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STATE OF NORTH DAKOTA

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

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

REPLY BRIEF OF APPELLANTS

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I. This Court should not reward NDDH's twelve-year failure to undertake rulemaking by upending precedent, plain statutes, and plain regulations.

[¶ 1] Rather than defending its rules, NDDH takes the somewhat incredible position that its rules have "had no effect" and that its existing rules are "void and unenforceable." To arrive at this conclusion, NDDH relies entirely on N.D.C.C. § 23-01-04.1. But this statute does not say that "all present and future rules of the Department of Health that are more stringent than federal law are void and of no effect." Rather, it (1) prevents NDDH from adopting new rules that are more stringent than certain federal environmental laws; (2) requires that such rules remain in effect until "revised," and (3) allows an aggrieved party to petition for mandatory revision of such rules within nine months and assert a defense against enforcement and permit denial until the rules are revised.

[¶ 2] NDDH raises four arguments in response to the permitting issues raised by Appellants. NDDH first argues in ¶¶30-31 that because Rolling Green is a CAFO and all CAFOs are AFOs, NDDH had authority to grant Rolling Green an AFO permit. NDDH's sole authority for this position is the definition of AFO contained in N.D.A.C. § 33-16-03.1-03(35). That definition simply states that "'[s]tate animal feeding operation permit' means a permit issued by the department pursuant to this chapter to an animal feeding operation." (emphasis added).

[¶ 3] N.D.A.C. § 33-16-03.1-05 is the portion of the chapter entitled "operations requiring a permit." It has four subsections. Subsection 1 discusses the NDPDES permit required for CAFOs. Only subsections 2, 3, and 4 discuss AFO permits, and therefore, if NDDH has authority to grant an AFO permit to a CAFO, it must flow from one of these three subsections. Subsections 2 and 3 do not give NDDH authority to grant an AFO permit

to Rolling Green because Rolling Green is neither a "medium" nor "small animal feeding operation." Subsection 4 does not give NDDH authority to grant an AFO permit to Rolling Green because it only applies to facilities that confine animals not specified in NDAC 33-16-03.1-03(17) (swine *are* specified therein). The only subsection that does apply (and plainly so) is N.D.A.C. § 33-16-03.1-05(1), which states that a CAFO "must obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01." "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. NDDH does not have authority to grant an AFO permit to a CAFO under these rules.

[¶ 4] NDDH's attempt to grant Rolling Green a weaker permit with no legal basis is an illegal end-run around the rule-making process. The Legislative Assembly requires agencies to revise rules through rulemaking under N.D.C.C. ch. 28-32. The rulemaking process includes three important safeguards: public participation, legislative oversight through the Administrative Rules Committee, and judicial review. When NDDH revises its rules, the Appellants intend to file detailed comments about the serious environmental risks that CAFOs present and the importance of a permitting scheme that is more protective than NDDH's current AFO requirements, because CAFOs are inherently riskier facilities than typical AFOs due to their size. If this Court upholds NDDH's underlying permitting decision, it would undermine that rulemaking process and prevent public participation and oversight.

[¶ 5] Second, NDDH argues that it tried to adopt the 2003 CAFO Rule (through several incorporations by reference of EPA rules as they existed "on February 12, 2003"

in N.D.A.C. ch. 33-16-01, but accidentally did not do so due to the EPA rule's effective date of April 14, 2003. It also argues that even if it did adopt the 2003 CAFO Rule, because the rule was vacated by a federal court, North Dakota's incorporation of that rule was also vacated.

[¶ 6] Appellants discussed none of those rules in their opening brief. Appellants' focus is on N.D.A.C. § 33-16-03.1-05. N.D.A.C. § 33-16-03.1-05(1) is NDDH's separate and independent promulgation of the rule that CAFOs "must obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01." This rule was not incorporated by reference from federal law – it is the product of NDDH's own rulemaking. It was also properly adopted pursuant to N.D.C.C. § 23-01-04.1(1). NDDH's rule became effective on December 1, 2004, EPA's rule became effective on April 14, 2003, and NDDH's rule was equivalent to EPA's NPDES requirement for CAFOs at that time. *See* N.D.C.C. § 28-32-14 (attorney general review to confirm agency authority prior to final adoption). Further, NDDH's argument does not address Appellants' principal concern that N.D.A.C. § 33-16-03.1-05 contains no authority for it to grant an AFO permit to a CAFO.

[¶ 7] Third, NDDH argues in ¶59 that its rule requiring CAFOs to obtain NDPDES permits is "preempted" by N.D.C.C. § 23-01-04.1 and its rule is therefore "void and unenforceable." But N.D.C.C. § 23-01-04.1(3), on its face, gives NDDH up to nine months to revise its rules, even when petitioned directly by an interested party. The rules remain valid until revised. *See also* N.D.C.C. § 28-32-06 (rules effective until determined repealed by legislative council). N.D.C.C. § 23-01-04.1(3) also evidences the Legislative

Assembly's intent to provide for the orderly transition of state environmental rules that become more stringent than federal law.

[¶ 8] NDDH also argues that if this Court finds the statute ambiguous, it should defer to NDDH's interpretation. NDDH Brief, ¶ 61. This Court should give NDDH no deference. First, the language is clear. N.D.C.C. § 23-01-04.1 contains no language saying it automatically voids existing rules (were this the intent, the Legislative Assembly would have simply said it). To the contrary, it expressly gives NDDH up to nine months to "review and revise" its rules upon petition. N.D.C.C. § 23-01-04.1(3). Second, NDDH is asking for more deference than the legislature allows. N.D.C.C. § 1-02-39 lists "[t]he administrative construction of a statute" as one of seven factors courts "may consider" when construing an ambiguous statute. "[T]he object sought to be obtained," "legislative history," and the "consequences of a particular construction" are others. Accepting NDDH's interpretation would render the petition process a nullity. After all, why petition for rule revision if the regulation is automatically void? NDDH's interpretation would also engender confusion over time about which regulations are enforceable, and which are not.

[¶ 9] Finally, NDDH argues in ¶69 that N.D.C.C. § 23-01-04.1 does not violate the legislative non-delegation doctrine. But NDDH's first reason – its rules are automatically "void if they exceed or conflict with statutory authority" – addresses the wrong question. The question is whether N.D.C.C. § 23-01-04.1 unconstitutionally delegates the Legislative Assembly's authority by tying the scope of the statutory defense in N.D.C.C. § 23-01-04.1(5) to constantly changing federal law. NDDH's second reason is more on point but fares no better. While NDDH's statement that "legislation conditioned on future federal action is permissible" is a correct statement of law, s*ee Ferch v. Housing*

Auth. of Cass Cty., 79 N.D. 764, 782, 59 N.W.2d 849, 862 (1953), the blanket delegation of legislative authority in N.D.C.C. § 23-01-04.1(5) is not tied to any specific condition. The case and rule NDDH cites is distinguishable and inapplicable.

[¶ 10] At bottom, NDDH has not revised its rules even though the ruling in *Waterkeeper All., Inc. v. EPA* occurred twelve years ago. And according to NDDH, "[n]o one has filed a petition during that time" (including Rolling Green or any of its partners). NDDH Brief, ¶68. This Court should not accept Appellees' strained and incorrect interpretations of the law, let alone give them precedential effect, simply to cover for their previous inaction.

II. Public comment was non-discretionary and Appellants were severely prejudiced by their inability to comment on material information filed with NDDH after the comment period.

[¶ 11] NDDH argues in ¶39 of its brief that it has "discretion" regarding whether to reopen a comment period. This is incorrect both under NDDH's rules, which made public comment mandatory in this case, and under the U.S. and North Dakota Constitutions. NDDH's rules require mandatory public comment if NDDH "determine[s] a significant degree of public interest exists" regarding a facility. N.D.A.C. §33-16-03.1-13(1). NDDH made that determination in this case. After making that determination, NDDH had no discretion. The regulation says NDDH "shall" solicit public comments. *Id.*

[¶ 12] Regardless of the regulation, NDDH was also required to provide Appellants with due process because it took action that affected Appellants' property rights. Constitutional due process is not discretionary. Setting aside NDDH's suggestion that it merely needs to give "minimal due process" because it is an administrative agency,

Appellants agree with the general proposition cited by NDDH that "[t]he fundamental requirement of due process is the opportunity to be heard." NDDH Brief, ¶ 51.

[¶ 13] Appellants were not given a meaningful opportunity to be heard. NDDH holds up its 83-day comment period as proof to the contrary, but while Appellants took full advantage of those 83 days and submitted comments that resulted in significant changes to the permit, Rolling Green filed a document indicating a vastly different number of animals at its facility – 199,680 piglets – after the comment period closed. This may be the most important document the applicant filed, and Appellants had no ability to review it during the permitting process, let alone respond to it. The 83 days are therefore irrelevant.

[¶ 14] The district court in this case noted that "there exists a serious, good faith issue as to whether the suggested one-mile setback even applies" due to the severe discrepancy in the animal unit calculation that results from this document. App. 35. Unfortunately, the record is devoid of any comments from Appellants or response to comments from NDDH on this issue so that it can properly be presented to this Court because NDDH failed to reopen the comment period.

[¶ 15] As for the two Appellants that NDDH cites to as commenting that there would be 170,000 and 177,000 hogs at the facility, these were mere guesses not based on Rolling Green's actual documentation (moreover, NDDH never responded to those guesses in its responses to comments, *see* NDDH5942, NDDH5883-85). None of the other Appellants mentioned the number of piglets. Rather, they relied upon NDDH's representation that the facility would only include the animals listed in the application and permit. App. 129 (NDDH finding of fact that "[t]he application indicates the facility will have … 800 swine under 55 pounds").

[¶ 16] NDDH tries to avoid these issues by now calculating the number of animal units in ¶49 of its brief to this Court based on the "average" number of piglets saved per litter from a recent USDA publication. NDDH's in-brief mathematical calculation is a post-hoc rationalization, nothing more than a litigating position, and therefore not entitled to deference. N.D.C.C. § 28-32-44(5) ("the agency record constitutes the exclusive basis for administrative agency action and judicial review of an administrative agency action."); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (litigating position not based on underlying ruling entitled to no deference). It is telling that NDDH finds it necessary to make such calculations now, rather than giving Appellants a right to comment before issuing a permit.

[¶ 17] NDDH also cites to a veritable cornucopia of alleged persuasive authority in ¶¶45-48 of its brief regarding the definition of "farrowing sow" in an attempt to argue that the farrowing sow includes its litter. Conspicuously NDDH cites to everything but the relevant provision of the North Dakota Century Code. N.D.C.C. § 23-25-11(7)(c)(6), cited in Appellants' opening brief, requires "swine weighing less than fifty-five pounds" to be counted as "0.1 animal unit." A piglet is plainly a "swine weighing less than fifty-found pounds." NDDH's interpretation would render this statute meaningless. NDDH's attempts to re-write the statutory schemes under which it operates in an ad hoc manner should not be condoned by this Court.

DATED this 19th day of June, 2017.

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Appellants,	)	**CERTIFICATE OF SERVICE**
vs.	)	
North Dakota Department of Health, and Rolling Green Family Farms, RE, LLP, Appellees.	)	

I hereby certify that on June 19th, 2017, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Reply Brief 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

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