



Philadelphia Judges Gut Wetland Agricultural Exemption

In a ruling handed down on November 22, 1994, when millions of Americans were preparing to give thanks for their families and freedom, a three member panel of judges serving on the U.S. Third Circuit Court of Appeals destroyed Waterford area farmer Robert Brace's dreams of pursuing the use of land that has been in his family for over three generations.

The three judge panel reversed an earlier ruling by U.S. District Court Judge Glenn Mencer in December of 1993 which had vindicated Brace and decided that Brace's activities to maintain his agricultural drainage system were exempt from permitting requirements under Section 404 of the Federal Clean Water Act, which regulates the nation's wetlands, and that such activities were not violations of the Act.

The eight year nightmare began in 1987, when Brace was served with government orders to cease farming activities on his land and "restore" it to wetland status. The original orders were followed by a government "restoration" plan requiring him to build several rock dams in his drainage ditch and cement closed existing tile lines which had been on the farm for years, as well as planting hundreds of plants indigenous to wetlands in order to convert the area back to wetland. The Government orders also threatened him with fines and imprisonment if the orders were not obeyed.

"I thought my nightmare was finally over when Judge Mencer determined my innocence last year," stated Brace. "I believed I was innocent from the beginning and still do. Section 404 provides an agricultural exemption for farmers who have been involved with on-going farming activities, which I certainly have. I started farming on my own when I was just 15 years old. I also worked with and obtained the advice of the United States Department of Agriculture back in the 70s' when I restored the farm's drainage system after buying the farm from my father when he retired.

I believe I've been made an example by our government to send a message to other farmers and landowners that federal bureaucrats are serious about controlling agricultural land in rural America with an iron hand. But many people still don't take the threat to their freedom seriously. A big part of the problem is selective enforcement. People see individuals disturbing wetlands without any

consequences and, therefore, don't take the threat of wetlands regulation seriously. But, believe me, if a dictatorial bureaucrat wants to get you, Section 404 provides him with plenty of ammunition. Needless to say I'm extremely disappointed with the Appellate Courts' ruling and believe that they really don't understand the consequences of this decision on me and my family. It's hard enough trying to make a living by farming today if you don't believe in government subsidies, as I don't, yet have to compete with farmers who do.



Robert Brace (center) and his
sons
Ronnie (left) and Randy
(right)

This battle has already consumed nearly eight years of my life and I guess it's going to consume a few more. I've got two sons who dreamed of being the fourth generation of Braces to run this farm, but now I don't know if that will ever be possible. I plan to ask the Court of Appeals for a rehearing or seek review by the Supreme Court but don't know if it will be granted.

What really bothers me about this whole nightmare is the process. The federal government issued the compliance orders in 1987. I was charged with discharging dredge and fill material from my ditch (cleaning silt, branches, And pebbles deposited from a beaver clam) without a Section 404 permit. According to the three judges who never heard any of the testimony presented at trial or even saw an inch of my property and who decided to reverse judge Mencer's ruling "... regardless of how 'typical' or 'necessary' such drainage systems are in Erie County." my maintenance of this system did not qualify within the meaning of the statutory term of normal farming activities defined by un-elected bureaucrats (who obviously have no understanding of agriculture). I am appalled that the judges who know nothing about farming have the ability to ruin my entire farming operation, a farm which I have lived on and devoted 55 years of my life to, by interpreting a regulation rather than abiding by the law established by our elected officials Congress carved out an express exemption from the permitting requirements for farmers in Section 404. It states:

"(f) Non-prohibited discharge of dredged or fill material

1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material -

A) from normal fanning, silviculture, and ranching activities such as

lowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation

(C) for the purpose of construction or maintenance of farm or stock ponds r irrigation ditches, or the maintenance of drainage ditches;
...is not prohibited by or otherwise subject to regulation under this section..."

To me these words are as plain as can be and at the time the federal agents arrived in 1987, I believed I was entitled to the exemption. Nevertheless, some faceless bureaucrats issued blanket orders which ignored the exemption and the fact that after originally accusing me of destroying over 200 acres of wetlands, it all boiled down to 30 acres of my farm which the federal government sought to control as

wetlands and which Judge Mencer concluded, after reviewing the property to be only about 8 under the most technical of definitions.

I argued until I was blue in the face that I was exempt and when that was rejected, I explored the possibility of getting a permit. The federal government said I couldn't get a permit since I was in violation of Section 404. There was no procedure to claim or even assert the agricultural exemption and I could not get a permit application reviewed. I was truly astounded when my lawyer told me that the federal appellate courts have held that I couldn't obtain any review in court (pre-enforcement review) until the government sued me. The Justice Department didn't get around to doing that until October 1990 and the case didn't come to trial until 1993. District Court judge Mencer decided the case entirely in my favor But the government was not satisfied with judge Mencer's ruling and appealed it to the Court of Appeals. Now three judges from the Philadelphia area who didn't hear the testimony or even see my farm have decided that judge Mencer was wrong and that regulations issued by the EPA and Corps of Engineers gutted the exemption Congress said farmers were entitled to. And this took almost eight years, cost the tax-payers and me hundreds of thousands of dollars and subjected my family and me to public vilification as polluters and scofflaws.

I am a law abiding, God fearing, tax-paying citizen who tries to earn a living by farming. I am not a polluter or a scofflaw. I feel as though my American citizenship has been revoked after the way I have been treated for the last eight years by my government and our so-called 'system of justice. But I'll continue to fight until my judicial remedies run out in hopes that justice will prevail. All I know is that something is really wrong here and something has to be done about it. And this whole ordeal sure as heck hasn't amounted to due process."

The recent U.S. Court of Appeals decision in *United States of America v. Robert Brace & Robin Brace Farms, Inc.* could have devastating consequences for American farmers. And although Bob's personal fight on behalf of all farmers continues to weave its way through the judicial system, the lack of sensitivity to the plight of farmers and ordinary citizens displayed by the three judges in this most recent go-round only demonstrates once again the absolute need for our elected officials to remedy the wetland nightmares occurring nationwide by passing legislation which recognizes the property rights of all farmers and landowners.