

## Illinois State Appellate Court Allows Construction of "Megadairy"

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(Originally published at: <http://illinoisenvironmentallaw.blogspot.com/2011/02/state-appellate-court-allows.html>)

The Appellate Court of Illinois, Second District, recently issued an opinion in *Helping Others Maintain Environmental Standards v. Bos*, Case Nos. 2-09-1283 & 2-10-0162, which concerned the construction of a livestock management facility in Nora Township, Jo Daviess County, Illinois. The "Tradition South" dairy would have 6,850 "animal units" in the form of dairy cows and calves and would use three livestock waste holding ponds, one with dimensions of 300 by 855 by 20 feet; the second 760 by 850 by 20 feet; and the third 400 by 400 by 20 feet. Bos sought the Department of Agriculture's approval of the dairy pursuant to the Livestock Management Facilities Act. The Department ruled that "it was more likely than not" that the Livestock Act's provisions had been met regarding the Tradition South facility, and it approved its construction.

Plaintiffs filed an action in State court, challenging the Department's ruling and seeking preliminary and permanent injunctions halting construction of the facility under theories of private nuisance, public nuisance, and trespass. Although the trial court issued a preliminary injunction that initially halted construction, the court ruled, after a trial on the merits, that a permanent injunction should not be issued. The court also ruled that Plaintiffs did not have standing to challenge the Department's ruling.

On appeal, the Appellate Court affirmed the ruling that Plaintiffs did not have standing to challenge the Department's ruling. The Court found that the "right to review administrative decisions is limited to those who were both parties of record to the agency proceeding and aggrieved by the agency's decision." Because Plaintiffs were not parties of record (although they did participate in a public informational meeting), Plaintiffs did not have standing to challenge the administrative decision of the Department. The Court held that the Livestock Act allowed Plaintiffs to pursue claims against the owner of the facility but not against the Department.

The Appellate Court held that the Trial Court "acted within its discretion" in refusing to dissolve the preliminary injunction (and thus Bos was not entitled to damages as the result of an improperly entered preliminary injunction). However, the Appellate Court affirmed the ruling that a permanent injunction should not have issued, accepting the Trial Court's evaluation of the parties' experts:

"In the end, the trial court was faced with testimony from credentialed, experienced experts who arrived at opposite conclusions as to whether there was evidence of karstified carbonate bedrock on the proposed dairy site. As stated, it is the trier of fact's role to resolve conflicts in the evidence, assess witnesses' credibility, and determine the weight to be given to their testimony. The record supports the trial court's finding that Bos's expert witnesses, unlike plaintiffs' expert

witnesses, conducted more site-specific analysis in arriving at their conclusions that there was no evidence of karstified carbonate bedrock below the containment ponds. Accordingly, we cannot say that the trial court's decision, that plaintiffs failed to show that there was a high probability of groundwater contamination and were not entitled to a permanent injunction on that basis, is against the manifest weight of the evidence."

At the end of the day, it appears that Plaintiffs, a citizens' group and individuals organized to oppose the facility's construction, could not muster (or pay for) sufficient expert testimony to defeat the owner's expert. They also had no recourse against the administrative agency, which had authority to give the green light to the owner to build the facility. This is a typical example of an environmental citizen lawsuit in action. Usually, environmental statutes allow the agency to make a decision with citizen input, and then presume that the agency decision is correct, with limited ability by the citizens to challenge the decision after the fact.

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