

# DUCKING THE TRUTH ABOUT THE GREAT ‘COMMENCED CONVERSION’ CONSPIRACY AGAINST AMERICA’S FARMERS

This article is intended to document for the historical record the previously undisclosed well-choreographed efforts of federal agency and congressional officials and government-funded environmental groups to prevent and reverse USDA-determined and authorized "commenced conversions" of wetlands to farmlands entitled to but not requiring cost-sharing under the Food Security Act of 1985, that were subsequently (in 1993) grandfathered retroactively as an exclusion from the definition of "Waters of the United States" found in Clean Water Act Section 404, and consequently, from federal agency wetlands jurisdiction. This ad hoc "partnership" arose following the heated debates within Congress over the 1977 Clean Water Act amendments, and amid the ensuing jurisdictional battles taking place during the Reagan, Bush and Clinton administrations between and among several federal agencies (the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Department of Interior Fish & Wildlife Service, and U.S. Department of Agriculture).

## I. BACKGROUND

Erie, Pennsylvania farmer, Robert Brace, was among a select group of American farmers who, before the end of September 1988, had vigilantly secured a coveted prior "commenced conversion" ("CC") determination with respect to portions of two of his farm fields from the U.S. Department of Agriculture's Agricultural Stabilization and Conservation Service ("USDA-ASCS").<sup>1</sup>

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<sup>1</sup> See Lawrence A. Kogan, *Attorney clarifies Brace's wetlands case against EPA*, AMERICAN AGRICULTURALIST (Dec. 14, 2017), <http://www.americanagriculturalist.com/epa/attorney-clarifies-brace-s-wetlands-case-against-epa>; Lawrence A. Kogan, *When Assessing Burdens for Farmers, Other Landowners, White House Shouldn't Duck Overhaul of Wetlands Regulatory Juggernaut*, THE WLF LEGAL PULSE (Feb. 9, 2018), <https://wlflegalpulse.com/2018/02/09/when-assessing-burdens-for-farmers-other-landowners-white-house-shouldnt-duck-overhaul-of-wetlands-regulatory-juggernaut/>; The Kogan Law Group, P.C., Press Release - *30-Year-Old EPA Wetlands Case Takes Favorable Turn for Aggrieved Pennsylvania Farmer* (July 12, 2017), <https://www.pr.com/press-release/723108>; Lawrence A. Kogan, *Update: Justice May Yet be Served in 30-Year-Old EPA Wetlands Case Against Small Erie, PA Farmer*, WLF LEGAL PULSE (July 11, 2017),

The official CC designation rendered the conversion of these designated fields from pastured wetlands to croplands eligible to receive USDA program funding pursuant to the exemption (from USDA financial program benefit ineligibility) available under the Food Security Act of 1985 (“FSA”),<sup>2</sup> as if USDA had designated those CC fields as “prior converted” (“PC”) croplands.<sup>3</sup>

The official CC designation evidenced that Mr. Brace had, consistent with the FSA and then-applicable regulations,<sup>4</sup> provided sufficient documentation to show that he had, prior to December 23, 1985, both actually physically commenced and committed substantial financial funds toward the conversion from pastured wetlands to croplands of portions of two farm fields situated within two of three contiguous and adjacent farm tracts comprising his 157-acre hydrologically integrated farm located in Waterford Township, PA. For these purposes, permissible conversion activities included the excavating and dredging, clearing, leveling, draining and filling, etc. of dikes and ditches in wetlands so as to impair or reduce the flow, circulation or reach of water.<sup>5</sup>

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<https://wfllegalpulse.com/2017/07/11/update-justice-may-yet-be-served-in-30-year-old-epa-wetlands-case-against-small-erie-pa-farmer/>; Lawrence A. Kogan, *US Food Security and Farmers’ Livelihoods at Stake in “Waters of the US” Rule Rewrite*, THE WLF LEGAL PULSE (Apr. 20, 2017), <https://wfllegalpulse.com/2017/04/20/us-food-security-and-farmers-livelihoods-at-stake-in-waters-of-the-us-rule-rewrite/>; Lawrence A. Kogan, *EPA Disregard for “WOTUS” Prior Converted Cropland Exclusion Kills Ag Jobs and Contributes to Nation*, CANADA FREE PRESS (Apr. 29, 2017), <http://canadafreepress.com/article/epa-disregard-for-wotus-prior-converted-cropland-exclusion-kills-ag-jobs-an>.

<sup>2</sup> See Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 1507-1508 (Dec. 23, 1985); (16 U.S.C. §3822 (a)(1) (2018)– “The Food Security Act of 1985 (‘FSA’),” specifically, FSA Secs. 1221 and 1222(a)(1); See also Food, Agriculture, Conservation, and Trade Act of 1990, Pub.L. No. 101-624, 104 Stat. 3359, 3572-3573 (Nov. 28, 1990) – the “Food, Agriculture, Conservation, and Trade Act of 1990,” Secs. 1421(b) and 1422(b) amending FSA Secs. 1221 and 1222; Federal Agriculture Improvement and Reform Act of 1996, Pub.L. No.104-127, 110 Stat. 888, 987-989 (April 4, 1996) - the “Federal Agriculture Improvement and Reform Act of 1996,” Secs. 321 and 322 amending FSA Secs. 1221 and 1222, as previously amended.

<sup>3</sup> See 7 C.F.R. § 12.5(d)(1)(i)(2018); 52 FR 35194, 35203 (Sept. 17, 1987) (“A person shall not be determined to be ineligible for program benefits under [Sec.] 12.4 as the result of the production of an agricultural commodity on: (i) Converted wetland if the conversion of such wetland was commenced or completed before December 23, 1985” (emphasis added). See also Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 1508 (Dec. 23, 1985), FSA Sec. 1222(a)(1).

<sup>4</sup> See 7 C.F.R. § 12.5(d)(1)(i)(2018); 52 FR 35194, 35203 (Sept. 17, 1987); 7 C.F.R. § 12.5(d)(5)(iv)(2018); 52 FR 35194, 35203-35204.

<sup>5</sup> See Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 1504 (Dec. 23, 1985), FSA Sec. 1201(4)(A); 7 C.F.R. § 12.2(a)(6) (2018); Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. 35194, 35201 (Sept. 17, 1987).

The application of these FSA statutory provisions and corresponding USDA implementing regulations, and of subsequent Clean Water Act (“CWA”) regulations the U.S. Army Corps of Engineers (“Corps”) issued in September 1990<sup>6</sup> and the Corps and the Environmental Protection Agency (“EPA”) jointly issued in August 1993<sup>7</sup> with retroactive effect to the FSA’s enactment date (December 23, 1985), also rendered the official USDA-ASCS CC designation of those portions of Mr. Brace’s two fields presumptively eligible for the exclusion from “waters of the United States” definition, and consequently, from CWA Section 404 jurisdiction, as if USDA had designated such CC fields as PC croplands.<sup>8</sup> Mr. Brace’s CC determination had qualified for this exclusion, at least, until the government was able to affirmatively show that he had not “actively pursued” and completed his “commenced conversion” within the FSA regulation’s prescribed 10-year period (on or before January 1, 1995)<sup>9</sup> (i.e., he had “abandoned” said conversion<sup>10</sup>) due to circumstances *other than* those beyond Mr. Brace’s control.<sup>11</sup>

The evidence to-date reveals, however, that EPA and the Corps, led by the U.S. Fish & Wildlife Service (“USFWS”) Pennsylvania Field Office (within

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<sup>6</sup> See Patrick J. Kelly, *Regulatory Guidance Letter 90-07 SUBJECT: Clarification of the Phase “Normal Circumstances” as it Pertains to Cropped Wetlands*, U.S. ARMY CORPS OF ENGINEERS (Sept. 26, 1990),

<http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl90-07.pdf>.

<sup>7</sup> See Clean Water Regulator Programs, 58 Fed. Reg. 45008-01, 45031-45033, 45036-45037 (Aug. 25, 1993) (codified at 33 C.F.R. 328.3(a)(8) (1993) (Corps) and 40 C.F.R. 230.3 (1993) (EPA). These regulatory provisions have since been recodified as part of the Obama administration’s controversial “Waters of the United States” regulation. See 33 C.F.R.328.3(b)(2) (2015) (Corps) and 40 C.F.R. 230.3(o)(2)(ii) (2015) (EPA). This regulation is currently being revised by the Trump administration. See *Definition of Waters of the United States Under the Clean Water Act - Current Implementation of Waters of the United States*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY SECTION 404 OF THE CLEAN WATER ACT, <https://www.epa.gov/cwa-404/definition-waters-united-states-under-clean-water-act>.

<sup>8</sup> See Kogan, *US Food Security and Farmers’ Livelihoods at Stake in “Waters of the US” Rule Rewrite*, *supra* at note 2; Kogan, *Update: Justice May Yet be Served in 30-Year-Old EPA Wetlands Case Against Small Erie, PA Farmer*, *supra* at note 2.

<sup>9</sup> See Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. 35194-01, 35204 (Sept. 17, 1987) (to be codified as 7 C.F.R. 12.5(d)(5)(iii)).

<sup>10</sup> See Kelly, *supra* at note 7; Clean Water Regulator Programs, 58 Fed. Reg. 45008-01, 45033-45034 (Aug. 25, 1993) (to be codified at 40 C.F.R. 230.3).

<sup>11</sup> See Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. 35194-01, 35203-35204 (Sept. 17, 1987) (to be codified as 7 C.F.R. 12.5(d)(5)(ii)); 7 CFR 12.33(b), 52 FR 35194, 35208; See also P.L. 104-127 (110 Stat. 888, 988-989) (April 4, 1996), Secs. 322(b)(1)(A) and 322(b)(2)(G)(i)-(iii).

Region 5),<sup>12</sup> intentionally interfered with,<sup>13</sup> actively contested<sup>14</sup> “on “relevance grounds,”<sup>15</sup> and then disregarded<sup>16</sup> the Erie County USDA-ASCS Committee’s CC determination for portions of the two prior commenced-converted Brace farm fields in question.<sup>17</sup> These Federal agencies also failed to affirmatively establish that Mr. Brace had not completed (i.e., abandoned) the conversion of those fields before the expiration of the FSA regulation’s prescribed window due to circumstances other than those beyond his control. Presumably, senior local FWS officials had acted aggressively against Mr. Brace based on their overbroad reading of the FWS’ “consultative” role under the FSA<sup>18</sup> which

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<sup>12</sup> See U.S. FISH AND WILDLIFE SERVICE PENNSYLVANIA FIELD OFFICE, <https://www.fws.gov/northeast/pafo>.

<sup>13</sup> See Letter from David J. Putnam, Fish and Wildlife Biologist, to James Butch, Environmental Protection Agency (Feb. 2, 1989) <http://nebula.wsimg.com/193adabc9f8ed5852980ccf1156c5d5a?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.; Defendants’ Memorandum of Law in Support of Motion for Relief from Judgment Based on Extraordinary Circumstances, *United States v. Brace*, No. 90-0029 (W.D. Pa. Apr. 24, 2018) [hereinafter Defendants’ Memorandum], ECF No.221-21.

<sup>14</sup> See also Letter from Joseph Burawa, Exec. Director, Erie County ASC Committee, to Robert H. Brace (Sept. 21, 1988) <http://nebula.wsimg.com/b1f1e386021bf33721baaa26d2f0aee9?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.; Defendants’ Memorandum, ECF No. 221; United States Department of Agriculture, Agricultural Stabilization and Conservation Service, Erie County ASCS Office, Letter Correspondence from Carroll S. Lesik, County Exec. Dir. to David Putnam, U.S. Department of Interior Fish & Wildlife Service (1/19/89); United States Department of the Interior Fish and Wildlife Service, Letter Correspondence from Edward Perry, Acting Supervisor, to Carroll S. Lesik, County Exec. Dir. USDA-ASCS (2/7/89); Erie County ASCS Committee Minutes of Meeting of February 8, 1989 (2/9/89), at Sec. 5.E.

<sup>15</sup> Defendants’ Memorandum, ECF No. 221 at 24; ECF No. 221-11 at 17.

<sup>16</sup> See Kogan, *EPA Disregard for “WOTUS” Prior Converted Cropland Exclusion Kills Ag Jobs and Contributes to Nation*, *supra* at note 2.

<sup>17</sup> See *Highly Erodible Land and Wetland Conservation Certification* (9-7-88); *Data Needed for Swampbuster Commenced and Third-Party Determinations* (8-31-88); *Highly Erodible Land and Wetland Conservation Determination* (and accompanying map) (9-15-88), EXECUTED FORMS AD-1026, <https://nebula.wsimg.com/01fc8086088f602011be83939d257cb4?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

<sup>18</sup> See P.L. 99-198 (99 Stat. 1354, 1508) (Dec. 23, 1985), FSA Sec. 1223(2) (16 U.S.C. 3823(2)) (directing the Agriculture Secretary to consult with the Interior Secretary on the determination of exemptions under FSA Section 1222, an authority which 7 C.F.R. § 12.6(b)(5) had subsequently delegated from the Agriculture Secretary to the ASCS and from the Interior Secretary to FWS.) See also 52 FR 35194, 35204 (Sept. 17, 1987).

could not have been legitimately construed as legally binding on the local USDA-ASCS Committee.<sup>19</sup>

As will be discussed below in much greater detail, newly revealed historical evidence clearly shows how the USFWS, during approximately the same time period in the 1980s, also had interfered with local USDA-ASCS Executive Committee commenced conversion (“CC”) determinations in Minnesota, North Dakota and South Dakota. Such evidence documents the extent to which senior USFWS officials had worked with prominent third-party nongovernmental environmental and wildlife extremist groups, including National Wildlife Federation (“NWF”), Environmental Defense Fund (“EDF”) and Natural Resources Defense Council (“NRDC”), and special interest groups such as Ducks Unlimited, Inc. to ensure the reversal of such USDA-ASCS CC determinations.

The government subsequently brought an action against Mr. Brace in the United States District Court for the Western District of Pennsylvania for violation of CWA Sections 404 and 301 in October 1990. It alleged that Mr. Brace’s prior commenced conversion of previously pastured wetlands into croplands had resulted in an unauthorized discharge of “fill” into wetlands that destroyed the habitat of North American migratory birds and the quality of wetland waters,<sup>20</sup> despite what some observers have since described as a “beautiful” and “picturesque” landscape “pulled from a postcard.”<sup>21</sup>

The Brace Waterford, PA farm has remained under a cloak of litigation<sup>22</sup> for approximately 31 years. Most recently, the Environmental and Natural Resource Division of the U.S. Department of Justice (“DOJ-ENRD”) filed two new actions, on January 9, 2017, only eleven (11) days prior to President

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<sup>19</sup> See Defendants’ Memorandum], ECF No. 221 at 19. (“Even if the FSA implementing regulations (7 C.F.R. § 12.6(b)(3)(viii) and 7.F.R. § 12.6(b)(5), respectively,) had charged the ASCS with determining whether Defendants’ fields qualified as a pre-12-23-85 commenced conversion, and also had required the ASCS to consult with FWS on that commenced conversion determination, FWS could not have reasonably and legitimately construed its consultative status as requiring the ASCS Erie County Executive Committee to render FWS’ preferred determination in this matter if the Committee otherwise had sufficient grounds to reach the determination it had made. Hence, it was ASCS’ and not FWS’ legal responsibility under the FSA and federal implementing regulations to determine whether the conversion of Defendants’ Murphy and Marsh Farm tracts had been commenced before December 23, 1985.”).

<sup>20</sup> See Complaint, United States v. Brace, No. 90-0029 (W.D. Pa. Apr. 24, 2018) [hereinafter Complaint], ECF No. 214-14.

<sup>21</sup> See Chris Bennett, *Blood And Dirt: A Farmer’s 30-Year Fight With The Feds*, AGWEB FARM JOURNAL (May 16, 2018), <https://www.agweb.com/article/blood-and-dirt-a-farmers-30-year-fight-with-the-feds>.

<sup>22</sup> See *United States v. Brace - Brief Summary* (WDPa 2017), available at: <https://nebula.wsimg.com/88e02bc126e19c1928175c26d76f81f9?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

Donald Trump's inauguration. The first action, covering a portion of one of the two prior commenced converted fields, was brought to enforce an allegedly violated consent decree<sup>23</sup> the parties had executed in July 1996 and the Court had entered as a judgment in September 1996.<sup>24</sup> The second action assumed the form of a newly filed complaint covering a portion of the second prior commenced converted field located no more than forty (40) feet from the first such field. It alleged violations of CWA Sections 404 and 301.<sup>25</sup> Both new actions, at least, until recently, completely ignored the ongoing presumptive PC status of Mr. Brace's authorized CC under the statutory and regulatory exclusions discussed above, the steady disclosure of new information resulting from extended discovery<sup>26</sup> undertaken notwithstanding considerable government opposition,<sup>27</sup> and the Brace's subsequent filing of an administrative countersuit.<sup>28</sup> If, however, the government's most recent filings in the 1990 action (seeking additional discovery *and* additional time to reply to<sup>29</sup> Mr. Brace's response to the United States' second motion to enforce the 1996 consent decree and related Federal Rule of Civil Procedure ("FRCP") 60(b) motions containing new facts and law), and the government's most recent motion in the 2017 action (seeking a partial judgment on the pleadings) are any indication, the government may have finally taken note of the potential legal implications of the prior commenced conversion determination that Mr. Brace had secured from USDA-ASCS.<sup>30</sup>

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<sup>23</sup> See United States' Motion to Enforce Consent Decree and For Stipulated Penalties, *United States v. Brace*, No. 90-0029 (W.D. Pa. Apr. 24, 2018) [hereinafter Motion to Enforce Consent Decree], ECF No. 82; United States' Second Motion to Enforce Consent Decree and for Stipulated Penalties, *United States v. Brace*, No. 90-0029 (W.D. Pa. Apr. 24, 2018) [hereinafter Second Motion to Enforce Consent Decree], ECF No. 206.

<sup>24</sup> See Defendants' Motion to Vacate Consent Decree, Ex. 1, *United States v. Brace*, No. 90-0029 (W.D. Pa. Apr. 24, 2018), ECF 215-1.

<sup>25</sup> See Complaint, ECF No. 1.

<sup>26</sup> See *United States v. Brace*, No. 90-0029 (W.D. Pa. Apr. 24, 2018), ECF No. 203.

<sup>27</sup> See *Brace Wins Battle Against U.S. Government Effort to Shut Down Discovery in 30-Year Old Prior Converted Cropland/Clean Water Act Wetlands Case*, NEBULA.WSIMG,

<https://nebula.wsimg.com/0ba88023faa6b25a391dfe6ef1e42b40?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

<sup>28</sup> See Kogan, Press Release - *30-Year-Old EPA Wetlands Case Takes Favorable Turn for Aggrieved Pennsylvania Farmer*, *supra* note 2.

<sup>29</sup> See *United States v. Brace*, No. 90-0029 (W.D. Pa. Apr. 24, 2018).

<sup>30</sup> *Id.*

## II. THE LEGISLATIVE HISTORY, STATUTORY/REGULATORY SCHEME AND AGENCY GUIDANCE RE PRIOR COMMENCED CONVERSIONS

### A. Overview

The Food Security Act of 1985 (“FSA”) “was the first [federal] statute to [codify the term] ‘wetland’ using explicit terms and requirements.<sup>31</sup> By comparison, the Clean Water Act (“CWA”) amendments of 1977 used the term ‘wetland’ only “in addressing the potential delegation to the states of administration of the Section 404 program. ‘The result of this legislative process was to leave the section 404 program substantially intact and to give the administering agencies little new guidance for the definition of wetlands.’”<sup>32</sup>

The FSA also was the first federal statute to “require[] agricultural producers to protect wetlands on the farms they own or operate in order to be eligible for USDA farm program benefits.”<sup>33</sup> The FSA conditioned eligibility for USDA farm benefits, first, on producers not “converting” a wetland, and second, on producers securing an exemption for the conversion activity that qualified it as either commenced or completed prior to December 23, 1985.<sup>34</sup>

From the FSA’s enactment on December 23, 1985, FSA Section 1221(1) (16 U.S.C. § 3821(1)) “was used to determine when a wetland was actually ‘converted.’”<sup>35</sup> A wetland was found to have actually been converted if an agricultural commodity was produced thereon. And from the enactment date of the Food, Agriculture, Conservation, and Trade Act of 1990 (“FACTA”) (11-28-90)<sup>36</sup> which amended the FSA, new FSA Section 1221(b) (16 U.S.C. § 3821(b) “[was] used to determine when a wetland [was] deemed ‘converted.’”<sup>37</sup> A deemed conversion of a wetland had been found to occur if the conversion was undertaken “for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such

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<sup>31</sup> See Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act’s ‘Swampbuster’ Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 Harv. Envtl. L. Rev. 201, 226, 232 (1987)

<http://nebula.wsimg.com/1d272cdacba0424f33485130b7b9b7de?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; United States v. Brace, *supra* note 30, ECF No. 221 at 38; ECF No. 221-71 at 226, 232.

<sup>32</sup> 21 Harv. Envtl. L. Rev. at 226; ECF No. 221-71 at 226.

<sup>33</sup> 21 Harv. Envtl. L. Rev. at 231; ECF No. 221-71 at 231.

<sup>34</sup> 21 Harv. Envtl. L. Rev. at 232-233; ECF No. 221-71 at 232-233.

<sup>35</sup> 21 Harv. Envtl. L. Rev. at 231; ECF No. 221-71 at 231; *See also* P.L. 99-198, 99 Stat 1354, 1507 (1985), at 16 U.S.C. 3821(1).

<sup>36</sup> *See* P.L. 101-624, 104 Stat. 3359, 3572 (Nov. 28, 1990).

<sup>37</sup> 21 Harv. Envtl. L. Rev. at 233; ECF No. at 233.

converted wetland;” i.e., “when an agricultural commodity could be produced on it, even if the commodity ha[d] not yet been produced.”<sup>38</sup>

### B. *Converted Wetland*

Consistent therewith, original FSA Section 1201(a)(4)(A) (16 U.S.C. § 3801(a)(4)(A)) defined the term “converted wetland” (“CW”) as:

[W]etland that has been drained dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) *for the purpose or to have the effect of making the production of an agricultural commodity possible* if – (i) such production would not have been possible but for such action; and (ii) before such action (I) such land was wetland; and (II) such land was neither highly erodible nor highly erodible cropland. (emphasis added).<sup>39</sup>

The legislative history surrounding the definition of CW supports the FSA text. Conference Committee Report 99-447 accompanying House bill H.R. 2100 stated as follows:

The *House* bill defines the term ‘converted wetland’ to mean wetland that has been converted by certain activity making the production of agricultural commodities possible that would not have been possible but for such activity and that, before such activity was taken, was wetland and not highly erodible land nor highly erodible cropland with several exemptions listed. (Sec.1201(4).) The *Senate* amendment is comparable with respect to ‘converted wetland’ except that it does not apply to highly erodible cropland (Sec. 1601(a)(4)(A), and though the exemptions are similar they are stated differently. The *Conference* substitute adopts the *House* provision. (italicized emphasis in original; underlined emphasis added).<sup>40</sup>

As the Preamble to the interim USDA regulations implementing FSA Section 1201(a)(4)(A) indicates, interim 7 C.F.R. § 12.2(a)(6) and 7 C.F.R. § 12.32(a) adopted the same definition of CW as Congress included in the statute:

Section 1201(a)(4) of the Act defines converted wetland as wetland that has been drained, dredged, filled, leveled or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) *for the purpose or to have the effect of making the production of an agricultural commodity possible* if such production would not have

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<sup>38</sup> 21 Harv. Envtl. L. Rev. at 233; ECF No. at 233.

<sup>39</sup> See Food Security Act Section 1201(a)(4)(A) (16 U.S.C. § 3801(a)(4)(A)).

<sup>40</sup> See H.R. Conf. Rept. 99-447, Food Security Act of 1985, accompanying H.R. 2100, 99<sup>th</sup> Cong., 1st Sess. (Dec. 17, 1985) at 454-455, in *United States v. Brace*, Civil Action No. 90-0029 (W.D.Pa.); ECF No. 221 at 39; ECF No. 221-72.



been possible for such action, and before such action, such land was wetland and such land was neither highly erodible land nor highly erodible cropland. Section 12.32(a) of the interim rule provides that a wetland shall be determined to have been drained, dredged, filled, level, or otherwise manipulated for the purpose of making the production of an agricultural commodity possible if: (1) one or more of the hydric soils criteria of such wetland has been removed *or* (2) the hydrophytic vegetation on such wetland has been removed or destroyed. [...] SCS will determine the prevalence of hydrophytic vegetation as it existed prior to the alteration based upon the occurrence of such vegetation typically found on the same soil map unit in the local area. (emphasis added).<sup>41</sup>

Apparently, bowing to substantial political pressure from environmental and wildlife activist groups, final FSA-implementing regulations issued during September 1987 revised the definition of “converted wetland” contained in the interim regulations. This revision arguably went beyond the text of FSA Section 1201(a)(4)(A) to place an apparent limitation on the scope and duration of the manipulations needed to convert a wetland. The final regulations stated that a wetland shall be considered a “converted wetland” when it:

[h]as been drained, dredged, filled, leveled or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity *without further application of the manipulations described herein* if (i) such production would not have been possible but for such action; and (ii) before such action such land was wetland and was neither highly erodible land nor highly erodible cropland. (emphasis added).<sup>42</sup>

The final USDA regulations also required the USDA-SCS to make the CW determination.<sup>43</sup>

### C. *Prior Commenced Conversion (“CC”)*

Original FSA Section 1222(a)(1) (1985) and new FSA Section 1222(b)(1)(A) amended/added by FACTA (1990)<sup>44</sup> exempted farmers from becoming ineligible to receive USDA farm program benefits “if

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<sup>41</sup> See 51 Fed. Reg. 23496, 23499 (June 27, 1986) and interim 7 C.F.R. § 12.2(a)(6) and 7 C.F.R. § 12.32(a) in *United States v. Brace*, Civil Action No. 90-0029 (W.D.Pa.), ECF 221; ECF No. 221-273.

<sup>42</sup> See 52 Fed. Reg. 35194, 35197 (Sept. 17, 1987) in *United States v. Brace*, Civil Action No. 90-0029 (W.D.Pa.); ECF No. 221 at 40-41; ECF No. 221-7.

<sup>43</sup> See 7 C.F.R. § 12.6(c)(2)(i).

<sup>44</sup> P.L. 101-624, 104 Stat. 3573.

the conversion of such wetland was commenced before the date of enactment of this Act” (emphasis added).

The pre-enactment legislative history surrounding the FSA’s ‘commenced conversion’ exemption provision is contained in the Congressional Record and Conference Report accompanying House bill H.R. 2100. The Congressional Record for December 17, 1985, indicates that the House of Representatives had preferred that only “completed conversions” qualified for such exemption, while the Senate had preferred that “commenced conversions” should qualify for it.<sup>45</sup> The Conference Committee reconciled this difference between the House and Senate versions by adopting the Senate’s broader commenced conversion preference, as was ultimately reflected in the FSA’s statutory text noted above.<sup>46</sup>

The Preamble to and Section 12.5(d)(1)(i) of the interim FSA-implementing regulations issued during June 1986 restated the Senate’s preference the Conference Committee had adopted that is contained in FSA Section 1222(a)(1), i.e., that wetland conversions commencing pre-December 23, 1985, remained eligible for USDA farm program benefits.<sup>47</sup> Section 1222(a) of the Act provides, in part:

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<sup>45</sup> See 131 Cong. Rec. (Dec. 17, 1987), at H12380, in *United States v. Brace*, Civil Action No. 90-0029 (W.D.Pa.), ECF No. 221 at 42, ECF No. 221-74. (“(7) *Exemption for wetland (Sec. 1222)(a)* The House bill exempts converted wetland from the program ineligibility provision of section 1202 if the land became converted wetland before the date of enactment of the bill. (Sec. 1203(a)(6). The Senate amendment exempts converted wetland if the conversion of the wetland was commenced before the date of enactment of the bill. (Sec. 1622(a)(1). The Conference substitute adopts the Senate amendment. The Conferees intend that conversion of wetland is considered to ‘commenced’ when a person has obligated funds or begun actual modification of the wetland” (italicized emphasis in original; underlined emphasis added).

<sup>46</sup> See H.R. Conf. Rept. 99-447, Food Security Act of 1985, accompanying H.R. 2100, 99<sup>th</sup> Cong., 1st Sess. (Dec. 17, 1985) at 460, in *United States v. Brace*, Civil Action No. 90-0029 (W.D.Pa.); ECF No. 221 at 43; ECF No. 221-272. (“(7) *Exemption for wetland (Sec. 1222)(a)* The House bill exempts converted wetland from the program ineligibility provision of section 1202 if the land became converted wetland before the date of enactment of the bill. (Sec. 1203(a)(6).) The Senate amendment exempts converted wetland if the conversion of the wetland was commenced before the date of enactment of the bill. (Sec. 1622(a)(1).) The Conference substitute adopts the Senate amendment. The Conferees intend that conversion of wetland is considered to be “commenced” when a person has obligated funds or begun actual modification of the wetland” (italicized emphasis in original; underlined emphasis added).

<sup>47</sup> See 51 Fed. Reg. 23496, 23500 (June 27, 1986) and interim 7 C.F.R. § 12.5(d)(1)(i) and (2)), in *United States v. Brace*, Civil Action No. 90-0029 (W.D.Pa.), ECF 221, *supra* at note 43; ECF No. 221-73.

[N]o person shall become ineligible under the wetland conservation provisions for program benefits as the result of the production of a crop of an agricultural commodity on converted wetland *if the conversion of such wetland was **commenced** before the date of enactment of the Act (December 23, 1985)*. It has been determined that a person shall be considered to have **commenced** the conversion of a wetland by December 23, 1985, if, prior to December 23, 1985, such person: (1) Began substantial earth moving for the purpose of draining the wetland or (2) legally and financially committed substantial funds, by entering into a contract for earth moving, or otherwise, for the purpose of draining the wetland. The Department shall determine the amount of land which is exempt under this provision based upon the amount of land which would be drained by the earth moving required in the contract or, if there is no contract, which would be drained by the earth moving which had begun prior to December 23, 1985. (emphasis added).<sup>48</sup>

Under the USDA interim regulations, farmland on which commodity crops were produced after December 23, 1985 would still be considered as meeting the “commenced conversion” standard if the crops had been planted thereon during the period spanning December 23, 1985 and June 27, 1986 (the interim regulation’s effective date).<sup>49</sup>

USDA final regulations<sup>50</sup> revised and elaborated upon the definition of “commenced conversion” set forth in the interim regulations inter alia by imposing a limitation on the amount of time that may be taken to complete a commenced conversion. The Preamble to the final regulation stated as follows:

USDA has revised the definition of ‘commenced’ in § 12.5(d)(3) and (4) of the final rule to clarify *what constitutes commencement of conversion prior to December 23, 1985* and to assure that commencement of conversion determinations are based on *one or more* of the following criteria: (1) the conversion activity was actually started before December 23, 1985; *or* (2) the person expended or committed substantial funds by entering into a contract for the installation of a drainage activity or for construction supplies and materials for the conversion prior to December 23, 1985. The final rule also provides that a person seeking a determination of conversion commencement under this exemption *must request the determination within one year following publication of this rule*, must demonstrate that the conversion of the wetland has been actively pursued and *must complete the conversion by January 1, 1995* (emphasis added).<sup>51</sup>

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<sup>48</sup> 51 Fed. Reg. at 23500.

<sup>49</sup> 51 Fed. Reg. at 23501 (Sept. 17, 1987).

<sup>50</sup> See 52 Fed. Reg. 35194, 35197 (Sept. 17, 1987) in *United States v. Brace*, Civil Action No. 90-0029 (W.D.Pa.), ECF No. 221 at 44, ECF No. 221-7, *supra*, and final 7 C.F.R. § 12.5(d)(3)-(4)). 7 C.F.R. § 12.5(d)(3).

<sup>51</sup> 52 Fed. Reg. at 35197; final 7 C.F.R. § 12.5(d)(3) (2015); 7 C.F.R. § 12.5(d)(5)(iii) (2015).

7 C.F.R. § 12.5(d)(3) of the final regulations stated that a wetland conversion would be considered “commenced” prior to December 23, 1985:

[I]f before such date: (i) *Any of the activities described in § 12.2(a)(6) were actually started on the wetland; or (ii) The person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland (emphasis added).*<sup>52</sup>

Clearly, the final regulations tied the USDA-ASCS determination of a pre-12-23-85 “commenced conversion”<sup>53</sup> to the date on which any of the activities ultimately resulting in a USDA-SCS converted wetland (“CW”) determination<sup>54</sup> (as discussed above) had been initiated.

The Preamble<sup>55</sup> to and 7 C.F.R. § 12.5(d)((5)(ii)-(iii) of the final regulations also stated that a commenced conversion must be “actively pursued” from the time of initiation,<sup>56</sup> and that, in any event, a commenced conversion must be completed on or before January 1, 1995.<sup>57</sup> Active pursuit of the conversion meant that:

[E]fforts toward the completion of the conversion activity have continued on a regular basis since initiation of the conversion, except for delays due to circumstances beyond the person’s control.<sup>58</sup>

It is reasonable to conclude, based on a plain reading of the “actively pursued” requirement, that a federal agency’s and/or third party’s intentional disruption of a USDA-ASCS prior commenced conversion determination, as had occurred in the Brace case and the in cases involving farmers in the Midwest and Great Plains regions discussed below, would qualify as a “delay due to circumstances beyond the person’s control” within the meaning of the final USDA regulations.

#### *D. Completed Conversion/Prior Converted Cropland (“PC”)*

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<sup>52</sup> 52 Fed. Reg. at 35203; final 7 C.F.R. § 12.5(d)(3) (2015).

<sup>53</sup> 7 C.F.R. § 12.6(b)(3)(viii) (2015).

<sup>54</sup> 7 C.F.R. § 12.6(c)(2)(i) (2015).

<sup>55</sup> 52 Fed. Reg. at 35197 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12).

<sup>56</sup> 7 C.F.R. § 12.5(d)((5)(ii) (2015).

<sup>57</sup> 7 C.F.R. § 12.5(d)(5)(iii) (2015); 52 Fed. Reg. 35203-35204 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12).

<sup>58</sup> 7 C.F.R. § 12.5(d)((5)(ii) (2015).

It may be recalled from the Conference Committee Report accompanying H.R. 2100 (enacted as the FSA) that the Committee had rejected the House preference that only “completed conversions” should be eligible for farm program benefits. Nevertheless, the final regulations added the new concept of “prior converted cropland” (“PC” – i.e., a conversion completed before December 23, 1985).

With regard to wetlands converted prior to the effective date of the Act, § 12.5(d)(2) was added to the final rule to make clear that determinations regarding whether the conversion of wetland was completed prior to December 23, 1985 will be based upon consideration of the types of activities set forth in the definition of what constitutes a ‘converted wetland.’ Section 12.5(d)(1)(i) of the final rule makes it clear that *wetlands converted prior to December 23, 1985 are exempted from the rule by the law. Therefore, those converted wetlands may be improved by additional drainage, provided that no additional wetland or abandoned converted wetland is brought into production of an agricultural commodity.*<sup>59</sup> (emphasis added).

USDA justified its addition of this new concept as follows:

Section 12.5(d)(1)(i) has been revised to clarify that the production of agricultural commodities on converted wetlands is exempt if the conversion was commenced or completed prior to December 23, 1985. *This change implements the intent of Congress to exempt the production of agricultural commodities on converted wetlands if conversion was completed prior to December 23, 1985, as well as on converted wetlands where the conversion was commenced prior to December 23, 1985* (emphasis added).

It would appear the USDA had quite broadly interpreted the Conference Committee’s earlier rejection of rendering only completed conversions eligible for farm program benefits as indicating its desire that both completed and commenced conversions remain eligible for such benefits.

7 C.F.R. § 12.5(d)(2) further elaborated on the new term pre-12-23-85 “completed conversion.” It provided:

The *conversion* of a wetland, for purposes of this section, is considered to have been *completed* before December 23, 1985 if before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible without further manipulation described

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<sup>59</sup> 52 Fed. Reg. 35197 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12); 7 C.F.R. § 12.5(d)(2) (2015).

*herein* where such production on the wetland would not otherwise have been possible (emphasis added).<sup>60</sup>

In summary, the final regulation's introduction of the new term "prior converted cropland" ("PC") is best understood as relating to the final regulation's revision of the term "converted wetland" ("CW"), since neither term was included in the FSA's original text. These changes were arguably attributable to the considerable political pressure the USDA encountered from environmental and wildlife activist groups during the drafting of both the interim and final regulations.<sup>61</sup>

*E. 1990 Corps Regulatory Guidance – P.C. v Farmed Wetlands – Narrowly Referencing USDA NFSAM*

During September 1990, approximately one month prior to the United States' filing of the original complaint in the Brace case, the Corps issued Regulatory Guidance 90-07.<sup>62</sup> RGL 90-07 distinguished the normal circumstances of wetlands subject to pre-December 23, 1985, completed conversions (identified as "prior converted croplands") citing Section 512.15 of the National Food Security Manual ("NFSAM"), from the normal circumstances of "farmed wetlands" citing Section 512.35 of the NFSAM.<sup>63</sup> USDA regulations defined "normal circumstances" as "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed."<sup>64</sup> NFSAM Section 512.35 defined "farmed wetlands" as follows:

[W]etlands that were manipulated and used to produce[] an agricultural commodity prior to December 23, 1985, *but had not been completely*

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<sup>60</sup> 52 Fed. Reg. 35203 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12); 7 C.F.R. § 12.5(d)(2) (2015).

<sup>61</sup> 52 Fed. Reg. 35197 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12) ("Fifty-one comments on the interim rule were concerned that the definition of converted wetland would allow additional drainage to occur to these lands after December 23, 1985. Section 12.5(d)(1)(i) of the final rule makes it clear that wetlands converted prior to December 23, 1985 are exempted from the rule by the law. Therefore, those converted wetlands may be improved by additional drainage, provided that no additional wetland or abandoned converted wetland is brought into production of an agricultural commodity.").

<sup>62</sup> U.S. ARMY CORPS OF ENGINEERS, RGL 90-07, CLARIFICATION OF THE PHRASE "NORMAL CIRCUMSTANCES" AS IT PERTAINS TO CROPPED WETLANDS (1990) [hereinafter RGL 90-07].

<sup>63</sup> *Id.*

<sup>64</sup> 7 C.F.R. § 12.31(b)(2)(i) (2015).

*converted prior to that date* and therefore are not prior converted wetlands (emphasis added).<sup>65</sup>

NFSAM Section 512.15(a) defined “prior converted croplands” (“PC”) as “wetlands that before December 23, 1985, were drained, dredged, filled, leveled, or otherwise manipulated for the purpose, or to have the effect of, making the production of an agricultural commodity possible.”<sup>66</sup>

According to RGL 90-07, the “normal circumstances” of farmed wetlands, including “areas with 15 or more consecutive days (or 10 percent of the growing season whichever is less) of inundation during the growing season,” are such that they “continue to exhibit important wetland values.” Since “the basic soil and hydrological characteristics [of wetlands] remain,” “even though the vegetation has been removed by cropping,” farmed wetlands are subject to CWA Section 404.<sup>67</sup> By contrast, the “normal circumstances” of prior converted croplands (“PC”) are such that they “have been subject to such extensive and relatively permanent physical hydrological modifications and alteration of hydro-phytic vegetation that the resultant cropland constitutes the ‘normal circumstances’ for purposes of [S]ection 404 jurisdiction” – i.e., hydro-phytic vegetation no longer predominates. Thus, they are not subject to CWA Section 404 jurisdiction.<sup>68</sup>

#### *F. 1993 Joint EPA-Corps Regulations Broadly Referencing USDA NFSAM*

In August 1993, following the conclusion of pretrial discovery, but prior to the beginning of trial in the Brace case, the EPA and the Corps jointly issued regulations that endeavored

to codify existing policy as reflected in RGL 90-07, that prior converted cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands [...B]oth agencies continue to follow the guidance provided by RGL 90-7, which interprets our regulatory definition of wetlands to exclude PC cropland.<sup>69</sup>

The joint regulations’ preamble acknowledges how administrative/regulatory consistency between the CWA and FSA could

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<sup>65</sup> U.S. DEP’T OF AGRIC. SOIL CONSERVATION SERV., NATIONAL FOOD SECURITY ACT MANUAL, 180-V-NFSAM SECOND ED. § 512.35 (1988) [hereinafter NFSAM].

<sup>66</sup> NFSAM, *supra* note 66, at 512.15.

<sup>67</sup> RGL-90-07, *supra* note 63, at 512.15(b)(3).

<sup>68</sup> *Id.* at paras. 5.c-5.d.

<sup>69</sup> 58 Fed. Reg. 45008, 45031-45032 (Aug. 25, 1993) (to be codified at 33 C.F.R. pts. 323, 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 401).

be enhanced if the EPA and the Corps, like the USDA-SCS, learned to broadly and flexibly utilize the guidance contained in the National Food Security Act Manual (“NFSAM”). These regulations enabled the EPA and the Corps to more generally consult and go beyond the specific NFSAM provisions referenced in RGL 90-07, when addressing “prior converted cropland” and “farmed wetland” issues.<sup>70</sup> The lasting effect of these regulations was to accord retroactive treatment to all pre-December 23, 1985, converted wetlands eligible for the USDA cost-sharing exemption, whether pre-December 23, 1985, prior conversions or pre-December 23, 1985, commenced conversions destined to be completed before January 1, 1995, but for circumstances beyond the control of the landowner (i.e., intentional disruption, thwarting and nullification of a prior commenced conversion by federal agencies collaborating with third-party environmental and wildlife groups for ideological reasons).

Indeed, the 1993 EPA-Corps joint regulations could be reasonably interpreted as containing a “non-degradation clause” protecting wetlands as they actually existed as of the date of the FSA’s enactment.<sup>71</sup> This reading makes plain sense given the acknowledged need to reconcile the differing standards then imposed by the Corps, EPA and USDA with which farmers had found it extremely difficult to comply.<sup>72</sup> For this reason, EPA and the Corps had agreed to defer to the

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<sup>70</sup> 58 Fed. Reg. at 45031-45034 (Aug. 25, 1993) (to be codified at 33 C.F.R. pts. 323, 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 401).

<sup>71</sup> See *Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 474-475 (7th Cir. 2005) (holding that the 1996 amendment to the 1985 Swampbuster provisions of 16 U.S.C. § 3821-24, which “added an exception for wetlands that had been drained and farmed, had reverted to wetland status, and then were restored to agricultural use, [i.e., for a] wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985) [...] [was] a non-degradation clause: the legislation protect[ed] wetlands as they actually existed on the date of [the FSA’s] enactment.”) Cf. *Maple Drive Farms Ltd. Partnership v. Vilsack*, 781 F.3d 837, 847 (6th Cir. 2015) (wherein the Court upheld the USDA’s slightly different interpretation of this added exemption as applying “‘where the conversion occurred [i.e., was completed] prior to December 23, 1985...’” rather than where the conversion was commenced before December 23, 1985.) The added provision was 16 U.S.C. § 3822(b)(2)(D)).

<sup>72</sup> See *Orchard Hill Building Co. v. U.S. Army Corps of Engineers*, No.15-cv-06344 (N.D. Ill 2017), (noting how, due to “differing standards among” the Corps, EPA and NRCS (formerly the SCS), “farmers often found it difficult to comply with all three sets of regulations. Thus, in an effort to provide consistency between the three agencies, the Corps and EPA jointly adopted a rule implementing the NRCS’ [SCS’s] prior conversion exemption for purposes of the CWA. 33 C.F.R. § 328.3(b)(2)”).



USDA-SCS' expertise in identifying and determining the status of converted wetlands and prior converted croplands. Sections C and E of the 1993 joint regulation's preamble, for example, explain that, in

*recognizing SCS's expertise in making [] PC cropland determinations, we will continue to rely generally on determinations made by SCS. [...] We believe that farmers should generally be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the Section 404 program (emphasis added).*<sup>73</sup>

To facilitate such general reliance, the agencies previously committed themselves to ensuring regulatory consistency:

We believe that consistency with SCS policy will best be achieved by *our utilizing the NFSAM in the same manner as SCS, i.e., as a guidance document* used in conjunction with other appropriate technical guidance and field testing techniques to determine whether an area is prior converted cropland. [...] EPA and the Corps will [...] implement this exclusion in a manner following the guidance contained in the NFSAM and appropriate field delineation techniques, and will continue to rely, to the extent appropriate, on determinations made by the SCS. [...] The fact that we have not incorporated by reference the actual provisions of the NFSAM into our rules does not undercut our ability to maintain consistency. Rather [...] *we believe that utilizing the NFSAM as a guidance manual, as it is used by SCS, will enhance consistency in the administration of the Food Security and Clean Water Act programs (emphasis added).*<sup>74</sup>

The EPA and the Corps' emphasis of the need to maintain consistency in the administration of the Food Security Act and the Clean Water Act programs is an unmistakable policy justification/basis for promulgating the jointly issued 1993 regulations. Section B of the preamble further supports this reading.

*In utilizing the SCS definition of PC cropland for purposes of Section 404 of the CWA, we are attempting, in an area where there is not a clear technical answer, to make the difficult distinction between those agricultural areas that retain wetland character sufficiently that they should be regulated under Section 404, and those areas that [have] been so modified that they should fall outside the scope of the CWA. [...] We believe that the distinctions under the Food Security Act between PC cropland and farmed wetlands provides a reasonable basis for distinguishing between wetlands and non-wetlands under the CWA. In addition to the fact that we believe this distinction is an appropriate one based on the ecological goals and objectives of the CWA,*

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<sup>73</sup> 58 Fed. Reg. 45032-45033 (Aug. 25, 1993) (to be codified at 33 C.F.R. pts. 323, 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 401).

<sup>74</sup> *Id.*

*adopting the SCS approach in this area will also help achieve the very important policy goal of achieving consistency among federal programs affecting wetlands (emphasis added).*<sup>75</sup>

The SCS had used Part 512 of the NFSAM entitled “Wetland Conservation” to address various issues related to the conversion of wetlands for possible crop production. NFSAM Section 512.20(a), for example, states that the SCS was responsible for determining whether federally assisted project activities in a wetland constituted a “prior conversion,” which is “a wetland alteration that was completed prior to December 23, 1985.”<sup>76</sup> NFSAM Section 512.22(b)(3)(vii) states that SCS also was responsible for determining

the extent of the area on which conversion ha[d] commenced. The determination [was] based on the extent of the work done, contracted for, or supplies or materials purchased prior to December 23, 1985. The extent of work allowed is limited to the physical extent of work done, contracted for or materials purchased.<sup>77</sup>

NFSAM Section 512.22(b)(3)(vi) indicates that such SCS determination, however, is typically dependent on the ASCS having first determined under NFSAM Section 512.22(b)(1)(i)-(ii), that “Federally assisted project activities which convert wetlands or provide outlets for persons to convert wetlands for the production of an agricultural commodity [...had] started before December 23, 1985” (emphasis added).<sup>78</sup> In other words, such SCS determination requires first that the ASCS had determined that a commenced conversion had occurred.<sup>79</sup> In addition, NFSAM Section 512.22(b)(3)(v) indicates that such SCS determination also is dependent on the ASCS having first consulted with the U.S. Fish and Wildlife Service when evaluating that “commenced determination.”<sup>80</sup>

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<sup>75</sup> 58 Fed. Reg. 45032 (Aug. 25, 1993) (to be codified at 33 C.F.R. pts. 323, 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 401).

<sup>76</sup> NFSAM, *supra* note 66, at 512.20(a).

<sup>77</sup> *Id.* at 512.22(b)(3)(vii).

<sup>78</sup> *Id.* at 512.22(b)(3)(vi).

<sup>79</sup> *Id.* at NFSAM Sec. 512.22(b)(1)(i)-(ii) (“The conversion of a wetland may be determined by ASCS to be commenced if: “(i) any of the construction activities including flood water reductions that would convert wetland were actually started; or (ii) the person applying for benefits ha[d] expended or legally committed substantial funds either be entering into a contract, or by purchasing construction supplies or material for the direct purpose of converting the wetland.”).

<sup>80</sup> *Id.* at 512.22(b)(3)(v).

Arguably, the most significant of all the NFSAM provisions relating to converted wetlands, commenced conversions and prior converted croplands is NFSAM Section 512.31 entitled, “Use of Prior Converted Croplands (PC).” This section groups together both pre-December 23, 1985, completed (prior) conversions and pre-December 23, 1985, commenced conversions under one category of “converted wetlands” eligible for one or more of the FSA exemptions from funding ineligibility. NFSAM Section 512.31 provides as follows:

[...W]etlands that were converted prior to December 23, 1985 are not subject to the provisions of the FSA. Therefore, drainage facilities installed on prior converted croplands may be improved or maintained as desired by the person provided no new wetland is converted [...]<sup>81</sup>

According to NFSAM Section 512.31(a),

Wetlands that have been given a *commenced conversion determination* are considered prior conversions when the commenced activities are completed and the area meets the criteria for prior converted croplands. Otherwise, the area will be mapped according to the conditions found. *All commenced activities must be completed before January 1, 1995 to receive the (PC) determination*” (emphasis added).<sup>82</sup>

NFSAM Section 512.31(b) precludes landowners who obtained a prior commenced conversion determination for a given area (field) from converting “additional wetland acres beyond that which ha[d] been determined to be commenced.”<sup>83</sup> This treatment is consistent with NFSAM Section 512.31’s prohibition against landowners bearing a prior completed conversion determination converting any additional wetlands, as the Eighth Circuit Court of Appeals had ruled in *Gunn v. U.S. Department of Agriculture*, 118 F.3d 1233, 1235 (8th Cir. 1997) (holding “[w]etlands that were converted to production of agricultural commodities before the cutoff date of December 23, 1985, ‘can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way’” (emphasis in original)). NFSAM Section 512.36 illustrates this consistency of treatment between prior conversions and commenced conversions in a chart titled, “Summary of use, maintenance and improvements of various wetlands conditions.”<sup>84</sup>

NFSAM Section 512.32(a), furthermore, distinguishes the post-December 23, 1985 use of lands designated as pre-December 23, 1985 commenced

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<sup>81</sup> *Id.* at 512.31.

<sup>82</sup> *Id.* at 512.31(a).

<sup>83</sup> *Id.* at 512.31(a)-(b).

<sup>84</sup> *Id.* at 512.36.

conversions from the use of post-December 23, 1985 converted wetlands (CW) “not subject to one or more of the exemptions” from farm funding ineligibility. Moreover, NFSAM Section 512.35(c) distinguishes the use of pre-December 23, 1985 commenced conversions from farmed wetlands (FW) of the kind discussed in RGL 90-07, as the Eighth Circuit Court of Appeals had addressed in *Gunn*, 118 F.3d at 1238 (stressing USDA’s distinction between wetlands and converted wetlands and identifying fields that a farmer failed to demonstrate as having been “commenced converted” pre-December 23, 1985 as likely “farmed wetlands”) and in *Barthel v. U.S. Department of Agriculture*, 181 F. 3d 934 (8th Cir. 1999), slip op. at 6 (characterizing the farmer’s land, which had not been designated either as “prior converted” or “commenced converted,” consistent with NFSAM Section 5.14.23(a), as “farmed wetland pasture or hayland” i.e., as “wetlands that were manipulated and used for pasture or hayland prior to December 23, 1985, [which] still meet wetland criteria”...).<sup>85</sup>

Based on these USDA-SCS NFSAM provisions and the 1993 EPA-Corps joint regulations generally incorporating them, Mr. Brace’s Fields 14 and 15, which the USDA-SCS had designated on Form SCS-CPA-026 and accompanying map as converted wetlands (“CW”), and which the USDA-ASCS had designated as “commenced converted,” had actually undergone a more extensive degree of conversion than a farmed wetland for both FSA and CWA purposes. This should have qualified them as FSA-exempt converted wetlands (CW) which had they been completed by January 1, 1995, without United States disruption beyond Mr. Brace’s control, would have been treated as prior conversions (prior converted cropland) excluded from CWA Section 404 jurisdiction under the more broadly construed 1993 joint EPA-Corps regulations.<sup>86</sup>

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<sup>85</sup> See *Barthel*, slip op. at 7-8, 9-10 (The limitations the 1987 final USDA regulations impose upon the post-12-23-85 use of nonconverted farmed wetlands are analogous to the limitations placed upon prior commenced conversions and prior completed conversions in only one respect: they prevent further drainage of the wetland as it previously existed on December 23, 1985.) (holding with respect to nonconverted farmed wetlands that the then “current [USDA] regulation on ‘use of wetland and converted wetland’ provides that changes in the watershed due to human activity which increases the water regime on a person’s land, can result in a person being allowed ‘to adjust the existing drainage system to accommodate the increased water regime.’ 7 C.F.R. § 12.33(a),” provided “the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way.”); 52 Fed. Reg. 35208 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12).

<sup>86</sup> Defendants’ Memorandum, ECF No. 221 at 53-54.

### III. GOVERNMENTAL EFFORTS TO DISRUPT BRACE'S USDA-ASCS PRIOR COMMENCED CONVERSION DETERMINATION

As early as July 1987, U.S. Fish and Wildlife Service (“USFWS”) representatives issued to Mr. Brace correspondences indicating that his activities could constitute a violation of the FSA.<sup>87</sup> These correspondences had been prepared by the same zealous USFWS representative, who had later that year spoken publicly about the Brace case to the Council of Sportsmen Clubs as the Pennsylvania Sportsman had reported. This reportage had signaled the case’s increasingly “high visibility” triggered by EPA’s prior intentional issuance of a press release.”<sup>88</sup>

Facing EPA, Corps and USFWS violation notices and cease-and-desist orders, and the one-year deadline imposed by final USDA Swampbuster regulations issued in September 1987, Mr. Brace conferred with USDA officials who recommended that he apply for a prior commenced conversion for both fields in question before September 18, 1988. He submitted his request to the Erie County USDA-ASCS for such designation on the required Form ASCS-492, entitled “Data Needed for Swampbuster Commenced and Third-Party Determinations” on August 31, 1988.<sup>89</sup> Brace also submitted USDA-ASCS Form AD-1026 entitled, “Highly Erodible and Wetland Conservation Certification.”<sup>90</sup> The USDA-ASCS referred all of this information to the USDA-SCS, along with an accompanying map and cropping history, to review soil types published in the Erie County Soil Survey, to conduct a field check of the Brace Waterford, PA Farm consistent with the National Food Security Act Manual (“NFSAM”), and to complete USDA Form SCS-CPA-026 entitled, “Highly Erodible Land and Wetland Conservation Determination.”<sup>91</sup> The USDA-SCS representative inserted on this latter form the designation of “CW” (“converted wetland”) for Fields 14 and 15 which rendered them eligible to receive a prior commenced conversion designation from the USDA-ASCS, provided the conversion-related invoice requirements and/or financial expenditure requirements evidencing pre-December 23, 1985 conversion activities had been satisfied.

On September 14, 1988, the Erie County USDA-ASCS determined that such criteria had been met and approved Mr. Brace’s request for an FSA Swampbuster prior commenced conversion determination for each of these

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<sup>87</sup> See Defendants’ Memorandum, ECF No. 221.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> See *id.* at 6; Defendants’ Memorandum, ECF No. 221-8; Defendants’ Memorandum, ECF No. 221-10 at 9.

<sup>90</sup> See Defendants’ Memorandum, ECF No. 221 at 6-7; Defendants’ Memorandum, ECF No. 221-8.

<sup>91</sup> See Defendants’ Memorandum, ECF No. 221 at 8; Defendants’ Memorandum, ECF No. 221-8.

fields (approximately 32.4 acres of the Murphy Farm tract and approximately 10-11 acres for the adjacent Marsh Farm tract separated only by a thirty-forty (30-40) foot-wide dirt and gravel road. Thereafter, on September 21, 1988, the Erie County USDA-ASCS conveyed that determination to Mr. Brace.<sup>92</sup>

At least one former USDA-SCS representative had raised issues about the Erie County USDA-ASCS's prior commenced conversion determination of Mr. Brace's Fields 14 and 15 in two separate pre-trial depositions,<sup>93</sup> even though he had not known what a "converted wetland" was because it was the first CW he had ever done.<sup>94</sup> In fact, due to his inexperience with CWs said representative had then contacted the USDA's former Pennsylvania State Biologist who later testified that he too had not previously been involved in any commenced conversion determinations, and that the Brace commenced conversion determination may have been the very first one in the State of Pennsylvania.<sup>95</sup> The former USDA Pennsylvania State Biologist also noted how he had relied entirely on the SCS representative's unvalidated verbal description of the Brace fields. The former state biologist indicated that he had made his CW determination without referencing any of the poor quality faxed documentation he may have received and without the benefit of satellite imagery.<sup>96</sup> The former state biologist also sought to color his recent deposition testimony after-the-fact upon conferring with DOJ counsel during an intermission in an effort to disguise USDA officials' prior lack of knowledge about CWs and commenced conversions.<sup>97</sup>

Furthermore, the former state biologist indicated that his CW determination also had relied upon the unvalidated "forested wetland" description provided by the very same zealous USFWS representative who had prepared the FSA correspondences the USFWS had previously dispatched to Mr. Brace and who had spoken publicly about the Brace case to the media in 1987.<sup>98</sup> Indeed, USFWS representative also had authored two correspondences on behalf of more senior agency officials that had been dispatched to the Erie County

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<sup>92</sup> See Defendants' Memorandum, ECF No. 221 at 9-10; Defendants' Memorandum, ECF No. 221-13; Defendants' Memorandum, ECF No. 221-14.

<sup>93</sup> See Defendants' Memorandum, ECF No. 221 at 10-15; Defendants' Memorandum, ECF No. 221-11.

<sup>94</sup> See Defendants' Memorandum, ECF No. 221 at 10.

<sup>95</sup> See Defendants' Memorandum, ECF No. 221 at 11; Defendants' Memorandum, ECF No. 221-13; Defendants' Memorandum, ECF No. 221-15.

<sup>96</sup> See Defendants' Memorandum, ECF No. 221 at 12-13; Defendants' Memorandum, ECF No. 221-13.

<sup>97</sup> See Defendants' Memorandum, ECF No. 221 at 11-12; Defendants' Memorandum, ECF No. 221-16.

<sup>98</sup> See Defendants' Memorandum, ECF No. 221 at 13; Defendants' Memorandum, ECF No. 221-13.

USDA-ASCS Executive Committee in early 1989.<sup>99</sup> The first correspondence objected to the September 1988 Brace-favorable commenced conversion determination and requested USFWS presence at the next scheduled ASCS Erie County Executive Committee meeting. The USDA-ASCS Erie County Executive Director responded to the first letter by inviting the USFWS “ghost writer” to the February 8, 1989 meeting.<sup>100</sup>

The second correspondence, dispatched one day before said meeting, extensively challenged the USDA-ASCS’ Executive Committee’s September 1988 evaluation and characterization of the conversion activities Mr. Brace had undertaken and the supporting invoices for expenditures incurred that Mr. Brace had submitted. The zealous USFWS represented alleged that such submission failed to satisfy the prior commenced conversion invoicing and financial expenditure requirements set forth in the then applicable USDA-ASCS Handbook for State and County Offices. He also falsely alleged that Mr. Brace had failed to “actively pursue” his conversion activities, as required by the then-applicable USDA regulations, because he had failed to submit invoices to USDA for three consecutive years. The facts, however, show that Mr. Brace actually submitted invoices for eight of eleven consecutive years, and that during the three nonconsecutive years for which he had not submitted invoices to the USDA he incurred those expenses out-of-pocket.<sup>101</sup> The second correspondence falsely alleged that Brace’s so-called conversion activities did not successfully work a conversion of the two fields, contrary to what more recently unearthed satellite imagery of his farm during 1977 and 1983 had shown.<sup>102</sup>

The record reflects that once in attendance at the February 8, 1989 USDA-ASCS Erie County Executive Committee monthly meeting, the zealous USFWS representative formally objected to the evidence Mr. Brace had previously submitted of his commenced conversion activities.<sup>103</sup> These objections failed to sway the Executive Committee’s reevaluation of its prior September 14, 1988, favorable commenced conversion determination of Mr. Brace’s Fields 14 and 15, which it proceeded to reaffirm.<sup>104</sup>

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<sup>99</sup> See ECF No. 221, *supra* at 15 and 16-19.

<sup>100</sup> *Id.*; Defendants’ Memorandum, ECF No. 221-20.

<sup>101</sup> See Defendants’ Memorandum, ECF No. 221 at 16-19; Defendants’ Memorandum, ECF No. 221-3; Defendants’ Memorandum, ECF No. 221-23; Defendants’ Memorandum, ECF No. 221-24.

<sup>102</sup> See Defendants’ Memorandum, ECF No. 221 at 18-19; Defendants’ Memorandum, ECF No. 221-23; Defendants’ Memorandum, ECF No. 221-18; Defendants’ Memorandum, ECF No. 221-19.

<sup>103</sup> See Defendants’ Memorandum, ECF No. 221 at 20; Defendants’ Memorandum, ECF No. 221-26.

<sup>104</sup> *Id.*

Presumably, the second USFWS correspondence had likely been dispatched as an exercise of the consultation status the agency had been granted under the FSA vis-à-vis USDA-ASCS prior commenced conversion determinations. However, the USFWS could not have reasonably and legitimately expected the USDA-ASCS to heed its objections in connection with the Brace commenced conversion determination if the Erie County Executive Committee otherwise had sufficient grounds to reach the determination it had made.<sup>105</sup>

Nevertheless, it is more than theoretically possible that the former USFWS and USDA-SCS representatives who had previously worked together on the Brace case had harbored a sufficiently strong bias in favor of wetlands restoration such that they were relatively unconcerned about expressing it to the public, including Mr. Brace.<sup>106</sup> Indeed, it is now a matter of court record that the zealous USFWS representative had been a card-carrying member of the nonprofit organization Ducks Unlimited, Inc. during his handling of the Brace case. It also is a matter of court record that the former USDA-SCS representative who had made the earlier “converted wetland” (CW) determination is currently, and perhaps also had previously been, a card-carrying member of Ducks Unlimited, Inc! Furthermore, it is a matter of court record that the same zealous USFWS representative had overseen the agency’s “Partners for Fish and Wildlife Program” in Pennsylvania.<sup>107</sup>

These former USFWS and USDA-SCS representatives were not the only federal government officials who had played a role in disrupting the USDA-ASCS’ Brace commenced conversion determination; former DOJ-ENRD officials and the former DOJ-ENRD trial attorney on the Brace case also contributed to that effort. For example, the former DOJ-ENRD trial attorney had emphasized during at least one fact witness’ pre-trial deposition that Clean Water Act Section 404 creates a legal fiction that distinguishes between pasture farming (including haying) or livestock (including cattle) farming, on the one hand, and crop farming, on the other hand. Apparently, this distinction was useful to the EPA and the Corps in determining that a change in “use” from pasture/livestock farming to crop farming had occurred which constituted the conversion of the land from a prior nonfarming activity to a farming activity, requiring a Corps permit. In other words, according to these agencies, only crop farming was and continues to be considered a “normal farming activity” that is eligible for the exemption from Corps permitting under CWA

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<sup>105</sup> See Defendants’ Memorandum, ECF No. 221 at 19.

<sup>106</sup> See ECF No. 221, *supra* at 20.

<sup>107</sup> Defendants’ Memorandum, ECF No. 221 at 20-21; See also Affidavit of Beverly Owens Brace, *United States v. Brace*, No. 90-0029 (W.D. Pa. Apr. 24, 2018), ECF No. 221-27; Defendants’ Memorandum, ECF No. 221-3 at pp. 156-159, 164-166, 169-171, 178, 184-185, 188-190, 192-193; Defendants’ Memorandum, ECF No. 221-28.



Section 404(f)(1)(A).<sup>108</sup> The former DOJ-ENRD trial attorney also emphasized in the same and another fact witness' pre-trial depositions the United States'

standing objection on relevance grounds to questions regarding the commenced conversion determination of the swamp buster provision since it[']s an entirely separate program unrelated in this case as to whether a violation occurred of the Clean Water Act.<sup>109</sup>

Clearly, the DOJ-ENRD had endeavored to "frame" the original action against Mr. Brace as a CWA action to which the FSA had no relevance or application. It has since endeavored to "frame" the current consent decree enforcement action relating to the original action and the new CWA Section 404 violation action, both filed in January 2017, in the same manner.<sup>110</sup>

#### IV. OUTSIDE GOVERNMENTAL INFLUENCE REVEALED IN PRIOR OFFICIAL FWS DOCUMENTS

Newly revealed historical evidence clearly shows how the USFWS also had interfered with local USDA-ASCS Committee commenced conversion ("CC") determinations in Minnesota, North Dakota and South Dakota during approximately the same time period (i.e., during the mid-to-late 1980's). This evidence is contained in prior witness statements and exhibits submitted to the U.S. House of Representatives Committee on Agriculture during the hearing Ag Committee Chairman E. (Kika) De La Garza had convened in Moorhead, Minnesota on June 24, 1988.<sup>111</sup> Indeed, these submissions indicate how very closely senior officials from the USFWS' National and Region 3 Offices<sup>112</sup> had worked with prominent nongovernmental environmental and wildlife extremist groups, including National Wildlife Federation ("NWF"), Environmental Defense Fund ("EDF") and Natural Resources Defense Council ("NRDC"), and special interest groups such as Ducks Unlimited, Inc.

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<sup>108</sup> See ECF No. 221, *supra* at 22-23.

<sup>109</sup> Defendants' Memorandum, ECF No. 221 at 24 (and accompanying exhibits).

<sup>110</sup> See Defendants' Memorandum, ECF No. 221 at 6; See also Defendants' Memorandum of Law in Support of Motion to Vacate Consent Decree and to Deny Stipulated Penalties, *United States v. Brace*, Civil No. 90-229 (W.D. Pa. Apr. 24, 2018), ECF No. 216, at 9-13.

<sup>111</sup> See *Review of the Sodbuster and Swampbuster Provisions of the Food Security Act of 1985 and Drought Conditions in Minnesota and Upper Midwest*, 100<sup>th</sup> Cong. (1988); Defendants' Memorandum, ECF No. 221-30; See *Conserving the Nature of America-Regional Map*, U.S. FISH & WILDLIFE SERVICE, <https://www.fws.gov/where/> (last updated Oct. 19, 2016).

<sup>112</sup> See *Conserving the Nature of America – Regional Map*, *supra* note 112; Defendants' Memorandum, ECF No. 221-31.

(hunting groups portraying themselves as wildlife conservation groups) to ensure the reversal of USDA-ASCS CC determinations, and how these overzealous groups played a major role at such hearings.

For example, four official 1988 USFWS documents that were previously submitted during the June 24, 1988 House Agriculture Committee hearing<sup>113</sup> as exhibits accompanying a 50-page prepared statement of the NWF discussed below shed light on the extent of the USFWS' extensive interference with local USDA-ASCS CC determinations in those states, particularly on private lands situated within public drainage districts containing temporary wetlands.

The first of these USFWS documents was a January 14, 1988, correspondence<sup>114</sup> issued by former USFWS Regional Director (Region 3), James C. Gritman<sup>115</sup> and directed to the nonprofit Wildlife Management Institute ("WMI"),<sup>116</sup> a virtual hunting group-in-disguise.<sup>117</sup> It was an apparent response to a December 18, 1987, letter correspondence previously drafted by WMI's Western Field Representative, Keith Harmon.<sup>118</sup> The January 14, 1988, USFWS letter<sup>119</sup> expressed alarm about USFWS field operative observations that the USDA agencies had not been implementing the Swampbuster provisions "fully consistent with the purposes, intent, and letter of the Food Security Act or the step-down regulations," and that the USFWS' "role with U.S. Department of Agriculture agencies ha[d] been continual hair-splitting

<sup>113</sup> See *Review of the Sodbuster and Swampbuster Provisions of the Food Sececurity Act of 1985 and Drought Conditions in Minnesota and Upper Midwest*, *supra* note 112; Defendants' Memorandum, ECF No. 221-30.

<sup>114</sup> See Letter from James Gritman, Regional Director, United States Department of the Interior, to Dr. Keith W. Harmon, Western Field Representative (Jan. 14, 1988) <http://nebula.wsimg.com/f1c27ee9b088fe7ac48fc37a1214bf63?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1.>; The Kogan Law Group, P.C., <https://nebula.wsimg.com/af42a2167c28184c949efc12ea11bbb4?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1.> (last visited June 28, 2018); Defendants' Memorandum, ECF No.221-34.

<sup>115</sup> See Press Release, David Klinger, *Jim Gritman Named Director Of Fish And Wildlife Service's North Central Region*, DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE NEWS RELEASE (Dec. 21, 1987); Defendants' Memorandum, ECF No. 221-32.

<sup>116</sup> See *About the Wildlife Management Institute*, WILDLIFEMANAGEMENT.INSTITUTE, <https://wildlifemanagement.institute/about> (last visited June 27, 2018).

<sup>117</sup> See *WMI Board of Directors*, WILDLIFEMANAGEMENT.INSTITUTE, <https://wildlifemanagement.institute/about/board> (last visited June 27, 2018).

<sup>118</sup> See Letter from Keith Harmon, Field Representative, et al., to Honorable Hubert H. Humphrey, United States Senate (Dec. 17, 1971) <http://nebula.wsimg.com/52e3125ca182642fbf0831acfc5ae0f6?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1.>; Defendants' Memorandum, ECF No. 221-33.

<sup>119</sup> Defendants' Memorandum, ECF No.221-34.

that accommodate[d] more drainage.” This first USFWS document also indicated that Gritman had apparently shared with WMI a non-publicly disclosed FWS Region 3 memorandum he had dispatched to the USFWS National Director to “see this issue elevated to the investigation level so that corrective measures are implemented through the appropriate oversight channels.”<sup>120</sup> Among the names copied on this letter correspondence were Jan Goldman-Carter,<sup>121</sup> a former and current Counsel and Clean Water Act Restoration Program Manager<sup>122</sup> of the NWF who had since testified before Congress (in 2016) about the need for water-related regulatory and administrative reforms,<sup>123</sup> and former NWF Prairie Wetland Resource Center Director, Wayne ‘Skip’ Baron.<sup>124</sup>

The second of these USFWS documents, was a February 23, 1988 memorandum entitled, “Fish and Wildlife Service Responsibility in Swampbuster Implementation”<sup>125</sup> from USFWS National Director, Frank H. Dunkle,<sup>126</sup> to the Regional Directors of USFWS Regions 1-7. It was an apparent response to the undisclosed January 1988 memorandum that USFW Region 3 Director Gritman had previously shared with WMI. The February

<sup>120</sup> Defendants’ Memorandum, ECF No.221-34.

<sup>121</sup> See *Awardee, 1993 Nonprofit Category, Jan Goldman-Carter*, ENVIRONMENTAL LAW INSTITUTE, <http://elinwa.org/awards/recipients/jan-goldman-carter> (last visited June 27, 2018); See also *Jan Goldman-Carter*, RIVER NETWORK, <https://www.rivernet.org/hero/jan-goldman-carter> (last visited June 27, 2018); *Testimony of Jan Goldman-Carter, Director, Wetlands and Water Resources, National Wildlife Federation, Before the United States House of Representatives Subcommittee on Water, Power, and Oceans of the Committee on Natural Resources, Hearing on ‘Empowering States and Western Water Users Through Regulatory and Administrative Reforms’* (Apr. 13, 2016), [http://democrats-naturalresources.house.gov/imo/media/doc/testimony\\_goldman-carter.pdf](http://democrats-naturalresources.house.gov/imo/media/doc/testimony_goldman-carter.pdf); Defendants’ Memorandum, ECF No. 221-37.

<sup>122</sup> Defendants’ Memorandum, ECF No. 221-35.

<sup>123</sup> *Id.* at ECF No. 221-36.

<sup>124</sup> See *The Wildlife Society North Dakota Chapter Newsletter*, THE WILDLIFE SOCIETY, Jan. 1991, at 1,5; Defendants’ Memorandum, ECF No. 221-38.

<sup>125</sup> See Memorandum from Frank H. Dunkle, Director of the United States Department of the Interior Fish and Wildlife Service, on Fish and Wildlife Service Responsibility in Swampbuster Implementation to the Regional Director of FWS Regions 1-7 (Feb. 23, 1988) <http://nebula.wsimg.com/3198be85c876d33607717567a8551839?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants’ Memorandum, ECF No. 221-40.

<sup>126</sup> See Press Release, Tom Wilson, *President Reagan Selects Frank H. Dunkle to Head Interior’s Fish and Wildlife Services*, DEPARTMENT OF THE INTERIOR NEWS RELEASE (Mar. 25, 1986) <https://www.fws.gov/news/Historic/NewsReleases/1986/19860325.pdf>; Defendants’ Memorandum, ECF No. 221-39.

23, 1988, memorandum raised to the national level “[s]erious questions regarding the effectiveness of Swampbuster implementation efforts,” and instructed all USFWS Regional Directors to “offer the greatest possible technical support to agencies of the Department of Agriculture as they proceed[ed] with field implementation” of the FSA’s Swampbuster provisions. This memorandum also recommended that each FWS Region use the form then being “utilized by Region 3 to report observed wetland modifications.”

The third of these USFWS documents, was a March 8, 1988, memorandum<sup>127</sup> bearing the same title from former Acting USFWS Region 3 Director (Assistant Regional Director), John Popowski,<sup>128</sup> to the former Directors of the USFWS Region 3 Branch of Special Projects (BSP) and Division of Endangered Species and Habitat Conservation (EHC). An apparent response to the February 23, 1988, Dunkle memorandum, it noted with alarm how “Swampbuster, however conceived and legislated in Washington, ha[d] had minimal success in Region 3 in preserving wetlands on private lands involved in Department of Agriculture commodity programs.” It also emphasized how the USDA SCS and ASCS: 1) “ha[d] transformed wetlands into non-wetlands through lax interpretation of the regulations” and frequently failed to consult with USFWS except where USDA standards were unable resolve an issue; 2) differed with USFWS over what constituted a Swampbuster “violation;” and 3) decried the loss of Type 1 wetland potholes “needed for duck pairing activity in the early spring.” The memo recommended the protection of “the prairie pothole, playa, and seasonally flooded and ponded wetland values that existed as of December 23, 1985.”<sup>129</sup>

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<sup>127</sup> See Memorandum from John Popowski, Region 3 Acting Reg’l Dir. of the United States Department of the Interior Fish and Wildlife Service on Fish and Wildlife Service Responsibility in Swampbuster Implementation to FWS Region 3 Branch of Special Projects (BSP) and Division of Endangered Species and Habitat Conservation (EHC)

<http://nebula.wsimg.com/7fcd25f67f491986b7e81fe355f2cb08?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants’ Memorandum, ECF No. 221-42.

<sup>128</sup> See *Endangered Species Technical Bulletin*, DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, Jan. 1988, Vol. XIII No. 1 at p.2 <https://www.fws.gov/endangered/news/pdf/1988%20Jan%20Vol%20XIII%20No%201.pdf>; Defendants’ Memorandum, ECF No. 221-41 at 1.

<sup>129</sup> Defendants’ Memorandum, ECF No. 221-42.

The fourth of these USFWS documents was a March 9, 1988, memorandum<sup>130</sup> from Lloyd Jones,<sup>131</sup> former Supervisor of the USFWS' North Dakota Wetland Habitat Office to the USFWS' Region 6 Farm Bill Coordinator. It contained responsive comments to the February 23, 1988 Dunkle memorandum that were apparently intended also to be incorporated into the USFWS' then forthcoming proposals for the 1990 Farm Bill, which ultimately proceeded "to make the act of drainage a violation"<sup>132</sup> in service to the USFWS' campaign against already commenced conversions. The memorandum emphasized how ASCS county offices in North Dakota had negatively reacted to the USFWS' 1986 and 1987 reporting of hundreds of "potential violations" of the FSA's Swampbuster provisions. "ASCS response has been that it is not the responsibility of the Service [USFWS] to report potentials, they do not want the information and they have reacted by going to the press accusing the Service of being 'Spies in the Sky.'"<sup>133</sup>

This fourth USFWS document had also referenced the then ongoing efforts of USFWS to reach interagency memorandums of understanding ("MOUs") with the USDA-SCS to define the processes for making wetland determinations and minimal effect determinations under the FSA. Although it remains unknown whether these specific efforts succeeded, it can be confirmed that the USFWS' mother agency, the U.S. Department of Interior, subsequently executed a broader memorandum of agreement ("MOA")<sup>134</sup> with USDA, EPA and the Corps in January 1994. The 1994 interagency MOA

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<sup>130</sup> See Memorandum from Lloyd Jones, Supervisor of the FWS's N.D. Wetland Habitat Office regarding Comments on Director's Memo of 2-23-88 – Requesting Information on Swampbuster to the Farm Bill Coordinator, Region 6 (Mar. 9, 1988), <http://nebula.wsimg.com/262fd4560a3dc668cd209b2dc8108c1a?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants' Memorandum, ECF No. 221-45.

<sup>131</sup> See Press Release, David Klinger, *Prairie Wetlands, Traditional Havens For Wildlife, Proving Boon To Drought-Stricken Midwest Farmers* (Aug. 24, 1988), <https://www.fws.gov/news/Historic/NewsReleases/1988/19880824.pdf>; Defendants' Memorandum, ECF No. 221-43 at 2.

<sup>132</sup> See Anthony N. Turrini, Comment, *Swampbuster: A Report from the Front*, 24 Ind. L. Rev. 1507, 1511 (1991), <http://journals.iupui.edu/index.php/inlawrev/article/view/2935/2859> ("In a major victory for conservationists, swampbuster was amended to make the act of drainage a violation. Farmers who manipulate wetlands are ineligible for subsidies until they restore the affected wetland to its original condition."); Defendants' Memorandum, ECF No. 221-44.

<sup>133</sup> Defendants' Memorandum, ECF No. 221-45.

<sup>134</sup> See Memorandum of Agreement Among the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior, and the Department of the Army Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act, ENVIRONMENTAL PROTECTION AGENCY (Jan. 6, 1994); Defendants' Memorandum, ECF No. 221-46.

covered the USDA's implementation of the FSA Swampbuster provisions for purposes of both FSA Section 1222 and CWA Section 404 compliance. In particular, the MOA's Section IV.A stated that, "wetland delineations made by [USDA-]SCS on agricultural lands, *in consultation with [US]FWS*, will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction" (emphasis added). Section V.C of the MOA identified how USDA-SCS would "certify SCS wetland delineations *made prior to November 28, 1990*, [...] to ensure the accuracy of" those prior determinations. This MOA Section effectively enabled USFWS and the other federal agencies to retroactively reconsider and revise prior USDA-SCS-directed wetlands decisions that had informed prior positive USDA-ASCS commenced conversion determinations without affording the regulated farming community the due process of law to which they were constitutionally entitled under the Administrative Procedure Act.

#### V. OUTSIDE GOVERNMENTAL & NON-GOVERNMENTAL INFLUENCES REVEALED IN PRIOR AGENCY-WILDLIFE GROUP MOUS, AND ENVIRONMENTAL & WILDLIFE GROUP TESTIMONIES & INITIATIVES

Apart from and prior to the purely interagency MOA previously discussed, the USFWS had executed on March 14, 1984, a combined interagency-third party memorandum of understanding ("MOU") with the Interior Department's Bureau of Land Management ("BLM") (USFWS' sister DOI agency), the USDA Forest Service ("USDA-FS"), and nonprofit organization, Ducks Unlimited, Inc. ("DU"), a hunting group commonly perceived as a wildlife habitat conservation organization. DU's mission<sup>135</sup> has long been to "conserve[], restore[], and manage[] wetlands and associated habitats for North America's waterfowl." This MOU ("84-SMU-004"), a copy of which the government refused to produce in discovery in the Brace case,<sup>136</sup> "provide[d] the foundation to establish a dynamic habitat improvement program on public lands within the National Forest System branch of the Forest Service."<sup>137</sup>

The 1984 MOU had apparently been so important that the DOI announced its execution in a special agency press release dated, March 14, 1984.<sup>138</sup> According to the press release, DU would "fund projects to restore wetlands

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<sup>135</sup> See *About Ducks Unlimited Filling the skies with waterflow today, tomorrow and forever*, DUCKS UNLIMITED, <http://www.ducks.org/about-du> (last visited June 27, 2018).

<sup>136</sup> See United States' Response to Defendants' Second Set of Requests for Production, *United States v. Brace*, No. 90-229 (Dist. Ct. W.D. Pa. Jan. 30, 2018).

<sup>137</sup> See Memorandum of Understanding between the USDA Forest Service and Ducks Unlimited, Inc. 99-SMU-028, (Dec. 14, 1998); Defendants' Memorandum, ECF No. 221-51.

<sup>138</sup> Defendants' Memorandum, ECF No. 221-47.

and increase waterfowl production on lands owned or leased by” the DOI’s USFWS and BLM, and by USDA-FS (i.e., public lands).<sup>139</sup> This MOU had then been billed as “the most ambitious cooperative public and private effort to improve and develop wildlife habitat in U.S. conservation history.”

The activities [would] involve cooperation with State agencies as well as the Federal Government and [would] be carried out principally in Alaska, Montana, the Dakotas, and Minnesota, which together produce the vast majority of ducks and geese hatched in the United States.

[...] Ducks Unlimited [would] review proposals from Federal and State agencies for high priority habitat improvement projects that the agencies themselves cannot presently fund. [...] Through its generosity, Ducks Unlimited is enabling Federal agencies to carry out important habitat improvement projects that will benefit waterfowl and other wildlife that depend on wetlands (emphasis added).<sup>140</sup>

There are several problems with this archetype. First, it arguably constituted an illegal sub-delegation to an *outside party* of a statute’s delegation of authority to a federal agency. While a federal agency’s sub-delegation of delegated statutory authority to a subordinate agency is presumptively valid absent affirmative evidence of a contrary congressional intent,<sup>141</sup>

the cases recognize an important distinction between subdelegation to a subordinate and subdelegation to an outside party. The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization. [...] This distinction is entirely sensible. When an agency delegates authority to its subordinate, responsibility — and thus accountability — clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. [...] Also, delegation to outside entities increases the risk that these parties will not share the agency’s ‘national vision and perspective,’ [...] and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-

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<sup>139</sup> See Defendants’ Memorandum, ECF No. 221 at 21; Defendants’ Memorandum, ECF No. 221-3 at 156-157 (DU’s funding of the USFWS wetland restoration projects was confirmed by a USFWS deposition witness conducted during early 2018 in the Brace case).

<sup>140</sup> See Defendants’ Memorandum, ECF No. 221-47.

<sup>141</sup> See *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (and cases cited).

agent relationship. [...] A general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates (emphasis in original).<sup>142</sup>

Second, this MOU provided the USFWS and USDA-FS with the ability to unofficially engage in indirect regulatory creep through designation of adjacent private lands as “wetlands” under the Clean Water Act if they have been identified by National Wetland Inventory mapping or an USDA-SCS wetland evaluation as falling within the same watershed as the public lands under their management.<sup>143</sup>

Indeed, the relevant sections of two successor USDA-FS-DU MOUs describing the 1984 MOU revealed that DU had helped to expand the 1984 MOU’s original *public* lands scope of coverage to also include *private* lands. For example, Section III.D of “99-SMU-028,” executed on Dec. 14, 1998,<sup>144</sup> and Sections A, B.5, C.1, C.3, C.4, D.1, and D.2 of “09-SU-11132422-326,” executed on Oct. 9, 2009<sup>145</sup> have since revealed that DU had helped to *officially* expand the 1984 MOU’s original public lands scope of coverage to include “riparian areas and associated uplands *on private lands*” (emphasis added) if they had been situated within DU and federal agency-identified wetland ecosystems and watershed areas. The purpose of the program was to protect North American migratory bird wetlands habitats for hunters and birdwatchers, consistent with DU’s “landscape approach to habitat conservation”<sup>146</sup> which embraced the North American Waterfowl Management Plan to which the USFWS had been and remains a signatory party.<sup>147</sup> The DU website, furthermore, reveals that DU has long helped to

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<sup>142</sup> *Id.* at 565-566 (and cases cited).

<sup>143</sup> Defendants’ Memorandum, ECF No. 221; Defendants’ Memorandum ECF No. 221-48; Defendants’ Memorandum, ECF No. 221-49; Defendants’ Memorandum ECF No. 221-50.

<sup>144</sup> See Memorandum of Understanding Between the USDA Forest Service and Ducks Unlimited, Inc. (99-SMU-028) (Dec. 14, 1998); Defendants’ Memorandum, ECF No. 221-51.

<sup>145</sup> See Service-Wide Memorandum of Understanding Between Ducks Unlimited, Inc. and United States Department of Agriculture Forest Service 09-SU-111132422-326, (Oct. 9, 2009); Defendants’ Memorandum, ECF No. 221-52.

<sup>146</sup> See ROSS MELINCHUK, DUCKS UNLIMITED’S LANDSCAPE APPROACH TO HABITAT CONSERVATION, LANDSCAPE AND URBAN PLANNING, (Vol. 32, Issue 3 1995) at 211-217.

<sup>147</sup> See Defendants’ Memorandum, ECF No. 221-53.



shape successive Farm Bills (e.g., 2007,<sup>148</sup> 2012,<sup>149</sup> 2014,<sup>150</sup> 2018<sup>151</sup>) to ensure against further conversion of wetlands (including those used for pasturing and livestock) to croplands for its members' benefit. As noted above, several government deponents in the Brace case have either testified or been known to hold DU memberships during the 1980's.

Although DU had not participated in the June 24, 1988, House Ag Committee hearing, the National Wildlife Federation ("NWF") did. In fact, the NWF's extensive 50-page prepared testimony<sup>152</sup> also had been submitted on behalf of the Minnesota Conservation Federation (its affiliate), the NRDC, the EDF, etc.<sup>153</sup> It alleged *inter alia* that general improprieties and abuses had been committed by USDA Soil Conservation Service ("USDA-SCS") and ASCS officials in Minnesota, North Dakota and South Dakota in implementing the FSA's Swampbuster rules. In addition, said testimony alleged, more specifically, how such USDA officials in Minnesota and North Dakota had rendered unsupported commenced conversion (CC) determinations in favor of

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<sup>148</sup> See *Getting it Done in the Great Lakes, Farm Bill Summary – What is the Farm Bill*, DUCKS UNLIMITED,

[http://www.ducks.org/media/Conservation/GLARO/\\_documents/\\_library/\\_policy/FarmBill\\_GL.pdf](http://www.ducks.org/media/Conservation/GLARO/_documents/_library/_policy/FarmBill_GL.pdf) (last visited June 27, 2018); Defendants' Memorandum, ECF No. 221-55.

<sup>149</sup> See Scott Yaich, *Wetlands and the Farm Bill*, DUCKS UNLIMITED,

<http://www.ducks.org/conservation/public-policy/farm-bill/wetlands-and-the-farm-bill/page1> (last visited June 27, 2018); Defendants' Memorandum, ECF No. 221-56.

<sup>150</sup> See *Farm Bill – The Importance of Farm Bill Policy to Ducks Unlimited*, DUCKS UNLIMITED, <http://www.ducks.org/conservation/public-policy/farm-bill> (last visited June 27, 2018); Defendants' Memorandum, ECF No. 221-57.

<sup>151</sup> See Kellis Moss, *Wetlands, Waterfowl, and the Farm Bill Now is the time to show your support for agricultural conservation programs that provide a host of benefits for wildlife and people*, DUCKS UNLIMITED,

<http://www.ducks.org/conservation/public-policy/farm-bill/wetlands-waterfowl-and-the-farm-bill> (last visited June 27, 2018); Defendants' Memorandum, ECF No. 221-58.

<sup>152</sup> See Statement of the National Wildlife Federation on the Application of the Food Security Act of 1985, Title XII, Subtitle C ("Swampbuster"), Before the House Committee on Agriculture, Field Hearings, Moorehead, Minnesota, presented by John Rose, Minnesota Conservation Federation, NATIONAL WILDLIFE FEDERATION (June 24, 1988),

<https://nebula.wsimg.com/5529377423c30b61763b65e05715f819?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants' Memorandum, ECF No. 221-59.

<sup>153</sup> See Statement of the National Wildlife Federation on the Application of the Food Security Act of 1985, Title XII, Subtitle C ("Swampbuster"), Before the House Committee on Agriculture, Field Hearings Moorehead, Minnesota, presented by John Rose, Minnesota Conservation Federation at 1-50 (108-160 of the House Ag. Comm. Rpt.).

farmers, at the expense of both wetlands and wildlife.<sup>154</sup> To this end, the NWF testimony, in part, emphasized how approximately “87% of the ducks bred in the lower 48 states breed in the Dakotas, Minnesota and Montana.”<sup>155</sup> The NWF testimony implored Congress to tighten up the FSA’s Swampbuster provisions to create a chilling effect against additional conversions of wetlands to farmlands in “the palustrine wetlands of South Florida, the Nebraska Sandhills and Rainwater Basin, the pocosins of the North Carolina coastal plain, [...] western riparian wetlands, [...] and] the prairie potholes and the Lower Mississippi River bottomlands.”<sup>156</sup> Evidence unearthed several years later by the Pennsylvania Landowners Association revealed how well funded the NWF, NRDC and EDF had been to implement their apparently national commenced conversion disruption agenda.<sup>157</sup>

The Minnesota<sup>158</sup> and North Dakota<sup>159</sup> chapter offices and the national office<sup>160</sup> of the Wildlife Society, “an international association of [current and former] professional wildlife managers working in the public [governmental] and private sectors,” also submitted prepared testimony at the June 1988 hearing. The Wildlife Society’s national office emphasized how “the commenced conversion determination regulations [had been] interpreted inappropriately” by the USDA-ASCS which had allegedly failed to “require appropriate and adequate evidence necessary to enforce [and strictly interpret] conversion determination regulations.”<sup>161</sup>

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<sup>154</sup> *Id.* at 8-14 (118-124 of the House Ag Comm. Rpt).

<sup>155</sup> *Id.* at 18 (128 of the House Ag. Comm. Rpt.).

<sup>156</sup> *Id.* at 42-44 (152-154 of the House Ag. Comm. Rpt.).

<sup>157</sup> See Defendants’ Memorandum, ECF No. 221-60.

<sup>158</sup> See Letter from Ed Boggess, President, to Honorable E. (Kika) de la Garza, Chairman, Committee on Agriculture, MINNESOTA CHAPTER, THE WILDLIFE SOCIETY, (June 21, 1988),

<http://nebula.wsimg.com/54046b5abb65fe6d8f74d968ed7683e3?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants’ Memorandum, ECF No. 221-61.

<sup>159</sup> See Letter from William J. Berg, President, to the Honorable Arland Stangeland, House Agriculture Committee, NORTH DAKOTA CHAPTER, THE WILDLIFE SOCIETY (June 14, 1988),

<https://nebula.wsimg.com/c1fbf4b26ecc8f04c6c235a95ab6a23d?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants’ Memorandum, ECF No. 221-62.

<sup>160</sup> See Letter Correspondence from Harry E. Hodgdon, Executive Director to the Honorable E (Kika) de la Garza, Chairman, THE WILDLIFE SOCIETY (July 11, 1988), <https://nebula.wsimg.com/ad49d408af16f235539ca9d2ad9dc8fa?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants’ Memorandum, ECF No. 221-63.

<sup>161</sup> See Letter Correspondence from Harry E. Hodgdon, Executive Director to the Honorable E (Kika) de la Garza, Chairman, at 3; Defendants’ Memorandum, ECF No. 221-63, at 3.

The National Audubon Society, as well, submitted the prepared statement of one of its members (Daniel Svedarsky, a teacher) to the House Ag Committee for use at the June 1988 hearing.<sup>162</sup> Mr. Svedarsky's statement expressed support for retaining the FSA's Swampbuster provisions to ensure that "further conversion of wetlands [...] to croplands would be greatly reduced." More extensive narrative reports issued in 1988<sup>163</sup> and 1989<sup>164</sup> by the Garrison Wetland Management District of the Audubon Society's North Dakota chapter documented shortcomings in the ASCS's Swampbuster compliance monitoring process, including commenced conversion determinations, that echoed those described by the NWF.

As the testimonies of these environmental and wildlife groups disclosed, they had worked closely with the USFWS and other federal agencies since, at least, 1985, influencing the shape and tenor of subsequent revisions of the FSA and USDA implementing regulations against farmer interests. Indeed, farmer groups, such as the Minnesota, North Dakota and South Dakota Farmers Unions<sup>165</sup> and the Minnesota Association of Wheat Growers,<sup>166</sup> submitted their own statements at these 1998 Ag Committee hearings corroborating the significant influence this environmental group-federal agency partnership had wielded. These farmer groups testified about how said partnership managed to largely shape both the interim (June 1986, July 1986) and final (September

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<sup>162</sup> See Statement of Daniel Svedarsky, Teacher, on Behalf of the National Audubon Society and the Minnesota Chapter, Wildlife Society, Before the House Committee on Agriculture, Field Hearings, Moorehead, Minnesota (June 24, 1988), <https://nebula.wsimg.com/6e23f38797e7af279cbead5bfa95b779?AccessKeyId=7F494AADE6AF42D36823&disposdispo=0&alloworigin=1>; Defendants' Memorandum, ECF No. 221-64.

<sup>163</sup> See *Audubon Wetland Management District and Audubon Garrison Wetland Management District*, NARRATIVE REPORT 1988, at 17, available at: <https://ecos.fws.gov/ServCat/DownloadFile/40207?Reference=40499>; Defendants' Memorandum, ECF No. 221-65 at 17.

<sup>164</sup> See *Audubon Wetland Management District and Audubon Garrison Wetland Management District* NARRATIVE REPORT 1989, at 18-19; Defendants' Memorandum, ECF No. 221-66 at 18-19.

<sup>165</sup> See Statement of Karl Limvere, Assistant State Secretary, North Dakota Farmers Union, Before the House Committee on Agriculture, Field Hearings, Moorehead, Minnesota (June 24, 1988), at 14, <https://nebula.wsimg.com/33bfcaaf1ae93998c42b0da57e7319c6?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants' Memorandum, ECF No. 221-67 at 14.

<sup>166</sup> See Statement of Gary Rudningen, President, Minnesota Association of Wheat Growers, Before the House Committee on Agriculture at the Full Field Committee Hearing, Moorehead, Minnesota (June 24, 1988), at 2, <https://nebula.wsimg.com/5309e6f6ea72b5346fa2be05482de41e?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants' Memorandum, ECF No. 221-68 at 2.

1987) regulations the USDA adopted for the purpose of implementing the FSA's Swampbuster provisions, including those governing commenced conversion determinations, in ways that harmed farmers' constitutionally protected private property rights.

#### VI. OUTSIDE GOVERNMENTAL & NON-GOVERNMENTAL INFLUENCES REVEALED IN PRIOR U.S. GOVERNMENT ACCOUNTING OFFICE REPORT

The testimonies and prepared statements provided by these environmental and wildlife groups during the June 1988 House Ag Committee field hearings created such an impression with former Committee Chairman E. (Kika) De La Garza, that he requested the U.S. General Accounting Office (now the U.S. Government Accountability Office ("GAO")<sup>167</sup>) to investigate the questioned practices of USDA-ASCS County Executive Committees. The GAO agreed to this request and ultimately issued its report and findings in September 1990 (Report RCED-90-206),<sup>168</sup> less than one month prior to the commencement of the government's suit against Mr. Brace.

This report focused, in part, on USDA's "implementation of the wetland provisions to reduce wetland conversions." Chapter 4 of the GAO report repeated many of the claims the FWS, National Wildlife Federation and Wildlife Society previously advanced concerning group drainage district projects in North Dakota:

Implementing the act's swampbuster exemption provision has, in some instances, been a source of controversy because the criteria used to make decisions for group projects have frequently changed [...] as ASCS developed the final program rules and regulations [...] ASCS has amended or modified the exemption criteria for commenced conversion decisions several times since the publication of the interim rules in June 1986. [...] *These changes occurred for a variety of reasons, such as litigation by environmental groups and requests from special interests.* Table 4.1 highlights the changes in USDA's criteria between June 1986 and December 1989. [...] Further, application of the criteria has not always been consistent; the documentation provided does not, in many instances, support the

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<sup>167</sup> See Frederick M. Kaiser, *GAO: Government Accountability Office and General Accounting Office*, CRS REPORT FOR CONGRESS (RL30349) (Sept. 10, 2008), at Summary and CRS-1, <https://fas.org/sgp/crs/misc/RL30349.pdf>.

<sup>168</sup> See *Farm Programs: Conservation Compliance Provisions Could Be Made More Effective*, UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES (Sept. 24, 1990), <https://nebula.wsimg.com/247d21c6cc7b406698d56ce1529d121f?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; Defendants' Memorandum, ECF No. 221-69.

exemption decisions; and consultation with the Fish and Wildlife Service was not always carried out as required by law (emphasis added).<sup>169</sup>

The GAO report concluded that “the changing criteria and sometimes *contradictory nature of commenced conversion decisions*” (emphasis added) led to county committee and other ASCS official decisions resulting in the draining of wetlands, especially where group projects were involved. It noted that, as the result of these phenomena, the NWF had repeatedly intervened and requested the ASCS to modify its commenced conversion decisions during 1987-1989.<sup>170</sup>

Although the GAO report appears to have addressed mostly alleged drainage district group project irregularities leading to insufficient or nonenforcement of frequently changing commenced conversion documentary criteria,<sup>171</sup> its scope arguably had been intended to be much broader. For example, it cited how USDA-ASCS’ then latest national statistics had allegedly shown that “producers requested 5,259 exemptions for commenced conversions,” of which “45 percent were approved, 13 percent were denied, and the remaining 42 percent were pending” as of April 1989, when national reporting was suspended due to inaccurate data.<sup>172</sup> In addition, the GAO recommended that the Agriculture Secretary “(1) monitor the application of the wetlands commenced conversion criteria so the decisions made are consistent and (2) enforce the requirements of the Fish and Wildlife Service consultations on commenced conversion decisions in order to utilize its expertise in the area.”<sup>173</sup>

## VII. OUTSIDE NON-GOVERNMENTAL INFLUENCES REVEALED IN PRIOR ENVIRONMENTAL AND WILDLIFE GROUP LITIGATION & LEGAL SCHOLARSHIP

During September 1988, at approximately the same time the Erie County, Pennsylvania ASCS Executive Committee had granted Mr. Brace’s two fields (Fields 14 and 15) a commenced conversion determination covering no more than 43.4 acres in total,<sup>174</sup> the Bottineau County, North Dakota ASCS Committee granted the Bottineau County Water Resource District a commenced conversion determination covering 139 square miles. Unable to persuade the national ASCS Deputy Administrator to reverse that decision, the National Wildlife Federation (“NWF”) brought suit in 1989 in the U.S. District

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<sup>169</sup> See *Farm Programs: Conservation Compliance Provisions Could Be Made More Effective*, *supra* at 27-29, 32-33.

<sup>170</sup> *Id.* at 31.

<sup>171</sup> *Id.* at 31-32.

<sup>172</sup> *Id.* at 28.

<sup>173</sup> *Id.* at 34.

<sup>174</sup> Defendants’ Memorandum, ECF No. 221-8, *supra* at Form SCS-CPA-026, line 16.

Court for the District of North Dakota.<sup>175</sup> The District Court dismissed the NWF's complaint on the ground that "appellants' injuries were insufficient to give them standing under *Sierra Club v. Morton*."<sup>176</sup>

The Eight Circuit Court of Appeals reversed the District Court's ruling holding that the NWF had established Article III standing to present its members' claims before the federal courts.<sup>177</sup> The Circuit Court reached this conclusion based, in part, on congressional findings regarding the value of wetlands which had been included in an FSA-related bill originating in 1985 in the House Merchant Marine and Fisheries Committee<sup>178</sup> that was ultimately enacted into law as the "Emergency Wetlands Resources Act of 1986."<sup>179</sup> The NWF had referenced this same 1985 committee bill language, as explained in a related House Committee report,<sup>180</sup> in its submitted prepared testimony during the June 1988 House Ag Committee hearing.<sup>181</sup>

At least one colored law review article authored by the former Counsel to the NWF's Prairie Wetlands Resource Center (Anthony N. Turrini) discussed

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<sup>175</sup> See *National Wildlife Federation v. ASCS*, 901 F.2d 673, 20 Env'tl. L. Rep. 20,801 (8th Cir. 1990) at 2, citing *National Wildlife Federation v. ASCS*, No. A4-89-067, slip op. at 4 (N.D. Aug. 2, 1989).

<sup>176</sup> 901 F.2d, slip op. at 4, citing *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>177</sup> 901 F.2d at 6. ("The injuries appellants allege their members will suffer because of the actions of the ASCS--a decrease in water supplies and of soil moisture for growing crops, a decrease in the purity of the water they use for domestic needs, a decrease in wetlands and wetland wildlife available to them for aesthetic purposes--are more than an identifiable trifle. They 'are statements of specific injury experienced by ascertainable individuals who' live in or recreate in the Bottineau District. *Coalition for the Environment*, 504 F.2d at 156. Thus, appellants have alleged sufficient injury to establish standing under *SCRAP* and *Morton*. 'An interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected.' *Defenders of Wildlife*, 851 F.2d at 1040 (relying on *SCRAP* and *Morton*). See also, *Coalition for the Environment*, 504 F.2d at 167. [...] We find, for the reasons specified above, that appellants have standing to present their claims to the federal courts.").

<sup>178</sup> 901 F. 2d at 4-5.

<sup>179</sup> See P.L. 99-645, "Emergency Wetlands Resources Act of 1986" (100 Stat. 3582) (Nov. 10, 1986), Sec. 2(a)(1),(2), (4), (5) and (6) (16 U.S.C. Sec. 3901) available at: [http://nebula.wsimg.com/6d75fb9f08abb4e595b7f7dd69719a79?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1.](http://nebula.wsimg.com/6d75fb9f08abb4e595b7f7dd69719a79?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1.;); Defendants' Memorandum, ECF No. 221-70.

<sup>180</sup> See *National Wildlife Federation v. ASCS*, 901 F.2d 673, 20 Env'tl. L. Rep. 20,801 (8th Cir. 1990) at 4-5, citing H.R. Rep. No. 271 Part 2, 99th Cong., 1st Sess. 86-87.

<sup>181</sup> See Statement of the National Wildlife Federation on the Application of the Food Security Act of 1985, Title XII, Subtitle C ("Swampbuster"), NATIONAL WILDLIFE FEDERATION, (June 24, 1988) at 27-28 (137-138 of the House Ag. Comm. Report); Defendants' Memorandum, ECF No. 221-59.

the *NWF v ASCS* litigation in glowing terms.<sup>182</sup> It highlighted how the Eight Circuit Court of Appeals had found that “the link between the wrongful issuance of a commenced determination and injury resulting from wetland drainage [was] not too speculative to support standing.”<sup>183</sup> It also concluded that, by “allowing nonfarmers to sue the ASCS,” the Court’s ruling effectively compelled farmers “who intend[ed, thereafter,] to convert wetlands to consider the cost of litigation and possibility of having invalid exemptions reversed by a federal court.”<sup>184</sup>

The article’s author recycled the USFWS and NWF argument that had attributed nonenforcement of the FSA’s Swampbuster provisions to the “organizational structure of the ASCS,” which he condescendingly referred to as having been comprised of “locally elected county committees [that] misconstrue[d], misappl[ied], or ignore[d] swampbuster in order to excuse farmers for wetland drainage.”<sup>185</sup> Furthermore, the author disparaged the ASCS as “institutionally biased,” ASCS personnel as “lack[ing] technical expertise [and formal training] in wetland issues,” and part-time ASCS committee members as “sometimes personally biased” and “hav[ing] little professional or financial incentive to enforce laws or regulations with which they disagree[d].”<sup>186</sup> Finally, the author discussed the NWF’s extensive role in drawing attention to and ensuring the stricter implementation and enforcement of the FSA’s Swampbuster provisions<sup>187</sup> and in triggering the 1990 GAO report which focused, in part on alleged improper commenced conversion determinations.<sup>188</sup> Given the timing and sequence of this NWF litigation relative to the USFWS administrative challenges to USDA-ASCS commenced conversion determinations, both in the Brace case and in the Midwest and Great Plains regions, the likelihood these events had been thoughtfully choreographed should not be overlooked.

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<sup>182</sup> See Anthony N. Turrini, *Swampbuster: A Report from the Front*, 24 Indiana Law Review 1507 (1991), *supra* (fn. 133) at 1515-1516; Defendants’ Memorandum, ECF No. 221-44 at 1515-1516.

<sup>183</sup> See Turrini at 1516.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1513.

<sup>186</sup> *Id.* at 1513-1514.

<sup>187</sup> *Id.* at 1509-1512.

<sup>188</sup> *Id.* at 1515.

### VIII. OUTSIDE U.S. INFLUENCES REVEALED IN PREVIOUSLY EXECUTED INTERNATIONAL AND INTERSTATE WATERFOWL & WATER QUALITY AGREEMENTS

USFWS<sup>189</sup> and Ducks Unlimited, Inc.<sup>190</sup> publications, the Wildlife Society's June 1988 prepared testimony discussed above, the text of the then applicable North American Wetlands Conservation Act of 1989,<sup>191</sup> and the 1998 and 2009 USDA-FS-DU MOUs<sup>192</sup> reveal that the elaborate domestic public-private sector campaign to end the conversion of pastured wetlands to croplands was premised, in part, on the perceived need to fulfill the legal obligations imposed by international treaties intended to protect migratory birds and their wetland habitats. These agreements include, in reverse chronological order, the North American Waterfowl Management Plan ("NAWMP")<sup>193</sup> (executed in May 1986 by the Minister of the Environment Canada and the U.S. Secretary of the Interior in and in 1994 by Mexico), the prior Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere,<sup>194</sup> and the earlier

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<sup>189</sup> See *North American Waterfowl Management Plan – A Model for International Conservation*, U.S. FISH & WILDLIFE SERVICE MIGRATORY BIRD PROGRAM, <https://www.fws.gov/birds/management/bird-management-plans/north-american-waterfowl-management-plan.php>.

<sup>190</sup> See *NAWMP – North American Waterfowl Management Plan*, DUCKS UNLIMITED, <http://www.ducks.org/conservation/public-policy/nawmp-north-american-waterfowl-management-plan>.

<sup>191</sup> See P.L. 101-233, "North American Wetlands Conservation Act of 1989" (103 Stat. 1968-1969) (Dec. 13, 1989), Secs. 2(a)(9), 2(a)(11), 2(a)(12), and 2(a)(13) (16 USC 4401).

<sup>192</sup> See Memorandum of Understanding between the USDA and Ducks Unlimited, Inc. (99-SMU-028) (Dec. 14, 1998), *supra* at Secs. II-III, p. 2. See also Service-wide Memorandum of Understanding Between Ducks Unlimited, Inc. and United States Department of Agriculture Forest Service (09-SU-11132422-326) (Oct. 9, 2009), *supra* at Secs. B and C at 2-3; Defendants' Memorandum, ECF No. 221-51.

<sup>193</sup> See *North American Waterfowl Management Plan – A Strategy for Cooperation*, UNITED STATES DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE AND ENVIRONMENT CANADA (May 1986), [https://nebula.wsimg.com/66813738944138a282ece4c3ced152aa?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1.](https://nebula.wsimg.com/66813738944138a282ece4c3ced152aa?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1.;); Defendants' Memorandum, ECF No. 221-53.

<sup>194</sup> See *Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere* (executed on Oct. 12, 1940, ratified on April 15, 1941, and proclaimed on April 30, 1942), <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treay-WesternHemisphere.pdf>.



1916<sup>195</sup> and 1936<sup>196</sup> Migratory Bird Conventions the U.S. executed with Canada and Mexico, respectively.

The NAWMP, in particular, emphasized how, as of 1986, the waterfowl industry had generated “in excess of several billion dollars annually,” how the 1916 Migratory Birds Convention had been established “to ensure conservation of migratory birds, and how the “[r]eversing or modifying [of] activities that destroy or degrade waterfowl habitat [was] imperative to the future success of waterfowl management.”<sup>197</sup> It also highlighted how the most important nesting habitat of numerous duck species are the prairie pasturelands that have been converted to “intensively farmed land,” the “unaltered natural environments along the Great Lakes-St. Lawrence lowlands, in the boreal forest, and in coastal lowlands and estuaries” (i.e., “natural wetlands”), and the “wetlands in the eastern farmlands [which were] also be being drained and cultivated at an increasing rate.”<sup>198</sup>

The NAWMP recommended that the signatory parties “induce farmers and ranchers to manage their lands for waterfowl production,” and to promote “[s]oil, water and wetland conservation [...] on [their] private lands.” In other words, the “goal would be to protect and improve prairie wetlands for duck production by ensuring that wetland basins are conserved, along with an adequate amount of nearby upland nesting cover”<sup>199</sup> Lastly, the NAWMP pointed out how “the financial participation of private conservation organizations,<sup>200</sup> such as Ducks Unlimited,<sup>201</sup> [...was] critical to the

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<sup>195</sup> See *Convention Between the United States and Great Britain for the Protection of Migratory Birds*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, NO. 2 (April 1917), <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treaty-Canada.pdf>.

<sup>196</sup> See *Mexico-United States: Convention for the Protection of Migratory Birds and Game Mammals*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW NO. 3 (July 1937), <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treaty-Mexico.pdf>.

<sup>197</sup> See *North American Waterfowl Management Plan – A Strategy for Cooperation*, UNITED STATES DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE AND ENVIRONMENT CANADA (May 1986) at 1.

<sup>198</sup> *Id.* at 11.

<sup>199</sup> *Id.* at 14.

<sup>200</sup> See *Bird Conservation Partnerships & Initiatives*, U.S. FISH & WILDLIFE SERVICE MIGRATORY BIRD PROGRAM, <https://www.fws.gov/birds/management/bird-conservation-partnership-and-initiatives.php>.

<sup>201</sup> See Mark Petrie, Ph.D. & Michael Anderson, Ph.D., *Measuring Conservation Success – How do Current Waterfowl Populations and Habitat Levels Stack Up Against the Goals of the North American Waterfowl Management Plan?*, DUCKS UNLIMITED, [www.ducks.org/conservation/conserving-wetlands-waterfowl/measuring-conservation-success](http://www.ducks.org/conservation/conserving-wetlands-waterfowl/measuring-conservation-success).

implementation of the NAWMP.”<sup>202</sup> To this end, it recommended that the signatory governments should conduct research “on the effects of land use practices on the breeding success of waterfowl,” and should, “in cooperation with such conservation organizations as Ducks Unlimited” develop and demonstrate to farming interests “methods of integrating sound agricultural land use with duck production.”<sup>203</sup> Stated differently, the United States Government ultimately sought to persuade American farmers such as Mr. Brace to breed waterfowl on their private croplands deemed by the USFWS to be of marginal economic value primarily to cultivate more remunerative game prey and haute cuisine, not to mention, “aesthetic, conservational, and recreational values” for nonfarmer third parties.

The USFWS subsequently initiated the national “Partners for Fish and Wildlife Program” in 1987,<sup>204</sup> which induced farmers to execute voluntary agreements to restore fish and wildlife habitat on their private lands in exchange for receiving FWS technical assistance and cost-sharing. “The Partners Program in Pennsylvania [...] began in 1988,<sup>205</sup> primarily as a wetland restoration program” targeting the habitats of “migratory birds, anadromous fish, and Federally-listed threatened and endangered species. [...] Restoration efforts [have] focus[ed] on *returning hydrology to formerly drained wetlands by removing or disabling field drainage tiles, plugging drainage ditches*, and constructing low berms to further inhibit drainage” (emphasis added).<sup>206</sup> The PA Partners Program closely cooperated with the Pennsylvania Game Commission and Fish and Boat Commission – two state law enforcement agencies, as well as, with Ducks Unlimited, Inc. to achieve these goals. Such close cooperation was consistent with the testimony of at least one recent deponent in the Brace case, a former PA Game Commission “law enforcement” field officer. He had testified twenty-five (25) years ago that PA Game Commission field officers who had other states bordering and/or

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<sup>202</sup> See *North American Waterfowl Management Plan – A Strategy for Cooperation* *supra* note 198 at 14.

<sup>203</sup> *Id.* at 15.

<sup>204</sup> See *DOI News: Partners for Fish and Wildlife Program Celebrates 25 Years*, U.S. DEPARTMENT OF THE INTERIOR – FOR EMPLOYEES (Sept. 7, 2012), <https://www.doi.gov/employees/news/Partners-for-Fish-and-Wildlife-Program-Celebrates-25-years>.

<sup>205</sup> See *Partners for Fish and Wildlife in Pennsylvania – Restoring Habitat for Future Generations*, U.S. FISH AND WILDLIFE SERVICE (Oct. 2010), [https://www.fws.gov/northeast/EcologicalServices/pdf/partners/pa\\_2010\\_pffw\\_program\\_final.pdf](https://www.fws.gov/northeast/EcologicalServices/pdf/partners/pa_2010_pffw_program_final.pdf).

<sup>206</sup> See *Partners for Fish and Wildlife Program Summary*, U.S. FISH AND WILDLIFE SERVICE (Sept. 2001), <https://www.fws.gov/northeast/partners/PDF/PA-needs.pdf>. (“Wetland restoration techniques focus on returning hydrology to formerly drained wetlands by removing or disabling field drainage tiles and plugging drainage ditches.”).

migratory bird routes in their districts would frequently be deputized by the FWS to enforce federal game (species and habitat) laws.<sup>207</sup>

Along with the NAWMP, the Great Lakes Water Quality Agreement of 1978 (“GLWQA ‘78”) which the U.S. and Canada executed on November 22, 1978 had been intended to govern the mutual rights and obligations of all Basin jurisdictions, including the Great Lakes States, to use, conserve, and protect Basin water resources. These rights and obligations were subsequently reaffirmed by the Governors of the eight (8) Great Lakes States and the Premiers of Quebec and Ontario Provinces in the preamble to the Great Lakes Charter – Principles for the Management of Great Lakes Water Resources, executed on February 11, 1985.<sup>208</sup> These rights and obligations were again reaffirmed in the 1987 Protocol to the Great Lakes Water Quality Agreement of 1978 (“GLWQA ‘87”), executed on November 18, 1987.<sup>209</sup> The GLWQA ‘87 instructed the signatory parties to pay “direct particular attention to the identification and preservation of significant wetland areas in the Great Lakes Basin Ecosystem which are threatened by dredging and disposal activities.”<sup>210</sup> It also directed the parties to identify, preserve and, where necessary, rehabilitate “[s]ignificant wetland areas in the Great Lakes System that are threatened by urban and agricultural development ...”<sup>211</sup>

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<sup>207</sup> See Defendants’ Memorandum, Deposition of Andrew Martin (March 18, 1992), at 50-52. (“Former Pa. Game Commission official Andrew Martin testified as follows: “Q. I believe, Mr. Martin, you testified that you also contacted a David Put[nam]? A. That is correct. Q. He is with the U.S. Fish and Wildlife Service. What is his job? A. Biologist. Q. And? A. I am not sure what all his duties entail. Q. How long [have] you known Mr. Put[nam], if you have? A. Approximately 15 years. Q. Fifteen years? A. Yes. Q. I believe you said you had been deputized as an agent for the Fish and Wildlife Service? A. Yes. Q. How does that work? A. Field officers that have adjoining states and/or have migratory bird routes in their districts would frequently be deputized by the Department of Interior through the U.S. Fish and Wildlife Service to enforce the federal game laws. My district happened to border – well, of course, the north is Canada and to the east was New York. And very definitely had a lot of migratory birds in y district and so that goes with the district. More so that the officer or the individual person, that goes with the district. Q. And there is a formal relationship of any kind as far as the Fish and Wildlife’s authority over you. Could they give you direction? A. They could, yes. Q. In his capacity as a deputy? A. Yes.”).

<sup>208</sup> See *The Great Lakes Charter – Principles for the Management of Great Lakes Water Resources* (Feb. 11, 1985),

<https://www.internationalwaterlaw.org/documents/regionaldocs/Local-GW-Agreements/1985-GL-Charter.pdf>.

<sup>209</sup> See *Revised Great Lakes Water Quality Agreement of 1978, as Amended by Protocol Signed November 18, 1987*,

[http://www.ijc.org/files/tinymce/uploaded/GLWQA\\_e.pdf](http://www.ijc.org/files/tinymce/uploaded/GLWQA_e.pdf).

<sup>210</sup> *Id.* Annex 7.3, at 40.

<sup>211</sup> *Id.* Annex 13.3, at 55-56.

The Great Lakes Charter and the GLWQA '87 were each subsequently amended and supplemented in June 2001,<sup>212</sup> and September 7, 2012,<sup>213</sup> respectively. On December 13, 2005, the eight (8) Great Lakes States, the Province of Ontario and the Government of Quebec executed a new international agreement known as the Great Lake-St. Lawrence River Basin Sustainable Water Resources Agreement.<sup>214</sup> On the same day, the eight (8) Great Lakes States, including Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York, executed an interstate (regional) compact subsequently approved by Congress, known as the Great Lakes—St. Lawrence River Basin Water Resources Compact,<sup>215</sup> for purposes of implementing that international agreement. Each of these latter agreements, including the GLWQA's 2012 Protocol, are distinct from the earlier Canada-U.S. agreements discussed above. They are significantly different because they incorporate post-modern<sup>216</sup> international sustainable development environmental law concepts such as the European precautionary principle<sup>217</sup>

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<sup>212</sup> See *The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter* (June 18, 2001), [https://www.michigan.gov/documents/deq/deq-ogl-Annex2001\\_260204\\_7.pdf](https://www.michigan.gov/documents/deq/deq-ogl-Annex2001_260204_7.pdf).

<sup>213</sup> See *Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983, and on November 18, 1987* (Signed Sept. 7, 2012, Entered into force, Feb. 12, 2013), [https://binational.net/wp-content/uploads/2014/05/1094\\_Canada-USA-GLWQA-\\_e.pdf](https://binational.net/wp-content/uploads/2014/05/1094_Canada-USA-GLWQA-_e.pdf).

<sup>214</sup> See *Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement* (Dec. 13, 2005), [www.glslregionalbody.org/Docs/Agreements/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Sustainable\\_Water\\_Resources\\_Agreement.pdf](http://www.glslregionalbody.org/Docs/Agreements/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf).

<sup>215</sup> See *Great Lakes-St. Lawrence River Basin Water Resources Compact* (Dec. 13, 2005), <http://www.glslcompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Water%20Resources%20Compact.pdf>.

<sup>216</sup> See Lucas Bergkamp & Lawrence Kogan, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, 4 EURO. J. RISK REG. 493 (Apr. 2013), available at: [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2EA78F975F1C93B921AB3054E70CDD31/S1867299X00003123a.pdf/trade\\_the\\_precautionary\\_principle\\_and\\_postmodern\\_regulatory\\_process.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2EA78F975F1C93B921AB3054E70CDD31/S1867299X00003123a.pdf/trade_the_precautionary_principle_and_postmodern_regulatory_process.pdf). See also Margherita Ramajoli, *A Post-Modern Administrative Law?*, IUS PUBLICUM (July 28, 2016), at Sec. 4, [http://www.ius-publicum.com/repository/uploads/28\\_07\\_2016\\_18\\_35-Ramajoli.pdf](http://www.ius-publicum.com/repository/uploads/28_07_2016_18_35-Ramajoli.pdf) (discussing, in part, how administrative law is constitutionally post-modern).

<sup>217</sup> See Lawrence A. Kogan, *Local Sustainability Movement Rides Wave of Evolving Federalism To 'Axe' Private Property Rights*, 7 Ky. J. Equine, Agric., & Nat. Res. L. 469 (2014-2015), <https://nebula.wsimg.com/c2d8337790ff684bd31b029c30b1b6dc?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

that have effectively Europeanized<sup>218</sup> and thereby drastically altered, consistent with European social democratic values (i.e., “soft socialism”<sup>219</sup> and “soziale Marktwirtschaft”<sup>220</sup>), the way U.S. federal and state wetlands laws and implementing regulations have been aggressively enforced against private landowners, especially farmers.

Since these value-laced agreements effectively require signatory state governments to adopt an administrative presumption of possible harm to environment and wildlife tied to an ecosystem-based management assessment of international waterbodies and their domestic tributaries and reaches that reflexively promotes public interests over private interests,<sup>221</sup> they are, by definition, anathema to the Enlightenment-era natural rights and empirical science-based foundations of the U.S. Declaration of Independence, the U.S. Constitution and the U.S. Bill of Rights. Therefore, given their oaths of office, would it not be reasonable to expect that the current political leadership in the Great Lakes States would object to, if not, sensibly call for the comprehensive review of these international agreements to, at least, assess how severely these *influences* have diminished the constitutionally protected private property rights of their citizens? If, however, these state political leaders are inclined to follow in the footsteps of their lackadaisical congressional colleagues,<sup>222</sup> it is likely that concerned state citizens will need to compel them to do so.

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<sup>218</sup> See Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetlands Laws & Regulations*, prepared for THE CLARE CTY. MICH. FARM BUREAU LEGIS. BREAKFAST (June 26, 2017), <https://nebula.wsimg.com/cc88e67ef1abace7ef0a31b33115ee42?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

<sup>219</sup> See Daniel Oliver, Jr., *Socialism in Stages*, NAT'L REV. (Dec. 15, 2009), <https://www.nationalreview.com/2009/12/socialism-stages-daniel-oliver-jr/>; Jonah Goldberg, *Capitalism vs. Capitalists*, TOWNHALL (Apr. 23, 2010), <https://townhall.com/columnists/jonahgoldberg/2010/04/23/capitalism-vs-capitalists-n1343620>.

<sup>220</sup> See Vaclav Klaus, *The Czech Republic and the EU After the French and Dutch Referendums*, Speech (Oct. 18, 2005), <https://www.klaus.cz/clanky/1178>. (“Politically, we are now a mature pluralistic, parliamentary republic with – ideologically – well-defined political parties. Economically, we transformed the centrally planned and state-owned economy into a market economy, based predominantly on private property. It is, however, not the world of free markets of Mises, Hayek or the Chicago school. It is the European “soziale Marktwirtschaft”, a European paternalistic, overregulated welfare state with all its well-known rigidities and demotivating irrationalities.”).

<sup>221</sup> See Lawrence A. Kogan, *'Ecosystem-Based Management': A Stealth Vehicle to Inject Euro-Style Precaution Into U.S. Regulation*, Washington Legal Foundation Legal Backgrounder Vol. 24, No. 23 (July 10, 2009).

<sup>222</sup> See Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law*, 7 Santa Clara J. Int'l L. 23 (2009) at 29-30, (*inter alia*, describing the U.S. Senate's failure-

## IX. CONCLUSION

The Trump administration has repeatedly hailed how it has relieved America's farmers of their prior regulatory burdens<sup>223</sup> and "ended the regulatory assault on [their] way of life."<sup>224</sup> Nevertheless, merely delaying by two years the implementation of the former Obama administration's "Waters of the U.S." ("WOTUS") rule which extends EPA and the Corps' already expansive CWA Section 404 wetlands jurisdiction over private farmlands,<sup>225</sup> while endeavoring to rescind it,<sup>226</sup> doesn't go nearly far enough to guarantee this relief. And Congress' more recent efforts to craft a new Farm Bill delivering only prospective relief and promoting additional wetland conservation<sup>227</sup> will do little to ameliorate the harm already suffered by America's farmers, including Mr. Brace. President Trump's more informed advisers likely recognize that he is facing a deeply entrenched regulatory and

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to-date to examine the environmental regulatory dimensions of the U.N. Convention on the Law of the Sea ("UNCLOS"), and imploring Congress to undertake a due diligence review of that international agreement "to discover and explain the treaty's numerous environmental regulatory, enforcement and revenue-raising provisions," and "how new controls and imposts could be introduced to the general public" through implementing domestic environmental and wildlife regulation).

<sup>223</sup> See, e.g., Ken Maschhoff, *Trump's first 100 days bring regulatory relief for farmers*, DES MOINES REG. (Apr. 26, 2017),

<https://www.desmoinesregister.com/story/opinion/columnists/2017/04/26/trumps-first-100-days-bring-regulatory-relief-farmers/306647001>.

<sup>224</sup> See Christina Wilkie, *Trump to farmers: I've ended the 'regulatory assault on your way of life'*, CNBC (Jan. 8, 2018), <https://www.cnbc.com/2018/01/08/trump-to-farmers-i-ended-the-regulatory-assault-on-your-way-of-life.html>.

<sup>225</sup> See Coral Davenport, *E.P.A. Blocks Obama-Era Clean Water Rule*, NEW YORK TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/climate/trump-water-wotus.html>; See also Ariel Wittenberg, *Clean Water Rule – No Time to Waste for Trump Admin's Assault on WOTUS*, E&E NEWS (Apr. 14, 2017), <https://www.eenews.net/stories/1060053119>; Juliet Eilperin & Abby Phillip, *Trump Directs Rollback of Obama-era Water Rule He Calls 'Destructive and Horrible'*, THE WASHINGTON POST (Feb. 28, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/02/27/trump-to-direct-rollback-of-obama-era-water-rule-tuesday>.

<sup>226</sup> See Chuck Abbott, *Trump Administration Says WOTUS Is On Its Way Out*, SUCCESSFUL FARMING (June 28, 2017), <https://www.agriculture.com/news/business/trump-administration-says-wotus-is-on-its-way-out>.

<sup>227</sup> See, e.g., United States House of Representatives, Committee on Agriculture, FARM BILL - H.R. 2, AGRICULTURE AND NUTRITION ACT OF 2018, <https://agriculture.house.gov/farmbill/>; Gabrielle Levy, *9 Things in the Farm Bill That Affect (Almost) Every American*, U.S. NEWS & WORLD REPORT (June 27, 2018), <https://www.usnews.com/news/politics/articles/2018-06-27/9-things-in-the-farm-bill-that-affect-almost-every-american>.

law enforcement legacy bureaucracy linked to the “deep state;”<sup>228</sup> but, they may not realize that they must go back much farther in time, perhaps to 1977, or at least, to 1985 when the FSA was first enacted and to which the 1993 jointly issued EPA-Corps regulations retroactively apply, to properly address the wetlands regulatory juggernaut that has steadily decimated our nation’s small and medium-sized farms. Specifically, the President must both work with Congress and direct the heads of those federal agencies that participated in the prior conspiracy/choreography of curtailing the completed or commenced conversions of wetlands to croplands (i.e., USFWS, EPA, Corps and USDA), to reclaim, reestablish and reaffirm for all of America’s farmers, especially Mr. Brace, their former PC and CC exclusions from FSA funding ineligibility and CWA Section 404 wetlands jurisdiction. Doing less or simply ignoring the magnitude of this problem (i.e., failing to ensure that hay and pasture farming, like crop farming, are recognized in both the FSA and CWA as “normal farming activities”) for reasons of political expediency, as state and congressional political leaders have, will spell the end of America’s traditional farming communities as we have come to know them.

LAWRENCE A. KOGAN<sup>229</sup>

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<sup>228</sup> Mike Lofgren, *Essay: Anatomy of the Deep State*, MOYERS & COMPANY (Feb. 21, 2014), <http://billmoyers.com/2014/02/21/anatomy-of-the-deep-state/>; Mike Lofgren, *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government* (Penguin © 2016); Greg Grandin, *What is the Deep State?*, THE NATION (Feb. 17, 2017), <https://www.thenation.com/article/what-is-the-deep-state/>; Michael Goodwin, *The GOP Memo Proves the ‘Deep State’ is Real*, N.Y. POST (Feb. 3, 2018), <https://nypost.com/2018/02/03/the-gop-memo-proves-the-deep-state-is-real/>; Emma M. Ashford, *The Deep State Isn’t What You Think*, THE NAT’L INTEREST (Feb. 11, 2018), <http://nationalinterest.org/feature/the-deep-state-isnt-what-you-think-24455>.

<sup>229</sup> The author wishes to thank the Brace Family for placing their faith in my judgment and abilities during this new unfortunate chapter of this 31-year ordeal, and the Knox Law Firm of Erie, PA for providing support to my defense of the Brace Family. The author also wishes to thank those members of the farm media who were alarmed sufficiently about the excessive Government overreach exercised and excessive growth of the administrative state demonstrated in these actions, and their implications for We the People’s exercise of our constitutionally protected private property rights, to write about and disclose these injustices to America’s farming communities. Finally, this author wishes to thank the San Joaquin Agricultural Law Review and the entire editorial staff for providing the opportunity to document for the historical record what has truly been a travesty for the Brace Family and the American Farmer. Hopefully, this article will not fall on deaf ears, and responsible and attentive members of Congress and the White House will act quickly “to do the right thing.”