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The above image of a casting of a wolf print taken in Michigan is a teaser for an article inside this issue of the MELJ—themed Animal Law and the Environment. Each article tackles a different legal topic where environmental and animal law practitioners may overlap.

In This Issue

The Environmental Law Section's Chair's Report from James Enright

I hope you and your families are all healthy and coping well with the coronavirus pandemic and all of the other uncertainties and difficulties we confront. This is the outgoing Chair's report — normally delivered during the annual meeting — but, due to the pandemic . . .

State of the Section

- Membership and budget: The number of Environmental Law Section members increased over the previous year. The Section's account at SBM is in excellent condition and a reform of our budget categories should make running the Section easier, more transparent, and more efficient.
- Section activities: Since September 2019, the Section published two issues of the *Michigan Environmental Law Journal* and participated in the annual fall conferences in 2019 (in-person) and 2020 (online) with the East Michigan and West Michigan chapters of the Air & Waste Management Association. Some of the committees met, including subject matter committees, standing committees, and the Section's governing council. No webinars were held. The Section's website was reorganized and expanded.
- Breadth: The new council elected in 2019 represented a greater range of practice settings, locations, and gender balance than its predecessors.
- Younger Lawyers Ad Hoc Committee: The Section's committee, intended to build relationships with and among younger practitioners, is chaired by Lydia Barbash-Riley. This committee had set a half-day conference for mid-spring but that event was postponed by the onset of the pandemic. This committee is expected to continue its work.

What's New and Coming Up

- More collaboration: The Section already collaborates with the AWMA chapters and the Michigan Manufacturers Association on the fall and spring conferences, respectively. This *MELJ* issue is prepared in collaboration with the Animal Law Section, and we are promoting an online presentation of the Administrative Law Section titled "What Administrative Law Judges wish practitioners knew: Zoom Event with the Michigan Office of Administrative Hearings and Rules." Expect more of this — and if you have more ideas on collaboration with other potentially-allied groups, please bring those to the council.
- Adaptation: In order to better serve you, this Section pioneered use of webinars and shifted to producing an excellent online publication of *MELJ*. Expect more; indeed, ask for more by contacting officers or council members.
- New officers and council members: Tammy Helminski will be Chair by the time you read this. Sue Sadler will be Chair-Elect (and Chair during the 2021-22 year), and Scott Sinkwitts

will be Secretary-Treasurer. Andrea Hayden will be a new member of the council, and Ross Hammersley and Margrethe Kearney will be elected as returning members of the council.

A Song for the Unsung - Thank You

- Mary Anne Parks: As Section Administrator, Mary Anne Parks basically does all the work. She's also a fountain of ideas for presentations and collaborations, including those drawn from her experience as administrator of another SBM section.

- Kurt Kissling: Kurt Kissling has, for years, made an enormous contribution to planning and organizing the fall joint conference and the spring air conference, mostly behind the scenes, all without even close to adequate recognition.

- Amanda Urban: What you see in a recent *MELJ* is there because Amanda Urban created it, organized it, directed the production, and fostered the content, building on Chris Dunsky's years of prior work. And she's a consistent and enthusiastic contributor to the work of the council.

Best wishes to you all. I look forward to chatting and lifting a glass with you after an in-person meeting as soon as circumstances allow.

Preview of a New Book that Provides Expansive Exploration of the Parallels and Synergies between Animal Law and Environmental Law

Randall S. Abate[1]
Professor, Monmouth University

Published in July, the second edition of WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? (hereinafter the Book) (Environmental Law Institute Press, 2020) features significantly expanded coverage of what animal law can learn from environmental law in many contexts and how the two fields can work together to secure mutual gains. The book updates and builds on the existing coverage of topics from the 17 chapters in the first edition and adds 12 new chapters on cutting-edge topics including lab-grown meat, animal testing, "tag-gag" litigation, deceptive advertising, climate change, right of nature, impact assessments, enforcement, regulatory avoidance, and "animal socioequality."

The U.S. has a long history of exploiting animals for human advancement and comfort in much the same way that natural resources have been exploited since the industrial revolution. The environmental movement in the United States in the 1960s and 1970s demanded that the use of natural resources be carefully managed to ensure a sustainable future for our nation and our planet. In the five decades during which it has been recognized as a specialty area in U.S. law,[2] environmental law in the United States has been highly successful in promoting this sustainable management objective. Drawing support from both legal and social developments in the late 1960s and early 1970s, environmental law quickly moved within its first decade from a marginal niche to a fully institutionalized field in the American legal system.

There are many reasons for this success. First, there was an urgent and visible pollution crisis in our air, water, and land. Second, economic stability in the 1960s and 1970s enabled the United States to regulate the environment in a manner that would have been economically challenging in previous decades. Third, scientific evidence had been collected to establish direct links between environmental contamination and human health. Fourth, growing awareness of the importance of ecosystem integrity and biodiversity led to protection of the "unseen" and "overlooked" in our natural world, which gained national attention in the *Tennessee Valley Authority v. Hill* case in 1973, involving protection of the snail darter under the Endangered Species Act.

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[1] Professor and Rechnitz Family and Urban Coast Institute Endowed Chair in Marine and Environmental Law and Policy; Director, Institute for Global Understanding, Monmouth University. Prof. Abate is the editor of *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?* (ELI Press, 2020). This submission is adapted from the prefaces to the first and second editions of the book with permission from the Environmental Law Institute.

[2] The early 1970s are widely regarded as the beginning of environmental law as a specialty field with the convergence of events such as Earth Day; *Sierra Club v. Morton* 405 U.S. 727 (1972); passage of major federal environmental laws such as NEPA, the CAA, the CWA, and the ESA; and the establishment of several environmental law journals at American law schools.

In addition to these reasons for the environmental law movement's success, the most important reason that environmental law became mainstreamed as a legal specialty is because it worked within the system rather than against it. While there were, and still are, many radical environmental groups and objectives that challenge the status quo of the legal system, the vast majority of environmental law issues acquired legitimacy through victories in the courts and in Congress. Ultimately, environmental law succeeded because its message was understood that protecting the environment ensures a sustainable future for humans. Many environmental law regulations are premised on enforcing standards that seek to protect human health.

While animal law has enjoyed some important victories within the past three decades in the courts and in federal and state legislative initiatives,[3] it has remained largely marginalized in the American legal system and has struggled for legitimacy. Much of this struggle is rooted in a false perception in the legal system and in society regarding what animal law represents—that enhancing legal protections for animals somehow requires a corresponding diminution of legal protections for humans.

To secure enhanced legitimacy and success, the animal law field needs to capitalize on the successful strategies of the environmental law field. In much the same way that the American public has grappled with the knowledge that economic growth does not require unsustainable depletion of natural resources, our increased demand for food, scientific research, and entertainment likewise should not require animal suffering. Moreover, animal law can work directly with environmental law on some issues for mutual benefit.

The Book seeks to address several dimensions of this inquiry. It raises important parallels between animal law and environmental law and proposes strategies for how animal law can benefit from the well-worn trail that environmental law has blazed in the legal system. Some key similarities include:

- Both fields involve defending those unable to defend themselves in the legal system (e.g., mountains, rivers, trees, and animals).
- Both fields involve the need for creative lawyering (e.g., drawing on a mix of statutory and common law theories) to develop new theories of protection under the law.
- Both fields must confront issues of federalism and avoid the pitfall of preemption as a limitation on the scope of available protections.
- Both fields benefit from cross-disciplinary engagement with other doctrinal areas (e.g., human rights) and with foreign domestic and international law principles to advance new theories of protection.
- Both fields must confront how best to define their focus and may benefit by defining goals for mutual gain. For example, environmental law is routinely paired with natural resources law, energy law, and land use law. Animal law is related to environmental law to a similar degree as these fields; however, it is rarely paired with environmental law as a joint enterprise.

[3] *See infra* notes 4 and 6 and accompanying text.

- "Think globally, act locally" is an appropriate mantra for both fields, yet it has galvanized environmental law's success much more so than it has for animal law. Environmental law issues are inherently international because of their transboundary nature, whereas animal law issues are intertwined with cultural and religious traditions that tend to make them more national and local in character.

Progress for Animal Law

Since the publication of the first edition of the Book in 2015, animal law advocates have secured landmark victories in three high-profile contexts—SeaWorld, the Circus, and Pet Custody laws. Longstanding traditions of captive breeding of orcas at SeaWorld and training of elephants for performance in Ringling Bros. and Barnum and Bailey circus came to an end within the same year in 2016, thanks to persistent and creative litigation, legislative, and public information campaigns.[4] While these developments did not intersect directly with environmental law on the surface, they built on a legacy of advocacy strategies that were successful in environmental law in previous decades: (1) the power of advocacy based on science and public information campaigns in the case of SeaWorld, and (2) the power of grassroots advocacy at the local level to secure a nationwide outcome in the case of the circus, which relied on a patchwork of local bans in multiple states on the use of the bullhooks used to train elephants.[5] In the companion animal context, California enacted a groundbreaking pet custody law in 2018 that authorizes judges to consider what is in the best interests of companion animals in custody disputes, which elevates animals' status above their traditional recognition as property.[6]

In other animal law contexts since the release of the first edition of the Book, animal rights advocates continued the ambitious and important quest for recognition of legal personhood protections for animals. High-profile cases filed by three of the leading animal protection organizations in the nation used creative strategies intended to secure a common goal in the animal law and environmental law movements: legal personhood for these "voiceless" entities (i.e., animals and natural resources) to be recognized as rights holders to some degree under the law. The first of these cases, *Naruto v. Slater*,[7] also known as the "monkey selfie" case, involved People for the Ethical Treatment of Animals' (PETA's) suit on behalf of a crested macaque monkey in Indonesia, Naruto, to secure intellectual property rights to selfie photos that the monkey had taken with a photographer's camera that was set up on a tripod in an Indonesian rainforest. The Copyright Act extends protections to any "person," which is not limited by its terms to humans under the

[4] Jennifer Hackett, *SeaWorld Ends Controversial Captive Breeding of Killer Whales*, SCI. AM., (Mar. 17, 2016); see also Faith Karimi, *Ringling Bros. Elephants Perform Last Show*, CNN.COM, (May 2, 2016).

[5] For a discussion of some compelling parallels between the enactment history of the Clean Air Act and the use of local bans on bullhooks to secure the victory against Ringling Bros. circus, see Chapter 13 of the Book.

[6] Dareh Gregorian, *New California divorce law: Treats pets like people—Not property to be divided up*, NBC NEWS.COM, (Dec. 29, 2018).

[7] 888 F3d 418 (9th Cir 2018).

statute. The Court concluded that "person" should not be interpreted to include non-humans and that Naruto therefore lacked statutory standing under the Copyright Act.[8]

Second, the Nonhuman Rights Project (NhRP) also proceeded undaunted with its line of habeas corpus cases that began prior to the first edition and continued through to the publication of the second edition of the Book.[9] These cases have sought to have chimpanzees and elephants released from captivity and placed in sanctuaries. The most recent of these cases involved Happy, a 49-year-old Asian elephant in captivity at the Bronx Zoo.[10] Happy's case is the first in the world for a court to issue a habeas corpus order on behalf of an elephant.[11] The "show cause" order required the Bronx Zoo to justify its ongoing confinement of Happy. In February 2020, the NhRP's case was dismissed,[12] but NhRP continues to pursue litigation and legislative initiatives in the U.S. and abroad to secure legal personhood protections to recognize these animals' rights to be free from confinement.

"[The case] is the first in the world for a court to issue a habeas corpus order on behalf of an elephant."

In the last of this trio of legal personhood cases on behalf of animals, the Animal Legal Defense Fund (ALDF) filed a high-profile case on behalf of Justice, a horse, in a suit against the horse's owner for abuse under Oregon's animal cruelty statute. The suit seeks to establish that animals have a legal right to sue their abusers in court. The case was dismissed in 2018 on the ground that non-human animals lack standing to sue on their own behalf.[13] ALDF's appeal of the dismissal was pending at the time that the second edition of the Book was published.[14]

Building on the momentum from these landmark victories and creative and ambitious litigation strategies in the animal law field since 2015, animal protection initiatives can be enhanced by

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[8] *Id.* at 426. Despite the loss in court, there was some good news for Naruto and the animal protection advocates in the wake of the litigation. After oral arguments before the Ninth Circuit, however, the parties agreed to a settlement that provided that 25 percent of the proceeds from the photographer's sales of the monkey selfies would be donated to charities that seek to protect the habitat of the crested macaques in Indonesia. *See* Nicole Pallotta, *En Banc Review Requested in "Monkey Selfie" Copyright Case*, ANIMAL LEGAL DEFENSE FUND ANIMAL L. UPDATE, (Aug. 7, 2018).

[9] For a summary of the chimpanzee cases, see Courtney Fern, *The Need for Chimpanzee Rights*, NONHUMAN RIGHTS BLOG, (July 13, 2019).

[10] For a helpful discussion of the context and controversy surrounding this case, see Brandon Keim, *An Elephant's Personhood on Trial*, THE ATLANTIC, (Dec. 28, 2018).

[11] Laura Choplin, *World's First Habeas Corpus Order Issued on Behalf of an Elephant*, NONHUMAN RIGHTS BLOG, (Nov. 19, 2018).

[12] Sophia Chang, *Judge Rules That Bronx Zoo's Happy the Elephant Is Not "Unlawfully Imprisoned,"* GOTHAMIST, (Feb. 20, 2020).

[13] Aimee Green, *Oregon judge refuses to be first in the nation to let animals sue*, THE OREGONIAN, (Jan. 29, 2019).

[14] Press Release, *Animal Legal Defense Fund Appeals Dismissal of Groundbreaking Lawsuit for Abused Horse*, (Jan. 22, 2019).

learning valuable lessons from environmental law in certain contexts, and by seeking collaboration with environmental law on certain issues for mutual gain. New chapters in the second edition of the Book address how two contexts from the environmental law field – rights of nature and environmental justice – serve as foundations for potential future gains for animal law. One chapter presents an Australian perspective on how recent successes in rights of nature initiatives can provide an opportunity for animal law and environmental law to secure mutual gains through a "comprehensive ecosystem personhood" approach. Another chapter coins a new term, "animal socioequality," as an innovative approach to enhance protection for animals through an environmental justice lens.

The Intersection between Animal Law & Environmental Law

Developments at the intersection of animal law and environmental law have exploded since the publication of the first edition of the Book in 2015. The second edition addresses some of these developments to build on some of the existing content from the first edition and extend the book's coverage in new directions. One of these developments is food law and policy as a rapidly growing area of convergence between these two fields. In adding new chapters addressing how food law and policy can enhance protection of animals, the second edition builds on the first edition's coverage of one dimension of this topic addressed in the meat labeling chapter. New chapters in the second edition extend the coverage of food law and policy issues to include consumer protection litigation involving false advertising claims, potential synergies between greenwashing and humane washing contexts, and animal and environmental law and policy considerations concerning lab-grown meat.

Another area of convergence between animal law and environmental law is climate change regulation. The first edition of the Book addressed this topic with two chapters: one proposed strategies to address greenhouse gas emissions from concentrated animal feeding operations (CAFOs), whereas the other addressed how the listing of the polar bear as threatened under the Endangered Species Act can offer lessons for enhanced protection of wildlife. The second edition adds two new chapters that address climate change as common ground between these two movements. One of these chapters considers synergies between climate change mitigation and wildlife conservation and the other seeks to build on the environmental law movement's ambitious use of the public trust doctrine to leverage enhanced protections for wildlife.

The first edition's core theme regarding lessons that environmental law can offer animal law extends in new directions in the second edition. The second edition adds new chapters addressing procedural contexts in which environmental law has enjoyed enduring success in enforcement of law generally, impact assessments, and accountability for regulatory avoidance. It also includes a chapter on what animal law can learn from environmental law to promote animal protection in the context of animal testing.

Successful demand reduction strategies are perhaps the most effective and most promising of all of the developments since the publication of the first edition of the Book. Demand reduction strategies can enhance animal protection more readily than litigation or legislative initiatives. Animal law and environmental law embrace demand reduction efforts through public information campaigns and science. In environmental law, this approach is reflected in efforts such as fossil fuel divestment, anti-fracking campaigns, and renewable energy initiatives to help move the public

away from its addiction to fossil fuels. In animal law, demand reduction strategies take many forms because animals are considered property under the law and are abused in multiple contexts such as animals in agriculture and animals in entertainment. Examples of effective demand reduction advocacy occurred in the animals in entertainment context with recent victories against circuses and marine parks, in addition to previous victories against the dog fighting and dog racing industries.

"One example of these state tag-gag laws is the meat industry's attempt to limit the definition of the term "meat" to animal flesh…"

The rapid expansion of the plant-based meat and dairy industries since 2015 promises significant gains in animal protection by threatening the stronghold of the meat and dairy industries. The walls of this fortress of secrecy and abuse in the meat and dairy industries have continued to crumble in the years since the second edition of the Book, and at a much faster rate. Plant-based meat and milk have caused massive economic impacts to the meat and dairy industries such that some major dairy producers have filed for bankruptcy. Feeling this pressure, the meat industry has fought back by transitioning from one unsuccessful form of bullying tactics ("ag-gag" laws[15] seeking to stifle public information access and dissemination) to a new form of bullying with a recent wave of new "tag-gag" laws.[16] One example of these state tag-gag laws is the meat industry's attempt to limit the definition of the term "meat" to animal flesh for consumption in an effort to exclude the competitive threat from the plant-based meat industry's use of that term. These tag-gag laws have been challenged by animal protection advocates in a wave of pending litigation that offers a sense of déjà vu when one compares it to the ag-gag litigation that preceded it.

Listen to the Experts

The Book assembles the insights of 36 experts in the animal law and environmental law fields to promote legal protections for animals by drawing on U.S., foreign, domestic, and international environmental law regulatory strategies and perspectives. The Book is divided into four units. Unit I provides introductory context with seven chapters that thoroughly examine the historical, political, and legal foundations of environmental law as possible building blocks (and pitfalls to avoid) in seeking to advance the animal law field. Sub-topics within this unit address procedural mechanisms (standing, enforcement, damages, and impact assessments) and concepts and themes (politics of the environmental law movement, regulatory avoidance, and animal socioequality) to set the stage for Book's coverage in the ensuing three units.

Unit II addresses several U.S. law contexts to illustrate these lessons from environmental law and possible opportunities for collaboration between the two movements. These contexts include chapters on animal agriculture, consumer protection and labeling, emerging issues in food law and policy, climate change, lead pollution, fisheries management, and animal testing. Unit III considers

[15] ALDF has been remarkably successful in challenging asnd defeating several ag-gag laws. *See generally* Issue: Ag-Gag Laws, ANIMAL LEGAL DEFENSE FUND.

[16] Tag-gag laws seek to prevent plant based products from using terms such as "meat" and "milk." For a detailed discussion of laws and pending litigation in this context, see Chapter 11 of the Book.

these issues from international and comparative law perspectives. It reviews international trade and environment treaties and jurisprudence, environmental and animal welfare regulation in Australia and the European Union, and the need for regional and global animal welfare and rights laws to emerge to capitalize on the success and avoid the failures of the international regulation of species under environmental law regimes. Unit IV offers reflections in four chapters on how animal law can learn from environmental law in practical and theoretical contexts, and how the two fields can enhance their collaborative efforts for mutual gain.

A famous quote from Gandhi on the progression of social movements is particularly apt in reflecting on the future of animal law: "First they ignore you, then they laugh at you, then they fight you, then you win."[17] With the help of lessons from environmental law, and drawing on opportunities for increased collaboration between animal law and environmental law, animal law can close in on a "win" that will hopefully be a "win-win" for these two fields.

[17] For a helpful reference to this quote and its relationship to the plant-based meat revolution, see Rowan Jacobsen, *This Is the Beginning of the End of the Beef Industry*, OUTSIDE, (July 31, 2019).

Recent Events

What Administrative Law Judges Wish Practitioners Knew: A Zoom Event with the Michigan Office of Administrative Hearings and Rules

Date: Wednesday, December 2, 2020
Time: Noon–1:00 p.m.
Cost: There is no cost to attend.
Register with Zoom

The Administrative and Regulatory Law Section and the Young Lawyers Section will be hosting a Zoom event with the Michigan Office of Administrative Hearings and Rules. The purpose of the event is to provide practitioners the opportunity to hear insight from Administrative Law Judges from the Michigan Office of Administrative Hearings and Rules (MOAHR) and gain insight from the ALJs about how to best present administrative cases. The event will also seek to address some of the particular aspects of presenting cases virtually during the COVID-19 season. MOAHR Director Suzanne Sonneborn will also give a few opening remarks.
Contact: Dustin Kamerman at dustink1013@gmail.com.

The Hazardous Substance and Brownfield Committee's Year-end Webinar

Date: Wednesday, December 9, 2020
Time: Noon–1:30 p.m.
Cost: There is no cost to attend.
Register with GoToWebinar

The Hazardous Substance and Brownfield Committee of the Environmental Law Section of the State Bar of Michigan is planning a year-end webinar. The webinar will feature Ben Fruchey, a Partner at Foley, Baron, Metzger & Juip, PLLC; Nicholas J. Tatro, a Senior Associate at Foley, Baron, Metzger & Juip, PLLC; and Rick Welsh, Director at ASTI Environmental. They will focus on notable changes in 2020 to Michigan's environmental regulations, rules and guidance, including with respect to air, waste, remediation and environmental due diligence. They also will take a brief look into what we can anticipate for 2021, including new ASTM standards for environmental due diligence.
Register Today.

Recap: The Joint Fall Conference of the East and West Michigan Chapters of the Air & Waste Management Association and ELS

This year's Annual Joint Fall Conference was held virtually with sessions beginning Nov. 5 and continuing through Nov. 19, 2020. The Conference kicked off with a welcome and updates from EGLE Director Liesl Eichler Clark as well as several EGLE Division Directors, including Mary Ann Dolehanty (Air Quality Division), Robert Jackson (Acting Assistant Materials Management Division), Mike Neller (Remediation and Redevelopment Division), and Teresa Seidel (Water Resources Division).

Panels tackled relevant topics such as "Environmental Challenges in 2020" and included notable speakers from Honigman Business Law Firm, Marathon Petroleum, and Consumers Energy, among others. Barr Engineering sponsored the opening panel on PFAS as emerging contaminants. Energized panels on "Michigan Nonattainment Areas" and "Dam Failures and High Water" were possible thanks to support from Fishbeck and GZA Environmental.

Howling at the Man: FOIA as a Tool for Truth in Managing a Controversial Species

Rebecca Millican
Partner, Olson, Bzdok, & Howard[1]

I signed up for animal law as a 3L in my last quarter of law school without much thought as to what "animal law" meant or where its roots in the law lie. I chose the class out of personal interest and (if I am being honest), to balance out a slate of bar exam-driven selections like negotiable instruments. Animal law proved to be one of the most dynamic, thought-provoking courses of my law school career, however. What I quickly learned was that "animal law" borrows substance and tools from many areas of the law and repurposes them to advance the welfare of and strengthen protections for animals of all kinds and in all places.

A few years later, and not long after I started at my current firm, an interesting little case came through the door which would illustrate how nearly any area of the law might be employed in the name of animal interests. Nancy Warren, Ontonagon County resident and advocate for wolves for more than 25 years, had routinely used information requests under the state's Freedom of Information Act[2] (FOIA) to gather data used to assess the Michigan Department of Natural Resources' (DNR) wolf management activities and to engage in outreach and education about these important apex predators. But Warren had been recently stymied in her efforts to obtain information from the DNR relating to its wolf management activities, and was seeking legal support in filing a formal FOIA appeal. The FOIA law itself does not contain any provisions related to animals, but for individuals seeking information about how the state of Michigan manages its wildlife or the rates of prosecution for charges of animal cruelty, for example, FOIA can be a powerful tool to learn what the government is doing, and why.[3]

Even before her FOIA appeal, Warren was known to officials at DNR. She served on the Michigan Wolf Management Roundtable, which was convened in 2006 to craft principles and recommendations to DNR for inclusion in the state's wolf management plan, and she sits on the DNR's Wolf Management Advisory Council. But over the years, Warren emerged as an unofficial

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[1] In accordance with the MELJ's mission statement regarding publication of viewpoint articles, the positions and opinions advanced within this piece are those of the author; they do not purport to represent the Environmental Law Section's position on any legal issue.

[2] MCL 15.231 *et seq*.

[3] As Warren's case demonstrates, useful information can be obtained through FOIA, despite our state's rating as the worst in the nation on government accountability measures. Chad Selweski, *Michigan Gets F Grade in 2015 State Integrity Investigation; An honor system with no honor* (November 12, 2015). However, high-level officials' ability to avoid public release of e-mails about the Flint water crisis laid bare the statute's shortcomings. *Flint water crisis highlights lack of transparency with Michigan governments* (January 26, 2016).

watch dog over state officials on matters concerning wolves, and FOIA was often her weapon of choice.

The Controversy over Wolves in Michigan

For those readers unfamiliar with the history and controversy of wolves in Michigan, some background on wolf management is useful to understanding the tenor of the case. Across the United States, wolves were baited and trapped, bounty hunted and maligned into near extinction in the late 19th and early 20th centuries.[4] They were nearly entirely eradicated from Michigan's Lower Peninsula by the 1930s and the Upper Peninsula (UP) by the 1960s.[5] Legal protection for wolves in Michigan actually predated the passage of the federal Endangered Species Act by eight years.[6] According to the DNR, limited numbers of animals began moving into the Upper Peninsula and sightings were reported in the decades after the passage of the Endangered Species Act (ESA) in 1973.[7] The total population was estimated at around 20 animals in 1992; this year's survey identified a minimum of 695 wolves in 143 packs.[8] The population appears to have stabilized, staying steady at 600 to 700 animals over the past decade.[9]

With the rebound in population came an increased interest in more active management of wolves. In 2009, the Michigan legislature acted to remove state legal protections for the species, and in 2012, the U.S. Fish and Wildlife Service removed wolves of the western Great Lakes states from the federal endangered species list, paving the way for the state to regulate wolves as any other game.[10] The next year, state officials authorized a recreational wolf hunt, which resulted in the taking of 23 wolves from three UP management units.[11]

A pair of referenda in 2014 left little doubt as to the public's opposition to further recreational wolf hunts, but opponents were outmaneuvered by the state legislature, which shortly before the election had placed authority to establish game species and hunting seasons with the Natural Resources Commission.[12] But later that year wolves were returned to the federal endangered species list by

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[4] Nature, *The Wolf That Changed America. Wolf Wars: America's Campaign to Eradicate the Wolf* (September 14, 2008).

[5] The Department of Natural Resources, *Wolf Biology and Identification*.

[6] *Id.*

[7] *Id.*

[8] Cody Norton, *Michigan wolf surveys show stable, healthy population* (July 27, 2020).

[9] *Id.*

[10] *Wolf Biology and Identification*.

[11] U.S. Fish and Wildlife Service, *Western Great Lakes Distinct Population Segment of the Gray Wolf* (September 2014), p 5.

[12] Michigan Radio, *How our attitudes figure into the wolf debate* (November 24, 2014).

a federal district court in Washington, D.C.[13] That decision was upheld on appeal in 2017.[14] Currently, wolves may be killed only to protect human life from an imminent threat; private citizens may no longer kill wolves in defense of livestock or pets, and DNR officials may not engage in lethal management measures.[15]

"Warren was always working to ensure that misinformation was corrected and that the public and state officials charged with managing wolves were well informed."

Even as the status of wolves in Michigan seemed to be ever up in the air, Warren was always working to ensure that misinformation was corrected and that the public and state officials charged with managing wolves were well informed. On multiple occasions, Warren's dogged pursuit of depredation reports,[16] e-mails, and other information from the DNR revealed that locals, legislators, and even DNR staff and managers had misled the public about the true nature of many wolf encounters and the reasons to resume recreational wolf hunting. In one example from the spring of 2013, DNR furbearer specialist Adam Bump claimed that wolves had been appearing in backyards and porches and that people pounding on their sliding glass doors were unable to deter the animals.[17] Warren was skeptical about this tale, and so immediately submitted a FOIA request for documents relating to such incidents. When the request turned up zero responsive records, Bump was forced to retract his statement.[18]

Later that same year, as the recreational hunt was scheduled to open, Warren had assembled a sheaf of records through FOIA that showed the majority of wolf depredations in the UP were occurring at a single farm in Ontonagon County, thus dispelling the notion that wolves were a

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[13] *Humane Soc'y of the US v. Jewell*, 76 F Supp 3d 69 (D DC, 2014). Warren, as a member of the Humane Society of the United States (HSUS), provided an affidavit in support of organizational standing of HSUS. That affidavit documents her interactions with a pack of wolves on her Ontonagon County property and her observations relating to the deaths of three pack members.

[14] *Humane Soc'y of the US v. Zinke*, 431 US App DC 238 (2017). Under the Trump Administration, the U.S. Fish & Wildlife service has continued to seek delisting. A notice of proposed rulemaking that would remove gray wolves in the lower 48 states from the ESA was published in March 2019; the final federal rule was published November 3, 2020 and will become effective January 4, 2021.

[15] *Wolf Biology and Identification*. The DNR is authorized to carry out many non-lethal measures to minimize human-wolf conflicts. Warren's investigatory efforts over the years have also focused on DNR's deployment and the effectiveness of such techniques.

[16] Depredation reports document the incidence of deaths or injury to pets and livestock by wolves or coyotes. Confirmed livestock depredations may qualify the owner for compensation from federal grant monies administered by the Michigan Department of Agriculture and Rural Development (MDARD).

[17] Steve Carmody, *Are people in Ironwood really afraid of wolves? (part 2)* (May 9, 2013).

[18] Michigan Radio NPR, *MDNR official says he misspoke when talking about Michigan wolves* (November 5, 2013).

menace across the region.[19] In particular, DNR records of depredation events at that location revealed that cattle were not well cared-for, dead animals were not properly buried, and guard donkeys provided to the owner to protect against wolf attacks (at taxpayer expense) were so badly neglected that two of the three animals were found dead on the property. Given the conditions at this farm, it was little wonder wolves were attracted to the area, Warren argued.

Even after the 2014 court ruling when wolves seemed safe for the time being, Warren kept at her public education campaigns, regularly requesting DNR reports of depredation and other encounters, documentation of payments made to farmers for the loss of livestock, and communications that might shed light on the DNR's current thinking on wolves. But after Warren's vocal opposition to the 2013 hunt, she began to notice a perceptible shift in DNR staffers' attitudes towards sharing information.[20]

The FOIA Request that Proved Controversial

The FOIA request that would eventually become the subject of litigation was one in a series of requests made by Warren, periodically seeking depredation reports for incidents occurring in Ontonagon County. But unlike prior responses from the DNR, on this occasion the request was denied in part and records were returned to Warren with redactions concealing the township, range, and section information describing the location of the reported depredation, as well as the name of the individual making the report. The Department's written response to Warren's inquiry stated that "information of a personal nature (i.e., names, addresses, and personal identifiers of private individuals)" was required to be redacted under Section13(1)(a) of the FOIA.[21]

Warren next filed an administrative appeal to then-DNR Director Keith Creagh, pursuant to Section 10(1)(a) of the statute.[22] That provision provides for an informal, expedited appeal to an agency or department head upon the filing of a written statement identifying the reasons to overturn the FOIA denial. The department must provide a written decision within 10 days.[23]

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[19] Rina Miller, *Foes say upcoming wolf hunt is based on one neglectful farmer's claims* (August 29, 2013). An investigation by MLive reporter John Barnes, informed in part by FOIA, also showed that the justifications offered by the DNR for the wolf hunt that year were based on "half truths" and "falsehoods." John Barnes, *Michigan's wolf hunt: How half truths, falsehoods and one farmer distorted reasons for historic hunt* (April 3, 2019).

[20] The Department's reluctance to freely share information is particularly frustrating given that the state wolf management plan expressly recognizes that "[p]roviding prompt and professional responses to information requests is one way to increase individual understanding, dispel misconceptions, and generate support for wolf management efforts." Michigan Department of Natural Resources, Wildlife Division, *Michigan Wolf Management Plan* (July 10, 2008), p 29.

[21] Even more curious, the e-mail response copied high-level DNR officials such as the heads of the wildlife division and natural resources commission–individuals who would not typically concern themselves with routine FOIA requests.

[22] MCL 15.240(1)(a).

[23] MCL 15.240(2).

Warren contended that township, range, and section information was not "personally identifying" because it does no more than identify a location; within any one section multiple property owners may be found. Warren also pointed out that the livestock purportedly lost to wolves may be grazing on rented land. Director Creagh upheld the DNR's partial denial of Warren's FOIA request and the redaction of township, range, and section information, claiming that the redacted information "can be used to discern or discover personal information; namely, an individual's or individuals' name(s), address(es), and property interests, or when combined with other personal or identifying information can be connected to a specific individual." Upon receipt of Director Creagh's decision, Warren sought legal counsel and was eventually referred to our firm.

A decision of a department head under Section 10(1)(a) is appealable under Section 10(1)(b) of the FOIA.[24] A civil action against a state agency must be brought in the Court of Claims, and should be verified as required by the Court of Claims Act.[25] Note that any such claim must be brought within 180 days after the agency's final determination, but where the appeal also seeks reversal of a fee determination, that timeline is shortened to 45 days.[26]

"A civil action against a state agency must be brought in the Court of Claims and should be verified as required by the Court of Claims Act."

Warren's administrative appeal correctly zeroed in on the critical issue in the case—the applicability of the statutory exemption—and the same question was the focus of the subsequent action against the DNR. The "personally identifiable information" (PII) exemption provides that "[a] public body may exempt from disclosure as a public record under this act any of the following: (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[27] The Michigan Supreme Court has defined personal information in this context as information that is "intimate, embarrassing, private, or confidential."[28]

Because the facts of Warren's FOIA request and administrative appeal were uncontroverted, the parties filed cross motions for summary disposition under MCR 2.116(C)(10). On the points that mattered most—the disclosure of the name of the depredation complainant and the township, range, and section of the reported incident—Judge Cynthia Diane Stephens sided with Warren.[29]

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[24] MCL 15.240(1)(b).

[25] *Id.*; MCL 600.6431(2)(d).

[26] MCL 15.240a(1)(b).

[27] MCL 15.243(1)(a).

[28] *Mich Fed of Teachers v. Univ of Mich*, 481 Mich 657, 676; 753 NW2d 28 (2008).

[29] *Warren v. Dept of Natural Resources*, unpublished order of the Court of Claims, entered May 16, 2018 (Docket No. 16-000269-MZ).

The Final Decision, the Fees, and the Future

Judge Stephens first looked to the two-part test in *Michigan Federation of Teachers* in determining whether the PII exemption should apply. As described in that case, the information must first be "of a personal nature"; second, it must be determined that public disclosure of the information "would constitute a clearly unwarranted invasion of an individual's privacy."[30]

Regarding the township, range, and section information, the Court held that such location information "is simply not 'personal.'" The Court found that township, range, and section "does not expressly identify an individual's home address or telephone number. Nothing about the information expressly refers to a particular person." The Court distinguished the case from *Michigan Federation of Teachers*, wherein the Michigan Supreme Court clarified that the PII exemption generally applies to home addresses and telephone numbers, the release of which "constitutes an invasion of privacy, since it serves as a conduit into the sanctuary of the home."[31] Judge Stephens rejected as overbroad DNR's argument that location information needed to be redacted in this instance because within the redacted township, range, and section there is only one farm and that information, when combined with other information, could be used to determine the address of an individual. Further, the Court found no support for an interpretation of the exemption that would extend to information that merely has the *potential* to reveal personal information, and declined to entertain the Department's speculation about the uses to which the release of the depredation location information could be put. Rather, the Court held firm in applying FOIA caselaw mandating a narrow interpretation of the exemptions and holding that future uses of information requested pursuant to FOIA was not relevant to the application of an exemption.[32]

The Court of Claims also agreed with Warren's position that the names of the individuals reporting a depredation event fall outside of the PII exemption. The Court cited *ESPN, Inc v. Mich State University* for the rule that a name, by itself, is not information of a personal nature, and explained that it must look to the nature of the information "associated with the name" in the requested

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[30] *Mich Fed of Teachers*, 481 Mich at 675.

[31] *Id.* at 676-677 n 58.

[32] *Rataj v. City of Romulus*, 306 Mich App 735, 748-749, 752; 858 NW2d 116 (2014). In *Rataj*, a Detroit-area attorney sought the release of records, including video, relating to an alleged assault by a Romulus Police Department officer on an individual in custody. Records were produced with heavy redactions. In the circuit court phase of the appeal, plaintiff faced questioning about his motives in making the request, the court suggesting he intended to solicit the victim of the alleged assault to become a client or that the FOIA request was intended as discovery in a related whistle-blower case. *Id.* at 744. The Court of Appeals reversed the circuit court's grant of summary disposition in favor of the City as it pertained to the application of the privacy exemption to the videorecording, emphasizing that initial and future uses of the requested information, as well as the identity of the requester himself, are irrelevant to determining whether the exemption applies. *Id.* at 752.

materials to determine whether a person's name is adequately "personal" in that context.[33] Here, the Court observed that "[t]he depredation reports simply note a wolf depredation event and contain brief information about the livestock lost or injured in the incident. The individual making the report is not necessarily the property owner or the owner of the livestock." Accordingly, the Court determined the reports did not reveal details about where the reporter lives or any other significant information about the person making the report.

Because neither the name of the individual contacting DNR to make a depredation report, nor the location of a depredation event (as described by township, range, and section) met the definition of information of a personal nature, the Court of Claims concluded that it need not analyze whether release of such information would "constitute a clearly unwarranted invasion of privacy" and the information redacted by DNR did not fall within the PII exemption under Section 13(1)(a) of the FOIA.[34] Consequently, the Department was ordered to provide Warren with the redacted information.

"[T]he information redacted by DNR did not fall within the PII exemption under Section 13(1)(a) of the FOIA."

Consistent with the statute's pro-disclosure objectives, an award of reasonable attorney's fees is available to a prevailing FOIA appellant when litigation is "reasonably necessary to compel the disclosure" and has a "substantial causative effect on the delivery of the information to the plaintiff."[35] The award may include fees, costs, and all disbursements relating to the success of the action.[36] While Nancy Warren prevailed only in part (the Department successfully defended the fee imposed for the search and production of records and on Warren's challenge to the DNR's position that no records exist related to the use of non-lethal wolf control measures), the Court found she was successful on the central issue of the PII exemption, and so ordered an award of fees corresponding to that claim.

Ultimately, Warren's case was as much about obtaining the specific set of depredation reports she had requested on that occasion as it was about setting the parties' expectations about the confines of permissible disclosures going forward. So long as wolves persist as a subject of controversy, Warren will continue her work bringing awareness and understanding to the public, and, where necessary, countering misinformation—especially that coming from state officials charged with conservation, protection, and management of the state's natural resources.

Since the Court of Claims was able to resolve the case on the "personal nature" prong of the PII test, it did not have to reach the issue of whether the disclosure of the redacted information would

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[33] *ESPN, Inc v. Mich State Univ*, 311 Mich App 662, 666; 876 NW2d 593 (2015) ("In order for a name to be useful, the name must normally be associated with some other information. In the context of a police report, a person's name is useful because the report will contain information about the person's actual or purported involvement in the incident. That is, the report will associate the name with specific facts or allegations that may or may not be information of a personal nature.").

[34] MCL 15.243(1)(a).

[35] MCL 15.240(6); *Amberg v. City of Dearborn*, 497 Mich 28, 34; 859 NW2d 674 (2014).

[36] *Meredith Corp v. City of Flint*, 256 Mich App 703, 715; 671 NW2d 101 (2003).

be justified. But in the two years since the case was decided, it has become clear that the public airing of depredation reports serves the core purpose of FOIA, shedding light on where depredation incidents are concentrated and the circumstances surrounding those losses. Such revelations in turn assist the public in assessing whether DNR is faithfully carrying out its conservation and management duties. A lengthy Bridge Michigan report last year, drawing on the magazine's own FOIA requests and Warren's work, examined the circumstances surrounding DNR's killing of wolves in Ontonagon County in 2016.[37] The report concluded that DNR sought permission from the federal government to take wolves with a history of threatening humans shortly after it agreed to a three-fold increase in the valuation of the beef being raised on the problem farm previously identified by Warren as a depredation hot spot. Contrary to the official narrative about the dangers posed by the particular wolves targeted, it appeared that the high cost of reimbursing the producer for losses from depredation, together with political pressure from a state senator, likely influenced the DNR's actions. The Bridge article has the potential to lead to true accountability, after Michigan Attorney General Dana Nessel announced her department would be looking into the Department's handling of public records related to killing of wolves.[38]

As the Bridge piece points out, the transparency of DNR's management decisions and the availability of public records through FOIA continue to be critically important as the U.S. Fish & Wildlife Service once again prepares to de-list the gray wolf, throwing management of the species back to the states. Given the turbulent history of Michigan wolves in recent years, it is anything but clear what their fate will be (lawsuits challenging de-listing are anticipated), however I am confident a certain Yooper advocate will be doing her part behind the scenes to ensure that the public is educated on the issues and that decision-makers are held to account.

Whether in the context of animal welfare, wildlife management, other animal-related interests (or something altogether different), I encourage readers to identify local, state, and federal agencies who may be involved in such issues, and send out a FOIA request. You might ask for records you already know are of interest to you, or even documents you are not sure exist, but seem like they should. FOIA practice has a certain Forrest Gump box of chocolates quality—you never know what you might turn up. Knowledge and information are powerful, so as citizens and advocates, let's make use of this tool!

[37] John Barnes, *Michigan DNR said it killed wolves to protect humans. Then we got its emails* (November 22, 2019).

[38] John Barnes, *Dana Nessel to review Michigan DNR handling of wolf kill records* (November 25, 2019).

ELS is still here: Don't forget about our webinar library

Environmental Law Section Online Library

Many of ELS's webinars are available in the ELS online library under the webinar tab. They make for good viewing during quarantine at home.

Here's a list of ELS's currently available webinars.

- 2020
  - Coming soon! The Hazardous Substance and Brownfield Committee Year Review
- 2019
  - Duck! Insiders Review the Late 2018 Legislation
  - The Challenging Effects of Dynamic Great Lakes Shorelines on Zoning & Planning in Coastal Communities
- 2018
  - A Closer Look at the Endangered Species Act
  - A Legal Perspective on PFOS/PFAS Contamination Issues, Tuesday, July 10
  - Examining Shared Environmental Interests Webinar, Nov. 12
  - Examining Shared Environmental Interests Webinar, Nov. 12
  - Updated-Lender's Perspective on Environmental Issues
- 2017
  - Endangered Species Act and Land Use Webinar 030717
  - Environmental Layer's Next Frontier -Vapor Intrusion 033017
  - Using SBM Connect to Connect with Environmental Law Section Lawyers
  - Vapor Intrusion Issues in Transactional Due Diligence and Due Care
- 2015
  - Allocation and Agreement Webinar Materials 2015 05 27
  - Michigan's Adaptive Management Plan to Address Lake Erie Issues
  - Webinar: The ELS Presents Statutory Update 2015
- 2014
  - Great Lakes Legacy Program: Managing Contaminated Sediment
  - Great Lakes Water Levels: Past, Present, and Future
  - Let the River Run Free-Pigeon River Dam Litigation
  - Resource Extraction and Management in Michigan: Hot Issues
  - The Environmental Lawyer's Role in Transactions
- 2013
  - Perspectives on Recent Wetlands Amendments in Michigan
  - The K.I.S.S. Principle in Environmental Litigation
- 2011
  - Michigan's New Energy Development

ELS still has the capability of hosting webinars, and in fact, this might be a very good time to do so. If you'd like to do put on a webinar, please contact Mary Anne Parks directly at parks.maryanne@gmail.com for assistance.

The Animal Law Section Turns 25: An Interview with Two of the Section's Founding Members

Margaret M. Sadoff
Animal Law Section Council (2019-2021)
Co-Editor of the Animal Law Section's Newsletter
Treasurer for Help4Wildlife[1]

The year 2020 will forever be remembered as the year of the pandemic. But this year also marks the 50th anniversary of Earth Day and the 25th anniversary of the Michigan Animal Law Section. As a member of both the Environmental and Animal Law sections, I often think about the overlap of issues important to both sections. A few examples are the devastating impact of climate change on wildlife and ecosystems, expansion of logging and oil and gas drilling into pristine wildlife habitat, and the effects of factory farming on animal welfare as well as air and water pollution.

Animal law as a recognized field of legal practice is relatively young, so I was surprised to learn that the very first anti-cruelty law dates back to 1641. In Massachusetts' first legal code "the Body of Liberties", it was provided (in the original Old English) that "No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use."[2] Animal cruelty laws have certainly come a long way. All states have some animal cruelty laws on the books and a federal anti-cruelty law (the so-called anti-crush legislation) was passed in November 2019.[3] Modern-day animal advocates seek not only to protect animals from abuse and cruelty but to improve the lives of animals and elevate their legal status beyond mere property. The Non-Human Rights Project[4], which seeks to gain legal personhood for animals, is one such effort. Although it seems a lofty goal, other countries have already begun to recognize animals as sentient beings, deserving of legal rights and protections. As the Animal Law Section enters its 26th year, I wanted to reflect on its history and significance and explore the connection between animal and environmental law.

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[1] In accordance with the MELJ's mission statement regarding publication of viewpoint articles, the positions advanced within this piece are those of the author and the interviewees. They do not purport to represent the Animal Law or Environmental Law Sections' position on any legal issue.

[2] G.K. Mikita, *Animal Law Section: An Advocate for Michigan's Animal Population*, 76 The *Michigan Bar Journal* 5, p 422-425 (1997).

[3] See 2019 HB 724, Preventing Animal Cruelty and Torture Act as passed by 116th Congress.

[4] See The Non-Human Rights Project.

Michigan's Animal Law Section was created in 1995 through the efforts of a small group of like-minded attorneys which included founding members Bee Friedlander[5] and Don Garlit.[6] In fact, Don has the distinction of being the only member to have served the Section continuously, either as an Officer or on the Council, since its inception. Today, the Section has over 200 members and includes attorneys practicing in the field of animal law as well as attorneys working or volunteering with animal advocacy groups and attorneys who have a general interest in animal law and policy. The Section's goals, as set forth in its bylaws, include:

- Educating members of the State Bar and the public about laws relating to the protection of animals and animal rights, including the development and modification of existing law;
- Promoting legislation to advance animal protection and animal rights;
- Maintaining and operating a referral service for and among attorneys practicing in the area of animal protection and animal rights;
- Promoting animal protection and animal rights in Michigan through use of the legal system;
- Coordinating programs for lawyers practicing in the area of animal law with national and local bar associations; and
- Cooperating and sharing information with other groups within the State Bar which have an interest in legal issues of interest to lawyers practicing in the area of animal law related topics.

I spoke with Bee and Don about the history of the section, progress in animal law, the intersection of animal and environmental law, and their hopes for the future of animal law.[7]

Q: Bee and Don, between the two of you there's a ton of institutional knowledge. You have both been active in the Animal Law Section from the start as founding members. How did the Animal Law section get its start?

Bee: The section began over 25 years ago with a notice placed in the *Michigan Bar Journal*: "Michigan attorneys interested in animal law contact Wanda Nash." About 20 attorneys responded to that

[5] Bee Friedlander leads several Section committees and is the President of Attorneys for Animals. She serves on the boards for Animals and Society Institute, Bird Center of Washtenaw County, and Leuk's Landing. Additional information provided by Bee from "A History of the Animal Law Section, 1995 to 2015" by Beatrice M. Friedlander, September 21, 2015.

[6] Donald Garlit serves as Treasurer for the Animal Law Section as well as Attorneys for Animals and is Co-Editor of the Animal Law Section's Newsletter. He served on the board of RedRover from 2005-2011 and 2014-2019 and remains on the group's finance committee.

[7] The answer portions of this article do not reflect direct quotes but rather excerpts and paraphrases from a conversation with Bee and Don.

notice. Keep in mind this was before social media, so responses were via phone call or snail mail. The animal law field was a relatively new concept at the time, at least in Michigan.

What resulted from that initial invitation was the formation of the non-profit group Attorneys for Animals by Wanda Nash. A major goal of the newly formed organization was to create an animal law section within the State Bar. Michigan's Animal Law Section would become the first such state-wide section in the United States. Attorneys for Animals still is active; it is a non-profit organization comprised of attorneys and other advocates dedicated to working within the legal system to ensure that animals are recognized, treated, and protected as individuals.

Q: Who was Wanda Nash?

Bee: Wanda Nash (1943-2008) was the Section's founder and first Chair. She was my mentor. I admired her passion, energy, enthusiasm, and her optimism. She taught me resilience, which is an absolute necessity for an animal advocate. She taught me that the key to longevity in this movement is to remain on an even keel. We must take pride and pleasure in victories small and large, and we must take losses in stride without succumbing to feelings of fatalism or futility. Wanda recognized the necessity of keeping ever vigilant.

The Section established the Wanda Nash Award in 2006 in her honor. The award recognizes a law student from a Michigan law school who is dedicated to animal law and has demonstrated outstanding involvement in animal issues. It is a fitting tribute to Wanda because she always encouraged those new to animal law. It is notable that Wanda's family members continue to attend the annual ceremonies honoring Wanda Nash Award recipients.

Don: Wanda attended Cooley Law School in the mid-1980s, specifically to use her legal knowledge to advance the cause of animals which was virtually unheard of at the time. I visited Wanda shortly before she passed in 2008. I remember telling her "Wanda, we're going to keep working for the animals." She gave her trademark response: "FAN-tastic!" Wanda touched a lot of lives as evidenced by a recent tribute on the Attorneys for Animals website.[8]

Q: Tell me about the early days of animal law. I imagine there was skepticism and maybe even some pushback. What was it like?

Don: In the early days, people didn't know what animal law was about. I would often be challenged by people who did not take the field seriously, but I always deflected with humor. I would ask people, "Do you have a dog (or cat)?" And when they responded "Yes" I would tell them "Well, your dog (or cat) has retained me and we're going to sue you." That broke the ice.

Bee: I remember our inaugural meeting in 1995. The bylaws used the term "animal rights" and some folks were opposed to that terminology. I also recall an early article in the news that mentioned Michigan's newly formed animal law section. The tone of that article was quite dismissive.

[8] See *Wanda Nash: A Remembrance at 75 and an Announcement*, Attorneys for Animals (2020).

Q: I know the Section's Legislative Committee is very active and has provided written position statements as well as oral testimony on animal-related bills. Can you give a recent example (or a favorite example) of legislation the Section has helped to move forward?

Bee: By way of background, the Section has been taking positions on bills since the 2005-2006 legislative session. We take positions and provide testimony on a wide variety of legislation that impacts animals. We were active in supporting three major bills that became law in the past five years: one allowing animals to be included in Personal Protection Orders (PPOs);[9] one strengthening the animal crimes law;[10] and one essentially making Michigan a cage-free state.[11]

Two bills are illustrative of our approach: In 2015, a bill was introduced as part of a package to repeal what were considered "archaic" laws. Among those was repeal of a bill "Prohibiting the Sale of Dyed or Artificially Colored Baby Chicks, Rabbits, Ducklings or Other Fowl" (2015 HB 4251). The Section, along with other advocates, raised immediate and loud objections. The bill was withdrawn. Our goal was to educate legislators that this is not a frivolous, outdated, or unnecessary prohibition.

HBs 4910/4911 of 2019 are the most recent bills on which we testified, in September 2020. These bills would regulate emotional support animals (not service animals) by criminalizing the misrepresentation of emotional support animals and allowing for early termination of leases for violations. We joined other organizations opposing the bill but focused on the hardship to the animals involved and the legitimate role these animals serve.

Q: What stands out in your mind as an area in which Michigan has made significant progress in terms of animal protection?

Bee: The greatest gains have been for companion animals. Michigan has strong animal cruelty laws. The addition of animals to PPOs has been significant, as threats of harm or actual harm to companion animals is common in domestic violence situations. Dove hunting was prevented– all counties voted against it in 2006. Some progress has been made to protect Michigan wolves, but that progress has been thwarted by special interest groups.

I'll give you an example of the need for vigilance and persistence. In the early to mid-2000s, we started to see ballot initiatives introduced by advocacy groups to phase out the most egregious of agricultural confinement practices related to egg laying hens, gestation crates for pigs, and veal crates. Such a ballot measure was proposed for Michigan and had wide-spread support. In response, to avoid a lengthy and likely successful ballot measure, the legislature passed House Bill 5127 of 2009 (2009 PA 117), which set phase-out dates for confinement of egg-laying hens and gestating sows by 2019 and phase-out of confinement of calves (veal crates) by 2012. However, as the ten-year deadline approached, the egg producers lobbied for more time and a bill was

[9] 2015 HB 4478; 2016 PA 94.

[10] 2017 HBs 4332/4333; 2018 PA 452 and 652.

[11] 2019 SB 174; 2019 PA 132.

introduced that would have repealed all protections added by the 2009 law as well as extend the time for phase-in. The Section and other animal welfare groups mobilized and succeeded in passage of a much less draconian law referenced above (2019 PA 132) that delayed protections for egg-laying hens until 2024, less time than industry wanted. Michigan is the 5th or 6th largest egg producer, so the state going cage-free has significant impact on the industry.

Q: What trends or advancements have you noticed in animal law over the last 25 years?

Bee: When the Section started in the 1990s, animal law was not taken seriously. Now it's accepted, even feared! Animal law is a component of general practice in areas like probate and divorce. Many law schools now offer animal law classes or programs. In terms of animal cruelty/animal abuse laws, we went from about 12 states to 50 states with felony level penalties. The field is also becoming more sophisticated and politically savvy. Some of the best creative legal minds are making an impact in litigation and legislation.

Don: There is certainly more interest and activity in animal law. The section's newsletter dates back to 1997. We've published 42 issues and the State Bar Journal featured animal law in two issues: December 2013 and July 2018. Collectively, that's over 600 pages of content over the years. One of my favorite articles was written by Barbara Goldman. She wrote an excellent comprehensive article on dog bite law that I highly recommend (See "Sinking Your Teeth Into the Michigan Dog Bite Law" in the Summer 2010 issue of the Animal Law Section's newsletter, available on the SBM website; updated in "Highlights of Animal Law, 2013-2018" in July 2018 in a special animal law theme issue of the *Michigan Bar Journal*).

Q: Given current events, do you think there will be renewed interest in animal rights/protection issues, post-pandemic?

Bee: History shows that after a period of social upheaval, people are more open to systemic change. I have never seen the topic of slaughterhouses discussed so much. People understand that wildlife markets played a big role in the pandemic. And I think they are starting to realize that factory farms have the same potential.

Q: There is considerable overlap on issues pertinent to both animal law and environmental law. What experience have you had with environmental law or advocacy? Do you see any similarities?

Bee: Don and I both attended the first Earth Day events but on separate campuses. This was before we met. I was at Ohio State and Don attended Michigan State. I remember Rachel Carson's *Silent Spring* was a big driver of the movement as was a law that would later become the Endangered Species Act. That spring there were also riots on campus related to the Vietnam War's expansion into Cambodia, so it was a pretty tumultuous time. I wouldn't describe myself as an environmental activist, but I was definitely interested in what was going on.

Don: I've always been interested in the economics of the American system. I can recall pushback on environmental law from people saying it would destroy jobs and the economy. I worked for an

automotive company before I retired, so I am familiar with the battle for more stringent auto emission standards and regulations and I think there's been progress there. Animal law has also seen pushback due to economics, from people who see their livelihoods as threatened. For example, horse racing and greyhound racing are dying businesses. There is also more visibility to the problems of certain animal use industries, especially animals used as "entertainment." Economic issues are a big driver in both animal and environmental law, but changes in attitude have driven success in both areas. Animal law began with a focus on companion animals, but now there is more focus on wildlife and farmed animal issues which is where there is overlap with environmental law. Animal law is farther behind and can look to environmental law as a model.

Bee: We recognize that the environmental law movement can inform the animal law movement.

Q: What do you hope animal law will look like over the next 25 years?

Bee: It's hard to predict because of the wild card – climate change. I would expect that the property classification will be removed or modified (e.g., animals as "living property"). I believe that the excesses of industrial agriculture (e.g., factory farms) will be curbed – for example, by strict enforcement of environmental laws and the industry no longer propped up by government subsidies.[12] I would hope that people will no longer view animals as entertainment or simply as money making schemes, with puppy mills becoming obsolete and adoption becoming the norm. When animals and money mix, the animals lose. I'd like animal law to achieve public acceptance, with animal law issues being embraced by the majority of society. I see a major shift in how humans interact with nature, and those who enjoy hiking, bird watching and similar activities, having more impact on its direction and funding. And, of course, we'd like – and expect -- to continue to attract the best people to the field.

Don: People often ask is it about rights or welfare? I think it's about social justice. We are the voice for the voiceless. The section gives out several awards each year to honor animal advocates. I always remind people at these ceremonies that the awards are *earned*, not won. On advocacy generally, if everyone does *something*, you can accomplish a lot. You don't need to do everything on every issue. Many hands make light work. You can accomplish powerful things one small step at a time.

[12] There may be some traction on this federally. The Farm System Reform Act of 2019 (S. 3221) introduced by Sen. Cory Booker (and a companion bill in the House, H.R. 6718) would place a moratorium on new and expanding factory farms with phase-out by 2040, among other reforms.

Current Court and other Legal Procedures related to COVID-19

SBM has provided a list of informational resources related to legal practice during shelter in place and state of emergency orders:

- Guidance from local courts—there's a lot of information coming at you from Michigan's trial courts, so we are helping keep it straight
- Text of documents related to COVID-19—because you need to know exactly what the law actually says
- Guidelines from our ethics department—while much has changed during the pandemic, the Michigan Rules of Professional Conduct are still in full effect
- Guidance on remote notarization and witnessing under EO 2020-41—this checklist includes everything you need to do before, during, and after a remote notarization or witnessing

Other news and information of relevance includes:

- The Michigan Department of Health and Human Services issued a new order effective Nov. 18, 2020, putting limitations on indoor and outdoor gatherings for three weeks. The order has been challenged by restaurant groups in federal court (the Western District of Michigan).
- FAQ regarding the CDC's Order Halting Evictions.
- The Board of Law Examiners plans to administer the February 2021 Bar Exam on Feb. 23 & 24, 2021 with both in-person and remote siting options.
- The Michigan Supreme Court has issued several orders and guidance in light of COVID-19. Most can be found on the Court's website.
- The Court continues to hear oral arguments for pending cases virtually on its YouTube channel.
- The COVID-19 Guidelines for Michigan's Judiciary- provides the phases for return to full capacity for Michigan's trial courts. Transitions between phases are dependent upon the gating criteria listed in the guide. Since being published in July 2020, the guide was updated by memorandum in November 2020.

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

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

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

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

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

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

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

CAFO Permitting: Family Farms Meet the Regulatory State

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

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[4] MCL 324.3106.

[5] Mich Admin Code, R 323.2102(b).

[6] Mich Admin Code, R 323.2102(i).

[7] Mich Admin Code, R 323.2103(g).

[8] See 411 FR 11468-01, *Concentrated Animal Feeding Operations*, Final Rule, Mar. 18, 1976 at 41 CFR 124.82(a)(3) (defining "animal unit").

[9] Mich Admin Code, R 323.2103(g).

[10] Mich Admin Code, R 323.2103(m)(*ii*).

[11] Mich Admin Code, R 323.2103(m)(*i*).

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

Even aside from the EGLE's new mandates, CAFOs are subject to extensive environmental regulation under both state and federal statutory and regulatory regimes. The Clean Water Act[16] defines CAFOs as "point sources."[17] Because discharges from point sources must be permitted under the National Pollutant Discharge Elimination System ("NPDES"),[18] CAFOs must also be permitted under that program as well if they discharge to a water of the state.[19] And though CAFOs are defined by regulation as only the "*lot or facility where . . . :* (*i*) *[a]nimals . . . have been, are, or will be stabled, or confined,* and fed or maintained for a total of 45 days or more in any 12-month period"[20]—and not the entirety of the livestock farming operation—courts have divined that discharges "from" a CAFO include any discharge caused by a CAFO's land-application of manure (the process of spreading manure onto crops as a fertilizer).[21] So the rules governing CAFOs are directed not only to the actions taking place at the CAFO site but also to land application of manure[22] that happens often at multiple locations far removed from the CAFO site, such as neighboring crop fields that can use the manure's nutrients for agronomical purposes, as long as such activities are under the control of the permitted CAFO.[23]

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[12] U.S. Department of Agriculture Economic Research Service. 2020. Farming and Farm Income. *Ag and Food Statistics: Charting the Essentials*.

[13] U.S. Department of Agriculture Economic Research Service. 2016. *America's Diverse Family Farms: 2016 Edition*. Economic Information Bulletin Number 164.

[14] U.S. Department of Agriculture Economic Research Service. 2020. Farming and Farm Income. *Ag and Food Statistics: Charting the Essentials*.

[15] MCL 24.207a. (defining small business as a business with "fewer than 250 full-time employees" or "gross annual sales of less than $6,000,000.00.").

[16] 33 USC 1251 *et seq*.

[17] 33 USC 1362(14).

[18] 33 USC 1311(a); 33 USC 1342(a)(1).

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

[20] 40 CFR 122.23(b)(1) (emphasis added).

[21] *Waterkeeper Alliance, Inc v. Environmental Protection Agency*, 399 F3d 486, 510 (CA2 2005).

[22] 40 CFR 122.23(b)(3) & (e).

[23] *Id.*

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

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

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[24] 33 USC 1342(b).

[25] MCL 324.3101, *et seq*.

[26] Mich Admin Code, R 323.2196(5)(a)(*iii*).

[27] Mich Admin Code, R 323.2196(5)(a)(*iv*).

[28] Mich Admin Code, R 323.2196(5)(a)(*i*).

[29] Mich Admin Code, R 323.2196(5)(a)(*x*).

[30] Mich Admin Code, R 323.2196(5)(a)(*viii*) & (5)(a)(*ix*).

[31] See Mich Admin Code, R 323.2196(5)(a).

[32] Mich Admin Code, R 323.2196(1)(b).

[33] Data compiled via EGLE's MI-Waters database, accessed on May 4, 2020.

[34] Mich Admin Code, R 323.2191(1).

[35] General Permit MIG440000, issued January 1, 2003, last accessed on October 7, 2020; General Permit MIG010000, issued April 30, 2015, last accessed on October 7, 2020; General Permit MIG010000, issued March 27, 2020, last accessed on October 7, 2020.

[36] *Id.*; Mich Admin Code, R 323.2150.

referenced above.[37] In other words, most of the existing general permit conditions are "rules" that have been adopted as state or federal administrative rules before being incorporated into the permit.

What EGLE's Revised 2020 CAFO General Permit Means for Farms

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

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

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[37] *Id.*

[38] See MI Waters documents, last accessed on October 7, 2020.

[39] MCL 24.239(1).

[40] MCL 24.245(3).

[41] MCL 24.245.

[42] MCL 24.265; MCL 24.266.

[43] MCL 24.232(8).

[44] *Slis v. Dep't of Health and Human Servs*, __ Mich App __, issued May 21, 2020 (Docket Nos. 351211 & 351212).

[45] 2020 CAFO General Permit, Part I.B.3.f.3.

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

A "Rule" By Another Name: EGLE's Regulation of CAFOs by General Permit

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

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[46] 2019 SB 247; 2019 HB 4418; 2017 SB 639; 2017 HB 5185.

[47] General Permit MIG010000, Part I.B.3.f.4.

[48] General Permit MIG010000, Part I.B.3.h.

[49] General Permit MIG010000, Part I.B.3.c.; Michigan Phosphorus Risk Assessment ("MPRA") Application Spreadsheet Example, last accessed October 7, 2020.

[50] General Permit MIG010000, Part I.B.3.c.1.a.

[51] General Permit MIG010000, Part I.B.3.c.1.a. & Part I.B.3.c.2.a.

[52] General Permit MIG010000, Part I.B.3.f.3.d.

[53] General Permit MIG010000, Part I.C.9.

[54] Mich Admin Code, R 323.2196(1)(b).

"rules" [55]—it must do so through the rulemaking process.[56] Moreover, case law is clear that the label or name that an agency gives to a rule does not govern whether it is, in fact, a "rule."[57] In passing the APA, the Legislature intended for the definition of "rule" to be broadly construed and any exceptions to be narrowly construed.[58] That approach effectuates the Legislature's purpose in prescribing the rulemaking process, which is "to 'ensure that none of the essential functions of the legislative process are lost in the course of the performance by agencies of many law-making functions once performed by our legislatures.'"[59]

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

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

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[55] MCL 24.207.

[56] *Mich State AFL-CIO v. Secretary of State*, 230 Mich App 1, 6 (1998).

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

[58] *AFSCME, AFL-CIO v. Dep't of Mental Health*, 452 Mich 1, 10 (1996).

[59] *Detroit Base Coalition*, 431 Mich at 178–79 & 183.

[60] Mich Admin Code, R 323.2191(1).

[61] General Permit MIG010000, Part I.A.1 & Part I.A.3.

[62] *Nat'l Assoc of Home Builders v. US Army Corps of Eng'rs*, 417 F3d 1272, 1284–85 (2005); *Lakes Carriers Ass'n v. US EPA*, 652 F3d 1, 6 n 3 (CADC 2011).

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

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

In *AFSCME, AFL-CIO v. Department of Mental Health*,[65] for example, the Michigan Supreme Court analyzed whether the terms of a standard-form contract used by the Department of Mental Health in contracting with a few hundred group home providers constituted "rules" under the APA.[66] The contract delegated to these private entities functions otherwise assigned to the Department and subjected their provision of such services to standards for care and staff training via contract.[67] And the Department's contract was inflexible, offered to the providers without negotiation.[68] Therefore, the Court held that the contract terms were "rules" requiring promulgation.[69]

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

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

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

[65] *AFSCME, AFL-CIO*, 452 Mich at 9.

[66] *Id.* at 5–6.

[67] *Id*. at 7–8.

[68] *Id*. at 5–6.

[69] *Id*. at 3.

[70] *Delta Co v. Dep't of Nat Res*, 118 Mich App 458 (1982).

[71] *Id* at 468.

[72] *Id*.

[73] *Id*.

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

Conclusion

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

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

[75] *Spear v. Mich Rehab Servs*, 202 Mich App 1, 4 (1993) (deciding to employ a welfare needs test was covered by the exemption but the agency needed to promulgate a rule explaining its test).

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