

# County Stormwater Detention Ponds/Adjacent Groundwater Impact: Federal Court Addresses Agricultural Operation's Taking/Nuisance Claims



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A United States District Court (W.D. Wisconsin) (“Court”) addressed in a July 19th Opinion and Order (“Opinion”) an issue arising out of the alleged release of water from a breach in the bottom of three stormwater detention ponds. See *Kaltenberg, et al. v. County of Dane*, 2023 WL 462359.

The alleged breach was argued to have caused groundwater to saturate soil on an adjacent agricultural operation adversely affecting its growing seasons.

Ziegler Dairy Farms, Inc. (“Ziegler”) and its two individual owners raised corn and alfalfa along with cattle on 149 acres in Dane County, Wisconsin.

Dane County began excavating in 2014 clay from its land across from the Ziegler farm. The excavation work eventually created three stormwater detention ponds. A County official stated that the bottoms of all three retention ponds should have remained solid clay.

Ziegler alleged that prior to 2015 its 10-acre parcel across from the ponds drained well. However, they alleged that in 2015 or 2016 water began pooling beneath the soil and on all their fields. As a result, crop yields declined and there was a loss of income.

County staff acknowledged the areas of wet soil and standing water but refused to pay for the installation of field tiles to drain the ponds. They argued the conditions were consistent with those throughout the County and caused by historic rainfall. It was alleged that during such discussions a County employee indicated that in excavating to obtain clay it had done so until reaching the sand layer.

Ziegler installed field tiles on their properties which stopped the pooling. Ziegler and the individual owners alleged causes of action for a taking in violation of the Fifth Amendment to the United States and Wisconsin Constitutions and that the County activities were a nuisance.

## Fifth Amendment Taking Claim.

The Court noted that the takings clause of the Fifth Amendment provides in pertinent part:

... nor shall private property be taken for public use without just compensation.

The Court states that damage resulting from government action does not constitute a taking if it is “only incidental” to the government’s action.

The Court granted summary judgment to the County, noting that the evidence established that the alleged taking was a temporary and partial invasion of the property. It held that there was no genuine dispute that the water saturation/pooling was:

- Seasonal
- Affected only a portion of the property
- Has been resolved since the installation of field tiles

The Court applied the Arkansas Game and Fish Commission United States Supreme Court Decision factors which addressed governmental caused flooding:

1. degree to which the invasion is intended or is the foreseeable result of an authorized government action;
2. the duration of the invasion;
3. the severity of the interference;
4. the character of the land at issue, and
5. the owner's reasonable expectations regarding the land use.

Applying these factors the Court held that the water saturation was not a compensable taking because there was a failure to advance evidence for a reasonable trier of fact to find the seepage and pooling on plaintiffs' land was intentional or foreseeable. In other words, the County's objective was to extract clay to build a landfill and no evidence was provided that it had intended to change groundwater levels.

State Law Takings/Nuisance Claims.

Because the Fifth Amendment takings claim was dismissed, the Court remanded state claims for Wisconsin taking and alleged nuisance to state court.

A copy of the Opinion can be downloaded [here](#).