STATE OF MICHIGAN
CIRCUIT COURT FOR THE 54TH JUDICIAL CIRCUIT
TUSCOLA COUNTY

ATTORNEY GENERAL DANA NESSEL ex rel PEOPLE OF THE STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES, STATE OF MICHIGAN,

Plaintiffs,

v

ZIMBA DAIRY, INC.

Defendant.

No. 2023-32629-CE

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There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

FIRST AMENDED COMPLAINT

Plaintiffs, Attorney General Dana Nessel *ex relatione* the People of the State of Michigan, the Michigan Department of Environment, Great Lakes, and Energy (EGLE), and the Michigan Department of Natural Resources (DNR), by and

through their attorneys, Elizabeth Morrisseau and Rebecca Smith, Assistant Attorneys General, states as follows:

NATURE OF THE CASE

1. This is a civil action for injunctive relief to require Defendant Zimba Dairy, Inc. to comply with Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*. (Part 31), Mich Admin Code, and rules promulgated thereunder, specifically Mich Admin Code, R 323.2101 *et seq*. (Wastewater Rules) and Mich Admin Code, R 323.2201 *et seq*. (Groundwater Quality Rules).

2. Defendant's failure to comply with Part 31 of the NREPA and related rules, as described in this Complaint, threatens to impair Michigan's natural resources in and near Tuscola County and Sanilac County by overloading waters of the state, McCallum Drain and White Creek, with nutrients, and also by introducing bacteria and other pathogens from animal waste into them.

3. The scope of this threatened impairment is large because McCallum Drain and White Creek each flow to the Cass River, which flows to the Saginaw River, which flows into Lake Huron at Saginaw Bay.

4. Relatedly, Defendant also threatens Michigan's groundwater resources by discharging harmful contaminants into drinking water aquifers.

5. Further, Defendant's longstanding, ongoing refusal to obtain and comply with a wastewater discharge permit threatens the integrity of the EGLE

permitting program because Defendant gained an unfair financial advantage relative to competing CAFOs that follow permitting rules.

6. Defendant's ongoing noncompliance with Part 31, the Wastewater Rules, and the Groundwater Rules has killed substantial numbers of fish and aquatic life in North Branch White Creek, depriving the State and its residents of valuable natural resources.

7. Further, this action seeks injunctive relief for Defendant's violations of Part 303, Wetlands Protection, of the NREPA, MCL 324.30301 *et seq.* (Part 303), and Part 301, Inland Lakes and Streams, of the NREPA, MCL 324.30101 *et seq.* (Part 301).

8. Defendant's failure to comply with Parts 303 and 301 threaten to impair wetlands and inland streambeds within Tuscola County, specifically McCallum Drain, by disturbing natural soils, flow, and vegetation.

9. In addition to injunctive relief, EGLE also seeks civil fines, attorney fees, and costs.

10. Michigan Attorney General Dana Nessel brings a public nuisance claim under Part 31 of the NREPA and common law; EGLE brings this action under Parts 31, 301, and 303 of the NREPA; DNR brings a conversion claim arising from common law.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the subject matter of this action under Section 3115(1) of the NREPA, MCL 324.3115(1); Section 30316(1) of the NREPA,

MCL 324.30316(1); Section 30112 of the NREPA, MCL 324.30112(1) of the NREPA, and under Section 605 of the Revised Judicature Act, MCL 600.605.

12. This Court has personal jurisdiction over Zimba Dairy, Inc. under Section 711 of the Revised Judicature Act, MCL 600.711.

13. Venue in this Court is proper under Parts 31, 301, and 303 of the NREPA. MCL 324.3115(1), MCL 600.1641(1), MCL 324.30316(1).

PARTIES

14. Michigan Attorney General Dana Nessel is the state officer charged with appearing on behalf of the People of the State of Michigan. MCL 14.28.

15. EGLE is the state department mandated to protect the natural resources of the state from pollution, impairment, and destruction. MCL 324.301, MCL 324.501, and Executive Order 2019-02. By Executive Order 2019-06, the former Michigan Department of Environmental Quality (DEQ) was renamed as EGLE. *Id.* To avoid confusion, this Complaint only refers to EGLE, even when describing actions taken when the agency was still named DEQ.

16. In particular, EGLE is mandated to "protect and conserve the water resources of the state[.]" MCL 324.3103.

17. DNR is the state department charged with managing the fish and wildlife in Michigan, which the State owns and holds in trust for the People of the State of Michigan. MCL 324.40105, MCL 324.48702(1).

18. Zimba Dairy, Inc. is a domestic for-profit corporation incorporated in Michigan in 1990.

19. Zimba Dairy, Inc. is a "person" within the meaning of MCL 324.301(h).

STATUTORY AND REGULATORY BACKGROUND
Part 31 of the NREPA

20. Michigan enacted Part 31 of the NREPA to protect and conserve the water resources of the state and to prevent and control pollution of surface and underground waters of the state and the Great Lakes. MCL 324.3103.

21. Section 3109(1) of NREPA, MCL 324.3109(1), states:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety or welfare.
>
> (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
>
> (c) To the value or utility of riparian lands.
>
> (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation.
>
> (e) To the value of fish and game.

22. Violations of Section 3109 of NREPA are "prima facie" public nuisances that the Michigan Attorney General may abate in a court of competent jurisdiction. MCL 324.3109(6).

23. Under Part 31 of the NREPA, a person shall not discharge any waste or waste effluent into the waters of the state unless the person is in possession of a valid permit from EGLE. MCL 324.3112(1).

24. "Waters of the state," as defined by Part 31 of the NREPA, include all "groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state." MCL 324.3101(aa).

25. "Waste or waste effluent" includes water that contains polluting substances such as chemicals and agricultural waste like manure, milkhouse waste, and sileage leachate. Mich Admin Code, R 323.2104(aa)(ii), (viii), (xvi).

26. Congress created the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC 1251(a).

27. The Clean Water Act establishes a system of cooperative federalism that "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 USC 1251(b).

28. A cornerstone of the Clean Water Act is the National Pollutant Discharge Elimination System (NPDES) program, which is a point source discharge permitting program that controls and limits the discharge of pollutants from point sources into surface waters. See 33 USC 1342(a)(1). The Clean Water Act establishes requirements for NPDES permits, including that they contain discharge limits necessary to meet state and federal water quality standards. *Id.*

29. As is relevant here, "concentrated animal feeding operations" fall within the definition of a point source, under the Clean Water Act, 33 USC

1362(14), and, to operate, must be covered under, and comply with the terms of, an NPDES permit. 33 USC 1311; see also 33 USC 1362.

30. Under the Clean Water Act, the United States Environmental Protection Agency (EPA) can approve state NPDES permitting programs for states that have sufficient standards and resources. 33 USC 1342(b); *Michigan Farm Bureau v Dep't of Envtl Qual*, 292 Mich App 106, 110 (2011).

31. In 1973, the EPA authorized Michigan to implement the NPDES permitting program in lieu of the EPA. *Mich Farm Bureau*, 292 Mich App at 110.

32. Thus, permits issued under Part 31 of the NREPA are state permits that meet minimum federal NPDES permitting requirements so that EGLE can issue NPDES permits instead of the EPA.

Concentrated Animal Feeding Operations–CAFOs

33. Concentrated animal feeding operations (CAFOs) are "large-scale industrial operations that raise extraordinary numbers of livestock." *Mich Farm Bureau*, 292 Mich App at 111 (internal citation omitted).

34. Housing that many animals in confinement "generate[s] large amounts of animal waste and pose[s] known risks to Michigan's water resources." *Mich Farm Bureau*, 292 Mich App at 144.

35. Among other things, the pollution associated with housing that many animals in a confined area includes manure and other animal waste that contains nutrients, such as nitrogen and phosphorous, and pathogens, such as *Escheria coli* bacteria (*E. coli)*, among other harmful contaminants. *NPDES Permit Regulation*

and Effluent Limitations Guidelines and Standards for CAFOs (Proposed Rule), 66 FR 2960, 2976–79 (Jan 12, 2001).

36. Although that pollution includes both CAFO process wastewater and production area waste, defined *infra*, this Complaint refers to them collectively, and in the alternative, as CAFO waste.

37. Specific to this Complaint, large CAFOs are dairy operations that confine more than 700 mature dairy cows and feed or maintain them for a total of any part of the day for 45 days or more in any 12-month period. Mich Admin Code, R 323.2102(a) and Mich Admin Code, R 323.2103(g)(i).

38. Michigan has cold winters that do not support the growth of vegetation year-round, so most animal feeding operations confine and feed or maintain animals more than 45 days each year.

39. CAFOs are broken down into two areas of operation: (1) the production area, where animals are housed, fed, and milked, and their waste is contained; and (2) the land application area, where the waste produced at the production area is spread for disposal.

40. Land application of CAFO waste regularly occurs during times of the year when there are no growing crops to uptake the fertilizing components.

41. When improperly performed, land application of CAFO waste threatens waters of the state with potential discharges of nitrogen, phosphorous, bacteria, and other pollutants and pathogens.

42. At the production area, clean storm water from precipitation and snow melt can become contaminated if it contacts CAFO waste due to poor production area housekeeping and poor production area design and construction; uncaptured storm water can result in polluted discharges to waters of the state.

43. Liquid waste storage structures, also part of the production area, are typically in-ground, engineered and designed, lined structures that capture and store tens of millions of gallons of CAFO waste, including manure, animal bedding, milkhouse waste, sileage leachate runoff, mortality leachate, and other contaminated production area runoff.

44. Generally speaking, an average dairy CAFO with 3500 mature dairy cows, and no other cattle, generates approximately 50 million gallons of CAFO waste annually, requiring a minimum storage capacity of over 25 million gallons.

45. The United States Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS), developed and periodically updates engineering standards that all CAFOs seeking grant funding to construct these liquid waste storage structures must meet.

46. Typically, EGLE includes those industry standards in NPDES permits to meet Michigan's requirements that all CAFO permits "ensure adequate storage of production area waste and CAFO process wastewater[.]" Mich Admin Code, R 323.5196(5)(a)(i).

47. Outside of the CAFO permitting program, similar waste storage structures must be designed to meet standards laid out in Michigan groundwater regulations. Mich Admin Code, R 323.2237.

48. If waste storage structures are not designed and sized appropriately, they may overflow or leak, resulting in discharges to groundwater or surface water.

49. Likewise, if the waste storage structures are not properly maintained, they may not perform as engineered, resulting in discharges to groundwater or surface water.

50. CAFO waste can reach groundwater through improperly designed and engineered waste storage structures. *Food & Water Watch v EPA*, 20 F4th 506, 511 (CA 9, 2021).

51. CAFO waste from storage structures can also reach surface waters by traveling through groundwater after being improperly discharged to the ground. (*NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs (Proposed Rule)*, 66 FR at 2979–80.)

52. Another way CAFO waste can reach surface waters is by traveling through tiles, which are artificial drainage mechanisms comprised of perforated piping installed beneath agricultural fields in order to move water off those fields.

53. CAFO waste can enter tile lines through both surface tile inlets and underground tile lines.

54. Tiles typically discharge to surface waters, either directly or through conduits.

55. When CAFO waste reaches surface waters, nutrients, such as nitrogen and phosphorous, can harm water quality.

56. Additionally, elevated amounts of these nutrients can result in fish kills, increase stress in aquatic ecosystems, cause nuisance algae blooms and excessive bacterial slimes, and contaminate shellfish and fish, as well as the animals that eat them. (*Id.* at 2981.)

57. Before reaching surface waters, excess amounts of nitrogen and phosphorous can harm soil quality and plants. (*Id.*)

58. High levels of nitrogen (particularly nitrate and nitrite) in drinking water can cause various degrees of illness and birth defects in humans, pets, and livestock. (*Id.* at 2982–83.)

59. Groundwater with high nitrogen levels may not be suitable for drinking water (for human or other animal purposes). (*Id.*)

60. Further, high levels of nitrogen in groundwater can significantly limit the value and possible uses of the land, including for domestic, commercial, industrial, agricultural, and recreational purposes.

61. Pathogens, such as *E. coli*, in surface waters can contaminate shellfish and fish, in turn harming people and other animals who consume them.

62. Swimming, and even fishing, wading, or paddling, in surface waters containing pathogens such as *E. coli* can result in gastrointestinal illness from incidental ingestion or infections from contact.

63. Consuming or otherwise using groundwater contaminated with pathogens, such as *E. coli*, can make humans, pets, and livestock sick. (*Id.*)

64. Further, the presence of pathogens, such as *E. coli*, in groundwater can significantly limit the value and possible uses of the land, including for domestic, commercial, industrial, agricultural, and recreational purposes.

65. Low oxygen or a lack of oxygen in rivers, streams, and groundwater can also be injurious to aquatic animal life.

66. Low oxygen, resulting from discharges of waste with high biochemical oxygen demand, among other things, can also result in toxic metals being released to groundwater, and ultimately surface water.

67. Ammonia, chlorides, and copper are all toxic substances.

68. When ammonia, chlorides, and copper are present in surface water in amounts above the concentrations specified in Mich Admin Code, R 323.1057, this directly harms, and can kill, the fish, mussels, and other aquatic organisms living in the affected surface waters.

69. Total dissolved solids is a measure of all organic and inorganic material dissolved in surface water, including salts such as sodium, sulfates, and chlorides.

70. Surface water with high total dissolved solids can disrupt osmoregulation across cellular membranes in aquatic organisms, causing significant damage and even death.

71. Surface water with high total dissolved solids can also corrode metal pipes and machinery.

72. Surface water with high total dissolved solids is unsuitable for irrigation and watering of livestock.

73. Surface water with high total dissolved solids also tastes very salty, rendering affected surface water unsuitable as a drinking water source.

CAFO Regulation in Michigan

74. EGLE regulates CAFOs primarily to prevent the discharge of pollutants into the waters of the state. Mich Admin Code, R 323.2196; see also *Mich Farm Bureau v DEQ,* 292 Mich App at 137 (discussing MCL 324.3106).

75. EGLE issues NPDES permits pursuant to the Part 21 Permitting Rules, found at Mich Admin Code, R 323.2101 *et seq*.

76. Although the Part 21 Permitting Rules incorporate by reference federal regulations developed by the EPA, "Michigan runs its own [CAFO] program under an enabling statute that is clearly more expansive than the federal Clean Water Act." *Mich Farm Bureau*, 292 Mich App at 113, 123.

77. The Part 21 Permitting Rules incorporate baseline federal regulations specific to CAFOs that explicitly recognize state authority and discretion to include more stringent requirements to meet, among other things, state water quality standards. Mich Admin Code, R 323.2189(2)(m) (incorporating 40 CFR 412 (2003); Mich Admin Code R 323.2189(2)(h) (incorporating 40 CFR 122.44 (2005)).

78. Those state water quality standards are duly promulgated rules, located at Mich Admin Code, R 323.1041 *et seq.* (Part 4 Water Quality Standards).

79. The section of the Part 21 Permitting Rules specific to CAFOs contains the following definitions relevant to this Complaint:

> a. "Animal feeding operation (AFO)" means a lot or facility . . . where the animals . . . 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, and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." Mich Admin Code, R 323.2102(b);
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> b. "CAFO process wastewater" means water directly or indirectly used in the operation of a CAFO for any of the following: (i) Spillage or overflow from animal or poultry watering systems; (ii) Washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; (iii) Direct contact swimming, washing, or spray cooling of animals; (iv) Dust control; (v) Any water which comes into contact with, or is a constituent of, any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding. Mich Admin Code, R 323.2102(j).
>
> c. "Concentrated animal feeding operation (CAFO)" means an AFO that is defined as a large CAFO…Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes." Mich Admin Code, R 323.2102(i);
>
> d. "Large CAFO" means an AFO that stables or confines as many as or more than . . . 700 mature dairy cows, whether milked or dry. . . . Mich Admin Code, R 323.2103(g)(i);
>
> e. "Land application area" means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, or subject to an access agreement to which production area waste or CAFO process wastewater is or may be applied. Land application area includes land not owned by the AFO owner or operator but the AFO owner or operator has control of the land application of production area waste or CAFO process wastewater. Mich Admin Code, R 323.2103(f);

f. "Production area" means that part of an AFO that includes animal confinement area, manure storage area, raw materials storage area, and waste containment areas. The animal confinement area includes open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milk rooms, milking centers, cow yards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes lagoons, runoff ponds, storage sheds, stockpiles, under-house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes feed silos, sileage bunkers, and bedding materials. The waste containment area includes settling basins and areas within berms and diversions which separate uncontaminated storm water. Also included is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities. Mich Admin Code, R 323.2104(d); and

g. "Production area waste" means manure and any waste from the production area and any precipitation, for example, rain or snow, which comes into contact with, or is contaminated by, manure or any of the components listed in the definition for "production area." Production area waste does not include water from land application areas. Mich Admin Code, R 323.2104(e).

80. Michigan requires all owners or operators of large CAFOs to obtain an individual NPDES permit, a certificate of coverage under a general NPDES permit, or a determination from EGLE of no potential to discharge. Mich Admin Code, R 323.2196(1)(b), (4).

81. Among other things, NPDES permits issued to CAFOs include requirements intended to prevent surface runoff of CAFO waste from production areas and land application areas, as well as to prevent groundwater infiltration from improperly engineered or maintained waste storage structures. Mich Admin Code, R 323.2196(5)(a).

82. NPDES permits issued to CAFOs require them to collect and store all CAFO waste generated at production areas, including all precipitation contacting (and thus becoming contaminated with) CAFO waste.

83. CAFOs must collect and store CAFO waste, including contaminated stormwater, in "adequate" waste storage structures. Mich Admin Code, R 323.2137(5)(a)(i).

84. Adequate waste storage structures have been engineered in accordance with duly promulgated regulations specific to wastewater lagoons, Mich Admin Code, R 323.2237, with the less stringent NRCS standard, or a demonstrated equivalent.

85. Adequate waste storage is not just a matter of engineering; but also depends on the amount of CAFO waste produced annually as well as regional rainfall. As a result, all CAFOs must have the capacity to store at least six months' worth of CAFO waste, plus additional storage to provide one foot of freeboard, plus emergency storage to ensure that the waste storage structures will not overflow from precipitation expected during regional 25-year, 24-hour storm events.

86. To minimize the risk of discharges to surface water from land application of CAFO waste to frozen or snow-covered ground, each permitted CAFO must demonstrate adequate storage capacity for all CAFO waste it produces. Mich Admin Code, R 323.2196(5)(a)(i).

87. CAFOs must submit documentation prepared by licensed professional engineers confirming that their waste storage structures meet the standards necessary to ensure adequate storage.

88. Further, under the NPDES permits issued to CAFOs, CAFO owners must ensure that all waste storage structures are operated and maintained appropriately to prevent any damage to their structural integrity, as such damage could result in discharges to groundwater and surface waters.

89. CAFO NPDES permits further require weekly inspections of waste storage structures.

Michigan Surface Water Quality Standards

90. The Part 4 Water Quality Standards promulgated under Part 31, Mich Admin Code, R 323.1041 *et seq.*, establish water quality standards for surface waters. Mich Admin Code, R 323.1041.

91. Pursuant to Section 303(c) of the Clean Water Act, 33 USC 1313(c), the EPA has approved the Part 4 Water Quality Standards as the applicable water quality standards in Michigan.

92. Among other things, the Part 4 Water Quality Standards prohibit surface waters from containing unnatural turbidity, color, foams, settleable solids, and suspended solids. Mich Admin Code, R 323.1050.

93. Further, the Part 4 Water Quality Standards limit the amount of total dissolved solids. Mich Admin Code, R 323.1051.

94. Specifically, no dissolved solids may "exceed concentrations which are or may become injurious to any designated use," and at no time as the result of a controllable point source, may the concentration of total dissolved solids exceed 750 milligrams per liter (mg/L).

95. Further, the Part 4 Water Quality Standards establish the following limits of microorganisms: (a) from May 1 through October 31, surface waters shall contain no more than 300 *E. coli* per 100 milliliters (mL) of water; and at all other times, surface waters shall contain no more than 1,000 *E. coli* per 100 mL. Mich Admin Code, R 323.1062(1) and (2), R 323.1044(i) and (x), and R 323.100(2).

96. Further, the Part 4 Water Quality Standards prohibit the presence of toxic substances above levels necessary to safeguard public health and safety, aquatic resources, and designated uses of water bodies. Mich Admin Code, R 323.1057.

97. Specifically, ammonia is limited to an amount based on a formula taking the pH and temperature of the specific water body into account. See Mich Admin Code, R 323.1057(2).

98. For the surface waters at issue, on the dates they were inspected, the water quality standards limited ammonia levels to 4.7 mg/L to 12.6 mg/L for acute exposures and 1.2 mg/L to 2.4 mg/L for chronic exposures.

99. Copper is also limited based on a formula taking the specific water body's characteristics into account. See Mich Admin Code, R 323.1057(8). For the surface waters in issue, copper is limited to a range of 126 micrograms per liter

(µg/L) to 259 µg/L for acute exposures and a range of 71 µg/L and 136 µg/L for chronic exposures.

100. Similarly, to protect aquatic life, chloride should not exceed 320 mg/L for acute exposures or 150 mg/L for long term exposures. See Mich Admin Code, R 323.1057(2) (describing formula necessary to reach chloride toxicity limits.)

101. Further, the Part 4 Water Quality Standards limit the amount of nutrients that may be present in waters of the state. Mich Admin Code, R 323.1060.

102. Specifically, "nutrients shall be limited to the extent necessary to prevent stimulation of, among other things, "fungi or bacteria which are or may become injurious to the designated uses of the surface waters of the state." Mich Admin Code, R 323.1060(1).

103. Finally, the Part 4 Water Quality Standards also establish minimum thresholds for how much dissolved oxygen must be available in waters of the state. See Mich Admin Code, R 323.1064 generally.

104. Relevant here, there must be at least 5 mg/L of dissolved oxygen in inland streams and connecting waters. Mich Admin Code, R 323.1064(1).

Groundwater Discharge, Part 22 Rules

105. CAFOs, like everyone else, are prohibited from discharging to waters of the state, except as authorized under a permit. MCL 324.3109(1).

106. Groundwater, like surface water, is a water of the state. MCL 324.3101(aa).

107. Discharges of waste to soil can migrate to the groundwater and can then travel through the groundwater to ultimately discharge to surface water.

108. The Part 22 administrative rules for groundwater quality promulgated under Part 31, Mich Admin Code, R 323.2201 *et seq.* (Part 22 Rules), among other things, set certain requirements for discharges to groundwater. See Mich Admin Code, R 323.2204.

109. Generally speaking, CAFOs that meet specifically defined discharge requirements are not required to obtain permits to discharge to groundwater, unless they house more than 3,500 mature dairy cattle, or 5,000 of any other type of cattle. Mich Admin Code, R 323.2204, R 323.2210(f).

110. However, a CAFO with fewer than 3,500 mature dairy cattle that discharges to groundwater in a manner that is, or is likely to be, injurious to groundwater must obtain a groundwater discharge permit. Mich Admin Code, R 323.2204(2)(a).

111. The Part 22 Rules define "injurious" as "any damage to or change in the condition of background groundwater quality that causes or may cause groundwater to no longer be fit for 1 or more protected uses." Mich Admin Code, R 323.2201(s).

112. The Part 22 Rules also prohibit all unauthorized, injurious discharges. Mich Admin Code, R 323.2205.

113. Relatedly, pursuant to Part 201, Environmental Remediation, of the NREPA, MCL 324.20101 *et seq.* (Part 201), EGLE has established groundwater

cleanup criteria for hazardous substances within the Cleanup Criteria Requirements for Response Activity, Mich Admin Code, R 299.1–299.50 (Cleanup Criteria Rules).

114. Part 201 defines "hazardous substances" to include "hazardous waste" as defined by Part 111, Hazardous Waste Management, of the NREPA, MCL 324.1101 *et seq.* (Part 111). MCL 324.20101(x)(*iii*).

115. Part 111 defines "hazardous waste" to include waste "that because of its quantity, quality, concentration, or physical, chemical, or infectious characteristics may…pose a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed." MCL 324.11103(3).

116. Levels of hazardous substances above the cleanup criteria are "injurious" to groundwater, within the meaning of Mich Admin Code, R 323.2201(s).

117. The Cleanup Criteria Rules establish limits for, among other things, nutrients such as phosphorous and nitrogen, and metals and metalloids such as arsenic, manganese, and iron. See, e.g., Mich Admin Code, R 299.44, 299.49(EE).

118. Those limits protect both groundwater, and any surface water body that receives impacted groundwater.

119. Those limits are calculated, in part, based on parameters like pH and the water hardness of the receiving surface water body. Mich Admin Code, R 299.49(A), (G), (X).

120. Nutrients, including phosphorous and nitrite, can contaminate groundwater above applicable limits in the Cleanup Criteria Rules.

121. Wastewater exhibiting high biological oxygen demand can mobilize metals, including but not limited to iron, manganese, and arsenic, above applicable limits in the Cleanup Criteria Rules.

Compensation for Wildlife Lost to Illegal Discharges

122. As detailed in the previous sections, polluted discharges to surface waters can be harmful, even deadly, to aquatic life living in the affected waters.

123. By law, wild fish and aquatic life belong to the People of the State of Michigan. MCL 324.48702(1), MCL 324.40105.

124. Michigan law allows the Attorney General to file a common law conversion claim, on behalf of the People of the State of Michigan, against parties whose conduct destroys wild fish and aquatic life. *Attorney General v Hermes*, 127 Mich App 777, 784–786 (1983).

Parts 301 and 303

125. Michigan enacted Part 303 of NREPA to protect and conserve Michigan's wetlands. MCL 324.30302.

126. Wetland conservation is "a matter of state concern since a wetland of 1 county may be affected by acts on a river, lake, stream, or wetland of other counties." MCL 324.30302(1)(a).

127. Loss of a wetland may deprive Michigan residents of benefits like:

a. "Flood and storm control by the hydrologic absorption and storage capacity of the wetland," MCL 324.30302(b)(i);

b. "Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species," MCL 324.30302(b)(ii);

c. "Protection of subsurface water resources and provision of valuable watersheds and recharging ground water supplies," MCL 324.30302(b)(iii);

d. "Pollution treatment by serving as a biological and chemical oxidation basis," MCL 324.30302(b)(iv);

e. "Erosion control by serving as a sedimentation area and filtering basis, absorbing silt and organic matter," MCL 324.30302(b)(v); and

f. "Sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish," MCL 324.30302(b)(vi).

128. Among other things, Part 303 of the NREPA prohibits the depositing of fill material in a wetland, removal of soil or minerals from a wetland, the draining of surface water from a wetland, and construction, operation or maintenance of a use or development in a wetland without a permit. MCL 324.30304(a)–(d).

129. Inland lakes and streams are similarly regulated under Part 301 of the NREPA. MCL 324.30101 *et seq*.

130. Part 301 of the NREPA prohibits dredging, filling of bottomlands of any inland lake or stream, construction activity in bottomlands, or interference with the natural flow of inland lakes or streams without a permit. MCL 324.30102(1)(a), (b), (e).

GENERAL ALLEGATIONS

131. Currently, Defendant owns and manages animal feeding operations of at least 1,627 mature dairy cattle, 776 bred heifers, 313 heifers, 110 dairy steers, and 511 calves[1], which includes, without limitation, collecting and spreading the waste produced from the animal feeding operations on approximately 4,000 acres of land in Tuscola County and Sanilac County.

132. Defendant owns and manages the animals, animal feeding operations, waste collection and spreading equipment, waste management and disposal, and labor at the following three adjacent locations, collectively referred to as "Zimba Dairy" in this Complaint:

a. Zimba Main Farm, located at 7995 Mushroom Road;

b. Zimba Farm 2, located on Parcel No. 015-001-000-0300-00 on Crawford Road; and

c. Zimba Heifers, located at 7658 Mushroom Road.

133. Zimba Main Farm has had animal feeding operations since before 1999, and Defendant added and expanded free stall barns, calf barns, and hutches here from 2006 until 2016.

134. Since at least 2016, Defendant continuously confined and fed or maintained at least 700 mature dairy cows at Zimba Main Farm, for at least a portion of each day for 45 days in every 12-month period.

[1] These numbers are taken from Zimba Dairy, Inc.'s 2021-2022 comprehensive nutrient management plan. Upon information and belief, its animal census has grown since the preparation of this plan.

135. The production area at Zimba Main Farm spans approximately 25 acres and includes seven barns. (Exhibit A, Zimba Main Farm Overview.)

136. At Zimba Main Farm, there are two main free stall barns and a milking parlor with the capacity to confine up to 900 mature dairy cows.

137. The milking parlor at Zimba Main Farm operates 24 hours a day, milking each lactating cow two to three times daily.

138. Zimba Main Farm confines approximately 1,000 heifers/steers and approximately 500 calves in barns and hutches.

139. Zimba Main Farm has five liquid waste storage structures with a combined operational storage volume of approximately 9.38 million gallons (MG). North Storage Pond: 215' x 595' x 12', operational volume approximately 7.7 MG, South Storage Pond: 150' x 110' x 5', operational volume approximately 22,000 gallons, Concrete Storage Pond: 180' x 200' x 11.5', operational volume approximately 1.6 MG, North Small Concrete Pit: approximately 35' x 70' x 10', operational volume approximately 73,000 gallons, and South Small Concrete Pit: approximately 25' x 40' x 10', operational volume approximately 33,000 gallons.

140. The silage storage area at Zimba Main Farms spans approximately 173,500 square feet (3.98 acres).

141. Since 2020, Defendant continuously housed and fed or maintained at least 700 cattle at Zimba Farm 2, for at least a portion of each day for 45 days in every 12-month period.

142. The production area at Zimba Farm 2 spans approximately 15 acres and includes at least four barns, including two free stall barns that are each sized to confine approximately 600 mature dairy cows. (Exhibit B, Zimba Farm 2 Overview.)

143. On information and belief, Defendant plans to build another free stall barn at Zimba Farm 2 that will also be sized to confine approximately 600 mature dairy cows.

144. The milking parlor at Zimba Farm 2 operates 24-hours a day, milking each mature dairy cow two to three times daily.

145. There are two liquid waste storage structures at Zimba Farm 2 with a combined operational volume of approximately 11 MG; Crawford Rd Big Pit, 240' x 600' x 14.5', operational volume approximately 10.5 MG, and Crawford Rd Small Pit: 160' x 105' x 9', operational volume of approximately .5 MG. There is also a sand stacking pad, Big Stacking Pad, adjacent to the Crawford Rd Big Pit, 20' x 580', which can store approximately 2200 tons of CAFO waste. (*Id.*)

146. At Zimba Farm 2 there is an approximately 81,600 square feet Runoff Collection Area, which includes the Sand Stacking Pad, feed lot between the heifer barns, and the silage storage area. (*Id.*)

147. This area generates at least 1.6 MG of contaminated runoff annually.

148. The main barn at Zimba Heifers was constructed before 1999, and four additional barns were constructed east of the main barn at some point between 2013 and 2016.

149. Since at least 2019, Defendant continuously housed and fed or maintained cattle at Zimba Heifers, for at least a portion of each day for 45 days in every 12-month period.

150. The production area at Zimba Heifers spans approximately 2.5 acres and includes five barns, one liquid waste storage structure, Coop Pit: 125' x 100' x 6', with an operational volume of approximately 600,000 gallons. Solid waste is stored in two locations, north and south of the main barn. (Exhibit C, Zimba Heifers Overview.)

151. From at least 2020 until sometime in the spring of 2023, Zimba Dairy, Inc. used approximately three acres of property on Lamton Road owned by, among other people, Edward Zimba and James Walters, to store production area waste. (Exhibit D, Aerial Image of Lamton Road Area.)

152. Defendant owns and operates the animal feeding operations located at Zimba Main Farm, Zimba Farm 2, and Zimba Heifers; as a result, they are under common ownership.

153. Zimba Main Farm, Zimba Farm 2, and Zimba Heifers adjoin each other.

154. Zimba Main Farm, Zimba Farm 2, and Zimba Heifers use a common area or system for the disposal of wastes.

155. Zimba Main Farm is a "large CAFO" within the meaning of Mich Admin Code, R 323.2103(g).

156. Zimba Farm 2 is a "large CAFO" within the meaning of Mich Admin Code, R 323.2103(g).

157. Collectively, in accordance with Mich Admin Code, R 323.2102(i), Zimba Main Farm, Zimba Farm 2, and Zimba Heifers is a "large CAFO" within the meaning of Mich Admin Code, R 323.2103(g).

158. This Court determined that Defendant is a CAFO in opinions and orders dated October 13,2023 and November 21, 2023.

159. Improperly managing the CAFO waste produced at Zimba Dairy threatens nearby waters of the state with serious environmental and public health harms such as contaminated drinking water, surface water unsafe for recreation, and excess nutrients that harm aquatic life and contribute to algae blooms.

160. North Branch White Creek is a water of the state, within the meaning of MCL 324.3101(aa).

161. White Creek is a water of the state, within the meaning of MCL 324.3101(aa).

162. McCallum Drain is a water of the state, within the meaning of MCL 324.3101(aa).

163. McCallum Drain is designated for the following uses: (a) agriculture; (b) navigation; (c) industrial water supply; (d) warmwater fishery; (e) other indigenous aquatic life and wildlife; (f) partial body contact recreation; (g) fish consumption; and (h) total body contact recreation from May 1 through October 31.

164. McCallum Drain, at least from Gilford Road south approximately 1,700 feet, is an inland stream within the meaning of MCL 324.30101(i)(*ii*). (Exhibit E, Partial Map of Impacted Resources at Zimba Dairy.)

165. McCallum Drain, at least from 1,700 feet south of Gilford Road continuing south to beyond Mushroom Road, and additionally from McCallum Drain east on McCallum Drain Branch No. 2, is a wetland, within the meaning of MCL 324.30301(n). (*Id.*)

166. McCallum Drain flows to the North Branch White Creek, which meets the South Branch White Creek and converges to become White Creek, which flows to the Cass River, which flows into the Shiawassee River, which flows to the Saginaw River, and ultimately into Lake Huron at Saginaw Bay.

167. Defendant has approximately 176,000 square feet of sileage storage, which produces a significant amount of sileage leachate, and which Defendant fails to collect and prevent from discharging.

168. Sileage[2] is processed and partially fermented plant matter that must be stored at the appropriate moisture level and airtight to allow it to further ferment.

169. Sileage is used as cattle feed.

170. Sileage, through the fermenting process, produces leachate, which is high in nutrients and is acidic.

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[2] Throughout this litigation, Defendant has referred to the supplemental feed at Zimba Dairy as "hayleage." Hayleage is sileage made from grasses; it has all of the characteristics of the more common corn-based sileage.

171. Sileage leachate also exhibits high biochemical oxygen demand, which means that it consumes readily available oxygen in the natural environment.

172. For comparison, the standard biochemical oxygen demand of raw municipal wastewater is approximately 500 mg/L, whereas the standard biochemical oxygen demand of sileage leachate ranges from 20,000 mg/L to 80,000 mg/L.

Defendant's Refusal to Permit its CAFO

173. By 2016, Defendant was operating a large CAFO, but failed to first apply for an NPDES permit, in accordance with Mich Admin Code, R 323.2196(e) (requiring an AFOs that becomes a CAFO to apply for NPDES permits at least 180 days before becoming a CAFO.)

174. Once EGLE determined that Defendant exceeded the regulatory threshold for requiring a CAFO permit, the agency sent Defendant a letter asking it to apply for a CAFO permit by September 28, 2018, or alternatively to produce evidence supporting that its animal feeding operations were exempt from permit requirements. (Exhibit F, 6/29/18 Letter.)

175. Defendant did not provide a written response to EGLE's June 29, 2018 letter, and did not apply for a CAFO permit or offer any proof that it was exempt from permitting requirements.

176. In 2021, EGLE confirmed through aerial imagery that Defendant expanded its animal feeding operations to three adjacent sites that are large enough to house approximately 1,600 mature dairy cows and at least 1,200 other cattle,

including additional permanent animal housing and waste storage structures that were built after June 29, 2018.

177. In 2022, EGLE confirmed after reviewing Defendant's records that the animal feeding operations housed 1,617 mature dairy cows and 1,710 other cattle.

Defendant's Improper Handling of CAFO Waste Kills Thousands of Fish

178. In the fall of 2021, in response to citizen complaints about thousands of dead fish in North Branch White Creek near Phillips Road and Deckerville Road, first a conservation officer and then a fisheries biologist from the Michigan Department of Natural Resources (DNR) inspected the area to investigate the source of the fish kill, and the extent of harm to the natural resources. (See Exhibit G, DNR Damage Assessment, Figures 2, 3, 4, 6, 7, 8, 9.)

179. The fish kill site was immediately downstream from stockpiled production area waste, located northeast of Zimba Dairy along Lamton Road. (*Id.*, Figure 1.)

180. The killed fish include Bluegill, Pumpkinseed Sunfish, Hybrid Sunfish, Northern Pike, and Smallmouth Bass, which are popular sport fish. (*Id.*)

181. North Branch White Creek serves as a nursery for these sport fish, which migrate to the Cass River, which is popular with anglers. (*Id.*)

182. The killed fish include Johnny Darter, Blackside Darter, Greenside Darter, Rainbow Darter, Barred Fantail Darter, Bluntnose Minnow, Central

Stoneroller, Common Shiner, Creek Chub, Hornyhead Chub, Northern Hog Sucker, Northern Pike, Smallmouth Bass, Stonecat, White Sucker, and Yellow Perch. (*Id.*)

183. Johnny Darter is a host species for Slippershell mussels. (*Id.*)

184. Blackside Darter, Greenside Darter, and Rainbow Darter are host species for Ellipse and Rainbow mussels. (*Id.*)

185. Barred Fantail Darter, Blackside Darter, Bluntnose Minnow, Central Stoneroller, Common Shiner, Creek Chub, Hornyhead Chub, Northern Hog Sucker, Northern Pike, Smallmouth Bass, Stonecat, White Sucker, and Yellow Perch are host species for Fluted-shell mussels. (*Id.*)

186. Of those mussels, Slippershell are listed as threatened, while Ellipse, Rainbow, and Fluted-shell are listed as species of special concern. (*Id.*)

187. After completing its investigation, the DNR estimated the cost of replacing the killed fish at $49,497.73. (*Id.*)

188. That estimated cost does not include the value of other killed aquatic life, such as mussels, reptiles, amphibians, nor does it include the loss of ecological value, the loss of recreational value to nearby fisheries, or any other value besides the replacement cost of the killed fish. (*Id.*)

189. The day after the fish kill was reported, EGLE along with a DNR Fisheries Biologist inspected the area and observed a stockpile of production area waste directly above North Branch White Creek, covering more than three acres. In addition to manure, the stockpiled waste also contained remnants of dead cattle.

(Exhibit H, Stockpiled Waste Photos; see also Exhibit G, DNR Damage Assessment, Figure 5.)

190. EGLE observed runoff from the stockpiled waste flowing into North Branch White Creek. (Exhibit I, Photos of Runoff Near North Branch White Creek.)

191. During that same inspection, EGLE staff observed black runoff flowing from the stockpiled production area waste directly into the creek, resulting in large pollution plumes and floating solids in the waterway, in apparent violation of the Part 4 Water Quality Standards, specifically Mich Admin Code, R 323.1050 (physical characteristics). (Exhibit J, Photo of Black Plume in North Branch White Creek; Exhibit K, Photo of Discharge Flowing into North Branch White Creek.)

192. During that same inspection, EGLE staff measured levels of dissolved oxygen in North Branch White Creek downstream of the discharge and determined that the dissolved oxygen levels in this area were only 2.84 mg/L and 2.52 mg/L, in violation of Mich Admin Code, R 323.1064(1) (requiring certain waterways to maintain a minimum of 5 mg/L of dissolved oxygen); (see also Exhibit L, 4/19/22 Enforcement Notice.)

193. During that same inspection, for reference, EGLE measured levels of dissolved oxygen in North Branch White Creek upstream of the discharge, and those levels were 7.52 mg/L, well within the requirements of Mich Admin Code, R 323.1064(1).

194. The next day, EGLE staff performed additional water testing near the runoff site, which revealed high biochemical oxygen demand, which is indicative of

poor water quality, and high levels of numerous pollutants, in violation of the Part 4 Water Quality Standards, specifically Mich Admin Code, R 323.1062(1) (limiting microorganisms by proxy limits of *E. coli*) and Mich Admin Code, R 323.1057 (limiting toxic substances).

195. Most shocking, the amounts of *E. coli* were over 230 times legal limits. Compare (Exhibit M, *E coli* Lab Results from 9/14/21 (water testing results showed *E. coli* levels in North Branch White Creek of 83,840 CFU/mL and 90,467 CFU/mL)) with Mich Admin Code, R 323.1062(1) (limiting *E. coli* in this location at this time to no more than 1,000 CFU/mL.)

196. EGLE staff subsequently contacted James Walters, the owner of the property where the discharge originated, who confirmed that Edward Zimba, Defendant's registered agent, President, Treasurer, and Director, used the property to store waste.

197. During its inspection of the stockpiled production area waste and surrounding animal feeding operations, EGLE staff also observed additional discharges coming directly from Zimba Main Farm into a roadside ditch on Lamton Road. (Exhibit N, Photos of Discharge from Zimba Main Farm to Lamton Road Ditch.)

198. Following its September 2021 inspections, EGLE issued an enforcement notice determining there was a failure to obtain a CAFO permit as required by Rule 323.2196(3) as well as unlawful discharges of agricultural

wastewater in violation of MCL 324.3109(1). (Exhibit L, 4/19/22 Enforcement Notice.)

199. That enforcement notice required Defendant to cease all unlawful discharges, to provide ownership information and operational contracts for its animal feeding operations, and to confirm whether it would permit EGLE staff to enter its property for additional inspection. (*Id.*)

200. The enforcement notice further stated that failure to comply with the applicable law would result in additional "fines, penalties, or other actions." (*Id.*)

201. Defendant refused additional inspection of its property by EGLE personnel, did not apply for an NPDES permit, did not provide the requested ownership information and operational contracts, and continued operating Zimba Dairy as an unpermitted CAFO.

Placement of Culverts in Wetlands and Stream Areas

202. McCallum Drain, which is part of the Tuscola County drain system, runs through the west side of property owned by Edward Zimba that Defendant uses for its animal feeding operations. McCallum Drain consists of a combination of wetlands and inland stream.

203. EGLE reviewed aerial photos and determined that 629 feet of McCallum Drain appeared to be enclosed. (Exhibit O, McCallum Drain Aerial.)

204. EGLE staff conducted a site visit on September 30, 2021 and observed fill and culverts placed on bottomlands and in wetlands in McCallum Drain Branch

#2, enclosing approximately 640 feet of the drain. (Exhibit L, 4/19/22 Enforcement Notice.)

205. After that site visit, and after reviewing documentation from the Tuscola County Drain Commissioner, EGLE staff confirmed that 28 additional culverts had been placed on stream bottomlands and wetlands within the McCallum Drain. (*Id.*)

206. Defendant directed the filling and culvert placement activities.

207. Through its corporate officer, Edward Zimba, Defendant entered into an agreement with the Tuscola County Drain Commissioner regarding the fill and culverts but that agreement does not address the Part 301 and 303 violations. (Exhibit P, Drain Commissioner Agreement.)

208. Defendant refused EGLE further entry to fully inspect the drain and it never applied for after-the-fact permits under either Part 301 or Part 303 of the NREPA.

Site Inspections Pursuant to Administrative Warrants

209. On September 28, 2022, the Tuscola County District Court issued an administrative warrant authorizing EGLE to inspect Parcel No. 018-036-000-1200-01, owned by Edward Zimba, James M. Walters, and others, and Parcel Nos. 015-001-0800-00, 015-001-000-0600-03, 015-001-000-700-00, 015-001-000-400-02, 015-001-000-400-01, 015-001-000-0300-00, 015-001-000-0100-02, 015-001-000-0100-06, 015-012-000-0200-02, 015-012-000-0100-03, 015-012-000-0100-04, 015-012-000-

0100-06, and 015-012-000-0100-05, all owned by Edward Zimba. (Exhibit Q, Aerial Imaging indicating Tuscola Co. Parcels).

210. EGLE executed the Tuscola County warrant on October 12, 2022 and November 1, 2022.

211. On October 11, 2022, the Sanilac County District Court issued an administrative warrant authorizing EGLE to inspect Parcel Nos. 140-006-300-010-10, 140-006-300-030-30, and 140-006-300-020-02, all owned by Edward Zimba, for compliance with Part 31 of the NREPA. (Exhibit R, Aerial Imaging indicating Sanilac Co. Parcels).

212. EGLE executed the Sanilac County administrative warrant on October 12, 2022.

213. On October 11, 2022, a manure tanker containing CAFO waste from Zimba Dairy spilled into the McCallum Drain, west of Zimba Main Farm, causing a continuing violation of Mich Admin Code, R 323.1050(a) and (b) (limits on unnatural turbidity and color) that was still apparent October 12, 2022.

214. EGLE listed and described the violations it observed upon executing the warrants for administrative inspections in the March 3, 2023 Violation Notice. (Exhibit S, 3/3/23 Violation Notice.)

215. Among other things, the violation notice included water quality data collected from the production area at Zimba Main Farm, Zimba Farm 2, Zimba Heifers, the Lamton property, and portions of McCallum Drain upstream and downstream of those production areas. (*Id.*, Tables 1 and 2.)

216. That water quality data demonstrated violations of the following water quality standards in McCallum Drain, west of Zimba Main Farm:

a. Mich Admin Code, R 323.1064(1) (establishing minimum allowable amount of dissolved oxygen);

b. Mich Admin Code, R 323.1057 (limiting toxic amounts of ammonia);

c. Mich Admin Code, R 323.1057 (limiting toxic amounts of chloride);

d. Mich Admin Code, R 323.1051 (limiting total dissolved solids); and

e. Mich Admin Code, R 323.1062 (limiting microorganisms via proxy limit specific to *E. coli*). (*Id.*)

217. Further, EGLE observed unnatural amounts of biological (bacterial and/or fungi) slimes in McCallum Drain, immediately below a tile draining from Farm 2, in apparent violation of Mich Admin Code, R 323.1060 (limiting excess nutrients and prohibiting, among other things, excess bacterial and fungal growth). (*Id.*; see also Exhibit T, Slime Photo.)

218. Water quality data also demonstrated that CAFO waste from Zimba Dairy contained, without limitation, high levels of nutrients and oxygen demanding substances, toxic amounts of copper, ammonia, and chloride, and high levels of *E. coli*. (Exhibit S, 3/3/23 Violation Notice.)

219. During these authorized inspections, EGLE determined that Defendant confined and fed sileage to well over 700 mature dairy cows in large, permanent structures. (Exhibit U, Photos of Confined Dairy Cows at Zimba Main Farm.)

220. During these authorized inspections, EGLE observed uncontained and poorly controlled CAFO waste and indications that CAFO waste was discharging to both surface water and groundwater, including, without limitation:

a. CAFO waste discharging to the ground from near the sileage storage area at Zimba Main Farm into the ditch west of the production area (which connects to the McCallum Drain) (Exhibit V, Photos of Sileage Leachate Runoff at Main Farm; see also Exhibit S, 3/3/23 Violation Notice, Table 1, D5 (water quality data from ditch receiving this runoff));

b. CAFO waste at the Zimba Main Farm discharging to the ground (Exhibit W, Photo of Discharge to Ground at Zimba Main Farm; see also Exhibit S, 3/3/23 Violation Notice, Table 1, D3 (water quality data from tile inlet receiving this runoff));

c. CAFO waste discharging to the ground east of the production area at the Zimba Main Farm (Exhibit X, Photos of Additional Discharge to Ground at Zimba Main Farm);

d. CAFO waste from Zimba Heifers discharging to the ground (Exhibit Y, Photos of Discharge to Ground at Zimba Heifers; see also Exhibit Z, Photo of D4 Sampling Location in McCallum Drain; Exhibit S, 3/3/23 Violation Notice, Table 1, D4 and D6);

e. CAFO waste from Zimba Farm 2 pooling and discharging to the ground (See Exhibit AA, Photos of Discharges at Zimba Farm 2; see also Exhibit S, 3/3/23 Violation Notice, Table 1, D1);

f. Evidence of a discharge from Zimba Farm 2 via a pipe to the west bank of McCallum Drain (See Exhibit T, Slime Photo); and

g. CAFO waste from Lamton Road discharging to ground resulting in burned vegetation in the adjacent field and pooling behind permeable sand berms Defendant created adjacent to North Branch White Creek (see Exhibit BB, Photos of Lamton Road Site; see also Exhibit S, 3/3/23 Violation Notice, Table 1, D2.)

221. During these authorized inspections, EGLE inspected the soil near pooled discharges of CAFO waste to the ground and determined that the soil was

permeable, allowing for liquids to transmit from the surface to the subsurface groundwater aquifer.

222. During these authorized inspections, EGLE reviewed available paperwork and determined that some of the waste storage structures at Zimba Heifers did not meet the NRCS 313 Standard, or an environmental performance alternative.

223. During these authorized inspections, Defendant did not have any documentation demonstrating that the liquid waste storage structures at either Zimba Main Farm or Zimba Farm 2 meet the NRCS 313 Standard, or an environmental performance alternative.

224. During these authorized inspections, EGLE staff more fully inspected McCallum Drain and confirmed installation of numerous culverts and related fill material within the section of McCallum Drain north of Mushroom Road and south of Guilford Road, and the entirety of McCallum Drain Branch No. 2 through property owned by Edward Zimba and used by Defendant. (Exhibit E, Partial Map of Impacted Resources at Zimba Dairy (indicating which portions of the drain are wetlands, within the meaning of MCL 324.30301(n), which portions are an inland stream, within the meaning of MCL 324.30101(i)(ii*)*, with further red indications where those natural resources have been filled in or enclosed).)

225. Specifically, EGLE staff observed 3-foot diameter culverts installed on stream bottomlands in the drain, enclosing 171 linear feet of stream. (*Id*.)

226. Defendant disturbed a total of 0.25 acres of wetland by placing 8- and 12-inch diameter culverts and related fill material in a 676-foot segment of linear wetland and placing additional three-foot diameter culverts in 17 small segments covering an additional 432 linear feet of linear wetlands. (*Id.*)

227. Defendant, through its President, Treasurer, and Director (Edward Zimba) and its Secretary and Director (Melanie Zimba), met with the Department on April 21, 2023, in accordance with MCL 324.1511(1)(a), and discussed potentially resolving the violations listed and described in the violation notices issued on April 22, 2022 and March 3, 2023.

228. As of April 3, 2024, Defendant failed to fully resolve the alleged violations, notably refusing to apply for an NPDES permit.

COUNT I
VIOLATION OF PART 31–FAILURE TO PERMIT CAFO

229. Paragraphs 1 through 228 are hereby realleged and incorporated by reference.

230. Under Mich Admin Code, R 323.2196(1) CAFOs are point sources that require NPDES permits.

231. This Court has determined that Defendant operates Zimba Dairy as a CAFO.

232. Since at least 2016, Defendant has maintained Zimba Dairy as a CAFO without applying for coverage under an NPDES permit.

233. Failing to permit Zimba Dairy is a continuous violation of Mich Admin Code, R 323.2196(1).

234. Defendant is subject to a civil fine of not less than $2,500 and no more than $25,000 per day of violation of rules promulgated under Part 31. MCL 324.3115(1).

235. This Court may order Defendant to comply with Part 31 and award reasonable attorney fees and costs. MCL 324.3115(1).

COUNT II
VIOLATIONS OF PART 31–UNLAWFUL DISCHARGES TO SURFACE WATER

236. Paragraphs 1 through 235 are hereby realleged and incorporated by reference.

237. Under Part 31, a person may not directly or indirectly discharge substances into the waters of the state that are or may be injurious to, among other things, public health, safety, or welfare, and recreational or other uses of the receiving waters. MCL 324.3109(1)(a) and (b).

238. Part 31 prohibits discharges to surface water without a valid permit. MCL 324.3112(1).

239. Defendant has a litany of unpermitted discharges, including discharges from its stockpiled production area waste, from its production areas, from its manure and sileage piles, and from its improperly engineered waste storage structures to McCallum Drain, North Branch White Creek, ditches connecting to

these waterways, and ultimately the Cass River, the Saginaw River, and Lake Huron at Saginaw Bay.

240. Defendant is subject to a civil fine of not less than $2,500 and no more than $25,000 per day of violation of Part 31. MCL 324.3115(1).

241. This Court may order Defendant to comply with Part 31 and award reasonable attorney fees and costs. MCL 324.3115(1).

COUNT III
VIOLATIONS OF PART 31–CAUSING OR CONTRIBUTING TO WATER QUALITY STANDARD EXCEEDANCE

242. Paragraphs 1 through 241 are hereby realleged and incorporated by reference.

243. Under Part 31, a person may not directly or indirectly discharge substances into the waters of the state that are or may be injurious to, among other things, public health, safety, or welfare, and recreational or other uses of the receiving waters. MCL 324.3109(1)(a) and (b).

244. Part 4 Water Quality Standards set thresholds and limits on toxins, dissolved oxygen, bacteria, and other criteria needed to maintain aquatic life and healthy safe water quality. Mich Admin Code, R 323.1041 *et seq.*

245. Defendant's discharges to surface water have directly contributed to violation of Part 4's water quality standards for dissolved oxygen, *E. coli* bacteria, and several toxic substances, including copper, ammonia, and chloride.

246. Defendant is subject to a civil fine of not less than $2,500 and no more than $25,000 per day of violation of rules promulgated under Part 31. MCL 324.3115(1).

247. This Court may order Defendant to comply with Part 31 and award reasonable attorney fees and costs. MCL 324.3115(1).

COUNT IV
VIOLATIONS OF PART 31 AND RULE 2205–INJURIOUS DISCHARGES TO GROUNDWATER

248. Paragraphs 1 through 247 are hereby realleged and incorporated by reference.

249. Under Part 31, a person may not directly or indirectly discharge substances into the waters of the state that are or may be injurious to, among other things, public health, safety, or welfare, and recreational or other uses of the receiving waters. MCL 324.3109(1)(a) and (b). Rule 2205 of the Part 22 Rules also prohibits all unauthorized, injurious discharges to groundwater. Mich Admin Code, R 323.2205.

250. Defendant discharges CAFO waste to permeable ground around its production areas and into the groundwater aquifers immediately below the production areas.

251. Under Part 31, Defendant is subject to a civil fine of not less than $2,500 and no more than $25,000 per day of violation of MCL 324.3112(1) and Mich Admin Code, R 323.2205. MCL 324.3115(1).

252. Under Part 31, this Court may order Defendant to comply with MCL 324.3112(1) and Mich Admin Code, R 323.2205 and award reasonable attorney fees and costs. MCL 324.3115(1).

COUNT V
PUBLIC NUISANCE

253. Paragraphs 1 through 252 are hereby realleged and incorporated by reference.

254. Under Part 31, violations of MCL 324.3109 constitute evidence of a prima facie public nuisance that the Attorney General may abate. MCL 324.3109(6).

255. Each of Defendant's unlawful discharges discussed in Counts II, III, and IV are prima facie evidence that Zimba Dairy is a public nuisance.

256. Under Part 31 and at common law, this Court may abate a public nuisance.

COUNT VI
CONVERSION–FISH KILLED BY DISCHARGES

257. Paragraphs 1 through 256 are hereby realleged and incorporated by reference.

258. The State owns the fish and aquatic life whose deaths were caused by Defendant's malfeasance and holds them in trust for the People of the State of Michigan. MCL 324.48702(1); MCL 324.40105.

259. Defendant had a duty not to interfere with the State's property, let alone destroy it.

260. Defendant knew or should have known that its actions would cause discharge of hazardous agricultural waste into North Branch White Creek, killing fish and aquatic life.

261. Defendant's actions wrongfully exerted dominion over the fish and aquatic life and caused their deaths, which denies and is inconsistent with the rights of the People of the State of Michigan.

262. Defendant's actions constitute a taking, and it was contrary to law for Defendant to take the State's Michigan's fish and aquatic life without authorization. MCL 324.48702(1), MCL 324.40105.

263. On behalf of the People of the State of Michigan, the Attorney General seeks damages from Defendant for converting the State's fish and aquatic life.

264. Plaintiff DNR estimates the replacement costs for the dead fish at $49,497.73.

COUNT VII
PART 303 VIOLATIONS–FILLING WETLANDS

265. Paragraphs 1 through 264 are hereby realleged and incorporated by reference.

266. Michigan law prohibits filling, dredging, construction, development, and drainage of wetlands without a permit. MCL 324.30304(a)–(d).

267. Defendant installed culverts and fill material through a linear wetland area 676 feet long.

268. Defendant installed additional three-foot culverts and fill material in 17 additional wetland segments, 432 linear feet in all.

269. MCL 324.30316(1) subjects Defendant to a civil fine of up to $10,000 per day of violation of Part 303 of the NREPA.

270. MCL 324.30316(4) authorizes this Court to require Defendant to restore the regulated wetlands affected by its violations to the original condition immediately before the violations.

COUNT VIII
PART 301 VIOLATIONS–ENCLOSING INLAND STREAM

271. Paragraphs 1 through 270 are hereby realleged and incorporated by reference.

272. Michigan law prohibits construction on bottomlands and disturbances of inland streams without a permit. MCL 324.30102(1)(a), (b).

273. Defendant placed seven three-foot diameter culverts in bottomlands without a permit, enclosing 171 linear feet of a stream.

274. MCL 324.30112(2) subjects Defendant to a civil fine of up to $5,000per day of violation of Part 301 of the NREPA.

275. MCL 324.30112(1) authorizes this Court to order Defendant remove the culverts and restore the stream and bottomlands affected by Defendant's violations to the original condition immediately before the violations.

DEMAND FOR JUDGMENT

Plaintiffs respectfully request that this Honorable Court grant the following relief:

A. Abate the public nuisance at Zimba Dairy; by enjoining Defendant from unlawfully discharging waste into waters of the state;

B. Affirm the Court's earlier holding that Zimba Dairy, collectively, is a CAFO, within the meaning of Mich Admin Code, R 323.2102(i).

C. Find that the Defendant is in violation of Parts 31, 301, and 303 of the NREPA.

D. Order Defendant to obtain and comply with an NPDES permit;

E. Find that Defendant is not entitled to the groundwater permit exemption under Mich Admin Code, R 323.2210(f) because its discharge does not meet the requirements of Mich Admin Code, R 323.2204;

F. Order Defendant to remove the culverts and associated fill material and restore the McCallum Drain and McCallum Drain Branch #2 to the conditions that existed prior to the unauthorized culvert installations.

G. Order Defendant to pay civil fines of not less than $2,500 and no more than $25,000 per day of violation of Part 31 and associated rules;

H. Order Defendant to pay no less than $49,497.73 for conversion of fish and aquatic life from North Branch White Creek;

I. Order Defendant to pay civil fines of $5,000 per day of violation of Part 301;

J. Order Defendant to pay civil fines of $10,000 per day of violation of Part 303;

K. Order Defendant to pay reasonable attorney fees and costs; and

L. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

/s/ *Elizabeth Morrisseau*

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Date: April 9, 2024

LF: Zimba, Edward (EGLE & DNR v)/AG# 2022-0354128-C/First Amended Complaint 2024-04-09