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Damage Caused by Construction Dewatering Not Recoverable Under an Inverse Condemnation Claim

The Wisconsin Supreme Court has held that consequential damages caused by sewer construction dewatering are not recoverable under a claim of inverse condemnation. *E-L Enterprises, Inc., v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58 (decided July 2, 2010). The Supreme Court case reverses the prior decision of the Court of Appeals allowing the recovery of damages under an inverse condemnation claim. *E-L Enterprises, Inc., v. Milwaukee Metropolitan Sewerage District*, 2009 WI App 15, 316 Wis. 2d 280, 763 N.W.2d 231 (2009).

The case involved the construction of the Milwaukee Metropolitan Sewerage District's (MMSD's) deep tunnel project. In order to construct the project, the construction contractor was required to dewater the area of construction by pumping out the groundwater from the construction trench. This was done adjacent to a building owned by the plaintiff, E-L Enterprises. E-L's building was built on "wood piles," long wooden poles capped with concrete and driven into the ground to provide support for the building's foundation. To prevent the wood piles from rotting and weakening, they are required to be sufficiently saturated with water. When the sewer was completed in 1988, groundwater measurements showed that the level of groundwater near E-L's building had

been significantly reduced. Ten years after the sewer project was completed, E-L noticed that cracks in the foundation of its building were worsening. An engineer examined the building's wood piles and determined that some of the wood piles had rotted and were no longer able to support the building. The owner repaired the damaged portions of the wood piles at a cost of over \$300,000.

E-L sued MMSD for negligence, continuing nuisance, and inverse condemnation. The circuit court dismissed E-L's negligence and nuisance claims against the MMSD on the basis of governmental immunity under Wis. Stat. § 893.80(4). The dismissal of these claims was not appealed. The inverse condemnation claim went to trial and a jury found in favor of E-L. MMSD appealed, and the Court of Appeals affirmed. The Supreme Court now reverses.

The Supreme Court's decision is based on its conclusions on four main points. First, the Court concluded that E-L's claim is based upon its contention that MMSD physically took E-L's groundwater because the dewatering extracted groundwater from beneath E-L's adjacent building. The Court stated that two types of governmental conduct can constitute a taking: (1) an actual physical occupation of private property; or (2) a restriction that

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deprives an owner of all, or substantially all, of the beneficial use of his property. This case involved the first type of taking — an allegation of an actual physical taking of groundwater.

Second, the Court found that E-L introduced no proof as to the value of the groundwater that was taken. As a result of this lack of evidence, the Court said it did not have to decide whether a landowner owns the groundwater beneath his property. While the Court conceded that E-L's taking claim can only arise if it has a property right in groundwater, the Court said it did not need to reach this question because E-L introduced no proof as to the value of the extracted groundwater, in the event it did have a property right in the groundwater.

Third, E-L did provide proof on the cost to repair the wood piles and E-L's building. However, the Court found that MMSD did not physically occupy the wood piles, and it imposed no government restriction that deprived E-L of all, or substantially all, of the beneficial use of its property. Therefore, the Court held that E-L's damaged building and wood piles were not taken for public use in the usual sense of those words. Accordingly, the damage to the wood piles did not arise from the type of governmental conduct that constitutes a taking.

Fourth, because the wood piles were not physically taken by MMSD for a public use, damage to them is not a compensable taking. Instead, damages to the wood piles are merely a consequential damage arising from the groundwater dewatering. Consequential damages to property resulting from governmental action are not compensable under the Wisconsin Constitution, because damage, without appropriation to the public purpose, is not a compensable taking for public use.

The Court, citing *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 101 N.W.706 (1904), acknowledged an exception to the general rule that consequential damage to property resulting from governmental action is not compensable for situations where the governmental action destroys the value of the property. However, the Court stated the exception did not apply in this case because E-L was not deprived of all, or substantially all, of the beneficial use of its building. This was demonstrated by the fact that E-L continued to lease the building throughout the entire period at issue.

The result of the Court's decision was that plaintiff could not use a claim of inverse condemnation to

circumvent the circuit court's dismissal of its negligence claim on the basis of governmental immunity. Justice Prosser dissented from this result, indicating that he was troubled that E-L suffered damages caused by MMSD, but that it did not have any meaningful remedy for its injury. He described this case as exposing the chasm between government wrongdoing and citizen redress because of the Court's unreasonably broad notions of governmental immunity and unreasonably narrow exceptions for tort recovery.

The rest of the Court, however, emphasized that E-L's claim that MMSD's alleged negligent construction of the sewer damaged E-L's building clearly sounded in tort, and that E-L had not appealed the circuit court's dismissal of its negligence claim on the basis of governmental immunity. This appears to leave open the question of whether the Wisconsin Supreme Court would have allowed E-L to pursue a negligence claim against MMSD had the issue been presented to it.

The Court strongly reaffirmed its holding in *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974), that a property owner has a tort claim against another who unreasonably interferes with the property owner's use of groundwater. Under *Michels Pipeline*, a landowner is permitted to withdraw groundwater for a beneficial purpose, but he or she may be liable in tort for excessively withdrawing groundwater to the detriment of another's property. Justice Bradley, in a concurring opinion, noted that under the circumstances presented here, the withdrawal of groundwater may have caused unreasonable harm to E-L.

As a final point, the Court directed that a circuit court should not place the question of whether government conduct constitutes a taking of private property without just compensation before a jury. This is a question of law to be decided by the court. The jury should only be asked fact questions, such as the amount of damages that will justly compensate a property owner for a taking.

— Lawrie Kobza & Mark Steichen

SPEAKERS FORUM

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Madison, WI

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Supreme Court Applies Ministerial Duty Rather than “Known Danger” Exception to Governmental Immunity

Governmental immunity generally applies to discretionary acts by governmental officials, employees, and in some cases, contractors. Immunity does not extend to “ministerial” acts. Ministerial acts are those for which the law prescribes the specific time, mode and occasion of its performance. Generally, the basis for ministerial duties will be found in written laws, policies, or contracts. For example, a building inspector has a ministerial duty to ensure that construction is done in compliance with the specific standards set out in the state building code before approving the work.

In 1977, the Wisconsin Supreme Court created an offshoot of the ministerial duty exception, known as the “known and compelling danger” rule. *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). In *Cords*, a park ranger knew that a park hiking trail ran immediately adjacent to a deep gorge and hikers were not protected by warning signs, guardrails or other means. A hiker using the trail at night fell into the gorge and died. Under those circumstances, even though there was no written rule or policy requiring that any action be taken, the court held that the danger was so immediate and so serious that the ranger had a duty to take some action, whether warning his superiors, erecting a warning sign or installing some sort of barrier along the trail.

In *Pries v. McMillon*, 2010 WI 63 (July 2, 2010), the Wisconsin Supreme Court affirmed a court of appeals decision holding that governmental immunity did not apply under the circumstances of the case. However, it affirmed on different grounds. The court of appeals applied the known danger rule, while the majority of the Supreme Court applied the ministerial duty rule. *Pries* involved McMillon, an employee of State Fair Park in Milwaukee, who did not adequately supervise inmates working for the Park. The inmates were taking apart a horse stall with large, heavy metal sections. When two sections would not separate, McMillon jumped on them. His actions, which did not follow the instructions for disassembling the horse stalls lead to *Pries*, one of the inmates, suffering a broken foot and other injuries.

The court of appeals reasoned that McMillon should have recognized the danger in which he placed the inmates when he did not follow directions by having someone bracing each section so they would not suddenly crash to the ground. It relied on other recent cases in which the court of appeals had employed the known danger rule. In one such case, *Voss v. Elkhorn Area Sch. Dist.*, 2006 WI App 234, 297 Wis. 2d 389, 724 N.W.2d 420, the court held that

the school district had no immunity where a teacher had students use sight-altering goggles in an effort to replicate the experience of being drunk. The teacher had the students walk through rows of metal and wood desks to try to catch a bouncing ball. The teacher had used the same exercise for several years, apparently without incident. On this particular occasion, he had seen students stumbling earlier in the day; Voss, a student, fell and suffered serious injuries to her teeth later in the day. Although there were no written rules or procedures for how to conduct the exercise, the court of appeals held that the exercise as it was being conducted presented obvious dangers and that the only reasonable course of action was to stop performing it until changes were made.

In contrast, in *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, 253 Wis. 2d, 646 N.W.2d 314, a police officer was dispatched to a busy intersection at night after traffic lights stopped working because of a storm going on at the time. A car accident occurred when several drivers entered the intersection from different directions and one driver was injured. Testimony differed as to what actions the officer took to direct traffic. The officer testified that he had tried to direct traffic with a flashlight from the center of the intersection but that no one was obeying his orders. The driver testified that the officer was just standing on the side of the road at the time. The court of appeals found that the situation presented a serious and obvious danger and that the officer therefore had a duty to “do something.” It applied the known danger exception and held the officer was not entitled to immunity. The Wisconsin Supreme Court reversed explaining:

“2002 WI 71, ¶45. To pierce immunity pursuant to this exception, we must be able to conclude that the circumstances were sufficiently dangerous so as to give rise to a ministerial duty not merely a generalized “duty to act” in some unspecified way, but a duty to perform the particular act upon which liability is premised, here, manual traffic control.”

Several court of appeals decisions in last few years seem to have relaxed this rule that the danger must give rise to a duty to take specific actions, rather than doing “something” among a range of possible options.

In *Pries* the Supreme Court found that the directions for disassembling the horse stalls were sufficiently specific and mandatory that McMillon had a ministerial duty to carry them out. It did not reject the known danger rule as an alternate ground, the majority simply declined to ad-

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U.S. District Court Rejects City of Reedsburg Appeal on Automatic Stay Ruling

In a tightly reasoned decision sticking closely to existing precedent, a federal judge in the Western District of Wisconsin upheld a ruling of the United States Bankruptcy Court that the Reedsburg Utility Commission (Reedsburg) violated the automatic stay provisions of the United States Bankruptcy Code (Code) when it sent notice of unpaid utility bills to a large industrial customer and the City of Reedsburg (*Reedsburg Utility Commission v. Grede Foundries, Inc.*, 10-cv-84-bbc (May 24, 2010)).

The customer, Grede Foundries, Inc. (Grede), filed a Chapter 11 bankruptcy petition in June, 2009. At the time, Grede owed Reedsburg, its municipal electric utility service provider, over \$1.3 million in prepetition obligations for utility service. In October, 2009, in accordance with standard utility procedure for collecting delinquent bills, Reedsburg notified Grede that it would be placing the utility arrearages on the city's property tax rolls, citing sections 66.0809 and 66.0627, Wis. Stats., and two provisions of the Code. In November, Grede moved to enforce the Code's automatic stay provision, which creates a statutory injunction against debt collection efforts outside bankruptcy proceedings. Grede sought to void Reedsburg's actions and prevent the arrearages from becoming a lien on its property. In an order issued in December, 2009, the bankruptcy court held that Reedsburg had violated the automatic stay provisions by sending delinquency notices and reporting the delinquencies to the city clerk. Reedsburg subsequently filed its appeal in federal district court.

The district court decision affirms the Code's automatic stay provision as "fundamental" protection afforded debtors by bankruptcy law. Those provisions are intended to give debtors "breathing room" by putting a stop to collection efforts, including any act undertaken to create, perfect or enforce a lien against property of the bankruptcy estate. Acknowledging that the automatic stay is broad, but not absolute, the court decision rejects three exceptions cited by Reedsburg in its appeal.

The first exception allows creditors with pre-petition interests in debtor property to perfect their interest within a given time. The district court decision holds that this exception is inapplicable in Reedsburg's case because the mere existence of a payment obligation does not create an interest in the debtor's real property under the Code. Moreover, even if such a debt did create an interest in the debtor's property, the court reasons that the utility arrearage tax roll procedure under Wis. Stat. §66.0809, or any other statute, does not allow a perfected utility lien to be effective against previously acquired rights in the property, for example,

through statutorily imposed retroactivity, or priority.

The district court decision goes on to reject other exceptions to the automatic stay cited by Reedsburg for (i) notices of audit or tax delinquency, and (ii) perfection of liens for "special taxes or assessments." Citing federal precedent on the latter exception, the district court concludes that special taxes or assessments for purposes of applying the Code's exception to the automatic stay refer to amounts levied against specific properties for public benefits intended to enhance such properties. In contrast, according to the court's decision, Grede's delinquent charges did not arise to pay for a public improvement from which Grede's property received a specific benefit.

With a federal district court ruling upholding prior bankruptcy court precedent on the issue of whether placing utility arrearages on the property tax rolls violates the automatic stay, the issue may now be considered settled law. Municipal utilities seeking to protect themselves against potential delinquencies should avail themselves of other tools, including collection of customer deposits, closely monitoring the financial condition of large customers, and various forms of credit and performance assurance allowed by Public Service Commission rules.

— Richard A. Heinemann

Reedsburg to Receive \$5.2 Million Recovery Act Grant for Expansion of Broadband Services

In early July, the U.S. Department of Agriculture began its second round of broadband funding announcements through the American Recovery and Reinvestment Act (Recovery Act). In all, \$390.9 million will be invested in 37 projects through funding made available by the Recovery Act. The Reedsburg Utility Commission's application was among those 37 projects that were approved. Reedsburg will be receiving a \$5,239,168 grant to help fund an \$8 million expansion of its broadband network. The project is to extend the City of Reedsburg's existing municipal Fiber-to-the-Premise network to the surrounding rural area to provide affordable advanced broadband services to residents and businesses that are currently confined to traditional dial-up, wireless, and costly satellite services. Reedsburg was the first entity, municipal or private, operating a Fiber-to-the-Premise network in Wisconsin, over which it offers phone, cable TV and Internet services.

— Anita T. Gallucci

Citizens' Ability to Challenge High Capacity Well Permits Broadened by New Court Decision

The Wisconsin Court of Appeals has issued a decision, *Lake Beulah Management District v. Wisconsin Department of Natural Resources*, Appeal No. 2008AP3170 (Ct. App., Dist. II, decided June 16, 2010 and recommended for publication), that significantly broadens a citizen's ability to challenge a high capacity well permit. Under Wisconsin's high capacity well law, Wis. Stat., § 281.34, the Department of Natural Resources (DNR) must review the environmental impact of a proposed high capacity well if the proposed well will: (1) be located in a groundwater protection area, (2) result in a water loss of more than ninety-five percent of the amount of water withdrawn, or (3) potentially have a significant environmental impact on a spring. In *Lake Beulah*, the court of appeals held that the DNR also has the ability to review the environmental impact of a proposed well if it is presented with information that the proposed well will negatively impact waters of the state. The case is being appealed to the Wisconsin Supreme Court.

The case involved the Village of East Troy's efforts to permit a new 1.44 MGD municipal water supply well. The well site chosen was approximately 1400 feet from the shores of Lake Beulah. The Village submitted a pump test report which indicated that the proposed well would not result in any serious disruption of groundwater discharge to Lake Beulah. The DNR granted the well permit in 2003.

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dress it. The majority's decision leaves some ambiguity about whether the court will go along with what appears to be a trend toward expanding the known danger rule.

Chief Justice Abrahamson wrote a concurring opinion explaining that she found the known danger analysis used by the court of appeals to provide a "simpler, and to me, a more persuasive means of resolving this case." Justice Bradley, joined by Justices Roggensack and Gabelman, dissented, finding that the written procedure for disassembly was not sufficiently particularized as to create a ministerial duty. She expressed concern over an expansion of liability that could expose governmental bodies to substantial expense at a time when they least afford it. Justice Gabelman wrote a separate dissenting opinion expressing concern that the cases in this area were departing from the statutory language of section 893.80, Wis. Stats.

— Mark J. Steichen

After the permit was granted, the Lake Beulah Management District (District) requested a contested case hearing, alleging that the DNR failed to comply with its responsibility to protect navigable waters, groundwater and the environment as a whole in issuing the permit to the Village. The DNR eventually granted the contested case hearing request. However, in the contested case hearing, the administrative law judge (ALJ) held that the DNR did not have the authority to consider the environmental effects of the municipal well because the proposed well would not be located in a protected area identified under Wisconsin's high capacity well statute, Wis. Stat. § 281.34. The ALJ held that because § 281.34 requires the DNR to consider certain impacts, the statute should be construed to exclude consideration of other factors. The District filed for judicial review of the decision, and the circuit court affirmed the ALJ's decision and reasoning.

In 2005, the Village applied and received a two year extension of the 2003 permit. The District filed a petition for review of the 2005 permit, restating many of the concerns expressed in the litigation over the 2003 permit. The circuit court denied the petition for judicial review holding that although the DNR had a right to consider whether a high capacity well would negatively impact the waters of the State, there was no proof in this case of such an impact, so the DNR did not fail in its obligation to protect the waters of the state. The District appealed to the court of appeals.

In a broadly worded decision, the court of appeals held that the DNR has very broad authority under its general statutes -- Wis. Stat. §§ 281.11 and 281.12 -- to take action to protect surface water and groundwater. The court of appeals interpreted these general statutes as expressly delegating to the DNR the regulatory authority necessary to fulfill a mandatory duty to protect, maintain and improve the quality and management of the waters of the state.

The Village's position was that these general statutes set forth the legislature's intent in adopting Chapter 281, but that Chapter 281 needed to be reviewed in its entirety in order to determine the extent of the DNR's authority. As §§ 281.34 and 281.35 contained specific provisions applicable to high capacity wells, the Village argued that those statutes were controlling because they represented the legislature's policy decision regarding the extent of high capacity well regulation necessary to satisfy the DNR's duties to protect the waters of the state.

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PSC Gives WPL Go Ahead for Economic Development Rates

In a June 4, 2010 decision, the Wisconsin Public Service Commission (the Commission) on a 2 to 1 vote (with Commissioner Azar dissenting) approved the request by Wisconsin Power and Light Company (WPL) to implement an experimental economic development rate (EDR) in order to offer certain of its large commercial and industrial customers discounts on their electric rates. In February, the Commission had approved the concept of offering an EDR for the purposes of attracting and expanding businesses and creating jobs in WPL's service territory. The Commissioners also laid out several conditions that they believed should be addressed to develop a detailed EDR. In response, WPL revised its plan, which the Commission has now approved.

Specifically, the Commission approved a two-year pilot EDR program. The discounted rates will be available only to WPL's large industrial or commercial customers that are in economic distress and meet other criteria. Such customers are to apply to the Commission for approval to participate in the EDR program. The discounted rate will be set at 105 percent of marginal costs for the first year, with the discount decreasing annually on a pro rata basis until the customer pays the full rate of its rate class. The rate will be available to both new and existing WPL customers. With regard to existing "load retention" customers, the Commission reserved the right to decide how much of the customer's load would qualify for the EDR when the Commission reviews the customer's application and approves an EDR for that customer. For new customers, all of the customer's electric load from its new facilities in Wisconsin qualifies for the discount.

In her dissent, Commissioner Azar charged that the Commission's action in this matter strays from the Commission's traditional mission of regulating Wisconsin's public utilities and takes a new course into economic development. She opined that the EDR was inconsistent with the Commission's statutory authority and the Commission's past practice. Commissioner Azar also stated that the Commission should not have taken action without first holding a contested case hearing, issuing a notice of proceeding, and opening a docket. "The result," according to Azar, "is significant in its policy, and striking in its haste."

The Citizens' Utility Board (CUB) is challenging the PSC's decision, claiming that the discounts would harm residential and small-business customers by forcing their rates to rise to make up for the loss in revenues resulting from the EDR program. CUB also complains that the Commission failed to follow the proper procedure by approving the rate discount program without holding a contested case proceeding.

— Anita T. Gallucci

Town Lacks Authority to Deny Building Permit for Pier Approved by DNR

In *Lake Geneva Club v. Town of Linn*, Appeal No. 2009AP2001 (Ct. App., Dist. II, decided June 9, 2010, not recommended for publication), the Wisconsin Court of Appeals held that a town lacks the authority to prohibit the construction of a pier approved by the Wisconsin Department of Natural Resources (DNR).

The Lake Geneva Club (Club) obtained a permit from the DNR to modify an existing pier and install a new one on the bed of Geneva Lake. No one appealed the granting of the permit. When the Club applied to the Town of Linn (Town) for a building permit to build the pier, the Town Board denied the permit. The Club petitioned the circuit court for certiorari review of the denial. The circuit court reversed the Town's decision and ordered it to grant the Club a permit in accordance with the DNR's permit. The court of appeals has now affirmed the circuit court's decision.

The Town argued that it had the authority to deny the building permit for the pier because municipalities have broad authority to govern matters of local concern. The Town pointed to Wis. Stat. § 61.34, which provides that: "Except as otherwise provided by law, the village board shall have the management and control of the village ... navigable waters ... and may carry its powers into effect by license, regulation ... and other necessary or convenient means."

The court held, however, that the authority to regulate piers now is "otherwise provided by law," because the DNR has been given the authority to permit piers under Wis. Stat. § 30.12. According to the court, Wis. Stat. Ch. 30 regulates Wisconsin's navigable waters pursuant to the public trust doctrine. The state of Wisconsin has the responsibility under the public trust doctrine to hold the beds of navigable waters in trust for all its citizens, and the legislature has the primary authority to administer the public trust. It delegated the duty of regulating piers to the DNR under Wis. Stat. §§ 30.12 and 30.13. This authority is preeminent, and the Town does not have the right to effectively negate what the DNR has permitted. A local governing body can neither lawfully forbid what the legislature, through the DNR, has expressly authorized, nor authorize what it has expressly forbidden.

According to the court, any objection the Town had to the permit had to be addressed through Wis. Stat. Ch. 227.

— Lawrie Kobza

Citizens' Ability to Challenge High Capacity Well Permits Broadened by New Court Decision

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The court rejected the argument that §§ 281.34 and 281.35 limited the extent of the DNR's ability to review environmental impacts from high capacity wells. The court's decision was principally based upon its initial conclusion that the general statutes expressly delegated broad authority to the DNR to take the action necessary to fulfill a mandatory duty to protect, maintain and improve the quality and management of the waters of the state.

The court's rationale raises the question of why the specific provisions of §§ 281.34 and 281.35 are necessary at all if the broad authority in §§ 281.11 and 281.12 gives the DNR authority to do anything it deems necessary with regard to waters of the state. The court appears to answer that the legislature requires the DNR to complete a formal environmental review for all proposed high capacity wells that meet the criteria in § 281.11 and § 281.12. For other wells, the DNR is not required to complete a formal environmental review, but may exercise its discretion to give greater review of a well if the facts warrant it.

The District argued that the DNR always has an affirmative obligation to consider a well's effect on the waters of the state. The court disagreed and held that the DNR's public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well. Citizens may submit evidence to the DNR on a proposed well's impact during the permit review process or during a contested case hearing. The DNR is to determine whether the evidence submitted is sufficient to trigger the DNR's duty to investigate public trust concerns. The court noted, however, that "scientific evidence" suggesting an adverse affect to waters of the state should be enough to warrant further, independent investigation. If the contested case hearing process is used, the court said, every party, including concerned citizens, will have an opportunity to rebut or offer countervailing evidence. At the conclusion of the testimony, the hearing examiner may then decide whether there is sufficient evidence of a potential adverse impact and, if so, may issue specific orders to the DNR.

In this case, the court found that a hydrogeologist's affidavit presented by the District to the DNR's attorney as part of the litigation prior to the time the DNR acted on the 2005 permit should have been considered in the 2005 permit application process. The hydrogeologist's affidavit stated that based upon his tests, there would be a lowering of water levels, and the potential for adverse impacts to Lake Beulah. Because the DNR did not consider the affidavit, the court reversed and remanded the case to the circuit court, with directions to remand the case to the DNR so that it may consider the hydrogeologist's affidavit and any other information the DNR had pertinent to the proposed municipal well before it issued the 2005 approval.

— Lawrie Kobza

Court of Appeals Rules on Power Plant Emissions Case

The Wisconsin Court of Appeals issued a decision on June 14, 2010 ruling that the Wisconsin Department of Natural Resources (DNR) did not set strong enough pollution controls before issuing air pollution permits to Wisconsin Public Service Corporation (WPS) and Dairyland Power Cooperative (DPC) for the Weston 4 power plant. *Sierra Club v. DNR*, Appeal No. 2009AP648 (June 24, 2010). Weston 4 is a coal fired electric generating unit, with a capacity of 525 megawatts. It went online in 2008.

In 2006, the Sierra Club brought suit against the State of Wisconsin, WPS and DPC, claiming that the DNR failed to require the best pollution-control technology (BACT) before issuing a construction permit for air emissions. At issue before the District 4 Court of Appeals were three BACT determinations by the DNR, which included the emissions limit and control technology for sulfur dioxide, the emissions limit for nitrogen oxide, and the visible emissions standard for opacity.

The appellate court ruled that DNR set appropriate limits on sulfur dioxide and nitrogen oxide emissions from the plant. However, the court also ruled the DNR failed to limit visible emissions such as particulate matter, PM10, and sulfuric acid for the main boiler at the Weston 4 plant. Accordingly, the court remanded that matter to the DNR to reopen the permit to establish a BACT visible emissions limit for those emissions that are visible.

None of the parties have announced at this time whether it will seek review by the Wisconsin Supreme Court.

— Anita T. Gallucci

MUNICIPAL LAW NEWSLETTER

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Richard L. Bolton	283-1789	rbolton@boardmanlawfirm.com
Andrew N. DeClercq	283-1734	adeclercq@boardmanlawfirm.com
Anita T. Gallucci	283-1770	agallucci@boardmanlawfirm.com

Robert E. Gregg	283-1751	rgregg@boardmanlawfirm.com
Rhonda R. Hazen	283-1724	rhazen@boardmanlawfirm.com
Richard A. Heinemann	283-1706	rheinemann@boardmanlawfirm.com
Lawrie J. Kobza	283-1788	lkobza@boardmanlawfirm.com
Richard A. Lehmann	283-1719	rlehmann@boardmanlawfirm.com
Jennifer S. Mirus	283-1799	jmirus@boardmanlawfirm.com
Jon C. Nordenberg	283-1739	jnordenberg@boardmanlawfirm.com
Catherine M. Rottier	283-1749	crottier@boardmanlawfirm.com
John P. Starkweather	283-1708	jstarkweather@boardmanlawfirm.com
Mark J. Steichen	283-1767	msteichen@boardmanlawfirm.com
Cynthia A. Van Bogaert	283-7543	cvanbog@boardmanlawfirm.com
Steven C. Zach	283-1736	szach@boardmanlawfirm.com

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