

USDA Administrative Appeals – It’s More Than Going Through the Motions

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Overview

A great deal of governmental regulation of agriculture is conducted via administrative agencies that promulgate regulations and make decisions. This is particularly true concerning the regulation of agricultural activities. Usually, a farmer or rancher’s contact with an administrative agency is in the context of participation in an agency-administered program, or being cited for failure to comply with either a statutory or administrative rule. Consequently, it is critical for agricultural clients to have a general understanding of how administrative agencies must first be dealt with in accordance with the particular agency’s own procedural rules before the matter can be addressed by a court of law. This is known as exhausting administrative remedies.¹ But, does the exhaustion of administrative remedies by completing the administrative appeal process also require that legal issues must be raised during the administrative process so as to be preserved for judicial review? That issue was recently addressed in a case involving converted wetlands.

The Facts of *Ballanger*²

The plaintiff is an Iowa resident who owns and operates farmland in Missouri. Upon his purchase of the farmland at issue in 1996, the seller informed the plaintiff that the farm did not contain any wetlands and no wetland delineation had been made. The plaintiff cleared woody vegetation and other plants from approximately five acres of the property for conversion to crop production and then enrolled the property in the farm program. In 2002, the local Farm Service Agency (FSA) sought a determination from the Natural Resources Conservation Service (NRCS) that the plaintiff’s farm, for crop year 2000, was in compliance with the highly erodible and wetland provisions of the 1985 Farm Bill.³ The wetland provisions of that legislation prohibit the conversion of “wetlands” to crop production on land enrolled in the farm program.⁴ NRCS made field visits to the plaintiff’s farm in 2002 and again in late 2003, ultimately concluding that the plaintiff had converted 4.5 acres of wetlands.⁵

The plaintiff appealed the NRCS’ decision to the county FSA, specifically stating that he had not sought an exception for “good faith”⁶ or pursued mitigation.⁷ Apparently, the plaintiff believed that doing so would have amounted to his agreement (or acquiescence) with the NRCS wetland determination.⁸ The county FSA affirmed the NRCS’ determination, and the plaintiff filed an administrative appeal with the USDA’s National Appeals Division (USDA NAD). USDA NAD affirmed the county FSA’s decision, and the plaintiff further appealed administratively to the USDA Deputy Director. The Deputy Director likewise affirmed. After exhausting all administrative appeals, the plaintiff filed suit in federal district court.⁹

Exhaustion of Administrative Appeals in Wetlands Cases

The plaintiff clearly exhausted his administrative remedies before filing suit in federal district court – there was no administrative body remaining that could hear an appeal. So, the plaintiff was entitled to move his case to federal court. However, at the district court, the plaintiff raised several issues that had not been raised during the administrative appeal process. The plaintiff argued that NRCS improperly relied on data from field visits that occurred at times outside of the crop growing season; that NRCS did not follow the proper wetland determination methodology;

and that NRCS failed to determine whether his conversion activities had a minimal effect on wetland functions. The court ruled that it could not consider these issues because the plaintiff had not raised them during the administrative appeal process - it was insufficient for the plaintiff to merely exhaust administrative remedies. Instead, the court ruled that the plaintiff must also raise and exhaust legal issues in the administrative process (known as "issue exhaustion") in order to preserve them for further review in the judicial process. The plaintiff appealed.

The United States Court of Appeals for the Eighth Circuit affirmed.¹⁰ The court noted that the U.S. Supreme Court, in *Sims v. Apfel*,¹¹ established the rule that issue exhaustion applies in administrative appeal proceedings if required by statute or, if no statute applies, if the proceeding is adversarial in nature.¹² In applying the *Sims*¹³ rule to this case, the court noted that while no statute requires issue exhaustion in the context of wetland appeals, the applicable regulations (after the filing of an appeal) prohibit ex parte communications between NAD officers or employees and interested persons,¹⁴ provide for the subpoenaing of evidence and witnesses¹⁵ and generally describe a process that is similar to a trial.¹⁶ In addition, the regulations state that the party challenging an agency decision bears the burden of proof to establish by a preponderance of the evidence that the agency decision was erroneous.¹⁷ The regulations also specify that the NAD is independent from all other USDA agencies and offices at all levels.¹⁸ Based on these factors, the court reasoned that the USDA administrative appeal process (at least as applied to wetland determinations) was adversarial in nature, and that the plaintiff had a duty to develop the administrative record and preserve legal issues for eventual judicial review.¹⁹ The court also noted that it had previously required issue exhaustion in a wetland determination case.²⁰

The Preserved Issue – Wetland Manipulation

The plaintiff did preserve the issue of whether the removal of woody vegetation from a wetland, by itself, constitutes an illegal manipulation of a wetland. The plaintiff claimed that USDA also had to prove that the removal of woody vegetation from a wetland had an *actual impact* on the wetland or reduced its water flow. The applicable statute defines a "converted wetland" as a "wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible..."²¹ The governing regulation similarly defines a converted wetland as a "wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose or to have the effect of making possible the production of an agricultural commodity..."²² The trial court ruled that the parenthetical language in the statute merely illustrated the type of activity that could qualify as a wetland manipulation. The plaintiff, however, argued that the parenthetical language of the regulation impermissibly expanded the scope of the statute. The trial court disagreed, as did the Eighth Circuit. Under the standard of deference that is generally granted to agency interpretations of statutory language,²³ and agency interpretation of its own regulation,²⁴ the court upheld the agency's determination that the removal of woody vegetation from a wetland for the purpose of bringing the land into crop production is an illegal manipulation, and that separate proof of an impact on water flow is not required.²⁵

Handling Administrative Agency Appeals

Clearly, the lesson of *Ballanger*²⁶ is that producers must take care to preserve evidence, all disputed factual issues, and raise all potential legal issues during the administrative process that could help their case upon eventual judicial

review. While it is not the rule that issue exhaustion automatically applies in administrative appeal proceedings, it is the general rule. As such, agricultural producers should seriously consider retaining legal counsel at the beginning of the administrative appeal process, and practitioners should communicate to clients the need and rationale for representation.

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¹ *But see*, Gold Dollar Warehouse, Inc. v. Glickman, 211 F.3d 93 (4th Cir. 2000) (plaintiff not required to exhaust administrative remedies before challenging imposition of personal liability for violation of tobacco market quotas where plaintiff made facial challenge to regulation).

² Ballanger v. Johanns, No. 06-3889, 2007 U.S. App. LEXIS 18245 (8th Cir. Aug. 1, 2007).

³ See 16 U.S.C. §3821.

⁴ “Converted wetland” is defined as “wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible...”. 16 U.S.C. §3801(a)(6)(A).

⁵ The 4.5 acres were determined to be wetlands due to the presence of hydric soil, hydrophytic vegetation, wetland drainage patterns and oxidized root channels in the upper foot of soil – all wetland characteristics. See 16 U.S.C. §3801(a)(18). The finding resulted in the plaintiff being ineligible for USDA farm program payments as of the 1996 crop year, and triggered repayment of all amounts the plaintiff had received since that time, plus interest.

⁶ Under the 1996 Farm Bill, a “good faith” exemption is provided to producers who inadvertently drain a wetland. Under the rule, if the wetland is restored within one year of drainage, no penalty applies. See 16 U.S.C. §3822(h)(2).

⁷ Under the 1996 Farm Bill, a farmed wetland located in a cropped field can be drained without sacrificing farm program benefit eligibility if another wetland is created elsewhere. See 16 U.S.C. §3822(f)(2).

⁸ The plaintiff was represented by counsel only during a portion of the administrative process.

⁹ While the farmland at issue was in Missouri, the plaintiff resided in Iowa. Hence, jurisdiction was properly with the federal district court for the district of the plaintiff’s residence – in this instance, the Federal District Court for the Southern District of Iowa. The lead author began representing the plaintiff after the administrative appeal process had been exhausted.

¹⁰ Ballanger v. Johanns, No. 06-3889, 2007 U.S. App. LEXIS 18245 (8th Cir. Aug. 1, 2007).

¹¹ 530 U.S. 103 (2000).

¹² In a non-adversarial agency proceeding, the administrative agency is responsible for identifying issues and developing the record. In an adversarial proceeding, each party must develop the factual bases for its claims and raise those desired to be preserved for any future appeal. Issue exhaustion was not required in *Sims* (involving a social security proceeding) because an administrative law judge served an investigative role and was required to develop the record. As such, the administrative proceedings were inquisitorial and not adversarial.

¹³ 530 U.S. 103 (2000).

¹⁴ 7 C.F.R. §11.5.

¹⁵ Id. §11.8(a)(2).

¹⁶ Id. §11.8(c)(5)(ii).

¹⁷ Id. §11.8(e).

¹⁸ Id. §11.2

¹⁹ The U.S. Supreme Court, in *Sims*, also noted that issue exhaustion is *not* disfavored and that it is required as a general rule.

²⁰ *Downer v. United States*, 97 F.3d 999 (8th Cir. 1996) (alternative holding of court was that plaintiff, at the administrative appeal stage, failed to present evidence concerning the existence or non-existence of natural wetlands on his property, and failed to carry the burden of proof). While not reference by the court, issue exhaustion was also required in another wetlands case. See *Holly Hill Farms Corp. v. United States*, 447 F.3d 258 (4th Cir. 2006) (government's failure to make minimal effects determination (16 U.S.C. §3822(f)(1)) not plain error; landowners raised minimal effects exemption for first time on appeal).

²¹ 16 U.S.C. §3801(a)(6)(A).

²² 7 C.F.R. §12.2(a).

²³ See, e.g., *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006).

²⁴ See, e.g., *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994). The party challenging an administrative agency's regulatory interpretation of statutory language must show that the agency's interpretation is arbitrary, capricious, and not otherwise in accordance with the law. See, e.g., *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁵ The plaintiff cited a proposed regulation (67 Fed. Reg. 19699, 19701 (2002)) to support his argument that the government had to separately prove that the wetland's water flow had been impaired. But, the court refused to apply the regulation as an expression of the USDA's interpretation of the statute because the regulation had not been finalized, and because the regulation would not have, in any event, applied to the plaintiff (the plaintiff made no argument that he removed the woody vegetation in order to restore the land to a more natural, properly functioning wetland state).

²⁶ No. 06-3889, 2007 U.S. App. LEXIS 18245 (8th Cir. Aug. 1, 2007).