Washington Supreme Court Addresses Constitutionality of Water Pollution Control Mandate

*By Seth L. Cooper**

In *Lemire v. Department of Ecology* (2013),[1] the Washington Supreme Court addressed the constitutionality of an order made pursuant to the State's Water Pollution Control Act ("WPCA"). Lemire offers the Washington Supreme Court's latest take on evidentiary standards for reviewing administrative agency actions that affect property rights.

I. Background

At issue in *Lemire* was an administrative order issued by the Washington Department of Ecology ("Department") to cattle rancher Joseph Lemire pursuant to the WPCA.[2] The Department directed Lemire to take steps—namely constructing livestock fencing and off-stream water facilities to eliminate livestock access to the stream corridor—to curb activities it determined were polluting a creek that runs through Lemire's property.

Lemire challenged the order but the Pollution Control Hearings Board ("Board") upheld it on summary judgment. However, on administrative appeal the Columbia County Superior Court reversed the judgment and invalidated the Department's order. In its decision, the Superior Court ruled the Department's order was unsupported by substantial evidence and constituted a taking. Division Three of the Washington Court of Appeals certified the case directly to the Washington Supreme Court for review.

By an 8-1 vote, the Washington Supreme Court reversed the Superior Court on all counts. In an opinion written by Justice Debra Stephens,[3] the majority held that the Department acted within its authority, the order was supported by substantial evidence, and Lemire failed to establish that a taking occurred.

II. Majority Opinion: Substantial Evidence Analysis

The evidence presented by the Department at the administrative hearing consisted of reports of four visits to Lemire's property by a Department employee between

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1 (1986) (California commission may not force a regulated utility to include in its billing envelopes a newsletter from an activist group criticizing the company's actions).

5 547 U.S. 47 (2006).

6 494 872 (1990).

7 309 P.3d at 79.

Illinois Supreme Court Ruling Explores Scope of Second Amendment

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the possession of firearms by minors did not.[1] Upon denial of rehearing on December 19, 2013, the Court modified its opinion and clarified that its holding was limited to the "Class 4" form of the specified AUUW violation, leaving unanswered the question of whether other "classes" of a similar AUUW violation (such as a "Class 2" violation of the statute by a felon) would also be deemed unconstitutional and leading two Justices to dissent from the majority opinion, which was previously unanimous.[2]

The Illinois Supreme Court's ruling came on the heels of (and largely adopted) the Seventh Circuit's ruling in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which similarly found that the AUUW's blanket prohibition on concealed carry of a firearm in public was unconstitutional. While the practical effect of the Court's ruling was largely mooted by the Illinois legislature's enactment after *Moore* of the Firearm Concealed Carry Act (*see* Pub. Act 98-0063 (eff. July 9, 2013)), which amended the AUUW to allow for a limited right to carry certain firearms in public, the ruling nevertheless provides insight into the outcome of future challenges to Illinois laws restricting and regulating the personal use of firearms.

I. Factual Background

At issue in *Aguilar* were defendant's second amendment challenges to his conviction for violating two Illinois gun control laws.[3] Police arrested defendant (who was then 17 years old) after they had investigated a group of teenagers who were making disturbances

about whether the court's new constitutional analysis should cause it to reconsider the determination that the AUUW statute is facially unconstitutional.[35]

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Endnotes

1 People v. Aguilar, 2013 IL 112116, __N.E.2d__, 2013 Ill. LEXIS 1626 (Ill. Sept. 12, 2013) (petition for rehearing denied).

2 *Aguilar*, 2013 IL 112116, ¶22, n.3.

3 *Id.* at ¶¶1, 11.

4 *Id.* at ¶¶3-7.

5 *Id.* at ¶¶7, 15, 25.

6 *Id.* at ¶7.

7 *Id.*

8 *Id.* at ¶¶11-12.

9 *Id.* at ¶11.

10 *Id.* at ¶12.

11 *Id.*

12 *Id.* at ¶¶15-18.

13 *Id.* at ¶18.

14 *Id.* at ¶19.

15 *Id.*

16 *Id.*

17 *Id.* at ¶20.

18 *Id.* at ¶21.

19 *Id.*

20 *Id.* at ¶21.

21 *See* Pub. Act 98-0063 (eff. July 9, 2013).

22 *Aguilar*, 2013 IL 112116, ¶22 n.4.

23 *Id.* at ¶¶24-25.

24 *Id.* ¶25.

25 *Id.* at ¶26 (*quoting Heller*, 554 U.S. at 626).

26 *Id.* at ¶27.

27 *Id.*

28 *Id.* ¶¶28-30.

29 *Id.* at ¶36 (Garman, J., dissenting).

30 Id. at ¶22 n.3 (majority opinion); *see also* 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008).

31 *Id.* at ¶33 (Garman, J., dissenting).

32 *Id.*

33 *Id.* at ¶40 (Theis, J., dissenting).

34 *Id.* at ¶44-45 (Theis, J., dissenting).

35 *Id.* at ¶48 (Theis, J., dissenting).

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2003 and 2008, as well as four visits to his property in 2009. Reported conditions at the property included "livestock with direct access to the creek, overgrazing of the riparian corridor, manure in the stream corridor, inadequate vegetation, bare ground, erosion, cattle trails across the creek, trampled stream banks, and cattle wallowing in the creek."

Addressing this, Justice Stephens' opinion noted that the Department's expert had "described via declaration how these conditions tend to cause pollution."[4] The declaration also stated that Washington State's water quality assessment report to Congress—required by the federal Clean Water Act—listed the creek as polluted. The majority continued that even when viewing the record in the light most favorable to Lemire, the evidence still supports a grant of summary judgment to the Department. It reasoned that the observations of cattle access to the stream on Lemire's property was "consistent with the kind of pollution found in the stream, such as sediment content, fecal coliform, and other disturbances of the water quality" and this was all the Department was required to prove.[5]

This can be distinguished from the Superior Court decision, which emphasized that "[t]he record is absolutely absent of any evidence-direct evidence-that Mr. Lemire's modest herd *actually polluted* Pataha Creek."[6] The Supreme Court applied a different standard than the lower court, ruling that the statute at issue "does not require it [the Department] to prove causation" and that it was sufficient that the Department's "expert declaration provided evidence that the *current condition* of Pataha Creek is polluted."[7] The court rejected arguments that causation is a question of fact and stated rather that "the 'causation' contemplated by the statutes is the likelihood that organic or inorganic matter will cause or tend to cause pollution."[8]

III. Majority Opinion: Takings Analysis

The court also rejected Lemire's argument that the fence he was required to construct on his property amounted to a taking by depriving him of the economic use of his land. Specifically, Lemire had argued the fence was a taking because it prevented his cattle from grazing pasturelands on the far side of the creek and his exercise of stock water rights.

The majority opinion did not consider "whether and to what extent our state constitutional takings provision may offer greater protection than its federal counterpart," since, they reasoned, "no factual basis existed for finding a taking."[9] The majority concluded that none of the evidence in the record suggested the Department's order would restrict cattle from any access to the creek, the record was devoid of evidence regarding stock water rights, and Lemire had conceded that his claim of economic loss is "neither a physical invasion nor a regulatory taking."[10]

IV. Dissent

The sole dissenter in the case, Justice James Johnson, asserted that "the majority disregards constitutionally protected private property rights, and bases its decision on credibility judgments and factual findings."[11]

Specifically, Justice Johnson contended that "the majority assumed that [the Department of] Ecology's allegations are gospel truth and summarily dismissed the statements in Lemire's declaration that counter [the Department of] Ecology's claims as 'conclusory allegations.'"[12] Justice Johnson examined Lemire's responses to the Department's allegations, and concluded that several issues of fact remained. He argued that because the Washington Administrative Procedure Act requires that this type of appeal to be viewed in the light most favorable to the nonmoving party[13] and Lemire's statements "amount to much more than 'conclusory allegations,"[14] there were "genuine issues of material fact about whether or not the conditions [the Department of] Ecology's witness (not a qualified 'expert') allegedly observed are present."[15]

Justice Johnson also took issue with the majority's application of the WPCA, asserting that the majority's and Board's approach was inconsistent with what the drafters of the statute intended.[16]

With respect to takings, Justice Johnson asserted that "to make it clear that the 'question' of whether or not our state constitutional takings provision offers greater protection than its federal counterpart has already been answered in the affirmative," and cited two cases in support of this proposition.[17] Pointing to the Washington Constitution Article I, Section 16's provision that "[n]o private property shall be taken or *damaged* for public or private use without just compensation having been first made," Justice Johnson maintained that "[t]he extent of this greater protection has not yet been fully delineated in all contexts."[18]

Justice Johnson determined there was insufficient record evidence to establish a *per se* taking under Washington jurisprudence, reasoning that it was "possible that Lemire's property has been 'damaged' by the order, but there is not enough evidence in the record to establish the type and magnitude of this damage."[19] Nonetheless, Justice Johnson premised his takings analysis on an apparent clarification or change in the Department's interpretation of its order's effect.[20]

V. Conclusion

Lemire did not establish any new jurisprudential doctrines or significantly expand on existing ones. But the opinion is noteworthy because it provides the Washington Supreme Court's latest gloss on evidentiary requirements and burdens for judicial review of administrative agency orders affecting private property.

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Endnotes

1 Lemire v. Department of Ecology, No. 87703-3 (Wash. Aug. 15, 2013).

2 Wash. Rev. Code § 90.48.

3 Justice Stephens' opinion was joined by Chief Justice Barbara Madsen, by Justices Charles Johnson, Susan Owens, Mary Fairhurst, Charlie Wiggins, Steven Gonzalez, and by Justice *Pro Tempore* Tom Chambers.

4 Lemire v. Department of Ecology, No. 87703-3, slip op. at 7 (Wash. Aug. 15, 2013) (majority opinion).

5 *Id.* at 9.

6 *Id.* 9 (internal citation omitted). The Superior Court stated, "There's no testing, there's no showing, there's no increased numbers, there's nothing."

7 *Id.* at 10.

8 *Id.* (internal citation omitted).

9 *Id.* at 16 (citing U.S. Const. amend. V; Wash. Const., art. I, § 16).

10 *Id.* at 17.

11 Lemire v. Department of Ecology, No. 87703-3, slip op. at 2, (Wash. Aug. 15, 2013) (Johnson, J., dissenting).

12 *Id.* at 5.

13 *Id.* at 3 (citing chapter Wash. Rev. Code § 34.05 (internal citartion omitted)).

14 *Id.* at 13.

15 *Id.* at 13.

16 *Id.* at 11-12 (citing Wash. Rev. Code § 90.48.120(1)) ("According to the Board and the majority, in order for a rancher to create a "substantial potential" to pollute, all the rancher has to do is (1) have a state water body on his or her property that is not completely fenced off and (2) own cattle that occasionally cross or drink from the water body. That is it. Nothing else needs to be proved but those facts. Surely, that cannot be what the 1945 legislature intended by "substantial potential to violate.").

17 *See id.* at 15 (citing Manufactured Hous. Cmtys. of Wash. v. State, 142 Wn.2d 347, 357-361, 13 P.3d 183 (2000); Brutsche v. City of Kent, 164 Wn.2d 664,681 n.11, 193 P.3d 110 (2008)).

18 *Id.*

19 *Id.* at 18.

20 *Id.* at 17 ("If we review the order, it clearly does not make any specific provision for the cattle to drink from or cross the creek . . . To the contrary, it requires "exclusion fencing," "off-stream watering facilities," and that Lemire eliminate "[l]ivestock access to the stream corridor" . . . It was only later in its briefing to the superior court and before this court that Ecology finally clarified that Lemire's cattle would be allowed to drink from and cross the stream to reach the other pasturelands; this is argument, and it contradicts the challenged order in the record.").

LITIGATION UPDATE

By Seth L. Cooper

"Washington Supreme Court Rules on Attorney General's Discretion to Enter Litigation in Two Landmark Cases" (*State Court Docket Watch* Fall 2011) briefly examined a pair of decisions by the Washington Supreme Court involving separation of powers principles and the authority of the Washington State Attorney General. In *Goldmark v. McKenna* (2011)—one of the two cases examined—the Washington Supreme Court ruled that statutory law required the Attorney General to represent the Commissioner of Public Land in any court when requested to do so. The Washington Supreme Court concluded that the attorney general had a mandatory duty in this regard and accordingly had no discretion to deny the requesting agency legal representation.

The case emerged when Commissioner of Public Lands Peter Goldmark sought a writ of mandamus compelling then-Attorney General McKenna to pursue an appeal from an adverse trial court decision in a condemnation action. The attorney general had chosen not to pursue an appeal or to appoint a special assistant attorney general to pursue the appeal on behalf of the commissioner.

Following the Washington Supreme Court's decision in *Goldmark*, the case continued with a special assistant attorney general representing the Commissioner of Public Lands. On May 17, however, Division Three of the Washington Court of Appeals rejected Commissioner of Public Land's legal position regarding the condemnation of State trust lands in *Public Utility School District No. 1. of Okanogan County v. State* (2013). In a 3-0 opinion written by Judge Teresa Kulik, the Washington Court of Appeals upheld the summary judgment ruling of the Superior Court from which then-Attorney General McKenna declined to pursue an appeal, which, in turn, spawned the litigation in *Goldmark v. McKenna*.