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Friends of Ottawa River v. Schregardus, No. 98AP-1314, 1999 Ohio App. LEXIS 4236 (Ohio Ct. App. Sept. 16, 1999)

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construction met the applicable North Dakota Department of Transportation's twenty-five year flood event design standards. The court concluded that the trial court did not abuse its discretion in refusing to grant injunctive relief to the Hubers.

Finally, the supreme court considered whether the trial court abused its discretion in awarding the County costs and disbursements under the North Dakota statute granting such awards to prevailing parties. The Hubers argued that they were the prevailing party under the statute because of the County's pretrial agreement to build an additional culvert. The court rejected the Hubers' argument finding the County was the prevailing party in the case. The court also rejected Hubers' argument that the costs were not properly detailed and verified as required by the North Dakota rules of civil procedure. Finally, the court held that the trial court did not abuse its discretion in rejecting Hubers' argument that the County inappropriately taxed the costs of its expert engineer because the engineer changed his position before trial which increased the litigation costs.

In conclusion, the court held that the trial court did not err in denying the Hubers' motion for a new trial and affirmed both the judgment and the post-judgment orders.

Julie E. Hultgren

OHIO

Friends of Ottawa River v. Schregardus, No. 98AP-1314, 1999 Ohio App. LEXIS 4236 (Ohio Ct. App. Sept. 16, 1999) (upholding issuance of a section 401 Water Quality Certification to City of Toledo, Ohio, where appellants claimed they had submitted an incomplete application and had made alterations to the original plan).

Friends of Ottawa River ("Friends") appealed the Ohio Environmental Review Appeals Commission's ("ERAC") decision to uphold issuance of a section 401 Water Quality Certification to City of Toledo, Ohio ("Toledo") by the Ohio Environmental Protection Agency ("OEPA"). Toledo agreed to remediate several parcels of real estate to prepare for Chrysler's expansion of a Jeep production plant ("Jeep project"), thereby making Toledo responsible for the appropriate permits.

Toledo applied to the United States Army Corps of Engineers ("COE") for a section 404 permit to fill roughly twenty-five acres of wetlands surrounding the facility, including 5.34 acres adjacent to the Ottawa River. The Clean Water Act required section 401 certification as a prerequisite to a section 404 permit. Under Ohio law, a section 404 permit application with COE simultaneous effects application for section 401 certification from OEPA. Toledo filed supporting documentation as required.

After the notice and comment period, OEPA issued section 401 certification for the Jeep project to Toledo. Shortly thereafter, Friends argued the certification invalid for two reasons: (1) incompleteness of the application; and (2) a change of the planned uses after the public

certification hearing. After a hearing, ERAC affirmed the OEPA issuance of the section 401 certification.

Friends raised two issues on appeal from that order. Friends first argued that OEPA issued the section 401 certification in error because Toledo submitted an incomplete application. The court noted that the COE must have felt the application was complete before it issued the public notice. Further, the court concluded that submitting an incomplete section 401 permit application does not invalidate OEPA's issuance of the Section 401 certification. Friends further claimed that Toledo's application failed to provide the required additional documentation to support its section 401 certification. Specifically, Friends contended that Toledo's section 401 application did not provide the intended fill material's chemical composition. Friends argued that Ohio law required identification of regulated pollutants that applicant would discharge. But the applicable code section did not require the applicant to identify the chemical constituents of the fill material, only the "substance" and "amount." Further, the state administrative code addressed the potential for the presence of "regulated pollutants" in other sections. Therefore, the court concluded that Toledo had satisfied the applicable requirements for the section 401 application.

Friends next claimed that Toledo must resubmit its section 401 certification due to alterations in the planned use for the 5.34 acres adjacent to the Ottawa River. In the initial plans, a shipping lot completely covered the 5.34 acres at issue. In the ERAC appeal, Toledo had modified the plans by moving the access road to the northern rather than the southern edge of the shipping lot. The court found that this "minor" change did not cause any additional wetlands loss, and was therefore immaterial. The court, therefore, affirmed OEPA's issuance of the Section 401 certification.

Shana Smilovits

OREGON

Norden v. Oregon, 329 Or. 641 (Or. 2000) (holding that under Oregon's Administrative Procedure Act the scope of the record on judicial review of an order in an other than contested water proceeding was not limited to the information the water department had before it when it issued its order).

In November 1994, the Water Resources Department ("Department") issued an order informing Dorothy Norden ("Norden") that she was not entitled to divert water from a spring arising on her property without first obtaining a water right permit. In Oregon, a property owner was required to obtain a water right permit if waters leaving a spring on the property form a watercourse and, if undiverted, would flow onto the land of another.

The circuit court considered evidence as to what information was