

SUPREME COURT OF NORTH DAKOTA

Coon v. North Dakota Department of Health and Rolling Green Family Farms RE, LLP

Coon, 2017 ND 215 (N.D. 2017) · No. 20170089 · Decided August 30, 2017

SUMMARY

The North Dakota Supreme Court affirmed a district court judgment upholding the North Dakota Department of Health’s issuance of an animal feeding operation permit to Rolling Green Family Farms. The Court held that the Department erred by failing to apply its own rule requiring concentrated animal feeding operations to obtain a NDPDES permit, but concluded remand would be futile because the rule was more stringent than corresponding federal regulations and the permit would ultimately be available. The Court also held that the Department did not abuse its discretion by declining to reopen the public comment period and that the landowners failed to establish a due process violation.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Crothers, Justice; Daniel J. Crothers; Lisa Fair McEvers; Carol Ronning Kapsner, S.J.; William Neumann, S.J.; Gerald W. VandeWalle, C.J.
JURISDICTION	North Dakota
DECIDED	August 30, 2017
DOCKET	20170089
DISPOSITION	affirmed
PROCEDURAL POSTURE	Landowners appealed to the North Dakota Supreme Court from a district court judgment affirming the North Dakota Department of Health’s issuance of an animal feeding operation permit to Rolling Green Family Farms.
STANDARD OF REVIEW	The Supreme Court reviews the agency decision and the record under N.D.C.C. § 28-32-46, giving respect to the district court’s reasoning. An agency permitting decision is reviewed to determine whether it was arbitrary, capricious, or unreasonable, with deference to the agency’s interpretation and application of its own regulations.
PRECEDENTIAL VALUE	Published North Dakota Supreme Court opinion; precedential

PARTIES

Deb Coon, Randal Coon, Carolyn Dostert, Alan Dostert, Lee Fraase, Carol Hoveskeland, Lee Fischer, Ametta Frueh, Tim Frueh, Jan Kasowski, Paul Kasowski, Bill Marcks, Jackie Marcks, Gerald Marcks, David Percel, Liane Stout, Roy Thompson, Sheila Thompson, Judith VonBank, Robert VonBank, Craig Wendt, Vicki Wendt v. North Dakota Department of Health, Rolling Green Family Farms RE, LLP

TOPICS

judicial review of agency action

administrative law

statutory interpretation

due process

environmental law

PRACTICE AREAS

administrative law

environmental law

constitutional law

appellate procedure

QUESTIONS PRESENTED

1. Whether the Department was required to require Rolling Green, a concentrated animal feeding operation, to obtain a NDPDES permit under the Department's administrative rules.
2. Whether the Department erred by failing to apply its own rule requiring concentrated animal feeding operations to obtain a NDPDES permit.
3. Whether the Department abused its discretion by failing to reopen the public-comment period after Rolling Green submitted supplemental information.
4. Whether the landowners established a protected property interest and a due process violation based on the Department's permitting process.

HOLDINGS

1. Rolling Green was a large concentrated animal feeding operation under the Department's rules, and the rules required all concentrated animal feeding operations to obtain a NDPDES permit.
2. The Department erred by failing to apply its validly adopted rule requiring a CAFO to obtain a NDPDES permit, even though the rule was more stringent than current federal regulations.
3. The Department did not abuse its discretion by declining to reopen the public-comment period after receiving supplemental information from Rolling Green.
4. The landowners failed to establish a due process violation because they did not show that the permit deprived them of a protected property interest.

KEY QUOTATIONS

"An 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." (¶ 18)

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (¶ 28)

FACTUAL BACKGROUND

Rolling Green sought a permit for a large swine animal feeding operation near Buffalo, North Dakota. The Department provided public notice, extended the public-comment period to 83 days, held a public meeting and hearing, and requested supplemental information concerning soil borings, air quality, the nutrient-management plan, and facility design. After reviewing the materials and comments, the Department issued an animal feeding operation permit; the landowners challenged the permit, asserting that a NDPDES permit was required and that the failure to reopen public comment violated their due process rights.

PROCEDURAL HISTORY

Rolling Green applied for an animal feeding operation permit, and the Department issued the permit after public notice, an extended comment period, and a public hearing. The landowners appealed the agency decision to the Cass County District Court, arguing that a North Dakota pollutant discharge elimination system permit was required and that the Department violated due process by not reopening public comment after receiving supplemental information. The district court affirmed the Department’s decision, and the Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- People to Save the Sheyenne River, Inc. v. N.D. Dep’t of Health, 2005 ND 104, ¶¶ 9, 15, 24, 697 N.W.2d 319
- Voigt v. N.D. Pub. Serv. Comm’n, 2017 ND 76, ¶ 28, 892 N.W.2d 149
- St. Benedict’s Health Ctr. v. N.D. Dep’t of Human Servs., 2004 ND 63, ¶ 9, 677 N.W.2d 202
- Fercho v. Montpelier Pub. Sch. Dist. No. 14, 312 N.W.2d 337, 341 (N.D. 1981)
- Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486, 504-06 (2d Cir. 2005)
- Havener v. Glaser, 251 N.W.2d 753, 761 (N.D. 1977)
- In re N.A., 2016 ND 91, ¶ 10, 879 N.W.2d 82
- Mathews v. Eldridge, 424 U.S. 319, 333 (1976)
- American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999)
- Wilkinson v. Austin, 545 U.S. 209, 224-25 (2005)
- Hagerott v. Morton Cty. Bd. of Comm’rs, 2010 ND 32, ¶ 10, 778 N.W.2d 813