

September 18, 2019

The Honorable Sonny Perdue
Secretary
United States Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250

Re: *Boucher v. USDA's Implications for NRCS*

Dear Secretary Perdue:

I write to bring your attention to the recent opinion from the U.S. Court of Appeals for the Seventh Circuit in *Boucher v. USDA*, where a unanimous court found that USDA repeatedly abused the Boucher family by falsely claiming that the Bouchers had converted 2.8 acres of land by either installing tile after 1985 (they had not) or removing 9 trees. In a blistering 47-page opinion, the Seventh Circuit excoriated USDA for its horrific pattern and practice of refusing to consider evidence provided by the farmer, making incorrect assumptions, failing to follow NRCS's own guidance, issuing regulations that do not match the underlying statute, and engaging in a fundamentally broken appeals process that stacks the odds against the farmer. In the words of the Court:

The USDA repeatedly failed to follow applicable law and agency standards. It disregarded compelling evidence showing that the acreage in question never qualified as wetlands that could have been converted illegally into croplands. And the agency has kept shifting its explanations for treating the acreage as converted wetlands. The USDA's treatment of the Bouchers' acreage as converted wetlands easily qualifies as arbitrary, capricious, and an abuse of discretion.

Boucher v. USDA, No. 16-1654, slip op. at 2 (7th Cir. Aug. 8, 2019) (**Attachment A**).

Notably, the Seventh Circuit highlighted several problems that USDA must address. Those areas are discussed below and relate to our previous discussions on NRCS's implementation of the Conservation Compliance programs. USDA's interim final rule on Highly Erodible Land and Wetland Conservation, 83 CFR 63046 (Dec. 7, 2018) (the "Interim Final Rule") *does not* remedy any of these problems, and in some cases only makes them worse. USDA should view its finalization of the Interim Final Rule as an opportunity to correct the problems identified in *Boucher*.

While the opinion is worth reading in full, we have copied highlights from the decision in the attached document that summarize the Court's findings (**Attachment B**). The wrongs identified by the Seventh Circuit are systemic throughout NRCS and representative of the

experience of countless farmers.¹ We hope that you find this case as shocking and troubling as does the Seventh Circuit.

NRCS Problems Identified by Seventh Circuit Court of Appeals

Woody Vegetation

The *Boucher* Court noted that USDA’s regulations defining “converted wetland” are “slightly altered from the statutory text, potentially pulling the definition away from the statute’s primary focus on hydrology.” *Id.* at 7 n.2 (discussing 7 C.F.R. § 12.2). To make matters worse, 7 C.F.R. § 12.32(a)(2), improperly read in isolation, makes “the removal of woody vegetation” sufficient to trigger a converted wetland, even though that phrase is not in the underlying statute. *Compare* 7 C.F.R. § 12.32(a)(2) *with* 16 U.S.C. § 3801(a)(7)(A). Indeed, NRCS argued just that. The Court had little difficulty concluding that “[t]he government’s reading of this provision – the removal of woody hydrophytic vegetation from hydric soil is sufficient by itself to deem the site a converted wetland, without reference to hydrological factors – conflicts with the statutory definition’s focus on hydrology.” *Id.* at 43. To be consistent with the statute and the *Boucher* decision, NRCS must remove all references to “woody vegetation” from 7 C.F.R. §§ 12.2 and 12.32.

One-Time Observations of Wetland Criteria under Irregular Circumstances

The *Boucher* Court criticized NRCS for conducting a single site visit to the Boucher farm in the winter of 2013 to finalize a preliminary determination in 2003:

Conditions for the site visit were unusual. Over three inches of rain fell on January 13 and January 14, the day of the visit. That rain melted eleven inches of snow on the ground. NRCS sent ... no hydrologist.... The agency experts did not schedule a follow-up visit but did snap some pictures of puddled fields they believed to be [the site in question] and noted in their assessment form the (unsurprising) “evidence that water collected at the surface after heavy rains.”

Id. at 23-24. As noted by the Seventh Circuit, such one-time visits create a high risk of generating false-positives, as was the case with the Boucher farm. More troubling, the Interim Final Rule codifies NRCS’s ability to make wetland determinations based on one-time site evaluations. USDA must amend NRCS’s regulations, guidance, and manuals to prohibit one-time observations to alone satisfy the hydrologic criteria.

¹ USDA’s implementation of its conservation compliance programs transcends politics: the Bouchers’ battle began in the beginning of the Bush presidency and continued through the Obama and Trump administrations. The unanimous judges on the Seventh Circuit were appointed by Presidents Reagan, Clinton, and Obama. And the actions by USDA were not limited to a few individuals, but were endemic through all levels of review and appeal.

NRCS Must Be Prohibited from Changing Rationales for Wetland Determinations

One of the most troubling aspects for the *Boucher* Court was that, for over seventeen years, NRCS “kept shifting its explanations for treating the acreage as converted wetlands.” *Id.* at 2. The Bouchers were not the only ones forced to chase a moving target. *See Maple Drive Farms Ltd. Partnership v. Vilsack*, 781 F.3d, 849-50 (6th Cir. 2015) (noting NRCS’s shifting claims as to the farmer’s request for a minimal-effect determination throughout the appeals process). USDA should prohibit NRCS from making result-oriented wetland determinations by forbidding the agency from changing its rationales for wetland determinations. USDA should amend 7 C.F.R. § 12.12 to prevent such unfair gamesmanship. Once a farmer refutes the basis for the agency’s determination, that should end the matter. NRCS must not be allowed to shift its rationale once the farmer presents contradictory evidence. The regulation governing appeals should expressly state that once a farmer comes forth with evidence to refute the agency’s determination, any counter-arguments that NRCS has not already raised are deemed waived.

NRCS Must Accept Evidence Supplied by the Farmer Absent Substantial Evidence to the Contrary

The *Boucher* Court castigated NRCS for repeatedly ignoring evidence provided by the Bouchers. For example, NRCS based its various claims over the years on allegations that Mr. Boucher removed hydrophytic vegetation and added drainage tile after 1985. But NRCS had no evidence of either assertion. To the contrary, “Mr. Boucher pointed out that the only trees he removed had been Facultative Upland Plants – i.e., those unlikely to be found in wetlands – and that no leveling or drainage work had been performed on this site.” *Id.* at 22. Thus, NRCS ignored the only available evidence and effectively shifted the burden of proof onto the farmer to prove a negative.

The Bouchers were left with no option but to spend significant sums of money to commission an independent study to prove that they had not, in fact, installed drainage tile – just as they had told NRCS. What’s more, they had to pay lawyers to spend years challenging the agency’s position that the Bouchers were, effectively, liars.

USDA must require NRCS and NAD judges to accept as true evidence produced by the farmer absent substantial evidence to the contrary. When NRCS takes a position that conflicts with evidence provided by the farmer, NRCS should document what evidence clearly establishes that the farmer’s evidence is incorrect. NRCS should not be permitted to effectively shift the burden of proof onto the farmer to prove that they have not converted a wetland into cropland.

The Broken Appeals Process Must Be Fixed

The *Boucher* court criticized USDA’s flawed appeal process that did little more than rubber-stamp NRCS’s wetland determination. There was plenty of criticism for the Court to spread around. For example:

The NRCS experts did not attribute the alteration of hydrology to the removal of the nine trees, and the agency presented no evidence that the tree removal altered

the wetland hydrology. The USDA hearing officer and appellate officer failed to engage meaningfully with this point, thereby ignoring a crucial factor under the agency's interpretation of this regulation, rendering the decision arbitrary and capricious.

Id. at 46-47. As to the NAD appeal, the *Boucher* Court wrote:

Rather than grappling with this evidence [that the lands at issue were not wetlands], the hearing officer used transparently circular logic, asserting that the agency experts had appropriately found hydric soils, hydrophytic vegetation, and wetland hydrology, 'using a similar adjacent property [i.e., ... the wetland in the depression] because the Property was converted and no longer had any natural fauna.

Id. at 29. The *Boucher* Court similarly blasted the agency director review:

The deputy director did not mention, let alone reconcile, Mrs. Boucher's evidence that: (1) even without any drainage on [the disputed fields], the fields did not demonstrate sufficient inundation or saturation; (2) the site topography study revealed that [the fields] were not in a depression, unlike [the comparison field]; and (3) the removed trees were FACU – i.e., trees unlikely to be found in wetlands.

Id. at 32. *See also B & D Land & Livestock Co. v. Veneman*, 231 F.Supp.2d 895 (N.D. Iowa 2002) (noting that the Hearing Officer "improperly plac[ed] the burden on [the farm] to demonstrate why criteria not identified in the statute or regulations as determinative of a wetland did not demonstrate the presence of wetlands" and "completely ignored, or ignored the credibility of, [the farmer's] evidence"). In short, the agency safeguards to ensure the farmer receives due process are wholly inadequate.

USDA must fix its broken appeals process. *At a minimum*, USDA should:

- Retrain NAD judges and agency directors in how to provide a fair and balanced hearing;
- Require USDA to provide the entire record or decisional documentation to the farmers at the time of alleged compliance violation;
- Allow the farmer and his counsel to call NRCS technical staff as witnesses in the appeal;
- Accept evidence provided by the farmer as true absent substantial evidence to the contrary; and
- Compensate the farmer for legal fees when the farmer wins an appeal – i.e., when the farmer is forced to incur costs as a result of an incorrect decision from NRCS.

Stop Harassing Mrs. Boucher

After seventeen years of "repeatedly fail[ing] to follow applicable law and agency standards," "disregard[ing] compelling evidence," and endless "shifting [] explanations," *id.* at 2, we ask that USDA accept the Seventh Circuit's decision in the *Boucher* case. The unanimous *Boucher* panel was clear: NRCS's actions "easily qualif[y] as arbitrary, capricious, and an abuse of discretion." *Id.* at 2. We ask that USDA listen to the Seventh Circuit and end this decades-long

harassment of Mrs. Boucher, compensate Mrs. Boucher for her legal costs in defending herself against NRCS's actions, and drop any contemplated appeal.

* * *

The Bouchers' experience is representative of what our members have experienced across multiple administrations and continue to experience to this day. *See, e.g., Maple Drive Farms Ltd. Partnership v. Vilsack*, 781 F.3d 837, 857-58 (6th Cir. 2015) ("USDA has permanently deprived Smith of program benefits and forced him to navigate a bureaucratic labyrinth. All the while, USDA has demonstrated a disregard for its own regulations and insisted that Smith mitigate his land when the relief he seeks is not based on regulations requiring mitigation."); *Rosenau v. Farm Serv. Agency*, 395 F.Supp.2d 868, 874 (D.N.D. 2005) ("[B]ecause [USDA was] responsible for creating a situation in which the . . . eligibility for a minimal effect exemption cannot be determined in accordance with the controlling regulations, [USDA] should not reap the benefits of its noncompliance."); *B & D Land & Livestock Co. v. Veneman*, 231 F.Supp.2d 895, 909 (N.D. Iowa 2002) (granting motion for preliminary injunction against USDA where USDA arbitrarily failed to consider whether or not any "conversion" of the wetland in question had only a "minimal effect").

USDA should resist the temptation to characterize these decisions from federal courts as outliers; in reality, affected farmers typically have been unable to challenge the agency's decisions because they simply cannot afford to lose eligibility or the costs of a fruitless appeal. Generally, farmers follow the direction of the agency to avoid ineligibility instead of appealing. A few farmers, such as the Bouchers, have the means to follow through on their appeals out of principal. As part of your legacy, we hope that you commit to embracing a fair and transparent decision-making and appeal process, restoring congressional intent to conservation compliance programs, improving compliance, and creating an environment where more farmers enthusiastically want to take additional actions to protect our precious land and water resources.

Sincerely,



Zippy