STATE OF MICHIGAN

COURT OF APPEALS

SIERRA CLUB MACKINAC CHAPTER, Petitioner-Appellant, v DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent-Appellee.	FOR PUBLICATION January 15, 2008 9:10 a.m. No. 269181 Ingham Circuit Court LC No. 05-000979-AA Advance Sheets Version

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. I conclude that the dispositive issue in this case is whether the Department of Environmental Quality (DEQ) complied with all applicable state statutory and regulatory requirements under Michigan's federally approved program to issue National Pollutant Discharge Elimination System (NPDES) permits to concentrated animal feeding operations (CAFOs). I conclude that the Sierra Club failed to meet its burden of establishing that the DEQ's construction, interpretation, and application of its state permitting program as set forth in the declaratory ruling here under review were arbitrary, capricious or not in accordance with applicable law. I would affirm the circuit court's order affirming the declaratory ruling issued by the DEQ.

Because I conclude that the dispositive issue before this Court is whether the DEQ's program for the issuance of NPDES permits to CAFOs complies with Michigan law, I agree that this Court has jurisdiction in this matter. I decline to consider, however, all arguments advanced by the Sierra Club that the DEQ has failed to comply with federal Clean Water Act (CWA) requirements that are not expressly incorporated in Michigan's federally approved NPDES permitting program. To the extent that these arguments are advanced, I would conclude that this Court lacks jurisdiction to consider them. Judicial review of the United States Environmental Protection Agency's (EPA) approval of the DEQ's permitting program is exclusively vested in the United States circuit courts. 33 USC 1369(b).

To be sure, the CWA influences many aspects of our state's permitting process. However, the EPA has authorized Michigan and 44 other states to issue NPDES permits pursuant to state law. In so doing, the EPA determined that Michigan's permitting program is at least as stringent as the federal EPA permit program. As the majority notes, "[i]n 1973, the EPA

delegated authority to Michigan to administer its own NPDES program." *Ante* at ___. On July 1, 2005, the EPA approved revisions to Michigan's program for issuing NPDES permits to CAFOs. Upon EPA approval of this program, the federal permitting program was suspended in Michigan and the state program operated in lieu of the federal program. 33 USC 1342(c). See also *Ringbolt Farms Homeowners Ass'n v Hull*, 714 F Supp 1246, 1253 (D Mass, 1989).

Significantly, the EPA's sanction of the Michigan permitting program is not a declaration that the DEQ stands in the shoes of the EPA to administer the EPA's federal permitting process. Likewise, the EPA's approval of Michigan's permitting program is not an indication that the state and federal permitting programs are identical. Rather, the EPA reviewed the overall efficacy of the Michigan permitting program and determined that, while the state program may be different from the federal program in some aspects, Michigan's program is at least as effective as the federal program in advancing the policies and purposes of applicable federal environmental law.

Because there is no requirement that Michigan's state permitting program be identical to the federal permitting program, any challenge that the state program is insufficient to satisfy the requirements of federal law is either an unsubstantiated state-law claim or a challenge to the EPA's approval of the Michigan permitting program. However, as previously stated, challenges to the EPA's approval of Michigan's state permit program must be pursued in the federal circuit courts. Accordingly, while this matter is properly before this Court, we must limit our review to whether the general permit process challenged by the Sierra Club is contrary to or in some way fails to comply with state law.

As pointed out by the DEQ, the Sierra Club has done little more than make "sweeping assertions that [Michigan's general CAFO] permit is contrary to state law." The Sierra Club has not pointed to any Michigan statute or regulation that has been violated. What the Sierra Club seeks is not information regarding the effluent limitations applicable to entities issued certificates of coverage under a general permit. Here, the Sierra Club sought and received the ability to influence how CAFO operators manage their farms in order to satisfy the effluent limitations set forth in the general permit. Nothing in state or federal law grants the Sierra Club such authority.

I would affirm.

/s/ Brian K. Zahra