that it withdraws the normal farming exemption from activities by persons who would attempt to farm never-before farmed wetlands without first obtaining a Section 404 permit. The applicable COE regulation interpreting the "recapture provision," however, is much more aggressive than the statute it purports to implement. 33 C.F.R. § 323.4(c) provides that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States."

The language of Section 404(f)(2) and the structure of Section 404 will not bear the construction embodied in 33 C.F.R. § 323.4(c). The recapture provision only makes sense when read as referring back to Section 404(f)(1). Thus, Section 404(f)(2) withdraws from the Section 404(f)(1) class of exempt activities those discharges which bring an area into a new use if the flow or circulation of navigable waters is impaired thereby. Two circumstances must exist before the recapture provision renders Section 404(f)(1) inapplicable. First, the otherwise exempt activity (e.g., normal farming) must be new in that the activity was not previously before practiced on the wetland at issue. Second, this new use must impair the flow or circulation of navigable waters. Unless both circumstances obtain, no permit is required under the recapture provision.

The COE, in 33 C.F.R. § 323.4(c), simply collapses the "activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject" provision into the "where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced" provision. The statutory test for recapture ("new use plus impairment of water flow") is reduced by the Corps' regulation into simply "impairment of water flow," which, if found, is neatly deemed to satisfy the new use requirement.

The COEs' interpretation of the recapture provision is neither reasonable nor authorized by Congress. If Congress had intended the recapture provision to render the enumerated exemptions inapplicable whenever the flow of navigable waters is impaired, it could have so provided. Instead, Congress created a two-pronged recapture provision. The COE should not be

permitted unilaterally to expand its jurisdiction by simply pretending the first prong (the new use requirement) does not exist.

The correct application of the recapture provision is illustrated in many prominent Section 404 cases, including several cited by the court of appeals. *See Conant v. United States*, 786 F.2d 1008 (11th Cir. 1986) *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344 (E.D. N.C. 1992). In each of these cases, the landowner acquired land which had not previously[8] been farmed and attempted to convert wetlands into non-wetlands before commencing normal farming activities. The courts in these cases appropriately rejected the landowners' claims of exemption because in each case the landowner would have had to convert the property into non-wetlands before commencing (for the first time on that property) farm activity. The combination of such new uses and concomitant impairment of water flow is exactly what Section 404(f)(2) was intended to prevent.

By contrast, *Brace* is a pure agricultural exemption case. Brace converted the Site from wetland into nonwetland, but not for the purpose of establishing a new (farming) use. As discussed above, Brace simply switched from one type of farming to another type of farming. That is precisely the type of normal farming activity Congress exempted from the Section 404 permit process, even if the flow of navigable waters is impaired in the process.

As such, the instant case is distinguishable from the cases relied upon by the court of appeals in support of its decision. In *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1989), the defendant landowners acquired 550 acres of flood plain property in 1976. The land,

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[8] In *United States v. Huebner*, 752 F. 2d 1235 (7th Cir. 1985), the subject property had not been farmed in decades.