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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Deb Coon, Randal Coon, Carolyn Dostert, Alan Dostert, Lee Fraase, Carol Hoveskeland, Lee Fischer, Arnetta Frueh, Jan Kasowski, Paul Kasowski, Bill Marcks, Jackie Marcks, Gerald Marcks, David Percel, Liana Stout, Roy Thompson, Shiela Thompson, Judith VonBank, Robert VonBank, Craig Wendt, and Vicki Wendt, Appellants, vs. North Dakota Department of Health, and Rolling Green Family Farms, RE, LLP, Appellees.	)	Supreme Court No. 20170089 Cass County District Court Case No.: 09-2016-CV-02561

Appeal from Judgment Entered on March 6, 2017
Case No. 09-2016-CV-02561
County of Cass, East Central Judicial District
The Honorable Douglas R. Herman, Presiding

BRIEF OF APPELLANTS

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the Health Department had authority under its rules to grant Rolling Green, a concentrated animal feeding operation, a permit other than a North Dakota Pollutant Discharge Elimination System Permit, given that N.D.A.C. § 33-16-03.1-05 states "a concentrated animal feeding operation … must obtain a North Dakota pollutant discharge elimination system permit."

[¶ 2] Whether N.D.C.C. § 23-01-04.1's prohibition on "adopting" environmental rules more stringent than corresponding federal law also immediately incorporates revisions to federal environmental law as state environmental law (thus abrogating the need for rulemaking) when federal environmental law previously corresponding to state law is deemed weakened by the regulatory agency.

[¶ 3] Whether, following the Health Department's formal finding of the need for public notice and comment on Rolling Green's permit, the Health Department improperly denied the opportunity for further public comment when Rolling Green materially revised its permit application after the close of the comment period, including Rolling Green's first mention of 199,680 piglets at the facility (10% of which would be composted).

[¶ 4] Whether the Health Department approved Rolling Green's permit in violation of Appellants' right to due process under the North Dakota Constitution and United States Constitution to present comments to the Health Department on Rolling Green's final application, given that 199,680 piglets would likely cause Rolling Green to exceed the state law odor setback.

II. STATEMENT OF THE FACTS

[¶ 5] This case arises from Rolling Green Family Farms, RE, LLP's ("Rolling Green"), application to the North Dakota Department of Health ("NDDH") for an Animal Feeding Operation ("AFO") permit pursuant to N.D.A.C.ch. 33-16-03.1, and NDDH's subsequent approval of this permit. NDDH3690–NDDH4005 (initial permit application), NDDH4201–NDDH4544 (revised application), NDDH5316–NDDH5842 (final application); NDDH6208–NDDH6229 (approval).[1]

[¶ 6] On December 10, 2015, Rolling Green applied to NDDH to obtain an Animal Feeding Operation ("AFO") permit to operate its proposed Concentrated Animal Feeding Operation ("CAFO") approximately two miles southeast of Buffalo, North Dakota. NDDH4202–NDDH4544. The application consisted of a basic NDDH application form (App. 54-57) with a more detailed application, including engineering sheets and operation plans, attached to the form. NDDH4202–NDDH4544. Rolling

[1] Because this case has a large administrative record, many of the record citations in this brief refer to bates numbers. A copy of nearly all of the bates-numbered administrative record is contained in Doc. No. 290 and Doc. No 473. These two CDs contain color copies of several hundred separate Odyssey docket entries that were also electronically filed with the district court as the administrative record. These CDs are on file with the Court. Because they are significantly easier to reference than the voluminous Odyssey entries, all bates number citations in this brief should be construed as referring to the two CDs at Doc. No. 290 and Doc. No. 483. Additionally, the most important parts of the record are also contained in Appellants' Appendix.

Green's application stated that its proposed facility would be "a 9,056 head swine sow facility" with swine enclosed in several large structures, and the "waste from the facility will be disposed of on surrounding cropland via an injection applicator system." App. 56 (NDDH4209). The detailed application stated waste would be applied to 3312.4 acres of surrounding farm land. NDDH4208.

[¶ 7] On December 28, 2015, NDDH sent notice to the public of its draft AFO permit for Rolling Green and requested public comment on this draft permit. App. 58-72 (NDDH4570–NDDH4584). After receiving a request for a public hearing on this permit, NDDH extended the comment period until March 19, 2016 and held a hearing on March 17, 2016. NDDH4680, NDDH5843.

[¶ 8] Many of the above-captioned Appellants—almost all of whom live and work either on property adjacent to or in the immediate vicinity of Rolling Green's proposed CAFO (*see* Affidavits of Appellants, Doc ID#s 497-502)—provided oral comment at the public hearing and submitted their own written comments. NDDH0001–NDDH2882. In addition, the undersigned counsel drafted and filed written comments on behalf of the above-captioned Appellants. App. 73-90 (NDDH0667–NDDH0684). The lead concern in these comments was that NDDH did not have authority to grant Rolling Green an AFO permit because NDDH's rules expressly state that a CAFO "must obtain a North Dakota pollutant discharge elimination system permit." N.D.A.C. § 33-16-03.1-05. Apart from this legal concern, these comments also included detailed technical concerns related to inadequate land application area for waste produced by the facility, improper application locations on sensitive land, apparent structural defects in the engineering

plans, odor concerns, and a high risk of environmental damage and health effects. App. 73-90 (NDDH0667–NDDH0684).

[¶ 9] After the public comment period closed, NDDH sent a letter to Rolling Green that copied verbatim many of the technical concerns from Appellants' comments and asked Rolling Green to provide additional application materials to support its permit application. App. 91-95 (NDDH5004–NDDH5008) (requiring corrections to sixteen inaccuracies in the Nutrient Management Plan and requesting nineteen additional design plan requirements).

[¶ 10] In response, Rolling Green substantially altered its application by providing new and revised documents between March 14 and June 20, 2016. First, and of particular importance to this appeal, it provided animal compost calculations that for the first time included the number of piglets that would be at the facility: 199,680. App. 96 (NDDH5022). This document, which was sent to NDDH on April 28, 2016, was *never* disclosed in any of Rolling Green's prior permit materials.[2] Second, Rolling Green nearly doubled its land application area. *Compare* NDDH4580 *with* NDDH6217. While this was responsive to one of the Appellants' concerns—inadequate land application area—it introduced a new problem: Rolling Green had added multiple square miles of new land application area to the project around the Buffalo community, some of which appear to be particularly sensitive to nutrient loading and runoff. In all, Rolling Green revised or

[2] It should almost go without saying that Appellants would have filed different comments if the record at the time of public comment disclosed the actual number of animals that would be at the facility.

added a total of 222 pages to its application after the public comment period closed. Brief of Appellants, App. 111-112, Doc. ID. 480, ¶ 22 (providing a list of the pages added/modified, the date each document was submitted to NDDH, and a short description of each document).

[¶ 11] On June 20, 2016, NDDH deemed Rolling Green's application complete. On June 30, 2016, NDDH finalized its response to the public comments. NDDH5843–NDDH5943. Of importance to the issues presented for appeal to this Court, that response addressed Appellants' concern that NDDH had no authority to issue an AFO permit and must issue a NDPDES permit instead. Specifically, NDDH stated as follows:

> In 2003 and 2008, EPA adopted rules requiring certain non-discharging facilities to apply for National Pollutant Discharge Elimination System (NPDES) permit coverage, but these requirements were held invalid by *Waterkeeper Alliance v. EPA,* and *National Pork Producers Council v. EPA.* Current EPA rules require only discharging facilities to obtain an NPDES permit - 40 CFR § 122.23(d). The Department implements the NPDES program in accordance with current EPA rules. Accordingly, the proper permit for this facility is not an NPDES permit but instead an animal feeding operation Approval to Operate permit under NDAC § 33-16-03.1. The Department is in the process of reviewing its rules to determine if any need updating. But even if the Department's rules could be read as requiring a rule that would require a non-discharging facility to apply for an NPDES permit, such requirement would not be grounds for denying this permit or issuing any type of enforcement action against the facility. See NDCC § 23-01-04.1.

App. 113 (NDDH5915).

III. STATEMENT OF THE CASE

[¶ 12] On August 3, 2016, NDDH's Environmental Division recommended approval of the permit, and NDDH granted the final permit (AFO#0853) the following day. NDDH6208–6224.

[¶ 13] The appeal to district court followed. Appellants filed their appeal in Cass County District Court on September 2, 2016, and the case was assigned to the Honorable Judge Douglas R. Herman. Before the District Court, the Appellants argued first that NDDH does not have the authority, based upon the plain language of its rules, to approve an AFO permit for Rolling Green because Rolling Green is a CAFO and therefore "must obtain a North Dakota pollutant discharge elimination system permit." N.D.A.C. § 33-16-03.1-05. Second, Appellants argued that due to the substantial revisions to Rolling Green's application, Appellants were not afforded an opportunity to comment on the actual project and that this matter must be remanded to NDDH to allow public comment on Rolling Green's *actual* permit application. The district court upheld NDDH's permit approval. Appellants appealed the district court's judgment to this Court on March 13, 2017.

IV. STANDARD OF REVIEW

[¶ 14] The standard of review for this appeal is controlled by the Administrative Agencies Practice Act, N.D.C.C. § Ch. 28-32. Under N.D.C.C. § 28-32-46, a decision of an agency "shall be remanded to the agency" if, *inter alia*, "the order is not in accordance with the law" or "the order is in violation of the constitutional rights of the appellant." *Id.* Courts "review questions of law de novo" under the Administrative Agencies Practice Act. *Cudmore v. Director of N. Dakota Dep't of Transp.,* 2016 ND 64, ¶ 6, 877 N.W.2d 52. This Court gives deference to agency interpretations of its own implementing statute and regulations, but only where such "interpretation does not contradict clear and unambiguous statutory language." *Indus. Contractors, Inc. v. Workforce Safety & Ins..*, 2009 ND 157, ¶ 6, 772 N.W.2d 582. "No deference is called for when the regulating

language is clear." *Matter of Permits to Drain related to Stone Creek Channel Improvements & White Spur Drain*, 424 N.W.2d 894, 900 (N.D. 1988). "[R]ules have the force and effect of law until amended or repealed by the agency." N.D.C.C. § 28-32-06.

V. SUMMARY OF THE ARGUMENT

[¶ 15] NDDH granted Rolling Green an animal feeding operation permit ("AFO Permit") without any legal authority to do so. N.D.A.C. § 33-16-03.1-05(1) plainly states that "a concentrated animal feeding operation … must obtain a North Dakota pollutant discharge elimination system permit." If there is any ambiguity in that language (there is none), the Administrative Code's definition of CAFO further states that "All concentrated animal feeding operations are required to obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01." N.D.A.C. § 33-16-03.1-03(4). This language is clear and unequivocal.

[¶ 16] But the permit that NDDH granted to Rolling Green was not a NDPDES Permit; it was an AFO Permit. AFO Permits are expressly reserved by NDDH rules for AFOs that are <u>not</u> CAFOs. N.D.A.C. § 33-16-03.1-05. In Appellants' view, the case should end here. NDDH's action was unlawful.

[¶ 17] But NDDH instead argued in its response to comments that because a federal court struck down the federal rule requiring CAFOs to obtain federal NPDES permits under the Clean Water Act, 42 U.S.C. § 1251 *et seq.*, NDDH can act as though it had changed its own properly promulgated rules to match the rules modified by the federal court without going through rulemaking. That position is wrong as a matter of at least two North Dakota statutes requiring NDDH to revise rules through proper rulemaking (N.D.C.C. § 23-01-04.1(3), N.D.C.C. § 28-32-06) and North Dakota's

Constitution, which this Court has repeatedly held prevents tying state laws to outside sources that change over time. *See, e.g., McCabe v. N.D. Workers Comp. Bureau*, 1997 ND 145, ¶ 13, 567 N.W.2d 201.

[¶ 18] Further, Rolling Green did not disclose the number of piglets at its facility until after the close of the public comment period. Rolling Green then disclosed that the number was in fact 199,680. App. 96 (compost calculations).

[¶ 19] The fact that the number of actual animals was unavailable until after the comment period closed significantly prejudiced Appellants from a procedural standpoint because it prevented the Appellants from commenting on arguably the most important aspect of this swine-rearing facility: the scope and scale of its piglet production. The number of animals at a CAFO affects everything from engineering plans, to manure spreading rates, to setback distances. And here, it appears very likely that the 199,680 piglets changes the setback distance to a minimum of 1.5 miles from any "residence, church, school, business, public building, park, or campground" under N.D.C.C. § 23-25-11(7)(a), which would prevent Rolling Green from siting its facility at its proposed location. NDDH's attempt to introduce new findings of fact at oral argument before the district court (App. 131-132) arguing that Rolling Green will have less than 5,000 AU and therefore does not exceed the setback are improper post-hoc rationalizations that were not part of the administrative record. *Cf. State v. Klem*, 438 N.W.2d 798, 802 (N.D. 1989) (adopting position that post hoc rationalizations are improper in context of appellate review). This permit should therefore be remanded to NDDH develop a proper record on this issue through public comment and NDDH responses to comments.

VI. ARGUMENT

[¶ 20] NDDH erred in two distinct ways. First, NDDH erred substantively by granting Rolling Green an AFO Permit instead of a NDPDES Permit, which is contrary to what NDDH's rules explicitly require. Second, NDDH erred procedurally by not re-opening the public comment period when Rolling Green disclosed material new facts after the public comment period closed.

A. The Health Department lacked authority to grant Rolling Green a state Animal Feeding Operation Permit because concentrated animal feeding operations such as Rolling Green "are required" by N.D.A.C. § ch. 33-16-03.1 to instead obtain a more protective NDPDES Permit.

[¶ 21] N.D.A.C. § 33-16-03.1-05 ("Operations Requiring a Permit) is the fork-in-the-road provision that explains whether a livestock facility must obtain a NDPDES Permit, an AFO Permit, or no permit. It states that "[a]ny animal feeding operation that has been defined as a concentrated animal feeding operation … must obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01." N.D.A.C. § 33-16-03.1-05(1) (emphasis added). Likewise, the definition of "Concentrated Animal Feeding Operation" includes the following statement: "All concentrated animal feeding operations are required to obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01." N.D.A.C. § 33-16-03.1-03(4) (emphasis added).

[¶ 22] It is undisputed that Rolling Green is a CAFO. Therefore, the permit that it "must obtain" and is "required to obtain" under state law is "a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01." N.D.A.C. § 33-16-03.1-05(1); N.D.A.C. § 33-16-03.1-03(4).

[¶ 23] But the permit that NDDH granted Rolling Green was not a NDPDES Permit. It was an AFO Permit. Apart from the clear language of N.D.A.C. § 33-16-03.1-05(1) and N.D.A.C. § 33-16-03.1-03(4) requiring Rolling Green to obtain a NDPDES Permit, NDDH also lacked any authority to grant Rolling Green this less protective permit because NDDH's rules only allow AFO Permits to be granted to three types of facilities:

- N.D.A.C. § 33-16-03.1-05(2) states "medium animal feeding operations," such as those "within one-fourth mile of ... surface water," "must apply for a state animal feeding operation permit."
- N.D.A.C. § § 33-16-03.1-05(3) requires small animal feeding operations to obtain an AFO Permit "when the department has determined … the operation causes or is likely to cause pollution."
- N.D.A.C. § 33-16-03.1-05(4) requires any animal feeding operation "which stables or confines animals, other than the types of animals specified in the definition of medium animal feeding operation," to obtain an AFO Permit.

[¶ 24] Rolling Green fits into none of these categories because it is a CAFO. Instead, CAFOs "must obtain" a NDPDES Permit under N.D.A.C. § 33-16-03.1-05(1). NDDH's act of granting Rolling Green an AFO Permit was therefore "not in accordance with the law" and "must be modified or reversed … and … remanded." N.D.C.C. § 28-32-46.

[¶ 25] This conclusion rests upon established principles for statutory construction. This Court "construe[s] administrative regulations, which are derivatives of

statutes, under well-established principles for statutory construction." *North Dakota Dep't of Human Servs. v. Ryan*, 2003 ND 196, ¶ 11, 672 N.W.2d 649.

> Rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the legislature. Procedural rules are binding upon the agency which enacts them as well as upon the public … and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule so long as such rule remains in force. This is true even though the adoption of the rule was a discretionary function...

Havener v. Glaser, 251 N.W.2d 753, 761 (N.D. 1977). "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. *See* N.D.C.C. § 1–02–07." *Schaaf v. North Dakota Dep't of Transp.*, 2009 ND 145, ¶ 11, 771 N.W.2d 237. "In construing statutes and rules, the law is what is said, not what is unsaid, and the mention of one thing implies exclusion of another." *Sanderson v. Walsh Cty.*, 2006 ND 83, ¶ 16, 712 N.W.2d 842. N.D.A.C. § 33-16-03.1-05(1) and N.D.A.C. § 33-16-03.1-03(4) clearly and explicitly says Rolling Green must obtain a NDPDES Permit and may not obtain an AFO Permit.

B. The Health Department's decision to grant Rolling Green an AFO Permit due to a federal court striking portions of a corresponding federal law violates basic North Dakota rulemaking and legislative principles.

[¶ 26] In an attempt to explain why NDDH ignored the plain language of its rules, NDDH argued in its response to comments that it did so because a federal court struck down the analogous federal law requiring all CAFOs to obtain federal NPDES

Permits. *Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005). NDDH's position is that it "implements the NPDES program in accordance with current EPA rules." The only legal authority that NDDH presented as support for this assertion was N.D.C.C. § 23-01-04.1, which prevents NDDH from "adopt[ing]" rules "more stringent than corresponding federal regulations which address the same circumstances" and allows any person denied a permit based upon "a rule of the department which is more stringent than a corresponding federal regulation" to assert a "partial challenge to that denial."

[¶ 27] NDDH's reliance on N.D.C.C. § 23-01-04.1 is incorrect for at least four reasons. First, even assuming *arguendo* that N.D.C.C. § 23-01-04.1 somehow negated or voided NDDH's requirement that CAFOs obtain NDPDES Permits, this does not explain what authority NDDH instead had to grant a CAFO an AFO Permit instead. Second, NDDH did not "adopt[]" a rule more stringent than EPA's rule. At the time of adoption (the effective date was December 1, 2004), NDDH's rules were equivalent to EPA's. Third, N.D.C.C. § 23-01-04.1(3) requires NDDH to "review and revise" rules that become more stringent than EPA rules, but only within "nine months" of receiving a "petition" to do so. Until then, such rules "have the force and effect of law until amended or repealed." N.D.C.C. § 28-32-06. Here, NDDH has made no such amendment or repeal, even though it had twelve years to do so. And fourth, NDDH's position would unconstitutionally tie its own state law rules to changing federal standards without undergoing independent rulemaking.

1. At the time the Health Department adopted rules requiring CAFOs to obtain NDPDES Permits, the rules corresponded to equally stringent federal law and therefore were not "adopt[ed]" in violation of N.D.C.C. § 23-01-04.1(1).

[¶ 28] NDDH adopted its Chapter 33-16-03.1 rules requiring all CAFOs to obtain NDPDES permits effective on December 1, 2004. At the time of adoption, the rule was equivalent to EPA's rules, which were adopted on February 12, 2003. *Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 495 (2d Cir. 2005) ("on February 12, 2003, the EPA promulgated its Final CAFO Rule"). Specifically, EPA's rules included the same requirement that CAFOs apply for a NPDES permit that NDDH later adopted. *Id.* (citing 40 C.F.R. 122.23(d) (2003)).

[¶ 29] The word "adopts" as used in N.D.C.C. § 23-01-04.1(1) indicates an action taken by NDDH at a specific point in time. Here, that point in time was December 1, 2004 (the time that NDDH "adopt[ed]" the rule in question). NDDH does not "adopt" a rule over time—a rule's adoption occurs at a particular moment. Therefore, at the time that NDDH adopted its requirement that CAFOs "must obtain" NDPDES Permits, N.D.A.C. § 33-16-03.1-05(1), the rule was directly equivalent to EPA standards. This adoption therefore did not violate N.D.C.C. § 23-01-04.1(1) because the rule, when it was adopted, was not "more stringent" than corresponding federal rules.

2. The Department's rules requiring CAFOs to obtain NDPDES Permits have not been amended or revised and therefore "have the force and effect of law" under N.D.C.C. § 28-32-06.

[¶ 30] The Legislative Assembly created a process that directly addresses the situation where an NDDH environmental rule becomes more strict than federal law. "[A]ny person affected by [the] rule" may "petition" the department to change the rule. N.D.C.C. § 23-01-04.1(3). After receiving the petition, NDDH must then "review and

revise those rules to comply with [N.D.A.C. § 23-01-04.1] within nine months of the filing of the petition." *Id.*

[¶ 31] The Court's "primary goal when interpreting a statute is to ascertain the intent of the legislature." *Olson v. Workforce Safety & Ins.*, 2008 ND 59, ¶ 14, 747 N.W.2d 71. The intent and policy of N.D.C.C. § 23-01-04.1(3) seems clear. The Legislative Assembly intended that individuals affected by state environmental rules more stringent than EPA rules have the power to petition for the withdrawal of such rules, but that NDDH be given sufficient time (9 months) to withdraw or revise those rules in an orderly manner.

[¶ 32] NDDH's interpretation of N.D.C.C. § 23-01-04.1 would grant NDDH the authority to void and amend its rules whenever necessary, without undertaking rulemaking. NDDH may not resort to such legal contortions. Until it revises its rules through rulemaking, its current "rules have the force and effect of law until amended or repealed by the agency." N.D.C.C. § 28-32-06.

3. NDDH's position that it must ignore state law and apply different standards when federal rules are weakened unconstitutionally ties state law to outside sources that change over time.

[¶ 33] "[A] statute that attempts to incorporate future changes of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power."[3] *McCabe v. N.D. Workers Comp. Bureau*, 1997 ND 145, ¶ 13, 567 N.W.2d 201.

[3] This rule also applies to regulations because "[t]he authority of an administrative agency to adopt administrative rules is authority delegated by the legislative assembly." N.D.C.C. § 28-32-02.

Conversely, the "adoption by reference of laws or regulations of other states or the federal government in effect at the date of adoption are valid." *State v. Julson*, 202 N.W.2d 145, 152 (N.D. 1972).

[¶ 34] NDDH stated in its response to comments that the "Department implements the NPDES program in accordance with current EPA rules" and cited N.D.C.C. § 23-01-04.1 as its only support for this position. App. 113 (NDDH5915) (emphasis added). NDDH's apparent position is that it does not need to change its rules because it can simply look to "current EPA rules" to implement its NDPDES program.

[¶ 35] NDDH's position is much like the delegation of legislative authority that this Court found unconstitutional in *McCabe*, 1997 ND 145. In that case, this Court addressed a statute that defined "permanent impairment" by incorporating by reference the definition contained in the "most current edition" of an American Medical Association publication. This Court avoided finding the provision unconstitutional, but only by holding that the statute was ambiguous and construing the statute so as to adopt the "most current edition" of the publication in "in existence at the time of [the statute's] enactment." *McCabe*, ¶ 16. This Court continued on to explain that:

> Numerous other courts hold that a statute that attempts to incorporate future changes of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power. *See, e.g., International Ass'n of Plumbing and Mechanical Officials v. California Bldg. Standards Comm'n*, 55 Cal.App.4th 245, 64 Cal.Rptr.2d 129, 134 (1997); *People v. Pollution Control Bd.*, 83 Ill.App.3d 802, 38 Ill.Dec. 928, 932-933 404 N.E.2d 352, 356-357 (1980); *Gumbhir v. Kansas State Bd. of Pharmacy*, 228 Kan. 579, 618 P.2d 837, 842-843 (1980); *Board of Trustees v. City of Baltimore*, 317 Md. 72, 562 A.2d 720, 731 (1989); *Michigan Mfrs. Ass'n v. Director of Workers' Disability Compensation Bureau*, 134 Mich.App. 723, 352 N.W.2d 712, 715 (1984); *Meyer v. Lord*, 37 Or.App. 59, 586 P.2d 367, 371 (1978); *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 132-133 (S.D.1994); *Independent Community Bankers Ass'n v. State*, 346 N.W.2d 737, 744 (S.D.1984); *Woodson v. State*, 95 Wash.2d 257, 623 P.2d 683, 685 (1980).

Id. ¶ 13. Like the "most current edition" of the medical treatise in *McCabe*, NDDH's tying the implementation of its NDPDES program to "current EPA rules" without undertaking its own, independent rulemaking is an unconstitutional delegation of the legislative power entrusted to NDDH by the Legislative Assembly.

C. NDDH erred by not re-opening the public comment period upon Rolling Green's disclosure of significant new information in its permit application after the close of the comment period.

[¶ 36] As previously stated *supra*, NDDH requested voluminous additions to Rolling Green's application after the close of the comment period. In response, Rolling Green submitted approximately 222 pages of new or revised documents. Apart from the scale of these changes, Rolling Green also disclosed for the first time that its facility would contain 199,680 piglets.[4] App. 96 (NDDH5022). As will be explained in detail, this late disclosure significantly prejudiced Appellants' ability to participate in this permitting process through public comment.

[¶ 37] Given the importance of these new documents, Appellants believe NDDH was required to re-open its draft permit for public comment. When, and whether, a public agency must re-open a public comment period if the foundation for the agency's proposed decision changes in some way (e.g., a changed permit application during or after the comment period) appears to be an open question of law in North Dakota. Based on their experience before NDDH in this proceeding, however, Appellants are confident that, at least in certain, limited situations, agencies must re-open public comment. At the

[4] This document did not indicate whether this was an annual number or the number of animals that would be at the facility at one time.

bare minimum, public notice and comment must be sufficient to meet the requirements of due process.

1. This Court should interpret "permit application," for purposes of public comment, to mean "the application containing no further material changes."

[¶ 38] N.D.A.C. § 33-16-03.1-13(1) requires NDDH to provide public comment on permit "applications." This regulation does not say comment is on "preliminary documents," or "draft applications." It says "applications."

[¶ 39] The Court's "primary goal when interpreting a statute is to ascertain the intent of the legislature." *Olson v. Workforce Safety & Ins.*, 2008 ND 59, ¶ 14, 747 N.W.2d 71. This primary rule of statutory interpretation also applies to interpretation of agency regulations. *See, e.g., North Dakota Dep't of Human Servs. v. Ryan*, 2003 ND 196, ¶ 11, 672 N.W.2d 649. Here, it seems clear that the purpose of N.D.A.C. § 33-16-03.1-13(1) is to ensure that the public has a *meaningful* opportunity to comment on NDDH's proposed approval of an AFO Permit when NDDH "determines a significant degree of public interest exists regarding" a new facility. N.D.A.C. § 33-16-03.1-13(1).

[¶ 40] Specifically, Appellants believe "application" as used in N.D.A.C. § 33-16-03.1-13(1) means an application sufficiently complete such that the agency is able to make a final determination on the application without the need to obtain further information. Appellants' interpretation is supported by the long-standing reasoning of federal courts that have addressed this issue, the dictionary definition of the word "application," and public policy. The D.C. Circuit – a court with a wealth of administrative law experience – has stated that

> Even in an informal adjudicatory setting, if the public is not apprised of the rationale behind a proposed decision, or if the public is informed of the

> rationale only after the close of the comment and hearing period, then the agency cannot be said to have provided a realistic opportunity for public hearings or meaningful comments. The requirements that
>
> > an agency ... provide initial notices of proposed action, ... disclose internal reports, and ... state its reasons for acting as it did, all rest on the fundamental proposition that the right to comment or the opportunity to be heard on questions relating to the public interest is of little or no significance when one is not apprised of the issues and positions to which argument is relevant. Only when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion.

National Wildlife Fed'n v. Marsh, 568 F. Supp. 985, 993–94 (D.D.C. 1983) (quoting *U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519, 540 (D.C.Cir.1978)).

[¶ 41] Federal courts have adopted the rule that "pivotal" changes to an agency decision generally requires re-opening of the public comment period. *See, e.g., Citizens of Karst, Inc. v. United States Army Corps of Engineers*, 160 F. Supp. 3d 451, 459–60 (D.P.R. 2016) (Army Corps decisions during permitting that decrease project impacts do not require supplemental notice, but new "pivotal data" underlying the decision does require supplemental notice); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 674 F.Supp.2d 783, 804 (S.D.W.Va.2009) (holding that Corps erred by issuing public notice that "contained no substantive information on mitigation"); *Friends of the Earth v. Hall*, 693 F.Supp. 904, 948 (W.D.Wash.1988) (holding that Corps erred by failing to give notice of a monitoring plan because it was "the single most important feature" of the project); *Nat'l Wildlife Fed'n v. Marsh*, 568 F.Supp. 985, 991, 994–95 (D.D.C.1983) (holding that Corps erred by failing to issue notice of a "staff evaluation," which

evaluated benefits and rated alternative sites, because it was "the most important document influencing the [Corps'] decision" and differed substantially from information included in the public notice).

[¶ 42] Appellants' interpretation of "application" closely tracks these federal courts' reasoning. By interpreting "application" to mean "an application sufficiently complete such that the agency is able to make a final determination on the application without the need to obtain further information," any information of sufficient importance that the agency cannot make a decision in its absence is "pivotal" information and is therefore the same type of information that federal courts agree requires agencies to re-open public comment.

[¶ 43] The dictionary definition of the word "application" also supports Appellants' position. The definition of "application" is "[a] formal request to be considered for a position or to be allowed to do or have something, submitted to an authority, institution, or organization." Oxford Online Dictionary (2017). While it is common for permit applicants to submit preliminary materials to agencies prior to submitting an application, preliminary documents are not "a formal request."

[¶ 44] Appellants' proposed interpretation also serves the policy underlying public comment on agency permitting actions. The opportunity for public notice and comment exists to inform the public of governmental decisions that may affect them and to allow them to participate in that process. Public participation in governmental decision making ultimately ensures that the government's decision is informed by the individuals that the decision will affect. Making significant changes to a document upon which public comments were solicited, and in which significant public interest evidently exists,

runs afoul of the fundamental principles underlying public participation in this democratic process.

[¶ 45] This Court should interpret "application" as used in N.D.A.C. § 33-16-03.1-13(1) to uphold the purpose of NDDH's public notice rule, which is to provide the public a meaningful opportunity to comment on a facility's application, and not on mere preliminary documents that later materially change.

2. Rolling Green's changes to its permit application were material because they caused NDDH to miscalculate the setback for Rolling Green's facility.

[¶ 46] N.D.C.C. § 23-25-11(7) is the odor setback statute for livestock facilities. N.D.C.C. § 23-25-11(7)(a)(5) provides that "[i]f there are five thousand one or more animal units, the setback for a hog operation is one and one-half miles." N.D.C.C. § 23-25-11(7)(a)(4) provides that "[i]f there are at least two thousand one animal units but no more than five thousand animal units, the setback for a hog operation is one mile." Thus, the calculation of animal units is critically important to determine whether a livestock facility may legally site at a specific location in accordance with North Dakota's odor setback rules. N.D.C.C. § 23-25-11(7)(c) provides that "[o]ne swine weighing fifty-five pounds [24.948 kilograms] or more equals 0.4 animal unit" and "[o]ne swine weighing less than fifty-five pounds [24.948 kilograms] equals 0.1 animal unit."

[¶ 47] Because N.D.C.C. § 23-25-11(7)(c)(6) requires, by its plain language, "swine weighing less than fifty-five pounds" to be counted as "0.1 animal unit," Rolling Green's disclosure of 199,680 piglets after the close of the comment period was highly significant. It plainly affects the number of animal units at the facility, which in turn affects the setback.

[¶ 48] Several Appellants have residences within the 1.5 mile odor setback, but not within the one mile setback. Doc. No. 498, Aff. of Arnetta Frueh; Doc. No. 497, Aff. of Roy Thompson; Doc. No. 500, Aff. of Judith Von Bank; Doc. No. 501, Aff. of Lee Fraase They in particular were prejudiced because based upon the odor setback enacted by the Legislative Assembly, 199,680 piglets would almost certainly make it unlawful for Rolling Green to site its facility at its proposed location. Aff of Arnetta Frueh; Aff of Roy Thompson; Aff of Judith Von Bank; Aff of Lee Fraase. Appellants had no opportunity to comment on this information and to raise these concerns to NDDH.

3. Denial of public comment on Rolling Green's final application deprived Appellants of due process.

[¶ 49] "[I]f a serious doubt of a statute's constitutionality is raised, the court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided … If a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, we adopt the construction that avoids constitutional conflict." *State ex rel. Heitkamp v. Family Life Servs., Inc.*, 2000 ND 166, ¶ 42, 616 N.W.2d 826 (*citing International Ass'n of Machinists v. Street,* 367 U.S. 740, 749–50, (1961). Here, denial of a meaningful opportunity for Appellants to comment on Rolling Green's application (as required by N.D.A.C. § 33-16-03.1-13(1)) with all material documents submitted raises an issue of due process that further suggests this Court should adopt Appellants' interpretation of the word "applications" in N.D.A.C. § 33-16-03.1-13(1).

[¶ 50] The law regarding deprivations in violation of due process was recently articulated in *In re N.A.*, 2016 ND 91:

> Under the Fourteenth Amendment no State may "deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1. Article I, section 12, of the North Dakota Constitution also provides: "No person shall ... be deprived of life, liberty or property without due process of law." "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).
>
> To determine whether procedures meet constitutional requirements a court must apply a three-factor test:
>
> > First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

In re N.A., 2016 ND 91, ¶¶ 10-11, 879 N.W.2d 82. Regarding property interests in particular, "[p]rotected interests in property derive from an independent source, such as a state statute or rule entitling an individual to benefits." *Beckler v. North Dakota Workers Comp. Bureau*, 418 N.W.2d 770, 772 (N.D. 1988).

[¶ 51] Here, the Appellants within the 1.5 mile setback area have a protected interest in their property – protection against odor from Rolling Green's facility – derived from N.D.C.C. § 23-25-11(7). *See also Hagerott v. Morton Cty. Bd. of Comm'rs*, 2010 ND 32, ¶ 10, 778 N.W.2d 813 ("the Commission's decision to grant a conditional use permit for a feedlot within the one mile odor setback of the proposed house has the effect of diminishing and injuriously affecting his personal and individual interest in his land").

[¶ 52] N.D.C.C. § 23-25-11(3)(b) explicitly contemplates that a company such as Rolling Green "may purchase an odor easement." Such odor easements may be

purchased by Rolling Green if a prior, preexisting use, such as a residence, exists within the odor setback. N.D.C.C. § 23-25-11(7)(b) ("The setbacks set forth in subdivision a do not apply if the owner or operator applying for the permit obtains an odor easement from the pre-existing use that is closer."). Here, several of the Appellants live within the 1.5 mile setback from Rolling Green's facility. NDDH's action of approving Rolling Green's permit with a one mile setback, without affording them an opportunity to comment on the disclosure of 199,680 piglets at the facility and how that likely changes the setback to 1.5 miles, deprived these Appellants of the right to either enjoy protection from Rolling Green's odorous facility by virtue of the setback, or, in the alternative, to sell Rolling Green an odor easement. This was a denial of Appellants' due process rights.

VII. CONCLUSION

[¶ 53] NDDH's action of granting Rolling Green an AFO Permit was unlawful. NDDH lacked authority to grant such a permit to Rolling Green, a different permit is expressly required by NDDH's rules, and NDDH further did not allow Appellants to comment on material changes to Rolling Green's permit application disclosed after the comment period ended. In accordance with N.D.C.C. § 28-32-46, NDDH's permit approval must be "reversed" and "remanded" to NDDH for further proceedings, with instruction from this Court for NDDH to deny Rolling Green's AFO Permit.

DATED this 16th day of May, 2017.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Deb Coon, Randal Coon, Carolyn Dostert, Alan Dostert, Lee Fraase, Carol Hoveskeland, Lee Fischer, Arnetta Frueh, Jan Kasowski, Paul Kasowski, Bill Marcks, Jackie Marcks, Gerald Marcks, David Percel, Liana Stout, Roy Thompson, Shiela Thompson, Judith VonBank, Robert VonBank, Craig Wendt, and Vicki Wendt, Appellants, vs. North Dakota Department of Health, and Rolling Green Family Farms, RE, LLP, Appellees.	)	Supreme Court No. 20170089 Cass County District Court Case No.: 09-2016-CV-02561 **CERTIFICATE OF SERVICE**

I hereby certify that on May 16th, 2017, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Appellants; and

2. Appendix of Appellants,

and served the same electronically upon the following:

Margaret I. Olson maiolson@nd.gov Attorney for Appellee North Dakota Department of Health	Robin Wade Forward rob.forward@stinson.com Attorney for Appellee Rolling Green Family Farms RE LLP

/s/ *JJ England*
JJ ENGLAND

IN THE SUPREME COURT
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Deb Coon, Randal Coon, Carolyn Dostert, Alan Dostert, Lee Fraase, Carol Hoveskeland, Lee Fischer, Arnetta Frueh, Jan Kasowski, Paul Kasowski, Bill Marcks, Jackie Marcks, Gerald Marcks, David Percel, Liana Stout, Roy Thompson, Shiela Thompson, Judith VonBank, Robert VonBank, Craig Wendt, and Vicki Wendt, Appellants, vs. North Dakota Department of Health, and Rolling Green Family Farms, RE, LLP, Appellees.	Supreme Court No. 20170089 Cass County District Court Case No.: 09-2016-CV-02561 **CERTIFICATE OF SERVICE**

I hereby certify that on May 24, 2017, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Appellants with corrected Table of Authorities; and

2. Corrected Table of Authorities (single page)

and served the same electronically upon the following:

Margaret I. Olson maiolson@nd.gov Attorney for Appellee North Dakota Department of Health	Robin Wade Forward rob.forward@stinson.com Attorney for Appellee Rolling Green Family Farms RE LLP

/s/ *JJ England*
JJ ENGLAND