



THE BRACE TRAVESTY

by John Ward

The Brace family has farmed near Waterford in Erie County, Pennsylvania since the early 1930's. Bob Brace worked on his father's farm from early childhood. The crops were generally rye, oats, corn, cabbage and hay. A portion of the property was used for dairy cattle. As their father's age required a gradual retirement from active farming, Bob and his brother purchased portions of his land and operated successfully. In 1975, Bob bought out his father's and brother's interests and established a 600-acre farming unit.

Shortly thereafter, he obtained the assistance of the U.S. Agriculture Stabilization and Conservation Service (ASCS) in designing and improving the drainage system for the entire crop producing lands. This work included the need to integrate a 30-acre parcel that was separated from the main sections by an existing road. It was this acreage that had been used for the dairy cattle operation. Brace decided to discontinue the use of cattle and prepare the area for crop production. Some trees remained on this site and included two drainage ditches. Since this parcel was situated in a lower elevation from the other croplands, it was a natural route for the drainage of the uplands. The ASCS recognized this and recommended a culvert be installed under the road joining the two areas along with several additional ditches. Brace advised them he wanted to put in crops and they agreed that underground tiling should be placed at certain positions for surface drainage.

Most of Erie County is low-lying terrain with high water tables. Without adequate drainage, the surface areas have a moisture content that adversely affects crop production. Therefore, a system of drainage ditches and tiling are an absolute necessity to obtain sustainable yields.

In mid-1987, Bob Brace was cleaning loose sediments out of one of the drainage ditches and depositing it on the surface. An employee/ranger of the Pennsylvania Game Commission, new to the area, was driving by and noticed Brace's activity. He engaged in conversation with Brace, commenting that this would make a good wildlife preserve." Bob responded with "If you like it, why don't you buy it?" The ranger was angered and responded, "We don't have to buy it, we'll take it. This is a wetland. You

are in violation of the law if you don't have a permit." Both men became agitated and their exchanges became more heated. This scene initiated an ordeal for Bob Brace and his family for almost ten years and continues to this day.

Within two days of that encounter, the ranger brought people from the Pennsylvania Game Commission, U.S. Corps of Engineers and the U.S. Fish and Wildlife Service to the property. Some observations and quick tests of soil were made, without Brace's knowledge, and it was determined that the area was a wetland. Brace was served with a cease and desist order, requiring that he do no further work of any kind, i.e., haying, mowing, ditch cleaning, etc., until further notice. Brace countered that he was farming and did not need a permit under the law. It was at this point that he hired a law firm for assistance.

From 1987 to 1990, the USFWS, Corps of Engineers and the Environmental Protection Agency tromped over Brace's land, boring holes for water tests, gathering vegetation and collecting various microinvertebrates. They issued several more cease and desist orders because Brace mowed and gathered hay in the area. Concurrently, EPA ignored the lawyers requests for hearings and the assertion that Brace was entitled to an agricultural exemption under the law. Instead they issued press releases citing Brace as one of the most serious violators of the Clean Water Act (CWA) in Pennsylvania. Finally, after three years and the urging of several environmental groups, EPA filed suit in 1990 against Brace in the U.S. District Court charging violations on a 30-acre site under the wetland provisions of the CWA.

The government sought a permanent injunction, restoration of the site and civil penalties up to \$25,000 per day for each violation. The matter came to trial in Erie in 1993.

The CWA contains a provision which allows certain farming activity to be conducted in wetlands without a Section 404 permit issued by the Corps of Engineers:

Section 404(f)(1) - a permit is not required for: (1) the discharge of dredged or fill material "from normal farming, silviculture and ranching activities such as plowing... **minor drainage**... harvesting for production of food, fiber and forest products, or upland soil and water conservation practices and (2) the

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discharge of dredged or fill material for the purpose of... **the maintenance of drainage ditches.**" 33 U.S.C. Sec. 1344(f)(1)(c). Emphasis added.

The trial was held before U.S. District Judge Mencer, a native of western Pennsylvania, familiar with that part of the state. The government's witnesses were primarily technicians with the various agencies. They testified that no water quality samples were taken coming into or leaving the area, nor was there any report of injury to fish or wildlife downstream. They asserted they need not prove any harm or damage resulting from Brace's activity because the CWA invokes a strict liability on any violator; for example, merely placing loose dirt from a ditch to the surface around the ditch is presumed to cause harm! Moreover, under cross-examination, government witnesses admitted that test reports did not show adverse impacts upon the hydrological regime nor had they assembled sufficient vegetation indicative of a wetland. They could only produce positive evidence of hydric soils. The regulations require that a wetland determination include the presence of certain water amounts, vegetation and soils. Yet the EPA could only satisfy one out of the three required criteria!

In his defense, Brace, neighboring farmers, a man in the business of installing drainage tiles and the citizen/farmer administrator of the local ASCS all testified that ditching and tiling were common practices in farming operations in most of Erie County. The judge found that Brace was conducting normal farming activity, entitled to the agricultural exemption and entered judgment in favor of Brace.

The government appealed this decision to the U.S. Court of Appeals for the Third Circuit in Philadelphia. The three-judge panel found that Brace did not qualify for the agricultural exemption, that his activity was not normal farming practice and he therefore violated the CWA. They reversed the District Court judgment and remanded the matter back to that Court to determine penalties. The U.S. Supreme Court denied certiorari of the case and enforcement proceedings were held in the U.S. District Court in Erie.

In 1996, Brace was ordered to pay a \$10,000 fine, remove all tiling, fill ditches, put in riprap to raise the water table and flood the property!

The punishment, not measurable in terms of dollars or the destruction of his property, is the grief, curmoil and desolation this experience has brought to the entire Brace family over a nine-year period. This is made even more egregious when it was shown that no harm or damage to the environment occurred. Bob, his wife Bev and their four children all worked on or about the farm. He raised the American flag daily and they were all active in community affairs. The result of this travesty is that the Brace family no longer raises their country's flag.

The infliction of distorted interpretation of the law by the Appeals Court here has the effect of denying agricultural exemptions to farmers, as intended by Congress, and they are all at risk.

This is yet another instance of imposing oppressive measures upon people who work with the land while the government has no duty to prove harm. Agricultural exemptions were explicitly provided in the law for a reason—we need food and that food comes from the land. Viewing land strictly for its recreational or aesthetic values is shortsighted and imprudent, especially in light of increasing world populations. As more and more arable land is removed from agricultural uses, our ability to provide the products of farming is reduced, particularly at the family farmer level. Those who live and work with the land have a vested interest in the health of that land and know what is needed year after year to maintain its ability to produce. Farms, as well, provide a home and livelihood for families and serve as an economic base and a stabilizing influence in the community.

John Ward is a Frontiers-Wyoming Board Member who served as the principle attorney on the Brace Case. Mr. Ward tried the case at the U.S. District Court level and remains a close friend and advocate for the Brace family.

If you would like more information about Frontiers—Wyoming or if you would like to join the Wyoming Chapter, please contact Evie Ebzery at:

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