

Federal court tosses finding that Clean Water Act does not apply to Newton County CAFO

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Finding the Army Corps of Engineers did not follow its own guidance and procedures, the Northern Indiana District Court has thrown out the Corps' decision that a concentrated animal feeding operation built on a former wetland in Newton County is not under federal regulation.

The 37-page ruling in *Hoosier Environmental Council, et al. v. Natural Prairie Indiana Farmland Holdings, LLC, et al.*, 4:19-cv-71, gives a detailed analysis of all the steps the Corps did not take during its review of Natural Prairie's dairy farm and concludes the agency's determination that the operation was not subject to the Clean Water Act was "arbitrary and capricious."

"... (T)he court's review of the administrative record leaves substantial gaps from the data the Corps used to the conclusion the Corps made," Judge Damon Leichty wrote. "These gaps are so significant that the court is left with the firm conviction that the Corps did not follow its own guidance and procedures when it concluded that Natural Prairie's land was prior converted cropland before Natural Prairie's alterations."

Natural Prairie purchased land on the former lakebed of Beaver Lake to build and operate a CAFO with more than 4,350 dairy cows. At one time, the lake was the largest natural lake in Indiana and was part of the Grand Kankakee Marsh, which was dubbed the "Everglades of the North" because it was the largest inland wetland in the U.S.

In the early 1900s, the lake was drained to make way for farmland.

To drain Beaver Lake, several large ditches and drainage canals were constructed to move the water from the lake into the nearby Kankakee River. Two of the drainage ditches — the Lawler Ditch and the Bogus Island Direct — sit on Natural Prairie's land.

The plaintiffs assert Natural Prairie altered the ditches without informing the government. Specifically, the farm filled in and installed drainage tiles in some of the ditches to remove excess water from the soil. After the alterations were made, the CAFO contacted the Corps to determine if the ditches, lateral ditches and the land was subject to federal regulation.

Subsequently, the Corps concluded only the Lawler and Bogus Island Ditches were under regulatory control. And, according to the court filings, the Corps determined, without any support or analysis, that Natural Prairie's land was "prior converted cropland" and not farmed wetland.

In 2019, the Hoosier Environmental Council, the Indiana Audubon Society and certain nearby residents sued the Corps and Natural Prairie. The plaintiffs argued the Corps' determination was "arbitrary and capricious" because the agency did not rely on its technical guidance manuals.

The Corps responded that its guidance procedures weren't applicable and that its administrative record supported its decision. Natural Prairie likewise argued the finding was supported by substantial evidence.

However, the court found the Corps did not follow the procedures outlined in the agency's own guidance.

In particular, the Corps did not consider the hydrology of the land before Natural Prairie made the alterations for the ditches. Also, while the agency looked at a series of maps — including those from Natural Prairie and the U.S. Geological Survey along with a 1929 National Geographic flood plan elevation map — the Corps did not use the data its manuals have identified as useful to assess relevant drainage factors.

Looking beyond the data, the court found no indication the Corps considered the impact of the pre-Natural Prairie draining system or the impact of the new draining system. Moreover, there is no indication in the record that the Corps considered groundwater and runoff models, historic meteorological data, scope and effect drainage equations, topographical changes made to the property, the water table, or comparisons to any reference wetland sites or hydrological indicators.

"Despite an obligation to assess the hydrology of the land, absent from the administrative record is any indication of a meaningful consideration of the nature and characteristics of the hydrology of the land as it existed prior to Natural Prairie's alterations, how the drainage systems were designed to function, and how effectively and efficiently they could convert land from wetland to upland," Leichty wrote. "There is also no explanation why these steps were skipped. Nevertheless, the Corps concluded the land was drained (in some way) and the drainage systems (at some point) converted it into upland."

The district court denied both Natural Prairie's motion for summary judgment and the Corps' cross-motion for summary judgment. It granted the plaintiffs' summary judgment motion. Also, the court remanded the administrative jurisdictional decision to the Corps for reconsideration of its jurisdiction over Natural Prairie's land consistent with the court's opinion.