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**VIA ELECTRONIC MAIL**

Landon Y. Jones  
Assistant United States Attorney  
615 Chestnut Street, Suite 1250  
Philadelphia, PA 19106  
[pubcomment\\_eds.enrd@usdoj.gov](mailto:pubcomment_eds.enrd@usdoj.gov)

**Re: *United States v. Gizella Pozsgai*, No. 88-6545 (E.D. Pa.)  
DJ No. 90-5-1-1-17910**

Please accept the following comments made on behalf of the Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, “DRN”), regarding the proposed Consent Decree lodged in the above-referenced case.<sup>1</sup> DRN is an intervenor in that case, and opposes the proposed consent decree because it is an inadequate resolution to egregious violations of the Clean Water Act.<sup>2</sup> The United States should withdraw the proposed Consent Decree and instead proceed with full remediation of the subject property as authorized by court order.

**Background**

The violations underlying the case began in 1987 at a property owned by John and Gizella Pozsgai at 536 West Bridge Street in Falls Township, Bucks County, Pennsylvania (“the Property”). As described by the United States Court of Appeals for the Third Circuit, the U.S. Army Corps of Engineers (“Corps”) investigated the Property in 1987, finding that

nearly the entire property constituted wetlands . . . . Corps biologist and field investigator Martin Miller described the site as a “forested wetland dominated by arrowwood” and noted “areas of standing water were scattered throughout the site,” and “a stream flows along the east border of the property and wetland and is a tributary to the Pennsylvania Canal.”<sup>[3]</sup> Miller

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<sup>1</sup> See Notice of Lodging of Proposed Consent Decree, 87 Fed. Reg. 63,801 (Oct. 20, 2022).

<sup>2</sup> 33 U.S.C. §§ 1251-1389.

<sup>3</sup> Also known as the Delaware Canal.

also observed several species of vegetation on the site which require a saturated environment to survive, including skunk cabbage, sensitive fern, red maple, sweet gum, ash, and aspen. Soil borings taken by Miller and other Corps biologists confirmed the initial determination of wetlands, revealing water either at or within one inch of the surface of the soil. This so-called hydric soil takes 100 years or more to develop.<sup>4</sup>

Defendants had purchased the property at a discounted rate after seeking three professional opinions, each of which concluded that the Property was primarily wetlands and that a permit would be required from the Corps before discharging any fill material.<sup>5</sup> After multiple verbal warnings from the Corps, and two cease-and-desist letters, the United States filed a civil complaint in the U.S. District Court for the Eastern District of Pennsylvania on August 24, 1988 alleging violations of the Clean Water Act.<sup>6</sup> Even after the entry of a temporary restraining order, Defendants dumped 25 truckloads of dirt into the wetlands on the Property.<sup>7</sup>

On January 8, 1990, the district court found Defendants strictly liable for violations of the Clean Water Act and ordered Defendants to comply with a restoration plan developed by the Corps.<sup>8</sup> The court found that the Property “performs critical environmental functions” and that the restoration plan would “confer maximum environmental benefits consistent with its feasibility and its equitable relationship to the degree and kind of harm perpetrated by the defendants.”<sup>9</sup>

The restoration plan called for “all fill material” to be “removed from areas of Federally regulated wetlands to be restored” and for the upland/wetland edge to be graded to a slope no steeper than 2:1,” with “no portion of the toe of slope . . . occur[ring] in restored wetland areas.”<sup>10</sup> The restored wetlands were to be seeded with approved seed mixes, and specific tree and shrub species were to be planted at specified densities.<sup>11</sup> The restoration plan was implemented by the district court on June 18, 1991.

In 2001, the Corps determined that Defendants had begun filling the Property again, including areas that had previously been restored by court order.<sup>12</sup> DRN first intervened in this matter in 2002, in order to ensure the enforcement of the court’s 1990 Order.<sup>13</sup> In 2007, Defendants were found to be in civil contempt of the court’s 1990 Order, and were ordered

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<sup>4</sup> *United States v. Pozsgai*, 999 F.2d 719, 721–22 (3d Cir. 1993).

<sup>5</sup> *Id.* at 722.

<sup>6</sup> *Id.* at 722–23. *See also United States v. Pozsgai*, No. 88-6545 (E.D. Pa.)

<sup>7</sup> *Pozsgai*, 999 F.2d at 723.

<sup>8</sup> Mem. & Order, ECF No. 52, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa. Jan. 8, 1990).

<sup>9</sup> *Id.* at 1, 5.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Id.* at 9.

<sup>12</sup> U.S. Mot. for Prelim. Inj. & Order to Show Cause at 4–5, Mar. 15, 2002, ECF No. 99, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa.).

<sup>13</sup> Compl. In Intervention, Apr. 8, 2002, ECF No. 104, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa.).

to complete remediation of the Property in accordance with an updated February 13, 1996 remediation plan by the Corps.<sup>14</sup> After several unsuccessful settlement discussions between the United States and defendants, the United States moved to implement the 2007 Contempt Order, which DRN supported.<sup>15</sup> That motion was granted November 9, 2020.<sup>16</sup>

By sheer obstinance, the Defendants in this case have been able to evade their obligation to remediate the wetlands on the Property, benefitted from decades of use of the illegally-filled wetlands, and are now able to profit from the sale of the Property in its degraded state. Even worse, the Property will *not* be fully restored, and instead will be partially restored and used by Britton Industries, Inc. (“Britton”), a mulching company. A concession of this scale by the United States falls far short of the requirement that a consent decree “must fairly, adequately, and reasonably resolve the pending controversy, while remaining consistent with the public interest.”<sup>17</sup>

As an initial matter, *there is no pending controversy*. The district court has resolved all outstanding questions of law and fact, and has implemented its 2007 Contempt Order. This means that the Corps now has full legal authority to enter upon and remediate the Property, judgment has been entered against defendants and against the Property, a protective deed restriction has been imposed upon the Property, and the Corps and the United States are authorized to recover all costs associated with the remediation and enforcement of the court’s orders.<sup>18</sup> And although the 2020 Order implementing the 2007 Contempt Order contemplates a potential transfer of the Property to a third party for remediation, that remediation *still* must be in accordance with the February 13, 1996 Restoration Plan.<sup>19</sup> Thus, a consent decree is inappropriate in this case, where the United States has full authority to completely remediate the Property.

Even assuming a consent decree is procedurally appropriate in this case, the proposed Wetlands Restoration Plan and Guidelines still fail to meet the standard for a court’s acceptance of a consent decree, the requirements for authorization under a Clean Water Act general permit, and specifically fail to meet the requirements of Nationwide Permit 32 (“NWP 32”).

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<sup>14</sup> Order of Civil Contempt, ECF No. 148, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa. Mar. 8, 2007).

<sup>15</sup> Mot. to Implement 2007 Contempt Order, May 18, 2020, ECF No. 234, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa.); *see also* Response in Support of U.S. Mot. to Implement, May 27, 2020, ECF No. 237, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa.).

<sup>16</sup> Order Implementing 2007 Contempt Order, ECF No. 253, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa. Nov. 9, 2020).

<sup>17</sup> *United States v. Atofina Chemicals, Inc.*, No. 01-7087, 2002 WL 1832825 at \*4 (E.D. Pa. Aug. 5, 2002) (citing *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983)).

<sup>18</sup> Order Implementing 2007 Contempt Order, ECF No. 253, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa. Nov. 9, 2020).

<sup>19</sup> *See id.* at ¶ 3(b); *see also* Order of Civil Contempt, ECF No. 148, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa. Mar. 8, 2007).

## **Exhibits A & C: Wetlands Restoration Plan & Guidelines**

The Clean Water Act was enacted in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” including wetlands.<sup>20</sup> The proposed Wetlands Restoration Plan<sup>21</sup> and Wetlands Restoration Guidelines<sup>22</sup> will result in a permanent loss of 4.46 acres of wetlands, and a long-term loss of 2.12 acres of wetlands, which have been subject to unauthorized discharge since 1987. This allowance of the unauthorized discharge to remain in place is contrary to the public interest because it allows the permanent degradation of waters of the United States despite the Corps having full legal authority to resolve the degradation. Furthermore, the nature of the unauthorized fill has not been adequately characterized, and it is more than likely that any fill allowed to remain in place will be a source of contamination to the existing and restored wetlands on the Property. Any consent decree should provide for the full remediation of all illegally-filled wetlands.

Even assuming that the permanent loss of 4.46 acres of wetlands is acceptable, the proposed Wetlands Restoration Plan and Guidelines fall far short of fairly, adequately, and reasonably resolving any alleged controversy, and is inconsistent with the public interest. Specifically, the remaining wetlands are inadequately protected from further degradation. A two-to-one wetland to upland slope is an insufficient buffer for the protection of the site’s wetlands.<sup>23</sup> Any buffer should be at least twenty-five feet in width to protect wetlands from encroachment, stormwater runoff, and erosion.

The court’s 2007 Contempt Order imposed “a protective buffer . . . in uplands areas around all water and wetlands areas on the Pozsgai site to prevent further encroachments,” which was *in addition to* the February 13, 1996 Restoration Plan requirement that the “*upland/wetland edge shall be graded to a slope no steeper than 2:1 (horizontal to vertical) and stabilized.*”<sup>24</sup> The edge itself was never meant to be a buffer, and simply does not qualify as one.

Sections 1.1.11 and 1.1.12 of the proposed Wetlands Restoration Guidelines require Britton to place a concrete “Jersey barrier” or other similar barrier at the edge of the upland portions of the Property to prevent encroachment into the protected wetland areas and buffers. While it is important to prevent encroachment into protected areas, concrete Jersey barriers may redirect overland stormwater flows in a manner that could result in discharge of debris into the wetlands, or erosion of the slope. Britton is also required to place a compost filter sock and/or silt fencing at the toe of the wetland to upland slope and plant a seed mix to prevent erosion of sediment into the wetlands.

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<sup>20</sup> 33 U.S.C. § 1251(a).

<sup>21</sup> See Proposed Consent Decree Exhibit A: Wetland Restoration Plan (Aug. 5, 2022) (hereinafter, “Wetlands Restoration Plan”).

<sup>22</sup> See Proposed Consent Decree Exhibit C: Wetland Restoration Guidelines for Gizella Pozsgai Property (Aug. 25, 2022) (hereinafter, “Wetlands Restoration Guidelines”).

<sup>23</sup> See *id.* ¶ 1.1.10.

<sup>24</sup> Exhibit C to Order Implementing 2007 Contempt Order, ECF No. 253, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa. Nov. 9, 2020) (emphasis added).

The combination of the filter sock, silt fencing, and Jersey barrier to protect the wetlands underscores why actual wetland buffers are needed to protect the Property's ecological features. Finally, all seed mixes, seeding, and plantings proposed in the Wetlands Restoration Guidelines should be solely native species in order to restore the ecological value of the Property.<sup>25</sup>

### **Exhibit B: Nationwide Permit 32**

NWP 32 authorizes “discharge[s] of dredged or fill material remaining in place . . . in compliance with . . . the terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the Clean Water Act . . .”<sup>26</sup> However, as with all authorizations under Clean Water Act general permits, the Corps must first “conclude that [the activity] complies with the general permit’s conditions, will cause no more than minimal adverse effects on the environment, and will serve the public interest.”<sup>27</sup> Authorization under NWP 32 pursuant to the proposed consent decree fails on all three counts.

First, the proposed Restoration Guidelines fail to ensure compliance with the conditions of NWP 32.

- Condition 2 prohibits the authorized activity from substantially disrupting the necessary life cycle movements of those species of life indigenous to the waterbody. The proposed Wetlands Restoration Plan & Guidelines include the construction of a culvert with a “recessed” bottom, purportedly to allow for aquatic life passage.<sup>28</sup> A recessed bottom is inadequate for the many species that rely on natural stream bottom features to survive and that may avoid entering, or die in, a culvert. Should the Corps move forward with the consent decree and associated restoration plan, the stream should be daylighted, with a bridge constructed over it, so that the maximum amount of air and sunlight can reach the stream, and so that the stream may maintain its natural bottom habitat. This will also ensure compliance with condition 9, which requires “maintenance of the pre-construction course, condition, capacity, and location of open waters” to the maximum extent practicable. An open stream with a rough bottom will substantially decrease the volume and velocity of any stormwater flows.
- Condition 6 requires that discharged material must be suitable—meaning no trash, debris, car bodies, or asphalt—and that it must not contain toxic pollutants in toxic amounts. The Corps acknowledges in its restoration plan that the unauthorized fill

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<sup>25</sup> See Wetlands Restoration Guidelines at ¶¶ 1.1.12–1.1.17.

<sup>26</sup> Proposed Consent Decree Exhibit B: Nationwide Permit 32 Verification NAP-2000-00043 (51) at 1–2.

<sup>27</sup> *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 39 (D.C. Cir. 2015) (citing 33 C.F.R. §§ 330.1(e)(2), 330.6(a)(3)(i)).

<sup>28</sup> Wetlands Restoration Guidelines at ¶ 2.1.4.

material contains “construction debris,” “asphalt,” and “other materials.”<sup>29</sup> In addition, Pennsylvania’s Clean Water Act Section 401 Certification for NWP 32 includes an added condition that “[f]ill material may not contain any waste as defined in the Solid Waste Management Act.”<sup>30</sup> Allowing 4.46 acres of unauthorized fill material to remain on site violates condition 6 of NWP 32 and condition 2 of Pennsylvania’s State Water Quality Certification. Although the Wetlands Restoration Guidelines include a plan to address any discovered solid waste during the fill removal process,<sup>31</sup> there is no guarantee that any subsequent remedial action will address potentially undetected solid waste in the fill that is permitted to remain.

- Condition 23 lays out the mitigation requirements for authorization under NWP 32. In particular, condition 23(c) requires “compensatory mitigation at a minimum one-for-one ratio . . . for all wetland losses that exceed 1/10-acre . . . unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal.” Nowhere in the proposed Consent Decree does the United States explain why one-for-one compensatory mitigation is not being required in this case. There is also no determination that the impacts of the proposed restoration plan are “no more than minimal.”

Second, as stated above, there is no support for a finding, nor is there an explicit finding, that the proposed Restoration Plan meets the “no more than minimal adverse effects” threshold required for an authorization under a general permit. For the reasons outlined in this comment and reiterated in bullet point format below, the proposed Wetlands Restoration Plan and Guidelines would result in more than minimal adverse effects on the environment.

- Utilization of a culvert to redirect the stream on the property, rather than daylighting the stream and using a bridge to connect the uplands.
- Inadequate mechanisms to prevent the accumulation of litter and debris on the deed restricted portions of the Property, which is essential to maintaining the ecological functions of the preserved areas.
- Inadequate mechanisms to restrict the use of, and activities upon, the non-protected uplands to minimize impacts to the restored wetlands and preserved woodlands, including stormwater management.
- Use of a 2:1 sloped buffer rather than a twenty-five foot wide buffer to protect the wetlands on the Property.
- Allowing illegal fill to remain in jurisdictional wetlands, despite the likelihood that the fill contains unsuitable materials and solid wastes.
- A lack of compensatory mitigation for the loss of wetlands.

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<sup>29</sup> See *id.* at ¶ 1.1.1.

<sup>30</sup> Conditional State Water Quality Certification under Section 401 of the Clean Water Act for the United States Army Corps of Engineers Nationwide Permits for the Commonwealth of Pennsylvania, 51 Pa. B. 238, 239 (Jan. 9, 2021).

<sup>31</sup> Wetlands Restoration Guidelines at ¶ 1.1.21.

- Use of non-native seed mixes and plantings.

Finally, authorizing the proposed Wetlands Restoration Plan and Guidelines and allowing defendants to profit from the sale of the wetlands they destroyed does not serve the public interest. Instead, DRN's fears expressed in a letter to the district court in 2013 will have come to fruition: "Defendants appear to believe that if they ignore it long enough, this Court's Order of Contempt, and the consequences of noncompliance prescribed by it, will simply go away."<sup>32</sup> By authorizing 4.46 acres of unknown fill materials on the Property, which were illegally discharged with the full knowledge that a permit was required and that wetlands were being destroyed, and which the Pozsgai defendants stubbornly refused to remediate despite multiple court orders over three decades, the United States relegates the Clean Water Act to a mere inconvenience rather than a legal prohibition. The Pozsgai defendants benefitted from decades of use of the illegally filled wetlands, and are given another chance to benefit financially from the sale of the property, which includes the value of the land that was once a water of the United States, but that, through this proposed Consent Decree, the United States apparently wishes to transform into developable real estate. The United States also seeks to unnecessarily vacate the district court's prior orders, which vindicated the public interest.

#### **Exhibit D: Deed Restriction**

The Court's January 8, 1990 order, the 2007 Contempt Order, and the 2020 Order imposed a deed restriction on the Pozsgai property "upon all areas remediated pursuant to this Order, all other water and wetland areas on the Morrisville Property, and all protective buffers created pursuant to this Order . . . that will forever designate and protect them as waters, wetlands, and protective buffers as open space . . ." <sup>33</sup> The United States now wishes to vacate this more protective deed restriction in favor of a deed restriction that would preserve only the existing wetlands, the 2.12 acres of unauthorized fill to be removed and restored, the previously restored wetlands, and preserved upland buffer.<sup>34</sup> Again, it is far from clear why, after obtaining crucial victories in court that support the public interest, the United States now wishes to accept a less environmentally protective outcome.

Should the United States and the Corps proceed with the proposed deed restriction, it should be revised to include a requirement to maintain the Conservation Area in a litter-free condition. The Property is currently strewn with litter and larger discarded items, and regular inspection and maintenance will likely be necessary to prevent the Conservation Area from becoming degraded and undermining the purpose of the deed restriction. Although the proposed deed restriction currently prohibits the "storage, dumping, depositing, abandoning, discharging, or releasing of any gaseous, liquid, solid, or hazardous waste substance, materials, or debris,"<sup>35</sup> this prohibition does not necessarily prevent the

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<sup>32</sup> Oct. 28, 2013 Letter to Court, ECF No. 163, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa.).

<sup>33</sup> Order Implementing 2007 Contempt Order, ECF No. 253, *United States v. Pozsgai*, No. 88-6545 (E.D. Pa. Nov. 9, 2020).

<sup>34</sup> Wetlands Restoration Guidelines at ¶ 4.1.1.

<sup>35</sup> Proposed Consent Decree Exhibit D: Declaration of Restrictive Covenants for Conservation at ¶ 4(E).

sometimes-inadvertent accumulation of litter, or the actions of unknown third parties. An inspection and maintenance requirement would go far in accomplishing the purpose of the deed restriction.

The proposed deed restriction should also be expanded to the entire property, including the uplands area, to ensure that the upland area's use will be no more intensive than its current "light industrial" designation and will not interfere with the ecological values of the Conservation Area. Heavier industrial uses and the mismanagement of stormwater could result in further degradation of the Property.

A deed restriction affecting the entire Property should include stormwater management requirements that (a) prohibit the use of the wetlands as a stormwater detention basin, (b) rely on infiltration for two-year storms with discharges permitted only for larger storms, and (c) prohibit the use of ecologically harmful substances on the uplands such as blacktop resurfacing paint and road salt/de-icing chemicals.

### **Conclusion**

For the reasons stated above, the United States should withdraw the proposed Consent Decree and instead act under the district court's orders to fully remediate the Property. Should the United States proceed with the proposed Consent Decree, it should adopt the modifications outlined in this comment.

Respectfully submitted,

/s/ Kacy C. Manahan  
Kacy C. Manahan  
Senior Attorney

cc: Pennsylvania Department of Environmental Protection  
(via *electronic mail* RA-epwater@pa.gov)