Damages for Wetlands Violations: Lesson from *Ventres v. Mellon*

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The Connecticut Supreme Court's recent decision in the case of *Ventres v. Mellon, et al*, 275 Conn. 105 (2005) contains lessons about the enforcement of Inland Wetlands and Watercourses regulations–some helpful for such enforcement actions, and some not. The case arose when the Goodspeed Airport, LLC in East Haddam, controlled by Timothy Mellon, clear-cut about 2.5 acres of dense forest that allegedly impaired the approach to the Goodspeed Airport runway. Every plant was cut at ground level–trees of all sizes, shrubs, and brush, even though FAA guidelines did not require that extent of cutting. There were a few problems with this: First, the area was a floodplain forest, and hence a regulated wetland. Mellon did not seek any declaration of jurisdiction nor a permit from the East Haddam Inland Wetlands and Watercourses Commission. Second, Mr. Mellon did not own the property where the trees were cut. And third, the owners were the East Haddam Land Trust and The Nature Conservancy. This cut area formed the northerly portion of the Chapman Pond Wildlife Refuge, home to the largest wintering ground for American Bald Eagles in the eastern U.S.

The Commission's enforcement agent issued a Cease and Desist Order, but when the Commission convened the show cause hearing, Mr. Mellon alleged conflicts of interest for so many Commission members that it could not raise a quorum that would meet his tests. The hearing adjourned without action on the Order, and then the Commission authorized the enforcement action to be brought. Although Mellon acknowledged that his conflict of interest claims were no long applicable in June of 2001, the Commission did not re-open the show cause hearing because litigation was already in progress.

Mr. Mellon raised a number of defenses, including a claim that FAA guidelines preempted the local wetlands regulations and so no permit was needed; a claim that he had a prescriptive easement to clear the area, and did not the consent from the Trusts; and a claim that, regardless of any wrongs, only Goodspeed Airport, LLC was liable, not him personally. The Connecticut Department of Environmental Protection brought its own independent action against Mr. Mellon, and the Trusts brought cross complaints under the Connecticut Environmental Protection Act (CEPA). The eight-day trial involved the testimony of many experts, and included testimony that restoration of the cut area would cost between $148,117.60 (per Mr. Mellon's expert) and $158,092.00 (per the commission's expert.)

The trial court ruled in favor of the Commission, finding that Mr. Mellon's actions violated the wetlands regulations; that FAA guidelines did not preempt those regulations; that whatever conflicts of interest might have interrupted the show cause hearing did not prevent the bringing of the enforcement action; and that Mr. Mellon was personally liable for his actions, in addition to his company. The State's CEPA claim was upheld on one count, but not on another one. The trial court ordered total damages on both the State and local actions of $67,500–about half of the actual restoration costs. He must also pay the attorney's fees and costs for the conservation parties.

Mr. Mellon appealed to the Supreme Court, and the Commission appealed the low level of the damage award. The State and the Trusts cross appealed on other adverse rulings. The Supreme Court affirmed the trial court's decision as to the enforcement action, and improved on the trial court's decision relative to the State and the Trust cases. It also found that the FAA preemption issue was not even part of the case and need not be ruled upon.

While this was a complex case, there are some lessons to be learned:

The Supreme Court missed an important chance to send a message to wetlands violators. The fact is that Mr. Mellon got the clear approach to his runway, he cut more trees than he could have under the limited easement the trial court gave him, and he paid less than half of the restoration cost. The payment of attorney's fees only makes the trust parties whole–it does not provide any benefit to the wetlands. The Court also implied that the penalty for "each day of violation" *might* be read to apply only to the violation itself. This tells violators to move fast! CACIWC should consider seeking changes to the Statutes to specify that "each day of violation" includes any time period of violation *continuing until the violation is corrected*.

The decision also calls into question the wisdom of issuing a Cease and Desist Order for a major wetlands violation. The trial court terminated the calculation of the per diem penalty upon the issuance of the Order on the basis that the Order prevented *restoration* of the cut area, as well as further cutting. It may be that issuing an Order for serious violations merely opens up more defenses for the violator and that the matter should just be referred for immediate legal action.

Where an Order *is* issued, and the violator offers no remedy, the Commission should prescribe one itself and issue it as an order under Conn. Gen. Stats. §22a-44(a). The Supreme Court implied that, if the Commission had done that in this case, the Court would have expanded its definition of the "period of violation" to include the time during which no restoration was performed.

Another lesson is that when the violator is a corporate entity, the commission must be watchful for evidence of personal involvement by the owner in the violation. In this case, Mellon's personal signature on certain documents and his personal statements to the Wetlands Enforcement Officer proved pivotal in finding him personally liable for the damage.

Lastly, the case emphasizes the role of perseverance. Mr. Mellon may have counted on wearing down the Commission with extensive discovery, numerous defenses and counterclaims, and a long trial. It didn't work. The message to other violators is clear: we are serious about enforcement.