

# Wetlands Modification Case

**Context:** In 1997, a routine review of agricultural properties by the United States Army Corps of Engineers (Army Corps) revealed a potential violation of the Clean Water Act and the wetlands protections provisions of the 1985 Farm Bill, also known as the “swampbuster” laws. The Army Corps spotted a particular plot of land that appeared to have been cleared of vegetation. The land was mapped as a wetland. If ruled a violation, the producer would have risked losing federal farm subsidies.

The producer appeared to have cleared about seven acres of wetlands. He owned and farmed over 400 acres of land and received more than \$35,000 annually in federal benefits. It was assumed that the cleared land was intended for agricultural use, but no crops had been grown on the land when the apparent violation was discovered. The Natural Resources Conservation Service (NRCS) representative in this case sent the producer a notice of potential violation, and offered the producer three choices for addressing the potential violation: mitigation of the wetland, restoration of the wetland, or acceptance of the violation and consequences. This was the first case in this particular state under the 1995 rules allowing mitigation of wetlands as an option. The producer did not take any action. When a determination of violation was issued against him, he asked for mediation of the case.

**Intervention:** The mediator conducted two sessions, each lasting about two hours. Participants in the mediation included the mediator, a Farm Service Agency (FSA) representative, the NRCS representative, the producer, the producer’s son, and a representative of a farming advocacy group who served as an advisor to the producer.

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During the first mediation session, “we tried to be sure that everyone understood what we were calling a violation,” the NRCS representative said. “We had to explain the swampbuster law to the producer, because this was a whole new thing to him. He was unaware that what he had done was a violation. We had to be as ready as we could to help him understand the predicament he was in.” Most of NRCS’ evidence consisted of the Army Corps’ aerial photographs of the site. Based on the photographs, the Army Corps and NRCS believed the land has been cleared beginning in 1991 or 1992. The producer insisted that the work had been done in 1989. “He questioned our evidence,” the NRCS representative said.

“He thought that we’d picked up the wrong year’s photos. He swore up and down that the clearing had been done in 1989. If that was the case, he would have been safe as long as he did not grow any crops on the land.” Federal wetlands law at the time stated that wetlands conversions without further modification of the land could be prosecuted only after 1990.

The producer provided bills from a contractor supporting the contention that the land had been cleared in 1989. “We didn’t want to run roughshod over this case, especially since it was the first mediation we’d participated in,” the NRCS representative said. “So instead of insisting on the Army Corps photographs, we agreed that we would find another source of aerial photographs.” The NRCS representative said he did not know where he might find additional evidence when he agreed to do so, but was concerned that the case proceed amicably.

Prior to the second session, the NRCS representative contracted the farmer’s advisor to tell him that aerial photographs confirming the government’s position had been found at the State Highway Department. At the second mediation session, the producer’s son quickly recognized that he and his father had been mistaken about the dates of the clearing. The son recognized a barn in the new photographs that had been built on a piece of land other than the one in question. The identification of the barn dated the photographs as 1991. “After acknowledgement of the evidence, we quickly started discussing what we could do to take care of the violation,” the NRCS representative said.

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**Outcome:** The participants in the mediation agreed that mitigation and restoration were the best outcomes for the producer and for the agencies involved. NRCS agreed to assemble a group of staff members to work with the producer to develop a mitigation plan.

“We went out to the producer’s land and discussed with him the value of the wetlands that were lost when he cleared the land,” the NRCS representative said. Then we looked at pieces of land where he could accept mitigation. “Then it was up to him to execute the plan. NRCS and the Army Corps review the work to make sure it is completed.”

**Cost/Benefit:** Generally speaking, the USDA representatives involved in this case feel that mediation is a useful tool. “The producers can ask questions they need to ask to understand the case,” the NRCS representative said. “The mediator can help explain the situation in a way we can’t. The mediator also will ask questions the landowner won’t ask. The producers need face-to-face contact to feel like they are being listened to.” The level of communication that is achieved through mediation is perhaps the most important aspect of this process. “We are able to explain to the producers all the possible outcomes of the case,” the FSA representative said. “They may not like it, but we can come to terms.”

Some of that may have to do with the fact that it’s often the first time the producer has come face to face with the USDA officials.” Also, the USDA officials in this case said they think that their producers understand what mediation has to offer. “People have more misconceptions about the appeals process than they do about mediation,” the NRCS representative said. “By the time you get to appeal, there really is not much change for working things out.”

The benefit of mediation is closely linked with the type of case and the regulatory framework that applies to each case. “In wetlands cases involving NRCS, mediation has been very valuable,” the FSA representative said. On the other hand, that FSA representative feels FSA-only mediations have not been as successful “because we don’t have as much regulatory flexibility.”

The ability to make decisions and arrive at creative solutions is crucial, both for the mediator in trying to effect a successful outcome and for the federal officials trying to serve the public. “Often we come up with a more creative solution through mediation than we otherwise would have,” the NRCS representative in this case said. “We can’t be very creative, but we do as much as we can. In this case, the producer had FSA payments held up. FSA could not release the payments without an agreement signed, which frees up the payments sooner.

When innovative solutions to which everyone agrees are the outcome, all parties tend to leave mediations satisfied with the results. “I haven’t seen mediation used as stalling, and no one in our program has pursued an appeal after the mediation process,” the NRCS representative in this case said. “The benefits of mediation do outweigh the costs.”

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