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Cultivating Dissent: Wetlands Regulators Down on the Farm

Excessive Regulation Threatens the Brace Family Farm

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To Robert Brace, drainage is as much a part of farming in Erie County, Pennsylvania, as are planting and harvesting. The topography and soil types in that part of Pennsylvania make drainage necessary for successful farming. Consequently, drain operation and maintenance is nothing new to Brace, a third-generation farmer who began cultivating his own fields at the age of 15.

In the late 1970s, Brace decided to rotate portions of his 140-acre farm from cow pasture into crop-bearing field. He began refurbishing the farm's drainage system, originally installed by his grandfather, which had become blocked by beaver introduced by the Pennsylvania Game Commission. Over the following years, Brace removed fenceposts, replaced old drain tile, and sidecast the silt collecting in the drain back onto the adjacent fields from whence it had come. By 1986, having completed the preparatory work, Brace was growing hay and oats. Business as usual, right?

Wrong. In May of 1987 Brace asked, as he had done before, the Pennsylvania Game Commission to remove the beaver from his farm. When the Commission's agent arrived at the Brace farm, he scanned the property and declared that it would "make a nice sanctuary" for wildlife. The agent then informed Brace that the field exhibited wetlands characteristics, and asked about his drain-refurbishing activities. Within days, several federal, state, and local bureaucrats descended on Brace's property unannounced and began excavating soil and plant species.

Soon thereafter, Brace received notices from the Environmental Protection Agency (EPA) and Army Corps of Engineers informing him that he had violated the federal Clean Water Act by discharging soil into a "wetlands" without first obtaining a government permit. The

agencies ordered him to cease all activity on his field, which was now under their jurisdiction. Accordingly, Brace stopped all work except for occasionally mowing hay.

In 1990 the federal government sued Brace for his clearing and draining activities. As punishment, the government sought a court order requiring Brace to: (1) strip off his crops; (2) remove the drainage system; and (3) refrain from disturbing the site so that it could return to its "natural state." Brace also faced the threat of a penalty of up to $25,000 per day for each day he was in violation of the Clean Water Act.

Brace prevailed at trial. Given the importance of drainage for farming in many areas of the country, Congress had written an exemption into the Clean Water Act permitting the discharge of fill material into wetlands if such activity is performed in the course of "normal farming." The trial judge found that Brace's activities fit squarely within the exemption and dismissed the suit. In November 1994, however, the Third Circuit Court of Appeals reversed the trial court judgment. In June 1995 the U.S. Supreme Court denied Brace's petition for writ of certiorari.

The trial court is now considering how much in fines and what form of remediation to impose. The Clean Water Act's penalties accrue for each day of violation rather than for each violation, so Brace faces a potential fine of more than $50,000,000. While it is unlikely that he will have to pay anything close to that amount, even one percent—or $500,000—would be confiscatory. Moreover, the remediation scheme proposed by the EPA requires Brace to plug his drainage system with concrete. Because the farm's drainage system is integrated, this "remedy" would likely destroy Brace's entire 140-acre farm.

Multiple Ironies

U.S. v. Brace is peppered with ironies. The beavers that caused Brace's initial water problem were introduced to the area by the Commonwealth of Pennsylvania. Brace refurbished the farm's drainage system using plans prepared specifically for him by the federal Agricultural Stabilization and Conservation Service. When Brace was ordered to stop working in his field, he sought an after-the-fact permit—which the Corps refused, citing the pending lawsuit.

Unfortunately, Robert Brace's ordeal is not exceptional. Scores of property owners have litigated wetlands disputes against the government; some have ended up in prison. And for every person who goes to court over wetlands, there are many others whose well-laid plans have been frustrated by state and federal bureaucrats. But *Brace* is especially interesting as a case study of the real-world application of wetlands regulation.

What we know today as "wetlands" were once referred to as swamps and thought likely to spawn "bilious fevers" if not drained. Now, of course, virtually all wetlands are viewed as sacrosanct due to recognition of the positive ecological role they play in some cases. This change in perspective has been accompanied by an about-face in governmental policies toward wetland areas. While state and federal governments once encouraged and subsidized the draining and reclaiming of wetlands, now they require wetlands preservation.

The foundation of the federal government's wetlands protection policy is the Clean Water Act, and the regulations promulgated thereunder. The Clean Water Act forbids the unpermitted discharge of any dredged or fill material into "navigable waters," which is statutorily defined as "waters of the United States." EPA and Corps regulations further expand federal jurisdiction while restricting the farming exemption created by Congress. According to the Corps, for instance, navigable "waters of the United States" include "wetlands," defined as any ground that supports "vegetation typically adapted for life in saturated soil conditions."

The portion of Brace's property of interest to the government does not resemble a swamp, bog, or marsh. One can walk across the field without getting wet feet. Nevertheless, because courts are extremely deferential to agencies' expansive statutory interpretations, the Corps' counterintuitive definition of "navigable waters" placed Brace's field under federal control. Thus, taking a stroll across Brace's field is legally equivalent to traversing navigable waters of the United States.

Moreover, in Brace's case, government attorneys argued that he was not eligible for the farming exemption because: (1) his field was a wetland; (2) the land was not part of an ongoing farming operation; (3) his activity was not "farming"; and (4) even if Brace was engaged in farming (and therefore exempt), his activity was "recaptured" by a regulation prohibiting landowners from bringing their property into a use in which it was not previously engaged.

Despite the fact that Brace and his ancestors never conducted any activity on the farm *except* farming, the government argued that he was not entitled to Congress's farming exemption because his field was not part of an ongoing farming operation. Rather, the government contended, Brace's activity merely brought the site *into* farming use. No matter that pasturing livestock and growing crops are both archetypal farming activities: the government argued successfully that even if the field was previously part of an established farming operation when it was used for pasture, it lost farmland status in 1978 when Brace began preparing it for crops. The trial court commonsensibly considered Brace's activities in light of the history of the Brace homestead farm, and in the context of normal farming practices in its vicinity. By contrast, the court of appeals measured Brace's activity solely against regulatory definitions of "farming" and "ongoing farming operations," which entailed an unduly narrow definition of farming. As a result, federal bureaucrats and judges have ended up dictating to farmers what does and does not constitute "farming."

The government's final argument was that even if Brace's field were part of an "established farming operation," he lost his exempt status by interrupting and then "resuming" his farming operations. The government contended that the site became something other than farmland the moment Brace stopped using it as pastureland. By planting crops, the argument ran, he brought the area into farming use once again, but by then it was too late, for the Corps' "recapture" regulation made his activity non-exempt. In short a farmer cannot interrupt his operations lest he risk losing his legal right to continue in the future.

Presumably Congress recognized the problem of imposing unreasonable burdens on the many farmers across the country whose normal farming activities, specifically including drainage, would otherwise subject them to wetlands regulation, which is why it wrote the farming exemption into the Clean Water Act. As Senator Edmund Muskie noted in 1977, the permit requirements of the Clean Water Act had become "synonymous with federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism." The farming exemption was Congress's attempt to mitigate those problems; however, environmental bureaucrats have eviscerated that Congressional intent.

Debates over environmental regulation often center on the expected public costs and benefits of particular legislative proposals. But the story of *United States v. Robert Brace* is a poignant reminder that such regulation, whatever the supposed cost-benefit ratio, erodes freedom and undermines independence. "Regrettably," says Robert Brace, "I've gotten to know the ways of the legal, legislative, and judicial systems since I got into this snarl. They aren't much help to ordinary citizens like me. We're simply overwhelmed by raw government power."

Wetlands reform bills are currently moving through Congress and Pennsylvania's General Assembly which would, among other things, categorize wetlands according to their relative value and function, strictly define wetlands so that they are more easily recognizable to

ordinary landowners, and require compensation for individuals whose property has been adversely affected by regulation. Such measures are a step in the right direction, but they will likely be too little and come too late to save the Brace family farm.

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