

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 90-229
)	Erie
ROBERT BRACE and)	
ROBERT BRACE FARMS, INC.,)	
a Pennsylvania Corporation,)	
)	
Defendants.)	

**DEFENDANTS' MOTION FOR STAY OF PROCEEDINGS
DURING PENDENCY OF AFTER-THE FACT
SECTION 404 PERMIT APPLICATION AND FOR
AN ORDER REQUIRING THAT THE PERMIT BE PROCESSED**

Defendants Robert Brace and Robert Brace Farms, Inc. hereby move the Court for stay of the above proceeding pending administrative review and action on the Defendants' application for an after-the-fact permit under Section 404 of the Clean Water Act, 33 U.S.C. Section 1344, and for an order compelling the Corps of Engineers, Department of the Army, to accept and process aid permit application in good faith.

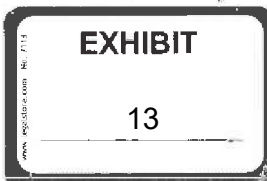
Respectfully submitted,

Henry McC. Ingram
David J. Porter

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(412) 562-1695/1318

Counsel for Defendants
Robert Brace and Robert
Brace Farms, Inc.

BN HMI595 STAY.MEM



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion for Stay of Proceedings During Pendency to File After-the-Fact Section 404 Permit Application and For An Order Requiring That the Permit Be Processed were served by United States first class mail this _____ day of _____, 1995, upon the following:

Henry Ingram

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

UNITED STATES OF AMERICA,)	
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Plaintiff,)	
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v.)	Civil Action No. 90-229
)	Erie
ROBERT BRACE and)	
ROBERT BRACE FARMS, INC.,)	
a Pennsylvania Corporation,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR LEAVE OF PROCEEDINGS
DURING PENDENCY OF AFTER-THE FACT
SECTION 404 PERMIT APPLICATION AND FOR
AN ORDER REQUIRING THAT THE PERMIT BE PROCESSED**

Defendants Robert Brace and Robert Brace Farms, Inc. submit the following memorandum in support of their Motion for Leave to File After-the-Fact Section 404 Permit Application, and for an Order Requiring That the Permit Be Processed.

BACKGROUND

Defendant Robert Brace owns and farms approximately 600 acres in Erie County, Pennsylvania, including the 140 acre Brace homestead farm in Pennsylvania. This litigation concerns Brace's use the Brace homestead farm and approximately thirty acres of jurisdictional wetlands (the "Site") located in the 140 acre farm.

Specifically, between 1977 and 1986, Brace improved an existing drainage system in order to convert the Site from its former use as cow pasture into a crop-bearing field. In 1987 and

1988, the United States Environmental Protection Agency ("EPA") issued three "cease and desist" orders to Brace, alleging violations of Section 404 of the Clean Water Act, 33 U.S.C. Section 1344, which prohibits the discharge of dredge and fill material into navigable waters of the United States, including wetlands, without a permit. Upon receipt of the "cease and desist" orders, Brace immediately stopped all farming activities on the area covered by the orders except for mowing hay.

By letter dated April 11, 1990, Brace's attorney, John D. Ward, inquired of Mr. Donald Wilson of the Monitoring and Enforcement Division, United States Army, Corps of Engineers ("COE"), as to whether COE would process and after-the-fact Section 404 permit application during the pendency of EPA's orders. Ex. A.

By letter dated May 8, 1990, Colonel Hugh F. Boyd III, informed Mr. Ward that because the United States Department of Justice was preparing to sue Brace, COE would not accept Brace's after-the-fact permit application. Ex. B.

On October 4, 1990, the United States filed suit alleging violations of the Clean Water Act and seeking a permanent injunction, restoration of the Site and civil penalties. On December 16, 1993, following a four day bench trial, Judge Mencer of this Court issued an order holding brace's activities to be exempt under section 404 and not violative of the Clean Water Act.

On November 22, 1994, the United States Court of Appeals for the Third Circuit reversed this Court and remanded the case for a determination of the appropriate penalties, if any, by order dated January 9, 1995, the Third Circuit denied Brace's Petition for Rehearing and Suggestion for Rehearing In Banc.

By order dated June 26, 1995, the Supreme Court of the United States denied Brace's Petition for Writ of Certiorari. Thus, the case is currently before this Court on remand from the United States Court of Appeals for the Third Circuit for entry of "judgment in favor of the United States and to assess upon further proceedings appropriate penalties for defendants' violations of the permit requirements, and to assess what, if any, penalties are appropriate for violations of the EPA administrative orders." U.S. v. Brace, 41 F.3d 117, 130 (3d Cir. 1994).

ARGUMENT

The Corps of Engineers' refusal in 1990 to accept and process Brace's permit application was based on 33 C.F.R. Section 326.3(e), which provides in pertinent part:

Situations where no permit application will be processed or where the acceptance of a permit application must be deferred are as follows:

(i) No permit application will be processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer.

(ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (Section 326.5(a)) until such legal action has been completed.

(iii) No permit application will be accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied.

(iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

33 C.F.R. Section 326.3(e)(iv) (emphasis added).

The Corps refused Brace's first permit application because it was aware that the United States Department of Justice as preparing to file an action to enforce EPA's administrative orders. Relying upon 33 C.F.R. Section 326.3(e)(iv), COE rebuffed Brace's application. That refusal virtually committed the parties to litigation, for it presented Brace with the stark choice of dismantling ten years worth of work or attempting to vindicate his rights in court. During the entire period of time from 1987 when the EPA and COE issued their orders, the Defendants have asserted in good faith that their activities at the Brace homestead farm were exempt from federal regulation under Section 404 of the Clean Water Act. The decision of the Court of Appeals reversing the District Courts findings and conclusions that Defendants activities were exempt and refusal by the United States Supreme Court to the decision of the Court of Appeals constitutes a final ruling that the Defendants' activities are subject to federal regulation and that any activities deemed to constitute a discharge of dredge or fill material must be authorized by a Section 404 permit. The

Defendants have need and had an opportunity to apply for such a permit.

The Corps is not precluded by any policy or regulation from accepting Brace's permit application. as provided by 33 C.F.R. Section 326.3(e)(iv), the COE district engineer may process a Section 404 permit application notwithstanding the pendency of an enforcement action brought by another Federal agency if he "determines that concurrent processing of an after-the-fact permit application is clearly appropriate."

Defendants suggest that at this stage in the proceedings, COE processing of Brace's permit application is appropriate. The issue of liability having been finally determined in the United States favor, the only issues left are the amount of Brace's penalty, if any, and the entry of a restoration order. Thus, COE's processing of Brace's permit application would not interfere with the United States' development or prosecution of its case against Brace.

The restoration order proposed by the EPA would require Brace to "plug[] with concrete all main drainage tiles at an excavated break in the pipe." Compliance with the EPA's restoration plan will disrupt and prevent adequate drainage throughout the entire Brace farm, likely giving rise to takings claim. Brace's application presents COE with an opportunity to draw this dispute to a close without ruining the Brace farm through its routine, administrative decisionmaking process. In

the interest of efficiency and administrative fairness, COE should now entertain Brace's permit application.

This Court possesses the inherent power to direct COE to accept and process Brace's permit application. Link v. Wabash Railroad Co., 370 U.S. 626, 630 (1962); Eash v. Riggins Trucking Inc., 757 F.2d 557 (3rd Cir. 1985) (discussing the inherent power of federal courts); U.S. v. Boccanfuso, 695 F. Supp. 693, 700 (D. Conn. 1988) (court ordered COE to allow property owner to submit an after-the-fact permit application). Defendants respectfully submit that this case is now in the appropriate posture for the Court to exercise that power in the interest of the "just, speedy, and inexpensive determination" of this action. Fed. R. Civ. P. 1.

In conclusion, defendants respectfully request an order from the Court granting a stay of the above proceedings during the pendency of defendants after-the-fact Section 404 permit application with COE, and compelling COE to accept and process said application in good faith.

Respectfully submitted,

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Counsel for Defendants
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CERTIFICATE OF SERVICE

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Henry Ingram