Sixth Circuit Rebukes USDA in Swampbuster Case

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On April 1, 2015, the United States Court of Appeals for the Sixth Circuit admonished the USDA for denying farm program benefits to a farmer and forcing him to "navigate a bureaucratic labyrinth," all the while "demonstrat[ing] a disregard for its own regulations."

The Court made these statements while reversing a decision from the district court that supported wetlands and penalty determinations made by NRCS and FSA, both USDA agencies. The Court remanded the case to the agencies for further consideration.

The Swampbuster provisions of the Food Security Act of 1985 deny certain farm program benefits to persons who convert a wetland on their property for agricultural purposes. The Michigan farmer in this case was told by the FSA in 2009 that he would be ineligible for $42,528 in annual farm program benefits because he had converted a 2.24 acre wetland that constituted less than 0.2 percent of his cropland.

The farmer had worked with the Soil Conservation Service to implement a tile drainage system to remove the excess water from the parcel at issue in 1961. With the help of USDA and pursuant to an NRCS plan, the farmer successfully drained the parcel and grew crops on the property through 1982. In the 1980's the drainage tile began to malfunction, and by 1985, the parcel had returned to a wetland condition. The USDA determined in 1988 and 1993 that a wetland existed on the 2.24-acre parcel. Despite repeated attempts to repair the drain tile, the farmer was unsuccessful. In 1988, the farmer filed a form with USDA indicating his intent to create a new drainage system on the property. NRCS responded that the parcel was designated as a wetland. At the farmer's request, the farmer and the NRCS engaged in mediation. They executed a January 2009 mediation agreement under which NRCS agreed to allow the farmer to plant the field that spring. Both parties agreed to keep the mediation open until a final wetland delineation was completed. NRCS re-designated the parcel as "converted wetlands" in July of 2009. After NRCS informed FSA of its determination, the farmer was rendered ineligible for any USDA benefits. The agencies did not mention the agreement the farmer had with the NRCS to plant the field in 2009.

After several years of exhaustive appeals of both determinations, the United States District Court for the District of Western Michigan affirmed them both. The district court found that the agencies' decisions were entitled to deference. On appeal, the Sixth Circuit reversed.

"Prior Converted Wetlands" Exception

The Court did defer to the USDA's interpretation of a provision of Swampbuster that eliminates the ineligibility penalty for wetlands that were "prior converted" wetlands (16 U.S.C.S. § 3822(b)(2)(D)). The farmer argued that his wetland fell under the exemption because it applied to any farmland that was converted at one point in time and subsequently reverted to wetland status. USDA argued that the exception only applied where the conversion occurred prior to December 23, 1985. The Court found that both interpretations were "sensible," but deferred to the USDA's interpretation since this was a statute the agency was tasked to administer.

As to the farmer's other arguments, however, the Court gave no such deference. The Court found that both NRCS and FSA had acted in manners "not in accordance with the law."

"Minimal Effect Exemption"

The Court found that NRCS acted arbitrarily by refusing to consider the farmer's "minimal-effect" exemption evidence. Under Swampbuster, farmers are also exempt from the ineligibility penalties of the law if they can demonstrate that the conversion of the

wetland had a "minimal effect" on the value of the wetlands in the area. Although the farmer had submitted evidence that his activities on the 2.24 acre parcel had a "minimal effect," NRCS refused to consider it or engage in any minimal effects analysis. The agency instead alleged that this exemption only applied where (1) there had been a placement of a subsurface drain through an existing wetland when need to provide drainage to adjacent cropland or (2) where there was the passage of a center pivot irrigation system through a wetland.

The Court said that the problem with the government's position was that "it ha[d] no support in the law." The Court then reversed the district court's decision and remanded to NRCS to make a determination as to whether the effect of the conversion to the surrounding wetland was "minimal." The Court also noted that the district court was wrong when it stated that to qualify for the minimal effect exception a person had to agree to a mitigation plan. This, the Court held, was simply not the law.

FSA Discretion to Reduce Penalty

The Court then evaluated the propriety of FSA's determination that it had no discretion to adjust the penalties for the farmer based upon six factors specified in 7 C.F.R. §12.4(c). Disregarding the discretionary factors set forth in the regulation, the FSA determined that the farmer would not be eligible for a penalty reduction because he could have mitigated the converted wetland but was unwilling to do so. The FSA then "conspicuously" revised its handbook, after the determination, to specify that a farmer is ineligible for a penalty reduction if he is able to restore or mitigate the converted wetland but is unwilling to do so. The Court found that the FSA was required to use guidance that was in effect at the time the farmer sought his penalty reduction in 2009. Under that guidance, the FSA was required to consider the §12.4(c) factors, not rely dispositively on a failure to mitigate. The Court then said "the ability to mitigate, moreover , does not have an obvious analogue among the factors listed in §12.4(c)." The Court questioned the FSA's post-hoc change of the handbook, and said that FSA's new guidance "seems to significantly alter the substance of §12.4(c)." It declared, however, that it did not have to decide "today" whether the new guidance was "legal." The Court reversed the district court's finding as to the penalty adjustment determination and remanded for the FSA to consider the §12.4(c) factors.

Concluding Words

The Court concluded with some pointed words that are worth reading in their entirety:

> This complicated case only involves a 2.24-acre parcel of land. But [the farmer] contends, and we have no reason to doubt, that this case has ramifications for thousands of corn and soybean farmers. In January 2009, USDA signed a mediation agreement with [the farmer], permitting him to plant the parcel in the spring and cut down trees so long as [he] did not remove stumps. USDA has never argued that [the farmer] intentionally violated this agreement. Nonetheless, USDA has permanently deprived [him] of program benefits and forced him to navigate a bureaucratic labyrinth. All the while, USDA has demonstrated a disregard for its own regulations and insisted that [the farmer] mitigate his land when the relief he seeks is not based on regulations requiring mitigation.

Ouch. We'll keep track of what happens on remand.

The case is *Maple Drive Farms LP v. Vilsack*, No. 13-1091, 2015 U.S. App. LEXIS 5208 (April 1, 2015).