

JAN 21 2009

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF NEWAYGO

NATURAL RESOURCES
DIVISION

**MICHIGAN FARM BUREAU,
MICHIGAN MILK PRODUCERS
ASSOCIATION, MICHIGAN ALLIED
PORK PRODUCERS ASSOCIATION,
CROCKERY CREEK TURKEY FARM,
FOUR D FARMS, LLC,**

File No. 07-19219-AA-M

Plaintiffs,

v

**MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,**

OPINION

Defendant.

27TH CIRCUIT COURT
NEWAYGO COUNTY
2009 JAN 20 A 9:01

The plaintiffs filed this action for declaratory judgment, requesting that the Rule 2196, 2005 AC, R.323.2196(1), promulgated by the Michigan Department of Environmental Quality ("DEQ"), be declared invalid. This rule expanded the requirement of concentrated animal feeding operations ("CAFOs") to obtain discharge permits for the animal waste generated by their facilities. Previously, CAFOs were only required to obtain a permit if they actually had a discharge of waste into the waters of Michigan; but, under the new regulation, all large CAFOs are required to obtain a permit unless they can demonstrate to the DEQ that they have no potential for discharge of waste from their operations.

The plaintiffs move for summary disposition of their complaint under MCR 2.116(C)(10). The Michigan Department of Environmental Quality requests summary disposition in its favor under MCR 2.116(C)(1)(2). I grant the DEQ's request for summary disposition and deny the plaintiffs' motion for summary disposition

BACKGROUND OF CASE

A. Concentrated Animal Feeding Operations

A CAFO is a large scale animal feeding operation where the animals are generally maintained in a confined facility, and their food is brought to the facility for consumption on site. A CAFO is distinguished from a traditional farm where the number of animals on-site is generally limited by the food that could be raised from the farm. Ordinarily, the

animals in a CAFO do not leave the facility to graze on pasture land during the warm weather months. In plaintiffs' brief, they cite statistics showing that Michigan has approximately 50,000 farms and that approximately 200 of these farms are CAFOs.

A CAFO has the capability of raising a much larger number of animals than possible on a traditional farm. For example, a large CAFO includes any facility with at least 700 mature cows, 1000 veal calves, 2,500 swine weighing 55 pounds or more, 10,000 swine weighing less than 55 pounds, 55,000 turkeys, or 125,000 chickens. 2005 AC, R 323.2103. The size of these facilities allows the farmer to achieve much greater economies of scale and no doubt benefits the public by providing food at more reasonable prices.

The large number of animals at a CAFO result in substantially more animal waste than a traditional farm, and this waste must be collected, stored, and removed from the site in some manner. There is no dispute that the disposal of animal waste has both positive and negative results. The waste may be used for safe and productive purposes such as fertilizer and energy. Improperly disposed animal waste can result in serious harm to the environment. For example, the nitrogen and phosphorous in animal waste can potentially pollute bodies of water resulting in the death of aquatic life, and they can contaminate groundwater.

B. Regulation of CAFO Waste

As a result of the potentially negative effects from improperly handled CAFO waste, the United States and Michigan have developed programs to address this issue. The authority for establishing the federal program was created in 1972, when Congress enacted the Clean Water Act. 44 USCS 1342. The legislation resulted in the National Pollutant Discharge Elimination System ("NPDES") to regulate the discharge of pollutants from point sources into navigable waterways, and CAFOs are included in the definition of a point source. The United States Environmental Protection Agency ("EPA") is charged with administering this law, and as part of its responsibility, the EPA passes regulations to carry out the mandates of the Clean Water Act.

The EPA may suspend its enforcement of the NPDES in states that have laws which allow them to create a program at least as stringent as the federally required NPDES program. 40 CFR 123.25. The federal program serves as a baseline or threshold for a state program; but, it is clearly appropriate for states to impose additional requirements beyond that mandated by federal law. Of course, the additional requirement imposed by any state agency must be consistent with the laws applicable to that state.

Shortly after the Clean Water Act was enacted, Michigan developed its own NPDES program, which has been approved by the EPA, on October 17, 1973. The authority for Michigan's program is based on Michigan's Natural Resources Environmental Protection Act ("NREPA"), and this program is administered by

Michigan's DEQ, which also has authority to pass regulations to implement the program. MCL 324.3101 et. seq.

To maintain its status as an approved NPDES program, Michigan (as well as all other states running their own program) must make changes to its program from time to time which reflect any additional requirements imposed by amendments to the Clean Water Act and regulations passed by the EPA which affect the federally approved NPDES program. If these changes are not timely made, Michigan could lose its status as a federally approved NPDES program, and the EPA would enforce the federal program in Michigan.

Prior to 2003, the EPA's regulations required CAFOs to obtain a NPDES permit, but only if they had an actual discharge of animal waste into navigable waters. On February 12, 2003, the EPA made substantial revisions to its NPDES regulations which added a new requirement that all CAFOs obtain a NPDES permit, unless they could demonstrate that their operations had no potential to discharge waste into navigable waters. As a result of the EPA's revisions, the DEQ started the process to amend its own regulations to be consistent with the new federal requirements. This process resulted in the adoption of Rule 2196, which is now being challenged by the plaintiffs.

ENACTMENT OF RULE 2196

The procedure to adopt a regulation is governed by the Administrative Procedures Act, MCL 24.201 et. seq., which includes publication of the proposed rule, preparing a detailed regulatory impact statement, giving notice and conducting a public hearing, and preparing a synopsis of comments from the hearing. This case does not involve any challenges to the procedure followed by the DEQ.

The DEQ proposed Rule 2196 with the package of revised regulations made in response to the action of EPA:

(1) CAFOs are point sources that require NPDES permits for discharges or potential discharges and require all of the following:

*

*

(b) All CAFO owners or operators shall apply either for an individual NPDES permit, or a certificate of coverage under an NPDES general permit, unless the owner or operator has received a determination from the department, made after notice and opportunity for public comment, that the CAFO has "no potential for discharge" pursuant to subrule (4) of this rule.

*

*

The regulatory impact statement submitted by the DEQ makes clear that the impetus to revise its regulations came from the 2003 revision of the EPA's regulations.

The DEQ opined that it could enforce the new federal regulations without amending its regulations, but instead it elected to incorporate the federal regulations into Michigan's regulations and, in addition, address issues not covered in the federal regulations. At the public hearing held on June 7, 2004, representatives of the DEQ stated that the NPDES permit requirement was expanded to CAFOs with the "potential to discharge" because of the new federal regulations

In the DEQ's regulatory statement, it represented that the rule was designed to prevent the illegal discharges of manure and related wastewater to surface waters that cause water quality standard violations. The DEQ stated that it was impossible to give an accurate number of illegal discharges, but it was aware of approximately 30 such discharges from CAFOs in Michigan. The DEQ stated that it considered the results of studies documented in the Federal Register, Volume 68, Number 2, pages 7234-7250 (February 12, 2003).

In describing the harmful conduct addressed by the regulation, the DEQ stated that the discharge of untreated or improperly treated animal waste to the surface waters results in such disease causing organisms as E. coli to infect the water, and such waste results in the depletion of dissolved oxygen, which is harmful to aquatic organisms. The DEQ opined that these conditions interfere with designated uses of the surface water for recreation, wildlife, and aquatic life. The DEQ stated that a regulatory scheme independent of state intervention was not possible, because its proposed rules were required by federal regulation.

On February 28, 2005, while the DEQ was still in the process of adopting Rule 2196, the Second Circuit Court of Appeals issued a decision which concluded that portions of the 2003 federal regulations were invalid. Waterkeeper Alliance, Inc. v Environmental Protection Agency, 399 F3d 486 (2nd Cir 2005). Specific to this case, the Court held that the Clean Water Act was not broad enough to expand the NPDES permit requirement from CAFOs with actual discharges into navigable waters to include CAFOs with potential discharges into navigable water. Id. The Court did express that the EPA appeared to have ample rationale for expanding the rule, if the enabling statute was more expansively written. Id. at 506.

Despite this development, the DEQ completed the process to amend Michigan's regulations pertaining to CAFOs, and these regulations went into effect on April 6, 2005. The plaintiffs contend that the effect of the Waterkeeper decision renders Rule 2196 legally flawed.

LEGAL ANALYSIS

The plaintiffs advance three arguments to support their claim that Rule 2196 is invalid: (1) the rule violates federal law, because it is contrary to the Clean Water Act and regulations promulgated by the EPA; (2) the rule violates state law, because it exceeds the scope of its enabling act which is Part 31 of the Natural Resources

Environmental Protection Act; and (3) the rule is arbitrary and capricious.

As previously discussed, Michigan created its own NPDES program using state law, NREPA, for its authority. Federal law clearly contemplates that states may run their own programs, provided the regulations are at least as stringent as the federal program. 40 CFR Sec. 123.25.

The Waterkeeper decision held that the federal enabling act, the Clean Water Act, was not broad enough to regulate potential discharges of animal waste. The effect of this decision would prohibit regulating potential discharges in states where the EPA enforces the NPDES program and in states running their own programs under state enabling statutes that contain the same limitations as the Clean Water Act.

Michigan runs its own program under an enabling statute that is clearly more expansive than the federal Clean Water Act. For example, the scope of the Clean Water Act is limited to discharges into navigable waters in contrast to the broader scope of Michigan law, which includes discharges into all surface and underground waters. MCL 24.3103(1). This distinction, by itself, does not give the DEQ authority to regulate potential discharges, but it does serve to give it authority to regulate discharges that would not be covered by the Clean Water Act.

The fact that the DEQ adopted portions of federal regulations struck down by the Waterkeeper decision does not necessarily mean that the corresponding state regulation is invalid. Michigan used its own enabling statute and followed its own Administrative Procedures Act to pass Rule 2196, which took almost two years to complete. The EPA approved Rule 2196, and this approval represents its determination that the rule does not violate the federal Clean Water Act. Jurisdiction to challenge this determination is vested exclusively with the United States Court of Appeals under 33 USC 1369(b), and no such challenge has been filed. As a result, the real question in this case involves whether or not Rule 2196 complies with Michigan law.

The plaintiffs argue that Rule 2196 does indeed violate state law. The parties agree that this regulation must pass a three-part test to be valid: (1) the rule must be within the subject matter of its enabling statute; (2) the rule must comply with the legislative intent underlying the enabling statute; and (3) the rule must not be arbitrary and capricious. Dystra v DNR, 198 Mich App 482, 484 (1993). The parties also agree that NREPA is the applicable enabling act for Rule 2196 and that the rule fulfills the first prong of the three-part test. The parties disagree about whether the rule is consistent with NREPA's legislative intent and whether it is arbitrary and capricious.

The DEQ certified that sections 3103 and 3106 of NREPA provide the authority to adopt Rule 2196:

(1) The department shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the

state and the Great Lakes, which are or may be affected by waste disposal of any person. * * *

(2) The department shall enforce this part and may promulgate rules as it considers necessary to carry out its duties under this part. * * * [MCL 324.3103(1)(2)]

The department shall establish pollution standards for lakes, rivers, streams, and other water of the state in relation to the public use to which they are or may be put, as it considers necessary. The department shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance which may affect the quality of waters of the state. * * * * [MCL 324.3106]

The legislative statement granting power to an administrative agency to regulate an activity must be strictly construed and the power plainly given. Lake Isabella Development v Lake Isabella, 259 Mich 389, 401 (2003).

Section 3103 of NREPA plainly and broadly gives the DEQ the authority to pass regulations designed to protect the water resources of Michigan from waste disposal, and this term is fairly interpreted to include the process of collecting, storing, and removing waste from a CAFO. See MCL 691.1416(j). There is no real dispute that CAFOs generate a large amount of waste, and the improper disposal of the waste can pollute Michigan's waters. The language of these sections clearly contemplate that, in appropriate circumstances, the DEQ may assert its regulatory authority before there is an actual discharge of waste into the waters.

The plaintiffs note that the legislature, in sections 3109 and 3112 of NREPA, requires a permit when someone actually discharges waste or an oceangoing vessel actually discharges ballast waters into Michigan's waters. They argue that these provisions of NREPA suggest that DEQ's authority to require a permit starts only if there has been an actual discharge of waste. I disagree. Regulatory enabling statutes establish the general boundaries within which an administrative agency may act, and, in this case, sections 3103 and 3106 set these boundaries. The fact that the legislature may prescribe specific things that the agency must do within these boundaries does not negate the broad grant of authority.

The plaintiffs argue that a budget bill for the 2007 fiscal year (2006 P.A. 343) demonstrates that the legislative intent that only actual discharges from CAFOs should be regulated. This funding bill purported to prohibit the DEQ from expending funds to implement a program requiring CAFOs to obtain a NPDES permit, unless they are actually discharging pollutants into the water. In Governor Granholm's veto message, she correctly noted that this portion of the legislation was invalid, because it attempted to amend another statute by reference. The legislature is certainly free to modify NREPA to limit its broad grant of authority to the DEQ, but, a budget bill for the 2007 fiscal year

does not accomplish this result. It was noted by the DEQ that the legislature did not impose a similar restriction on the expenditure of funds for the 2008 fiscal year.

Lastly, the plaintiffs contend that Regulation 2196 is invalid, because it is arbitrary and capricious. In Dykstra, the Court of Appeals expressed the principle that a rule is neither arbitrary or capricious if it is rationally related to the purpose of the statute. Id., 491. For this prong of the three-part test, great deference must be given to the judgment of the administrative agency, and any doubts about meeting this part of the test must be resolved in favor the agency. Id.

The practical effect of Rule 2196 is to expand the DEQ's regulations from CAFOs that make actual discharges, to all CAFOs, except those that are able to demonstrate no potential to discharge. To satisfy the third prong of the test, the DEQ must provide evidence in its administrative record to support its finding that the expanded rule is reasonably related to protecting water resources from pollution.

The plaintiffs claim that the DEQ's sole basis for adopting Rule 2196 was to comply with the 2003 EPA regulations so that Michigan could maintain its NPDES program. The Waterkeeper decision invalidated the EPA's version of this rule; thus, the plaintiffs claim that the record is devoid of any rationale basis to support it. This argument requires that the administrative record supporting the rule be evaluated.

During the process of adopting Rule 2196, the DEQ submitted a regulatory impact statement which supported its claim that the expanded rule was needed to protect the environment. It noted that previously, 30 CAFOs in Michigan had illegal discharges of animal waste into Michigan's water resources. The number of these discharges, by itself, was reason for the DEQ to examine whether the old rule was adequately protecting the environment. The DEQ also noted that illegal discharges of animal waste adds disease-causing organisms such as E Coli to the water and that such waste causes the depletion of dissolved oxygen in water which can be fatal to aquatic life.

Additionally, the DEQ cited the studies and findings relied on by the EPA to expand the scope of its regulation to include potential discharges. Federal Register, Vol. 68, No. 29 (February 12, 2003), pp. 7234-7250. In these findings, the EPA explained the characteristics of animal waste which cause water pollution; it described how animal waste from CAFOs can makes its way into water resources; it revealed its statistics regarding the number of previous illegal discharges from CAFOs; and it did a cost/benefit analysis to support its claim that an expanded rule was necessary.

The EPA described several characteristics of animal waste that can adversely affect water quality: (1) it contains nitrogen and phosphorous which can cause eutrophication (excessive plant growth and decay) of water, leading to the depletion of oxygen and resultant reduction in water quality and aquatic life, which has been documented as a leading stressor in the Great Lakes; (2) the nitrogen from animal waste contains nitrates which can contaminate drinking water supplies; and (3) animal waste

contains pathogens which are disease-causing organisms, and more than 150 pathogens found in such waste pose a risk to humans.

The EPA noted that land application of the waste (spreading manure on the ground or injecting it into the soil) is not the only method by which CAFOs have polluted water. It found that the improper storage of animal waste can result in spills onto the land, or leaks from storage areas can result in waste entering the underground and surface water.

In support of the need to expand the scope of regulations over CAFOs, the EPA stated the following:

. . . A literature survey conducted for the proposed rule identified more than 150 reports or discharges to surface waters from hog, poultry, dairy, and cattle operations. Over 30 separate incidents of discharges from swine operations between the years 1992 and 1997 in Iowa alone were reported by the State's Department of Natural Resources. The incidents resulted in fish kills ranging from about 500 to more than 500,000 fish killed per event. Fish kills or environmental impacts have also been reported by agencies in other States, including Nebraska, Maryland, Ohio, Michigan and North Carolina.

Id., 7237. The studies and findings referenced by the EPA provide additional support to the DEQ's contention that there is a rational basis to regulate potential discharges from CAFOs.

The plaintiffs correctly claim that certain CAFOs pose no risk to pollute water resources, and they should not be ensnared into a costly, complex regulatory scheme to address an environmental risk that does not exist. Rule 2196 reasonably deals with this fact by providing a method for CAFOs to be exempted from the permit requirement if they pose no potential to discharge, and the DEQ states that two of the plaintiffs in this case have already received the benefit of this exemption.

In sum, I make the following rulings: (1) DEQ's Rule 2196 does not violate the federal Clean Water Act; (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. I grant summary disposition in favor of the DEQ.

Dated: January 20, 2009



Anthony A. Monton (P26051)
Circuit Judge

A TRUE COPY



Deputy Clerk

27th Judicial Circuit Court
Newaygo County, Michigan