



P E N N S Y L V A N I A LANDOWNER

VOLUME VIII • NUMBER 4

AUGUST 1995

Pennsylvania Farmer Denied Supreme Court Hearing

On June 26, 1995, the United States Supreme Court, without explanation, refused to hear Erie County farmer Robert Brace's appeal of an adverse decision by a three judge panel of the United States Court of Appeals for the Third Circuit. The High Court's action crushes Mr. Brace's hopes of restoring the decision of now retired federal District Court Judge Glen Mencer which had vindicated Brace's reliance on the "agricultural exemption" — for normal farming activities — to relieve him from wetlands enforcement by the EPA and the U.S. Army Corps of Engineers. Judge Mencer, who heard the testimony and viewed the Brace homestead farm near Waterford, Erie County, ruled that Brace's activities were normal and necessary farming activities. He recognized that drainage of farm soils in this region was essential to make the land productive for vegetable farming and declared the farm to be exempt from federal wetlands regulation.

The government appealed Mencer's decision and the Third Circuit reversed and held that Brace's refurbishing and maintenance of the drainage system on the farm required a Section 404 permit and found that Brace had violated the Federal Clean Water Act by removing sediment blocking his drainage system and redepositing it on the farm fields from which it had washed in the first place.

The Third Circuit's decision sent shock waves through the nation's farming communities and farm organizations from New York to California, many of whom supported Brace's petition to the Supreme Court by filing *Amicus*

Curiae briefs. The American Farm Bureau Federation, which has member organizations in all 50 states and represents 4.4 million farm families, the Farm Bureaus of California, Pennsylvania and New York and the National Cattlemen's Association, represented by the nationally prestigious Chicago law firms, Jenner & Block and Mayer, Brown & Platt, together with the Pacific Legal Foundation urged the High Court to hear Brace's appeal and reverse the Third Circuit.

One brief stated:

- Although the court of appeals' decision will have nationwide impact, *amicus* Pennsylvania Farm Bureau, which represents over 26,600 families in the Commonwealth, notes that it is of special and immediate concern to the approximately 5,800 farms located in northwestern Pennsylvania. The topography and quality of the land farmed by petitioner Brace is typical of that region, where poor drainage that diminishes crop productivity and yield is the norm. Similar conditions exist in portions of New York State, where *amicus* New York Farm Bureau represents over 25,000 member families. In the southwestern portion of Chautauqua County, New York, alone, hundreds of farms would be directly impacted by the court of appeals' decision, as would thousands of farms statewide. The Third Circuit's misconstruction of the CWA harshly limits the ability of Pennsylvania and New York

(continued on page 2)



I just don't understand how unelected bureaucrats and the Courts can ignore the intent of Congress or how one federal agency, the Department of Agriculture, can urge me to do something that the EPA and COE later turns around and says is so illegal as to justify fining me hundreds of thousands of dollars and ordering me to destroy the drainage system my Dad put in.



Robert Brace

farmers to use historically proven soil management practices, thereby jeopardizing their ability to meet needed levels of feed crop production and casting doubt on the economic viability of both the farms themselves and the families who operate them.

Another brief stated:

• If farmers and ranchers are subject to regulatory oversight every time they alter the mix of activities on their lands, they will not be able to manage their properties effectively, and will be exposed to the constant and paralyzing risk of bureaucratic intervention. Congress never intended to create this situation, nor did it even intend to regulate farming at all. Rather, it sought to prevent the conversion of nonfarm wetlands into agricultural or industrial uses, and to prevent the filling of wetlands by nonfarm developers or industrial concerns. By specifically exempting agriculture, Congress maintained a policy begun by the founders of the United States... keep the federal government out of regulating the day-to-day activities of agriculture.

Over 35 property rights advocacy groups also joined in a separate collective *amicus* brief prepared by Defenders of Property Rights which urged the Supreme Court to consider the "takings" and fundamental fairness issues in the case. Despite the obvious national concern over the apparent evisceration of the agricultural exemption by the Third Circuit's decision, the Supreme Court declined to review that decision.

Asked for his reaction, Mr. Brace stated: "What really bothers me is a regulatory philosophy which motivates unelected bureaucrats to employ the full might of the federal government to coerce compliance with an agency's wishes regarding how ordinary citizens use their own property. How is the average person supposed to know that his 137 acre, three generation family farm, located above the headwaters of Elk Creek, is navigable waters of the United States and that routine maintenance of farm drainage ditches is a violation of the Clean Water Act? And even if the regulators want to call my farm navigable waters, what gives them the right to make me ruin it?"

"Regrettably," Brace said "I've gotten to know the ways of the legal, legislative and judicial systems since I got into this snarl. They aren't much help to ordinary citizens like me.

The drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainages.

**Senator Muskie
(1977 Clean Water Act Debate)**

[During the 1977 debates on amendments to the Clean Water Act,] Senator Bentsen stated: 'I find it offensive that before a small farmer can dig new irrigation ditches he must first write the U.S. Army for permission, complete the necessary Federal forms, and then wait an average of 125 days while his request is shuffled from one bureaucrat's in-box to another. I also find it offensive that a farmer who has paid hard-earned money for new land 2 years ago may now be prohibited by the Government from improving that land for agriculturally productive uses, and will not receive a penny in just compensation for his loss of income from the property.' Senator Hart replied that the exemption 'does exempt activities which are normal farming or agricultural activities, run by individuals or family farmers.' Senator Hart stated that '[e]very proposal before the Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else. Any argument that is made on the floor to the contrary simply misrepresents one or the other of the proposals—upon which we will be asked to vote before this debate is over.'

As Senator Muskie, one of the principal Senate sponsors, explained, '[t]he drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainages.'

In my case, the court of appeals has required a permit for precisely the 'draining [of] poorly drained farm[land]' that Senator Muskie explained was to be exempt. I just don't understand how unelected bureaucrats and the Courts can ignore the intent of Congress or how one federal agency, the Department of Agriculture, can urge me to do something that the EPA and COE later turns around and says is so illegal as to justify fining me hundreds of thousands of dollars and ordering me to destroy the drainage system my Dad put in.

And I can't believe that the government would want or be able to put me in a regulatory Catch 22 and keep me there for nearly 10 years. My only alleged violation was that I didn't have a Corps of Engineers permit to clean sediment out of my farm drainage ditches and put it back on the farm fields from which it washed in the first place. Instead of simply ordering me to stop while I applied for a permit, the government tried to coerce me into complying with its restoration orders, thus destroying my farm I worked years to improve, under threat of enormous fines, penalties, and even jail. To make sure that citizens like me can't escape their clutches, the regulators went on to adopt a policy that they won't process permit applications when the applicant is said to be "in violation." I could never claim my farm exemption or try to get a permit once the regulators said I was in violation. What is worse, when the government issues a Notice of Violation in situations like this, there is no appeal or forum in which to claim your exemption. You have to wait for the government to sue you. In this case it took three years for the government to get around to filing suit and then three more to get to trial. And when the government finally sues, the imbalance of resources between the federal government and ordinary citizens like me is shocking. We're simply overwhelmed by raw government power."

Now that the Supreme Court has denied Mr. Brace's petition, the case will resume in the District Court which is directed to determine if civil penalties should be levied against him and to enforce the government's restoration order. Mr. Brace is conferring with his lawyers concerning the resumption of the case.

Sadly for the Brace family, wetlands reform legislation now being considered by Congress and the General Assembly of Pennsylvania is likely to come too late to save the farm and end this regulatory nightmare.