

**CONCLUSIONS OF LAW**

1. This Court has jurisdiction under CWA § 309(b), 33 U.S.C. § 1319(b) to grant injunctive relief and impose civil penalties with respect to violations of the CWA.

2. Under CWA § 309(b), 33 U.S.C. § 1319(b), this Court is empowered to order permanent injunctive relief enjoining all future violations of the CWA at a site.

3. The CWA was passed to restore and maintain the chemical, physical, and biological well-being of the Nation's waters. Section 301(a) makes it unlawful for a person to discharge pollutants into "waters of the United States" except as in compliance with other provisions of the Water Act. One of those sections is § 404, which requires a permit from the COE for the discharge of dredged or fill material into waters of the United States, including wetlands. 33 U.S.C. § 1311, 1344.

4. "Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. 33 C.F.R. § 328.3(d). To be a wetland an area must be inundated or saturated by surface or ground water for long enough periods of time so that plants that are adapted to wet conditions or that can live in saturated soils are dominant plant species in that area. The term "prevalence of vegetation" refers to vegetation that is dominant in an area or that covers most of a given area under normal circumstances. Normal circumstances simply means the condition of an area when undisturbed by man.

5. The parties have stipulated, and this Court concludes, that the site constituted wetlands at the time of Defendants' activities.

6. The term "waters of the United States" means all waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all wet-

lands which are adjacent, neighboring or bordering to tributaries of waters which are or may be used in interstate commerce. In addition, a wetland is "waters of the United States" if the use, degradation or destruction of it could effect waters which are or could be used by interstate or foreign travelers for recreational or other purposes, or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce. "Waters of the United States" are also tributaries of the waters described above. Wetlands adjacent to any of these waters are also waters. The term "adjacent" means bordering, contiguous, or neighboring. 33 C.F.R. § 328.3(a).

7. The Court concludes that the site constituted waters of the United States at the time of Defendants' activities.

8. The term "pollutant" is broadly defined in the Clean Water Act to include "dredged spoil, solid waste, . . . rock, sand, . . . biological materials, . . . and agricultural waste discharged into water." 33 U.S.C. § 1362.

9. Dredged or fill material consisting of "dredged spoil, solid waste, . . . rock, sand, . . . biological materials, . . . and agricultural waste" constitutes a "pollutant" within the statutory definition. 33 U.S.C. § 1362.

10. "Fill material" means "any material which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a waterbody for any purpose." 40 C.F.R. § 232(i).

11. Defendants' clearing, churning, mulching, levelling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of dredged spoil, biological material, rock and/or sand, each of which is defined as a pollutant by the CWA, which change the bottom elevation of the site.

12. Despite the prohibition against discharge of pollutants under the CWA, a person may obtain a permit for the discharge of any pollutant upon meeting certain applicable requirements of the CWA. 33 U.S.C. § 1342.

13. The CWA contains explicit exemptions from the permit requirements. Specifically, a permit is not necessary for the

“discharge of dredged or fill material (a) from normal farming, silviculture and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices,” . . . or (c) “for the purpose of . . . maintenance of drainage ditches, . . . 33 U.S.C. § 1344(f)(1)(A), (C).

14. A permit is not required for an activity that would not “destroy or degrade” waters of the United States because it would have only a *de minimus* effect on such waters. The discharger bears the burden of demonstrating that its activity will not destroy or degrade waters of the United States. 33 C.F.R. § 232.2, *as amended*.

15. For purposes of the regulations dealing with exemptions, “an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.” 33 C.F.R. § 232.2, *as amended*.

16. For purposes of the regulations dealing with exemptions, “an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimus* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.” 33 C.F.R. § 232.2, *as amended*.

17. In order to qualify for the exemption from the permit requirements for “normal farming,” 33 U.S.C. § 1344(f)(1)(A) the activities at issue “must be part of an established (i.e., ongoing) farming, silviculture or ranching operation.” 33 C.F.R. § 323.4(a)(1)(i).

18. This case is not the type of case where a corporation or large farming enterprise takes control of a parcel of land and dramatically alters the composition of the land and runs roughshod over the requirements of the Clean Water Act. It is a case of a legitimate factual dispute regarding the use of a parcel of land that has remained within the same family for over half of a century.

19. The determination of "normal agricultural activities" is a "fact specific" inquiry.

20. The existence of "normal farming" activity turns on an analysis of whether farming activities are "established and continuing."

21. Normal farming activities within the exemptions from the permit requirements of the CWA connote and establish a "continuing activity." They are activities that occur on a continuing basis as part of an ongoing farming or forestry operation.

22. The normal farming exemption will apply where land has been subjected to an established upland farming operation.

23. Section 404(f)(1)(C) of the CWA, 33 U.S.C. § 1344(f)(1)(C), "specifically provides that dredge or fill discharges for the purpose of maintenance (but not construction) of drainage ditches are exempt" from the permit requirements.

24. "Maintenance of a drainage ditch" means "the physical preservation of the original, as-built configuration of the ditch. Maintenance includes the removal of accumulated sediment and debris."

25. Unlike the farming activity exemption found in Section 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A), there is no "ongoing" requirement associated with the "maintenance of a drainage ditch" exemption. Maintenance must be interpreted in the context of an "as needed basis," and there is no requirement in the CWA that it must be carried out in a precise or specified way.

26. Notwithstanding the exemptions from the permit requirements, under the "recapture provision" of the CWA, 33 U.S.C. § 1344(f)(2), certain activities do require a permit. Specifically, a permit will be required where "discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced. 33 U.S.C. § 1344(f)(2).

27. In order to prevail on a claim there the recapture provision applies in this case, two elements must be established. First, it must be established that Brace's activities were conducted in order to bring the property into a use to which it was not previously subject. Second, if this element is established, it must then be established that Brace's activities will impair the flow or circulation of navigable waters or will reduce the reach of such waters. Both elements must be satisfied in order for the recapture provision to apply. The Court finds that neither element has been proven in this case.

28. The recapture provisions of the CWA clearly apply only to an area of navigable waters that is brought "into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).

29. For the purposes of determining whether a discharge associated with the "maintenance of a drainage ditch" is recaptured under Section 404(f)(2), 33 U.S.C. § 1344(f)(2), it is necessary to determine whether such maintenance activities would convert wetlands to a use to which the area was not previously subject.

30. This case involves a thirty-acre site that has been part of an ongoing farming operation of the Brace family for more than half a century. The land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven. Accordingly, the Court finds that the recapture provision does not apply to this case.

31. Defendants' activities in commencing conversion of the site prior to December 23, 1985, and in obtaining status as "commenced conversion" from the ASCS are evidence that Brace and Brace Farms have established an ongoing farming operation on the site.

32. Under the exemption provisions of the CWA, the activities of Brace and Brace Farms do not require a permit because they constitute: (a) normal farming activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches.

33. Brace has testified that his farming activities on the site enhanced productivity in the upland areas due to improvements in water flow, by which water flowed to its natural courses, and the corresponding improvements to the soil. The Court finds that Brace's activities on the site constitute upland soil and water conservation practices and are thereby exempt from the permit requirements.

34. Based upon the testimony and documentary evidence of Defendants' conduct in preserving and regularly cleaning the existing drainage system on the site, the Court finds that such conduct constitutes maintenance of the drainage system, and as such, is exempt from the permit requirements of the CWA.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES OF AMERICA  
Plaintiff**

**v.**

**ROBERT BRACE and  
ROBERT BRACE FARMS, INC.,  
a Pennsylvania Corporation,  
Defendants**

**Civil Action No. 90-229 Erie**

**ORDER**

AND NOW, this \_\_\_\_\_ day of December, 1993,  
after a non-jury trial bifurcated as to liability and upon Findings  
of Fact, Conclusions of Law and reasons set forth in the  
accompanying Adjudication,

IT IS HEREBY ORDERED that Judgment is  
entered in favor of the Defendants, Robert Brace and Robert  
Brace Farms, Inc., a Pennsylvania Corporation, and against the  
Plaintiff, United States of America.

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United States District Judge