

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

OUTAGAMIE COUNTY

NEW CHESTER DAIRY LLC,

Petitioner,

vs.

Case No. 14-CV-1055

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

TRANSCRIPT OF PROCEEDINGS

ORAL DECISION HEARING

November 12, 2015

Hon. Mark J. McGinnis
Circuit Court Judge
Presiding

8:30 a.m.
at the Outagamie County Justice Center
Appleton, WI

Kara L. Nagorny, RPR
Circuit Court Reporter

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A P P E A R A N C E S

JOSEPH D. BRYDGES, Attorney at Law,
MICHAEL BEST & FRIEDRICH, LLP,
One South Pinckney Street, Suite 700,
Madison, WI 53703; appears on behalf of New
Chester Dairy along with ATTORNEY DERIC DUQUAINE.

ELIZABETH ANNE WHEELER, Attorney at Law,
634 W. Main Street, Suite 300,
Madison, WI 53703; appears on behalf of
Clean Wisconsin, intervenor.

TIMOTHY ALAN ANDRYK, Attorney at Law,
PO Box 7921,
Madison, WI 53703-7921; appears on behalf of
Wisconsin DNR.

ROBERT I. FASSBENDER, Attorney at Law,
10 E. Doty Street, Suite 504,
Madison, WI 53703; appears on behalf of
Great Lakes Foundation, intervenor.

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2 (Proceedings commenced at 8:30 a.m.)

3 THE COURT: All right. We're going to go
4 on the record in 14-CV-1055. This is the matter
5 involving New Chester Dairy, LLC versus the Wisconsin
6 Department of Natural Resources. There are people in
7 the courtroom and on the phone, so why don't we start
8 with the people in the courtroom and introduce
9 yourself. Make sure we use the microphone.

10 ATTORNEY BRYDGES: Good morning, Your
11 Honor. Attorney Joseph Brydges of Michael Best and
12 Friedrich for petitioners New Chester Dairy and MS
13 Real Estate Holdings. I have with me at counsel
14 table Deric DuQuaine of New Chester and MS Real
15 Estate.

16 THE COURT: All right. Good morning, and
17 who do we have on the phone?

18 ATTORNEY WHEELER: Good morning. This is
19 Elizabeth Wheeler on behalf of Clean Wisconsin.

20 ATTORNEY FASSBENDER: And Robert Fassbender
21 on behalf of the Great Lakes Legal Foundation and
22 intervenor associations.

23 ATTORNEY ANDRYK: And Tim Andryk on behalf
24 of the Wisconsin Department of Natural Resources.

25 THE COURT: All right. Well, anybody else

1 on the phone? All right. Good morning, and one of
2 you apparently called in. I was in a three-week
3 trial the last three weeks, but, and I don't remember
4 who, but I know somebody that's part of this group
5 called in and asked my assistant if you'd be able to,
6 be able to argue or make some arguments this morning.
7 And I had indicated when that call came in which
8 either was last week or the week before that I didn't
9 have any problem with that, and then I think there
10 was a second attorney who called in and after that,
11 and I told my assistant to tell that attorney exactly
12 what we had told the first one.

13 So we'll just start and ask is there anybody who
14 wants to say anything before a decision is made? And
15 we'll start with you, Mr. Brydges.

16 ATTORNEY BRYDGES: Thank you, Judge. The
17 petitioners do not have anything further to add at
18 this time.

19 THE COURT: Okay. Start with you,
20 Ms. Wheeler, on the phone?

21 ATTORNEY WHEELER: Thank you, Your Honor.
22 You know, I think that probably my call was the one
23 that precipitated all of that, and I have to
24 apologize 'cause I think it was a miscommunication.
25 We actually weren't speaking to make a statement. We

1 were just trying to figure out if you were expecting
2 us to or not, so we have no further statement to make
3 at this time.

4 THE COURT: Okay. Mr. Fassbender?

5 ATTORNEY FASSBENDER: Similarly, we'll
6 stand on the briefs.

7 THE COURT: Okay. And then I know the
8 attorney, is it Attorney -- what's your last name?

9 ATTORNEY ANDRYK: Tim Andryk, DNR.

10 THE COURT: Okay. And Mr. Andryk, anything
11 you'd like to say?

12 ATTORNEY ANDRYK: No. We have nothing
13 further, Your Honor.

14 THE COURT: All right. Well, I'm prepared
15 to make a decision this morning then, and my decision
16 is based upon everything that's been filed, the
17 entire record. And it's, there's a lot of paperwork,
18 so I'm not going to cite everything that was read,
19 but I've gone through it numerous times.

20 ATTORNEY ANDRYK: Your Honor, we can't hear
21 you. You're cutting in and out.

22 THE COURT: I was hoping that you wouldn't
23 be able to hear me. No, I'm kidding. I'll try to
24 speak -- is this better?

25 ATTORNEY ANDRYK: Yes, that's better.

1 THE COURT: Okay. And if it happens again,
2 you know, interrupt me and just say so, and I'll try
3 to remember to stay close to the microphone.

4 I was just indicating, Mr. Andryk, that I have
5 reviewed everything in the file and all of the
6 motions, all of the paperwork.

7 ATTORNEY ANDRYK: In and out --

8 THE COURT: Okay. Ms. Wheeler or
9 Mr. Fassbender, can you hear me?

10 ATTORNEY WHEELER: No.

11 THE COURT: Okay. Can you hear me now?

12 ATTORNEY FASSBENDER: Yes.

13 THE COURT: Mr. Andryk? Okay.

14 Ms. Fassbender, are you there, or I mean,
15 Ms. Wheeler?

16 ATTORNEY WHEELER: Yes. I'm here, and I
17 can hear you sort of intermittently.

18 THE COURT: Okay. I'll do my best. I
19 always try to accommodate people by telephone so that
20 you save time and your clients money, and it's -- but
21 I'm just going to go ahead and make the decision. If
22 you to need to order a transcript of it, you can do
23 that.

24 In this case New Chester operates an industrial
25 dairy farm in Adams County. It constructed its

1 facilities after receiving a Wisconsin pollutant
2 discharge elimination system permit, an approval to
3 construct reviewable facilities, and a high-capacity
4 well approval from the Wisconsin DNR in 2011. In
5 2012, New Chester applied to modify its pollutant
6 discharge permit to accommodate an expansion in the
7 number of cows at its dairy. WDNR was concerned that
8 the increased water use necessitated by the increased
9 number of cows would have an adverse impact on nearby
10 Patrick Lake. The Wisconsin DNR therefore requested
11 that New Chester evaluate surface and ground water
12 impacts of the expansion of the dairy.

13 New hire or New Chester at that time hired S.S.
14 Papadopulos and Associates, Inc. to do a ground water
15 modeling study of the potential impact of the
16 expanded water use on Patrick Lake and to identify
17 alternative sites for the high-capacity well. SSPA,
18 which is the initials that I'm going to use for that
19 entity, identified an alternative well location
20 approximately 2.5 miles from the dairy where the
21 impact of surface waters would be minimized. The
22 Wisconsin DNR agreed that the alternative site would
23 be appropriate, and in its environment assessment,
24 the Wisconsin DNR concluded that the impacts to water
25 resources from New Chester's proposed wells were

1 relatively small and did not have significant adverse
2 impact on Patrick Lake or the area streams. The
3 Wisconsin DNR was concerned, however, about the lack
4 of data available about the region's hydrogeological
5 features and the viability of that data, the
6 variability of that data.

7 Based upon that, the Wisconsin DNR eventually
8 approved the permit, but it included the condition
9 that New Chester install ground water monitoring
10 wells, collect monitoring data for at least three
11 years and provide that data to Wisconsin DNR on a
12 quarterly basis. Specifically, New Chester was
13 required to install three monitoring wells at
14 different locations within the area projected by SSPA
15 to experience at least 24 inches of ground water
16 drawdown after five years and two additional wells
17 within the area projected by SSPA to experience at
18 least 12 inches of ground water drawdown after five
19 years.

20 At the 24-inch drawdown locations, New Chester
21 is required to collect water elevation data every
22 four hours for the first year and every two days
23 thereafter. At the 12-inch locations, New Chester
24 must collect water elevation data every day for the
25 first year and then weekly thereafter but biweekly

1 during the winter months. New Chester has been
2 complying with these requirements since April of
3 2013.

4 New Chester objected to the monitoring condition
5 because SSPA's hydrogeologist Dr. Charles Andrews had
6 an opinion that the data collected from the
7 monitoring wells would not be effective in evaluating
8 whether New Chester's water use matched the impact
9 predicted in SSPA's model.

10 New Chester sought a contested hearing and moved
11 for summary judgment on that basis or on the basis
12 that, first, the Wisconsin DNR did not have the
13 requisite authority to impose the monitoring
14 condition, and second, that the monitoring condition
15 imposed was unreasonable. The administrative law
16 judge denied New Chester's motion and granted the
17 Wisconsin DNR partial summary judgment finding that
18 it did have authority to impose the monitoring
19 condition. A hearing was held on the reasonableness
20 of the monitoring condition and the administrative
21 law judge found that the condition was reasonable.
22 This matter is here because New Chester seeks
23 administrative review of the administrative law
24 judge's decision.

25 The argument that's presented here by New

1 Chester requires this Court to address an issue of
2 first impression, and that issue of first impression
3 is how is the newly-created Wisconsin Statute Section
4 227.10(2m) to be applied. Because consideration of
5 this question is one in which the Wisconsin DNR is
6 not entitled to deference, the Court should apply a
7 de novo review standard. De novo review is also
8 appropriate because the Court is assessing the scope
9 of the Wisconsin DNR's own powers, and I'm citing for
10 those de novo authority the *RURAL*, R-U-R-A-L, *versus*
11 *Public Service Commission* at 239 Wis.2d 660 and
12 *Wisconsin Citizens Concerned for Cranes & Doves*
13 *versus the DNR* at 270 Wis.2d 318.

14 When interpreting a statute, a court shall begin
15 by examining the language of the statute, and the
16 analysis ends there if the meaning is plain; and that
17 is citing at 271 Wis.2d 633, the State of, or the
18 case of *State ex rel Kalal*, K-A-L-A-L, *versus Circuit*
19 *Court for Dane County*. Statutory language is
20 interpreted in relation to the language of
21 surrounding or closely-related statutes and
22 reasonably to avoid absurd or unreasonable results.
23 This includes the scope, context, and purpose of the
24 statute if it is evident from the statutory language.
25 If the Court's interpretation yields a plain, clear

1 statutory meaning, then the statute is unambiguous
2 and it need not resort to other sources such as
3 legislative history or others to aid in its
4 interpretation.

5 Paragraph (2m) of Wisconsin Statute Section
6 227.10 provides as follows: No agency may implement
7 or enforce any standard, requirement, or threshold
8 including as a term or a condition of any license
9 issued by the agency unless that standard,
10 requirement, or threshold is explicitly required or
11 explicitly permitted by statute or by a rule that has
12 been promulgated in accordance with this subchapter
13 except as provided by Wisconsin Statute Section
14 186.118(2)(c) and (3)(b)3. The governor, by
15 executive order, may prescribe guidelines to ensure
16 that rules are promulgated in compliance with this
17 subchapter, and that is the paragraph that is at
18 issue in this case.

19 New Chester argues that this paragraph removes
20 from consideration whether a statute provides an
21 agency any implied powers. Clean Wisconsin on the
22 other hand argues that it does not change how the
23 Court should interpret the Wisconsin DNR's powers.

24 The language of paragraph (2m) states very
25 clearly that an agency can only implement or enforce

1 a requirement begin quote including as a term or
2 condition of any license end of quote, unless it is
3 begin quote explicitly required or permitted end of
4 quote by statute or rule. Thus, under paragraph (2m)
5 and the clear language in that statute, agencies
6 cannot rely on implied authority to impose
7 conditions. Those agencies must seek amendment to a
8 statute or promulgate a rule.

9 Looking at the legislative history provided by
10 New Chester and the industry intervenors, it is clear
11 that the legislature in this case wanted to provide
12 subjects of agency regulations more notice and
13 involvement in how regulations will be applied to
14 them. The Court should find as a result that
15 Wisconsin DNR must have explicit authority through
16 either a statute or a rule to impose monitoring
17 conditions on permittees of high-capacity wells for
18 the condition it imposed on New Chester in order for
19 it to be valid.

20 Clean Wisconsin argues that this interpretation
21 leads to an unconstitutional and absurd result.
22 Clean argues that paragraph (2m) must be harmonized
23 with other statutes, case law, and constitutional
24 requirements. Clean Wisconsin argues that courts
25 have consistently found that limiting agency powers

1 to those expressly granted is too restrictive to
2 allow agencies to function in an efficient and
3 effective manner. The language and legislative
4 history of Wisconsin Section 227.10(2m), however,
5 indicates quite clear that the legislature disagreed
6 with that conclusion. Denying an agency implied
7 authority does not conflict with other statutes or
8 constitutional divisions of power, and that is from a
9 cite of *Lake Beulah*, B-E-U-L-A-H, in paragraph 23 at
10 2011 WI 54.

11 Clean Wisconsin argues that the Wisconsin DNR
12 does have authority to impose the monitoring
13 condition because monitoring is a power that is
14 permitted by statute and the WDNR's administrative
15 rules. Clean Wisconsin argues that Administrative
16 Rule NR 812.09 authorizes the monitoring condition
17 because it permits WDNR to impose more stringent
18 requirements where the WDNR deems it necessary and
19 appropriate for the protection of public safety, safe
20 drinking water, and the ground water resource, and
21 that's from Wisconsin Administrative Code NR
22 812.09(4).

23 The provision that Clean Wisconsin relies on,
24 however, is limited to well and heat exchange drill
25 holes. The department may specify more stringent

1 well and heat exchange drill holes locations, well
2 and heat drillhole construction or pump installation
3 specifications for existing and proposed high
4 capacity school or waste water treatment plant water
5 systems requiring approval by the subsection or the
6 waters systems approved by variance, and that was a
7 quote from that provision. This rule permits the
8 WDNR to specify more stringent well locations, well
9 construction specifications, or well installation
10 specifications when approving a high-capacity well
11 permit. While this could implicitly refer to
12 requiring monitoring wells as part of the
13 construction or installation specifications, it does
14 not do so explicitly. Paragraph (2m) of Section
15 227.10 requires that the authority be explicitly
16 permitted. Therefore, the monitoring condition
17 cannot be said to be permitted by NR 812.09(4).

18 It's clear in this case that Statute Section
19 227.10(2m) was enacted as an industry rule with the
20 plain language of that statute requiring agencies or
21 the WDNR to provide maximum notice of rules and
22 regulations to the industry or to businesses in the
23 industry similar to New Chester.

24 I've spent a lot of time trying to think through
25 this on a bigger picture in terms of, or take it into

1 consideration that this is a case of first
2 impression. And I come back to, you know, the bottom
3 line that, you know, if the legislature was satisfied
4 with agencies having some implied authority, in this
5 case, that the WDNR would have some implied authority
6 in situations like this, then there would have been
7 no reason to create the statute, Section 227.10(2m)
8 which specifically in its plain language requires the
9 agency, WDNR, to have or to be required to have
10 things that are explicit, and the words there are
11 explicitly required or explicitly permitted.

12 For all of those reasons, I think it is
13 appropriate to reverse the decision of the
14 administrative law judge and reach the conclusion
15 that the WDNR does not have authority to impose the
16 monitoring condition pursuant to Wisconsin Statute
17 Section 227.10(2m). Anything else today,
18 Mr. Brydges?

19 ATTORNEY BRYDGES: No, Judge. Thank you.

20 THE COURT: Anything else from anybody on
21 the phone?

22 ATTORNEY WHEELER: No, Your Honor. Thank
23 you.

24 ATTORNEY FASSBENDER: No, Your Honor.
25 Thank you.

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THE COURT: And Mr. Brydges, will you draft
an order consistent with this?

ATTORNEY BRYDGES: Yes, Judge.

THE COURT: Okay. Good luck to everybody.
We're adjourned.

ATTORNEY BRYDGES: Thank you, Your Honor.

ATTORNEY ANDRYK: Thank you, Your Honor.

(Proceedings concluded at 8:53 a.m.)

1 STATE OF WISCONSIN)

2 COUNTY OF OUTAGAMIE)

3 I, KARA L. NAGORNY, RPR and Notary Public,
4 hereby certify that I reported stenographically the
5 proceedings held in the aforementioned matter, in
6 said court, at the Outagamie County Justice Center,
7 Appleton, WI, on November 12, 2015, the Honorable
8 Mark J. McGinnis presiding;

9 That the foregoing transcript was reported
10 stenographically to the best of my ability and
11 transcribed by me by means of Computer-Aided
12 Transcription equipment;

13 That I believe it to be a true and correct
14 transcript of said proceedings had on said hearing.

15 Dated this 16th day of November, 2015.

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Kara L. Nagorny, RPR
Circuit Court Br. 1
320 S. Walnut Street
Appleton, WI 54911