FARMWORKER WOE

ROB ENGELHARDT/Erie Times-News

Bob Brace stands in one of the fields of his Waterford farm. Brace says he won't plant his annual 400 acres of cabbage this year because of a labor dispute with the federal government that shut off his ability to hire foreign work crews.

Brace: 'I'm done'

Red tape over labor halts cabbage operation

By JIM MARTIN
jim.martin@timesnews.com

WATERFORD — In the faces of foreign-born farm workers, Bob Brace sees something worth admiring.

It's more than just a reminder of his grandmother, who came to America from the Ukraine on a cattle boat.

The collective work ethic of the newly arrived kept his cabbage farm alive when U.S. workers were turning up their noses at the backbreaking job of growing up to 16 million pounds of cabbage a year.

Now, after 52 years, Brace said he's grown his last cabbage crop because the government has shut off his access to work crews from Jamaica.

"I'm done," Brace said.

That means he won't be spending a million dollars this year to put a 400-acre crop of cabbage in the ground.

It also means he has said "no" and "sorry" a lot lately to workers who come from Erie each summer to pack cabbage in his packing house and to the 20 or so workers who come each spring from Jamaica.

Cabbage is more than the fibrous foundation of coleslaw and sauerkraut.

To hear Brace talk, it's one of the few ways he knows to squeeze a profit from the land.

Yet, Brace said he's done growing it

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Brace: Farmer calls it quits for cabbage

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because the government has taken away his ability to hire and fire employees.

As far back as the early 1990s, Brace said he was offering local workers $10 an hour or more. There were few takers, at least not ones who would show up at first light and work through the day between May and October.

Eventually, Brace and his wife, Babe, found help in the form of southern labor contractors who supplied a new team of migrant workers each spring.

The arrangement worked well, but Brace found himself more and more concerned about the penalties he could face for hiring an illegal.

Brace said he never knowingly hired anyone who wasn't legal, but he admits he wouldn't necessarily know forged documents if he saw them.

Nearly a decade ago, the Braces signed up for the government's H-2A program, which would provide the couple with a pre-approved work force that could be delivered to his farm.

Brace said he paid his workers $8.48 an hour, plus travel and living expenses and a fee to the Jamaican government.

"It wasn't a cheap labor force, but it was a good labor force," he said.

What seemed like a tidy arrangement unraveled last spring, when the Department of Labor Industry directed Brace to hire two Puerto Rican workers. One of the provisions of the H-2A program is that U.S. workers, which includes those from Puerto Rico, be given first chance.

Brace said the two men had failed to send résumés as he had requested or to schedule telephone interviews. But under pointed instructions from the government, he hired them anyway.

Problems soon developed. Brace said he received calls from state police, asking him to retrieve intoxicated workers.

> *"The current system of being forced to hire people I cannot depend on ... is simply not tolerable."*
>
> **— Bob Brace,** cabbage farmer, in a letter last summer to the Labor Department

After issuing the workers two warnings, Brace said, he took what he thought was a logical step — he asked the two men to agree in writing that they would no longer drink alcohol.

Neither the two employees nor the government thought his move was so logical. Supported by the group Friends of Farmworkers Inc., they lodged complaints.

The Labor Department ruled Brace had gone too far.

In a letter dated Nov. 22, John Vogel, director of the Bureau of Workforce Development Partnership, wrote: "The department's investigation demonstrates that the employer did not so restrict the activities of H-2A workers and that the H-2A workers routinely consumed alcohol on the employer's premises."

Brace said his only alternative was to make all his employees pledge not to drink.

"Why insult them?" he said. "They have been there. They have behaved themselves. These people are as good as anyone."

Brace has signed a settlement agreement, paying each of the Puerto Rican workers more than $5,300. As part of his penalty, the government suspended Brace's ability to hire workers through the H-2A program.

Christopher Manlove, a spokesman for the Department of Labor, said Brace had the option of finding labor through some other source.

"Participation in the program is voluntary," Manlove said. "When you volunteer to participate in the program that implies acceptance (of the rules)."

In this case, he said, Brace needed to establish any rules in advance and apply them to all his workers.

Brace still can't accept the idea that he had no control over whom to hire.

"The current system of being forced to hire people I cannot depend on ... is simply not tolerable," he wrote last summer in a letter to the Labor Department.

Norman Stark, Brace's attorney, said his client has fought the government before and could have done it again in this case.

Brace waged a years-long battle with the federal government over 37 acres of his land that had been declared a wetland.

His case went all the way to the U.S. Supreme Court, where he lost his bid to drain the property. Now, he awaits a ruling for monetary compensation with the Court of Federal Claims.

"We probably could have litigated this through the administrative law judge, but I think Bob was fed up with them," Stark said.

Brace said finding his own crews is a job he doesn't want to tackle, especially with increased government scrutiny being paid to immigrant workers.

"It's not worth going to jail for," Babe Brace said.

Still, Brace said he regrets that he won't have as many jobs to offer this year — not for local people or the Jamaican workers eager to return to his farm.

"These are good people," he said. "These are people who want to work."

JIM MARTIN *can be reached at (814) 724-6397, 870-1668 or by e-mail.*

FYI

Jeffery H. Kirby,
General Counsel

New York Farm Bureau • Route 9W, P.O. Box 992 • Glenmont, New York 12077-0992 • (518) 436-8495 Fax: (518) 436-5471

April 7, 1995

Phil Riedesel, President
Chautauqua County Farm Bureau
RR 2, Box 119
Ripley, NY 14775

RE: Brace Farm Petition to U.S. Supreme Court

Dear Phil:

This letter is to follow-up on our phone conversation of 3/29/95 regarding the Brace lawsuit in western Pennsylvania.

As you know, this case involves the farmers' drainage ditch-cleaning and maintenance activities for agricultural purposes, which the Army Corp of Engineers halted by a "cease and desist" order in 1987. The Army Corps' position is that such activity is a violation of the Clean Water Act (CWA), and the farmer's position is that his activities fit within the CWA exemption for "normal farming activities". The Federal District Court had agreed with Brace, but the U.S. Court of Appeals reversed in favor of the Army Corp.

I first learned of this case through a letter and articles sent to our office by Clint Meeder of your Board. Since the case did appear important but was outside New York's boundaries, I passed that information along to the AFBF Counsel's Office and to the Pennsylvania Farm Bureau (PFB), with a memo recommending that they review the case regarding the possibility of submitting a Farm Bureau legal brief as amicus curiae.

Since my conversation with you, I have spoken with both Clint Meeder and John Bell, an attorney with PFB, regarding the Brace case. Mr. Bell informed me that as a result of my memo to PFB and AFBF, they have contacted the farmer and are looking into the case. Although no decision had been made, it was my impression from speaking with PFB attorney John Bell that the involvement of AFBF and PFB as amicus curiae was likely, and that the final decision should be made very soon. Such an amicus brief would be due to the court on about May 6, 1995.

I raised with Mr. Bell the possibility, if review of the case by AFBF and PFB was favorable and they decide to prepare an amicus brief, that NYFB might be able to join in as a named party to their brief to strengthen the effort. He was receptive to that idea. At this point, Mr. Bell is to contact me immediately when he knows anything further, and we will go from there.

I will let you know when I learn of any further development in regard to the Brace case. Best regards, and thank you for your interest in this important issue.

Sincerely,

Jeffery H. Kirby,
General Counsel

cc: John Lincoln, NYFB President
Bruce Hawley, NYFB Administrator
John Rademacher, AFBF General Counsel
John Bell, PFB Counsel
Clint Meeder, CCFB Board
Rick Zimmerman, NYFB
Tim Bigham, NYFB

QUESTION PRESENTED

Whether the "normal farming activity" exemption under Section 404(f) of the Clean Water Act must be construed in a manner consistent with the Fifth Amendment mandate that private property be protected?

SUMMARY OF ARGUMENT

This case presents a classic example of a federal regulatory program operating wholly outside the demands of the Constitution and as a result often destroying the historic and productive uses of private property. The facts of this case tell a compelling story of hardship and inequities foisted off on an individual property owner, the Petitioner. The larger picture is of countless individual property owners all across the county in a variety of contexts being singled out to bear the costs of achieving a wetland policy requiring the setting aside of millions of acres of private land as wetland preserves, often without payment of compensation to the property owner.

What makes this case particularly egregious is that the use of the property engaged in by the Petitioner and now forbidden by the Army Corps of Engineers (Army Corps) is an activity that Congress expressly exempted from regulation in the Clean Water Act, Section 404(f). Moreover, the land delineated as wetland by the government has been historically used, since at least the 1930's by the Brace family, for pasture and crop production. The Petitioner purchased the farmland from his father in 1975 with the intention of continuing the historic, productive use of that land and to keep the farming operation within the Brace family. When he purchased the property, the Petitioner was aware that the existing drainage system, which integrated the now-regulated thirty-acre parcel with other portions of the farm, needed upgrading. Moreover, due to the clogged drainage system, the regulated parcel was in poor condition and thus by then only partially utilized for crop production.

So in 1976 and 1977 he cleared clogged drains and installed new tiling in order to make the drainage system fully functional for the entire farm. The United States Agricultural Stabilization and Conservation Service (ASCS) drew up the original plan for the drainage system, and Petitioner continued to work closely with that agency for the next eight years, from 1977 to 1985. In 1986 and 1987, the Petitioner continued improvements to the drainage system, cleared the parcel of existing vegetation and prepared it for crop production. In 1987 and 1988, both the Environmental Protection Agency (EPA) and the Army Corps ordered the Petitioner to cease all activity and to allow indigenous vegetation to

grow on the parcel, arguing that the activity he was conducting on his property was beyond the scope of "normal farming activity" allowable under Section 404(f) of the Clean Water Act.

Specifically, the Petitioner was told that he can no longer grow crops on the thirty acres which his family has farmed for decades. Nor can he continue to maintain the drainage system which is linked to the entire 600-137 acre farm. As a result, the Petitioner's entire farming operations are at risk.

The court below clearly erred when it concluded that the Petitioner's farming activities were outside the scope of Section 404(f). In so ruling, the court below patently violated the language of the provision which on its face exempts "normal farming activity." Applied elsewhere, the ruling below could result in the regulatory shutting down of millions of productive and historic uses of agricultural property. All across the United States there are farmers, just like the Petitioner in this case, who are making reasonable, investment-backed decisions regarding the use of their land in reliance on Section 404(f) which purports to exempt "normal farming activity." Destruction of these investment-backed expectations directly implicates the duty of the government to compensate the property owner. *Penn Central Transportation Co. v. New York City*, 438 U.S.. 104 (1978).

Therefore, it is clear that the court below did not consider the Fifth Amendment ramifications of its decision which could potentially require the federal government to compensate thousands of similarly situated farmers across the United States. *See, e.g., Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995)(government to compensate property owner for the denial of wetlands permit to mine limestone) and Loveladies *Harbor, Inc. v. United States*, 27 F. 3d 1545 (Fed. Cir. 1994)(government to compensate property owner for the denial of a wetlands permit to develop property).

Accordingly, this Court should grant the Petition requested in this case and reverse the decision of the court below as being inconsistent with the intent of Congress in adopting Section 404(f) agriculture exemption and with the Fifth Amendment, which requires that property owners be compensated for the taking of their property.

ARGUMENT

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT -- WHETHER THE JUST COMPENSATION CLAUSE OF THE

FIFTH AMENDMENT REQUIRES THAT SECTION 404(f) OF THE CLEAN WATER ACT BE INTERPRETED AND ENFORCED IN A MANNER THAT DOES NOT PROHIBIT NORMAL ACTIVITIES BASIC TO THE BENEFICIAL AND PRODUCTIVE USES OF PROPERTY AS PROTECTED BY THE CONSTITUTION.

The property rights protections of the Fifth Amendment include the rights "to possess, use & dispose" of private property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Where government attempts to prohibit normal, well-established uses of private property, without providing compensation to the property owner, it runs the risk of running afoul of this important constitutional guarantee. In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), this Court held that regulatory prohibitions of such ordinary uses as farming must be considered in the context of the historic use of the property and surrounding area, stating that "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . ." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992); *see also Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994). Farming in general is a common and historic use of private property, and is specifically a historic use of the regulated land at issue in this case, and as such, that use cannot be infringed or destroyed by government with impunity. *See Lucas v. South Carolina Coastal Council, supra.*. Nevertheless, the Respondent interpreted its authority to regulate the use of private property under Section 404 of the Clean Water Act in blatant disregard of the property owner's constitutional right to continue the farming operations in place for decades.

In applying a twisted reading of the phrase "normal farming activity," the court below has sanctioned the Petitioner's loss of all right to make reasonable, beneficial, and productive use of his property as guaranteed by the Fifth Amendment.[1] He cannot utilize the drainage system painstakingly implemented and maintained over ten years, which is necessary for crop production on the parcel and is integrated with the entire farm. Without proper drainage, the property cannot be used for agricultural production -- the sole historic use of the property.

As Section 404(f) reflects, Congress never intended to interrupt the nation's agricultural production when it adopted the Clean Water Act. The

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[1] The interpretation propounded by the United States, rejected by the trial court, makes criminal activity out of the only economically viable use of this property. The Clean Water Act FILL IN RE STRICT LIABILITY. Under these draconian sanctions, Mr. Brace now faces the possibility of hundreds of thousands of dollars in penalties, which are to be assessed upon remand to the district court.

language of the provision could not be clearer: "normal farming activity" is allowable under the Act.[2] Under this exemption, an owner of property utilized for farming activity should be allowed to continue farming his property, regardless of the hydrology, soil characteristics and vegetation of the property and the potential that in fact the land could be designated as "wetland." Clearly Congress recognized the importance of the agricultural industry to our nation's well-being. Farmers are responsible for the production of food and fiber for the citizens of this country. Production agriculture (the output of goods and services by farms and ranches) totaled $188 billion in 1993, approximately three percent of the gross domestic product. Economic Research Serv., U.S. Dep't of Agric., Pub. No. ECIFS-13-1, Economic Indicators of the Farm Sector, National Financial Summary (1993). From farm to table, farm products in 1993 were responsible for sixteen percent of the gross domestic product and twenty-two million jobs, eighteen percent of the workforce. U.S. Census Bureau, Statistical Abstract of the United States, 115th ed., Industries of the Total Food and Fiber System (1995).

Over the life of the wetlands regulatory program, Congress has often reiterated its intent that the Act be construed in a manner that would not prohibit America's farmers from earning a living.[3]

One vital aspect of agricultural production is proper drainage of agricultural land, which is allowed as part of the agriculture exemption of the Clean Water Act. Drainage and irrigation are an integral part of a long range program to balance production with conservation of resources so that the land is productive for generations to come. The decision of the court below, which disallows drainage of the Brace property, flies in the face of the clear congressional scheme by separating out an inseparable aspect of farming.

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[2]The exemptions applicable to the present case, which preclude the necessity of asking permission of the government to conduct enumerated activities, include "normal farming" and the "maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A). Applicable regulations further define "normal farming" as:

> part of an established (i.e. on-going) farming, silviculture and ranching operation ad must be in accordance with definitions in § 323.4(a)(1)(iii). . . . Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conduoted has been converted to another use or has lain idle so long that modifications to the hydrological regime are neoessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii).

[3] For example, Representative Breaux stated that:

> it is important that our farmers, many of whom have never previously been affeoted by the complex regulatory program under Section 404, be well-informed and be assured that continuing their normal farming practioes will not require new burdens or subjeot them to potential violations of federal law.

136 Congressional Record S 5643, 5648.

In the same way that Congress did not intend that farmers be precluded from engaging in normal agricultural activities, surely the framers of our Constitution likewise did not intend that there be wholesale destruction of beneficial and productive uses of land. When such uses of private property are prohibited, the fundamental principle underlying the protection of property rights is nullified merely to realize some momentary regulatory goal. Regulatory programs that result in the wholesale elimination of private property rights, no matter how laudable, cannot be countenanced. As Justice Marshall observed in the landmark decision of this Court in *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982): "[T]he government does not have unlimited power to redefine property rights."

CONCLUSION

In order to ensure that the Respondent's interpretation of Section 404 (f) not be applied in a manner which continues to "redefine" private property rights out of existence, it important that this regulatory provision be construed in a manner consistent with the Fifth Amendment. Accordingly, these *amici* urge this Court to grant the requested Petition and issue the Writ of Certiorari.

Respectfully submitted,

Nancie G. Marzulla
Lisa M. Jaeger
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd Street, N.W.
Washington, D.C. 20015
202-686-4197

May 9, 1995

January 31, 1995

FOR IMMEDIATE RELEASE

U.S. APPEALS COURT DENIES WATERFORD FARMER REHEARING

On January 9, 1995, the Third Circuit Court of Appeals in Philadelphia denied a petition for rehearing filed by Waterford farmer Robert Brace regarding the Court's ruling issued November 22, 1994 reversing U.S. District Court Judge Glenn Mencer's ruling over one year ago.

The petition asked the Court to reconsider its interpretation of "normal farming practices" and agricultural activities clearly exempted from the permit requirements outlined by Section 404 of the federal Clean Water Act. In the Appellate Court's opinion of November 22, 1994 reversing Erie County Court Judge Glenn Mencer's ruling in December of 1993, "normal farming practices" used by Bob and hundreds of other farmers throughout Pennsylvania and the nation, do not qualify under the guidelines promulgated by regulatory bureaucrats. In reaching this seemingly counter-intuitive decision, the panel completely sidestepped the statute enacted by Congress which specifically states that permits are not needed for agricultural activities related to normal farming practices *including* the maintenance of drainage ditches.

The Appellate Court's refusal to rehear Bob's case now puts him in a completely untenable position. The Third Circuit sent the case back to the District Court for enforcement of the EPA's restoration order and for determination of a civil penalty. Now that the original order has been upheld by the Court of Appeals, Bob is theoretically liable for hundreds of thousands of dollars, even millions, in penalties. Moreover, to EPA, restoration of the property means converting it into a wetlands preserve. To Bob, it means destroying the farm he worked so long and hard to make productive.

What is striking about this is the government's ability to put Bob in a regulatory Catch 22. His only alleged violation was that he didn't have a Corps of Engineers permit to clean sediment from his farm drainage ditches and redeposit the sediment back on the farm fields from which it washed in the first place. Instead of simply directing Bob to stop while he applied for a permit, the government tried to coerce him into complying with a restoration order, thus destroying his farm under threat of enormous fines, penalties, and even jail. To make sure citizens like Bob can't escape its clutches, the government goes on to adopt a policy that it won't process permit applications when the applicant is said to be "in violation." Thus, Bob could never claim his farm exemption or try to get a permit once the bureaucrats said he was in violation.

"It is disheartening," states Bob, "that 3 judges would reverse a decision made by a highly respected federal judge from Erie who actually saw my property and heard all the testimony which clearly established that my farming activities were exempt under

applicable state and federal laws and that many of these same agencies aided and assisted me in my endeavors. It's just unbelievable."

After nearly 8 years of bureaucratic abuse and regulatory finagling with the agricultural exemption now rubberstamped by the Court of Appeals, Bob now faces his last hope to obtain justice. He plans to ask the U.S. Supreme Court to hear his appeal of the Third Circuit's decision and hopefully restore his faith in the system and the confidence of the farmers of this nation that they may maintain their agricultural drainage systems, a vital and necessary aspect in producing food and fiber for the citizens of this country; And as Congress clearly intended, without the fear of fines, imprisonment, and harassment and Appellate Court deference to unelected bureaucrats to the detriment of the ordinary citizen.

A short video has been produced detailing the events of Bob's case and this, along with any further information, may be obtained by contacting Bob or his legal counsel at:

Robert Brace
Robert Brace Farms, Inc.
1131 Route 97
P.O. Box 338
Waterford, PA 16441

(814)796-2174
(814)796-2529 (fax)

Henry Ingram, Esq.
Buchanan Ingersoll, P.C.
600 Grant Street
58th Floor
Pittsburgh, PA 15219

(412)562-1695
(412)562-1041 (fax)