

404 Enforcement/Remedy Proceeding: Federal District Court Addresses Federal Government Request for Wetland Rehabilitation



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03/09/2020

A United States District Court (Western District of Pennsylvania) (“Court”) addressed in a February 27th Order a United States Department of Justice (“DOJ” or “United States”) request for an Order directing certain individuals and entities (collectively, “Defendants”) to rehabilitate wetlands in what is referred to as the “Marsh Site.” See 2020 WL 956460.

The Court had previously found that the Defendants violated Section 301(a) of the Clean Water Act for allegedly attempting to convert 14 acres of wetlands to arable land on the Marsh Site in Erie County, Pennsylvania.

The Defendants are described as farmers owning several tracts of land which include the Marsh Site. The Marsh Site was purchased in 2012. It is described as including wetlands adjacent to a creek which is a tributary flowing into Lake Erie.

DOJ sought in what is described as the remedy stage of litigation permanent injunctive relief. Such relief would include the restoration of the wetlands that Defendants allegedly cleared on the Marsh Site.

The proposed relief would require retention of a qualified consultant to conduct a wetlands delineation and develop a restoration plan consistent with the conceptual plan outlined by the United States’ expert. The proposed plan would then be submitted to the United States and the Environmental Protection Agency (“EPA”) for approval.

The Defendants did not object to DOJ’s request for injunctive relief in the form of restoration rehabilitation. However, it argued that the United States’ plan was too abstract for the Court to current assess. The plan was stated to in effect outsource plan approval to EPA rather than the Court.

The Court notes agreement with DOJ that restoration is appropriate, citing the Clean Water Act’s goal of restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters. Also noted is the Court’s authority to issue restorative orders so as to effectuate the Clean Water Act goals. In addition, rehabilitation of disturbed wetlands is identified as the Clean Water Act’s preferred remedy.

In assessing DOJ’s request the Court states in evaluating remediation or restoration proposals that three factors are considered:

1. whether the proposal would confer maximum environmental benefits;
2. whether it is achievable as a practical matter; and

3. whether it bears an equitable relationship to the degree and kind of wrong it is intended to remedy.

The Court reviews the DOJ expert's conceptual plan and determines it is sufficiently detailed to provide a basis for Defendants to retain a qualified delineation expert and construct a restoration plan for approval. The plan is stated to consist of:

1. Removing or disabling the installed tile drains
2. Filling in to grade ditches dug by Defendants
3. Reintroducing previously cleared vegetation
4. Reestablishing the severed connection between Elk Creek and its floodplain

The Court looks at each of the criteria and determines they are applicable to this matter. As a result, it orders that Defendants retain a qualified expert to conduct a wetlands delineation on the Marsh Site and utilizing the DOJ expert's plan. The stated goal is to provide for the complete restoration of the wetlands.

DOJ also proposed that the Court order Defendants to record a deed restriction on the Marsh Site to protect the wetlands as they recover. The Defendants responded that the proposal was overly abstract and a permanent deed restriction is excessive. Concern was expressed about the deed restriction impeding the marketability of the property. The Court holds the deed restriction is appropriate because of the Defendants alleged history of disturbing wetlands and the need to protect them as they rehabilitate.

A civil penalty of \$400,000 is proposed by DOJ. Defendants challenged the amount of excessive.

The Court defers ordering a civil penalty until after the costs of rehabilitation are determined and adequate financial resources are allocated towards achieving that goal. It indicates that this will provide it an opportunity to assess Defendants' good faith in correcting the damage they have allegedly done to the Marsh Site.

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