

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Memorandum and Order

v.

03-C-075-S

PAUL A. HEINRICH and
CHARLES VOGEL ENTERPRISES, INC.,

Defendants.

Presently pending before the Court in the above entitled matter is plaintiff's objection to defendant's interim restoration plan and another request for sanctions which will be granted.

In its order determining that the case was not ripe for appellate review, the United States Court of Appeals for the Seventh Circuit observed that the District Court had not approved a restoration plan and accordingly, the Court of Appeals lacked jurisdiction over the appeals, finding that the process of approving a restoration plan constitutes further litigation and is not merely a ministerial detail. Further, that several steps were yet to be taken before judgment becomes final.

After the May 24, 2005 remand arrived, the Court on June 16, 2005 held a hearing for the entry of final judgment, addressing argument on the proposed plans which were submitted. On June 17, 2005 a second amended judgment was entered attaching the restoration plan in full.

On July 20, 2005 the Court granted plaintiff's motion for penalties in the amount of \$3,800 for defendant's failure to submit a survey site plan or commence earth moving as required by the restoration plan. On July 27, 2005 the Court adjourned the proceedings to August 3, 2005, to address the further progress on the restoration. At the August 3 hearing, based on defendant's representation that he could complete restoration as required by the plan by August 19, 2005, it was ordered that the project be completed by that date. A hearing was scheduled for August 24, 2005 to determine compliance and those additional sanctions which may be necessary.

At the hearing to determine compliance with the restoration plan on August 24, 2005, the Court heard defendant's attempt at justification for his noncompliance. Because restoration had not been completed by August 19, defendant was unable to present evidence assessing compliance. Susan Knaube, supervisor of the restoration efforts undertaken by Northern Environmental Technologies, Inc. at defendant's request, testified that all plan requirements had been met except for the placement of erosion control mats and silt fences. She also testified that "soil ripping" was limited to the use of garden rakes on the top several inches of soil. She further testified that soil ripping provided only a temporary benefit to newly planted materials and would rapidly recompact. To resolve the state of compliance, the Court

directed plaintiff to provide a compliance inspection report not later than August 29, 2005. Defendant was directed to provide an as-built plan as required by the restoration plan, not later than noon September 7, 2005.

On August 29, 2005, plaintiff submitted its compliance inspection report asserting the following deficiencies in performance: (1) failure to use best efforts to use on site original organic soil; (2) failure to complete removal of fill material at the road shoulders; (3) failure to conduct adequate soil ripping; (4) failure to place erosion control matting and barriers. On September 14, 2005, plaintiff submitted an interim restoration compliance inspection report pursuant to restoration plan requirements. In the report plaintiff noted that it had not conducted an inspection since August 29, 2005, reiterated its previous objections and sought sanctions. Defendant has not submitted an as built plan as required by the Court's order nor anything else in response to plaintiff's submissions.

Based on the testimony at the August 24 hearing, the subsequent inspection report submitted by plaintiff, and defendant's lack of subsequent submissions the Court concludes that defendant has failed to complete removal of fill in the road shoulder area, to place erosion control matting and silt fences or to prepare an as built plan all as required by the restoration plan and this Court's order. The Court accepts the testimony of Knaube that Northern Environmental Technologies was unable to reasonably

reuse existing organic soil because of its contamination with underlying sand fill and that additional soil ripping should not be required under the circumstances.

Accordingly, defendant has failed to comply not only as ordered on August 24, 2005 but with the restoration plan set forth in the amended judgment as well. Throughout the process defendant has demonstrated his unwillingness to follow the plan set forth in the judgment as amended. In addition to ordering that defendant remove the remaining road shoulder fill, properly place silt fences, file an as built plan and complete plantings as required by the plan, the Court believes that additional sanctions should be imposed as a result of defendant's continued failure to perform as ordered on those occasions set forth herein. The Court is mindful of the additional restoration which must be accomplished now that autumn is here which is time for completion.

Since the last time sanctions were visited upon defendant 72 days have passed during which defendant has remained in non-compliance with his obligations under the plan for which sanctions up to \$1,000 per day are provided in the amended judgment. He has indisputably not complied with the preparation of the surveyed site plan or the as built plan as required by paragraph 12 of the restoration plan and this Court's order of August 24th. His continued failure to perform in a timely manner may require further additional sanctions which will be addressed at the conclusion of the project.

ORDER

IT IS ORDERED that defendant complete removal of the fill remaining in the shoulder area of the road, place erosion control mats and silt fences and submit an as built plan not later than October 7, 2005, and that he perform all plantings in accordance with the restoration plan and judgment previously entered.

IT IS FURTHER ORDERED that defendant pay \$50,000 in penalties forthwith and immediately to the Clerk of Court for the United States District Court for the Western District of Wisconsin and that plaintiff may request an order that from these funds it complete the restoration work applying the sanctions imposed.

Entered this 30th day of September, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge