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City of Salem v. Koncelik, 843 N.E.2d 799 (Ohio Ct. App. 2005)

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The court then determined that water rights are appurtenant to title in real property. As such, the government may not invade these rights. It held that property owners were not required to hold separate title to their groundwater. The court relied on numerous holdings from diverse jurisdictions to find that landowners' rights to groundwater protect them from government interference. It further stated that the welfare of Ohio homeowners, the security of Ohio's economy, and the reliability of real estate transfers demand the safeguarding of groundwater rights. The court answered the certified question holding that Ohio landowners have a property interest in the groundwater underlying their land and that government interference with that right can constitute an unconstitutional taking.

Jacki Lopez

City of Salem v. Koncelik, 843 N.E.2d 799 (Ohio Ct. App. 2005) (holding the Ohio Code required the Environmental Review Appeals Commission to consider biological criteria regulation when seeking to impose permit discharge limitations).

The City of Salem ("Salem") appealed from a renewal permit issued by the Ohio Environmental Protection Agency ("OEPA") imposing more stringent limits on the amount of phosphorus and total dissolved solids a municipal wastewater treatment plant ("WWTP") could discharge into a creek. The discharge allowed by the creek's biological water quality standards exceeded the permit limits. The Environmental Review Appeals Commission ("ERAC") affirmed the renewal permit and found OEPA's action comported with the legal authority pursuant to the Ohio Code. Further, ERAC found the Ohio Code legally required OEPA to impose limits "necessary and appropriate" to achieve and maintain the applicable standards of water quality.

Salem appealed ERAC's order to the Ohio Court of Appeals. First, Salem asserted ERAC's ruling that the Ohio Code provides legal authority for the imposition of the phosphorus limits was not in accordance with law. Salem reasoned the limits were not in accordance with the law because the Ohio Code required OEPA to comply with additional standards of biological criteria regulation when seeking to impose permit discharge limitations.

Second, Salem asserted reliable, probative and substantial evidence did not support ERAC's failure to find additional limitations in the Ohio Code precluded OEPA's action. Finally, Salem asserted ERAC's finding that the specific numeric limits for phosphorus included in the renewal permit were "necessary and appropriate" to achieve water quality standards was not supported by reliable, probative and substantial evidence and was not in accordance with law.

The court sustained Salem's first assertion and held the plain language of the Ohio Code required ERAC to consider the additional limitations when seeking to impose permit discharge limitations. The court reversed and remanded the first argument holding OEPA needed to consider biological criteria regulation. The court declined to address Salem's second and third assertions because ERAC needed to review these issues on remand.

Alexandra Farkouh

OREGON

Save our Rural Or. v. Energy Facility Siting Council, 121 P.3d 1141 (Or. 2005) (holding the Oregon Energy Facility Siting Council's decision to have the Water Resources Commission issue a water permit was proper because the record contained substantial evidence that the permit would not injure existing water rights).

The Oregon Energy Facility Siting Council ("Council") granted a site certificate allowing Cob Energy Facility LLC ("COB") to construct a privately owned energy facility. Save our Rural Oregon ("Rural Oregon"), which consisted of 22 Klamath County residents and two organizations representing them, challenged the Council's final order granting COB a site certificate.

The application process for site certification begins by submission of a Notice of Intent ("NOI") to the Council, after which the Council notifies the public. Next, the State Department of Energy ("Department") drafts a project order, which establishes the legal requirements for the application for site certification ("ASC"). Then, the state sends the NOI and ASC to various state agencies and affected municipalities for comment. After a comment period, the Department reviews the ACS to determine whether it is complete. If the Department deems the ACS complete, the Department prepares and issues a draft proposed order. The Council then holds public hearings regarding the ASC and the proposed order. After the hearings, the Department issues a proposed order and notifies the public that the Council will hold a contested case hearing to consider adoption of the proposed order. Following the contested case hearing, the Council issues a final order approving or rejecting the ASC.

On September 5, 2002, COB submitted its ASC to the Department. Thereafter, the Department gave public notice of the ASC proposing a natural gas-fired, combustion turbine, combined-cycle energy facility that would require between 5,390 and 7,590 gallons of water per minute for cooling. COB proposed to draw the water from deep wells in the Lost River Basin by means of a new water pipeline. Upon negative comment, COB informed the Department it intended to amend its