

# Wetland Mitigation Programs: Missouri Court of Appeals Challenge to Missouri Agency Activities



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The Missouri Court of Appeals (Western District) in a March 7th Opinion addressed a for-profit organization's challenge on constitutional grounds to a Missouri agency's activities involving wetland mitigation banks. See *Swallow Tail, LLC v. Missouri Department of Conservation*, 2017 WL 892549.

*Swallow Tail, LLC* ("Swallow Tail") filed a Petition for Damages and Injunctive Relief in the Circuit Court of Cole County, asserting multiple claims against the Missouri Department of Conservation ("Conservation Department") and the Missouri Conservation Heritage Foundation ("Heritage Foundation") relating to the Conservation Department's alleged design, support, and operation of a compensatory mitigation program sponsored by the Heritage Foundation and known as the Stream Stewardship Trust Fund ("SSTF").

The Conservation Department is responsible for various Missouri natural resource issues including issuing permits, educating the public regarding outdoor issues, and managing programs that help conserve the state's wildlife and forested land. The Heritage Foundation was created for the benefit of the Conservation Department. This organization works on the conservation of forest, fish and wildlife resources.

The Heritage Foundation functions by working with the Conservation Department as well as donors and other partners to provide funding for specific conservation projects. The SSTF primarily disperses funds from the Heritage Foundation to the Conservation Department and other stream partners for the protection of aquatic wildlife and riparian habitats.

Section 404 of the Clean Water Act 33 U.S.C. § 1344 requires that developers obtain a permit from the Army Corps of Engineers ("Corps") for certain activities in jurisdictional waters. A frequent condition of such permits is mitigation of environmental impacts to rivers, streams, or wetlands. The Corps may require that the party proposing the project purchase credits from a mitigation bank or an in-lieu fee program in the same area to compensate for such impacts. The SSTF receives the proceeds from the credits purchased by the developers seeking a section 404 Clean Water permit.

Appellant *Swallow Tail, LLC*, made two principal arguments on appeal.

The appellant argued that Article III, section 38(a) of the Missouri Constitution forbids the Conservation Department from expending its resources for the benefit of the private non-profit organization.

Swallow Tail further asserts that when the Conservation Department provides resources to primarily benefit a non-profit entity other entities cannot compete. Conservation Department's actions are alleged to be "not for a public purpose because the projects fail to produce a net environmental benefit."

Article III, section 38(a) states that:

. . . the General Assembly shall not 'grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation.'"

A grant to a private entity is, however, constitutional if it is used for a public purpose. A public purpose can be "for the support of the government or for some of the recognized objects of government, or directly to promote the welfare of the community."

The Missouri Supreme Court previously held that "'the preservation of the state's natural resources' is a 'public purpose' that justifies a grant of public money to a private entity because 'the quality of our environment and the improvement thereof are among the foremost of today's public concerns.'" Further, a publicly funded project does not have to produce a net gain.

Swallow Tail also argued that article IV, section 43(b) of the Missouri Constitution requires that appellee use all the resources generated by its fund for conservation purposes including the non-profit's proceeds from the sale of credits for projects generated by Conservation Department's activities.

Article IV, section 43(a) requires the Conservation Department's fund to be used "for the control, management, restoration, conservation, and regulation of the bird, fish, game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto, and for no other purpose." The court notes that the Conservation Department receives grants from the non-profit organization to complete projects whose primary purpose is mainly conservation. Further, the court states that if the non-profit must deposit its proceeds in the Conservation Department's fund, all individuals must do so. As a result, because the credits are an incidental benefit (as opposed to a primary purpose) the non-profit may keep the proceeds from the sale of its credits.

The Court concluded that "[b]ecause any public funds used by the Conservation Department for the public purpose of environmental conservation and any benefit to the [non-profit entity] is merely incidental to that public purpose," the lower court's decision is upheld.

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