

COA Opinion: Michigan's Natural Resources and Environmental Protection Act gives DEQ authority to regulate concentrated animal feeding operations regardless of actual waste discharge

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In *Michigan Farm Bureau v. Department of Environmental Quality*, the Court of Appeals held that DEQ Rule 2196 does not exceed the scope of the DEQ's statutory rulemaking authority under Michigan's Natural Resources and Environmental Protection Act (NREPA). Rule 2196 requires all owners and operators of concentrated animal feeding operations (CAFOs) to obtain a National Pollutant Discharge Elimination System (NPDES) permit or demonstrate that the CAFO has no potential for discharge. The Court of Appeals determined that DEQ's duty to "take all appropriate steps to *prevent* any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream, or other waters of the state" encompasses the subject matter of Rule 2196.

Plaintiffs, farming associations and farms, filed this action seeking a declaratory judgment that Rule 2196's requirement that CAFOs either seek and obtain an NPDES permit or demonstrate that they have no potential to discharge is an invalid exercise of DEQ's rulemaking authority, that it violates the intent of the Legislature, and that it is arbitrary and capricious. Plaintiffs moved for summary disposition, and DEQ requested that summary disposition be granted in its favor under MCR 2.116(l)(2). The trial court granted DEQ summary disposition and the Court of Appeals affirmed.

The Court of Appeals first provided relevant statutory and regulatory background. Congress enacted the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 USC 1251 *et seq.*, with a goal of eliminating discharge of pollutants into the nation's navigable waters. The CWA prohibits the discharge of pollutants unless authorized by the NPDES. The CWA also established two types of NPDES permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program administered by the EPA. State permitting plans must be approved by the EPA, but once a state's program is approved, it is administered pursuant to state law rather than federal law. Michigan has promulgated its own administrative rules specific to NPDES permits, and the EPA has approved them.

The Court then discussed the federal NPDES CAFO rule under the CWA. In 2003 the EPA promulgated its final CAFO rule outlining NPDES permit requirements. It provided that all CAFO owners or operators must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. The rule created an exception to this requirement for "CAFOs that have successfully demonstrated no potential to discharge" This EPA rule was challenged and struck down in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486, 492 (2nd Cir 2005), which determined that under the CWA, CAFOs are not statutorily obligated to comply with EPA regulations unless there is a discharge of pollutants. Thus, the EPA is not allowed to regulate CAFOs that do not actually discharge pollutants under the CWA.

The Court of Appeals then quoted the pertinent part of the circuit court decision, which ruled that (1) DEQ's Rule 2196 does not violate the federal CWA; (2) the enabling act for this rule, Part 31 of NREPA, provides the DEQ the legal authority to regulate potential discharges of animal waste from CAFOs; and (3) the rule is rationally related to the DEQ's responsibility under NREPA to protect Michigan's water resources from pollution.

Next the Court addressed Plaintiffs' arguments that Rule 2196 is invalid. First, although it had appeared that Plaintiffs had abandoned their argument that Rule 2196 violates the CWA, the Court, wishing to make the point quite clear, stated that the scope of DEQ's statutory authority to promulgate rules concerning NPDES permitting in Michigan is purely a matter of state law. It emphasized that although a state's discharge standards may not be less stringent than the federal standards, a state that administers its own NPDES permitting program may adopt more stringent standards.

The Court then addressed whether Rule 2196 is within the subject matter of NREPA. The Court concluded that the DEQ had authority to promulgate Rule 2196 under the rulemaking provision of § 3103(2). The Court observed that § 3103(2) contains a broad and general grant of rulemaking authority to carry out its duties. The Court reasoned that the DEQ's duty to "take all appropriate steps to *prevent* any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream, or other waters of the state" encompasses the subject matter of Rule 2196. The Court determined that preventing pollution confers upon the DEQ authority to forestall potential water pollution even before any discharge of pollutants occurs.

In addressing whether Rule 2196 complies with the Legislature's intent, the Court discussed the limitations of Plaintiffs' evidence and also opined about the Legislature's awareness about the realities of CAFOs. The Court noted that the pertinent part of a Senate Bill upon which Plaintiffs relied was actually line-item vetoed by Governor Granholm because it attempted to amend NREPA by reference and that the language was not re-passed over the veto. The Court also surmised that the Legislature was "[l]ikely aware" of the possibility that CAFOs may be forced to discharge some or all of their waste when it charged the DEQ with the duty to "take all appropriate steps to prevent any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any . . . waters of the state."

Finally, the Court concluded that Rule 2196 is not arbitrary or capricious, because DEQ had identified two environmental studies to support its proposed promulgation of the rule. The Court further noted that the DEQ finalized Rule 2196 even after the Second Circuit struck down the analogous provisions of the 2003 Federal CAFO Rule in *Waterkeeper*. Finally, the Court acknowledged DEQ's admission at oral argument that the promulgation of the rule was in part motivated by a change in administration in Lansing. The Court did not find this fact bothersome because administrative agencies like the DEQ are part of the executive branch, and the Michigan Constitution gives the governor "real control over the executive branch."