

404 Clean Water Act Citizen Suit Action: Federal Appellate Court Addresses Oklahoma Sand and Gravel Company's Objection to Restoration Plan



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The United States Court of Appeals for the Tenth Circuit issued a March 22nd opinion addressing a Oklahoma sand and gravel mining company's objection to a United States District Court's (Northern District of Oklahoma) Order requiring implementation of a restoration plan. See *David Benham v. Ozark Materials River Rock, LLC*, No. 17-5069.

The restoration plan would address wetlands in a creek that are stated to have been unlawfully filled.

Ozark Materials River Rock, LLC, ("Ozark" or "Defendant") operates a sand and gravel mine on property adjacent to Saline Creek in Oklahoma. The Plaintiff, David Benham, is stated to recreate in Saline Creek and claimed that the mining operation degraded his ability to do so.

Plaintiff served Ozark with a notice letter pursuant to Section 505 of the Clean Water Act alleging the company was violating Section 404 of the Clean Water Act. Despite the fact that the United States Army Corps of Engineers inspected Ozark's operations, it found no violations.

By June 1, 2011, Ozark is stated to have failed to address the alleged Clean Water Act violations alleged by Plaintiff. Therefore, Plaintiff filed a citizen suit action pursuant to Section 505 of the Clean Water Act.

The District Court held a bench trial and determined that Ozark violated Section 404 by disturbing more than one-half acre of wetland through the discharge of dredge and fill material. The Court determined that Ozark's construction of roadway in Saline Creek and the filling of its surrounding wetlands without a 404 permit constituted a continuing violation of the Clean Water Act.

A civil penalty of \$35,000 was assessed and briefing on a restoration plan for the unlawfully filled wetlands was ordered. The Court subsequently adopted substantially all of Plaintiff's proposed restoration plan. An element of that restoration plan included the creation of a conservation easement for the restoration site.

On appeal Ozark alleged six issues, which included:

1. Plaintiff lacked Article III standing
2. Plaintiff's Clean Water Act citizen suit notice letter was inadequate

3. The District Court erroneously found that Ozark violated the Clean Water Act
4. The District Court erroneously admitted evidence prepared by Ozark's withdrawn expert
5. The District Court's Order is unconstitutional
6. Plaintiff's suit falls within the primary jurisdiction of the United States Army Corps of Engineers

The Tenth Circuit Court of Appeals analyzed and rejected each argument and affirmed the District Court.

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