

(but not construction) of drainage ditches." *Id.* (citing 33 C.F.R. § 323.4(a)(3)) (emphasis in original). Thus, as in that case where that Court held it was "unrealistic to describe" the burying of new tile drains as "continuing maintenance," so too in this case where Defendants also buried new tile drains. *Id.* Therefore, this exemption is also inapplicable.

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c. Recapture

"Even when Legal"

Since the Third Circuit discussed recapture, this Court will as well, briefly, despite finding that neither exemption applies.

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The recapture provision of Section 404(f) provides that any discharge "having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject . . . shall be required to have a permit under this section." 33 U.S.C. § 1344(f)(2). Corps regulations further provide that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." 33 C.F.R. § 323.4(c). The Third Circuit held that "[t]he evidence establishes that [Mr.] Brace's activities drained the site to convert it from a wetland to a new, non-wetland use" and thus recapture applied. *Brace*, 41 F.3d at 129. This Court held the same in this case. *See supra* at 52. Thus, recapture is equally applicable here.

As such, the Court finds that Defendants are liable under Section 301(a) and therefore required a permit under Section 404 to conduct their land clearing activities. Further, none of Section 404(f)'s exemptions apply and, even if they did, recapture would be appropriate under Section 404(f)(2). As such, the Court will grant the United States' motion for summary judgment.

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IV. THE REMAINING MOTIONS

Having determined that it will grant the United States' motion for summary judgment, both the United States' and the Defendants' remaining *Daubert* motions are moot. Dkt. Nos. 82,

86, and 87. As such, they will be stricken.

V. CONCLUSION

For the foregoing reasons, the United States' motion to exclude undisclosed expert opinion and exhibits and to strike overlength brief is **GRANTED**. Additionally, the United States' motion for summary judgment on liability is also **GRANTED**. Finally, both the United States' and Defendants motions in *limine* to exclude expert testimony are stricken as **MOOT**.

IT IS SO ORDERED.

Dated this 12th day of August, 2019.



BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE