

9-1-2002

Greenfiled Mills, Inc. v. O'Bannon, 189 F. Supp. 2d 893 (N.D. Ind. 2002)

Sarah A. Hubbard

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Sarah A. Hubbard, Court Report, Greenfiled Mills, Inc. v. O'Bannon, 189 F. Supp. 2d 893 (N.D. Ind. 2002), 6 U. Denv. Water L. Rev. 184 (2002).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

navigable waterway. The decision explicitly upheld the authority of the Corps to regulate areas with a significant nexus to navigable waterways.

The district court next addressed the dispute regarding the connection between the wetland and the Fox River. Lamplight disputed the connection, claiming that the drainage ditch running from the wetland ended fifty feet east of a swale carrying water to Brewster Creek. However, Lamplight conceded that, at points, a continuous stream of water existed between the wetland and the swale, especially during wet seasons. The deposition testimony of one of Lamplight's shareholders substantiated this finding. The court found persuasive a Ninth Circuit Court of Appeals decision, *Headwaters Inc. v. Talent Irrigation District*, where intermittent connections to a navigable waterway established Corps jurisdiction. Following this rationale, the court determined that since pollutants discharged into areas connected to navigable waterways eventually reach those waterways; the Corps must be able to regulate the initial discharge. Thus, because the wetland connected to a navigable waterway, it was subject to the Corps regulation.

The district court found Lamplight's argument did not have merit when it asserted that a 1993 permit gave the requisite authority to build the road. The permit authorized Lamplight to build a parking area and a pond, not a road. In addition, the permit specifically stated that if the specifications of the construction project changed in any way, Lamplight needed to contact the Corps to ensure compliance with regulations and to determine if Lamplight needed to procure additional permits. As a result of its findings, the court granted the Corps' motion for summary judgment, and denied Lamplight's motion.

Jared Ellis

Greenfield Mills, Inc. v. O'Bannon, 189 F. Supp. 2d 893 (N.D. Ind. 2002) (holding that the defendant did not violate Clean Water Act when a fish hatchery was partially drained causing abnormal water flow and discharge of mud in the river).

Property owners sought review in the United States District Court for the Northern District of Indiana of an administrative entry of summary judgment in favor of the Fawn River State Fish Hatchery ("Hatchery"). The court rejected all of the property owners' claims and entered an order in favor of the Hatchery.

The Fawn River is located in the northeast region of Indiana. The Hatchery, located on the river near Orland, Indiana, raised smallmouth bass, walleye, muskies, channel catfish, and rainbow trout for stocking Indiana's lakes and rivers. The Indiana Department of Natural Resources ("IDNR") owned and operated the Hatchery. The

Fawn River was dammed in order to form a 1.8-acre supply pond, which in turn supplied water to the Hatchery's rearing ponds.

As early as 1996, workers at the Hatchery noticed rust on the dam structure that threatened its structural integrity. After discussing the problem with a local welder, the directors of the Hatchery proposed a repair project to the IDNR. The project involved partial draining of the dam reservoir in order to repair the rusted areas below the surface. The IDNR approved the project and the Hatchery obtained funding.

On May 18, 1998, property managers at the Hatchery began to draw-down the supply pond by opening a control gate in order to repair the dam. The draw-down resulted in an increase of water to the Fawn River, which in turn caused great amounts of sediment to be moved and re-deposited farther downstream. Property owners with land along the Fawn River claimed the Hatchery's actions violated sections 402 and 404 of the Clean Water Act ("CWA"). According to the property owners, 100,000 cubic yards of sediment became mud, which clogged the river, destroyed fish and wildlife, and violated the CWA.

Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES"). Under section 402, the Environmental Protection Agency may issue permits authorizing the discharge of pollutants in accordance with specified conditions. Discharges of dredged or fill material into waters of the United States, which are regulated under section 404 of the CWA, are exempt from the NPDES permit process. The property owners claimed the Hatchery was required to obtain a section 402 permit before discharging fill material and pollutants into the Fawn River.

Section 404 of the CWA provided an exception to the NPDES permit for pollutants that are discharges of dredge or fill material into waters of the United States. Though not requiring a section 402 permit, in order to discharge dredge or fill material into the waters of the United States, a section 404 permit is required from the Army Corps of Engineers. The property owners argued that, if the Hatchery was not required to obtain a section 402 permit, they were certainly required to obtain a section 404 permit before lowering the dam gate and releasing water into the Fawn River. The Hatchery did not obtain either permit.

The first issue the court addressed was whether the acts constituted the "discharge of dredged material" as defined in the CWA in order to trigger a section 404 analysis. The property owners argued the surge of water added to the river and dredged the bottom of the river, disturbing the riverbed and causing mud to be introduced into the river and redeposited downstream. The property owners thereby asserted the mud in the river was "dredged material." The Hatchery proposed a narrow definition of "dredged material." The Hatchery argued that the term dredge only contemplated intentional mechanized acts of digging up soil or other material and therefore the mud was not "dredged material." In concluding the term "discharge

of dredged materials” included dredging that occurred by means of hydraulics, regardless of intention, the court considered 66 Fed. Reg. 4550, 4554, which specifically stated “there is no support under the CWA for the position that a discharge must be an intentional act.” The court reasoned the statutory language of the CWA and clarifying regulations do not indicate an intent by the legislature to limit the definition of “dredge” to mechanized methods and therefore hydraulic dredging likewise requires a section 404 permit unless exempted under further provisions. The Hatchery was therefore not required to obtain a section 402 permit.

The court then considered whether the Hatchery was exempt from the section 404 permit requirement by an exception for acts of maintenance. The Hatchery argued they lowered the dam solely for the purpose of inspecting the dam control gates and to perform maintenance to a related intake valve, therefore any discharge of dredged materials occurred solely as a result of this maintenance. The property owners countered that “maintenance does not include any modification that changes the character, scope, or size of the original fill design” pursuant to the CWA, and thus, since the draw-down lessened the amount of water in the Hatchery, the discharge did not meet the maintenance exemption because it exceeded the scope of the original fill design. The court rejected the property owners’ argument and held the Hatchery’s acts constituted acts of maintenance and therefore were exempt from section 404 permit requirements, provided the Hatchery avoided the CWA’s section 1342 recapture provision.

Section 1342(f)(2) provides an exception to the maintenance exemption of section 404 permit requirements for discharges of dredged or fill material into navigable waters incidental to any activity where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced. The property owners argued the addition of 100,000 cubic yards of sediment in a five-mile stretch of the Fawn River changed the use of the river by rendering it unusable for recreation as it became mud. The Hatchery argued that the recapture provision did not apply because any discharge of dredged materials was incidental to the dam maintenance and did not have as its purpose changing the use of the Fawn River.

Sarah A. Hubbard