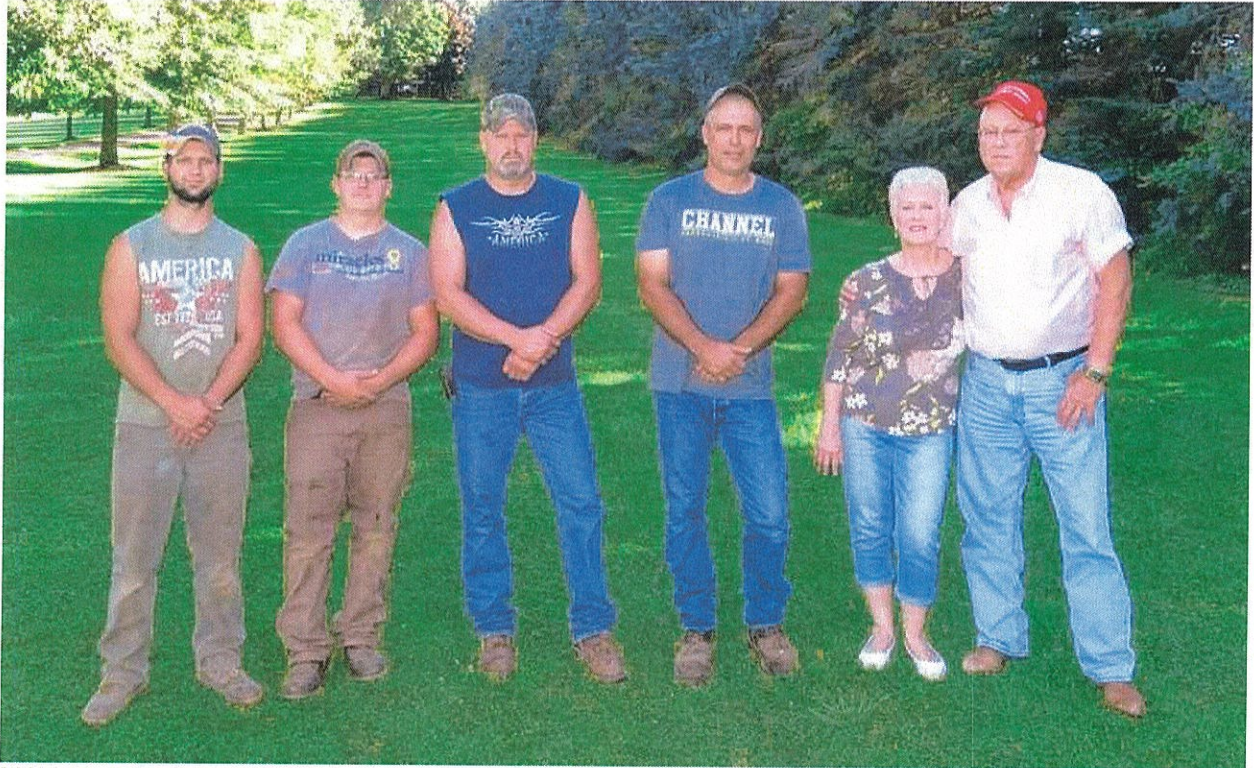


Blood And Dirt: A Farmer's 30-Year Fight With The Feds



MAY 16, 2018 07:43 AM

The Brace family's 30-plus year "damned nightmare" is at the center of one of the longest regulatory fights in U.S. agriculture history. From right: Bob and Babe; sons Ron and Randy; and grandsons Zack and Nic.

© Dieter Krieg



By **Chris Bennett**
Farm Journal
Technology and Issues Editor

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- [Email](#)
-

On a crisp May morning set against a striking backdrop of farmland tucked between rolling hills in northwest Pennsylvania, Randy Brace, 23, looked south after a tillage pass and watched in surprise as a 12-car caravan pulled alongside his fields. Time slowed and the young farmer's chest tightened when a phalanx of officials from the U.S. Army Corps of Engineers,

Environmental Protection Agency and a mix of state agencies spilled from the vehicles and walked onto his land.

Confused and fighting a rush of dread, he climbed down from the box and ran toward the security of his father. Patriarch of the family operation, Bob Brace listened in the milk house as his son described roughly 20 government reps moving across Brace farmland. The regulatory die was cast. Fists clenched, the elder Brace walked out of the milk house and into one of the longest legal fights in agriculture history. Brace's "damned nightmare" began that fateful May in 1987. Over 31 years later, it is yet to end.

By draining 30-plus acres of pasture, Brace was deemed to have violated the Clean Water Act (CWA). Regulatory agencies claimed the ground was a wetland and threatened the Erie County producer with imprisonment and severe financial penalties. As Brace vehemently protested his innocence through exemptions and exclusions, the merit of his pleas was lost to judicial interpretation and a courtroom gavel.

"Don't be fooled by the numbers; they want my blood, not my money." - Bob Brace

Since 1987, Brace has paid over \$1.5 million in litigation costs and refused to bow to the biggest law firm in the world: The United States Department of Justice (DOJ). Three decades in the making, Brace's case lays bare a labyrinth of agency contradictions and begs two echoing questions: *What is normal farming? What are the real-world boundaries of CWA jurisdiction?*

As of 2018, what is arguably agriculture's longest running legal saga may be entering its final stages, with EPA doubling down with more charges against Brace, and Brace countering with an \$8 million suit. "They want to fine me \$145,000 each day because those numbers are intended to crush me and should tell everyone something about my case," Brace says. "Don't be fooled by the numbers; they want my blood, not my money."

1970s

Peeling the layers on Brace's case requires a step back in time. Brace, 79, was born and raised on a family farm 15 miles south of Lake Erie in Waterford Township. In 1975, he purchased the farm from his father, and in 1976, began draining the land by replacing and repairing tile laid by his grandfather. The ground was used for hay and pasture, and Brace intended to switch it to row crops. Along a tiny creek, beaver had built several small dams, increasing drainage issues. At the request of Brace, the beaver were trapped and removed by the Pennsylvania Game Commission (PGC).

“I did what any normal farmer does,” **Brace** says. “I tried to make the most of my land and I didn’t hide a damn thing. In fact, I made sure USDA knew every single thing I was doing to make sure I had approval.”

He hired a dynamite crew in 1977 to clear ditches and restore drainage function, all with USDA’s nod, notes Brace’s attorney Larry Kogan, **Kogan Law Group**: “Mr. Brace did everything with the authorization of USDA, certifying his father’s conservation and water plan dating back to 1962. Beginning in 1977, he received technical support and partial funding from USDA Soil Conservation Service to develop drainage tile systems on one of the three parcels of land in question. The homestead farm was his original focus and then he expanded out to other ground with USDA technical support.”

“Ultimately this evolved into a conversion of the land itself, from one common form of farming—pasture farming—to another common form of farming—cropping. The former ASCS (Agriculture Stabilization and Conservation Service) was involved with cost-shares for a minimum of 10 years. At this point, Mr. Brace had the full support of government agencies,” Kogan describes.

Every year in the late 1970s and early 1980s, Brace shaped the fields, and began growing corn on the ground in 1986. “It became beautiful, beautiful land,” Randy Brace describes. “And then 1987 came and everything went straight to hell.”

1987

According to DOJ, which has poured millions of taxpayer dollars into its pursuit of Brace, the Erie County producer is a prolific defiler of the environment and a destroyer of wetlands. Yet, the overall beauty of Brace’s farming landscape is picturesque, almost as if pulled from a postcard. The condition of the Brace farm is sharply manicured, with fields, equipment and buildings presenting the appearance of a remarkably ordered operation. “Bob’s place is just about perfect and always has looked beautiful,” describes Tom Coffin, 75, who grows corn and soybeans on 500 acres to the northwest of the Brace’s operation. “I’m talking about the hardest working farm family I’ve ever seen. In the evening, I head home and they’re still in the field. The entire family.”

Brace again began having trouble with beaver proliferation in 1987, and asked the PGC for removal. When a senior PGC official arrived and began asking questions about permitting, Brace had no idea a regulatory sledgehammer was about to drop across his farmland. “The boss was Andy Martin and he came out and started asking for permits. He and dad got into an argument and I believe that was the trigger point for the next 30-plus years,” Randy Brace says.



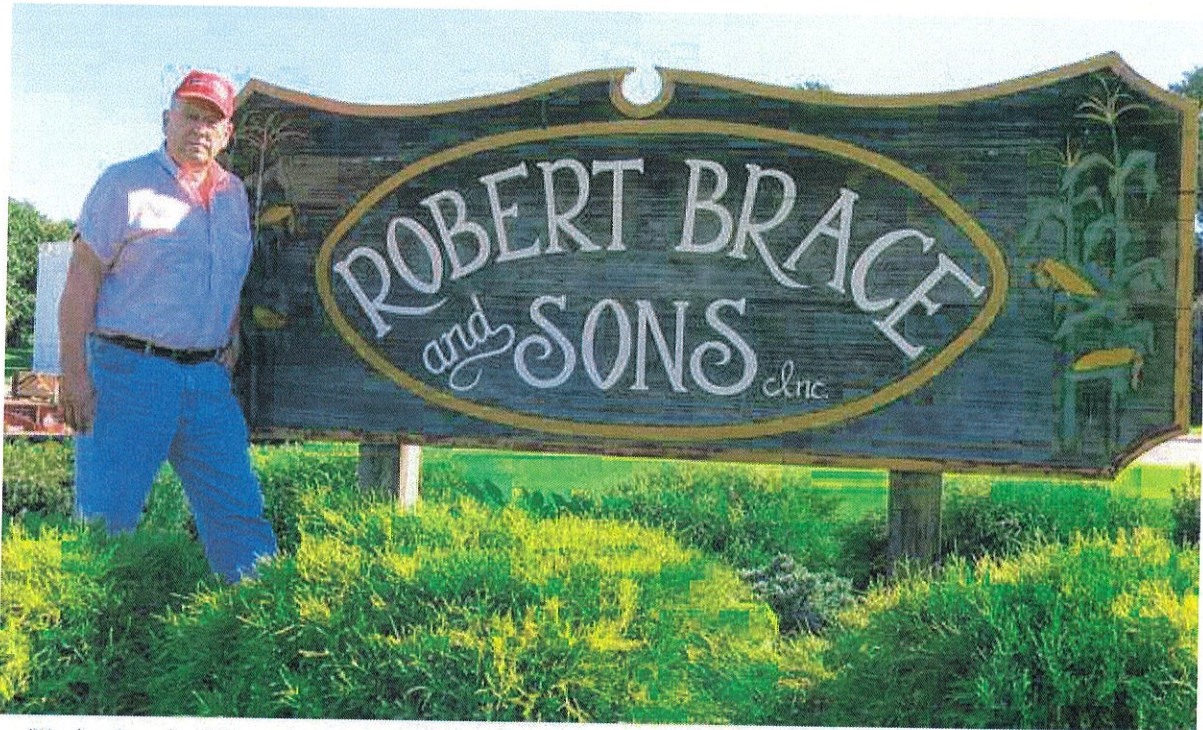
"Nobody sees what the families go through when the government tries to ruin a farm ... Almost nobody is from a farm anymore and what happened is so hard for me to describe," explains Randy Brace, standing, far left.
Photo by Dieter Krieg

"Mr. Martin saw the conversion work and thought it was the worst wetland destruction he had ever seen. He didn't have a clue what he was talking about," **Kogan** says. "He went to the U.S. Fish and Wildlife Service (USFWS) in 1987 and reported on Mr. Brace's land. Then the EPA and Corps jumped in, and they all descended together."

"Despite lacking a warrant, a showing of probable cause, or Mr. Brace's affirmative consent, Mr. Martin illegally entered Mr. Brace's private land to conduct his unscientific eyeball investigation at the time when Brace 'No Trespass' and 'Private Property' signs were clearly visible to the public," Kogan adds.

Congressman Glenn Thompson (R-Pa 5th District), vice-chairman of the House Committee on Agriculture, describes government action against Brace as an "egregious assault" on private property rights. "At the federal, state, local, game commission, and so many other levels, I've never seen anything even close to what the Brace family has been experiencing for three decades. I've never seen a case like this in my career. If this was a football game, yellow flags would be flying everywhere for piling on."

In his role as a farmer and landowner, Coffin claims he has never seen "anything as crazy and wrong" as regulatory action on Brace land. "I've watched shameful behavior from my own government officials as they change rules. In all of my life, I've never witnessed a court case where the government wanted to win so badly," he says.



"Maybe they should have just shot me instead of putting my family through this, but I've never been afraid to fight for what's right," Brace says.

Photo by Dieter Krieg

Pared down, regulatory officials demanded Brace restore the ground to a wetland. The 12-vehicle visit in May 1987, was the government's opening salvo, according to Randy Brace: "One day you're working ground and suddenly the feds bring in a small army to your land. You would have thought they were looking for Al Capone."

Based on CWA violations, the Corps and EPA ordered the Braces to end all discharge activities on the acreage. Brace had no wiggle room: Stop or face a \$50,000 per day penalty. "I couldn't even protest. Finally, the government sued us in 1990 and we got to start the court process," Brace explains.

Despite the potential consequences, Brace was relieved when DOJ took him to court in 1990: "Basically, I'd accumulated \$68 million in fines and couldn't contest anything, because you can't sue the government until the government sues you. I was ready to finally go to court."

DOJ cast Brace in the same light as private land developers, and framed its argument as a CWA Section 404 wetlands case. CWA Section 404 generally prohibits the dredging and filling of Waters of the United States (WOTUS), including adjacent wetlands, without a Corps permit, unless the landowner can meet one of the statutory exemptions or exclusions.

“Bob’s case demonstrates the serious problems landowners face regarding ambiguity of wetlands designations. ... We need to get rid of ambiguity. Ambiguity gives bureaucrats more room to maneuver.”
- *Rep. Glenn Thompson (R-PA)*

Brace was accused of recklessly converting land without regard to the environment. The portrayal was baseless, Kogan contends: “This is simply about a farmer on his own land who undertook a tremendous amount of work and was stunned to find out how far the government claimed federal jurisdiction could reach.”

Rep. Thompson served as chair of the Conservation, Energy & Forestry Subcommittee for six years, prior to his current role as chair of the Nutrition Subcommittee. The Brace case is a textbook example of the perils associated with CWA “ambiguity,” according to Thompson: “Bob’s case demonstrates the serious problems landowners face regarding ambiguity of wetlands designations. The Clean Water Act has been abused by bureaucrats and these punitive actions were not originally intended by Congress. We need once-and-for-all clarity on Section 404 which contains agricultural exemptions. A change must incorporate all normal farming practices or ranching practices ... We need to get rid of ambiguity. Ambiguity gives bureaucrats more room to maneuver.”



"Bob's place is just about perfect and always has looked beautiful," describes Tom Coffin, 75, who grows corn and soybeans on 500 acres to the northwest of the Brace's operation.

Photo by Dieter Krieg

Brace's district court date finally arrived in December 1993. He claimed his activity followed the guidelines of a government-approved conservation plan and was backed by all required permits—and former Judge Glenn Mencer (United States District Court for the Western District of Pennsylvania, Erie) agreed that Brace's activity constituted normal farming practices. At first glance, it was case closed and a return to row cropping for Brace. In reality, Brace's relief turned bitter as the case took on a byzantine level of complication. Despite a bench trial victory in his pocket, Brace's trouble was only just beginning.

(Citing pending litigation, the Corps and EPA declined comment on the Brace case. Pennsylvania Game Commission declined comment. DOJ and USFWS offered no response to FJ phone calls or emails.)

1994

DOJ appealed the decision to the Philadelphia-based Third Circuit Court of Appeals. In short, the Third Circuit and Judge Robert Cowen said Mencer was wrong and determined Brace was never engaged in "normal agricultural activity."

Brace contends judicial deference shown by the Third Circuit to EPA, Corps and USFWS agency (but not to USDA) recommendations was impossible to fight. "Suddenly, the facts didn't matter in court. My permits didn't matter. I get in front of the judge and he only relies on the word of government experts? What's the point? I can't compete against **Chevron deference**. It's

a terrible, tight spot to be in and I know there are other landowners that have been in the same predicament,” Brace notes.

“The Third Circuit said my farming wasn’t normal. *What is normal?* I was legal before all of this and I’ve always been legal since. They say whatever they want in a courtroom because administrative law does what it wants. We’re at the point where people who have never farmed in their lives or set foot outside an office building get to define normal farming.”

While the feds used the broad brush of the CWA against Brace, Kogan claims they ignored the specifics of a key statute: The Food Security Act of 1985. It contained among the most critical wetland conservation legislation in all of federal law, known as the swampbuster provision. For farmers who the USDA-ASCS determined had commenced conversion of wetlands to productive farmland prior to Dec. 23, 1985, swampbuster offered a means to secure USDA cost-sharing and avoid penalties. Essentially, producers were eligible to receive USDA cost-sharing if they could prove to USDA-ASCS through physical activity or invoice materials they had already started conversion of wetlands to farmland prior to Dec. 23, 1985.



Every year in the late 1970s and early 1980s, Brace shaped the fields, and began growing corn on the ground in 1986. “It became beautiful, beautiful land,” Randy Brace describes. “And then 1987 came and everything went straight to hell.” Photo by Dieter Krieg

Kogan says the Food Security Act of 1985 was a clear green light allowing Brace to continue conversion activities until Jan. 1, 1995—the regulatory deadline. However, the government claimed Brace’s activities prior to 1985—hay and pasturing—did not constitute normal farming. Bottom line: *DOJ said a lack of row crops equated with a lack of farming*. Brace was

sealed in a CWA box, and no matter which way he turned, he wasn't allowed to use the Food and Security Act of 1985 to say his farmland activity was protected from CWA jurisdiction.

With a flick of the pen, Brace was the court loser, and maddeningly, he had fought with one hand tied behind his back, according to Kogan: Before the district trial began in December 1993, the Corps released a regulatory guidance letter stating wetlands converted to cropland by Dec. 23, 1985, were excluded from federal jurisdiction. In addition, a joint EPA-Corps regulation (August 1993) broadened the definition of prior converted cropland by announcing reliance on the USDA Food Security Manual of 1988. However, due to the timing, the administrative record had already closed on his trial and Brace couldn't use the new regulatory guidelines for his case.

"The government blindly insisted Brace was a polluter of wetlands and entirely ignored the Food Security Act of 1985, the Food Security Manual of 1988, and jointly issued 1993 EPA-Corps regulations excluding prior commenced conversions from federal CWA Section 404 jurisdiction. They did this in order to put Mr. Brace in a corner and say he wasn't engaged in normal farming activity," Kogan exclaims. "Forget logic, because haying and pasturing isn't farming according to the court. The CWA creates this legal fiction so the government can assert federal jurisdiction and get control of the wetland. Private property rights and farming livelihood be damned."

1996

Brace tried to get the Supreme Court's ear and was denied. He was out of options, dejected and facing millions of dollars in stipulated penalties imposed by statute and due regardless of whether there was injury to the land. Brace was at a fork: Go broke or go into mediation with absolutely no bargaining power.

Brace signed a consent decree requiring restoration of 32.5 acres designated as wetlands to its pre-1985 condition. "My head was on the chopping block," he recalls. "I signed a consent decree to tear out tile lines, plug up some ditches and put in a check dam. The consent decree should have been the end."

Randy Brace describes the entire legal affair as a "horror show" that isolated the Brace family. "The government portrayed us as environmentally evil. I know what it's like to feel alone and lose faith. How do you even tell someone this story from start to finish?"

"Farmers don't always realize what power the government has," he continues, "but things get real very fast when it's your land."

2012-2013

The consent decree required tile removal, select ditch plugging and installation of a check dam. In short time, the backwater and beaver dams wreaked havoc on the farm's hydrology, causing erosion and flooding on adjoining family land, according to Brace. "What do you think happens when you're not allowed to clean ditches or culverts?" he asks.

In 2012, EPA and Corps officials walked the site and pointed out spots where ditch maintenance was legal and acceptable. Brace began cleaning culverts and installing drainage tile in prescribed areas with what he describes as “verbal authorization.”



“My dad and I have both been threatened with jail,” Randy Brace asserts. “We’ve been lied to repeatedly. I keep asking myself, ‘What country is this?’”
Photo by Dieter Krieg

In short time, Brace was again charged with violation of the consent decree and CWA regulations, and hit with over \$100 million in fines. “Basically, the government lied and said they authorized repair only outside the decree area, but they actually authorized such work both inside and outside,” Kogan says. “If you tell a farmer to fix a ditch and the laterals, then he’s going to clean them including putting in necessary tile, otherwise nothing will work. As always, the government said, ‘Dance to my tune or that’s it.’”

“My dad and I have both been threatened with jail,” Randy Brace asserts. “We’ve been lied to repeatedly. I keep asking myself, ‘What country is this?’”

2017

EPA reopened the 1990 case on Jan. 9, 2017, 11 days prior to President Trump’s inauguration. The court filings alleged consent decree breaches, and a second action was filed against Brace the same day, claiming the Pennsylvania producer had committed more CWA Section 404 violations on adjacent farmland within the same hydrologically integrated farm based on the same government-denied authorizations.

“They moved the goalposts on me over and over,” Brace says. “As a farmer, how can you even be in compliance when the government can change the definition of the word ‘compliance’ according to who does the interpreting?”

Yet, 2017 took a favorable turn for Brace in June, when a federal magistrate judge from the Western District of Pennsylvania reopened Brace’s 1990 case for new discovery. Additionally, on July 3 and July 7, Brace filed an \$8 million administrative action against EPA, the Corps and USFWS under the Federal Tort Claims Act, to which the government has not yet responded. Brace wants compensation for what he contends is 20 years of damaged farmland and lost harvest revenues resulting from “improper, wrongful and/or negligent” enforcement of the consent decree.

2018

On March 15, 2018, DOJ filed a second motion to enforce the 1996 consent decree. Kogan intends to show the court the interplay between the CWA and the Food Security Act of 1985: “We will show how Mr. Brace’s actions were grandfathered by the Food Security Act of 1985, and how EPA and Corps regulations excluded Mr. Brace from CWA jurisdiction.”

“The government has controlled this case with a, ‘Mother may I?’ proposition. The government doesn’t have to prove you are guilty; you have to prove you are innocent. We are now living in the European Union,” Kogan continues. “Put up a fence or hang a posted sign, but the government still believes it can do whatever it wants. This is an injustice of the highest order and Mr. Brace’s case is a wake-up call to all Americans.”

“Nobody Is From A Farm Anymore”

As Brace’s lifelong neighbor, Coffin has watched the legal fight from a ringside seat. He clings to what he considers a lone certainty: “I only know one thing for sure. If the government wins this in the end, it won’t be based on the merits of their case. They never wanted to stop Bob, they wanted to destroy him.”

“This case was never about the facts. The truth means nothing when the government can change the rules as they go along. Bob stands beyond himself and he’s fought for all farmers and landowners. Sure, all farmers have different soils and slopes, and grow crops in different states, but this case is all of us,” Coffin adds.



From left: Bob, Babe, Ron, Randy, Zack and Nic. "How does a farmer fight when they threaten you with a \$100,000 fine per day? How?" Brace asks.
Photo by Dieter Krieg

Spanning his political career, Thompson says he's never encountered a regulatory case with as much multiple-agency power directed toward one farmer: "I'm in awe of the endurance of Bob and the entire Brace family. For 30 years they've been under attack from government agencies and received mixed messages the whole time."

The toll on the extended Brace family has been exceedingly heavy, acknowledges Randy Brace. "Nobody sees what the families go through when the government tries to ruin a farm. The pain across 30 something years is hard to talk about. Almost nobody is from a farm anymore and what happened is so hard for me to describe," he explains.

Randy and his brother, Ron Brace, are quick to point toward a hopeful fifth generation of Brace producers: sons Zack, 25; Nic, 21; Jackson, 16; and Jep, 13. "Our boys are everything. They're our hope for this farm. They've stuck it out with us and they're hanging on, holding tight for something good," Randy describes.

DOJ: 10,000 Attorneys

How much money has DOJ, backed by 10,000 attorneys and 114,000 employees, spent in pursuit of Brace? Considering litigation at the administrative and judicial levels, and agency activity over the 30-plus year period, the precise multi-million dollar total remains a glaring question. (DOJ declined to answer how much money has been spent on the Brace case, as well as all other inquiries related to Brace.)

Kogan has deposed scores of government witnesses and recently filed [3,200 pages of exhibits](#) on behalf of Brace. Regarding the gravity of Brace's case for private property rights, [Kogan](#) speaks bluntly: "The government has done whatever the hell it wanted without accountability. They put Bob Brace in a vice and then used a consent decree to create a primordial wetland on his farm that never existed."

"The DOJ frames its case against Bob Brace as if he was an industrial polluter, entirely ignoring that he runs a small farm," Kogan continues. "This case is a train running wild without a conductor. DOJ, the biggest law firm on the entire planet, never gets enough."

(Again, citing pending litigation, the Corps and EPA declined comment on the Brace case. Pennsylvania Game Commission declined comment. DOJ and USFWS offered no response to FJ phone calls or emails.)

Normal Farming?

For 31 years, the elder [Brace](#) has been part of a complicated tangle of government regulation, CWA and FSA interpretation, wetlands preservation, agricultural exemption and agency authority. The case and its burdens have sat on his shoulders for three decades, and at 79, he hopes resolution is near. "Maybe they should have just shot me instead of putting my family through this, but I've never been afraid to fight for what's right. The government can come on any farmer's land and easily find something wrong. No matter which way you turn, you can't meet the letter of their regulations. How does a farmer fight when they threaten you with a \$100,000 fine per day? How?"

"When I raise the flag, I wonder what is going on in this country and if our republic is gone. Take a look at this horrendous case and you'll find out that it's not about me as a person, because there are other cases like mine in other states that people don't know about. This is about farming and the power of government to do as it likes. Trump, Pruitt, Congress and all the politicians in D.C. need to know what happened so this doesn't keep happening to more farming families."

[Brace](#) shakes his head, pauses, and offers a final reflection: "How in the hell do they know what normal farming practices are, anyway? I've been in those fields since I was four years old. Guess what? I've never done nothing except normal farming."

(See [here](#) for a summary page of Brace's March/April/May 2018 court filings and [here](#) for previous Brace case material. Also, visit [Pennsylvania Landowners' Association](#) for additional Brace-related legal documents.)

See also:

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[*Bald Eagles a Farmer's Nightmare*](#)

[*Private Property Rights Collide With Invisible Frog*](#)

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Comments

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Judy Green
Plainview, NE
5/21/2018 12:44 PM

President Donald Trump signed an executive order Tuesday aimed at rolling back an Obama-era rule that designates what smaller bodies of water, tributaries and wetlands are under the control of the Environmental Protection Agency and the Army Corps of Engineers. The order instructs both departments to formally reconsider the Water of the United States rule or WOTUS. This could lead to a re-write of the law or a complete repeal, but could take a while to be implemented. On Tuesday afternoon, Trump was surrounded by farmers, housing developers and county commissioners in the Roosevelt Room as he signed the order. "The EPA so-called Waters of the United States rule is one of the worst examples of federal regulation, and it has truly run amok, and is one of the rules most strongly opposed by farmers, ranchers and agricultural workers all across our land," Trump said. "It's prohibiting them from being allowed to do what they're supposed to be doing. It has been a disaster."
<https://www.nbcnews.com/news/us-news/trump-signs-executive-order-begin-water-rule-rollback-n726781>

Keith
Augusta, ME
5/18/2018 07:46 AM

I feel sorry for individuals who are trying to do the right thing and get screwed, however, this article sounds heavily one-sided. I really would like to hear the governments side and see what substantial justification they have to present. Trust me there are many (farmers included) WHO do abuse the land and ignore valid regulations to protect it which, unfortunately, "puts a sour taste" in many non-farmers mouths and doesn't help the farmers who are trying to do it properly by the regulations imposed. I'm confident it's not as bad as many make it out to be. It's a natural human instinct to play the "victim" I'm not saying this is the case here but it's the way it is more often than not. It also makes people, especially conservatives, feel right to think the whole government is corrupt, at least the parts that interfere with whatever they are trying to do whether it be for the good or the bad; the roles of government that benefit them, especially financially, are just fine, however.

Bob

cooper, IA

5/17/2018 12:38 PM

Well the USDA certainly considers pasture a crop. I have to certify that every year. Since the Government agency in charge of farming considers pasture an official crop i would contest on those grounds alone. As a side note my family has been farming since 1977, last week we got a letter that the conservation service is conducting a "random inspection" on a farm of ours that is not enrolled in any program and consists solely of pasture and timber. They said they would perform the "inspection" within two weeks of planting of this years crop. Well unfortunately for them they are 37 years past that date. I am not going to call them because the bureaucracy is vengeful as we can see in the story above . The same office once threatened to withhold all of our crp payments because a farm we had rented out had the crop planted in the wrong direction. "The soybeans are facing East instead of West" was the exact quote in the violation. Luckily the man farming it with over 50 years of experience explained to the head of the office why they were wrong. Unbelievably stupid at the upper management levels.