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Public Service Commission Tells Milwaukee to Accelerate Water Main Replacement

The Public Service Commission (PSC) approved Milwaukee's request for a water rate increase on October 30, 2014 (PSC Docket No. 3720-WR-108). Several noteworthy requirements regarding Milwaukee's water main replacement program were included in the decision.

The PSC raised concerns with aging water infrastructure and the need to spend increasing amounts on main replacements in its decision. Milwaukee initially took the position that it would replace 15 miles of main per year using cash financing. After the hearing was held, but before the PSC's decision, Milwaukee proposed accelerating its main replacement program to replace 15 miles of main in 2015-17, 18 miles in 2018-2019, and 20 miles in 2020. Milwaukee's water superintendent indicated that a revised funding plan had been worked on with the City's Budget Office, which would propose to issue $92 million in debt by 2020 in order to fund this quantity of main replacements.

The PSC accepted Milwaukee's revised main replacement program as a minimal effort and opined that Milwaukee will likely need to expand its main replacement efforts above proposed levels. The PSC required Milwaukee to hire an independent consultant to do a main replacement study and to submit a copy of the final report prepared by the consultant. In addition, Milwaukee must report to the PSC every six months regarding the condition of its mains and provide a copy of its main break reports.

During the hearing, PSC staff raised concerns about Milwaukee's main replacement program. Milwaukee has a total of 1,961 miles of main. Based on an average useful life of 77 to 100 years, PSC staff calculated that Milwaukee must replace between 20 to 25 miles of main each year to ensure mains do not exceed their useful life. When considering facts relevant to the condition of Milwaukee's water mains, PSC staff testified that Milwaukee would need to replace even more main each year. Milwaukee has 843 miles of main that were installed between 1880 and 1943 (pre-World War II) that have a remaining life of 54 years. At least 15.6 miles of this main would have to be replaced each year to upgrade it by the end of its remaining life. Milwaukee also has 431 miles of main installed between 1943 and 1963 (post-World War II) which is in worse condition than the pre-World War II main. Milwaukee indicated this main is expected to have a remaining life of 34 years. PSC staff computed that it will require 12.7 miles of main to be replaced each year to upgrade this vintage of main by the end of its remaining life. Using straight line depreciation, PSC staff testified that Milwaukee would need to replace about 28 miles of main per year to upgrade each vintage of main by the end of their respective remaining lives.

Data regarding Milwaukee's actual experience with its main breaks was also presented during the rate case. Milwaukee provided a 70-page list of sections of main that are still in the ground that have experienced one or more main breaks. The PSC also raised concerns that Milwaukee experienced 82 main breaks in six days when the Howard Avenue Treatment Plant was shut down and that the system relied solely on the Linnwood Treatment Plant, which required higher water pressure exiting the Linnwood Plant. This information was presented to demonstrate the concern that deferred maintenance could lead to possible catastrophic failures.

The PSC also discussed Milwaukee's method of funding water main replacements. Milwaukee originally testified that it intended to cash finance all main replacements. As a general proposition, PSC staff testified that

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Contractual "Fee in Lieu of Room Tax" Struck Down

The City of Delavan entered into a development agreement with Delavan Resort Holdings related to the development of the Lodges at Lake Lawn Resort Condominium. Part of the development agreement required the developer to adopt condominium declarations that would require that part of the development be deemed to be rental units. The developer agreed in the development agreement that a fee would be imposed on the owner of a rental unit in the affected area who did not want to rent his or her unit to the public. The agreement required that the fee would be paid to the City "in lieu of the room tax which the City would have otherwise received from the rental of such Unit to the public."

Certain owners chose to not rent their units to the public and paid the fee. They then sued the City and the condominium association seeking a judgment declaring the fee to be illegal and requesting a refund of fees paid to date. The City argued that the fee was a valid and enforceable contractual term and not a tax. The circuit court sided with the City, and the owners appeal. On appeal, the Court of Appeals reversed and held the "fee in lieu of room tax" to be a tax that the City was not authorized to impose. *Bentivenga v. City of Delavan,* (Ct. App., Dist. II, Decided October 15, 2014)

In its finding that the "fee in lieu of room tax" was a tax, the Court focused on the fact that the revenue collected from the owners who chose not to rent their units was not dedicated to the provision of any service or regulation but was purely for general government revenue. The Court also noted that increases in the fee were linked to increases in the consumer price index or average room tax collections at the resort, not the expense of any specific governmental services.

The Court rejected the City's argument that the fee was not a tax, but a "contractual penalty" that the City could bargain for in its proprietary capacity. The City, relying on *Baylake Bank v. Fairway Properties of Wisconsin, LLC,* No. 2010AP2632, unpublished slip op. (WI App Sept. 15, 2011), argued that it was authorized to impose such a penalty via the development agreement as a back-up mechanism to receive room taxes lost by the owners' decision to not rent their units to the public. The Court stated that the City's reliance on *Baylake Bank*, which dealt with a liquidated damages penalty provision in a development agreement, was misplaced. The provision at issue in *Baylake Bank* allowed the city to recoup the expenses it incurred for its part of the agreement if the developer did not develop property as promised to generate revenue to cover the City's costs. The "fee in lieu of room tax" at issue in this case did not help the City recoup its investment in the resort development, but rather was the City's way of collecting revenue that it had hoped to receive through taxation. The Court noted that the revenue at issue here was not designated for any development-related purpose but was to go into the City's general fund.

The fact that the "fee in lieu of room tax" was imposed by contract did not give the City the authority to impose the tax. According to the Court, the "fee in lieu of room tax" is a revenue generator for the City that is imposed on a certain class of residents without legislative permission and is therefore illegal.

— Lawrie Kobza

Public Records Law Not Applicable to Wisconsin Counties Association

The Wisconsin Court of Appeals has decided that the Wisconsin Counties Association is not subject to the public records law. *Wisconsin Professional Police Association, Inc. v. Wisconsin Counties Association*, 2014AP249 (Ct. App. Dist. IV, decided September 18, 2014).

The Wisconsin Police Association submitted a public records request to the Wisconsin Counties Association. The Counties Association is an unincorporated not-for-profit association. The Counties Association responded that the public records law "does not apply to the Wisconsin Counties Association" and the Police Association sued to enforce the public records law against the Counties Association. The circuit court found that the public records law did not apply to the Counties Association, and the Police Association appealed.

The Police Association argued that the Counties Association is an "authority" under the public records law. The term "authority," is defined in Wis. Stat. § 19.32(1). The Police Association argued that the Counties Association specifically fit within the statutory category of a "quasi-governmental corporation." The Counties Association argued that it did not fall within the category of a "quasi-governmental corporation" because it is an unincorporated association – not a corporation. The Court of Appeals agreed that in order to be

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for small water systems that are primarily constructed over a few years, it is not reasonable to finance construction through current rates because current ratepayers would be paying for improvements that would primarily benefit future users, thereby creating intergenerational inequities. While it may be possible for a large water utility to finance main replacements from current rates if those mains were originally installed over an extended period of time, and are not failing or reaching the end of useful life simultaneously, Milwaukee has not steadily replaced its water mains. According to the PSC, Milwaukee has replaced less than 1% of its mains since at least 1972 and needs to catch up due to deferred main replacements. PSC staff computed that using cash financing only, with a 5.38% rate of return, Milwaukee would only have funds to replace about 17 miles of main a year – much less than the 28 miles of main per year that PSC staff felt needed to be replaced. PSC staff testified that Milwaukee could issue $100 million in debt and that its total debt would still be below 28% of its total capital structure.

The PSC's decision noted that, while water utilities have a great deal of latitude in selecting their financing methods, the PSC has an interest in ensuring intergenerational equity when it comes to financing infrastructure. The PSC put Milwaukee on notice that, given Milwaukee's funding needs and its ample future bonding capacity, Milwaukee may need to issue more debt than the amount proposed in its revised financing plan in order to meet its future infrastructure replacement needs.

— Lawrie Kobza

DNR Must Require CAFO to Monitor Groundwater Where Area Is Susceptible to Contamination

In describing the proliferation of contaminated wells in the Town of Lincoln, Kewaunee County, as "a massive regulatory failure to protect groundwater," an Administrative Law Judge (ALJ) ordered the Wisconsin Department of Natural Resources (DNR) to require a large animal feeding operation to conduct groundwater monitoring as part of its wastewater discharge permit. The case involved Kinnard Farms, a concentrated animal feeding operation (CAFO), in the Town of Lincoln, Kewaunee County. Kinnard Farms applied to the DNR for reissuance of a Water Pollutant Discharge Elimination System (WPDES) permit and for approval of the plans and specifications for its facility. The DNR subsequently reissued the WPDES permit and conditionally approved the plans and specifications for the facility. Midwest Environmental Advocates (MSA) filed a petition for a contested case hearing with the DNR on behalf of petitioners who reside near the Kinnard Farms facility. A contested case hearing was held before the Wisconsin Department of Hearing and Appeals. On October 29, 2014, the ALJ issued his decision in Case No.: IH-12-071, approving, but modifying the WPDES permit.

Wastewater discharges from CAFOs are regulated by Wisconsin Administrative Code Chapter NR 243. NR 243 does not require the calculation of water quality based effluent limits for CAFOs, but instead effluent limitations are based on proper manure and process wastewater storage, containment and land application practices. The WPDES permit issued to Kinnard Farms required that discharges authorized by the permit comply with surface water quality standards and groundwater quality standards. The ALJ found, however, that the DNR failed to include a groundwater monitoring condition in the WPDES permit to assure compliance with groundwater protection standards in this area which was susceptible to groundwater contamination.

The ALJ found that the DNR is obligated to require groundwater monitoring in a WPDES permit when necessary. The DNR administrative code for CAFOs requires the installation of groundwater monitoring wells at a facility if it determines that groundwater monitoring "is necessary to evaluate impacts to groundwater and geologic or construction conditions warrant monitoring." Wis. Admin. Code § NR 243.15(7). The ALJ found that the petitioners and members of the public carried their burden of proof in establishing that groundwater monitoring is necessary in this case because the area at or near the facility and subject to landspreading contracts is "susceptible to groundwater contamination within the meaning of NR 243.15(3)(2)(a)."

In reaching his decision, the ALJ noted that groundwater monitoring is not a standard requirement for WPDES permits. However, the ALJ found that the level of groundwater contamination including E. coli bacteria in the area at or near the project site was also very unusual, as was the proliferation of CAFOs in Kewaunee County. According to the ALJ, "[m]embers of the public described what could fairly be called a groundwater contamination crisis in areas near the site." Witnesses testified that up to 50% of private wells in the Town of Lincoln were contaminated and that as many as 30% of the wells had tested positive for E. coli bacteria. Public comment witnesses suggested a plausible and even likely connection between the large numbers of CAFOs in the County and area and problems with groundwater contamination. They also testified about the hardship and financial problems that well water contamination had on their businesses, homes and daily life.

Testimony also established that the area around Kinnard Farms was very vulnerable to groundwater contamination. Any pollution at the surface can travel rapidly through the shallow, glacial till soils and fractured carbonate bedrock. There would be little opportunity for attenuation and dispersion given the rapid transport through groundwater. In karst areas such as these, pollution at the surface would be able to travel rapidly through groundwater into down gradient wells.

The ALJ described the proliferation of contaminated wells as "a massive regulatory failure to protect groundwater in the Town of Lincoln." Given the proliferation of contaminated wells in the vicinity of Kinnard Farms and the likely presence of karst features including fractured bedrock, the ALJ found that the DNR should have exercised its clear regulatory authority to require groundwater monitoring at and near the facility. While the ALJ noted that it may be difficult to establish a reliable system of groundwater monitoring under these geologic circumstances, he stated that "[t]he fact that groundwater monitoring might be difficult because of the very karst geological features that make the area particularly susceptible to groundwater contamination must not be used as an excuse not to exercise the DNR's clear regulatory authority and duty to do so. Rather, such an effort must be undertaken to ensure that there is no further contamination of groundwater under these deplorable background conditions."

The ALJ ordered that the WPDES permit be modified "to do what is reasonably necessary to protect the drinking water of the residents" and further protect the groundwater from contamination. The ALJ ordered that the permit be amended to require the permitee to establish a plan acceptable to the DNR for groundwater monitoring, which would include no less than six groundwater monitoring wells, at least two of which would monitor groundwater quality impacts from off-site landspreading.

— Lawrie Kobza

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a "quasi-governmental corporation" under the definition of "authority" an entity had to first be a corporation. The Court of Appeals was not persuaded that the Counties Association was a "corporation" for purposes of the law. The Police Association argued that the Court of Appeals' interpretation created a loop-hole for unincorporated associations. But the Court of Appeals' responded that a contrary interpretation "would effectively rewrite the statute to eliminate the legislature's use of the word 'corporation.'"

The Police Association made a late argument that the Counties Association also constituted a "governmental body," covered by the public records law. The Court of Appeals, however, refused to address that issue because the Police Association did not raise that argument before the circuit court.

— Lawrie Kobza

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