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Cass County District Court Case No.: 09-2016-CV-02561

IN DISTRICT COURT
COUNTY OF CASS

STATE OF NORTH DAKOTA
SOUTHWEST JUDICIAL DIVISION

Deb Coon, Randal Coon, Carolyn Dostert, Alan Dostert, Lee Fraase, Carol Hoveskeland, Lee Fischer, Arnetta Frueh, Tim Frueh, Jan Kasowski, Paul Kasowski, Bill Marcks, Jackie Marcks, Gerald Marcks, David Percel, Liana Stout, Roy Thompson, Sheila 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.

BRIEF OF APPELLEE ROLLING GREEN FAMILY FARMS RE, LLP

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STATEMENT OF THE ISSUES

[¶1] **Whether Rolling Green is required to obtain a North Dakota Pollutant Discharge Elimination System permit from the North Dakota Department of Health for a large-scale gestation sow operation.**

[¶2] **Whether the North Dakota Department of Health should have opened a second public comment period during the permitting process.**

STATEMENT OF THE CASE

[¶ 3] Rolling Green applied for a regulatory permit from the North Dakota Department of Health for a large-scale gestation sow operation that Rolling Green proposes to construct and operate in Cass County. Appellants' App. 54-57; ROA[1] 76-81. The Health Department issued findings and conclusions and recommended approval on August 4, 2016. Appellants' App. 128-130. Thereafter, the permit was signed and issued by the Department of Health on August 23, 2016. Appellees' J.A. 41-44.

[¶ 4] Appellants filed a notice of appeal with the district court on September 2, 2016, challenging the Health Department's decision to issue the permit by listing twenty-five specifications of error. Appellants' App. 20-26. When Appellants filed their brief with the district court, their grounds for appeal had narrowed from twenty-five to two: (1) the Health Department issued the wrong type of permit and (2) the Health Department should have opened up another public comment period. ROA 480. The district court affirmed the Health Department's decision to issue the permit to Rolling Green and judgment was entered accordingly on March 6, 2017. Appellants' App. 53. Appellants' appealed the judgment on March 13, 2017. *Id.* at 133-136.

[1] "ROA" means record on appeal, followed by digits that are the document identification numbers assigned by the district court clerk to the documents that were filed with the Court.

STATEMENT OF THE FACTS

[¶ 5] In the fall of 2015, Rolling Green submitted an application to the North Dakota Department of Health on a state form entitled "Application for Approval of Livestock Waste System" along with supporting material. Appellants' App. 54-57; ROA 76-81. Rolling Green proposes to construct and operate a large-scale gestation sow farm in Cass County which is carefully designed not to discharge any pollutants into surface waters. *Id.* Rolling Green's extensive submission was prepared by a professional engineering firm and included detailed information such as waste production calculations, maps, facility designs, water quality information, soil test reports, operation and maintenance plans, and a "nutrient management plan" among other things. *Id.* The permitting process was inherently fluid so that the Health Department could obtain all necessary information to assess whether environmental requirements would be met; therefore Rolling Green was asked at various times to provide clarification, additional material, and revisions. *See* ROA 59-64, 69-73, 83-85, 114, 116, 118-120.

[¶ 6] Even though there was no requirement to do so, the Health Department gave the public an opportunity to present written and oral comments regarding the Rolling Green operation. Specifically, on December 28, 2015, the Health Department opened a public comment period for written comments with a deadline of January 26, 2016, and later extended the deadline to March 19, 2016. ROA 101, 102. The Health Department received well over 2,800 pages of written comments and attachments consisting of studies, articles, maps, photos, et cetera; the comments advocated positions both in favor of and opposed to Rolling Green's operation. ROA 0002-2882. Also, the Health Department held a public hearing in Buffalo, North Dakota on March 17, 2016, with over 130 people in attendance, and received oral comments from 37 individuals. Appellees' J.A. 7-25; ROA 115-116. On

June 30, 2016, the Health Department issued its response to public comments. The Health Department issued a permit entitled "APPROVAL TO OPERATE A Concentrated Livestock Operation" on August 23, 2016. Appellees' J.A. 41-44.

ARGUMENT

A. The arbitrary and capricious standard of review applies to the Health Department's decision regarding Rolling Green's permit.

[¶ 7] While the issues that Appellants raise in this appeal are couched as legal in nature—the permitting decision was not "in accordance with the law" and was "in violation of constitutional rights"—the underpinnings of some of their arguments are factual. Appellants' Br. ¶¶ 36-52; s*ee* Appellants' App. 49-51 (district court referred to piglet and land application area issues as "mixed issues of law and fact"). Consequently, the amount of deference to be given to the Health Department by the Court requires attention.

[¶ 8] The Health Department's permitting decisions that do not arise from adjudicative proceedings are reviewed under the arbitrary and capricious standard. *People to Save the Sheyenne River, Inc. v. North Dakota Dept. of Health*, 697 N.W.2d 319, 328-29 (N.D. 2005). By statute, the Health Department's permitting hearings for animal feeding operations like Rolling Green are not adjudicative in nature. N.D.C.C. § 23-01-23. A decision is arbitrary, capricious, or unreasonable if it is not the product of a rational mental process by which the facts and the law relied on are considered for the purpose of achieving a reasoned and reasonable interpretation. *People to Save the Sheyenne*, 697 N.W.2d at 329. This deferential standard is especially applicable when the proceeding that generated the decision was not adjudicative in nature, and also when the subject matter is complex or technical and involves agency expertise. *Id.*

[¶ 9] The law reviewed in *People to Save the Sheyenne*—Section 61-28-07—indicates

that appeals regarding pollutant discharge permits (including animal feeding operations) are governed by the Administrative Agencies Practices Act. N.D.C.C. § 61-28-07. The Court confronted this requirement and specifically addressed Section 28-32-46—the statute that contains the standard of review to be applied under the Administrative Agencies Practices Act—and stated that Section 28-32-46 "is not completely compatible with administrative decisions where there has been no adjudicative proceeding . . ." *People to Save the Sheyenne,* 697 N.W.2d at 328. The Court further stated that, in light of the separation of powers doctrine, "the general standard of review of [the] agency's findings . . . under N.D.C.C. ch. 28-32 is incompatible with the procedural posture of this case." *Id.* Consequently, the Supreme Court eschewed the standard of review under Section 28-32-46 and applied the more deferential arbitrary and capricious standard. *Id.* at 329.

[¶ 10] Appellants ignored *People to Save the Sheyenne* in their opening brief and are advocating that the appropriate standard of review is under the Administrative Agencies Practices Act in Section 28-32-46.[2] Appellants' Br. ¶ 14. Appellants may argue that *People to Save the Sheyenne* is no longer controlling because the Legislature created Section 23-01-36 after *People to Save the Sheyenne* was decided and therefore, the enactment of Section 23-01-36 abrogated the Supreme Court's application of the arbitrary and capricious standard.[3] However, the Legislature's inclusion of Section 28-32-46 in Section 23-01-36 was the addition of nothing that had not already been considered in *People to Save the Sheyenne.* As it regards the standard of review, Section 23-01-36 is merely a reiteration of a concept that the Supreme Court previously invalidated. In other words, the Supreme Court declared that Section 28-32-46 is the wrong standard of review for the Health

[2] The relevant portions of Section 28-32-46 have not changed since *People to Save the Sheyenne* was decided.
[3] *People to Save the Sheyenne* was decided in 2005 and Section 23-01-36 was enacted in 2007.

Department's non-adjudicative permitting decisions and so the subsequent re-legislating of the same standard does not resurrect its use. *See Ellis v. North Dakota State University*, 764 N.W.2d 192, 202 (N.D. 2009) ("When the legislative branch intervenes through enactment the separation of powers doctrine does not disappear.").

[¶ 11] Because the Supreme Court's analysis was grounded in the separation of powers doctrine and regarded the same appeal standard that Section 23-01-36 attempts to reintroduce, *People to Save the Sheyenne* was not overruled by the enactment of Section 23-01-36. Therefore, the arbitrary and capricious standard applies to the review of the Health Department's actions regarding Rolling Green's permit.

B. Rolling Green does not have to obtain a NDPDES permit because the administrative rules that require an NDPDES permit are no longer controlling.

[¶ 12] Appellants' primary argument is that the Health Department should have issued Rolling Green a North Dakota Pollutant Discharge Elimination System (NDPDES) permit under the Health Department's administrative rules. Appellants' Br. ¶¶ 21-35. The Appellants' argument fails because, by operation of Section 23-01-04.1(1) of the North Dakota Century Code, the rules they rely upon are no longer controlling or enforceable.

[¶ 13] In order to understand why, some context is required. The rules in question were a part of the Health Department's role in administering the federal Clean Water Act. N.D.A.C. § 33-16-01-01(2). The Clean Water Act prohibits pollutant discharge to surface waters unless an appropriate permit has been obtained. 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 122.23(d). The Environmental Protection Agency (EPA) administers the Clean Water Act and has enacted regulations for that purpose, including those that regard permits for point sources. 40 C.F.R. § 122, *et seq*. The EPA's permits are called National Pollutant Discharge Elimination System (NPDES) permits. *See id.*

[¶ 14] If a state chooses to administer a pollution discharge elimination plan and it meets the specifications of the Clean Water Act, the EPA delegates authority to the state to issue the permits; in doing so, the state must comply with federal law. *See* 33 U.S.C. § 1342(b); 40 C.F.R. § 123, *et seq*. In 1975, the EPA delegated permitting authority to North Dakota as set out in the "Memorandum of Agreement between the State of North Dakota State Department of Health and the United States Environmental Protection Agency Region VIII."[4] Accordingly, the Health Department issues and regulates permits and creates the necessary administrative rules. *See* N.D.C.C. ch. 61-28; N.D.A.C ch. 33-16. The Health Department refers to its point source permits under the Clean Water Act as North Dakota Pollutant Discharge Elimination System (NDPDES) permits which are the counterparts of the federal NPDES permits.

[¶ 15] The Health Department's administrative rules that form the basis of the Appellants' argument require an animal feeding operation like Rolling Green to apply for a NDPDES permit regardless of whether the operation is actually discharging pollutants. N.D.A.C. 33-16-03.1(4); 33-16-01-01.1(1). These rules once corresponded with federal regulations, but the regulations were deemed invalid in federal circuit court of appeals decisions because they exceeded the statutory scheme of the Clean Water Act by requiring an operator of animal feeding operations to apply for permits regardless of whether the operator was discharging or proposing to discharge pollutants. *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005) (invalidating portions of regulations from 2003); *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (invalidating portions of regulations from 2008). Subsequently, the federal regulations were changed to

[4] A copy of the memorandum of agreement and subsequent amendments can be found at https://www.epa.gov/sites/production/files/2013-09/documents/nd-moa-npdes.pdf.

no longer require permits regardless of whether pollutants are discharged or proposed to be discharged. *See* 40 C.F.R. § 122.23(d). Under the current federal regulations, an operator that does not discharge pollutants into surface waters does not have to obtain a NPDES permit. *Id.*

[¶ 16] Even though the federal regulations for NPDES permits have changed, the corresponding administrative rules of the Health Department for NDPDES permits have not and so they still read as if all large feeding operations must obtain a NDPDES permit regardless of whether an operation is discharging pollutants. N.D.A.C. § 33-16-03.1(4); 33-16-01-01.1(1). Simply stated, the Health Department's rules that require a NDPDES permit regardless of whether an operation is actually discharging pollutants are more stringent than the corresponding federal regulations now in place regarding NPDES permits. Appellants have seized on this fact and argue that the Health Department's rules are the law and must be followed, essentially because they are still in print. However, Appellants have overlooked Section 23-01-04.1 of the North Dakota Century Code:

> **23-01-04.1. Rulemaking authority and procedure.**
> 1. Except as provided in subsection 2, no rule which the state department of health, hereinafter the department, adopts for the purpose of the state administering a program under the federal Clean Air Act, federal Clean Water Act, federal Safe Drinking Water Act, federal Resource Conservation and Recovery Act, federal Comprehensive Environmental Response, Compensation and Liability Act, federal Emergency Planning and Community Right to Know Act of 1986, federal Toxic Substances Control Act, or federal Atomic Energy Act of 1954, may be more stringent than corresponding federal regulations which address the same circumstances. In adopting such rules, the department may incorporate by reference corresponding federal regulations.
>
> 2. The department may adopt rules more stringent than corresponding federal regulations or adopt rules where there are no corresponding federal regulations, for the purposes described in subsection 1, only if it makes a written finding after public comment and hearing and based upon evidence in the record, that

> corresponding federal regulations are not adequate to protect public health and the environment of the state. Those findings must be supported by an opinion of the department referring to and evaluating the public health and environmental information and studies contained in the record which form the basis for the department's conclusions.
>
> 3. If the department, upon petition by any person affected by a rule of the department, identifies rules more stringent than federal regulations or rules where there are no corresponding federal regulations, the department shall review and revise those rules to comply with this section within nine months of the filing of the petition.
>
> 4. All existing rules of the department remain in full force and effect after July 10, 1989, pending department review and revision under subsection 3.
>
> 5. Any person who is issued a notice of violation, or a denial of a permit or other approval, based upon a rule of the department which is more stringent than a corresponding federal regulation or where there is no corresponding federal regulation, may assert a partial defense to that notice, or a partial challenge to that denial, on the basis and to the extent that the department's rule violates this section by imposing requirements more stringent than corresponding federal regulations, unless the more stringent rule of the department has been adopted in compliance with this section.
>
> 6. The provisions of this section may not be construed so as to require the department to review and propose revisions to any existing rule regarding the collection of fees by the department in connection with the administration of any program identified in subsection 1.

N.D.C.C. § 23-01-04.1.

[¶ 17] Under this statute, because the Health Department's rules regarding NDPDES permits are more stringent than "corresponding federal regulations which address the same circumstances" and the Health Department has not followed the requirements of Subsection 2, the rules are in violation of Subsection 1. Therefore, the rules are not controlling. *See Sloan v. North Dakota Workforce Safety & Ins.*, 804 N.W.2d 184, 188 (N.D. 2011). (administrative regulation is void if it exceeds an agency's statutory

authority).

[¶ 18] While there is no North Dakota case law regarding Section 23-01-04.1, there is a persuasive Kentucky Court of Appeals opinion regarding a similar fact pattern and state statute. *Energy and Environment Cabinet v. Sharp, et. al.*, 2012 WL 1889307 (Ky. App. 2013). The *Sharp* case involved the permit process for large-scale hog farms under Kentucky's environmental statutes and rules. *Id.* As in North Dakota, Kentucky's state government had been delegated by the EPA to administer permits pursuant to the Clean Water Act. *Id.* at fn. 7. Kentucky's relevant agency determined that the hog farms in question—which were not discharging pollutants—did not need Kentucky's version of a NPDES permit (their acronym is KPDES). *Id*. at *2. Third-parties opposed the hog-farms and argued, among other things, that KPDES permits were required under Kentucky's administrative rules, regardless of federal law. *Id.* at *7.

[¶ 19] In analyzing the issue, the Court of Appeals of Kentucky recognized that under *Waterkeeper*, the federal NPDES permit program extends only to large feeding operations that actually discharge. *Id.* at *9. And the court noted that a Kentucky statute specifically prohibited the implementation of the KPDES permit program in a manner more stringent than federal law. *Id.* Accordingly, the Court stated that "[i]t seems axiomatic that, where no federal NPDES permit would be required, any KPDES permit would necessarily be more stringent, and thus in conflict with . . ." the statute that prohibits KPDES permits from being more stringent than federal law. *Id.* Therefore, the court held that federal law was controlling and that Kentucky's state agency correctly determined that the hog farms were not required to obtain KPDES permits in this respect. *Id.* at *10.

[¶ 20] Much like as in *Sharp*, it is indisputable that the Health Department's NDPDES

program has requirements that are more stringent than the current federal regulations for large feeding operations, and are not in keeping with the rulings in *Waterkeeper* and *National Pork*. As such, the NDPDES program's requirements are not controlling and the Health Department's actions in this regard clearly had a rational basis and were not arbitrary, capricious, or unreasonable.

[¶ 21] Even if the Health Department had denied Rolling Green's application and required a NDPDES permit, Rolling Green not only would have had the force and effect of Subsection 1 in its corner, but Rolling Green also would have invoked Subsection 5 and raised a challenge to the Health Department's action. *See* N.D.C.C. § 23-01-04.1(5). An understanding of the logical operation of Subsection 5 in this instance has apparently escaped Appellants. Indeed, they are asking for a remand "with instruction from this Court for NDDH to deny Rolling Green's permit" because it is not a NDPDES permit. Appellants' Br. ¶ 53. If such a remand were to occur, there is no doubt the ensuing denial would be challenged by Rolling Green in further administrative proceedings because the denial would be based on a state rule that is more stringent than its federal counterpart, and the Health Department has not taken the required steps under Subsection 2 that allow for a more stringent rule. Under the current record, Rolling Green would prevail in its challenge and the Health Department would have to issue yet another permit, one that would be materially similar to the permit now at issue in that it would not be a NDPDES permit. Consequently, the route on which Appellants would take us is absurdly circular and underscores the flaws of their position.

C. Another period for public comment is not required by law.

[¶ 22] Appellants' secondary argument in their appeal is that the Health Department

should have allowed an additional period of public comment because Rolling Green supplemented and amended the material it submitted to the Health Department after the public comment period closed. Appellants' Br. ¶¶ 37-52. The Appellants' argument fails because Appellants did not have an absolute right to be heard a second time in the non-adjudicative permit process employed by the Health Department.

[¶ 23] The Health Department's implementation of the procedure for public participation under Section 33-16-03.1-13 of the North Dakota Administrative Code was correctly done. The Health Department has broad discretion under Section 33-16-03.1-13; here are the relevant portions of the rule:

> **33-16-03.1-13. Public participation.**
> 1. If the department determines a significant degree of public interest exists regarding new or expanding facilities, it shall issue a public notice requesting comment on applications for both individual permits and general state animal feeding operation permits.
>
> 2. The department shall provide a period of not less than thirty days during which time interested persons may submit comments. The period of comment may be extended at the discretion of the department.
>
> . . . .
>
> 6. The department shall hold a public meeting or hearing as it deems appropriate to allow additional public input or to provide information to the public concerning the department's review of the facility.
>
> 7. In making its final decision on the application or draft permit, the department shall consider all comments submitted within a timeframe specified in the public notice and all comments received at any public hearing. Within twenty days of the close of the public comment period, the applicant, if any, may submit a written response to the public comments. The department shall consider the applicant's response in making its final decision.
>
> 8. Pursuant to the requirements of this chapter and within sixty days of the applicant's response to the public comments, the department shall make a final determination as to whether the permit should be approved, approved with conditions, or denied.
>
> . . . .

N.D.A.C. § 33-16-03.1-13 (emphasis added).

[¶ 24] Under this process, there is no absolute right to <u>any</u> public comment period. A comment period is not held unless the Health Department, in its sole discretion, determines that there is a significant degree of public interest. N.D.A.C. § 33-16-03.1-13(1). The Health Department exercised its discretion and opened and extended a public comment period on the Rolling Green proposal with a duration of over 80 days. In addition, even though there was no requirement for a public hearing on Rolling Green's permit, the Health Department exercised its discretion and held a public hearing to receive input. *See* N.D.A.C. § 33-16-03.1-13(6). In sum, the public participation during the Rolling Green permit process—involving people in favor and opposed—included the submission over 2,800 pages of public comments and attachments consisting of studies, articles, maps, et cetera, along with the testimony of 37 individuals at the public hearing. In light of the large volume of information received and considered, and the permissive nature of the rule for public participation, and the extended time attributed to public comment, it is clear that the Health Department more than fulfilled its obligations under Section 33-16-03.1-13.

[¶ 25] Furthermore, and contrary to what Appellants suggest, there is nothing in Chapter 61-28 of the North Dakota Century Code or the applicable administrative rules that mandates the Health Department allow public comment on an applicant's final revisions submitted to the Department. *See* N.D.C.C. ch. 61-28; N.D.A.C. § 33-16-03.1-13. As such, there was no back-and-forth submission of evidence or right to scrutinize Rolling Green's material before the Health Department issued the permit. Appellants conflate the role of public participation in the permitting process with being a party in an adversarial adjudicative proceeding where the parties generally receive equal opportunity to present

their case and address evidence submitted by the other party. Appellants fail to recognize that, by statute, the process employed by the Health Department is not an adjudicative proceeding. N.D.C.C. § 23-01-23. *See People to Save the Sheyenne*, 697 N.W.2d at 328. And Appellants' confuse the matter by citing federal case law that is easily distinguishable because it regards federal procedural statutes and regulations that contain specific requirements for permitting processes that are considered adjudicative. *See, e.g., National Wildlife Federation v. Marsh*, 568 F.Supp. 985 (D.C. Cir. 1983) (involving requirements of federal Administrative Procedure Act for a permitting process that is an "adjudication").

[¶ 26] Finally, Appellants' are attempting to bolster their arguments with a fact-specific red herring about piglets which hinges on how swine are counted. If the number of animal units[5] on the site exceeds a threshold, the distance the operation must be set back from residences, et cetera, is longer. *See* N.D.C.C. § 23-25-11(7). Appellants contend that the compost barn information Rolling Green submitted after the close of public comments shows that more swine will be on the site than originally represented and that the additional animals render the odor setback in the permit incorrect. Specifically, Appellants contend that the number of animal units that will be on Rolling Green's site will exceed 5,000, and as such a one and one-half mile setback is required instead of the one-mile setback in the permit. *See* N.D.C.C. § 23-25-11(7). However, the Health Department directly contradicts Appellants' vague estimate of the number of animal units and a careful review of the information in the record shows that the Health Department's decision in this regard is supported and rationally-based. The piglet issue is a technical area in which the Health Department is entitled to considerable deference. *See People to Save Sheyenne River, Inc.*

[5] Per N.D.C.C. § 23-25-11(7)(c), one swine weighing 55 pounds or more equals 0.4 animal unit; one swine weighing less than 55 pounds equals 0.1 animal unit.

v. North Dakota Dept. of Health, 744 N.W.2d 748, 755 (N.D. 2008). "An agency has a reasonable range of discretion to . . . apply its own regulations, and the agency's expertise is entitled to deference when the subject matter is complex." *St. Benedict's Health Ctr. v. North Dakota Dept. of Human Services*, 677 N.W.2d 202, 205 (N.D. 2004).

[¶ 27] When reviewing Rolling Green's submissions, the Health Department considered that unweaned piglets would not be counted separately, but would be considered a part of the farrowing sows. *See* Transcript of Oral Argument at 55 (indicating Health Department's consistent practice is to consider unweaned piglets part of farrowing sow). As such, the Health Department calculated the number of animal units on the site would be 3,382.4, and would require a one-mile setback under N.D.C.C. § 23-25-11(7). Unlike the Health Department, Appellants believe the unweaned piglets should be counted separately from the farrowing sows, and apparently this discrepancy is the basis for Appellants' position that a greater setback is required. However, so far in this case Appellants have submitted three legal briefs and participated in an oral argument at the district court which lasted over an hour, and they have yet to explain how they calculate the number of animal units. Regardless of an explanation, their position is confusing because even if the unweaned piglets are counted separately from the farrowing sows, the number of animal units would still not exceed 5,000.[6]

[¶ 28] The Health Department considered all of Rolling Green's submissions and, after its expert analysis, determined that Rolling Green met the requirements for the permit that was issued. It logically follows that as a part of the Health Department's analysis, the

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[6] Assuming each farrowing sow has 10 piglets by her side and each piglet equals 0.1 animal unit, the total number of animal units on the site would be 4,726.4. Assuming each sow has 12 piglets instead of 10—which begins to strain credulity—the total number of animal units would be 4,995.2.

technical proprieties of the odor setback and number of animal units were reviewed and passed muster. Therefore, the Court should not substitute its judgment for that of the Health Department on this issue and Appellants' arguments regarding piglets setbacks should be disregarded.

CONCLUSION

[¶ 29] There was a rational basis for the Health Department's issuance of the permit to Rolling Green. Rolling Green is not required to obtain a NDPDES permit because the controlling federal law no longer requires operators of large feeding operations to obtain a NDPDES permit unless the operator discharges pollutants. Also, Appellants are not entitled to another comment period because no such right exists and the Health Department properly conducted the procedure for public participation. Therefore, Appellants have failed to show that the Health Department's actions were arbitrary, capricious, or unreasonable and the district court judgment affirming the Health Department's decision to issue Rolling Green a permit should be affirmed.

Dated: June 1, 2017

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CERTIFICATE OF COMPLIANCE

[¶ 30] The undersigned certifies pursuant to N.D.R. App. P. 32(a)(7)(A) that the text of Rolling Green Family Farms, RE, LLP Appellee's Brief (excluding the table of contents and table of authorities) contains 4681 words.

[¶ 31] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Times New Roman 12 point font.

Dated: June 1, 2017

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on June 1, 2017, a true and correct copy of Appellee Rolling Green Family Farms RE, LLP's Brief was served via electronic mail on:

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