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Thomas Philbrick

Thomas J. Philbrick

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ABSTRACT

Pennsylvania farmer Robert Brace was sued by the federal government in 1987 for repairs he made to an existing drainage system on his farm. The Third Circuit Court of Appeals held in 1994 that Brace's repair activities did not constitute "normal farming activity" and were therefore subject to Clean Water Act regulation. After thirty years of contending with the government, Brace has now filed an $8 million administrative action against the Environmental Protection Agency, the Army Corps of Engineers, and the United States Fish and Wildlife Service requesting financial compensation for improper regulatory enforcement that has resulted in millions of dollars of lost profits.

Mr. Brace should prevail in this lawsuit because he was wrongfully accused of violating federal regulations from which he was in compliance or exempt. Furthermore, to ensure that other farmers are not subjected to such a fate, structural changes must be made to the United States' environmental and agricultural regulatory systems. These changes include redefining "normal farming activities" under the Clean Water Act to reflect a more realistic understanding of agriculture, reinforcing the original definition of Prior Converted Cropland to definitively exclude croplands converted prior to 1985 from Clean Water Act jurisdiction, and definitively recognizing the Commenced Conversion exemptions from Clean Water Act regulation given to farmers like Robert Brace.

The Robert Brace case is a poignant reminder that failing to restrain regulatory overreach seriously threatens America's farmers. Agricultural and environmental interests must be balanced by policymakers and citizens alike, but regulatory frameworks divorced from the realities of farming are unhelpful on many levels. The story of Robert Brace shows that the shifting sands of the administrative state can pose a grave threat to individual freedoms if allowed to roam unchecked.

I. INTRODUCTION

On a cool morning in May 1987, twelve officials from the U.S. Environmental Protection Agency ("EPA"), U.S. Army Corps of Engineers ("Corps"), and the U.S. Fish and Wildlife Service ("FWS") pulled into the driveway of farmer Robert Brace in Waterford Township, Pennsylvania.[1] In a conversation that would drastically alter the course of Brace's life, the officials told him that he was violating section 404 of the Clean Water Act ("CWA") and ordered him to stop all discharge activities on one of three adjacent tracts of his mixed-use farm or pay a $50,000-per-day penalty.[2] The alleged discharge activities were the ditch maintenance actions Brace had taken from 1977 to 1984 to repair a field drainage system built by his grandfather.[3] The repairs were necessitated in large part by the recurring presence of several beaver dams within the ditch network. While the Pennsylvania Game Commission ("PGC") had removed the beavers on a previous occasion without issue,[4] one of the PGC agents subsequently began questioning Brace about the repairs he had made to the drainage system.[5]Soon afterward, the Department of Justice ("DOJ") sued Brace.[6]

Thirty years later, Brace is still battling the government.[7] The Third Circuit Court of Appeals held in 1994 that Brace's repair activities were not "normal farming activities" and were, therefore, subject to CWA regulation.[8] With no options left, Brace signed a consent decree in 1996 that required him to restore his approximately 30-acre tract to pre-1985 conditions.[9] However, the parties had different conceptions of what the pre-1985 condition of the tract had been.[10] After a series of contradictory notices to Brace regarding whether he could use the land, the EPA filed two lawsuits against him in January 2017 for CWA violations on two portions of his property.[11]

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1. Chris Bennett, *Blood And Dirt: A Farmer's 30-Year Fight With the Feds*, AGWEB (May 16, 2018, 7:43 AM), https://www.agweb.com/article/blood-and-dirt-a-farmers-30-year-fight-with-the-feds/.

2. *Id.*

3. *See* Defendants' Response and Opposition to United States Second Motion to Enforce Consent Decree and For Stipulated Penalties at 5, United States v. Brace, Civil Action No. 90-229 (W.D. Pa. 2018) [hereinafter Response] (noting that Brace's grandfather had used the drainage system years earlier); s*ee generally* 2-6-19 Order & 3-26-19 Order, United States v. Brace, Civil Action 90-299 (W.D. Pa. 1996). The author wishes to note that these Orders established that the Response cited previously in this footnote is currently being held in abeyance for redrafting and refiling. The document is historically archived and is valid public domain material.

4. *See* Bennett, *supra* note 1.

5. *See id.*

6. *See id.*

7. *See generally* United States v. Brace, Civil Action No. 1:17cv6 (W.D. Pa. 2017).

8. *See* United States v. Brace, 41 F.3d 117, 125 (3d Cir. 1994).

9. *See* Consent Decree at 3, United States v. Brace, Civil Action No. 90-299 (W.D. Pa. 1996) ("Defendants will perform wetlands restoration in accordance with the wetlands restoration plan.").

10. *See* Brace v. United States, 72 Fed. Cl. 337, 344 (2006) ("[B]y the end of 1979, the site was dry, with the exception of times of excessive rainfall."); *see also* ""EcoStrategies Civil Eng'g, *Wetland Evaluation Report*, 4, (2015), http://nebula.wsimg.com/658771222d0cf5edb63033181395d3a6?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1 [hereinafter *Report*] (stating that the "pre-1984 condition was dry farmland that was properly drained and either producing crops or was in the process of being converted to produce crops as shown on the authentic historical aerial photos").

11. *See infra* Part II.B; *see also* United States v. Brace, Civil Action No. 1:17cv6 (W.D. Pa. 2017).

In June of that year, the case took a favorable turn for Brace when a Western District of Pennsylvania judge agreed to authorize additional discovery in the initial 1990 case.[12] Brace then filed an $8 million administrative action against the EPA, Corps, and FWS under the Federal Tort Claims Act.[13] In this action, Brace requested financial compensation for twenty years of damage to his family farming business, harm to his land, and improper regulatory enforcement that resulted in millions of dollars of lost profits.[14]

Brace was wrongfully accused of violating federal regulations with which he was in compliance or exempt from.[15] Several structural changes must be made to the United States' regulatory framework in order to ensure that other farmers are not subjected to circumstances like those of Robert Brace.[16] These changes include redefining the CWA's "normal farming activities" exemption to reflect a more realistic understanding of agriculture, reinforcing the original definition of Prior Converted Cropland to exclude croplands converted prior to 1985 from CWA jurisdiction, and definitively recognizing the Commenced Conversion exemptions from CWA regulation given to farmers like Robert Brace.[17]

In Part I, this Note discusses the background of the Brace family farm lawsuit.[18] This Part includes the legal framework for the lawsuit, the factual and procedural history of the case, and an introduction to the broader policy debate.[19] Part II argues that Brace should prevail in this lawsuit because he was wrongfully accused of violating the federal statutes and regulations at issue.[20] Part III proposes three policy changes that Congress should adopt in light of the *Brace* lawsuit to better protect farmers from regulatory overreach.[21]

II. ENVIRONMENTAL REGULATION AND THE BRACE FAMILY FARM

The Clean Water Act ("CWA"), which regulates the use of the nation's waterways, is the primary statute at issue in the *Brace* case.[22] It intersects with the

12. *See* Bennett, *supra* note 1.

13. *See* Federal Torts Claims Act at 1, Brace v. United States, Civil Action No. 90-229 (W.D. Pa. 2017) [hereinafter Torts Claim].

14. *See id.*; *see also* Lawrence Kogan, *30-Year-Old Wetlands Case Takes Favorable Turn for Aggrieved Pennsylvania Farmer*, THE KOGAN LAW GRP., P.C., (July 12, 2017), https://www.pr.com/press-release/723108.

15. *See infra* Part II (arguing that Robert Brace should prevail because he was falsely accused of violating federal regulations with which he was in compliance or exempt from).

16. *See infra* Part III (arguing that Congress must address three policy issues in order to prevent other farmers from experiencing the same struggles as Robert Brace).

17. *See id.*

18. *See infra* Part I (describing the legal and factual background of the Brace family farm lawsuit).

19. *See id.*

20. *See infra* Part II (arguing that Robert Brace should prevail because he was falsely accused of violating federal regulations with which he was in compliance or exempt from).

21. *See* 33 U.S.C. § 1344(f)(1)(A)-(C) (2012) (noting that the current definition of normal farming activities includes planting, seeding, harvesting, cultivation, minor drainage, upland soil and water conservation practices, emergency repairs, maintaining drainage and tiling systems, and maintaining drainage ditches); *see also infra* Part III.

22. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2012).

Food Security Act of 1985 ("FSA"), which includes exemptions from regulation under the CWA and additional wetlands regulations.[23] These two statutes and their accompanying regulations create a complex administrative structure.[24] The government used these two statutes to charge Robert Brace with violations of federal law.[25]

A. The Clean Water Act and Its Progeny

The CWA prohibits the discharge of pollutants from any point source into navigable waters of the United States ("WOTUS") without a permit.[26] The EPA enforces the CWA in consultation with the FWS and the Corps.[27] The Obama administration redefined WOTUS so that all wetlands adjacent to WOTUS became subject to the CWA permitting requirements.[28] Whether a body of water is a WOTUS subject to CWA regulation is determined by whether the water has a significant nexus to a navigable water.[29] The Trump administration proposed a revised definition of WOTUS on December 11, 2018 and subsequently issued a final revised rule on January 23, 2020.[30]

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23. *See id.; see* Food Security Act of 1985, 16 U.S.C. §§ 3821-3822 (2012). The CWA and FSA intersect in several ways. For instance, the FSA's "Swampbuster" provision, which is discussed in depth below, partners with the CWA to prevent wetlands from being drained without proper consideration of other factors.

24. *See* Clean Water Act Regulatory Programs: Final Rule, 58 Fed. Reg. 45,008, 45,031-45,035 (Aug. 25, 1993) (to be codified at 33 C.F.R. pt. 323, 328) [hereinafter Final Rule] ("[W]e are excluding PC crop land from the definition of the waters of U.S. in order to achieve consistency in the manner in which various federal programs address wetlands.").

25. *See generally* Complaint, United States v. Brace, Civil Action No. 90-229 (W.D. Pa. 2017).

26. *See* 33 U.S.C. § 1251(a) (2012).

27. *See* 33 U.S.C. § 1251 (2012).

28. *See* Sarah Everhart, *The WOTUS Rule Applies in Maryland*, MD. RISK MGMT. EDUC. BLOG (Sept 18, 2018), http://agrisk.umd.edu/blog/the-wotus-rule-applies-in-maryland?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+MarylandAgriculturalLawBlog+%28Maryland+Risk+Management+Blog%29; *see also* 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://www.wlf.org/2017/04/20/wlf-legal-pulse/us-food-security-and-farmers-livelihoods-at-stake-in-waters-of-the-us-rule-rewrite/.

29. *See* Rapanos v. U.S., 547 U.S. 715, 779 (2006) (Kennedy, J., concurring) (stating that the requisite nexus of a wetland is met if the wetlands alone or in combination with similiarly situated lands in the region, "significantly affect the chemical, physical, and biological integrity" of a navigable water); *see also* Brandon C. Smith, Note, *Jurisdictional Donnybrook: Deciphering Wetlands Jurisdiction After* Rapanos, 73 BROOK. L. REV. 337, 340-41 (2007) (arguing that the significant nexus standard leads to "disparate outcomes and uncertainty" for private property owners).

30. *See* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (February 14, 2019) (to be codified at 33 C.F.R. pt. 328) [hereinafter Revised Definition];

see also Envtl. Protection Agency, FACT SHEET, PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES", https://www.epa.gov/sites/production/files/2018-12/documents/factsheet_-_wotus_revision_overview_12.10_1.pdf (Th[e] longstanding exclusion for [prior converted cropland] would be continued under the proposal, and the agencies are clarifying that this exclusion would cease to apply when cropland is abandoned (i.e., not used for, or in support of, agricultural purposes in the preceding five years) and has reverted to wetlands."); *see also* The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22, 251 (April 21, 2020) (to be codified at 33

Significant ambiguity exists regarding exactly what triggers the CWA permitting requirements.[31] However, one source of certainty comes from § 404 of the CWA, which creates an exception to the requirements.[32] This section states that discharges associated with "normal farming activities," such as growing crops, cultivating the soil, and maintaining drainage ditches, are exempt from the CWA permitting requirements.[33] Regulatory Guidance Letter 07-02 further defined the maintenance of drainage ditches to include necessary excavation, erosion management, and repair or replacement of existing structures to preserve the ditch's working condition.[34]

Congress created the § 404 normal farming activities exemption in order to avoid imposing undue burdens on farmers.[35] Many of the statements made during the 1972 CWA amendment hearings reflect this intent.[36] For instance, Assistant Secretary of Army for Civil Works Victor Veysey noted that the intent behind the normal farming activities exemption was to ensure "that all the normal things that a farmer does in the course of his operations are exempted."[37] National Farm Bureau's Bruce Hawley stated that normal farming activities included things like repairing drainage, laying new tiles, and managing water flow for farming purposes.[38] Maine Senator Edmund Muskie explicitly stated that permits were not required for draining

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C.F.R. pt. 328) [hereinafter New Rule] (laying out four categories of waters that are considered "waters of the United States": "the territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; tributaries; lakes and ponds, and impoundments of jurisdictional waters; and adjacent wetlands").

31. *See* William Pufko, *The Revised Definition of "Discharge of Dredged Material": It's Legality, Practicality, and Impact on Wetlands Protection*, 9 ENVTL. L. 187, 197-98 (2002) ("A review of the legislative history concerning Congress's understanding of what constituted a 'discharge of dredged material' reveals little as to the potential activities that Congress envisioned would trigger the section 404 permit requirement.").

32. *See generally* 33 U.S.C. § 1344(f) (2012).

33. *See* 33 U.S.C. § 1344(f)(1)(A), (f)(1)(C) (2012) (describing normal farming as "plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices").

34. *See* U.S. ARMY CORPS OF ENG'RS, No. 07-02, REGULATORY GUIDANCE LETTER, SUBJECT: EXEMPTIONS FOR CONSTRUCTION OR MAINTENANCE OF IRRIGATION DITCHES AND MAINTENANCE OF DRAINAGE DITCHES UNDER SECTION 404 OF CLEAN WATER ACT, at 4-5 (2007), [hereinafter Regulatory Guidance Letter 07-02] https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl07-02.pdf (noting that drainage ditch maintenance includes "activities such as [e]xcavation of accumulated sediments back to original contours[, r]e-shaping of the side slopes[, b]ank stabilization to prevent erosion where reasonably necessary using best management practices . . . [,] and [r]eplacement of existing control structures, where the original function is not changed and original approximate capacity is not increased. Maintenance is generally viewed as involving activities that keep something in its existing state or proper condition or preserve it from failure or decline.").

35. *See Section 404 of the Federal Water Pollution Control Act, Amendments of 1972: Hearings Before the Committee on Public Works*, 94th Cong. 59 (1976) [hereinafter Hearings].

36. *Id.*

37. *Id.* (statement of Victor Veysey, Assistant Secretary of Army for Civil Works).

38. *Id.* at 553 (statement of Bruce Hawley, Assistant Director of National Affairs, National Farm Bureau) (["N]ormal farming activity also includes such things as streambank protection, drainage ditches, construction of new drainage ditches, a laying of new tiles, impounding of waters for the express purpose of having something for livestock to drink later in the summer, and so on.").

poorly drained farmland.[39] Other statements made in Congress reflect the widespread fear of over-regulation that would fail to take into account the realities of everyday farming activities.[40] For example, West Virginia Senator Jennings Randolph noted the "widespread concern that many [farming] activities that are normally considered routine would be prohibited or made extremely difficult because of the complex regulatory procedures."[41] Senator Muskie also felt that the CWA was promulgating an unrealistic and cumbersome view of agriculture that could substantially disadvantage farmers.[42]

In practice, the normal farming activities exemption has been interpreted quite narrowly by the EPA (or agencies) and courts. The EPA regulations that accompany the CWA have mirrored this approach.[43] They establish that an agricultural activity is not part of an established farming operation and is therefore not exempt if it brings a wetland that has not previously been used for farming into agricultural production.[44] If modification of the hydrological regime is required for the land to become usable, the land is not considered part of an established or ongoing farming operation.[45] Many individuals have voiced concerns that the definition should include activities like growing hay or grazing animals, regardless of whether the land requires hydrological changes.[46] However, courts have continued

39. *See A Legislative History of the Clean Water Act of 1977*, 1042 (Aug. 4, 1977) (statement of Sen. Edmund Muskie) ("[T]he drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm land or forest land. . . . ").

40. *See Hearings*, supra note 36 at 1-2 (statement of Sen. Jennings Randolph, W. Va.).

41. *See id.* at 1-2.

42. *See* David Porter, *Cultivating Dissent: Wetlands Regulators Down on the Farm*, FOUND. FOR ECON. EDUC. (Feb. 1, 1996), https://fee.org/articles/cultivating-dissent-wetlands-regulators-down-on-the-farm/.

43. *See generally* 33 C.F.R. § 323.4(a)(1)(ii) (1986); *see also* Zippy Duvall, *Swampbuster is Broken, Congress Must Fix It*, AMERICAN FARM BUREAU FEDERATION (June 20, 2018), https://www.fb.org/viewpoints/swampbuster-is-broken-congress-must-fix-it [hereinafter Duvall] ("[P]rior-converted cropland . . . is exempt from Swampbuster, but agency employees have tried to narrow that exemption out of existence.").

44. *See CWA Section 404 and Swampbuster: Wetlands on Agricultural Lands*, ENVTL. PROTECTION AGENCY, (last visited March 2, 2019) [hereinafter SWAMPBUSTER] https://www.epa.gov/cwa-404/section-404-and-swampbuster-wetlands-agricultural-lands.

45. *See* 33 C.F.R. § 323.4(a)(1)(ii) (1986) ("Activities which bring an area into farming . . . use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.").

46. *See Quick Stats,* NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. (2016) [hereinafter Census] https://quickstats.nass.usda.gov/results/FE258E7B-4954-3D85-8C66-017C14A00DBF (showing that, in 2016, 213,934 acres of corn and 199,378 acres of hay were harvested); *see also* FARMS AND FARMLAND: NUMBERS, ACREAGE, OWNERSHIP, AND USE, 2012 CENSUS OF AGRICULTURE HIGHLIGHTS, (Sept. 2014) [hereinafter Farms and Farmland] https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Farms_and_Farmland/Highlights_Farms_and_Farmland.pdf (noting that "[o]f the 915 million acres of land in farms in 2012, 45.4 percent was permanent pasture [and] . . . 42.6 percent was cropland. . . . "); *see also* Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 722 (1989) ("Nevertheless, fulfillment of the congressional intent to exempt only slight modifications to areas currently used as farmland rests uneasily on the shoulders of thousands of private actors making case-by-case decisions about whether their activities merit an exemption.").

to narrowly interpret the normal farming activities exemption. For example, the court in *United States v. Akers* held that a farmer who tilled wetlands that had not produced crops on a regular basis did not fall under the normal farming activities.[47] The court in *Avolleyes Sportsmen League, Inc. v. Marsh* held that where no farming operation could have existed until long after the activities at issue completely changed the use of the land, the activities were not normal farming activities.[48]

In addition to this narrow interpretation, farmers are also faced with the Recapture Clause of § 404.[49] This clause states that an activity is not exempt if it creates a new use of a water that would result in an impairment of the flow or circulation of a regulated water.[50] Therefore, the farmer must prove that the activities in question fall under the § 404 exemption but do not fall under the Recapture Clause.[51]

Despite its comprehensive nature, the CWA does not mention wetlands. Instead, wetlands are only addressed in the statutes and regulations that accompany the CWA.[52] The FSA created additional and more targeted regulations for wetlands.[53] The FSA includes a "Swampbuster" provision, enforced by the United States Department of Agriculture's ("USDA") Natural Resources Conservation Service ("NRCS").[54] This provision states that any farmer who drains or fills a wetland in order to produce crops becomes ineligible for USDA funding.[55] The FSA also created the Commenced Conversion exemption from the Swampbuster provision, which excludes lands for which the farmer has commenced conversion of

47. *See* 785 F.2d 814, 819 (9th Cir. 1986) (holding that a farmer who tilled wetlands that had not produced crops on a regular basis did not fall under the normal farming activities exemption).

48. *See* 715 F.2d 897 at 925-26 (5th Cir. 1983) (holding that where no farming operation could have existed until long after the activities at issue completely changed the use of the land, the activities were not normal farming activities).

49 *See* 33 U.S.C. § 1344(f)(2) (2012).

50. *See id.*; *see also* United States v. Larkins, 657 F. Supp. 76, 76 (W.D. Ky. 1987) (holding that the landowners were not entitled to the exemption to the permit requirement because their actions were meant to bring the wetlands into cultivation, a use to which the land was not previously subject); *see also* John Davidson, *Protecting the Still Functioning Ecosystem: The Case of the Prairie Pothole Wetlands*, 9 WASH. U.J.L. & POL'Y 123, 150-51 (2002) ("All potential exemptions are subject to a 'recapture' clause. . . . ").

51. *See* 33 U.S.C. § 1344(f)(2) (2012); *see also* United States v. Cumberland Farms, 647 F. Supp. 1166, 1176 (D. Mass. 1986) ("[E]ven if [defendant] could establish that it is exempt from the permit requirements under § 1344(f)(1), it must also demonstrate that its activities avoid 'recapture' under the provisions of 33 U.S.C. § 1344(f)(2).").

52. *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 (1987) (noting that the FSA was the first federal statute to explicitly use the term "wetland").

53. *See* Food Security Act of 1985, 16 U.S.C. § 3821 (2012).

54. *See id.*

55. *See id.* (stating that any farmer who drains or fills a wetland in order to produce crops becomes ineligible for USDA funding); *see also* John Dilliard, *Don't Be A Swampbuster*, FARM JOURNAL, https://www.agweb.com/article/dont-be-a-swampbuster-john-dillard/ (noting that for Swampbuster to apply, "crop production does not actually have to occur on a converted wetland–it only needs to be a possibility").

the wetland to productive farmland prior to December 23, 1985.[56] The purpose of the Commenced Conversion designation was to allow those who had begun a conversion effort prior to December 23, 1985 to complete it without interference.[57] In other words, farmers who convert wetlands to croplands are still able to get USDA funding if they can prove to the USDA that they started the conversion process prior to December 23, 1985.[58] All conversion efforts are required to have been completed before January 1, 1995.[59] If the government can show that a farmer has not completed or actively pursued the conversion within the time period, the land is subject to the Swampbuster provision.[60] However, some precedent suggests that tolling the time limitation on Commenced Conversions would be acceptable in certain circumstances.[61] For instance, the U.S. Supreme Court in *Lyng v. Payne* determined that tolling the time limitation on Commenced Conversions was acceptable where the denial of a farmer's loan application was arbitrary and capricious.[62]

56. *See* 16 U.S.C. § 3822(b)(1)(A) (2012) ("No person shall become ineligible under section 3821 of this title for program loans or payments . . . [a]s the result of the production of an agricultural commodity on . . . [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985.").

57. *See* 7 C.F.R. § 12.5(b)(2) (1996) ("The purpose of a determination of commenced conversion . . . is to implement the legislative intent that those persons who had actually started conversion of a wetland or obligated funds for conversion prior to Dec. 23, 1985, would be allowed to complete the conversion so as to avoid unnecessary economic hardship.").

58. *See* Defendants' Memorandum of Law in Support of Motion for Relief from Judgment Based on Extraordinary Circumstances at 8, United States v. Brace, No. 90-229 (W.D. Pa. 2017) [hereinafter Memorandum] ("A commenced conversion, therefore, is a conversion that, although initiated prior to December 23, 1985, had not been completed prior to December 23, 1985, and consequently, required an additional fixed time period to complete."); *see also* Justin Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer*, 73 NEB. L. REV. 163, 176 (1994) ("Conversion is commenced once actual work has been done or substantial funds have been expended or legally committed by the purchase of construction supplies or material or contracting for the work.").

59. USDA Soil Conservation Serv., *National Food Security Act Manual*, Title 180 5th., at Sec. 514(B)(2) (Nov. 2010), [hereinafter *Manual*].

60. *See* 7 C.F.R. § 12.5(d)(5)(ii) (1996) ("'Actively pursued' means that efforts towards 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.").

61. *See* Bowen v. New York, 476 U.S. 467, 480 (1986) (stating that equitable tolling principles applied to administrative appeals); *see also* Lyng v. Payne, 476 U.S. 926, 936 (1986) ("If, for example, a farmer had filed a loan application prior to the expiration of the loan deadline and a court determined that the denial of the application after the deadline's expiration was "arbitrary, capricious and not in accordance with law," 5 U.S.C. § 706(2)(A), the appropriate remedy under the APA would be to direct that the application be granted or reconsidered."); *see also* Von Eye v. United States, 92 F.3d 681, 684 (8th Cir. 1996) (holding that, under certain circumstances, the time limitation in 12.5(b)(5)(iii) could be equitably tolled").

62. *See Lyng*, 476 U.S. 926 at 936 ("If, for example, a farmer had filed a loan application prior to the expiration of the loan deadline and a court determined that the denial of the application after the deadline's expiration was arbitrary, capricious and not in accordance with law, the appropriate remedy under the APA would be to direct that the application be granted or reconsidered.").

Alternatively, wetlands converted to farmland prior to December 23, 1985 become Prior Converted Cropland that is not subject to the FSA's Swampbuster.[63] The National FSA Manual set out three conditions for Prior Converted status.[64] First, the land must have been planted at least once prior to December 23, 1985.[65] Second, the area must not have been abandoned.[66] Third, a wetland conversion effort was considered commenced if construction activities necessary for that conversion had already begun or substantial funds had been committed to the conversion process. In 1990, the Corps issued Regulatory Guidance Letter 90-07, which excluded Prior Converted Croplands from CWA jurisdiction because they were sufficiently transformed from wetlands to dry farmland.[67] Three years later, the EPA and the Corps put forward a Joint Regulation excluding Prior Converted Cropland from the definition of WOTUS.[68] This Joint Regulation recognized that Prior Converted Cropland no longer exhibited characteristics or functions of wetlands and therefore should not be treated as such under the CWA.[69] However, these regulations have not been applied consistently to all farmers.[70]

B. The Case of Robert Brace

In 1975, Robert Brace purchased his father's farm in Erie County, Pennsylvania.[71] The farm contained three hydrologically integrated tracts of land with a road separating the two northernmost tracts from the one southernmost tract.[72]

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63. *See Manual*, *supra* note 59, at Sec. 514.30 (describing the three conditions for PC status: first, the crops must have been planted at least once prior to December 23, 1985; second, the land must not have been abandoned; third, conversion activities must have actually begun or at least substantial funds must have been committed for the purpose of converting the wetland); *see also* Kogan, *supra* note 28 ("The NFSAM defined abandonment as 'the cessation of cropping, management, *or* maintenance operations on prior converted croplands,' including '*repair of drainage system.*'"); *see also* Megan Stubbs, *Conservation Compliance and U.S. Farm Policy*, CONG. RESEARCH SERV., 7, (2016), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42459.pdf ("Under the wetlands compliance provision, the following lands are considered exempt: . . . wetlands converted to cropland before December 23, 1985, that have reverted back to a wetland as the result of a lack of drainage, lack of management, or circumstances beyond the control of the landowner.").

64. *See Manual*, *supra* note 59, at Sec 514.30.

65. *See id*.

66. *See id.* at Sec 514.33 (defining abandonment as "the cessation of cropping, management, or maintenance operations on prior converted croplands").

67. *See* U.S. Dep't of Def. Army Corps of Eng'rs, Regulatory Guidance Letter 90-07—Subject: Clarification of the Phrase 'Normal Circumstances' as it Pertains to Cropped Wetlands, at Sec. 5.d, (Sept. 26, 1990) (expired, Dec. 31, 1993).

68. *See* Final Rule, 58 Fed. Reg. 45,008 ("[W]e are excluding PC crop land from the definition of the waters of U.S. in order to achieve consistency in the manner in which various federal programs address wetlands.").

69. *See id.* ("PC cropland no longer performs the functions . . . that the area did in its natural condition. . . . ").

70. *See* United States v. Brace, 41 F.3d 117, 125 (3d Cir. 1994); *see also* John Perdion, Comment, *Protecting Wetlands Through the Clean Water Act and the 1985 and 1990 Farm Bills: A Winning Trio*, 28 U. TOL. L. REV., 867, 869 (1997) (displaying the sentiment that "the agricultural industry poses one of the greatest threats to our country's wetlands").

71. *See* Bennett, *supra* note 1.

72. *See* Telephone Interview with Lawrence A. Kogan, Esq., Senior Exec., Kogan Law Group, P.C. (October 3, 2018) [hereinafter Interview].

Throughout his life, Brace witnessed his family farming all of these properties.[73] Like the majority of farms in Erie County, Brace and his family used the farm for a mixture of different agricultural purposes, including cultivating crops, pasturing animals, and growing hay.[74]

In 1976, Brace repaired a drainage system on the thirty-two-acre Murphy tract, a piece of land that had been part of the farm for decades.[75] The Murphy tract had previously been used for a variety of agricultural purposes.[76] Like the rest of Erie County, the land had a high water table and required drainage in order to be suitable for planting.[77] The drainage process involved excavation, soil leveling, and installation of drainage tubing known as "drainage tile."[78] Tile drainage systems, which have been used in the United States since the 1830s, are a foundational component of nearly every farming operation.[79] Most tile drainage systems require excavation to a depth of at least three feet.[80] Farmers who utilize tile drainage systems have long considered periodic additions and repairs to the systems a regular task.[81]

Brace performed these repairs with full USDA approval, even using a conservation plan prepared for him by a branch of the agency.[82] As part of the conversion process, Brace had the PGC remove several beavers that had built dams

73. *See* Response*, supra* note 3, at 5 (describing Brace's repair activities).

74. *See Northwestern Woodland, Grassland, and Specialized Farming Region, c. 1830-1960*, PA. HISTORICAL & MUSEUM COMM'N, 12-13 (2012), http://www.phmc.state.pa.us/portal/communities/agriculture/files/context/northwestern_woodland.pdf [hereinafter Northwestern] (noting that, during this time, the Pennsylvanian farming economy "was developing a highly diversified farming system which emphasized products that made use of woodland and grassland resources").

75. *See* Response, *supra* note 3, at 5 (noting that Brace's grandfather had used the drainage system years earlier).

76. *See* United States v. Brace, Civil Action No. 90-229 Erie, 1, 6-7 (W.D. Pa. 1993).

77. *See The Brace Travesty*, John Ward, FRONTIERS WYOMING, Vol. 1, No. 2, (January 1997) ("Most of Erie County is low-lying terrain with high water tables. Without adequate drainage, the surface areas have a moisture content that adversely affects crop production. Therefore, a system of drainage ditches and tiling are in absolute necessity to obtain sustainable yields.").

78. *See* Motion for Relief from Judgment Based on Extraordinary Circumstances at 3, United States v. Brace, Civil Action No. 90-229 (W. D. Pa. 2017) [hereinafter Motion for Relief].

79. *See* Northwestern, *supra* note 74, at 136–37.

80. *See* John Panuska. PhD, *The Basics of Agricultural Tile Drainage*, BIOLOGICAL SYS. ENG'G DEP'T UNIV. OF WIS., 5, https://fyi.uwex.edu/drainage/files/2015/09/Basic_Eng_-Princ-2_2017.pdf (2017) (noting that most tile drain installations require excavation to a depth of between three and six feet).

81. *See* OFFICE OF FARM MGMT., BUREAU OF PLANT INDUS., U.S. DEP'T OF AGRIC., THE DRAINAGE ON THE FARM–FARMERS BULLETIN 524, 3 (1916) http://nebula.wsimg.com/751da32d76+-ba51505b9fc046680b0f268?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1 [hereinafter FARMERS BULLETIN]; *see also* Tara Matthews, *Best Practices for Agricultural Drainage Tile Placement*, FARM HORIZONS (Feb. 2016), http://www.herald-journal.com/farmhorizons/2016-farm/tiling-best-practices.html ("Agricultural drainage tile has been used in crop fields for centuries."); Don Hofstrand, *Understanding the Economics of Tile Drainage*, Iowa State University (2010), https://www.extension.iastate.edu/AGDM/wholefarm/html/c2-90.html (noting that the cleaning, repair, and maintenance of drainage systems is a regular and necessary part of farming).

82. *See* Porter, *supra* note 42 (noting that Brace acted based on an existing USDA conservation plan).

and caused drainage issues.[83] He also hired, with the USDA's approval, a dynamite crew to help him clear out the existing drainage systems.[84] In 1977, he received USDA technical support and funding to repair and develop the drainage systems.[85] He completed these actions pursuant to the 1962 conservation plan that his father had established.[86] His actions were also in accordance with USDA efforts to encourage farmers in Erie County to maintain agricultural drainage systems on their farms.[87] At no point did the USDA inform Brace that he would need a permit for any of his actions.[88]

Brace groomed the property from 1977 to 1983.[89] Although he had not completed the conversion by 1983, Brace was able to start growing crops on the Murphy tract in 1987.[90] Unfortunately, the beavers returned a year later and he had to request that the PGC remove them again.[91] This time, PGC agent Andy Martin questioned Brace about what he had done with the land.[92] The next day, twelve vehicles with FWS, EPA, and Corps officials arrived on his farm without (according to Brace's attorney) a warrant or probable cause.[93] They told him to stop all discharge activities on his land or face fines of up to $50,000 per day.[94] The officials claimed that Brace was violating the CWA by discharging into a regulated wetland without a permit.[95] They ignored all of Brace's attempts to explain his USDA approval.[96]

Immediately thereafter, Brace applied for a Commenced Conversion designation from USDA to confirm that he had commenced the conversion of the Murphy tract before December 23, 1985.[97] The USDA determined that Brace had commenced the conversion of the Murphy tract in 1977 and provided him with a valid Commenced Conversion designation.[98] This designation effectively gave his

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83. *See id.* (noting the irony in the fact that these beavers were introduced to the area by the state of Pennsylvania).

84. *See* Bennett, *supra* note 1.

85. *See* Brace v. United States, 72 Fed.Cl. 337, 342-43 (Cl. Ct. 2006).

86. *See id.* at 340-43.

87. *See id.* at 340-41.

88. *See* Motion for Relief, *supra* note 78, at 3.

89. *See* Memorandum, *supra* note 58, at 18-19 (noting that the conversion effort had not been completely finished by 1983).

90. *See id.* at 9; *see also* Porter, *supra* note 42 (stating that these activities included removing fenceposts, replacing old drain tile, and putting the silt "collecting in the drain back onto the adjacent fields from whence it had come").

91. *See* Bennett, *supra* note 1.

92. *See id.*

93. *See id.*

94. *See* Bennet, *supra* note 1.

95. *See* Bennett, *supra* note 1.

96. *See id.*

97. *See* Memorandum, *supra* note 58, at 18-19 (noting that the conversion effort had not been completely finished by 1983); *see also* Lawrence Kogan, *Ducking the Truth About the Great 'Commenced Conversion' Conspiracy Against America's Farmers*, 27 SAN JOAQUIN AGRIC. L. REV. 19, 20 (2018) [hereinafter Kogan].

98. *See* Motion for Relief, *supra* note 78, at 6-7; *see also* Kogan, *supra* note 97, at 20 ("The official [Commenced Conversion] designation evidenced that Mr. Brace had . . . physically commenced and committed substantial financial funds toward the conversion from pastured wetlands to croplands of

land Prior Converted status, exempting it from both the FSA's Swampbuster provision and the CWA's permitting requirements.[99] Brace received a letter from the Erie County branch of the USDA confirming that his conversion efforts began before December 23, 1985.[100]

Despite his Commenced Conversion designation, the EPA and the Corps sued Brace on October 4, 1990 for violating § 404 of the CWA.[101] In 1990, the United States Department of Justice ("DOJ"), acting in its capacity as representative of the United States' agencies, also sued Brace for violations of § 404 of the CWA.[102] Brace presented the District Court judge with proof of the permissions that he had secured for his agricultural activities and was able to persuade the judge to rule in his favor.[103] However, the DOJ appealed the decision to the Third Circuit Court of Appeals in 1994, arguing that Brace was ineligible for an exemption from the CWA requirements because the Murphy tract was not part of an ongoing farming operation.[104] The government also argued that any exemptions Brace might have had were lost when he converted the land in question from pasture to cropland.[105] In other words, the government maintained that changing the usage from pasture to cropland constituted an interruption in the farming operation that nullified his protection from regulation.[106]

The Third Circuit Court of Appeals sided with the DOJ, holding that Brace's actions prior to 1985 did not constitute ongoing or "normal agricultural activity" for purposes of the CWA.[107] The Third Circuit looked only at the Murphy tract to determine whether there was a normal and ongoing farming operation established.[108] The court did so because it felt that the regulations failed to specify the precise area to which the court should look, implying that it should only look at

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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.").

99. *See* U.S. DEP'T OF AGRIC. NAT. RES. CONSERVATION SERV., WETLAND FACT SHEET–PRIOR CONVERTED CROPLAND, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517 (last visited January 6, 2019).

100. *See* Memorandum, *supra* note 58, at 10 (*citing* Exhibit 13, Erie Cty. ASCS Comm. Mtg. Minutes 9-14-88, at 2-3) ("[O]n September 21, 1988, Erie County ASCS Executive Director Joseph Burawa dispatched a letter correspondence to Defendant Robert Brace apprising him of the Committee's determination that his 'conversion of wetlands began before December 23, 1985, and [would] enable [him] to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits.'").

101. *See generally* Complaint, United States v. Brace, Civil Action No. 90-229 (W.D. Pa. 2017).

102. *See* Bennett, *supra* note 1.

103. *See* United States v. Brace, Civil Action No. 90-229 Erie, 1, 16 (W.D. Pa. 1993).

104. *See generally* Brief for Appellant United States of America, United States v. Brace, 41 F.3d 117 (3d Cir. 1994).

105. *See* Bennett, *supra* note 1.

106. *See id.*

107. *See Brace*, 41 F.3d at 125; *see also* Perdion, *supra* note 70, at 869 ("The agricultural industry poses one of the greatest threats to our country's wetlands.").

108. *See Brace*, 41 F.3d at 125.

the tract in question as opposed to the entire farming operation.[109] In reaching this conclusion, the court relied on *United States v. Cumberland Farms*, which referred to the "site" as the area of land the court should focus on.[110] In addition, the Third Circuit held that Brace's activities between 1985 and 1987 were not part of an established farming operation under the CWA.[111]

The Third Circuit referenced the fact that from 1977 to 1986, Brace's activities on the Murphy tract included no crop production or pasturing but were instead focused on repairing the drainage systems.[112] It reasoned that Brace's ancestors' pre-1975 use of the land as farmland became irrelevant once Brace began repairing the drainage system.[113] The Third Circuit interpreted the statute narrowly and limited normal farming activities to those that were chronologically uninterrupted.[114] Because the regulation states that a farming operation is not ongoing if the hydrological regime must be modified in order to resume operations, Brace's modifications of the Murphy tract's hydrology by repairing the drainage system led the Third Circuit to conclude that there was no ongoing farming operation.[115] According to the Third Circuit, Brace's actions could not be classified as mere maintenance because they brought the land into a new use[116] The Third Circuit also determined that the District Court wrongly relied on Brace's Commenced Conversion designation because USDA regulations establish that a Commenced Conversion designation does not override other federal water law.[117] The Third Circuit reasoned that the only purpose of Commenced Conversion designations is to prevent the loss of USDA funding benefits, not to exempt a farmer from regulation.[118]

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109. *See id.* ("The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation.").

110. *See* United States v. Cumberland Farms, 647 F. Supp. 1166, 1175 (D. Mass. 1986) (referring to "the site").

111. *See Brace*, 41 F.3d at 124-25 ("Brace's activities between 1985 and 1987 meet neither prong of this provision: they were neither part of an 'established (i.e., on-going) farming operation,' nor were they conducted 'in accordance with the definitions in § 323.4(a)(1)(iii).'").

112. *See id.* at 126.

113. *See id.*

114. *Id.* at 127 ("Regardless of how typical or necessary such drainage systems may be in Erie County, Section 404 of the CWA requires a permit for 'activities which bring an area into farming . . . use,' as opposed to activities that are part of an 'established farming operation.'"); *see also The Clean Water Act's 404(f) Exemptions*, THE FEDERALIST SOCIETY (May 3, 2018) [hereinafter FEDERALIST SOCIETY], https://fedsoc.org/events/the-clean-water-act-s-404-f-exemptions (statement of Peter Prows, Managing Partner, Briscoe, Ivester, & Bazel, LLP) (noting that the current definition is more concerned with chronology than with actual farming usage).

115. *See* 33 C.F.R. § 323.4(a)(1)(ii) (1986); *see also Brace*, 41 F.3d at 126-27.

116. 33 U.S.C. § 1344(f)(2) (2012) ("Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."); *see also Brace*, 41 F.3d at 128.

117. *See* Brace, 41 F.3d at 127.

118. *See id.*

Brace was unable to use several important documents to defend his position.[119] For instance, he could not use the regulatory guidance of the EPA and the Corps that Prior Converted Cropland was excluded from CWA regulation because it was issued after the administrative record for his case had closed.[120] Additionally, no evidentiary documents—including engineer reports that supported his position—were allowed in on Brace's side due to the judge's denial of his request for additional time to find affordable engineers.[121] Furthermore, the court did not allow Brace to introduce copies of pre-1996 federal and state agency aerial photographs of the Murphy tract showing that it had been dry farmland since at least 1979.[122] Finally, Brace was unable to admit federal court testimony by EPA official Jeffrey Lapp regarding the government's proposed mitigation measures.[123]

As a result of the Third Circuit's ruling, Brace signed a consent decree that required him to restore the thirty-two-acre Murphy tract to pre-1985 conditions.[124] He agreed to sign the consent decree because he feared more significant financial penalties.[125] The consent decree included a Restoration Plan, the aim of which was to restore the hydrological wetland features that the government claimed were originally on the Murphy tract.[126] However, the Eco-Strategies Civil Engineering report prepared on Brace's behalf contained satellite images showing that the Murphy tract was used as almost completely dry farmland from at least 1979 until

119. *See* Bennett, *supra* note 1.

120. *See* Final Rule, 58 Fed. Reg. 45,031-35 (stating that PC cropland was excluded from CWA § 404 jurisdiction and FSA Swampbuster penalties); *see also* Motion for Relief, *supra* note 78, at 11 ("Defendants entered into a pretrial stipulation with the U.S. Department of Justice ('DOJ') on September 26, 1993 which acknowledged that the . . . area was a 'wetland' and 'water of the United States'. . . . The parties' pretrial stipulation defined the terms 'wetlands' and 'waters of the United States' by reference to . . . 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r), respectively, which cover activities . . . that may or may not be eligible for an exemption from CWA 404 permitting. The pretrial stipulation does not reference the jointly issued August 1993 Corps and EPA regulations that . . . amended 33 C.F.R. § 328.3(a)(8) and 40 C.F.R. § 232.2 by [excluding] prior commenced conversions from CWA Section 404 jurisdiction. . . . ").

121. *See* Interview, *supra* note 72.

122. *See* Curt Harler, *Farmer Wins Round in 31-Year Wetland Legal Battle*, AM. AGRICULTURIST (Dec. 04, 2017), https://www.americanagriculturist.com/epa/farmer-wins-round-31-year-wetland-legal-battle [hereinafter Harler].

123. *See id.*

124. *See* Notice of Lodging of Consent Decree Pursuant to Clean Water Act at 3, 7, United States v. Brace, No. 90–229 Erie, (W.D. Pa. 1996); *see also* Motion to Vacate Consent Decree and to Deny Stipulated Penalties at 3, United States v. Brace, Civil Action No. 90-229 (W.D. Pa. 1996) [hereinafter Motion to Vacate].

125. *See* Bennett, *supra* note 1; *see also Philadelphia Judges Gut Wetland Agricultural Exemption*, PA. LANDOWNERS' ASSOC., INC., Vol. I, No. 1, 2 (Jan. 1995) (statement of Robert Brace) [hereinafter Philadelphia Judges]

126. *See* Consent Decree at 3, 7, United States v. Brace, Civil Action 90-299 (W.D. Pa. 1996), Ex.1, Attach A, Restoration Plan (requiring Brace to excavate the drainage tile system currently in place, fill in multiple ditches, and install a check dam); *see also* Brace v. United States, No. 98-897L 1, 5 (Cl. Ct. 2006) 2005 WL 6133807 (testimony of Jeffrey Lapp) ("The goal of this restoration plan was to restore the hydrologic drive back to this wetland system, and we used a target date of 1984.").

1993.[127] The report even noted that the agency interference inappropriately constrained Brace's legal activity and in fact contributed to the flooding of his property.[128] Any wet areas shown by the satellite images were south of the Murphy tract and were the result of recurring beaver activity that was out of Brace's control.[129] In addition, historical aerial photographs of the Murphy tract showed that it was dry farmland in 1984.[130] Pennsylvania historical records also show that the vast majority of farms in Erie County have been used for growing crops, pasturing animals, growing hay, and more since the early 1800s.[131] Nonetheless, Brace removed the drainage tile, installed dams, and plugged ditches as directed by the Restoration Plan.[132] The beavers returned, causing flooding on both the Murphy tract and two adjoining parts of his property that were unrelated to the case.[133]

In 2011, the EPA and the Corps authorized Brace to remove the beaver dams after he informed them of the severe damage they were causing to his property.[134] On July 24, 2012, EPA and Corps officials came to Brace's farm and authorized him to conduct ditch maintenance and install drainage tile in certain areas in preparation for planting.[135] This authorization was evidenced to Brace through an EPA-prepared Consent Decree map that showed the portions of his land where he was allowed to conduct drainage and repair activities.[136] Relying on the Consent Decree map provided to him by the agency officials, Brace conducted drainage

127. Brace v. United States, No. 98-897L 1, 5 (Cl. Ct. 2006) ("[B]y the end of 1979, the site was dry, with the exception of times of excessive rainfall."); *see also Report, supra* note 10, at 3-4 (stating that the "pre-1984 condition was dry farmland that was properly drained and either producing crops or was in the process of being converted to produce crops as shown on the authentic historical aerial photos"); *see also* Defendants Responsive Detailed Statement to United States Concise Statement of Undisputed Material Facts in Support of United States Motion for Summary Judgment at 33-39, United States v. Brace, Civil Action No. 1:17-cv-00006-BR (W.D. Pa. 2018) [hereinafter Responsive Statement] (noting that the site "did not historically constitute a 'wetland,' did not previously constitute a wetland in 2012-2013, and currently does not constitute a 'wetland'").

128. *See Report*, *supra* note 10, at 3-4 (noting that agency interference was actually one of the primary causes of the creation of wetland conditions because they did not allow him to maintain the ditches).

129. *See id.*

130. *See* Motion to Vacate, *supra* note 124, Ex. 6, April 1973 Satellite Image of Murphy Farm.

131. *See* Northwestern, *supra* note 74, at 10-19.

132. *See* Bennett, *supra* note 1.

133. *See* Motion to Vacate, *supra* note 124, at 7 ("Together with the 1996 Consent Decree Restoration Plan features requiring the plugging of surface ditches, the cutting of all drainage tile lines legally installed in legally excavated ditches, and the installation of a substantially relocated and overbuilt check dam, the recurring beaver dams and clogged culverts steadily contributed to the transformation of the Murphy Farm tract into a primordial wetland that had not previously existed during Defendant Robert Brace's lifetime."); *see also* 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://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122790.

134. *See* Motion to Vacate, *supra* note 124, at 9-10 (noting that the actions required by the Restoration Plan had caused the flooding to extend beyond the consent decree area); *see also E-mail from Todd Lutte, EPA, to Robert Brace*, (Sept. 12, 2011, 11:59 AM EST), http://nebula.wsimg.com/4d2c02362cc6052014857f598d6be000?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1 [hereinafter Lutte] ("This activity may be undertaken provided there is no discharge of dredge or fill material to Waters of the US. . . . ").

135. *See* Bennett, *supra* note 1; *see also infra* 137, at 23-24.

136. *See* Response, *supra* note 3, at 58-59, Ex. 58 [Map 1].

maintenance on the two portions of the land at issue in order to prepare for planting.[137]

However, in January 2017, the EPA reopened the 1990 Murphy tract case, alleging that Brace had violated the 1996 Consent Decree by cleaning the ditches and planting crops.[138] The agency also charged Brace for allegedly violating § 404 of the CWA on the northernmost Marsh tract based on the same ditch-cleaning and planting actions.[139] The same set of actions, therefore, caused both the reopening of the 1990 Murphy tract case and the filing of the 2017 Marsh tract case.[140] The government subsequently claimed to have authorized the actions in error.[141] They disavowed the Consent Decree map that they had initially provided Brace with and produced a second map of the Consent Decree property—a copy of which Brace asserts he was never provided—that they had allegedly based their analysis on. [142]

Relevant to Brace's decision to plant and his subsequent challenging of the agencies' actions as a misrepresentation of their previous authorizations is the doctrine of equitable estoppel, which is used to prevent Party A from bringing a claim against Party B when Party B has relied to its detriment on Party A's misrepresentations.[143] To do so, Party B must establish that it relied to its detriment on Party A's misrepresentation and that its reliance was reasonable because it did not know—nor should it have known—that Party A was misrepresenting themselves.[144] The majority of circuits allow the equitable estoppel doctrine to be used against

137. *See generally id.*

138. *See* Brief in Support of Motion to Enforce Consent Decree and for Stipulated Penalties at 1, United States v. Brace, No. 1:90-cv-229 (W.D. Pa. Jan. 9, 2017), ECF No. 83 [hereinafter Brief for Petitioner].

139. *See* Complaint Against All Defendants at 8, No. 1:17-cv-6-BR (W.D. Pa. Jan. 9, 2017), ECF No. 1.

140. *See* Interview, *supra* note 72.

141. *See* Responsive Statement *supra* note 127, Ex. 36, Lutte Dep. 264:2–6, ECF No. 84-36 (describing how Lutte and his colleagues made the field determination for Brace's planting activities but later informed him that their "determination was made in error").

142. *See* Response, *supra* note 3, Ex. 59 [Map 2].

143. *See* Cmty. Health Servs. of Crawford Cty. v. Califano, 698 F.2d 615, 620 (3d Cir. 1983), *rev'd on other grounds sub nom.*, Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51 (1984); s*ee* Fredericks v. Comm'r of Internal Revenue, 126 F.3d 433, 440 (1997) where the Third Circuit addressed equitable estoppel in the context of governmental entities in *Fredericks v. Commissioner of Internal Revenue*, where it held that IRS misrepresentations to a taxpayer regarding an extension of the statute of limitations constituted affirmative misconduct that warranted application of the equitable estoppel doctrine.

144. *See* Heckler, 467 U.S. at 59; United States v. Asmar, 827 F.2d 907, 912 (3d Cir. 1987). In light of this background, the traditional elements of equitable estoppel in the context of government entities like the EPA and the Corps include (1) a misrepresentation by the government (2) that constitutes affirmative misconduct and (3) was reasonably relied upon by the claimant. *See also Fredericks*, 126 F.3d at 450.

governments.[145] However, in such cases the claimant must also establish "affirmative misconduct" by the government or its officials.[146]

Six months later, after an extensive series of pleadings from Brace's attorney, a federal judge in the Western District of Pennsylvania agreed to authorize new discovery for the 1990 Murphy tract case to determine the nature of the Consent Decree.[147] This authorization meant that the evidence Brace was not allowed to bring in for the initial 1990 proceeding was now presentable.[148] Brace subsequently filed an $8 million administrative action against the EPA, the Corps, and the FWS under the FTCA, requesting financial compensation for twenty years of damage to his land and improper regulatory enforcement.[149] Brace's attorney also filed two Rule 60(b) pleadings—one to vacate the Consent Decree and one for relief from the judgment.[150]

Throughout the course of the lawsuit, Brace's attorneys uncovered evidence of a coordinated FWS enforcement effort to override the Commenced Conversion designations of farmers in multiple midwestern states.[151] On one such occasion, the FWS executed a memorandum with the USDA-NRCS, EPA, and the Corps in

145. *See* Ritter v. United States, 28 F.2d 265, 267 (3d Cir. 1928) ("The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government.").

146. *See* Asmar, 827 F.2d at 911 n.4 (noting the additional burden on the claimant to show "affirmative misconduct on the part of the government officials"); *see also* Califano, 698 F.2d at 622 (noting that affirmative misconduct includes statements that "are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement" and holding that affirmative misconduct existed where the government's statements induced the healthcare provider to submit reports that it otherwise would not have). Equitable estoppel doctrine has been applied to many federal agencies. *See, e.g.*, Portmann v. United States, 674 F.2d 1155, 1169 (7th Cir. 1982) (holding that U.S. Postal Service may be estopped from claiming packages were merchandise and from applying lower insurable limit if plaintiff could prove that postal clerk assured her the packages could be insured as nonnegotiable documents up to a higher limit); Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970) (estopping the Bureau of Land Management from denying bidder priority where agent gave erroneous advice that resubmitting proposal would not result in loss of priority); Payne v. Block, 714 F.2d 1510, 1517–18 (11th Cir. 1983) (estopping government from adhering to the previously established deadline because government agents failed to notify potential applicants of loans), *vacated*, 469 U.S. 807 (1984) *and rev'd sub nom.*, Lyng v. Payne, 476 U.S. 926 (1986); Manloading & Mgmt. Assocs. v. United States, 461 F.2d 1299, 1303 (Ct. Cl. 1972) (holding that Department of Housing and Urban Development was estopped from denying renewal of contract with plaintiff where authorized agent had assured prospective bidders that funds were available and contract would be renewed); Dana Corp. v. United States, 470 F.2d 1032, 1046 (Ct. Cl. 1972) (holding that the Post Office Department was estopped from denying effects of agent's decision to continue to pay and not inform plaintiff-supplier that it was performing in excess of contract requirements).

147. *See generally* Order, United States v. Brace, No. 1:90-cv-229 (W.D. Pa. June 15, 2017), ECF No. 146.

148. *See* Interview, *supra* note 72.

149. *See* Attachment to Notice of Filing of Administrative Claims Against the United States, United States v. Brace, No. 1:90-cv-229 (W.D. Pa. July 7, 2017), ECF No. 156-1; *see also* Harler, *supra* note 122 ("[T]hat 30-acre plot might have produced 52,800 bushels of corn . . . over the past 11 seasons.").

150. *See* Motion to Vacate, *supra* note 124; s*ee also* Motion for Relief, *supra* note 78.

151. *See* Kogan, *supra* note 97, at 43 ("Newly revealed evidence clearly shows how the FWS also had interfered with . . . [Commenced Conversion] determinations in Minnesota, North Dakota and South Dakota at approximately the same time. . . . [T]hese submissions indicate how very closely senior officials . . . had worked with prominent nongovernmental environmental . . . special interest groups . . . to ensure the reversal of USDA-ASCS [Commenced Conversion] determinations.").

January 1994 addressing the implementation of the Swampbuster provision for purposes of CWA § 404 compliance.[152] The memorandum stated that NRCS, in consultation with FWS, would certify wetlands delineations made prior to November 28, 1990 to ensure that they were correct.[153] This memorandum effectively enabled NRCS and FWS to retroactively reconsider wetlands determinations that had informed legitimate Commenced Conversion designations.[154]

C. The Controversy Surrounding Administrative Action

Robert Brace is not alone.[155] Other farmers have been similarly affected by agency action. For instance, the government sued California farmer John Duarte for plowing his own field.[156] The government claimed that seasonal water gatherings on certain parts of the land subjected it to regulation despite the fact that the land had been used as farmland for over two decades.[157] In addition, the action of plowing was held not to be a normal farming activity because the land had been used as pasture for roughly thirty years in between crop uses.[158] Similarly, Springfield, Illinois lawyer Kurt Wilke was sued by the government three times for allegedly filling in a wetland on land that had been farmed for more than 100 years.[159] However, Wilke bought the property complete with a USDA form confirming that it was not a wetland.[160] The government never visited the site.[161] These cases further suggest the need for a careful consideration of the regulatory framework that is the subject of this article.[162]

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152. *See* Memorandum of Agreement Among the Dep't of Agric., the Envtl. Prot. Agency, the Dep't of the Interior, and the Dep't 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*, (1-6-94), https://nepis.epa.gov/Exe/ZyPDF.cgi/200053FC.PDF?Dockey=200053FC.PDF [hereinafter MOA].

153. *See id.*

154. *See* Kogan, *supra* note 97.

155. *See* Damon Arthur, *He plowed his field; now he faces a $2.8 million fine*, USA TODAY NETWORK (May 24, 7:07 AM), https://www.usatoday.com/story/news/nation-now/2017/05/24/farmer-plowing-fine/339756001/ [hereinafter Arthur].

156. *See* Robin Abcarian, *A land-use case that's enough to furrow a farmer's brow*, L.A. TIMES (Jan. 15, 2016, 2:00 AM), http://www.latimes.com/local/abcarian/la-me-0115-abcarian-farmer-wetlands-20160115-column.html.

157. *See* Chris Bennett, *When a Farmer Punches Back at the Feds*, AGWEB (May 1, 2017, 8:02 AM), https://www.agweb.com/article/when-a-farmer-punches-back-at-the-feds-naa-chris-bennett/ ("Twenty years of wheat production followed by 15 years of livestock production wasn't a continuous farming operation, according to DOJ.").

158. *See* Order Granting United States' Motion for Summary Judgment at 34; Duarte Nursery, Inc. v. United States Army Corps of Engineers, No. 2:13-cv-02095-KJM-DB (E.D. Cal. June 10, 2016), ECF No. 195.

159. *See* Deana Stroich, *Illinoisans Ask For Swampbuster Reform*, FARMWEEKNOW, (July 16, 2018), https://farmweeknow.com/story-illinoisans-ask-swampbuster-reform-3-177586 (statement of Adam Nielsen, Illinois Farm Bureau) ("Everyone we met with quickly recognized that if [Kurt Wilke] weren't a lawyer and a farmer, NRCS and the appeals process would have buried him and wrongfully denied his family's right to farm land that should never have been in question.").

160. *See id.*

161. *See id.*

162. *See infra* Part III (arguing that Robert Brace should prevail because he was falsely accused of violating federal regulations with which he was in compliance or exempt from).

The *Brace* case and its companions have contributed to the existing debate about the proper role of administrative agencies.[163] While some maintain that administrative agencies are a proper extension of the executive power, others feel that administrative agencies wield an unconstitutional power.[164] For instance, the famous case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is well known for Justice Stevens's majority opinion, which established the idea that courts should give significant deference to agency interpretations.[165] This viewpoint has been present in American jurisprudence for many years, as evidenced by former United States Supreme Court Chief Justice William Howard Taft's observation in *J.W. Hampton, Jr., & Co. v. United States*.[166] In his opinion, Chief Justice Taft stated that administrative action is a regular and necessary part of the government machine.[167] Scholars continue to hold this view, arguing that the administrative state holds an indispensable position in American government.[168] On the other hand, United States Supreme Court Chief Justice John Roberts stated in *City of Arlington v. Federal Communications Commission* that administrative agencies contradict the separation of powers concept that is central to the American constitutional structure by effectively utilizing all three powers of government.[169] Justice Clarence Thomas echoed Roberts' concerns in multiple cases, noting that the grant of power to each governmental branch is supposed to be exclusive.[170] Proponents of this perspective adhere to James Madison's statement that the consolidation of all three governmental

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163. *See* United States v. Brace, 41 F.3d 117, 124 (3d Cir. 1994); Arthur, *supra* note 155; Stroisch, *supra* note 162161.

164. *See* Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."); Perez v. Mort. Bankers Ass'n, 575 U.S. 92, 112-113 (2015) (Thomas, J.) (noting that deferring to administrative agencies "undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent").

165. *Id* ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

166. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) (Taft, C.J.).

167. *See id.* at 406 ("Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution.").

168. *See* Charles H. Koch Jr., *Confining Judicial Authority over Administrative Action*, 49 MO. L. REV. 183, 183 (1984) ("The administrative process is designed for the purpose of efficiently delivering government services to citizens.").

169. *See* City of Arlington v. F.C.C., 569 U.S. 290, 312 (2013) (Roberts, C.J.) (noting how administrative agencies "as a practical matter . . . exercise legislative power, . . . executive power . . . and judicial power.").

170. *See* Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 67 (2015) (Thomas, J.) ("[T]he Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. . . . These grants are exclusive."); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 112-113 (2015) (Thomas, J.) (noting that deferring to administrative agencies "undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.").

powers in one body is dangerously akin to tyranny.[171] This viewpoint can be traced back to eighteenth-century French philosopher Montesquieu, who believed that the combination of all three governmental powers in a single entity was the antithesis of liberty.[172] In addition, many in legal academia argue that the administrative state piles excess bureaucracy on the country's democratic system.[173]

The *Brace* case highlights this tension regarding the proper role of the administrative state. Nearly thirty years after initial proceedings, Brace is still fighting the regulatory structures at the center of his two lawsuits.[174] The extent of administrative power over private individuals is the underlying current of the Robert Brace story. However, before discussing the policy and regulatory implications of the *Brace* case, both the Third Circuit's ruling and the agencies' treatment of Brace's Commenced Conversion designation deserve a closer look.[175]

III. VINDICATING ROBERT BRACE

Robert Brace was wrongfully convicted under the FSA for three reasons.[176] First, the Third Circuit incorrectly characterized Brace's pre-1985 activities on the Murphy tract as not being normal farming activities.[177] Second, the agencies and the Third Circuit wrongly ignored Brace's Commenced Conversion designation, denying him the protection from CWA permitting requirements that he was due.[178] Third, the Third Circuit should use the equitable estoppel doctrine to bar the agencies

171. THE FEDERALIST NO. 47 (James Madison) (stating that the "accumulation of all three powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny").

172. *See* CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS COMPLETE WORKS, vol. 1, 199 (London, T. Evans 1748) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.").

173. *See* Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 590 (1996) ("By regulating vital decisions about environmental risk management through a remote, arcane, and piecemeal bureaucratic process, the command and control system necessarily runs a serious democracy deficit."); *see also* Hunter S. Higgins, *Deference, Due Process, and the Definition of Water: Dredging the Clean Water Act*, 20 U. DENV. WATER L. REV. 305, 307 (2017) ("[T]he CWA presents a stark illustration of how a seemingly limitless scope of authority can often lead to an abuse of power.").

174. *See* Bennett, *supra* note 1.

175. *See infra* Part III (arguing that Robert Brace should prevail because he was falsely accused of violating federal regulations with which he was in compliance or exempt from).

176. *See* United States v. Brace, 41 F.3d 117, 127 (3d Cir. 1994).

177. *See id.* ("Regardless of how typical or necessary such drainage systems may be in Erie County, Section 404 of the CWA requires a permit for 'activities which bring an area into farming . . . use,' as opposed to activities that are part of an 'established farming operation.'").

178. *See* Memorandum, *supra* note 58, at 10 ("[O]n September 21, 1988, Erie County ASCS Executive Director Joseph Burawa dispatched a letter correspondence to Defendant Robert Brace apprising him of the Committee's determination that his 'conversion of wetlands began before December 23, 1985, and [would] enable [him] to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits.'").

from pursuing legal action against Brace for his 2012 activities, which do not constitute violations of either the consent decree or the CWA.[179]

A. The Third Circuit Incorrectly Determined That Brace's Pre-1985 Activities on the Murphy Tract Were Not Normal Farming Activities

Brace's pre-1985 activities on the Murphy tract constitute normal farming activities under the language of CWA § 404.[180] His drainage system repairs were common agricultural operations that he invested substantial amounts of time and money in on a nearly annual basis.[181] Brace's actions were part of an established farming operation because the historical data clearly shows that the original state of the farm was an agricultural one.[182] The Murphy tract has been farmed by Brace's ancestors since the 1930s.[183] Pennsylvania historical records reveal that the vast majority of farms in Erie County have been used since the early 1800s for a mixture of different purposes, including cultivating crops, pasturing animals, and growing hay.[184] Satellite images show that the Murphy tract was used as farmland and was almost completely dry from at least 1983 until 1993.[185] In addition, historical aerial photographs of the Murphy tract show that it was dry farmland in 1984.[186] The definition of a "normal farming activities" for purposes of the Robert Brace case is therefore a mixed-industry farm, not a wetland.[187] Thus, complying with the Restoration Plan's instructions to restore the Murphy tract to its original state would actually require Brace to restore the tract to farmland.[188] The government effectively

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179. *See* Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 59 (1984) (noting that equitable estoppel is a means for avoiding injustice).

180. *See* United States v. Brace, C.A. No. 90-229 Erie, slip op. at 23 (W.D. Pa. Dec. 16, 1993) ("Defendants' activities in commencing conversion of the site prior to December 23, 1985, and in obtaining status as 'commenced conversion' from the ASCS are evidence that Brace and Brace Farms have establish an ongoing farming operation on the site.").

181. *See* Census, *supra* note 46 (showing that, in 2016, 213,934 acres of corn and 199,378 acres of hay were harvested); *see also* Farms and Farmland, *supra* note 46 (noting that "[o]f the 915 million acres of land in farms in 2012, 45.4 percent was permanent pasture, [and] 42.6 percent was cropland."); Memorandum, *supra* note 58, at 57 (stating that Brace worked "on a continuous and regular basis in these areas in 1977, 1978, 1979, 1981, 1982, 1984, 1986 and 1987").

182. *See* Northwestern, *supra* note 74, at 136.

183. Response, *supra* note 3, at 5 (explaining that the land in question had been farmed by Brace's father and grandfather).

184. *See* Northwestern, *supra* note 74, at 12-13, 136.

185. *See* Brace v. United States, No. 98-897L, slip op. at 5 (Fed. Cl. Aug. 4, 2006) ("[B]y the end of 1979, the site was dry, with the exception of times of excessive rainfall."); *see also Report*, *supra* note 10, at 4 (stating that the "pre-1984 condition was dry farmland that was properly drained and either producing crops or was in the process of being converted to produce crops as shown on the authentic historical aerial photos.").

186. *See* Motion to Vacate, *supra* note 124, at Ex. 6.

187. *See* Responsive Statement, *supra* note 127, at 34 (noting that the site "did not historically constitute a 'wetland,' did not previously constitute a wetland in 2012-2013, and currently does not constitute a 'wetlands.'").

188. *See* Motion to Vacate, *supra* note 124, at 11 ("The only possible way to restore the Murphy Farm tract to its original 'wet' state would have been for the Consent Decree to have ordered restoration back to its physical condition prior to or during the early twentieth century before it had even been cultivated

changed the normal state of the land from agriculture to wetland by requiring Robert Brace, through the Restoration Plan, to turn the tract into a wetland.[189]

Brace's repair activities should have been deemed to be normal farming activities because they are essential components of any Erie County farming operation and were necessary to maintain the drainage system.[190] The utilization of tile drainage systems began as early as the 1830s and were on nearly every farm by 1955.[191] Since that time, periodic additions and repairs to drainage systems have been a regular part of every farming operation.[192] Brace's activities, which included the installation of drainage tile, were in fact necessary prerequisites for the completion of the conversion effort.[193] The Third Circuit felt that Brace's actions could not be classified as mere maintenance of the drainage system because they brought the land into a new use.[194] However, the previous state of the Murphy tract and the entire surrounding area was agricultural.[195] Brace's drainage-related activities did not bring the Murphy tract into agricultural use; they were aimed at repairing the drainage system for the *existing* agricultural use.[196] Brace's activities could fit within many of the exempted activities listed in § 404, such as minor drainage repairs, crop production, upland soil and water conservation practices, maintenance of drainage

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for livestock pasturing and hay cropping."); *see also Report*, *supra* note 10, at 3 ("[T]o return the property to the pre-1984 condition, . . . [the] area would be drained and converted back to drive farmland . . . ."); Northwestern, *supra* note 74, at 136.

189. Interview with Lawrence A. Kogan, *supra* note 72 ("The feds effectively used this method to change the 'normal condition' of the Brace Erie Cty. farm from agriculture to pristine wetlands for CWA 404 purposes.").

190. United States v. Brace, Civil Action No. 90-229 Erie, 1, 3 (W.D. Pa. 1993) ("Extensive underground drainage systems are typical and necessary aspects of farming in Erie County, and the installation of such systems is a normal farming activity in order to make land suitable for farming.").

191. *See generally* Northwestern, *supra* note 74, at 136.

192. FARMERS BULLETIN, *supra* note 81, at 10 ("Where it is possible to install a whole drainage system on a farm at one time it is by all means advisable. In actual practice, however, such a condition seldom occurs. Not many farmers have the money, Time, or labor to do it all within a short period, or even within a year. Therefore, most of the tile-drainage work must be done as it has been done in the past, a part at a time, until it is all accomplished. This means that the farmers should first drain those parts of his farm that need it most sport on which the profits will be the greatest. . . . ").

193. Ward, *supra* note 77 ("Brace advised [USDA-ASCS] he wanted to put in crops and they agreed that underground tiling should be placed at certain positions for surface drainage."); *see also* Hofstrand, *supra* note 81(noting that the cleaning, repair, and maintenance of drainage systems is a regular and necessary part of farming).

194. *See* United States v. Brace, 41 F.3d 117, 128 (3d Cir. 1994); *see generally* 33 U.S.C. § 1344(f)(2) (2012) ("Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.").

195. *See generally* Responsive Statement, *supra* note 187, at 31 (noting that the site "did not historically constitute a 'wetland,' did not previously constitute a wetland in 2012-2013, and currently does not constitute a 'wetland.'").

196. *See id.*; Duvall, *supra* note 43 ("A wetland can only be converted to farmland once. Making the land more farmable does not (cannot) convert it a second time."); Porter, *supra* note 42 ("No matter that pasturing livestock and growing crops are both archetypal farming activities: the government argued successfully that even if the field was previously part of an established farming operation when it was used for pasture, it lost farmland status in 1978 when Brace began preparing it for crops.").

and tiling, or maintenance of drainage ditches.[197] This possibility is made particularly clear by the text of the 2007 Regulatory Guidance Letter 07-02, which notes that the term "maintenance" includes excavation, erosion management, and repair or replacement of existing structures in order to preserve their working condition.[198] These facts suggest that the Third Circuit incorrectly held that Brace's pre-1985 activities on the Murphy tract were not normal, ongoing farming activities.[199]

The District Court's determination is the correct outcome.[200] The District Court held that Brace's activities on the Murphy tract constituted normal farming activities, per the statute, because they were normal for a farmer in Erie County.[201] This distinction is important because, as the District Court noted, determining what constitutes normal farming activities is a fact and context-specific inquiry.[202] The District Court's conclusion was based on the fact that Brace's activities on the Murphy tract after 1985 did not bring the land into a new use.[203] Additionally, the District Court noted that the tract has remained in the possession and use of the same family for over sixty years.[204] Finally, the District Court emphasized the fact that there was a USDA conservation plan in place to ensure productive use of the tract.[205] The District Court correctly saw that Brace's activities constituted regular and ongoing farm maintenance efforts that were exempt from CWA regulation.[206]

There is a legitimate argument that the Third Circuit's determination was based on a valid interpretation of the statutory framework.[207] The Third Circuit stuck to a strict interpretation of the statute that limited normal farming activities to those

197. 33 U.S.C. § 1344(f)(1)(A) (2012) (describing normal farming as "plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . . ").

198. *See* Regulatory Guidance Letter 07-02, *supra* note 34, at 4-5 (noting that drainage ditch maintenance includes "activities such as [e]xcavation of accumulated sediments back to original contours[, r]e-shaping of the side slopes[, b]ank stabilization to prevent erosion where reasonably necessary using best management practices . . . [,] and [r]eplacement of existing control structures, where the original function is not changed and original approximate capacity is not increased. Maintenance is generally viewed as involving activities that keep something in its existing state or proper condition or preserve it from failure or decline").

199. *See* United States v. Brace, 41 F.3d 117, 125 (3d Cir. 1994).

200. *See* United States v. Brace, Civil Action No. 90-229, Erie, 1, 8 (W.D. Pa. 1993).

201. *See id.* at 3 ("Extensive underground drainage systems are typical and necessary aspects of farming in Erie County, and the installation of such systems is a normal farming activity in order to make land suitable for farming.").

202. *Id.* at 4.

203. *Id.* at 10.

204. *Id.*

205. *See id.* ("This plan and the defendant's efforts to reach its goal, as financing permitted, was not directed to converting in the mid 1980s a regulation defined wetland area to a new crop production area.").

206. *See id.* ("Such courses of action, together with regularly cleaning of the drainage system on the site, constituted maintenance of the drainage system on the site, constituted maintenance of the drainage system, and as such, is exempt from the permit requirements of the CWA.")

207. *See* United States v. Brace, 41 F.3d 117, 126 (3d Cir. 1994) (noting that the regulations make it clear that a farming operation should not be considered normal or ongoing where hydrological modifications are necessary in order to resume farming).

that were chronologically uninterrupted.[208] However, the realities of farming in the United States do not align with such an interpretation.[209] Those realities suggest that normal farming activities are not limited by chronology or crop type. If nothing else, the Third Circuit's determination strongly suggests that the statutory definition of normal farming activities should be revised to reflect a more realistic understanding of agriculture. Even if the Third Circuit's interpretation was in line with the statute, this case displays the urgent need for a redefinition of the statute in order to accurately reflect the variety of activities involved in agricultural production.[210]

B. The Agencies Wrongly Ignored Brace's Commenced Conversion Designation

The Third Circuit and the agencies involved incorrectly ignored Brace's Commenced Conversion designation, which exempted Brace from regulation under the FSA's Swampbuster provision and the CWA's permitting requirements.[211] Commenced Conversions exclude from the Swampbuster provision lands where the farmer commenced conversion of the wetland to farmland prior to December 23, 1985. Thus, the Third Circuit also effectively determined that Brace had not begun the conversion effort prior to December 23, 1985.[212] However, Brace has documentation from the Erie County USDA office stating that his conversion effort began prior to that date.[213] In addition, any failure to complete the conversion on time was because of beaver activity, the government's intrusion, and the subsequent

208. *See id.* at 127 ("Regardless of how typical or necessary such drainage systems may be in Erie County, Section 404 of the CWA requires a permit for 'activities which bring an area into farming . . . use,' as opposed to activities that are part of an 'established farming operation.'"); *see also* FEDERALIST SOCIETY, *supra* note 114 (discussing the chronological definition of normal farming activities).

209. *See generally* Census, *supra* note 46 (showing that, in 2016, 213,934 acres of corn and 199,378 acres of hay were harvested); Farms and Farmland, *supra* note 46 (noting that "[o]f the 915 million acres of land in farms in 2012, 45.4 percent was permanent pasture [and] . . . 42.6 percent was cropland. . . . ").

210. *See* Farms and Farmland, *supra* note 46.

211. *Brace*, 41 F.3d at 127 ("[T]he district court erred in relying upon a determination from the ASCS in September of 1988 that Brace had 'commenced conversion' of his property from wetland to cropland prior to December 23, 1985, as evidence of an 'established farming operation' at the site."); *see also* Bennett, *supra* note 1 ("Brace was sealed in a CWA box, and no matter which way he turned, he wasn't allowed to use the Food and Security Act of 1985 to say his farmland activity was protected from CWA jurisdiction.").

212. 16 U.S.C. § 3822(b)(1)(A) (2012) ("No person shall become ineligible under section 3821 of this title for program loans or payments . . . [a]s the result of the production of an agricultural commodity on . . . [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985."); *see also* Kogan, *supra* note 97, at 20 ("The official [Commenced Conversion] designation evidenced that Mr. Brace had . . . 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.").

213. Memorandum, *supra* note 58, at 10 ("[O]n September 21, 1988, Erie County ASCS Executive Director Joseph Burawa dispatched a letter correspondence to Defendant Robert Brace apprising him of the Committee's determination that his 'conversion of wetlands began before December 23, 1985, and [would] enable [him] to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits.'").

Restoration Plan that made it impossible for him to farm his land, even land not included in the consent decree area.[214] All three of these circumstances were completely out of Brace's control.[215]

The Third Circuit explained its reason for disregarding Brace's Commenced Conversion designation by pointing out that a Commenced Conversion designation does not override other federal water laws.[216] This fact may be true, but this case did not deal with "other" water laws—it dealt with the two laws that the Commenced Conversion designation was expressly created to provide exemption from![217] It is difficult to see the point of having the exemption at all if the Third Circuit can reason that a statutory exemption does not apply simply because it does not override various "other" laws.[218]

The Third Circuit also reasoned that the sole purpose of a Commenced Conversion designation is to prevent the loss of USDA funding benefits, not to exempt a farmer from regulation.[219] This reasoning is also incorrect because the National FSA Manual makes it clear that Commenced Conversion designations, by signaling that the farmer has commenced the conversion before December 23, 1985, effectively provide the farmer with Prior Converted status.[220] This status shields the farmer from regulation and enables him to receive USDA program funding. The Third Circuit's view of Brace's Commenced Conversion designation therefore contradicted the very purpose of the designation. In addition, the Third Circuit's dismissal of Brace's Commenced Conversion designation and the Prior Converted status it gave him contradicted the EPA's determination that Prior Converted Cropland was excluded from both CWA and FSA jurisdiction.[221]

Brace's case may also be an indicator of a larger, more coordinated agency effort to interfere with the legitimate Commenced Conversion designations of farmers in multiple midwestern states.[222] FWS executed a memorandum in January

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214. *Report*, *supra* note 10, at 3 (noting that agency interference was actually one of the primary causes of the creation of wetland conditions because they did not allow him to maintain the ditches); Motion to Vacate, *supra* note 124, at 3.

215. *See* Motion to Vacate, *supra* note 124, at 3; *see also* Kogan, *supra* note 97, at 22 ("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.").

216. *See* United States v. Brace, 41 F.3d 117, 127 (3d Cir. 1994) (arguing that a Commenced Conversion designation does not nullify requirements under State or Federal water laws).

217. *See generally* Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2012); Food Security Act of 1985, 16 U.S.C. § 3822(b)(1)(A) (2012).

218. *See Brace*, 41 F.3d at 126-27.

219. *Id.* at 127.

220. *See* Kogan, *supra* note 97 at 20 ("The official [Commenced Conversion] designation rendered the conversion of his designated fields from 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'), as if USDA had designated those [Commenced Conversion] fields as 'prior converted' ('PC') croplands."); *see also Manual*, *supra* note 59, at Sec. 512.31 (stating that if a wetland is converted to farmland prior to December 23, 1985, it becomes Prior Converted Cropland that is not subject to the FSA's Swampbuster provision).

221. *See* Final Rule, 58 Fed. Reg. 45,031-45,035 (stating that PC cropland was excluded from CWA § 404 jurisdiction and FSA Swampbuster penalties).

222. *Cf.* Kogan, *supra* note 97.

1994 with the USDA-NRCS, EPA, and Corps addressing the implementation of the Swampbuster provision of the FSA.[223] The memorandum stated that the NRCS, in consultation with the FWS, would certify wetlands delineations that were made prior to November 28, 1990 to ensure they were accurate.[224] This memorandum effectively enabled the NRCS and FWS to retroactively reconsider wetlands determinations that had informed legitimate Commenced Conversion designations like Robert Brace's.[225]

C. The Government Should be Equitably Estopped from Prosecuting Robert Brace for his 2012 Planting Activities.

The doctrine of equitable estoppel is used to prevent a party from bringing a claim against a second party who has already relied to its detriment on the first party's misrepresentations.[226] To do so, the second party must establish that it relied to its detriment on the first party's misrepresentation and that its reliance was reasonable because it did not know—nor should it have known—that the other party was misrepresenting themselves.[227] The majority of circuits allow the equitable estoppel doctrine to be used against governments, but in such cases the claimant must also establish "affirmative misconduct" by the government or its officials.[228] Although only five circuits require the claimant to establish "affirmative misconduct," the Third Circuit is one of those five.[229] In light of this background, the traditional elements of equitable estoppel regarding government entities like the EPA and the Corps include: (1) a misrepresentation by the government; (2) that constitutes affirmative misconduct; and (3) was reasonably relied upon by the claimant.[230]

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223. *See generally* MOA, *supra* note 152.

224. *See id.* at 8 ("[W]etland delineations made by [USDA-]SCS on agricultural lands, in consultation with FWS, will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction.").

225. *See generally* Kogan, *supra* note 97, at 23 (arguing that letting the agencies pick and choose like this constitutes a denial of due process that violates the Administrative Procedure Act).

226. Cmty. Health Servs. of Crawford Cty. v. Califano, 698 F.2d 615, 620 (3d Cir. 1983), *overruled by* Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51 (1984).

227. Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 59 (1984), *quoting* Wilber National Bank v. United States, 294 U. S. 120, 124-125 (1935); United States v. Asmar, 827 F.2d 907, 912 (3d Cir. 1987). Other courts have held that several factors must be established, including (1) false representation, (2) erroneous statement of fact, (3) factual ignorance on the part of the claimant, and (4) adverse effects on the claimant as a result of the erroneous statements. *See* Estate of Emerson v. Commissioner, 67 T.C. 612, 617-18, 1977 WL 3636 (1977). Courts are generally more likely to apply the doctrine when the government conduct involves a misrepresentation of fact like the misrepresentation made to Brace through the provision of an incorrect map of the Consent Decree property.

228. *See* Asmar, 827 F.2d at 911 n.4 (noting the additional burden on the claimant to show "affirmative misconduct on the part of the government officials"); *see also* Califano, 698 F.2d at 622 (noting that affirmative misconduct includes statements that "are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement" and holding that affirmative misconduct existed where the government's statements induced the healthcare provider to submit reports that it otherwise would not have).

229. *See Asmar*, 827 F.2d at 911 n.4.

230. *See* Fredericks v. Comm'r of Internal Revenue, 126 F.3d 433, 450 (1997).

The Third Circuit has stated that the government may be estopped if its actions harm the public interest.[231] In addition, the equitable estoppel doctrine has been applied to many federal agencies, including, among others, the Post Office Department ("Post Office"), United States Postal Service, Department of Housing and Urban Development, Land Management Office, Farmer's Home Administration, and Department of Commerce and Labor.[232] This wide exercise of the equitable estoppel doctrine strongly suggests that applying it to other federal agencies—such as the EPA and the Corps—should not be a problem.[233]

The Third Circuit has addressed the issue of equitable estoppel in the context of governmental entities in *Fredericks v. Commissioner of Internal Revenue*, where the IRS requested multiple extensions of the three-year statute of limitations for assessing deficiencies after Barry Fredericks submitted his 1977 tax return.[234] When those extensions expired, the IRS represented to Fredericks that it did not have a Form 872-A, which extends the statute of limitations indefinitely.[235] Fredericks therefore concluded that the government lacked the ability to assess a deficiency on his tax return.[236] However, eight years after the expiration of the last extension, the IRS informed Fredericks that he was liable for a deficiency of $28,361, plus interest.[237] Fredericks filed suit, arguing that the Commissioner was equitably estopped (or barred) from relying on the previous extensions to avoid the statute of limitations.[238] After examining both the traditional and additional elements of the estoppel doctrine, the Third Circuit held that Fredericks had proven the elements of equitable estoppel.[239] The court's decision was largely based on the IRS' repeated

231. *See id.*, slip op. at 8; Califano, 698 F.2d at 622 (3d Cir. 1983), *quoting* Brandt v. Hickel, 427 F. 53, 56-57 (9th Cir. 1970) (holding that "[. . .] some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement") (emphasis added).

232. *See, e.g.,* Dana Corp. v. United States, 470 F.2d 1032, 1046 (3d Cir. 1972) (holding that the Post Office Department was estopped from denying effects of agent's decision to continue to pay and not inform plaintiff-supplier that it was performing in excess of contract requirements); Manloading & Mgmt. Assocs. V. United States, 461 F.2d 1299, 1303 (1972) (holding that Department of Housing and Urban Development was estopped from denying renewal of contract with plaintiff where authorized agent had assured prospective bidders that funds were available and contract would be renewed); Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970) (estopping Land Management Office from denying bidder priority where agent gave erroneous advice that resubmitting proposal would not result in loss of priority); Portmann v. United States, 674 F.2d 1155, 1169 (7th Cir. 1982) (holding that U.S. Postal Service may be estopped from claiming packages were merchandise and from applying lower insurable limit if plaintiff could prove that postal clerk assured her the packages could be insured as nonnegotiable documents up to a higher limit); J. Homer Fritch, Inc. v. United States, 236 F. 133, 134 (9th Cir. 1996) (estopping Department of Commerce and Labor from denying effect of extension of an option to charter a vessel where government had requested said extension); Payne v. Block, 714 F.2d 1510, 1517-18 (11th Cir. 1983) (estopping government from adhering to the previously established deadline because government agents failed to notify potential applicants of loans).

233. *See* Simmons v. United States, 308 F.2d 938, 945 (5th Cir. 1962).

234. *See* Fredericks v. Comm'r of Internal Revenue, 126 F.3d 433, 436 (1997).

235. *Id.* at 437.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 435, 450.

and documented misrepresentations to Fredericks despite being the only party that had all of the applicable information.[240]

In January 2017, the EPA reopened the 1990 Murphy tract case, alleging that Brace had violated the 1996 consent decree by cleaning the ditches and planting crops on the tract.[241] The agency also charged Brace for violating the CWA on another part of his property based on the same ditch-cleaning and planting actions.[242] Brace had acted based on EPA and Corps officials' July 2012 authorization to conduct ditch maintenance and install drainage tile on certain parts of his property.[243] This authorization was evidenced to Brace through an EPA-prepared Consent Decree map that showed the portions of his land where he was authorized to conduct drainage and repair activities.[244]

Relying on the Consent Decree map provided by the agency officials, Brace conducted drainage maintenance on the two portions of land at issue in order to prepare for planting.[245] However, in the subsequent January 2017 lawsuits, the government denied ever authorizing such actions.[246] They disavowed the Consent Decree map that they had initially provided to Brace and produced a second map of the Consent Decree property that they had allegedly based their analysis on, a copy of which had not been provided to Brace.[247] These facts show that the government intentionally misrepresented the facts to Brace and should be equitably estopped from pursuing legal action against him for his 2012 activities.[248]

The elements of equitable estoppel are clearly fulfilled in Brace's case. First, the government made a misrepresentation to Brace by providing him with an incorrect map that inaccurately portrayed the Consent Decree property.[249] This action constitutes a misrepresentation because the EPA provided Brace with incorrect information that it could have corrected.[250] In addition, Brace received written documentation in the form of a map, rather than oral assurances, which helps him survive the United States Supreme Court's decision in *Heckler v. Community Health*

240. *See id.* at 446-47 ("Fredericks was not 'merely . . . induced to do something which could be corrected later.' He was induced to forfeit his right to terminate the Form 872–A consent agreement. The IRS' subsequent action was not simply a correction of prior misrepresentations, it was a penalty compounded daily as the IRS continued its 12–year investigation well beyond the statute of limitations for any assessments. We conclude these are sufficient detriments to establish an estoppel defense.") (internal citations omitted); *see generally* Ritter v. United States, 28 F.2d 265, 267 (3d Cir. 1928) ("The acts or omissions of the officers of the government, if they authorized to bind the United States in a particular transaction, will work estoppel against the government. . . . ").

241. *See generally* United States v. Brace, Civil Action No. 90-229 (W.D. Pa. 2017).

242. *See generally* United States v. Brace, Civil Action No. 1:17cv6 (W.D. Pa. 2017).

243. *See* Lutte Depo, *supra* note 141 (describing how Lutte and his colleagues made the field determination for Brace's planting activities but later informed him that their "determination was made in error").

244. *See* Response, *supra* note 3, Ex. 58 [Map 1].

245. *See id.* at 29, 58-59.

246. *See* Lutte Depo, *supra* note 141 (describing how Lutte and his colleagues made the field determination for Brace's planting activities but later informed him that their "determination was made in error").

247. *See* Response, *supra* note 3, Ex. 59 [Map 2].

248. *See id.* at 52.

249. *See* Response, *supra* note 3, Ex. 58 [Map 1].

250. *See id.* at Ex. 59 [Map 2].

Services of Crawford County that individuals who receive only oral representations from the government cannot invoke the estoppel doctrine.[251]

Second, this misrepresentation rises to the level of affirmative misconduct because the government failed to respond to Brace's repeated requests for confirmation,[252] failed to send Brace the proper map, and failed to inform Brace of its mistake despite having that information and authority.[253] This is exactly like the circumstances in *Fredericks*, where the IRS failed to inform Fredericks of its mistake despite being the only entity with all the relevant information and authority.[254] This also resembles *Dana Corporation v. United States*, where the Post Office was estopped from avoiding liability for knowingly failing to inform a supplier who was performing in excess of his contract.[255] The Post Office knew the plaintiff was incorrectly performing yet failed to inform him although it had the requisite information and authority. [256] The Third Circuit has also determined that affirmative misconduct in the context of misrepresentation includes statements that are central to the decision-making process at issue.[257] In the present case, the provision of the Consent Decree map by the agency officials was central to the process of deciding where Brace was authorized to plant.[258]

Third, Brace reasonably relied upon the misrepresentation.[259] He reasonably thought that the map he was provided with was accurate and acted based on what the agencies communicated to him.[260] Just as the IRS' documentation of its misrepresentations in *Fredericks* made Barry Fredericks' reliance reasonable, the agencies' production of two different maps documenting the Consent Decree makes Robert Brace's reliance reasonable.[261] Much like Community Health Services of

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251. *See* Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 66 (1984).

252. *See* Response, *supra* note 3, at 32 (noting the agencies' "repeated silence" in response to Brace's requests for confirmation).

253. *See id.* at 62 ("This Court must hold that the United States' known cover-up of its Corps and EPA representatives' erroneous authorizations and such agencies' subsequent intentional inducement of Defendants to rely upon and accept Plaintiff's legal position and to abandon any efforts to challenge it, upon which defendants, in fact, relied until February 2017, to its economic and legal detriment, constitutes affirmative government misconduct.")

254. *See* Fredericks v. Comm'r of Internal Revenue, 126 F.3d 433, 446-47 (1997).

255. *Id.* ("Fredericks was not 'merely . . . induced to do something which could be corrected later.' He was induced to forfeit his right to terminate the Form 872–A consent agreement. The IRS' subsequent action was not simply a correction of prior misrepresentations, it was a penalty compounded daily as the IRS continued its 12–year investigation well beyond the statute of limitations for any assessments. We conclude these are sufficient detriments to establish an estoppel defense.") (internal citations omitted); *see also* Dana Corp. v. United States, 470 F.2d 1032, 1046 (3d Cir. 1972).

256. *Id.*

257. *See* Cmty. Health Servs. of Crawford Cty., Inc. v. Califano, 698 F.2d 615, 622 (3d Cir. 1983) (noting that affirmative misconduct includes statements that "are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement" and holding that affirmative misconduct existed where the government's statements induced the healthcare provider to submit reports that it otherwise would not have).

258. *See* Response, *supra* note 3, Ex. 58 [Map 1].

259. *See id.* at 58-59.

260. *See id.* at 29 ("Brace, acting on behalf and under the direction of Defendants, reasonably understood the scope of the authority they had received to conduct agricultural ditch maintenance on Elk Creek and its tributaries and reaches south of Lane Road within the Consent Decree Area.").

261. *See Fredericks*, 126 F.3d at 443.

Crawford County in *Califano* relied in good faith upon the affirmative and incorrect instructions from the Secretary of Human and Health Services,[262] Brace relied in good faith on the affirmative misrepresentations of the agency officials.[263] The agencies clearly had the authority to make such representations, which is important because the Third Circuit has held that estoppel is appropriate where the government agents have binding governmental authority in the matter.[264] The Third Circuit Court of Appeals should therefore invoke the equitable estoppel doctrine to prevent the government from benefiting at Brace's expense from its own acts of affirmative misconduct upon which Brace relied.[265]

Robert Brace was falsely accused of violating the CWA.[266] The Third Circuit incorrectly characterized his pre-1985 activities on the Murphy tract as not being normal farming activities.[267] Furthermore, the agencies and the Third Circuit incorrectly ignored Brace's Commenced Conversion designation, denying him the protection from CWA permitting requirements that he was due.[268] Finally, the Third Circuit should use the doctrine of equitable estoppel to bar the agencies from pursuing legal action against Brace for his 2012 activities because the agencies made misrepresentations to Brace that constitute affirmative misconduct upon which Brace reasonably relied.[269] Thus, in order to ensure that other farmers are not subjected to circumstances like those of Robert Brace, Congress must make certain structural changes.[270]

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262. *See* Cmty. Health Servs. of Crawford Cty., Inc. v. Califano, 698 F.2d 615, 622 (3d Cir. 1983) (holding that the Secretary of Health and Human Services' affirmative (HHS) and incorrect instructions to Community Health Services of Crawford County (CHS) regarding the recouping of payments constituted affirmative misconduct upon with CHS relied to its detriment and that HHS was estopped from pursuing recoupment).

263. *See* Response, *supra* note 3, at 60 ("The United States knew Defendants would steadfastly rely upon that authorization and interpret and execute it consistent with normal customary farming practices, and Defendants did, in fact, so rely upon that authorization to their great financial, legal, emotional, medical and reputational detriment.").

264. *See* Ritter v. United States, 28 F.2d 265, 267 (3d Cir. 1928) ("The acts or omissions of the officers of the government, if they authorized to bind the United States in a particular transaction, will work estoppel against the government. . . . ").

265. *See Fredericks*, 126 F.3d at 450.

266. *See supra* Part II (arguing that Brace was falsely accused of violating Federal statute and regulations).

267. *See* United States v. Brace, 41 F.3d 117, 127 (3d Cir. 1994) ("Regardless of how typical or necessary such drainage systems may be in Erie County, Section 404 of the CWA requires a permit for 'activities which bring an area into farming . . . use,' as opposed to activities that are part of an 'established farming operation.'").

268. *See* Memorandum, *supra* note 58, at 10 ("[O]n September 21, 1988, Erie County ASCS Executive Director Joseph Burawa dispatched a letter correspondence to Defendant Robert Brace apprising him of the Committee's determination that his 'conversion of wetlands began before December 23, 1985, and [would] enable [him] to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits.'").

269. *See* Fredericks v. Comm'r of Internal Revenue, 126 F.3d 433, 450 (1997); *see also* Response, *supra* note 3, Ex. 58 [Map 1]; *see also* Response, *supra* note 3, Ex. 59 [Map 2].

270. *See supra* Part III (arguing that Congress must address three policy issues in order to prevent other farmers from experiencing the same struggles as Robert Brace).

IV. RESTRUCTURING THE REGULATORY SYSTEM TO PROTECT FAMILY FARMERS

The Robert Brace case exemplifies much of what is wrong with an expansive administrative state.[271] It provides a sobering reminder of the lack of accountability that can stem from a broad grant of authority and raises serious questions about the proper role of the government in overseeing private activities.[272] The case also reveals the dangers associated with bureaucrats writing regulations for a field in which they have no expertise.[273] Agricultural and environmental interests must both be taken into account, but regulatory frameworks divorced from the realities of farming lead to unjustified harm to individuals like Robert Brace.[274] The case of Robert Brace displays the urgent need for redefinition of these ambiguous statutes and regulations so that the rights of hard-working American farmers are not disregarded.[275]

There are other farmers like Robert Brace, he is not the only farmer effected by ambiguous statutes and regulations.[276] As noted above, California farmer John Duarte and Illinois farmer Kurt Wilke are two examples of others whose livelihood has been hindered by these ambiguities. Congress should clarify this maze of regulations so that the rights of other hard-working American farmers are not disregarded.[277] Congress must make three structural changes to the regulatory framework in order to protect other farmers from circumstances like those of Robert

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271. *See* Stewart, *supra* note 173, at 590 ("By regulating vital decisions about environmental risk management through a remote, arcane, and piecemeal bureaucratic process, the command and control system necessarily runs a serious democracy deficit.").

272. *See* MONTESQUIEU, *supra* note 172 ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator."); *see also* Higgins, *supra* note 173, at 307 ("[T]he CWA presents a stark illustration of how a seemingly limitless scope of authority can often lead to an abuse of power.").

273. *See* Bennett, *supra* note 1 (statement of Robert Brace) ("How in the hell do they know what normal farming practices are, anyway? I've been in those fields since I was four years old. Guess what? I've never done nothing except normal farming."); *see also* Philadelphia Judges, *supra* note 125 ("I am appalled that three judges who know nothing about forming have the ability to ruin my entire farming operation, a farm which I have lived on and devoted 55 years of my life to, by interpreting a regulation rather than abiding by the law established by our elected officials.").

274. *See* Response, *supra* note 3, at 4 ("This action also demonstrates the lengths to which the United States government will go . . . to secure a favorable *legacy* ruling and *return on investment* of millions of dollars of U.S. taxpayer funds needlessly expended to prosecute an honest hardworking third-generation Erie, Pennsylvania family farmer for following the law, relying on government advice and exercising his constitutionally protected private property rights.").

275. *Cf.* Porter, *supra* note 42 ("[T]he story of *United States v. Robert Brace* is a poignant reminder that such regulation, whatever the supposed cost-benefit ratio, erodes freedom and undermines independence.").

276. *See* Arthur, *supra* note 155.

277. *See* Porter, *supra* note 42 ("[T]he story of *United States v. Robert Brace* is a poignant reminder that such regulation, whatever the supposed cost-benefit ratio, erodes freedom and undermines independence.").

Brace.[278] First, Congress must redefine the CWA's definition of "normal farming activities" so that the regulation contains a realistic definition of agriculture.[279] Second, Congress must reinforce the original definition of Prior Converted Cropland to definitively exclude croplands converted prior to 1985 from CWA jurisdiction.[280] Third, Congress and the agencies must reinstate the Commenced Conversion designations of farmers like Robert Brace and allow them to complete those conversions within three years.[281] These proposed changes are the first few steps toward appropriately restraining the administrative state and protecting America's farmers.[282]

A. Congress Must Redefine "Normal Farming Activities" Under the Clean Water Act § 404 to Reflect a Realistic Understanding of What Agriculture Involves

Even if the Third Circuit's restrictive interpretation of normal farming activities is justifiable through the statute's wording, the Brace case clearly demonstrates the need for a more realistic statutory definition of normal farming activities.[283] Under the statute, the definition of normal farming activities is based on the chronological progression of agricultural uses, rather than the activities that are normal for most farmers.[284] This impractical definition is the reason behind the Third

278. *See supra* Part III (suggesting three policy changes for Congress to make in order to protect farmers).

279. *See generally* 33 U.S.C. § 1344(f)(1)(A) (2012) (noting that the current definition of normal farming activities includes planting, seeding, harvesting, cultivation, minor drainage, upland soil and water conservation practices, emergency repairs, maintaining drainage and tiling systems, and maintaining drainage ditches); *see also supra* Part III.A (arguing that the CWA's definition of "normal farming activities" must be redefined in order for the regulation to have a realistic definition of agriculture).

280. *See supra* Part III.A (arguing that Congress must reinforce the original definition of Prior Converted cropland to definitively exclude croplands converted prior to 1985 from CWA jurisdiction); *see also* Kogan, *supra* note 28 ("[F]ederal agencies have incrementally extended their control over agricultural lands by expanding the definition of 'waters of the US' (WOTUS) under the Clean Water Act (CWA) and asserting broad legal jurisdiction over WOTUS-adjacent 'wetlands.'").

281. *See* Memorandum, *supra* note 58, at 10 ("[O]n September 21, 1988, Erie County ASCS Executive Director Joseph Burawa dispatched a letter correspondence to Defendant Robert Brace apprising him of the Committee's determination that his 'conversion of wetlands began before December 23, 1985, and [would] enable [him] to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits.'"); *see also* Kogan, *supra* note 97, at 20 ("The official [Commenced Conversion] designation evidenced that Mr. Brace had . . . 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.").

282. *See* Kogan, *supra* note 97, at 65.

283. *See* United States v. Brace, 41 F.3d 117, 126 (3d Cir. 1994) (noting that the regulations make it clear that a farming operation should not be considered normal or ongoing where hydrological modifications are necessary in order to resume farming).

284. *See* FEDERALIST SOCIETY, *supra* note 114.

Circuit's determination that Brace's activities on the Murphy tract did not constitute normal farming activity.[285]

Farming entails a myriad of activities, many of which are not row cropping.[286] Failing to recognize that hay production and pasturing animals constitute the core of normal farming activities is contrary to reality.[287] The USDA's National Agricultural Statistics Service determined that in 2016, American farmers harvested 199,378 acres of hay.[288] By comparison, in 2016, American farmers grew 213,934 acres of corn, which is widely considered one of the country's most commonly grown crops.[289] Similarly, the 2012 Census of Agriculture showed that 45.4% of the total farmland in use that year was permanent pastureland while only 42.6% was cropland.[290] These statistics show how unrealistic it was for the Third Circuit to determine that Brace's haying and pasturing activities on the Murphy tract were not normal farming activities.[291]

In addition, the Third Circuit's determination that Brace's repairs to the Murphy tract drainage system were not normal farming activities directly contradicts the fact that installation and repair of drainage systems has been a regular part of farmers' lives for decades.[292] The majority of tile drainage systems require excavation to a depth of at least three feet, so it should come as no surprise to the EPA and the Corps that Brace's activities required some excavation.[293] These improper determinations by the Third Circuit as a result of the CWA § 404 definition of "normal farming activities" reveal the urgent need to reconsider the definition of normal farming activities.[294]

The original intent of the "normal farming activities" exemption was to provide farmers with the freedom to conduct the full variety of their farming activities without being hounded by regulations.[295] During extensive debates regarding the 1977 CWA amendments, statements by interested parties, bill sponsors, senators, and others made this intent clear.[296] For instance, National Farm

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285. *See Brace*, 41 F.3d at 124 (holding that the district court's ruling was irreconcilable with the relevant regulations and was based on what it felt were irrelevant facts).

286. *See* Bennett, *supra* note 1 ("DOJ said a lack of row crops equated with a lack of farming.").

287. *See* Brief for Petitioner, *supra* note 138, at 11 (arguing that normal farming activities "are not limited to growing only a particular row crop, but include other agricultural pursuits, such as pasturing livestock and rotating crops, which farmers have undertaken for thousands of years").

288. *See* Census, *supra* note 46 (showing that, in 2016, 213,934 acres of corn and 199,378 acres of hay were harvested).

289. *See id.*

290. *See* Farms and Farmland, *supra* note 46 (noting that "[o]f the 915 million acres of land in farms in 2012, 45.4 percent was permanent pasture [and] . . . 42.6 percent was cropland. . . . ").

291. *See* United States v. Brace, Civil Action No. 90-229 Erie, 1, 8 (W.D. Pa. 1993).

292. *See* Matthews, *supra* note 81 ("Agricultural drainage tile has been used in crop fields for centuries.").

293. *See* Panuska, *supra* note 80, at 5 (noting that most tile drain installations require excavation to a depth of between three and six feet).

294. *See generally* Bennett, *supra* note 1 ("DOJ said a lack of row crops equated with a lack of farming.").

295. *See Hearings*, *supra* note 35 (statement of Victor Veysey, Assistant Secretary of Army for Civil Works) (noting that the intent behind normal farming activities was to ensure "that all the normal things that a farmer does in the course of his operations are exempted. That was our intent").

296. *See id.*

Bureau's Bruce Hawley stated that "normal farming activities" included things like repairing drainage, laying new tiles, and managing water flow for farming purposes.[297] Hawley's statement reflected farmers' widespread use of tile drainage systems since at least the 1830s and validated the fact that repairs to drainage systems are a normal part of farming.[298] Other statements reflected the ubiquitous fear of overregulation that would fail to account for the realities of everyday farming activities.[299] For example, West Virginia Senator Jennings Randolph noted the "widespread concern that many activities that are normally considered routine would be prohibited or made extremely difficult because of the complex regulatory procedures."[300] Congress recognized the unreasonableness of imposing restrictive burdens on common farming activities across the country and created the § 404 "normal farming activities" exemption to avoid such a burden.[301] Over time, however, the agencies tasked with overseeing this definition have warped and misinterpreted it. This has led to a tremendous expansion of their power.[302] Therefore, Congress must redefine and reinforce the definition of "normal farming activities" under CWA § 404 in the following ways to protect farmers from unreasonable interpretations of the statute.[303]

First, Congress must reinforce the fact that compliance with this provision is a fact-specific, contextual inquiry.[304] The District Court acted correctly when it examined Brace's activities in light of usual farming practices in Erie County, Brace's Commenced Conversion designation, and the entirety of his property.[305] The Third Circuit looked only at the Murphy tract to determine whether there was a normal and ongoing farming operation.[306] The circuit court did so because it felt that the failure of the regulations to specify the precise area the court should look at implied that it should only look at the Murphy tract.[307] However, *United States v.*

297. *Id.* (statement of Bruce Hawley, Assistant Director, National Affairs, National Farm Bureau) (["N]ormal farming activity also includes such things as streambank protection, drainage ditches, construction of new drainage ditches, a laying of new tiles, impounding of waters for the express purpose of having something for livestock to drink later in the summer, and so on.").

298. *See* Northwestern, *supra* note 74, at 136.

299. *See Hearings*, *supra* note 35 (statement of Sen. Jennings Randolph, W. Va.).

300. *See id.*

301. *See* Porter, *supra* note 42 (stating that Senator Edmund Muskie felt that the permitting requirements of the CWA had become "synonymous with federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism").

302. *See* Brief for Petitioner, *supra* note 138 at 10 ("[T]he EPA and the Corps, along with a number of federal courts which have visited the matter, have given the exception a crabbed and unduly narrow interpretation which has vitiated the exemption's usefulness to farmers and ranchers.").

303. *See generally* 33 U.S.C. § 1344(f)(1)(A) (2012) (noting that the current definition of normal farming activities includes planting, seeding, harvesting, cultivation, minor drainage, upland soil and water conservation practices, emergency repairs, maintaining drainage and tiling systems, and maintaining drainage ditches).

304. *See* United States v. Brace, Civil Action No. 90-229 Erie, 1, 8 (W.D. Pa. 1993) ("Extensive underground drainage systems are typical and necessary aspects of farming in Erie County, and the installation of such systems is a normal farming activity in order to make land suitable for farming.").

305. *See id.*; *see also* United States v. Cumberland Farms, 647 F. Supp. 1166, 1175 (D. Mass. 1986).

306. *See* United States v. Brace, 41 F.3d 117, 125 (3d Cir. 1994).

307. *See id.* ("The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation.").

Cumberland Farms, the only precedent used by the Third Circuit to support its decision, is inconclusive as to whether courts should look at the specific parcel at issue or the entire property.[308]

Second, Congress must redefine the "normal farming activities" exemption to explicitly include pasturing and hay production.[309] The Third Circuit's definition of "normal farming activities" is simply out of touch with reality.[310] America's farmers have been producing hay and grazing animals on their farms for decades.[311] The original intent of the exemption was to provide farmers with the freedom to conduct the full variety of farming activities without oppressive regulatory pressure.[312] The formation of this exemption reflected the widespread concern that "many [farming] activities that are normally considered routine would be prohibited or made extremely difficult because of the complex regulatory procedures."[313] Congress should realign the definition and application of the "normal farming activities" exemption with both a realistic view of farming and with the true purpose of the exemption.[314] Congress can do so simply by recognizing that pasturing and hay production fall under one of the currently exempted activities, such as cultivation or harvesting.[315]

Third, Congress must either redefine "normal farming activities" to include the construction and repair of tile drainage systems or explicitly include the construction and repair of tile drainage systems within one of the currently exempted activities.[316] Farmers in the United States have used tile drainage systems since the early 1800s, and they are a part of almost every farmer's operation.[317] Like any other farming implement, tile drainage systems may need occasional maintenance.[318]

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308. *See Cumberland Farms*, 647 F. Supp. at 1175 (referring ambiguously to "the site").

309. *See* 33 U.S.C. § 1344(f)(1)(A) (2012) (describing normal farming as "plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. . . . ").

310. *See generally* Census, *supra* note 46 (showing that, in 2016, 213,934 acres of corn and 199,378 acres of hay were harvested); *see generally* Farms and Farmland, *supra* note 46 (noting that "[o]f the 915 million acres of land in farms in 2012, 45.4 percent was permanent pasture [and] . . . 42.6 percent was cropland. . . . "); *see generally* Bennett, *supra* note 1 ("DOJ said a lack of row crops equated with a lack of farming.").

311. *See* Census, *supra* note 46 (showing that, in 2016, 213,934 acres of corn and 199,378 acres of hay were harvested); *see also* Farms and Farmland, *supra* note 46 (noting that "[o]f the 915 million acres of land in farms in 2012, 45.4 percent was permanent pasture [and] . . . 42.6 percent was cropland. . . . ").

312. *See Hearings*, *supra* note 35 (statement of Victor Veysey, Assistant Secretary of Army for Civil Works) ("[A]ll the normal things that a farmer does in the course of his operations are exempted. That was our intent").

313. *See id.* (statement of Sen. Jennings Randolph, W. Va.).

314. *See generally* 33 U.S.C. § 1344(f)(1)(A) (2012) (describing normal farming as "plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. . . . ").

315. *See id.* (stating cultivating and harvesting are normal farming activities).

316. *See generally* United States v. Brace, Civil Action No. 90-229 Erie, 1, 6-7 (W.D. Pa. 1993) (describing the various repair, excavation, and construction activities Brace undertook).

317. *See* Northwestern, *supra* note 74, at 136-37.

318. *See Brace*, Civil Action No. 90-229, at 3 (W.D. Pa. 1993) ("Extensive underground drainage systems are typical and necessary aspects of farming in Erie County, and the installation of such systems is a normal farming activity in order to make land suitable for farming."); *see also* Northwestern, *supra* note 74, at 137.

Periodic additions and repairs to tile drainage systems are a regular task for farmers who utilize such systems.[319] The current statute includes the construction or maintenance of irrigation ditches and the maintenance of drainage ditches, both of which could reasonably include the construction and repair of drainage tile systems.[320] Therefore, Congress must recognize that maintenance of tile drainage systems reasonably includes repairing old, existing drainage tiles and that such repairs reasonably include construction efforts.[321]

Finally, Congress must clarify the Recapture Provision because it unduly burdens farmers' ability to earn a living.[322] The current provision, which requires a permit for any activity that brings a navigable water into a "new" use, is open to a wide variety of interpretations.[323] This provision contradicts the initial purpose of § 404 and ignores the fact that in order to comply farmers must constantly modify hydrological conditions to have a chance of growing crops.[324] Therefore, Congress should make it clear that this provision is only concerned with whether the water in question was used for any agricultural purpose in the past.[325] In other words, an activity should only fall under the Recapture Provision if it brings a navigable water into an agricultural use when that navigable water has never been used for agriculture.[326] Thus, a farmer who grows crops on land that was previously used for

319. FARMERS BULLETIN, *supra* note 81, at 10 ("Where it is possible to install a whole drainage system on a farm at one time it is by all means advisable. In actual practice, however, such a condition seldom occurs. Not many farmers have the money, Time, or labor to do it all within a short period, or even within a year. Therefore most of the tile-drainage work must be done as it has been done in the past, a part at a time, until it is all accomplished. This means that the farmers should first drain those parts of his farm that need it most sport on which the profits will be the greatest. . . . ").

320. 33 U.S.C. § 1344(f)(1)(C) (2012) (stating that the current definition of normal farming activities includes maintenance of drainage ditches and the construction or maintenance of irrigation ditches).

321. *See generally Brace*, Civil Action No. 90-229, at 6-7 (describing the various repair, excavation, and construction activities Brace undertook); *see generally* Matthews, *supra* note 81 (explaining that "agricultural drainage tile has been used in crop fields for centuries"); *see generally* Panuska, *supra* note 80, at 5 (noting that most tile drain installations require excavation to a depth of between three and six feet).

322. *See generally* 33 U.S.C. § 1344(f)(2) (2012) ("Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.")

323. *See* United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986) (holding that a farmer who tilled wetlands that had not produced crops on a regular basis did not fall under the normal farming activities exemption)*; see also* United States v. Larkins, 657 F. Supp. 76 (W.D. Ky. 1987) (holding that the landowners were not entitled to the exemption to the permit requirement because their actions were meant to bring the wetlands into cultivation, a use to which the land was not previously subject).

324. *See* Panuska, *supra* note 80, at 5 (noting that most tile drain installations require excavation to a depth of between three and six feet).

325. *See generally* 33 U.S.C. § 1344(f)(2) (2012) ("Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.").

326. *See id.*; *see also* Brief for Petitioner, *supra* note 138, at 12 (arguing that "the recapture provision . . . does not come into play were a farmer merely alters the mix of agricultural uses of his land. Rather it applies where landowners categorically change the use of their land, such as from a farm to a

grazing animals or producing hay should not be subject to the Recapture Provision even if there was a lapse in time between the two agricultural uses.

These changes will not give farmers free reign to skirt the permitting requirements of the CWA.[327] The legal precedent on the topic makes it clear that the courts have consistently construed the § 404 exemptions quite narrowly.[328] For example, the court in *Akers* held that a farmer who tilled wetlands that had not produced crops on a regular basis did not fall under the normal farming activities exemption.[329] Similarly, the court in *Avolleyes* held that where no farming operation could have existed until long after the activities at issue had completely changed the use of the land, such activities were not "normal farming activities." [330] In other words, the court determined that after the farming operations changed to the point that they were unrecognizable in comparison to the original farming activities, they would not be considered "normal farming activities." Thus, the CWA permitting requirements will still be in place and will still apply to all landowners, including farmers.[331] These proposed changes will simply ensure that the regulation is working with a realistic definition of agriculture and that it aligns with Congress' intent for the "normal farming activities" exemption.[332]

B. Congress Must Reinforce the Original Definition of Prior Converted Cropland to Definitively Exclude Croplands Converted Prior to 1985 from CWA Jurisdiction

The agencies disregarded Brace's Commenced Conversion designation and the Prior Converted status it effectively provided him.[333] The agencies' actions were possible primarily because of the definition of Prior Converted Cropland.[334] This definition requires that the land show no wetland features in order to be considered

residential development."); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 925-26 (5th Cir. 1983) (holding that where no farming operation could have existed until long after the activities at issue completely changed the use of the land, the activities were not normal farming activities).

327. *See* Perdion, *supra* note 70, at 868 ("The agricultural industry poses one of the greatest threats to our country's wetlands.").

328. Pufko, *supra* note 31, at 240 (noting that the permit exemption of § 404(f)(1) has been interpreted narrowly).

329. United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986) (holding that a farmer who tilled wetlands that had not produced crops on a regular basis did not fall under the normal farming activities exemption).

330. *See* 715 F.2d 925-26 (5th Cir. 1983).

331. *See generally* Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2012).

332. *See* Porter, *supra* note 42 (stating that Senator Edmund Muskie felt that the permitting requirements of the CWA had become "synonymous with federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism").

333. *See* Memorandum, *supra* note 58, at 10 ("[O]n September 21, 1988, Erie County ASCS Executive Director Joseph Burawa dispatched a letter correspondence to Defendant Robert Brace apprising him of the Committee's determination that his 'conversion of wetlands began before December 23, 1985, and [would] enable [him] to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits.'").

334. *Manual*, *supra* note 59, § 514.30 (describing the conditions for PC status).

Prior Converted Cropland.[335] Therefore, the agencies only had to prove that Brace's land had *some* wetland features to ensure Prior Converted status was not given.[336] This series of events is a perfect example of the ambiguity and potential over-enforcement inherent in the definition of Prior Converted Cropland.

Overshadowing these difficulties is the fact that the CWA does not say anything about wetlands; only the regulations that accompany the CWA mention wetlands.[337] Because these provisions are not in the statute, the government does not have to prove that the wetland was actually harmed.[338] Instead, the government only has to check the boxes necessary for the land to fall under the regulation.[339] This process creates a significant level of ambiguity that puts farmers at a disadvantage when trying to defend themselves against agency action.[340]

In order to remedy this problem, Congress must reinforce the 1993 Joint Regulation between the Corps and the EPA that excluded Prior Converted Cropland from the definition of WOTUS.[341] The Joint Regulation did so in order to achieve consistency among the various federal programs that address wetlands.[342] It recognized that Prior Converted Cropland no longer exhibited characteristics or functions of wetlands and therefore should not be treated as such under the CWA.[343] Reinforcement of this standard by Congress would eliminate the possibility of ambiguous over-enforcement and enable farmers to know exactly when they may be subject to regulation.[344] The Trump administration's revision of the WOTUS definition, which excludes Prior Converted Cropland from the definition of WOTUS, is a step in the right direction. [345] Reinforcing the Joint Regulation in this way will not lead to the widespread degradation of wetlands.[346] The cumulative effect of the CWA and other statutes will continue to protect wetlands.[347] This proposal will

335. *See* Final Rule, 58 Fed. Reg. 45,031 ("[W]e are excluding PC crop land from the definition of the waters of U.S. in order to achieve consistency in the manner in which various federal programs address wetlands.").

336. *See id.*

337. *See* McBeth, *supra* note 52, at 226 (noting that the FSA was the first federal statute to explicitly use the term "wetland").

338. *See* Interview, *supra* note 72.

339. *See Manual*, *supra* note 59, at Sec. 514.30(a) (explaining the conditions for PC status).

340. *See* Interview, *supra* note 72; *see also* Bennett, *supra* note 1 (statement of Congressman Glenn Thompson) ("Bob's case demonstrates the serious problems landowners face regarding ambiguity of wetlands designations. We need to get rid of ambiguity. Ambiguity gives bureaucrats more room to maneuver.").

341. *See* Final Rule, 58 Fed. Reg. 45,008 ("[W]e are excluding PC cropland from the definition of the waters of U.S. in order to achieve consistency in the manner in which various federal programs address wetlands.").

342. *See id.*

343. *See id.* at 26 ("PC cropland no longer performs the functions or has values that the area did in its natural condition.").

344. *See* Smith, *supra* note 29, at 340 (arguing that the significant nexus standard leads to disparate outcomes and uncertainty for private property owners).

345. *See generally* Revised Definition, 84 Fed. Reg. 4,154; *see generally* New Rule, 85 Fed. Reg. 22, 251.

346. *See* Perdion, *supra* note 70, at 868.

347. *See generally* Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2012).

simply ensure that the individual laws are not unduly oppressive to farmers like Robert Brace.

C. Congress Must Recognize the Valid Commenced Conversion Designations of Robert Brace and Others and Allow Them Three Years to Complete the Conversions

In addition to the changes proposed above, Congress must recognize the valid Commenced Conversion designations of farmers like Robert Brace and allow those individuals three years to complete the conversions.[348] This recognition will give farmers like Robert Brace the protection from CWA regulation that they are entitled[349] because a Commenced Conversion designation effectively provides the farmer with Prior Converted status by signaling that the conversion effort was begun before December 23, 1985.[350] The three-year timeframe will provide the appropriate amount of time for Brace and others like him to complete their conversions.[351]

The case of Robert Brace is a perfect example of the need for recognition of Commenced Conversion designations.[352] Brace has presented strong evidence of continued work on the conversion effort and has documentation that the conversion commenced before December 23, 1985.[353] He failed to finish the conversion effort only because of recurring beaver activity, the government's intrusion, and the faulty Restoration Plan, all of which were completely out of his control.[354]

Under the statute, Commenced Conversions were required to be completed by January 1, 1995.[355] However, some precedent suggests that a tolling of the time limitation on Commenced Conversions would be acceptable in certain

348. *See generally* Motion for Relief, *supra* note 78, at 14 ("Defendants respectfully request that this Court exercise its equitable powers to recognize the extraordinary circumstances that justify allowing Defendants to prospectively continue and complete, by no later than three (3) years from the entry of judgment, the prior commenced conversion of their Murphy Farm tract previously authorized by the United States Department of Agriculture.").

349. *See* Kogan, *supra* note 14, at 65 ("[T]he President must both work with Congress . . . to reclaim, reestablish and reaffirm for all of America's farmers, especially Mr. Brace, their former [Prior Converted] and [Commenced Conversion] exclusions from FSA funding ineligibility *and* CWA Section 404 wetlands jurisdiction.").

350. *See Manual*, *supra* note 59, at Sec. 514.30 ("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.").

351. *See* Interview, *supra* note 72.

352. *See* Bennett, *supra* note 1 ("Brace was sealed in a CWA box, and no matter which way he turned, he wasn't allowed to use the Food and Security Act of 1985 to say his farmland activity was protected from CWA jurisdiction.").

353. *See* Memorandum, *supra* note 58, at 57 (stating that Brace worked "on a continuous and regular basis in these areas in 1977, 1978, 1979, 1981, 1982, 1984, 1986 and 1987").

354. *See Report*, *supra* note 10, at 3 (noting that agency interference was actually one of the primary causes of the creation of wetland conditions because they did not allow him to maintain the ditches); *see also* Motion to Vacate, *supra* note 124, at 3.

355. *See* 7 CFR § 12.5(b)(2)(iii) (2015) (requiring conversion efforts to be completed before January 1, 1995).

circumstances.[356] One such circumstance, described in *Lyng* which could lead to the tolling of a Commenced Conversion designation is an arbitrary, capricious, or unlawful government action.[357] The government action in this case can arguably be classified as arbitrary and capricious.[358] For instance, the government's implementation of the EPA's Restoration Plan made it impossible for Brace to farm not only the Murphy tract but also other parts of his land.[359] In addition, the Restoration Plan forced Brace to create an artificial wetland that did not originally exist.[360] Furthermore, the government' disregarded Brace's valid Commenced Conversion designation without a warrant.[361] In light of *Lyng*, these facts strongly suggest that the government action in this case was arbitrary and capricious.[362] Therefore, Brace should have an opportunity to complete his conversion effort without further government interference.[363] Tolling the time limitation on Commenced Conversions for three years would provide Brace and others like him with adequate opportunity to complete their conversion efforts.

Based on these facts, Robert Brace was wrongfully accused of violating the CWA and FSA.[364] To ensure that other farmers are not subjected to such a fate, several structural changes must be made to the United States' environmental and agricultural regulatory systems.[365] These changes include redefining the normal farming activities exemption under the CWA to reflect a more realistic

356. *See* Bowen v. New York, 476 U.S. 467, 480 (1986) (stating that equitable tolling principles applied to administrative appeals); Von Eye v. United States, 92 F.3d 681, 684 (8th Cir. 1996), (holding that, under certain circumstances, "the time limitation in 12.5(b)(5)(iii) could be equitably tolled").

357. *See* Lyng v. Payne, 476 U.S. 926, 936 (1986) ("If, for example, a farmer had filed a loan application prior to the expiration of the loan deadline and a court determined that the denial of the application after the deadline's expiration was arbitrary, capricious and not in accordance with law, the appropriate remedy under the APA would be to direct that the application be granted or reconsidered.").

358. *See* Memorandum, *supra* note 58, at 57 (noting that the Murphy tract should have been excluded "from CWA Section 404 jurisdiction pending Defendants' completion of the conversion pre-January 1, 1995, but for circumstances beyond Defendants' control–i.e., the Government's intentional disruption, thwarting and nullification of such effort"); *see also* Kogan, *supra* note 97, at 21-22 ("The evidence to-date reveals, however, that EPA and the Corps, led by the U.S. Fish & Wildlife Service ('FWS') Pennsylvania Field Office (within Region 5), intentionally interfered with, actively contested on 'relevance grounds,' and then disregarded the Erie County USDA-ASCS Committee's CC determination for portions of the two prior commenced-converted Brace farm fields in question.").

359. *See* Motion to Vacate, *supra* note 124, at 3-4 (describing how the government's arbitrary implementation of the EPA's Restoration Plan makes it impossible for Brace to complete the conversion and farm much of his own land, even land outside the area of the consent decree).

360. *See* Responsive Statement, *supra* note 127 (noting that the site "did not historically constitute a 'wetland,' did not previously constitute a wetland in 2012-2013, and currently does not constitute a 'wetland'").

361. *See* United States v. Brace, 41 F.3d 117, 127 (3d Cir. 1994) ("[T]he district court erred in relying upon a determination from the ASCS in September of 1988 that Brace had 'commenced conversion' of his property from wetland to cropland prior to December 23, 1985, as evidence of an 'established farming operation' at the site.").

362. *See Lyng*, 476 U.S. at 936.

363. *See generally id.*; Bowen v. New York, 476 U.S. 467, 480 (1986) (stating that equitable tolling principles applied to administrative appeals); Von Eye v. United States, 92 F.3d 681, 684 (8th Cir. 1996).

364. *See Brace*, 41 F.3d at 127.

365. *See supra* Part IV (suggesting three policy changes for Congress to make in order to protect farmers).

understanding of agriculture, reinforcing the original definition of Prior Converted Cropland to definitively exclude croplands converted prior to 1985 from CWA jurisdiction, and definitively recognizing the Commenced Conversion exemptions from CWA regulation given to farmers like Robert Brace.[366]

V. CONCLUSION

The Robert Brace case is a sobering reminder of the dangers of an unchecked administrative state.[367] These foundational concepts of governance are threatened by administrative agencies, which utilize all three powers of government tend to unduly burden the freedoms of American citizens when they act without proper restraint.

Robert Brace was wrongfully accused of violating the CWA and FSA.[368] First, Brace's pre-1985 activities on the Murphy tract were incorrectly characterized as not being normal farming activities. Second, the agencies incorrectly ignored Brace's Commenced Conversion designation, effectively denying him the protection from CWA permitting requirements that he was rightfully due. Third, the Third Circuit should use the equitable estoppel doctrine to bar the agencies from pursuing legal action against Brace for his 2012 activities, which do not constitute violations of either the consent decree or the CWA.

In order to ensure that other farmers are not subjected to circumstances like those of Robert Brace, Congress must revise the statutory and regulatory framework so that it contains a realistic understanding of farming practices.[369] First, the CWA's definition of "normal farming activities" must be redefined to reflect the original intent of the drafters of the normal farming activities exemption, which was to enable farmers to freely conduct their farming operations without being unduly burdened by regulations.[370] Second, Congress must reinforce the original definition of Prior Converted Cropland to definitively exclude croplands converted prior to 1985 from CWA jurisdiction. Third, Congress and the relevant agencies should recognize the

366. *See Brace*, 41 F.3d at 124 (holding that the district court's ruling was irreconcilable with the relevant regulations and was based on what it felt were irrelevant facts); *cf.* Census, *supra* note 46 (showing that in 2016, 213,934 acres of corn and 199,378 acres of hay were harvested); c*f.* Farms and Farmland, *supra* note 46, at 2 (noting that "[o]f the 915 million acres of land in farms in 2012, 45.4 percent was . . . pasture [and] . . . 42.6 percent was cropland. . . . "); *see also* Kogan, *supra* note 28 ("[F]ederal agencies have incrementally extended their control over agricultural lands by expanding . . . the Clean Water Act (CWA) and asserting broad legal jurisdiction over WOTUS-adjacent 'wetlands.'").

367. *Cf.* Stewart, *supra* note 173, at 590 ("By regulating vital decisions about environmental risk management through a remote, arcane, and piecemeal bureaucratic process, the command and control system necessarily runs a serious democracy deficit."); *see also* Bennett, *supra* note 1 (statement of Congressman Glenn Thompson) ("Bob's case demonstrates the serious problems landowners face regarding ambiguity of wetlands designations. We need to get rid of ambiguity. Ambiguity gives bureaucrats more room to maneuver.").

368. *Cf. Brace*, 41 F.3d at 127 (arguing that the charges against Brace are unwarranted on multiple grounds).

369. *See* Porter, *supra* note 42 (showing how Congress's extensive and unrealistic regulation regime undermine a farmer's freedom). "[T]he story of *United States v. Robert Brace* is a poignant reminder that such regulation, whatever the supposed cost-benefit ratio, erodes freedom and undermines independence."

370. *See supra* Part II.

Commenced Conversion designations of farmers like Robert Brace and allow them to complete those conversions within three years.

The quality of the environment, including wetlands, is critically important. Protecting farmers and ranchers is also a worthy cause. National and local actors must balance these two interests, but it cannot be through an ever-expanding administrative state. Allowing unelected administrative agencies to regulate industries that they may or may not have a complete understanding of is a step in the wrong direction.[371] The unfortunate story of Robert Brace shows that the shifting sands of the administrative state can pose a grave threat to individual freedoms if allowed to roam unchecked.[372] The government's mistreatment of Robert Brace, although he followed the law and reasonably relied on government authorization, calls into question the administrative state's definition of justice.[373]

These proposed changes may not entirely solve the problem, but they will at least begin to appropriately restrain the administrative state and protect the individual freedoms of America's farmers.[374]

371. *See* Bennett, *supra* note 1 (statement of Robert Brace) ("We're at the point where people who have never farmed in their lives or set foot outside an office building get to define normal farming.").

372. *See* Response, *supra* note 3, at 4 ("The United States . . . has employed a 'win at any cost' 'ends justifies means' approach to governance that poses a grave threat to the administration of justice.").

373. *See id.* ("This action also demonstrates the lengths to which the United States government will go . . . to secure a favorable legacy ruling and return on investment of millions of dollars of U.S. taxpayer funds needlessly expended to prosecute an honest hardworking third-generation Erie, Pennsylvania family farmer for following the law, relying on government advice and exercising his constitutionally protected private property rights.").

374. *See* Kogan, *supra* note 14, at 65.