



# 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 inno-

## Wetland Nightmare Continues for Erie County Farmer

cent 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



Robert Brace

the advice of the United States Department of Agriculture back in the 70's 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 Court's 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.

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 govern-

*Continued on page 2*

ment issued the compliance orders in 1987. I was charged with discharging dredge and fill material from my ditch (clearing silt, branches, and pebbles deposited from a beaver dam) 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 unelected bureaucrats (who obviously have no understanding of agriculture). I am appalled that three 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 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;  
(C) for the purpose of construction or maintenance of farm or stock ponds or 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



The Brace Farm

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 taxpayers 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."

Additional information regarding this case may be obtained by contacting Robert Brace at (814) 796-2174 or Henry Ingram, Esq., c/o Buchanan Ingersoll PC, in Pittsburgh at (412) 562-1695.

## WHAT CAN I DO?

The recent U.S. Court of Appeals decision in *United States of America v. Robert Brace & Robert 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.

A personal hand or typewritten letter to your state and federal elected officials will help to create change. Please take a few moments of your time to express your thoughts on this issue to one or more of the legislators listed on the insert of this newsletter. If time does not permit this, please take a moment to merely sign, date and address the inserted letter and mail it to the legislator of your choice (copies can be made if you choose to mail it to all those listed).

# Coming to Harrisburg in 1995 Pennsylvania Land Use Summit "PLUS"

**Sponsored by:** Pennsylvania Landowners' Association, Buchanan Ingersoll, P.C., Pennsylvania Coal Association, Pennsylvania Chapter of Consulting Foresters, Pennsylvania Aggregates & Concrete Association, Pennsylvania Association of Realtors, Pennsylvania Builders Association, and Pennsylvania Farm Bureau

**To be held at:** Harrisburg Hilton & Towers  
One North Second Street  
Harrisburg, PA 17101

**Date:** March 23 and 24, 1995

**Speakers include:** Steve Finney, President, PA Realtors Association  
John Hoseman, Vice President, Farm Bureau Federation  
Tom Ridge, Pennsylvania Governor-Elect - (Invited)  
John Dankosky, Pennsylvania Business Roundtable  
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**MARCH 23, 24, 1995**

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412 North Second Street  
Harrisburg, PA 17101

**Reply Deadline:** March 7, 1995

**Hotel Rooms:** The Harrisburg Hilton and Towers has reserved a block of rooms for PLUS at a convention rate. Contact the Hilton direct (717-233-6000) if you need overnight accommodations.

## "PLUS"

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# It's a Good Thing Not Everyone Reads the *New York Times* on Tuesdays

By Henry Ingram, Esq.

**M**any landowners have felt the sting of wetlands preservation enforcement on their property and PLA members are familiar with the legal nightmares experienced by Bob Brace and Ed McDanniels in Pennsylvania and by Bill Ellen, Ocie Mills and Ted and Nancy Cline in other states. We have learned that approximately 80% of the wetlands in Pennsylvania are located on privately owned lands. Now, by virtue of extreme, preservationist regulations imposed by unelected, largely unaccountable bureaucrats and enforced by aggressive, often dictatorial environmental police, this private property has been dedicated, in effect, to public use. As a practical matter, these bureaucrats are telling you that you can't use your property as you wish or even as your family always has. Most ordinary citizens have had real trouble believing what they're hearing. It just doesn't seem to make any sense.

Many of us can remember the days when draining a swamp to make land productive or to eliminate mosquitoes was thought to be a good thing. Indeed, our same government which today is committed to preserving all

wetlands (remember President Clinton supports NO NET LOSS and wants to create even more wetlands!), had a much different approach in the past. In the 1920s, 30s, 40s and 50s, the Federal Government promoted and subsidized the conversion of millions of acres of "wet" lands for agricultural uses. Today converting wet land to productive land can be a crime.

This is not my main point, although perhaps it should be, but the recent election results should graphically remind us that we have the Constitutionally guaranteed right to change something the Government does to us that we don't like. There is nothing about the current governmental preference for swamps, bogs and marshes and the seemingly ridiculous but currently accepted notion that wetlands don't have to be wet — that can't be reversed. You have often heard that the word "wetlands" was not even mentioned in the federal Clean Water Act when all this preservation frenzy started. It wasn't in the Pennsylvania Clean Streams Law either. No, we're not talking about "elected legislator made law" — this is "unelected bureaucrat made law." Nor are wetlands protected or made sacrosanct by the Constitution. They're not like speech or liberty or even property. Wetlands on private property now have to be preserved because regulations made it that way but remember, regulations and government policy can be changed. Remember the elections. Suffice it to say here that, at least in theory, wetlands preservation regulations could be rolled back. Indeed, this is precisely what Tom Ridge and Jimmy Hayes were trying to do with HR 1330. It will be interesting to see what happens in the next Congress. Let's hope that the new majority has the guts to do something

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about the problem.

Did you ever stop and think about how we got to where we are on wetlands preservation? How did we get to the point where NO NET LOSS became a national battle cry and creating new farmland or eliminating mosquito breeding grounds became an environmental crime? At least part of the answer is that public opinion shifted. Somehow the dark, negative image of swamps and bogs changed and now they are considered by many to be, ecologically speaking, the greatest thing since sliced bread. And how does public opinion shift? One of the ways it shifts is that "opinion makers" begin to shift it. Now I'm getting to the *New York Times*.

Recently the *Times'* Tuesday "Environment" Section has been "reporting" on the threatening impacts of "habitat fragmentation" on a variety of wild plants and animals. It

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makes interesting, if scary, reading if you can cut through some of the jargon and newspeak.

For example, on September 27, *Times* environmental writer William K. Stevens reported:

The best adapted and most dominant species of wild plants and animals may be, paradoxically, the most vulnerable to long-term extinction as a result of **habitat loss**, say ecologists in the United States and Britain.

But since the species do not actually go extinct for 50 to 500 years after the **fragmentation** of their **habitat** dooms them, the researchers report, natural areas may now look healthier than they really are.

The good news, the scientists say, is that the long interval between **habitat fragmentation** and the **ultimate death of species** allows time to rescue many or most of them through **habitat restoration**.

**Habitat loss** and **fragmentation** brought about by **human activity** are advancing apace around the world. Because extinctions occur generations after fragmentation takes place, the scientists reported in the British journal *Nature* this month, they constitute **an ecological "debt" that will come due in the future unless it is repaid through restoration**.

To really understand the story, you have to know that "habitat fragmentation" means normal "use or development of the land." To the Ivory Tower ecologist, changing land use

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for development or, in the ecological context, downgrading it from its natural state to "settlement" which means "residential or agricultural use." The thrust of the entire story is that mankind owes a debt to Nature to restore these habitats.

On October 18, *Times* writer Carol Yoon followed up with a story on the vanishing species on Staten Island, one of New York City's five boroughs. This story reports on the findings of researchers concerning the Staten Island "ecology."

What they found was that even on Staten Island, where there is still much that is green and where 10 percent of the land is protected, no type of plant is safe, with everything from trees to shrubs and vines, delicate flowering orchids, even roadside weeds getting hit. "We really couldn't piece out any group of invulnerable species," said Dr. Robinson.

Dr. Handel explained that they also found **no invulnerable habitat, with everything from marshes to dry, upland woods and meadows losing comparable numbers of species**.

"That was a frightening finding," said Dr. Handel. "**What hit me was that we have had an enormous emphasis on preserving certain habitat types like the wetlands, and this study has shown me that we've reached a stage of habitat degradation where attention has to be leveled against all habitat types and we can't be naive to that.**"

When you think about it, these stories, without the expression or even any suggestion that there are positive or beneficial aspects of land use and development, or "fragmentation" as the restoration ecologists call it, advocate the notion that all "habitats" should be protected and all developed land should be restored to its natural state, not just wetlands! The preservationists shoved their noses under the tent with wetlands and now they're looking to take over the whole oasis!

I don't have to tell you that the *Times* is considered to be the most influential paper in the country. Many of our inside-the-Beltway friends read it every day including Tuesdays.

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## **The preservationists shoved their noses under the tent with wetlands and now they're looking to take over the whole oasis!**

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These people are being influenced and opinions are being formed. "Everything should be preserved and previously 'settled habitats' [read that previously developed land] should be restored."

If you think I'm kidding about a trend toward preservation oriented public opinion, just remember the Erie County Natural Heritage Inventory in its original form. Or think about the recommendations of the Forestry Work Group of the Non-Point Source Subcommittee of the Chesapeake Bay Foundation (The name of this organization ranks right up there with the Noxious Weed Control Committee and I have to confess that I couldn't resist mentioning it!). Simply stated, the Forestry Group doesn't want anyone cutting down any trees along stream banks in the entire Chesapeake Bay Watershed which encompasses about a third of Pennsylvania. They dress it up a little but that's what they're talking about. They did find the oasis, didn't they?

Landowners are well advised to keep an eye on their own "settlements." There are serious people out who truly believe that we owe a debt to restore everything and opinion makers and changers like the *Times* who pass it along without even a mention of the other side of the story.

*Henry Ingram is Chairman of the Natural Resources & Environmental Law section of Buchanan Ingersoll, P.C. and has practiced law for over 20 years. Mr. Ingram also serves as legal counsel for PLA. Questions or comments regarding this article or any other legal issue may be directed to Mr. Ingram in Pittsburgh at (412) 562-1695.*

# GOOD NEWS

## Election Returns Signal Hope for Property Rights Protection

As the general election results were tallied, a window of hope and opportunity emerged. Since the Republicans captured the Senate, and for the first time in 40 years gained control of the House of Representatives, an opportunity to restore private property rights has been presented. With continued grassroots efforts, activists are hopeful that the changes in leadership may indicate a more favorable conservative composition in Congress. However, common sense alone will not dictate passage of legislation unless grassroots efforts are visible at every level of Government.

Final tabulation within the Pennsylvania State Legislature also indicates a Republican majority. Additionally, Republican Tom Ridge is our new Governor-Elect. What does this mean for landowners?

During his night of victory while delivering his acceptance remarks, Tom stated ".....the commitment to empowering people and communities, getting government out of the way so that Pennsylvania can get back to work, our agenda for reform, the battle against unreasonable federal dictates - this is our battle plan for change. A Ridge Administration will not be business-as-usual. It's time to break through the gridlock. It's time to put people above politics. It's time to take back control."

Perhaps, the timing is correct and the foundation for federal and state legislative reforms are in place. However, don't sit back and merely anticipate positive change. Without your continued efforts, change will only remain a jingle of coins in one's pocket.

## Erie County Natural Heritage Inventory Debate Comes to a Close

On October 25, 1994, Erie County Council unanimously voted (7-0) to accept a resolution that makes the Natural Heritage Inventory (NHI) available for study but does not endorse its use as a regulatory tool.

Prior to the vote, Council heard from coalition members who spoke in favor of the resolution including Pennsylvania Landowners' Association, Erie County Farm Bureau, the County Association of Township Supervisors, and the Greater Erie Board of Realtors, as well as other concerned citizens. The resolution states that Council, "while approving the Inventory and its availability for those who choose to use it, does not approve, nor does it endorse, the recommendations of the Conservancy relative to the protection of Natural Heritage Areas in Erie County as published in the study."

Council president, Joe Giles, assured those in attendance that the Erie County Planning Department would not use the document to regulate land use.

Unfortunately, although Erie County Council supported the position presented by coalition members, much damage has already been achieved. The study was forwarded by the Erie County Department of Planning, including regulatory recommendations for protection of NHI areas, to the Pennsylvania Department of Community Affairs in Harrisburg. Through this maneuver, the study is now available to regulators of all agencies, state and federal, who have the ability to utilize the information as a regulatory tool.

For the time being, the Natural Heritage Inventory in Erie County has been concluded. And although the adopted resolution does not resolve all of the concerns expressed by the coalition members, it does convey a statement from County Council expressing their overall disapproval of the Inventory by stating, "the recommendations for the protection of Natural Heritage Areas in Erie County were neither reviewed nor adopted by County Council and thus do not reflect or represent any official policy of Erie County."

## Letters from Members Continue to Support PLA

December 8, 1994

The Board of Directors  
Pennsylvania Christmas Tree Growers Association  
Halifax, PA 17032

Gentlemen:

Enclosed please find a copy of an article on property rights published in *Country Focus* a publication of the Pennsylvania Farm Bureau, an organization in which we are members.

If you have not already done so I suggest you set up a sub-committee of the Board to address property rights issues and to coordinate the PCTGA's interests with those of the PFA and the PLA (Pennsylvania Landowners' Association). As the article suggests, now is the time to try and protect our rights for the future. We had better act now, while it appears we have a sympathetic Congress.

I would also suggest you consider recommending to the PCTGA membership that they individually join the PLA. Anyone with large land holdings needs a strong spokesman and lobbyist, and the PLA is where it's happening.

Sincerely,  
William G. McShane, President  
Sheerlund Forest, Inc.

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development of acreage in excess of 100 acres  
but less than 500 acres.

**BUSINESS II** ..... 1,250.00  
Same as I but in excess of 500 acres

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