gov](mailto:KILMERS@michigan.gov)>; Hengesbach, Stephanie (EGLE) <[HENGESBACHS1@michigan.gov](mailto:HENGESBACHS1@michigan.gov)>; McGeen, Dan (EGLE) <[MCGEEND@michigan.gov](mailto:MCGEEND@michigan.gov)>; Mitchell, Mark (EGLE) <[MITCHELLM7@michigan.gov](mailto:MITCHELLM7@michigan.gov)>; Olaguer, Jay (EGLE) <[OlaguerJ@michigan.gov](mailto:OlaguerJ@michigan.gov)>; Myott, Brad (EGLE) <[MYOTTB@michigan.gov](mailto:MYOTTB@michigan.gov)>  
**Cc:** Assendelft, Nick (EGLE) <[AssendelftN@michigan.gov](mailto:AssendelftN@michigan.gov)>; Greenberg, Jill (EGLE) <[GreenbergJ@michigan.gov](mailto:GreenbergJ@michigan.gov)>; Strong, Regina (EGLE) <[StrongR1@michigan.gov](mailto:StrongR1@michigan.gov)>; Kruse, Katherine (EGLE) <[KruseK2@michigan.gov](mailto:KruseK2@michigan.gov)>  
**Subject:** MLive News Article - Ajax Proposed Location

[An asphalt plant may be coming to Genesee Township. Air quality experts ask citizens to weigh in before it's settled - mlive.com](#)

**Annette Switzer**  
Permit Section Manager  
Air Quality Division  
Michigan Department of Environment, Great Lakes, and Energy  
517-643-3847 | [SwitzerA2@Michigan.gov](mailto:SwitzerA2@Michigan.gov)  
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# Exhibit 14: Permit File, Item 153

EGLE's Comparison of Fugitive Dust Emissions for Asphalt Plants in Michigan

Annual and a short-term production limit, (usually daily) based on toxics screening		Annual, daily, and hourly production limits based on toxics screening
Restrictions on the type and contents of fuels that can be used		Restrictions on the type and contents of the fuels that can be used
Prohibits asbestos materials		prohibits asbestos materials
<b>Fugitive Dust</b>		
All required to implement Fugitive dust plan		Required to implement a fugitive dust plan
5% opacity trigger action to lessen road emissions in the appendix		5% opacity trigger to added to EUYARD conditions and removed from appendix
NA		No visible emissions from storage piles when wind speed not exceed 12 mph based on modeling
NA		Wind speed monitor and continuous recording
NA		Silt content limit (based on lower than original value in emission calculations to pass modeling)
Report annual EUYARD emissions		Report annual EUYARD emissions
<b>Fugitive Dust Plan requirements:</b> <ol style="list-style-type: none"> <li>1. Watering or surface treatment of Roads</li> <li>2. Speed limit of 10 mph posted at entrance.</li> <li>3. Minimize drop heights</li> <li>4. Visible monitor of potential areas of fugitive emissions</li> <li>5. Pave HMA haul vehicle roads on site</li> <li>6. Clean aggregate spills immediately</li> <li>7. Cover trucks with loads</li> <li>8. Don't overfill front-end loaders</li> <li>9. Keep records of dust control activities.</li> <li>10. Correcting fugitive leaks from equipment</li> <li>11. Minimize drop distances on piles</li> <li>12.</li> </ol>		<b>Fugitive Dust Plan requirements:</b> <ol style="list-style-type: none"> <li>13. Watering or surface treatment of Roads</li> <li>14. Speed limit of 10 mph posted at entrance.</li> <li>15. Minimize drop heights</li> <li>16. Visible monitor of potential areas of fugitive emissions</li> <li>17. Pave HMA haul vehicle roads on site</li> <li>18. Clean aggregate spills immediately</li> <li>19. Cover trucks with loads</li> <li>20. Don't overfill front-end loaders</li> <li>21. Keep records of dust control activities.</li> <li>22. Correcting fugitive leaks from equipment</li> </ol>

# Exhibit 15: Permit File, Item 442

**Brown, Ambrosia (EGLE)**

---

**From:** Mitchell, Mark (EGLE)  
**Sent:** Monday, October 4, 2021 1:05 PM  
**To:** Brown, Ambrosia (EGLE)  
**Subject:** FW: URGENT REQUEST FOR INFORMATION  
**Attachments:** 2021 0930 Active Asphalt PTIs for NACIS 324121 - Updated\_LM comments.xlsx

Amber,

FYI

Mark

Oct. 4, 2021

---

**From:** Magirl, Lauren (EGLE) <MagirlL@michigan.gov>  
**Sent:** Monday, October 4, 2021 12:10 PM  
**To:** Switzer, Annette (EGLE) <SWITZERA2@michigan.gov>; Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>  
**Subject:** RE: URGENT REQUEST FOR INFORMATION

Annette,

Here is the updated list with the comments you request. It should be noted that the size of each HMA is different so I added a column with the yearly and hourly sizes (if they were in the permit), also the fuels the HMA plant can combust in the drum can be different – I noted if they were different than Ajax.

The top three things I noticed the most were most HMA plants have a lower lead and acrolein emission limit and some RUO plants have a HCl emission limit where as Ajax didn't. I didn't see any other permit with a set back distance other than PTI No. 19-11B but the eval stated "This permit is a first of its kind hybrid permanent/portable asphalt plant permit."

If this isn't what you expected to receive or you would like me to make any changes to it, please let me know.

Thank you,  
Lauren

---

**From:** Switzer, Annette (EGLE) <SWITZERA2@michigan.gov>  
**Sent:** Wednesday, September 29, 2021 2:37 PM  
**To:** Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>; Magirl, Lauren (EGLE) <MagirlL@michigan.gov>  
**Subject:** FW: URGENT REQUEST FOR INFORMATION  
**Importance:** High

Lauren,

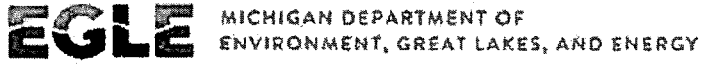
Here is the list of the Permits.

Thanks,  
Annette

Sorry for the short notice. Let me know if this will be a problem.

Thanks.  
Mary Ann

**Mary Ann Dolehanty**  
**Director, Air Quality Division**  
Michigan Department of Environment, Great Lakes, and Energy  
517-284-6791 | [DolehantvM@Michigan.gov](mailto:DolehantvM@Michigan.gov)



# Exhibit 16: Permit File, Item 450



### Summary of Asphalts Plants

For all asphalt plant permit applications:

- Emissions estimates are based on the capacity of the plant
- Typically have an annual emissions/material restriction since they do not operate in the colder months
- The hourly emissions are evaluated at the capacity of the drum.
- Companies propose what type of fuel they burn in the drum (basis for emission factors)

A total of 41 sets of permit conditions were compared with the proposed conditions for Ajax. Some of the differences with Ajax and the other permitted facilities are using different emission factors, which could be based upon a different fuel type such as only natural gas or a company not using recycled used oil (RUO). Here is a list of the how many plants had lower criteria pollutant emission limits and top 3 TACs compared to Ajax (lb/ton) (not all TACs are included in this summary):

- About 36 plants had a lower lead emission limit
- About 27 plants had a lower Arsenic emission limit
- About 24 plants had a lower Acrolein emission limit
- About 8 plants had a lower NOx emission limit
- About 31 plants had a lower PM emission limit
- About 5 plants had a lower PM10 emission limit
- About 3 plants had a lower PM2.5 emission limit
- About 8 plants had a lower CO emission limit
- About 17 plants had a lower SO2 emission limit
- About 5 plants had a VOC emission limit

About 13 plants had required testing for some criteria pollutants including TACs/HAPs whereas Ajax may have an "upon request" testing conditions for those criteria pollutants and TACs/HAPs.

Ajax is allowed to use up to 50% RAP whereas some facilities can not use RAP or are allowed a smaller amount. But when permitting a facility, the facility is requesting a percentage and their emissions are evaluated on the requested percentage.

Some plants had a lower fuel sulfur content, the sulfur content is typically used in calculating the SO2 emissions, so this should also be reflected in the SO2 emission factor.

Some plants are required to monitoring whereas Ajax isn't:

- Daily Tons of HMA
- Daily tons of HMA while burning each fuel
- Monitoring the fuel usage rate
- Daily emissions of HCl and SO2
- Daily hours of operation

About 2 plants were required to use a wet scrubber to control emissions.

About 14 plants have a higher stack than Ajax.

# Exhibit 17: Permit File, Item 454

**Table 2 - HMA Counter-flow Drum Dryer NSR Regulated Pollutant Estimated Emissions**

Maximum Short Term Production	tons HMA/hr	600
Daily Average Production	tons HMA/hr	500
Annual Production Limit	tons HMA/yr	876,322
Types of Fuel Permitted	Natural Gas, Propane, Fuel Oil 2-6, RUO	
Density of Fuel Oil (avg)	lb/gal	7.4
Fuel Oil/RUO Sulfur Content	% by weight	1.0

Air Permit to Install  
 Ajax Materials, Genesee Twp, Michigan

NSR Regulated Pollutant	Emission Factor (see notes)	Notes	Maximum Short Term Emissions (lb/hr)	Annual Emissions (tpy)	If eliminate RUO but still use Oil #6	If allow only up to Fuel Oil #2
CO	0.201 lb/ton HMA	1	120.6	88.1	NO change regardless of fuel	NO change regardless of fuel
NO <sub>x</sub>	0.12 lb/ton HMA	1	72.0	52.6	NO change IF still using a fuel oil (NG 50% of oil)	NO change regardless of fuel
PM	0.036393968 lb/ton HMA	3	21.8	15.9	NO change regardless of fuel	NO change regardless of fuel
PM <sub>10</sub>	0.06641453 lb/ton HMA	3,9	33.2	29.1	NO change regardless of fuel	NO change regardless of fuel
PM <sub>2.5</sub>	0.06641453 lb/ton HMA	3,9	33.2	29.1	NO change regardless of fuel	NO change regardless of fuel
SO <sub>2</sub>	0.178120291 lb/ton HMA	2	106.9	78.0	no change	50% decrease
VOC	0.064 lb/ton HMA	4	38.4	28.0	NO change regardless of fuel	NO change regardless of fuel
CO <sub>2</sub>	49.5 lb/ton HMA	5	29,700	21,689	NO change regardless of fuel	NO change regardless of fuel
CH <sub>4</sub>	0.018 lb/ton HMA	5	10.8	7.9	NO change regardless of fuel	NO change regardless of fuel
N <sub>2</sub> O	--		--	--		
CO <sub>2</sub> e	49.95 lb/ton HMA	6	29,970	21,886	NO change regardless of fuel oil (small decrease if NG)	NO change regardless of fuel oil (small decrease if NG)
Lead	0.00003 lb/ton HMA	7	0.02	0.01	Significant DECREASE: primary source from contamination in RUO	Significant DECREASE: primary source from contamination in RUO
Fluorides	--		--	--		
H <sub>2</sub> S	--		--	--		
H <sub>2</sub> SO <sub>4</sub>	0.0032 lb/ton HMA	8	1.9	1.4	NO change regardless of fuel	NO change regardless of fuel

<sup>1</sup> Emission factor is from the MDEQ Emission Factor Calculation Fact Sheet for HMA Plants waste oil asphalt heaters (3-05-002-10) for CO<sub>2</sub> and batch plant factor (3-05-002-46) for NO<sub>x</sub>.

<sup>2</sup> Emission factor is based on RUO sulfur content of 1% and a 43% control for SO<sub>2</sub> from RAP - See SO<sub>2</sub>/RAP calculation methodology below

<sup>3</sup> PM emissions are based on NSPS emission limit of 0.4 grains/DSCF. See Appendix 2 for particulate emission calculation data. PM<sub>10</sub> and PM<sub>2.5</sub> emissions are based on PM emissions plus AP-42 condensable emissions, plus H<sub>2</sub>SO<sub>4</sub> and HCL emissions, which are assumed to form condensible PM.

<sup>4</sup> VOC emission factor from AP-42, Section 11.1, Table 11.1-8 for waste oil fired dryer, plus a 100% safety factor.

<sup>5</sup> Emission factor is from EPA Webfire emission factor for #6 oil-fired counterflow drum mix plant (3-05-002-63); plus a 50% safety factor

<sup>6</sup> CO<sub>2</sub>e emission factor based on global warming potentials for CO<sub>2</sub> (1), CH<sub>4</sub> (25) and N<sub>2</sub>O (298) obtained from 40 CFR 98 Subparts A and C, respectively.

# Exhibit 18: Permit File, Item 464

**Brown, Ambrosia (EGLE)**

---

**From:** Brown, Ambrosia (EGLE)  
**Sent:** Tuesday, October 12, 2021 2:45 PM  
**To:** Dolehanty, Mary Ann (EGLE)  
**Cc:** Switzer, Annette (EGLE); Mitchell, Mark (EGLE); Williams, Keisha (EGLE)  
**Subject:** RE: Comparing Ajax Fuels  
**Attachments:** PTIApp\_Calcs\_Ajax\_GT\_2020 Looking at fuel impacts w revised EFs.xlsx

Mary Ann,

I reviewed Lauren's spreadsheet and summary and compared the emission rates for Ajax. Ajax is using many conservative emission factors in their calculations and could lower many of them (especially if they were not using RUO). I understand that we may not want to use overly conservative emission factors in this case but the conservative emission factors. However, we also want to keep in mind the conservative emission factors were the basis of the justification that emission factors would not change if the drum load were exceeded (600 tph vs 500 tph) and also why they are justifying not needing stack testing. If we were going to lower emission limits, of course we would need it to be confident we would comply with. The lowering of emission factors also impacts the difference between the resulting emissions of different fuels, so I thought it was important to convey the range of emission factors that could have been used as well as the one that I think is reasonable but on the lower side (as I believe was the goal).

I hope the attached spreadsheet provides the information that you are looking for. Please feel free to call me if have any questions or want me to modify it.

**Ambrosia Brown, P.E.**

Environmental Engineer

Air Quality Division - Permit Section

Michigan Department of Environment, Great Lakes, and Energy (EGLE)

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---

**From:** Brown, Ambrosia (EGLE)  
**Sent:** Saturday, October 9, 2021 12:24 AM  
**To:** Dolehanty, Mary Ann (EGLE) <DOLEHANTYM@michigan.gov>  
**Cc:** Switzer, Annette (EGLE) <SWITZERA2@michigan.gov>; Mitchell, Mark (EGLE) <MITCHELLM7@michigan.gov>; Williams, Keisha (EGLE) <WilliamsK29@michigan.gov>  
**Subject:** Comparing Ajax Fuels

I have attached a spreadsheet demonstrating how different fuel types would impact potential emissions from the ajax drum dryer. It should be noted that they used different emission factor sources for different pollutants and I tried to use the same calculation technique and emission factor source for each pollutant for an apples-to-apples comparison. There were a number of them which were based on fuel oil #6 with a safety factor to account for the use of RUO and so I

# Exhibit 19: Permit File, Item 467

**Brown, Ambrosia (EGLE)**

---

**From:** Brown, Ambrosia (EGLE)  
**Sent:** Wednesday, October 13, 2021 12:38 PM  
**To:** Dolehanty, Mary Ann (EGLE)  
**Cc:** Switzer, Annette (EGLE); Mitchell, Mark (EGLE); Williams, Keisha (EGLE)  
**Subject:** RE: Comparing Ajax Fuels

Mary Ann,

*Mark asked me to send you a summary of some of the information in the last email.*

Upon review of emission factors as detailed in the previous spreadsheet, I make the following recommendations for emission limits for EUHMAPLANT:

Regardless of RUO or no RUO:

- VOC emission limit of 0.058 lb/ton (Ajax calc = 0.064 lb/ton)
- VOC emission limit of 25.4 tpy (Ajax calc = 28.0 tpy)
- CO emission limit of 0.16 lb/ton (Ajax calc = 0.201 lb/ton)
- CO emission limit of 70.1 tpy (Ajax calc = 88.1 tpy)
- PM10 emission limit of 0.027 lb/ton (Ajax calc = 0.0664 lb/ton)
- PM10 emission limit of 11.8 tpy (Ajax calc 29.1 tpy)
- PM2.5 emission limit of 0.027 lb/ton (Ajax calc = 0.0664 lb/ton)
- PM2.5 emission limit of 11.8 tpy (Ajax calc 29.1 tpy)
- Sulfur limit of 0.5% (Ajax calc= 1%, conditions say 1.5% need updated anyway)
- SO2 emission limit of 0.089 lb/ton (Ajax calc = 0.178 lb/ton)
- SO2 emission limit of 39.0 tpy (Ajax calc = 78 tpy)
- Arsenic emission limit of  $1.1 * 10^{-6}$  lb/ton(Ajax calc =  $3.0 * 10^{-6}$  lb/ton)

If RUO:

- NOx emission limit of 0.07 lb/ton (Ajax calc = 0.12 lb/ton)
- NOx emission limit of 30.6 tpy (Ajax calc = 52.6 lb/ton)
- lead emission limit of  $1.5 * 10^{-5}$  lb/ton(Ajax calc  $3.0 * 10^{-5}$  lb/ton)
- Acrolein emission limit of  $2.6 * 10^{-5}$  lb/ton (Ajax calc = 0.001 lb/ton)
- NO CHANGE to Chromium emission limit (Ajax calc =  $3.0 * 10^{-6}$  lb/ton)
- Cadmium emission limit of  $6.2 * 10^{-7}$  lb/ton (Ajax calc =  $1.0 * 10^{-6}$  lb/ton)
- NO CHANGE to Hydrogen Chloride emission limit of (Ajax calc=  $2.4 * 10^{-2}$  lb/ton)

If no RUO:

- NOx emission limit of 0.06 lb/ton (Ajax calc = 0.12 lb/ton)
- NOx emission limit of 26.3 tpy (Ajax calc = 52.6 lb/ton)
- lead emission limit of  $1.3 * 10^{-6}$  (Ajax calc  $3.0 * 10^{-5}$  lb/ton)
- Acrolein emission limit of  $5.2 * 10^{-5}$  lb/ton (Ajax calc = 0.001 lb/ton)
- Chromium emission limit of  $5.7 * 10^{-7}$  lb/ton (Ajax calc =  $3.0 * 10^{-6}$  lb/ton)
- Cadmium emission limit of  $1.9 * 10^{-7}$  lb/ton(Ajax calc =  $1.0 * 10^{-6}$  lb/ton)
- NO Hydrogen Chloride emission limit (Non detectable) (Ajax calc=  $2.4 * 10^{-2}$  lb/ton)

*Based on using less conservative emission factors, I also think we should limit the throughput on an hourly basis to 500 tph (drum rating) rather than 600 tph the company requested on an hourly basis. If we do leave in the 600 tph option, we may need to put a larger margin of compliance in the emission factors above. I also think we should specify that the*

# Exhibit 20: Permit File, Item 475



Also, the hazard index for the noncarcinogenic pollutants predicted to be emitted from the Ajax facility is less than one, which indicates that adverse effects are not expected to occur from potential additive effects.

#### Comment

Concerns were received about how Polychlorinated Biphenyls (PCBs) from the air emissions would impact the Riskin Drain, an impaired stream on the Ajax property.

#### AQD Response

The only potential for polychlorinated biphenyls (PCBs) emissions from the Ajax facility is from the burning of recycled used oil (RUO), which was allowed in the proposed permit. The burning of RUO is not however allowed in the final permit, so there should be no PCB emission from the facility.

#### Comment

Comments were received stating that because the area has a higher portion of homes with lead-based paint in addition to previous possible lead exposure from water, EGLE should not allow or permit any additional lead in the area as the residents need clean air to recover.

#### AQD Response

The burning of recycled used oil is the main source of the predicted lead emissions from the Ajax facility and was allowed in the proposed permit. The burning of RUO is not however allowed in the final permit, so the actual lead emissions from the facility should be greatly reduced. Also, please note that the predicted maximum impact of lead in the air from the Ajax facility while burning RUO was evaluated and found to be below the NAAQS for lead. An even greater level of compliance with the NAAQS will be achieved now that Ajax is no longer allowed to burn RUO.

#### Comment

Multiple comments were received requesting a cumulative analysis be performed for toxics air contaminants (TACS). Most justified the need by citing the elevated risk factors for the area indicated in the EPA EJSCREEN and the existence of other nearby industry. One comment stated that a cumulative risk impact analysis should be done for all permit reviews regardless of location. It was also expressed that EGLE has the authority to require this review through Rule 228, Rule 901, and EPA's Title VI guidance.

#### AQD Response

The AQD does have the authority to do limited cumulative risk assessments for TACs depending on the proposed permit and associated emission unit(s). This authority however cannot be broadly applied to all permit reviews. For asphalt plants, a review of a limited cumulative risk assessment is routinely done because the mixture of asphalt fumes is regulated using a health-based screening level for the combined risk of cancer from polycyclic aromatic hydrocarbons.

Michigan Air Pollution Control Rule 225 requires that predicted air concentrations from new or modified emission units cannot exceed allowed screening levels established to prevent

# Exhibit 21: PSD Workbook Ch 7

EGLE's PSD BACT Guidance

### Step1: Identify All Control Technologies



The first step in a BACT analysis is to identify all available control options for each emission unit or for logical combinations of emission units for each regulated NSR pollutant subject to PSD. Available control options are control technologies or techniques that can be realistically installed or utilized on the process and that have the potential to reduce the regulated NSR pollutant under review. This step includes an evaluation of the characteristics of the source under review with comparable sources utilizing control.

Potential control options include add-on controls, such as scrubbers or fabric filters; lower emitting processes or work practices, such as the use of materials that result in lower emissions; or a combination thereof. Care must be used in selecting a “lower-emitting process” when evaluating control options. The purpose of a BACT analysis is not to re-define the process for which a permit is being requested. As an example, a permit applicant seeking to install a coal fired power plant should not be required to evaluate the installation of a nuclear power plant, even though it could be argued that the nuclear power plant is a lower emitting process. The USEPA guidance on performing a top down BACT analysis provides clarity on defining a lower-emitting process. The USEPA guidance suggests that lower emitting processes are those which utilize the same raw material(s) to produce the same product. Examples of lower emitting processes would be processes which utilize the raw materials more efficiently or similar raw materials which result in lower emissions, such as a spray booth which utilizes water borne coatings as compared to a spray booth which utilizes solvent borne coatings. The identification of lower emitting processes frequently has to be done on a case-by-case basis, and is dependent on how broadly (or narrowly) you define “raw material” and “product”.

To develop the list of available control technologies or techniques for the source, all demonstrated and potentially applicable control options must be identified. The applicant should review the USEPA’s RACT/BACT/LAER (RBLCL) Clearinghouse (at [www.epa.gov/ttn/catc/](http://www.epa.gov/ttn/catc/)); gather information from other government agencies, environmental or industry organizations, or control technology vendors; as well as any other available information source.

The purpose of a BACT review is not to redefine the project. The MDEQ will let the applicant know when alternative processes should be evaluated.

### Step2: Eliminate Technically Infeasible Options



The next step in the analysis is to determine the technical feasibility of each control option identified in Step 1. Each option that has been installed and successfully operated at a comparable source is considered to be feasible. For a control option that has not been demonstrated in practice, the applicant must determine the availability and applicability of using that control at the facility under review. An available technology is one that can be realistically installed and operated on the process in question and should be at least in the licensing and commercial demonstration stage of development. A commercially available control option is considered applicable if it can be reasonably installed on the facility under consideration. The applicant must have physical, chemical, or engineering data to demonstrate the technology would not work successfully at the facility under review. If modifications are needed to make the control compatible with the emissions unit under review, this does not necessarily mean it is technically infeasible. However, additional costs for such modifications may be considered

in the economic portion of the BACT analysis discussed in Step 4. The applicant is not required to review control options with negligible cost differences and the same environmental impacts. Judgment should be used when deciding what to evaluate when comparing several types of control that achieve similar emission reductions.

### Step 3: Rank the Remaining Control Technologies by Control Effectiveness



The third step involves ranking those control options that are remaining after Step 2. The control options are ranked from the most to the least effective in terms of emission reduction potential. The same units of measure should be used to compare performance levels of all options on the list. For example, control effectiveness in terms of percent of pollutant removed should not be compared with control effectiveness in terms of pounds per hour of emissions. Technologies can be ranked according to percent efficiency or as pollutant emission per unit of product produced or processed (e.g., pounds NO<sub>x</sub> per million Btu heat input). Some control technologies have a wide range of performance levels. The applicant should use the most recent BACT decision and performance data for comparable sources. A lower level of control can be used if the applicant can demonstrate that there are source-specific factors or technical, economic, energy or environmental issues that make the highest performance level unacceptable or unachievable. A control technology that has adverse impacts at its highest performance level may be acceptable at a somewhat lower level of performance.

After listing all feasible control technologies from most effective to least effective, the applicant should also display the expected emission rate, the performance level (percentage or emissions per unit product), and expected emissions reduction (tons per year) for each control option on the list. This should be done for each emissions unit and each logical grouping of emissions units for each pollutant subject to PSD.

### Step 4: Evaluate the Most Effective Option



This step in the “top-down” BACT analysis involves an analysis of all energy, environmental and economic impacts associated with the list of available control technologies. Both beneficial and adverse impacts should be discussed and quantified. If the top option is selected as BACT, and there are no significant environmental impacts, then the BACT review ends. However, if adverse energy, environmental or economic impacts exist and are documented, then the control option may be eliminated and the applicant continues down the list until a control option can no longer be eliminated. At this stage in the analysis, elimination of a control alternative involves demonstrating that there are unique circumstances where adverse environmental; energy or economic consequences exist, making the control option impractical.

### Energy Impacts

The applicant should determine any energy penalties or benefits that result from using each control technology. Penalties could include extra fuel or electricity required to power a control option. All penalties and benefits should be quantified. This is usually done in terms of cost. Any extra costs associated with energy penalties at a source should be included in the economic impact analysis. Only direct energy impacts should be considered in the energy analysis. Direct impacts are those that are completely associated with the addition of control, such as energy consumption to operate the control. Indirect impacts such as the energy required to create the control device should not be included. The applicant can also consider concerns over using a scarce fuel with the control option. A scarce fuel is one that is in short supply locally or not available to the source.

### Environmental Impacts

Environmental impacts, under this step are impacts other than those on air quality standards (NAAQS, PSD increment, AQD health based-screening levels). Examples of environmental impacts include solid or hazardous waste generation, discharges of polluted water, visibility impacts, or emissions of non-NSR pollutants. If reduction of the pollutant under review is small compared to the collateral increase in another pollutant, the control option may potentially be eliminated for having adverse environmental impacts. However, the fact that a control could create a waste that must be disposed of, does not by itself warrant elimination. The applicant must show that there are unusual site-specific characteristics why such waste disposal or pollutant emissions are unreasonable and create greater problems at the site under review than at other sites where the control is used. The quality and quantity of water and/or solid waste should be evaluated for compliance with applicable environmental rules. The applicant should also consider whether a control option may result in irreversible environmental damages (use of scarce water resources). Other impacts that should be considered in this analysis are radiant heat or local air quality impacts. An example would be control for carbon monoxide, which causes an increase in the amount of NO<sub>x</sub> in a NO<sub>x</sub> non-attainment area. This may result in the elimination of the most stringent control device.

### Economic Impacts

The economic impact analysis involves evaluating the cost to control the pollutant or pollutants at a particular facility. The cost to control the pollutant, or cost effectiveness, is measured in dollars per ton of pollutant removed and includes both the cost to install and operate the control equipment. Cost effectiveness is not meant to be an absolute standard by which the decision to use, or not use, a particular control device is made. A key question is whether the cost effectiveness is disproportionate when compared to the cost of control at other facilities. This economic evaluation does not involve determining the ability of a facility to absorb such costs. If the top BACT option is selected, and the top BACT option is technically feasible, there is no need for an economic evaluation.

The first step in the economic impact analysis is to combine the annualized capital cost of the controls with the annual operating expenses. This value is referred to as the annualized control cost. The cost of the control technology including associated equipment (i.e., ductwork, raw materials, utilities, etc.) and the basis for each should be determined. The cost analysis methods in the Office of Air Quality Planning and Standards (OAQPS) Control Cost Manual (USEPA 453/B-96-001) may be used to assure consistency with other BACT analyses performed across the country. The applicant should document and substantiate any assumptions. Cost data should be the most accurate site-specific data available (e.g., cost of raw materials, utilities, and labor).

Quantifying the cost of control also includes identifying the design parameters and assuring that these parameters are consistent with the modeling and permit limits. Vendor data may be used to define design parameters when applicable. Actual performance test data from the source under review or a similar source may also be used.

The cost effectiveness is calculated in two ways: average cost and incremental cost. The average cost effectiveness is most often used in an economic evaluation. The average cost is the annualized control cost divided by the annual emissions reduced by the control technology.

**Average Cost =**

Annualized Control Cost

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Annual emissions reduced

In developing the average cost, uncontrolled emissions are established using realistic upper boundary operating assumptions. NSPS or NESHAP requirements or added controls are not considered in the uncontrolled emissions calculation, but realistic physical or operational constraints are considered. For example, carbon monoxide emissions from a combustion turbine vary with ambient temperature. Thus, it is appropriate to use emissions at the annual average ambient temperature of the area instead of the maximum worst-case temperature. This represents a more realistic operating scenario for the turbine. The applicant can also use verified historical operating data for the source such as the number of shifts per day or limited capacity. If a source projects certain operating parameters lower than the standard practice for its industry; has specific design parameters that limit the operation; and such physical or operational parameters have a deciding role in the BACT determination; they should be included in an enforceable permit. Whatever the physical or operational parameters of the source may be, the BACT comparison should be done with other facilities that have similar operating and physical limitations as the source under review.

The incremental cost approach may be used to determine cost effectiveness for control devices if there are several types of control devices within a dominant alternative. The incremental cost analysis should be conducted in combination with the average cost. The incremental cost is the difference in cost between two control options. The incremental cost analysis should be used to analyze the difference between the dominant control options. The dominant controls are those that will buy the most emission reductions for the least cost. Incremental cost is especially useful when evaluating control options with a range of control efficiencies.

**Incremental Cost =**

Annualized Control Cost of Option 1 – Annualized Control Cost of Option 2

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Emissions Reduced by Option 1 – Emissions reduced by Option 2

Exhibit 22: *Zizzo v*  
*Commissioner of Social*  
*Security*, 2013 WL  
5291663

2013 WL 5291663

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Michigan,  
Southern Division.

Salvatori ZIZZO, II, Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY, Defendant.

No. 12–14042.

|

Sept. 19, 2013.

\*8 Dr. George's records include documents relating to an employment claim brought by Plaintiff against his former employer, Rouge Steel. The record contained materials related to this claim (Tr. 172–240), including deposition testimony from Dr. George (Tr. 172–200). These records, including the deposition testimony, were received after the hearing, but before the ALJ closed the record. (Tr. 29, 40). The Commissioner argues that not only does plaintiff fail to identify which documents were included in Exhibit 11F, but not Exhibit 9F, but he also fails to provide any explanation of what type of information was contained in the medical records that was not discussed by Dr. George in his deposition testimony. Thus, according to the Commissioner, plaintiff's sentence six argument concerning the documents in 11F is inadequate because he fails to specify which documents had been submitted and considered by the ALJ and which ones had not. See *Bass v. McMahon*, 499 F.3d 506, 513 n. 3 (6th Cir.2007) (“Plaintiff is now asking us to go through one-hundred-twenty-two pages to determine which of the records were not previously submitted, and which of these new records are material. This in and of itself is likely inadequate development to constitute a real argument.”). Just as in *Bass*, the Commissioner points out that plaintiff's argument would require the court to comb through hundreds of pages just to determine which ones had already been considered by the ALJ. See *Thomas v. Halter*, 131 F.Supp.2d 942, 945 (E.D.Mich.2001), citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) (emphasizing that “judges are not like pigs, hunting for truffles buried in” the transcript). Thus, the Commissioner contends that plaintiff's argument concerning Exhibit 11F should therefore be considered waived.

And, even if the documents in Exhibit 11F were considered new, the Commissioner argues that the duplicative nature

of these records means that they are not material. In order to prove that new evidence was material, a claimant must show that there was a “reasonable probability” that the Commissioner would have reached a different conclusion on the issue of disability if he was presented with the new evidence. *Hollon*, 447 F.3d at 485. According to the Commissioner, plaintiff failed to show that there was a reasonable probability that the ALJ would have reached a different conclusion on the issue of disability. As noted above, the treating records of Dr. George (Exhibit 11F) were considered by the ALJ as they are in large part identical to the treatment records of Dr. George submitted in Exhibit 9F and in Dr. George's deposition testimony. Plaintiff does not dispute the ALJ's consideration of Exhibit 9F. Turning to Exhibit 11F, the Commissioner points out that plaintiff does not identify or discuss any records in Exhibit 11F or even attempt to argue that any of these records are material. Thus, plaintiff fails to satisfy his burden of proving a reasonable probability that the ALJ would have reached a different conclusion and the Commissioner contends that remand for consideration of the consideration of the documents in Exhibit 11F is not warranted.