

## ***United States v. Brace*** (WDPa 2017)

On January 9, 2017, only 11 days prior to the inauguration of President Trump, the U.S. Environmental Protection Agency (“EPA”) filed two lawsuits alleging permitting violations under Sections 301 and 404 of the Federal Clean Water Act (“CWA”), against a fourth-generation northwestern Pennsylvania farming business (Brace Farms, Inc. et al.) for activities previously undertaken on two-of-three contiguous and adjacent farm fields/properties. One suit ([90-225](#)) alleges violations had occurred in 2015 in violation of an ambiguous and ill-defined 1996 court-approved consent decree settling prior litigation over CWA 301/404 violations that had allegedly taken place during 1985-1987 on one such field/property. The other suit ([17-006](#)) alleges new CWA Section 301/404 violations had been committed during 2015 on the other such farm tract operated as a single drainage-integrated farm. CWA Section 404 prohibits the dredging and filling of “Waters of the United States” (“WOTUS”), including adjacent wetlands, without a U.S. Army Corps of Engineers (“Corps”) permit.

It strains credulity that the Government would have this Court believe that the timing of these actions was in no way motivated by political considerations. Indeed, during the past 30 years, a substantial portion of the operations of this family farming business have been disrupted, diminished, and rendered practically valueless because of the EPA’s, Corps’ and U.S. Fish & Wildlife Service (“FWS”)’s over-enforcement of these same CWA provisions.

The casefile reveals how EPA had selectively ignored that Robert Brace’s three-tract drainage-integrated family farm had previously received a “prior converted cropland” (“PCC”) designation (i.e., conversion from wetlands to farmable dryland) from, and the certification of Brace’s farmland conservation plan by, the U.S. Department of Agriculture’s Soil Conservation Service (“USDA-SCS”) prior to December 23, 1985. The PCC designation and certification were significant because they excluded those lands from the definition of WOTUS and, thus, CWA coverage, and allowed Mr. Brace to complete his cropland conversion, including the construction and maintenance of drainage tiling authorized by his certified conservation plan, before January 1, 1995.

EPA’s 1990 lawsuit alleged that Brace’s farm conversion activities did not meet the “normal farming activities” exemption from CWA 404 dredge-and-fill permitting. Although Brace had prevailed at the [Federal District Court](#), EPA successfully appealed that ruling to the [Third Circuit Court of Appeals](#), which held that his PCC and drainage construction activities violated the CWA 404 normal farming activities exemption and remanded the case to the District Court for resolution.

Unable to persuade the U.S. Supreme Court to grant his petition for certiorari, Brace, in 1996, executed an EPA-drafted Consent Decree with the U.S. Justice Department which the District Court thereafter approved. The Consent Decree required him to restore 32.5 acres of one farm tract designated as wetlands to its prior 1984 condition. Brace complied with the Consent Decree, but soon found that, when fully implemented, it not only transformed the 32.5 acres to wetlands (*a condition not present in 1984*), but also caused surface flooding and subsurface erosion of between 67 and 92 additional acres of his three farm tracts, thereby rendering that portion of them nonfarmable from 1996 to 2016.

Having suffered economically and emotionally from Government over-enforcement of the Consent Decree during the past 20 years, Brace filed, on July 3, 2017, and notified the Court, on July 7, 2017, of \$8 million of administrative claims brought against the EPA, Corps and U.S. Fish & Wildlife Service under the Federal Tort Claims Act. Brace seeks compensation for damages to his farmlands and for 20 years’ worth of lost harvest revenues resulting from the periodic ongoing flooding and erosion caused by EPA’s improper, negligent and wrongful over-enforcement of the Consent Decree. Defendants had first notified the Government of its intent to file with the EPA an administrative counterclaim under the Federal Tort Claims Act during early March 2017, prior to its first scheduled mediation session, and then again, prior to its May 2017 scheduled judge-supervised mediation session.

- Recent media discussing this case
  - Erie Times ([1-12-17](#); [3-2-17](#); [3-22-17](#))
  - Lancaster Farming ([4-14-17](#))
  - Farmshine (3-24-17) ([p. 4](#); [p. 7](#))
  - WLF Legal Pulse (4-20-17) ([here](#)) & ([here](#))
    - Appearing in George Washington Univ. Regulatory Studies Center Regulatory Digest ([4-26-17](#))
  - Canada Free Press ([4-29-17](#))
  - Farm and Dairy ([5-4-17](#))