***Boucher v. USDA* – Case Highlights**

Summary

> "In the mid- to late-1990s, the late David Boucher cut down nine trees on his family farm in Indiana. For almost two decades, the United States Department of Agriculture (USDA) has disagreed, first with Mr. Boucher and now his widow, plaintiff Rita Boucher, about whether that modest tree removal converted several acres of wetlands into croplands, rendering the Bouchers' entire farm ineligible for USDA benefits that would otherwise be available.
>
> In this case … the record shows arbitrary and capricious action by the agency. 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 1-2 (7th Cir. Aug. 8, 2019).

Background

> "All told, the nine trees had occupied approximately 12/10,000ths of an acre. As described in the later agency hearing, one could fill an area the size of a pick-up truck bed by laying flat a slice from each of the nine trees' trunks."

Id. at 20.

A. NRCS claimed that the removal of the nine trees converted an area totaling 2.8 acres. In doing so, NRCS incorrectly assumed that the removed trees were hydric vegetation, that NRCS could identify the tree species from blurry aerial photography, that the removal impacted the area hydrology, that the area was in a depression, and that the area had been tiled after 1985. NRCS also chose an incompatible reference site that was clearly a wetland sitting in a depression.

In 2003, NRCS made a preliminary determination that the Boucher farm contained 2.8 acres of converted wetland on two areas, designated as Un1 and Un2. *Id*. at 22. The FSA Committee referred the case to the NRCS State Conservationist for a further site visit, wherein Mr. Boucher felt "he had proved his position." *Id*. at 23. "No further communication was received from the USDA for nearly ten years, until late 2012. In February 2004, Mr. Boucher passed away." *Id*. at 23.

In January 2013, NRCS scheduled a new site visit. "Conditions for the site visit were unusual. Over three inches of rain fell on … the day of the visit. That rain melted eleven inches of snow on the ground." *Id*. at 23. NRCS did not bring a hydrologist or schedule a follow-up visit. *Id*. at 23-24. The agency incorrectly claimed that drainage tile had been added to the site after 1985 and therefore adopted a reference site, Field 7. *Id*. at 24. As stated by the Seventh Circuit:

> [In 2002 and 2013], the NRCS agents *assumed* that Un1 and Un2 had been drained of hydrology by the installation of field drainage tile *and* that Un1 and Un2 were in a depression. Both assumptions are, on this record, demonstrably wrong. The agents then walked down-gradient to Field 7, which *is* in a depression, into the midst of hydrophytic vegetation in what is obviously a wetland. They used those observations of Field 7 to declare that Un1 and Un2 were converted wetlands. That is not agency expertise that deserves deference. It is arbitrary and capricious disregard for both the facts and the law."

Id. at 36.

B. NRCS repeatedly ignored the evidence provided by the Bouchers

- "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.
- "Mr. Boucher documented that the nine trees he removed from the disputed site were categorized as FACU – i.e., Facultative Upland Plants that are unlikely to occur in wetland areas, a point made repeatedly by Mrs. Boucher during the agency appeals process." *Id*. at 45
- Mrs. Boucher was forced to hire a company "to make an independent assessment" to prove that she had never installed drainage tile and that the comparison site selected by NRCS was not, in fact, comparable. *Id*. at 26. Mrs. Boucher's company confirmed that there was no drainage tile and that the site did not meet the criteria for wetland hydrology under normal circumstances. *Id*. at 27. The company also confirmed that the land in question "was not in a depression and thus cannot meet the depressional geomorphic position criterion…. In fact, the only depressional field was … the comparison site selected by the NRCS experts. At the risk of stating the obvious, this was strong evidence that [the comparison site] did not provide a relevant comparison to [the alleged converted wetland]." *Id*. at 28.

The appeals process is critically broken, deferential to NRCS, and stacked against the farmer

- NAD Hearing & Decision
    - "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.
- Agency Director Review
    - "[A]n agency deputy director found that the decision was 'supported by substantial evidence' and affirmed…. Astonishingly, the deputy director wrote that all that was required of the comparison site was that it be *on the same hydric soil map*." *Id*. at 31-32 (emphasis in original).
    - "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.
- In short:
    - "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.

- District Court
    - "In some logical tension" found "sufficient evidence supported the agency's wetland determination." *Id*. at 33.

Agency Malfeasance: NRCS repeatedly abused the Bouchers over 17 years, changed the agency's story, and outright lied

- NRCS agents "strayed far from these norms" required to certify wetland determinations. *Id*. at 19-20.
- NRCS's proposed a remediation plan "that would have required Mr. Boucher to plant 300 trees per acre to compensate for the removal of the nine trees." *Id*. at 22.
- "USDA personnel in 2013 were not aware of the 2003 appeal and the evidence Mr. Boucher had provided to contradict Ms. Hauer's preliminary findings. In the agency hearings and the district court, the USDA blamed the Bouchers for the passage of time and the disappearance of USDA records, claiming the Bouchers should have realized the USDA had never closed its file after Mr. Boucher provided the evidence showing that the Un1 and Un2 parcels were not converted wetlands." *Id*. at 25 n.11.
- During the agency director review, NRCS "now also asserted, apparently for the first time … that 'Removal of woody vegetation … is considered a hydrological alteration.'" *Id*. at 31.
- "Did the USDA examine relevant factors and relevant data, or articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made? Were the opinions of its own qualified experts reasonable, such that we should defer to their expertise? Did the agency evaluate the significance—or lack of significance—of any new information presented during the agency appeals process? The answers to all of these questions are no." *Id*. at 35.
- "Instead of defending these shortcomings [of incorrectly assuming that the field had drainage tile and was in a depression], the government on appeal has tried to change the subject." *Id*. at 37.
- "We are not sure what 600-page administrative record the government is looking at, but it does not appear to be the same one we have…. We should be done—or rather the USDA should have been done when Mrs. Boucher provided evidence that the USDA experts should have found or recognized a decade earlier. But the USDA has continued to press two points on appeal—justifying its choice of a comparison site and its claim that it may forgo any assessment of wetland hydrology on a disputed site." *Id*. at 37.
- "The agency's assertion – that the removal of nine trees removed wetland hydrology from several acres of land – is incompatible not just with common sense, but with the NRCS experts' notation in their 2013 Atypical Situation Data Sheet for the Boucher farm…. There is no indication in the experts' documentation that the removal of trees altered the disputed site's hydrology, despite the agency's position in subsequent litigation." *Id*. at 45.
- "Despite the government's assertion in oral argument that 'there has never been a dispute as to whether or not the trees that were removed were hydrophytic vegetation,' Mr. Boucher documented that the nine trees he removed from the disputed site were categorized as FACU – i.e., Facultative Upland Plants that are unlikely to occur in wetland areas, a point made repeatedly by Mrs. Boucher during the agency appeals process." *Id*. at 45.

- "It is disappointing that the NRCS agents failed to try an 'indicator-based wetland hydrology' approach and made no effort to use any of these back-up tools." *Id*. at 42.
- "Hydrology was at the heart of this dispute, but none of the experts NRCS sent to the Boucher farm was a hydrologist." *Id*. at 42.
- "At oral argument, the government read from this portion of the Corps Supplement [describing the identification of a comparable site] but did not include Step 2's direction to verify the disputed site's geomorphic position and Step 3's insistence that, at a minimum, any reference site should share that same topography – just as it omitted those points in its appellate brief." *Id*. at 41 n.2.
- "The agency … claimed on appeal that the NRCS experts could identify the species of removed trees via a series of aerial photography slides. There is no evidence in the record that any agency expert has attempted to identify the removed trees' species from aerial photographs." *Id*. at 46.

Important statutory and regulatory pronouncements:

- The 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. In particular, 7 C.F.R. § 12.2 improperly makes "the removal of woody vegetation" sufficient to trigger a converted wetland. *Id*. Indeed, NRCS argued that "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," which clearly "conflicts with the statutory definition's focus on hydrology." *Id.* at 43.
- The Court recognized that "All three characteristics [[1] hydrophytic vegetation, [2] a predominance of hydric soils, and [3] wetland hydrology under normal circumstances] must be present for an area to be considered wetlands. *B&D Land and Livestock Company v. Schafer* … ('the statute plainly and unambiguously defines these three requirements as *separate, mandatory* requirements')." *Id*. at 5. "Atypical situations are wetlands in which vegetation, soil, or hydrology indicators are absent due to recent human activities or natural evernts" and "alteration must have occurred after 1985." *Id*. at 10 (quoting and citing NRCS Procedures (2-4), (2-15).