

Wetlands Conversion Case

Context: A producer ran a relatively small farm and received USDA subsidies for maintaining some parcels of his land as wetlands. The federal government protects wetlands under the provisions of several laws, including the Clean Water Act. In 1997, the Natural Resources Conservation Service (NRCS) conducted a standard compliance review of one tract on the producer's land. The producer passed the first review, but failed a follow-up review a year later because NRCS determined the producer had straightened an oxbow in a nearby creek by filling it in order to make farming somewhat easier. The producer claimed not to know that his action violated federal law. "This was not a little trickle of water," the NRCS representative involved in this case said. "It was a main creek, a perennial, constant stream. The creek had an eight-foot bank on each side, a stream three or four feet wide, and a foot deep. Filling it was not a minor change."

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Filling a wetland carries a penalty of forfeiting wetlands protection payments from the time the violation was committed to the time NRCS discovers it. The producer was held liable for more than \$160,000 in payments, as NRCS determined that the land had been filled in 1991 or 1992. NRCS notified the producer that the creek had to be restored to its original condition or mitigated, and that his Farm Service Agency (FSA) payments could be suspended until the work was complete. The producer failed to respond to NRCS until after he was found to be in noncompliance.

The producer conceded that he had filled the wetlands, but expressed concern about the cost of restoring the land. The producer asked for a field visit from NRCS, during which the NRCS representative described what work would need to be completed to restore the site. Following the site visit, the producer filed an appeal of the NRCS determination and requested mediation.



Intervention: In 1999, NRCS and FSA entered into mediation with the producer. The mediation was conducted in the offices of a nonprofit advocacy agency for small farmers. The mediation took place in a single afternoon. This mediator uses a relatively informal approach to solving agricultural disputes. "I start out by telling them that I'm a farm boy myself," he said.

“Then I tell the agency folks that I may appear to side more with the producer, but that it’s because the farmer is typically less comfortable with the situation. I try to make them more comfortable, and usually let them tell their side of the story first. People should be treated fairly, but that doesn’t mean they should necessarily be treated equally. They aren’t equal.”

The mediator encouraged both sides to tell their story with as much detail as necessary. An important turning point came when the USDA representatives told the producer they could understand why he had straightened the creek. The action made sense in terms of making farming easier, the representatives said, but was not permissible under the law.

“It is very important that the farmer knew USDA did not think he was a crook,” the mediator said. From that point, the mediation moved forward to a resolution. “We went over all the choices open to the producer,” the NRCS representative said. “Identifying the options open to the farmer and the ramifications of each was important,” the FSA representative said. “That really cleared the air, and was good because we’d never had a time for all three parties to get together.”

Outcome: It became obvious that re-bending the creek was the only solution. The producer agreed verbally that he was going to redig the channel in the original fashion. An agreement was reached in the form of a summary provided by the mediator to the parties. “The summary is the plan the parties have agreed to and the steps they say they will take,” the mediator said. “I do not ask people to sign anything, because that makes the whole process too formal. This is a handshake deal, and a handshake is still good in this part of the country. If there has been a meeting of the minds, they should not have to sign anything. If there isn’t a meeting of the minds, the agreement won’t work anyway.” The producer responded by the agreed-upon deadline, stating that he would restore the wetlands that had been filled. NRCS, therefore, staked out the appropriate path of the creek and reviewed their work with the Army Corps of Engineers. The producer dug out the stream and provided written evidence that the work was complete. Upon receipt of this letter, FSA restored the producer’s compliance status as well as the wetlands protection payments that had been suspended.

Cost/Benefit: The NRCS representative in this case enjoyed working with the mediator and admits that mediation might hold some value for producers, but also expressed some concerns with mediation. “Producers seem to have a misconception that mediation means we can bend the rules,” the NRCS representative said. “I can’t bend the regulations to bring producers into compliance. Most of the mediations I’ve been involved in have been in my district. I’ve already been to the site to explain to the producer what’s needed. It would be easier if the producer would just comply. It would save us a lot of staff time and paperwork. In this case, mediation was a way for the producer to delay by four or five months the work needed to get back in compliance.” This case was particularly frustrating to the NRCS representative, he said, because USDA in the past 15 years has made a major effort to tell producers that disturbing wetlands will not be tolerated by the federal government.

One cost that the mediator and the NRCS representative mentioned is the time and effort required to travel to the mediations, which generally are conducted in a neutral location close to the producer’s home. The state where this dispute arose appears to be responding to this problem by conducting some mediations by telephone, the mediator said. “Getting there often takes so much energy that the parties are worn out before they start the mediation,” he said. “And then very often they do not have the materials they need to move forward.” The mediator initially was skeptical about conducting mediations by telephone, but said the method has worked very well so far.

Despite the travel time required, however, mediation does appear to offer a quick alternative to the formal appeals process. “Mediation in this case really sped up the process,” the FSA representative said. “We’d all talked to the producers individually, but never together. Bringing everyone together was maybe something we should have done at the local level. but mediation was really useful, because it brought out answers to questions we hadn’t thought of before. I was satisfied.”

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