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# Kiewit-Atkinson-Kenney v. Mass. Water Res. Auth., No. 01-1920 BIS, 2002 Mass. Super. LEXIS 71 (Mass. Super. Ct. Mar. 5, 2002)

David W. Hall

## MASSACHUSETTS

**Kiewit-Atkinson-Kenney v. Mass. Water Res. Auth., No. 01-1920 BLS, 2002 Mass. Super. LEXIS 71 (Mass. Super. Ct. Mar. 5, 2002)** (holding a differing site condition could not be proven to account for a failure to meet a contractual post-mining baseline water inflow, thus negating tunnel constructor's claim of equitable adjustment).

Kiewit-Atkinson-Kenney ("KAK") sued the Massachusetts Water Resources Authority ("MWRA") to recover extra costs KAK claimed they incurred due to a "differing site condition" ("DSC"), resulting in increases in water inflows during tunnel construction. KAK moved for partial summary judgment in the Superior Court of Massachusetts at Suffolk, requesting the court to declare that, for contractual purposes, the DSC was the reason KAK failed to meet a contractual post-mining baseline for water inflows into the tunnel of one thousand gallons per minute ("gpm").

In April 1988, as part of the Boston Harbor clean-up effort, the MWRA planned to accept bids for the construction of Outfall Tunnel, a 9.5 mile-long tunnel carrying treated wastewater to the ocean. Prior to soliciting bids, the MWRA had its design engineer prepare a Geotechnical Design Summary Report ("GDSR") for the project. The GDSR established the geotechnical baselines for the project.

In March 1990, MWRA solicited bids for construction of the tunnel. KAK, a joint venture, submitted the lowest bid, totaling $201,900,000. MWRA and KAK entered into a contract entitled Boston Harbor Project—Effluent Outfall Tunnel ("contract"). KAK divided the project into three operations: (1) the mining and lining of the entire outfall tunnel, including 43,026 feet of mainline tunnel and 6,600 feet of diffuser tunnel; (2) the excavation of smaller tunnels running to the ocean floor and connection thereof to the diffuser section of the main tunnel; and (3) the clean-up and removal of the required construction utilities. KAK completed the project in January 1999.

KAK claimed it incurred additional costs because of a DSC water inflow increase during construction. A DSC is a physical site condition that differs substantially from the expected conditions set forth in the contract. The issue here was whether a DSC caused the increase in the water inflow, requiring KAK to spend more money during construction. The contract included a clause that granted KAK the right to an equitable adjustment of the construction price should it encounter a DSC. Under the contract, the GDSR established the only geotechnical baseline for all subsurface and physical conditions. The GDSR distinguished between inflows occurring prior to tunnel construction as being more than one thousand gpm and expected inflows of less than one thousand gpm after completion of the tunnel.

KAK claimed the GDSR set a baseline of one thousand gpm for water inflow after the first operation of mining and lining, while the MWRA claimed the GDSR merely set a goal for water inflow. Each position was ambiguous due to the uncertain language of the DSC when applied to either the baseline or the goal.

The court found merits in both arguments. KAK had to achieve a goal along with a baseline by which that goal could be measured. The court stated the baseline was not significant unless MWRA could prove the reason for the baseline's failure, whether the baseline failed because of a DSC or otherwise. The court noted there was no evidence of water inflow differing from the baseline after the installation of the lining, nor was there evidence the first operation had failed. KAK's motion asked the court to order a partial summary judgment identifying a DSC and stating the contractual post-mining baseline for water inflows to the tunnel was one thousand gpm. The court refused to declare a DSC caused the failure to achieve the post-contractual baseline without further exploration.

The court granted KAK's motion for summary judgment to the limited extent of declaring the contractual post-mining baseline for water inflows into the tunnel was one thousand gpm, however, the court did not recognize the existence of a DSC.

*David W. Hall*

## MINNESOTA

**Minn. Ctr. for Envtl. Advocacy v. Big Stone County Bd. of Comm'rs, 638 N.W.2d 198 (Minn. Ct. App. 2002)** (holding that ditch repair in protected wetlands required: (1) either Department of Natural Resources permission or a public waters work permit; (2) a mandatory Environmental Impact Statement; and (3) either an approved wetland replacement plan or exemption determination from the local government unit).

County Ditch 2 was an agricultural drainage ditch that passed through a Type-5 protected wetland. In 1998, adjacent landowners petitioned the Big Stone County Board of Commissioners ("Board") to repair the ditch by removing sediment to re-establish its original depth. The Board then commissioned an Environmental Assessment Worksheet ("EAW"), a brief document that determined if an Environmental Impact Statement ("EIS") is necessary. The EAW incorrectly identified the area as a Type-3 wetland, incorrectly found that the repair would not affect wetland status, and concluded that an EIS was unnecessary. The Board additionally determined the project was exempt from the statutory wetland replacement plan requirement, but did not seek an exemption from the local governmental unit prior