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Harmonizing 'Converted Wetland' under the Clean Water Act and Food Security Act Would Reaffirm Congress's Intent to Limit EPA and Army Corps 404 Jurisdiction

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INTRODUCTION

This Article explains the legal significance of the federal agency designation of a farm or field as a "converted wetland" ("CW"), considering Congress's use of the terms of art "wetland" and "converted wetland" in the statutory text of the Food Security Act of 1985 ("FSA"). It also explains how the plain textual meaning of these terms can and should be used to reaffirm Congress's intent to limit federal agency wetland jurisdiction under the 1977 Clean Water Act ("CWA") § 404 amendments over historical mixed-use wet pasturelands converted to croplands for economically beneficial purposes.

In support of this thesis, the Article explores: (1) the historical underpinnings of CWA § 404; (2) the critical importance of plain textual meaning especially in CWA wetlands litigation; (3) how contrary to plain textual meaning federal courts exclusively inferred from politically contentious and ambivalent legislative history CWA § 404 coverage of non-tidal inland wetlands located adjacent to manmade ditches and converted wetlands; (4) how contrary to plain textual meaning federal courts ignored the explicit text of the Food Security Act of 1985 calling for the safe harbor treatment of certain converted wetlands; and (5) how federal district courts' exercise of their inherent equity jurisdiction can be employed to entertain post-judgment 60(b) motions in CWA § 404 enforcement actions, thereby enabling the reexamination of previously controversial wetland determinations to reach a just and fair result for farmers and ranchers.

Lastly, this Article recommends that the district court in *United States v. Brace*[1] and other similar actions apply this analysis for the purpose of equitably resolving such disputes.

I. HISTORICAL BACKGROUND OF CLEAN WATER ACT §404

From the time the Nixon administration created the Environmental Protection Agency ("EPA") and secured enactment of the 1972 amendments to the Federal Water Pollution Control Act ("FWCPA"),[2] a growing environmental movement influenced Congress.[3] Under this influence, Congress, in 1972, expanded the

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[1] United States v. Brace, 41 F.3d 117 (3d Cir. 1994), rev'g,No.90-229 (W.D.Pa.Dec.16,1993) (this reversal led Brace to enter into a consent agreement with the Government which the district court entered on September 23, 1996. Although the U.S. Department of Agriculture had acknowledged that Brace had fully implemented the consent decree by late December 1996, the case docket does not reflect that the Government ever sought or secured a Court order reaffirming that Brace had fully satisfied the consent decree. The Government subsequently alleged Brace had violated the 1996 consent decree by having committed certain "unauthorized" acts within and surrounding the consent decree area during 2013 and 2014, and it brought suit to enforce the consent decree on January 9, 2017.); *see* United States' Mot. To Enforce Consent Decree and for Stipulated Penalties at 1, United States v. *Brace,* No. 1:90-cv-00229 (W.D. Pa. Oct. 4, 1990), ECF No. 82; *see also* United States' Mem. Of Law in Support of Mot. to Enforce Consent Decree and for Stipulated Penalties at 1, *Brace,* No. 1:90-cv-00229, ECF No. 83.

[2] *See* Lawrence A. Kogan, *CWA § 404: How So Few Words Re Wetlands Have So Greatly Impaled Private Property Rights*, KY. J. OF EQUINE AGRI. & NAT. RESOURCES L. SIXTH ANNUAL SYMPOSIUM (Feb. 28, 2020), http://www.kjeanrl.com/previoussymposiums (last visited Dec. 20, 2020) [https://perma.cc/D32W-255N].

[3] *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (at the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 MICH. ST. L. REV. 687, 697 (2019), , https://digitalcommons.law.msu.edu/lr/vol2019/iss3/3/ [https://perma.cc/7BHA-SDEU]; *see also* Meir Rinde, *Richard Nixon and the Rise of American Environmentalism*, SCI. HIST. INST. (June 2, 2017), https://www.sciencehistory.org/distillations/magazine/richard-nixon-and-the-rise-of-american-environmentalism [https://perma.cc/4FSE-GELU]; Annie Snider, *Clean Water Act: Vetoes by Eisenhower, Nixon Presaged Today's Partisan Divide*, EE NEWS (Oct. 18, 2012), https://www.eenews.net/stories/1059971457 [https://perma.cc/2DNV-HWPR] (noting that the FWCPA later became known as the clean water act).

scope of FWCPA jurisdiction over direct land-based discharges from "navigable waters" to "waters of the United States."[4]

Before the 1972 Clean Water Act ("CWA") amendments, the term "navigable waters," as used in the Acts of July 7, 1838[5] and August 30, 1852[6] regulating steamboats moving on the "navigable waters of the United States," had been defined pursuant to the United States Supreme Court's decision in *The Daniel Ball*, as waters "navigable in fact."[7] The Court based its determination on the Commerce Clause of the United States Constitution, rather than common law.[8] Historical accounts of the CWA's evolution confirmed the focus of Congress's amendments to the CWA were to regulate companies discharging hazardous pollutants (chemicals) from point sources "on small, non-navigable tributaries" (i.e., on rivers or streams not navigable in fact).[9] Indeed, the focus was not to control small nonpoint sources of soil erosion and surface water runoff from small and medium-sized farmlands, which environmentalists and the EPA now claim affects offsite water quality.[10] To achieve its objective, Congress "asserted jurisdiction over 'waters of the United States' [...by] simply equat[ing] this term with 'navigable waters.'"[11]

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[4] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816-865 (1972).

[5] An Act to Provide for the Better Security of the Lives of Passengers on Board of Vessels Propelled in Whole or in part by Steam, 25th Cong., Sess. II., Ch. 191, Secs. 2 and 3, 5 Stat. 304 (1838).

[6] An Act to Amend an Act Entitled 'An Act to provide for the better Security of the lives of Passengers on board of Vessels propelled in whole or in part by Steam,' and for other purposes, 32nd Cong., Sess. I, Ch. 105, 106 (1852).

[7] 77 U.S. (10 Wall) 557, 563 (1871) (holding that "public navigable rivers in law [...] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.").

[8] *Id.* ("And they constitute navigable waters of the United States within the meaning of the acts of Congress, [...] when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."); *See also* The Montello, 87 U.S. (20 Wall.) 430, 440-42 (1874) (this two-part definition ultimately became important to the definition of federal territorial jurisdiction under the Rivers and Harbors Act of 1899.); s*ee infra*.

[9] *See* Arthur Holst, *Clean Water Act,* BRITANNICA, https://www.britannica.com/topic/Clean-Water-Act [https://perma.cc/RRU5-KFMM] (last viewed Nov. 25, 2020); *see also* ENVIRONMENTAL WORKS, *History of the Clean Water Act*, (Apr. 18, 2018), https://www.environmentalworks.com/history-of-the-clean-water-act/ [https://perma.cc/XR58-C5PQ].

[10] Michael Blumm and 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, 704 (1989).

[11] *Id.*; *see also* CWA § 502(7).

While the "EPA quickly embraced a broad jurisdiction for its permit program under section 402 of the Act [overseeing State CWA implementation of *point* source pollution], the Corps resisted,"[12] having had more limited enforcement jurisdiction under the Rivers and Harbors Act of 1899.[13] "To the Corps, [CWA] section 404 was simply an exemption from the new EPA permit system for its preexisting regulatory program."[14] This difference in perspective created uncertainty about the Corps's role in implementing the FWCPA/CWA.[15] As a result, environmental activist groups initiated litigation in the U.S. District Court for the District of Columbia in 1974,[16] challenging the Corps's narrow regulatory interpretation of its jurisdiction.[17]

On March 27, 1975, the district court issued an order directing the Corps to promulgate proposed regulations "clearly reflecting the full mandate of the [CWA]."[18] The Corps responded to that court order on May 6, 1975, when it issued proposed

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[12] Blumm & Zaleha, *supra* note 10; Federal Water Pollution Control Act Amendments of 1972, *supra* note 4.

[13]An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for other Purposes, 55th Cong., Sess. III. Ch. 425, 30 Stat. 1121 (1899) (codified at 33 U.S.C. 1-54).

[14] Blumm & Zaleha, *supra* note 10.

[15] *Id.*

[16] Nat. Res. Def. Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

[17] *See* Permits for Activities in Navigable or Ocean Waters, 39 Fed. Reg. 12,115, 12119 (Apr. 3, 1974) (codified at 33 C.F.R. pt. 209.120) (final regulations prescribing the policies, practice and procedures to be followed in the processing of Department of Army permits authorizing structures and work in or affecting navigable waters of the United States pursuant to the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq..), and the discharge of dredged or fill material into navigable waters pursuant to Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), *inter alia*.) [https://perma.cc/S9XY-RTRK]. Significantly, in a 1988 magazine interview, Charles Hollis, former Chief of the U.S. Army Corps of Engineers Regulatory Branch in Wilmington, North Carolina, admitted that, prior to the enactment of the Food Security Act of 1985, "[t]he Army Corps ha[d] generally enforced 404 permits only on the coast" due to "the public's opposition to land-use regulations in general." *See* Suzanne Goyer, *What Are Wetlands?*, North Carolina Insight (March 1988), 73-74, at 74, https://nccppr.org/wp-content/uploads/2017/02/What_Are_Wetlands.pdf . *See also* Lawrence S. Earley, *Hope For Our Wetlands*, 51 Wildlife in North Carolina 4, 7 (Sept. 1987), https://ia800202.us.archive.org/15/items/wildlifeinnorthc51nort/wildlifeinnorthc51nort.pdf (quoting Charles Hollis, chief of the regulatory branch of the U.S. Corps of Engineers in Wilmington – "Before this law [Food Security Act of 1985 'swampbuster' provision], farmers were exempt from the wetland protection provisions of Section 404 of the Clean Water Act. 'A farmer could do just about anything he wanted without having 404 bother him,' he says. 'Now, he's no longer exempt and the wetlands issue is on his head.'").

[18] 392 F.Supp. at 686 (directing the Corps to publish "proposed regulations clearly recognizing the full regulatory mandate of the Water Act.").

regulations setting forth four alternative regulatory proposals, [19] ranging from that most favored by environmentalists, extending to inland as well as coastal tidal wetlands and waters (Alternative 1),[20] to that most favored by the Corps (Alternative 4), imposing more limited jurisdiction.[21] Environmentalist groups immediately charged the Corps with scaremongering when the press release it had issued prefacing these proposed regulations warned farmers and ranchers that stock pond alterations, irrigation ditch modifications, and field plowing under Alternative 1 would be subject to 404 permitting.[22] Eventually, the Corps was compelled to revise its regulations to more broadly exercise jurisdiction over "waters of the United States."[23]

Ongoing public debates over the scope of the FWPCA regulations continued between 1972 and 1975, despite the Corps's efforts in adjusting its regulations to satisfy the environmental movement's broad interpretation of Congress's

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[19] *See* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 19766-19768 (May 6, 1975) (codified at 33 C.F.R. pt. 209) (prescribing proposed regulations setting forth four alternatives pertaining to the regulation by the Corps under FWPCA (CWA) 404 of discharges of dredge or fill material in navigable waters.).

[20] *Id.* at 19767 (Under "Alternative 1," the Corps's "jurisdiction over the disposal of dredged or fill material would extend to virtually every coastal and inland artificial or natural waterbody," including "all navigable waters of the United States […] up to their headwaters." It would "also extend to all coastal, riverine, estuarine and lake waters subject to the ebb and flow of the tide shoreward […] *regardless of whether those wetlands are regularly or only periodically inundated by saltwater, brackish water, or fresh water*.") (emphasis added).

[21] *Id.* at 19768 (Under "Alternative 4," the Corps adopted "the limited definition of Alternative 2, and the initial State certification and authorization requirements of Alternative 3 prior to any processing of the section 404 application for the disposal of dredged and fill material in waters other than navigable waters of the United States."); *See also id.* at 19767 (Under "Alternative 2," "[j]urisdiction over inland waters under this limited definition would include all navigable waters of the United States up to their headwaters and all primary tributaries of such waters up to their headwaters. In addition, no section 404 permits would be required for the discharge of dredged or fill material amounting to 100 cubic yards or less into primary tributaries of navigable waters of the United States or into waters beyond the head of navigation of navigable waters of the United States.").

[22] James Curtiss, *The Clean Water Act of 1977: Midcourse Correction in the Section 404 Program*, 57 NEB. L. REV. 1092, 1103 (1978) (citing 6 ENVIR. REP. (BNA) 145 (1975).

[23] *See* STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44585, EVOLUTION OF THE MEANING OF "WATERS OF THE UNITED STATES" IN THE CLEAN WATER ACT 10 (2019); *see also "Waters of the United States" (WOTUS): Current Status of the 2015 Clean Water Rule*, EVERYCRSREPORT (Dec. 6, 2018 – Dec. 12, 2018), https://www.everycrsreport.com/reports/R45424.html [https://perma.cc/B346-6PEG] (stating the Army Corps of Engineers… [has] defined the term in regulations several times as part of their implementation of the act").

intent.[24] Once President Ford became involved in this debate during July 1976, the U.S. Senate initiated hearings "to reconsider the scope of the Corps' jurisdiction under section 404."[25] The Congressional debates that followed dramatically expanded CWA § 404 and were publicly portrayed as a putative "compromise" of competing interests.[26] However, public debates were renewed over the scope of CWA § 404 soon after the EPA and the Corps issued implementing regulations, reflecting that the compromise had overlooked the objections of the nation's small and medium-sized farmers and ranchers.[27]

It bears repeating that a review of the Corps's 1974 CWA § 404-implementing regulations reveals the definition of "navigable waters of the United States" covered waters "subject to the ebb and flow of the tide, and/or presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[28] U.S. navigable waters had not then been expressly extended to cover freshwater wetlands adjacent to *nontidal* tributaries of U.S. navigable waters.[29] The interim final regulations the Corps later issued on July 25, 1975, however, included "periodically inundated freshwater wetlands contiguous with or adjacent to navigable waters, periodically inundated freshwater wetlands contiguous with or adjacent to navigable waters, and…certain interstate waters based on non-transportation impacts on interstate commerce."[30]

Final July 19, 1977 Corps regulations implementing CWA § 404 explicitly excluded wetlands adjacent to tributaries to U.S.

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[24] MULLIGAN, *supra* note 23, at 10–12.

[25] Curtiss, *supra* note 22, at 1105–06.

[26] *See* Blumm & Zaleha, *supra* note 10, at 727; *see also* Clean Water Act of 1977 Amendments, Pub. L. No. 95-217, 91 Stat. 1566 (1977); *see also* United States v. Riverside Bayview Homes, *Inc.,* 474 U.S. 121, 137 (1985) (quoting 123 Cong. Rec. 39209 (1977)) (stating "[t]he Conference Committee adopted the Senate's approach: efforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'").

[27] *See* Curtiss, *supra* note 22, at 1107–12.

[28] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250, 22254 (to be codified at 33 C.F.R. pt. 328) (citing 39 Fed. Reg. 12115, 12119 (codified at 33 C.F.R. 209.120) (1974) and referencing the Corps's 1975 interim regulations).

[29] *See id.* ("Environmental organizations challenged the Corps' 1974 regulations…arguing that the Corps' definition of "navigable waters" was inadequate because it did not include tributaries or coastal marshes above the mean high tide mark or wetlands above the ordinary high-water mark.")

[30] *Id.*; *see also* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31319, 31320, 31324 (July 25, 1975) (codified at 33 C.F.R. § 209.120(d)(2)(h)).

navigable waters from the coverage of "waters of the United States" ("WOTUS") where said "tributaries" actually were "manmade nontidal drainage and irrigation ditches excavated on dry land."[31] Those final regulations defined the term "adjacent" as "bordering, contiguous, or neighboring."[32] In this context, "dry land" meant other than "wetlands," which had been redefined as follows:

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[33]

The preamble to the Corps's 1977 final regulations clarified the agency had not intended "to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes."[34] Despite the absence of any 1977 CWA statutory text expressing Congress's intent to subject the discharge of dredged or fill materials into *non-tidal* wetlands adjacent to manmade ditches not considered WOTUS to federal CWA § 404 permitting, the EPA and Corps officials inferred such congressional intent from historical legislative debates.[35]

As noted in the Introduction, this Article discusses how, in *United States v. Brace*, EPA exercised jurisdiction and control over nontidal wetlands adjacent to manmade drainage and irrigation ditches pursuant to CWA § 404, and ignored that Brace had secured distinct legal treatment under the Food Security Act of 1985.[36] In 1987, multiple federal government agencies had deployed to the Brace farm and concluded Brace "converted" an approximately 30-acre tract from nontidal wetlands adjacent to

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[31] Permits for Discharges of Dredged or Fill Material into Waters of the United States, 42 Fed. Reg. 37122, 37144 (July 19, 1977) (codified at 33 C.F.R. § 323.2(a)(3)).

[32] *Id.* at 37129 (codified at 33 C.F.R. § 323.2(d)).

[33] *Id.* at 37128 (codified at 33 C.F.R. § 323.2(c)).

[34] *Id.*

[35] CWA 1977 Amendments, Dec. 27, 1977, Pub. L. No. 95-217, 91 Stat. 1566, at § 404(g)(1).

[36] *Brace*, 41 F.3d at 121.

manmade dual function drainage/irrigation ditches.[37] Yet, the U.S. Government refused to recognize that wetlands (wet pasturelands) conversion for agricultural crop production purposes qualified for exclusion from CWA § 404 jurisdiction under this regulation because the land did not continue to demonstrate "wetland" features.[38] The Government also refused to recognize that Brace had secured a "commenced conversion" designation from the U.S. Department of Agriculture, enabling him to complete that conversion within 10 years's time to secure protected "prior converted wetland" status under the Food Security Act of 1985 ("FSA").[39]

When the U.S. Government initiated its consent decree enforcement action against Brace on January 9, 2017, it again ignored such evidence. In fact, the defendants in *Brace* were accused, once again, of not securing required CWA § 404 permits to engage in normal farming activities and recognized agricultural ditch maintenance-related activities in and around the approximate 30-acre consent decree area, even though the Government had never delineated that area, and EPA and Corps officials had provided express verbal authorization to the defendants to undertake such activities on two of their three adjacent, privately-owned, hydrologically integrated farm tracts operated as a single farm.[40]

While on the same farm, the tracts in question are separated from one another.[41] The EPA alleges the violations occurred on separate fields, consistent with the legal precedent enabling federal agency officials to arbitrarily divide operating farms into subunits (e.g., farm tracts and, even, farm fields) each of which would be treated as separate "farms" for purposes of 1977 CWA § 404 wetlands enforcement. The U.S. Government's treatment of these adjacent farm tract fields as separate "farms" in the absence of express congressional direction to cover *non-*

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[37] *Id.* at 119–20.

[38] *Id.* at 124–26.

[39] *See* discussion *infra*.

[40] *See* United States' Mot. To Enforce Consent Decree and for Stipulated Penalties, *supra* note 1, at 1; *see also* United States' Mem. Of Law in Support of Mot. to Enforce Consent Decree and for Stipulated Penalties, *supra* note 1, at 1.

[41] *See* Defendants' Resp. and Opp'n to United States Second Mot. to Enforce Consent Decree and for Stipulated Penalties at 4–5, *Brace,* No. 1:90-cv-00229, ECF No. 214; *see also* United States' Resp. in Opp'n to Defendants' Redrafted 60(b)(5) Mot. to Vacate Consent Decree and Deny Stipulated Penalties at 12, *Brace*, No. 1:90-cv-00229, ECF No. 318.

tidal wetlands adjacent to *manmade ditches* has allowed federal agencies to misinterpret and overzealously enforce the CWA normal farming activities and agricultural ditch construction and maintenance exemptions and the recapture provision, with devastating effects to the nation's small and medium-sized farms.[42]

The federal courts allowed federal agencies to ignore the rich agricultural histories of specific regions of the nation, including the extensively documented, centuries-old, mixed/diversified pastureland and cropland farming and use of tile drainage systems in the Erie Pennsylvania region.[43] Federal courts also compelled farmers, including the *Brace* defendants, to concede the issue of whether or not there existed wetlands, as a matter of science and as a matter of federal jurisdiction, on the sites/areas in question. The courts redefined "established normal farming activities" with respect to only the wetland site/area in question, exclusive of the other areas of the farm or specific farm tract of which the wetlands is an integral part.[44] In those few

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[42] CWA § 404(f)(1)(A)–(C).

[43] *See Pennsylvania Agricultural History Project,* PA. HISTORICAL & MUSEUM COMM'N, http://www.phmc.state.pa.us/portal/communities/agriculture/ [https://perma.cc/8NDZ-YYPT]; *Historic Agricultural Resources of Pennsylvania c 1700-1960,* PA. HISTORICAL & MUSEUM COMM'N, http://www.phmc.state.pa.us/portal/communities/agriculture/history/index.html [https://perma.cc/QR5T-PJGX]; *Northwestern Woodland, Grassland, and Specialized Farming Region, c. 1830-1960,* PA. HISTORICAL & MUSEUM COMM'N, http://www.phmc.state.pa.us/portal/communities/agriculture/files/context/northwestern_woodland.pdf (containing a case-relevant historical account of northwestern Pennsylvania agriculture accompanying a U.S. National Park Service National Historic Places registration, at 11-13, 16-18, 34-35, 48-50, 52, 54-56, 91-92, 94-5, 97, 136-137, and identifying, on p. 137, how "contradictions in Federal postures towards wetlands were coming to a head." And how "farmer Robert Brace and the federal government tangled over his attempts to drain a 30 acre parcel of his farm.") [https://perma.cc/3G9B-J5D4]; *Lake Erie Fruit and Vegetable Belt, 1870-1960,* PA. HISTORICAL & MUSEUM COMM'N, http://www.phmc.state.pa.us/portal/communities/agriculture/files/context/lake_erie_fruit.pdf [https://perma.cc/ZJU8-F7DL]; *Historic Agricultural Resources of Pennsylvania, 1700-1960: National Register of Historic Places Multiple Property Documentation Form,* PA. HISTORICAL & MUSEUM COMM'N, http://www.phmc.state.pa.us/portal/communities/agriculture/files/context/mpdf_introduction.pdf [https://perma.cc/3PYX-WX8Q]; *see also 2019 Updates to PA's Agricultural History Project: Additional Guidance for Using Pennsylvania's Agricultural Context,* PA. HISTORIC PRESERVATION OFFICE (Nov. 2019), https://www.phmc.pa.gov/Preservation/About/Documents/Ag%20Context%20Guidance%20Update%20November%202019.pdf [https://perma.cc/Z3CP-V5EN].

[44] *See*, *e.g.*, United States v. Akers, 785 F.2d 814, 816, 819 (9th Cir. 1986) (wherein *the approximately 2,900-acre portion consisting of wetlands locally known as the "Big Swamp"* of a farmer's purchase of 9,600 acres overall in northern California that had generally been farmed since 1897, was deemed not to have been previously "farmed" because the 2900-acre portion had '"never been subjected to any established upland

cases where federal agencies prepared and considered scientific wetland determinations, the courts reviewed such science in the absence of defendant rebuttal science.[45]

In effect, the federal courts, in most cases, rubber-stamped agency determinations as federal wetland science continued to evolve. The deemed wetlands in question would be *presumed* to be "undisturbed" and as constituting the "normal circumstances" of the area in question.[46] Federal courts also entertained the additional legal idea of normal farming activities, such as natural and cultivated pasturing and haying.[47] As a result, any farmer or

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farming […]' crop production.") (emphasis added); *see also* United States v. Huebner, 752 F. 2d 1235, 1239-42 (7th Cir. 1985) (wherein the Court found that a farmer's purchase *of a 5,000-acre property known as "Bear Bluff Farms", the largest continuous area of wetlands in Wisconsin*, to expand three existing cranberry beds and "to use a portion of the farm for growing vegetables and other upland crops" (*e.g.*, barley and corn) was deemed not to qualify for the "normal farming activities" exemption from CWA 404 permitting because the portion of the site/area in question had not been previously farmed with cranberry beds or upland crops, and also not to qualify for the agricultural ditch maintenance exemption because the deepening of the ditches expanded them beyond their prior dimensions. Applying the CWA 404 recapture provisions to each such exemption, the Court found that such activities consisting of "the side-casting and spreading activity reduced the reach of the wetlands surrounding the ditches at issue […and thereby brought] an area of navigable waters into a use to which it was not previously subject.") (emphasis added).

[45] *See*, *e.g.*, Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983), slip op. at 4)–(16 (wherein the Court, after reviewing USEPA's wetland delineation the Court had previously ordered, which "concluded that approximately eighty percent of the land [tract] was a wetland, […] decided that a section 404 permit was required for the land-clearing activities and that over ninety percent *of the [20,000-acre] Lake Long Tract [lying within the 140,000 Bayou Natchitoches basin* in Avoyelles Parish, Louisiana, which had previously been deforested and logged by other parties, and which was 'subject to flooding during the spring months, and it experience[d] an average rainfall of sixty inches per year'], *was a wetland.*") (emphasis added).

[46] 58 Fed. Reg. 45008, 45032 (Aug. 25, 1993) (codified at 33 C.F.R. pt. 323 and pt. 328). (Where wetland delineations had been undertaken, as in the original case at bar, they were often based on the now-defunct 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands ("1989 Manual"). "Under the 1989 Manual, […] *the phrase 'normal circumstances,' as applied to agricultural areas, meant the circumstances that would be present absent agricultural activity."* (emphasis added)).

[47] For example, during the 3-17-92 deposition of former longtime Waterford Township, PA resident Adrian Sharp, DOJ-ENRD counsel, David Dana had objected to Mr. Sharp's use of the word "farming" for the purpose of distinguishing between crop farming and pasture or cattle farming for CWA purposes. "Q. Now, obviously you are familiar with the area. And would you – Your testimony is you are familiar with the farming practices in the general area? A. Oh, sure. Q. And that would include crop farming and pasture farming? A. Sure. Mr. Dana: There's an objection as to – You can obviously use the word 'farming' as the witness understands it. But we may adopt a different definition of farming. For just general purposes. You might just want to – I just want it noted for the record. Mr. Ward: What other word would you use? Mr. Dana: Just to differentiate crop farming from pasture or cattle farming. Mr. Ward: So down the road your argument is going to be that cattle – raising beef or livestock is not agricultural? Mr. Dana: No, no. I'm not saying what our argument is. I just want it to be clear as to what

rancher engaged in longstanding land-use rotations between wetland and non-wetland crops and/or conversions from wetland pasturing and haying to cropping would first need to secure federal agency approval through a time-consuming and very costly permitting process.

The aggressive EPA/Corps interpretation of the 1977 CWA § 404(f)(2) recapture provision has certainly ensured this result. The EPA and the Corps have required § 404 permits for normal farming or agricultural ditch maintenance activities that otherwise would qualify for an exemption, if the discharge of dredged or fill material into U.S. navigable waters incidental to such activities had "as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," and "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced."[48] Corps implementing regulations refer to such "new" or "changed" uses as "conversion[s]" of wetlands concerning "waters of the United States," but they do not define the term "converted wetland."[49]

Corps implementing regulations also presume a flow or circulation of such waters may be impaired if the "proposed discharge will result in significant discernible alterations to [the] flow or circulation." [50] However, a "conversion" of wetlands is not required to meet this standard.[51] However, these regulations ignored the Carter administration's Council on Environmental Quality ("CEQ") findings,[52] which recognized normal farming activities could include converting wetlands to arable land and not be subject to recapture, so long as extensive areas of water and water bodies were not converted to *dry land*.[53]

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the witness is saying when he uses the word 'farming'" (emphasis added). (Dep. of Adrian Sharp on March 17th, 1992 at 6–7, *Brace,* No. 1:90-cv-00229, ECF No. 279-41.)

[48] Clean Water Act of 1977 Amendments, Pub. L. No. 95-217, 91 Stat. 1566, at § 404(f)(2) (1977).

[49] 47 Fed. Reg. 31794 (July 22, 1982) (codified at 33 C.F.R. pts. 320-30).

[50] *Id.* at 31813, n.4 (codified at 33 C.F.R. part 323).

[51] *See generally id.*

[52] *See The Ninth Annual Report of the Council on Environmental Quality,* COUNCIL ON ENVTL. QUALITY 318 (Dec. 1978), https://www.slideshare.net/whitehouse/august-1978-the-ninth-annual-report-of-the-council-on-environmental-quality ("The filling or draining of wetlands does not necessarily waste the land, which may be turned into other valuable but competing uses. In fact, 24 percent of all agricultural soils in nonfederal lands in the United States were originally wetland. One-half of wet soils (outside nonfederal lands) falls in the prime farmland class. With property management, some converted wetland soils can be highly productive farmlands for years, perhaps centuries.") [https://perma.cc/88DJ-Z767].

[53] 123 Cong. Rec. 30, 38379, 39188 (1977) (remarks of Sen. Muskie); *see also id.*

Aggressive EPA enforcement of §404 is based on a liberal interpretation of legislative history, apparently bolstered by the 1979 opinion of Carter administration Attorney General Benjamin Civiletti.[54] The Civiletti opinion concluded "the overall structure of the Clean Water Act *impliedly* place[d] responsibility on EPA to determine the scope of 'navigable waters' for the entire statute" (emphasis added).[55] Civiletti candidly admitted he reached this conclusion even though "[t]he question is explicitly resolved neither in § 404 itself nor in its legislative history."[56] Remarkably, the 1979 AG Opinion also inferred:

> [W]hile the Act charges the Secretary [of the Army] with the duty of issuing and assuring compliance with the terms of § 404 permits, it does not expressly charge him with responsibility for deciding when a discharge of dredged or fill material into the navigable waters takes place so that the § 404 permit requirement is brought into play. […] I therefore conclude that final authority under the Act to construe § 404(f) is also vested in the Administrator.[57]

Since the Corps's statutory permitting authority had been limited exclusively to § 404 discharges of dredged and fill materials, the Civiletti opinion could have easily construed the Corps's more specific, narrow permitting authority as extending exclusively to its evaluation of the availability of § 404(f) dredge and fill activity permit exemptions. This would have been the more logical and reasonable interpretation, especially considering President Carter's agricultural background and the significant public objections the 1977 CWA amendments received from the farming community. Thus, although CWA § 404(f) exempted certain point-source source discharge activities from regulation under §§ 404, 301(a), and 402, Civiletti could have easily read the statute to ensure EPA's broad authority over the permitting of direct discharges of harmful substances generally, while

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[54] Benjamin R. Civiletti, Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197 (1979).

[55] Blumm & Zaleha, *supra* note 10, at 709 n.85.

[56] Civiletti, *supra* note 54, at 201.

[57] *Id.* at 201–02.

preserving the Corps's more specific, narrowly focused § 404 dredge and fill permitting authority. Such an interpretation would not necessarily have assured different agency regulatory outcomes as he hypothesized.[58]

Civiletti's interpretation of CWA legislative history arguably encouraged the EPA to revise its CWA § 404(b) guidelines at the close of the Carter administration. The guidelines intended to "[r]eflect the 1977 amendments of Section 404 of the [...] CWA,"[59] with the EPA expanding the general "*presumption against wetland alterations for nonwater dependent uses* or where site or construction alternatives were available, [...] to include 'special aquatic sites' such as important fish and wildlife habitats, marine sanctuaries, and refuges." (emphasis added).[60] The Guidelines were inconsistent with the language in § 404(c), as many commenters pointed out.[61]

However, the EPA felt it was imperative dredge or fill material not be discharged into aquatic ecosystems, excluding discharges not having adverse impacts on the area.[62] The EPA was also concerned with filling and dredging affecting the longevity of wetlands.[63] Additionally, the EPA explained the Guidelines' presumption relating to the water dependency provision presumed there were alternatives to "'non-water dependent' discharges" concerning special aquatic locations.[64] These "'non-water dependent'" discharges are those not needing to be close to or in the aquatic area to meet their end-use. [65]

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[58] Civiletti, *supra* note 54, at 202.

[59] Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85336 (Dec. 24, 1980) (codified at 40 C.F.R. pt. 230).

[60] Blumm & Zaleha, *supra* note 10, at 709.

[61] Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*; *see also* 40 CFR 230.10(a) (1980) ("§ 230.10 [...] (a) Except as provided under § 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. (1) For the purpose of this requirement, practicable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters; (ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters; (2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. (3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) [, *including, § 230.41 Wetlands*,] does not

According to a former DOJ-ENRD attorney actively involved in CWA § 404 litigation during this period, the Reagan administration endeavored to soften the impact of these guidelines[66] on the nation's regulated farming communities, which the EPA and environmental activists then judicially challenged. For example, the Office of Management and Budget Administrator for Information and Regulatory Affairs ("OMB-OIRA") attempted to have the EPA narrow the scope and prescriptiveness of the CWA § 404(b) guidelines.[67] The Corps issued 1982 interim final regulations, the purposes of which were to expedite CWA § 404 permit processing "and expan[d] the nationwide permit program."[68] By requiring the Corps to balance multiple factors in the "public interest" when evaluating a CWA § 404 permitting application, these regulations effectively reversed the burden of proof from the permit applicant to show in advance a proposed discharge of dredge and fill material meet the guidelines, to the agency to show the issuance of a permit was contrary to public interest.[69]

Litigation over the conflicting EPA Guidelines and Corps interim final regulations ensued from 1982-1984. One of these cases, *National Audubon Society v. Hartz Mountain Development Corp.*, formally recognized the 404(b) guidelines' water dependency presumption as rebuttable, rejecting National Audubon's argument that 100 percent mitigation of wetlands was

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require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (*i.e.,* is not 'water dependent'), *practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise*. In addition, where a discharge is proposed for a special aquatic site, *all practicable alternatives to the proposed discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise*.") (emphasis added).

[66] Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85336 (Dec. 24, 1980) (because the 404(b) Guidelines had been issued after extensive public notice and comment, the Carter administration had referred to them as a "rulemaking" with binding regulatory effect: "[t]hese Guidelines […] (3) Produce a final rulemaking document"); *see also* Corps RGL 93-02 (Aug. 23, 1993), at Sec. 2 ("The Guidelines, which are binding regulations, were published by the Environmental Protection Agency at 40 CFR Part 230 on December 24, 1980.").

[67] Lawrence Liebesman, *The Role of EPA's Guidelines in the Clean Water Act § 404 Permit Program — Judicial Interpretation and Administrative Application*, 14 ENVTL. L. REV. 10272, 10275 (1984).

[68] Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31794 (July 22, 1982) (codified at 33 C.F.R. pts. 320–30).

[69] *Id.* at 320.4(a); *Cf.* 45 Fed. Reg. at 85345 (codified at 40 C.F.R pt. 230.1(c)).

required.[70] However, in *National Wildlife Federation v. Marsh*, an action filed by an environmental activist group challenging the Corps 1982 interim regulations, the parties reached a settlement in February 1984 upholding the EPA's 404(b) guidelines' presumptions and required the revision of the 1982 Corps regulations.[71] In Lawrence Liebesman's opinion, "[t]he NWF settlement certainly did not alter this 'balancing' requirement nor did it transform the rebuttable presumption against discharge in wetlands to an irreversible presumption."[72]

These efforts by the Reagan administration triggered a request from U.S. Congressman James Oberstar to investigate and review the Corps's administration of the CWA § 404 permitting program.[73] The GAO found normal farming and draining were not regulated activities under Section 404 and losses to wetlands based on these actions are not well tracked.[74] The GAO also found wetland boundaries were not defined broadly enough and the Corps was not reviewing permits practically or conceptually.[75]

In referencing the normal farming activities, agricultural ditch construction, and maintenance activities, the 1977 CWA amendments authorized the Corps to treat them as exempt from CWA § 404 permitting.[76] However, the GAO Report noted many such activities would have required a permit under the CWA § 404(f)(2) recapture provision because they converted wetlands to other uses.[77] EPA's comments to this report are instructive of how the agency subsequently proceeded to aggressively employ both

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[70] Nat. Audubon Soc'y v. Hartz Mountain Dev. Corp., No. 83-1534D (D.N.J. Oct. 24, 1983); *see* Liebesman, *supra* note 67, at 10277 (discusses several other cases in which permit applicant could not overcome the 404(b) guidelines's presumption against wetland alterations for nonwatery dependent uses); *see also* Buttrey v. United States, 690 F.2d 1170 (5th Cir. 1982); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982); Shoreline Associates v. Marsh, 555 F. Supp. 169 (D. Md. 1983), aff'd, 725 F.2d 677 (Table) (4th Cir. Jan. 10, 1984); Cf. 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983).

[71] Final Regulations for Controlling Certain Activities in Waters of the United States, 49 Fed. Reg. 39478 (Oct. 5, 1984) (codified at 33 C.F.R. pts. 320, 323, 325, and 330); National Wildlife Fed'n v. Marsh, No. 82-3632 (D.D.C. Dec. 22, 1982).

[72] Liebesman *supra* note 67, at 10278.

[73] *See* U.S. GEN. ACCT. OFFICE, Report to the Chairman, Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, House of Representatives, *Wetlands: The Corps of Engineers' Administration of the Section 404 Program*, GAO/RCED-88–110 (July 1988), at 3, 6.

[74] *Id.* at 3.

[75] *Id.*

[76] *Id.* at 9.

[77] *Id.*

the CWA § 404(f)(2) recapture provision and the CWA § 404(b) guidelines to prevent wetland conversions by the nation's small and medium-sized farming communities.[78]

By this time, the Reagan administration had secured Congress's enactment of the Food Security Act of 1985 ("FSA")[79] to ameliorate the harsh impacts on private property rights that aggressive § 404 enforcement wrought upon the nation's small and medium-sized farmers and ranchers. Through the FSA, Congress provided a prescribed doorway and protected window period within which farmers and ranchers could proceed, permit-free, to change their land use from natural and cultivated wetland pasturing and haying to more productive cropping in furtherance of the nation's efforts to promote agriculture, preserve wetlands, and reduce soil erosion. However, certain federal and state officials and conservationists did not believe the FSA sufficiently protected wetlands.

As a result, an extensive political campaign and litigation ensued to interrupt prospective and already authorized farmer and rancher conversions of wetlands to croplands. Defendants' previously filed FRCP 60(b) motion described in detail the extraordinary lengths to which federal and state agencies, led by the U.S. Fish and Wildlife Service ("USFWS"), along with federally funded environmental groups, *inter alia*, Ducks Unlimited, Inc. and the National Wildlife Federation, had gone to achieve such interruptions/disruptions.[80]

II. U.S. DISTRICT COURTS SHOULD UNDERSTAND THE IMPORTANCE OF PLAIN TEXTUAL MEANING ESPECIALLY IN CWA WETLANDS LITIGATION

At least one commentator concluded, "[w]etlands [j]urisdiction [n]ever [s]hifted to the Clean Water Act in Congress as [c]laimed in [r]etroactive [a]nalysis of [c]ongressional [i]ntent," because "Congress never intended to create a permanent federal wetlands permit program," and "[w]ith the exception of the

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[78] *See id.* at 102, 104.

[79] Food Security Act of 1985, Pub. L. No. 99–198, 99 Stat. 1354 (1985).

[80] *See* Defendants' Redrafted Mem. Of Law in Support of Redrafted 60(b)(5) Motion to Vacate Consent Decree and to Deny Stipulated Penalties at 37-51, *Brace,* No. 1:90-cv-00229, ECF 279; *see also* Lawrence A. Kogan, *Ducking the Truth About the Great 'Commenced Conversion' Conspiracy Against America's Farmers*, 27 SAN JOAQUIN AGRIC. L. REV. 19, 30 (2017-2018).

'Swampbuster' provision in the Food Security Act, Congress has never articulated the goal of wetlands protection."[81] Only the Wetlands Loan Extension Act of 1976[82] (the legislative history of which did "not mention the Clean Water Act or any goal or purpose for the protection of wetlands") indirectly "address[ed] wetlands protection" by "provid[ing] funds for wetlands acquisition," "increased appropriations, and "extend[ed time for] acquisitions for the 1961 Act until 1983" when the act expired.[83] The Senate Commerce Committee did not deem it "necessary to duplicate the purpose and goal in the Clean Water Act."[84]

Thus, even in the absence of any 1977 CWA § 404 statutory text defining the terms "wetlands" or "converted wetlands," and/or expressing Congress's intent to subject the discharge of dredged or fill materials into *non-tidal* wetlands adjacent to manmade agricultural ditches to § 404 permitting,[85] the federal agencies (EPA, Corps, and USFWS) and the federal courts, including the Third Circuit Court of Appeals, improperly gleaned from selected extracts of unreliable legislative debates and committee reports the intent of select members of Congress to protect such wetlands. Neither the agencies and the appellate court in the initial *Brace* action, nor the district court in subsequent consent decree enforcement action, referenced the plain text of FSA §§ 1204 and 1222 or the subsequently issued 1987 final FSA implementing regulations specifically discussing these terms in the context of agricultural activities, which would have provided a different result for the defendants in the *Brace*.

According to Justice Antonin Scalia, because such "snippets" of legislative history were utilized "without regard to the context in which the remarks were made," their use arguably resulted in erroneously overbroad interpretations of the

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[81] Vickie V. Sutton, *Wetlands Protection – A Goal Without a Statute,* 7 S.C. ENVTL. L. J. 179, 186–189 (1998) (discussing the U.S. Rivers and Harbors Act of 1899, the Water Pollution Control Act of 1948, the Water Pollution Control Act Amendments of 1956, the Water Pollution Control Act Amendments of 1972, and the Water Pollution Control Act Amendments of 1977); *See also* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

[82] Wetlands Loan Extension Act of 1976, Pub. L. No. 94-125, S. Rep. No. 94-594 (1976).

[83] Sutton, *supra* note 81, at 186–87.

[84] *Id.* at 187.

[85] Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977); Final Rules, 42 Fed. Reg. 37144 (codified at 33 CFR 323.2(a)(3)) (July 19, 1977).

congressional intent underlying CWA § 404.[86] Justice Scalia did not consider legislative history to be an acceptable tool in statutory interpretation.[87] He reasoned, in part, that because legislative bodies are collectives, it is highly unlikely all of the legislators had the same understanding.[88] In addition, he rationalized floor statements and committee reports are inherently unreliable sources of the full Congress's intent and more prone to manipulation and distortion.[89] Specifically, Justice Scalia wrote legislators were unlikely to focus on the specific issues appearing in litigation; they likely debated with varying opinions if they did discuss the issues.[90] The unreliability of committee hearings and reports also indicate legislative history should not be relied upon.[91]

Instead, Justice Scalia argued interpretation of a statute's text "begins and ends with what the text says and fairly implies."[92] Therefore, interpretation is limited to principles based on language and historical meaning; legislative history is *not* included. In addition, "words must be given the meaning they had when the text was adopted."[93] Justice Scalia, furthermore, argued the use of legislative history diverts the focus from the statutory text to the intent of the legislature, and thereby, substantively creates a government of men and not of laws.[94] He also emphasized the meaning of statutory terms should be based on the meaning shown to be most in accord with context and ordinary usage and most compatible with the surrounding body of law.[95] Significantly, Justice Scalia argued, "the legislative history was never enacted and is therefore not the law."[96] Even Professor

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[86] Elizabeth Liess, *Censoring Legislative History: Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568, 574 (1993).

[87] *See generally id.*

[88] *See id.*

[89] *See id.*

[90] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 376 (2012).

[91] *Id.*

[92] *Id.* at 16.

[93] *Id.* at 78.

[94] *See id.* at 375.

[95] Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1989) (Scalia, J. concurring).

[96] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103. HARV. L. REV. 405, 430 (1989) (citing Scalia's concurring opinions in Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1989); United States v. Stuart, 489 U.S. 353, 372–373 (1989); Blanchard v. Bergeron, 489 U.S. 87, 98 (1989).

Cass Sunstein, an advocate of "living constitutionalism"[97] who views original public meaning as a formal nonmandatory approach to statutory interpretation,[98] acknowledged the legitimacy of Scalia's concerns.[99]

Previously, courts understood legislative history as a way to manipulate a law's meaning and as a source from which to infer answers to hypothetically posed questions that suit a court's intent.[100] Most succinctly, the court in *In re Sinclair,* wrote "statutes are law, not evidence of law."[101] Similarly, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the U.S. Supreme Court employed the plain meaning approach to interpreting the Clean Water Act ("CWA") § 404 to avoid conflict with the Commerce Clause and traditional notions

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[97] *See* Andrew Coan, *Living Constitutional Theory*, 66 DUKE L.J. ONLINE 99, 105 (referring to Cass Sunstein as an advocate of "an affirmative vision of American constitutionalism that could be invoked to support and expand on the Warren Court's constitutional decisions. The work of these theorists, notably including Frank Michelman and Cass Sunstein, is too rich and varied to be neatly summarized here. But their central argument is that the American constitutional tradition is not merely, perhaps not even predominantly, one of liberal individualism."); *see also*, David A. Strauss, *The Living Constitution,* UNIVERSITY OF CHICAGO LAW SCHOOL (Sept. 27, 2010), https://www.law.uchicago.edu/news/living-constitution [https://perma.cc/39ZD-P5A7].

[98] *See* Cass Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1697–98 (2018).

[99] *See* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 (1989) (Professor Cass Sunstein previously acknowledged that, "judicial reliance on legislative intent, whether or not derived on the basis of legislative history, suffers from three basic difficulties" which led him to conclude that "the notion of legislative intent is at best an incomplete guide to statutory construction"); *Id.*, at 431–434; *see also id.* at 468, 474–475 (discussing "a Cautious Approach to Legislative History as a rule of priority for interpreting regulatory statutes. "As Justice Scalia has emphasized, legislative history is sometimes written by one side or another in a dispute over the content of the law, and the history will sometimes reflect a view that could not prevail in the processes of congressional deliberation. ("In any case, the history is not law. Courts should therefore adopt a firm principle of the priority of statutory text to statutory history – a principle that does not call on courts entirely do disregard history, but that gives the history limited weight in cases of conflict.").

[100] In re Sinclair, 870 F.2d 1340 (7th Cir. 1989).

[101] *Id.* at 1343; *see also* Oliver Wendell Holmes, 12 HARV. L. REV. 417, 417–18 (1899) ("[…] [A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used...But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law...We do not inquire what the legislature meant; we ask only what the statute means."); ("Or as Judge Friendly put things in a variation on Holmes's theme, a court must search for "what Congress meant by what it said, rather than for what it meant simpliciter.")

of federalism.[102] The Court held, "[w]here an administrative interpretation of statute invokes the outer limits of Congress' power, we expect a clear indication Congress intended such result."[103]

The Court further held "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[104] "Thus, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problem unless construction is plainly contrary to the intent of Congress.'"[105] In effect, the Court in *Solid Waste Industry* restricted the scope of the Corps's permitting jurisdiction under CWA § 404 by interpreting the statutory term "navigable waters" so as not to cover small intrastate ponds and intermittent streams which do not engender interstate commerce.[106]

The Supreme Court arguably rejected the Court's prior deference to agency interpretations of a statute under *Chevron* where the agency's interpretation of § 404(a) would be unreasonable or result in infringement of a traditional state power – protection of the environment – through state and local control of water and land use (i.e., out of federalism concerns).[107] The Court in *Solid Waste Industry* recognized the CWA's limited application to only *tidal* wetlands adjacent to traditional navigable waters.[108]

Furthermore, a Supreme Court plurality in *Rapanos v. United States* employed the plain meaning approach to interpreting statutes to effectively reject *Chevron* deference to a longstanding Corps interpretation of CWA§ 404.[109] In particular, the Court's plurality had dispensed with the Corps's

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[102] Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170–81 (2001).

[103] *Id.* at 172 (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Constr. Trades Council, 485 U.S. 568, 575 (1988)).

[104] *Id.* at 173 (citing *See* United States v. Bass, 404 U.S. 336, 349 (1971)) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

[105] *Id.* at 173 (quoting *DeBartolo*, 485 U.S. at 575).

[106] *Id.*

[107] Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[108] *Solid Waste,* 531 U.S. at 159.

[109] *See* Rapanos v. United States, 547 U.S. 715, 750 (2006).

interpretation of the term "waters" as including "wetlands,"[110] intermittent water bodies, (i.e., arroyos) and man-made channels.[111] Rather, the court decided on a narrower interpretation limiting "waters" to relatively permanent oceans, rivers, streams and lakes.[112] The *Rapanos* decision also recognized the CWA's limited application to only *tidal* wetlands adjacent to traditional navigable waters.[113]

The Supreme Court recalled its prior holding in *Iselin v. United States*, where the Court refused to extend the coverage of a statute covering one subject matter but expressly failing to

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[110] *Regulatory Guidance Letter,* USACE (Aug. 27, 1986), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1331 [https://perma.cc/Q3V2-N87B] (The Corps defines the term "wetland" as including "swamps," "bogs" and marshes," which it describes as "truly aquatic areas."); *Swamp,* MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/swamp [https://perma.cc/HKZ6-YQQA] (last viewed Nov. 25, 2020) (However, the plain meaning of the term "swamp" is "a wetland often partially or *intermittently covered with water*."); *Marsh,* MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/marsh [https://perma.cc/B3UX-PPGQ] (last viewed Nov. 25, 2020) (The plain meaning of the term "marsh" is "a tract of soft wet land usually characterized by monocotyledons (such as grasses or cattails)"); *Bog,* MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/bog [https://perma.cc/3SS8-JEQ9] (last viewed Nov. 25, 2020) (The plain meaning of the term "bog" is "a poorly drained usually acid area rich in accumulated plant material, frequently surrounding a body of open water, and having a characteristic flora (as of sedges, heats and sphagnum)").

[111] *Rapanos,* 547 U.S. at 725.

[112] *Id.* at 731–33 ("We need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over 'waters.' [citations omitted] The only natural definition of the term 'waters,' our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that 'the waters of the United States' in § 1362(7) cannot bear the expansive meaning that the Corps would give it. The Corps' expansive approach might be arguable if the CWA defined 'navigable waters' as 'water of the United States.' But 'the waters of the United States' is something else. The use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general. In this form, 'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.' Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second) [footnotes omitted]. On this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.' Ibid. All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely 'streams,' connotes a continuous flow of water in a permanent channel — especially when used in company with other terms such as 'rivers,' 'lakes,' and 'oceans.'").

[113] *Id.*

include another subject matter.[114] More recently, in *Lamie v. United States Trustee*, the Court was more explicit.[115] It held courts should not add an "absent word" to a statute.[116] According to the *Lamie* Court, reading an "absent word into the statute," as the petitioner wanted, would enlarge the meaning of a statute beyond its enacted scope to effectively rewrite it.[117] In *Lamie*, the Court was unwilling to do so, citing deference to the Legislature and recognition of constitutional powers.[118] The Court's ruling in *Lamie* arguably addressed Congress's failure to define the terms "wetlands" or "converted wetlands" *anywhere* within the text of the CWA, especially in § 404, whereas Congress expressly defined these terms within the text of the Food Security Act of 1985 ("FSA").

In reading the law as Congress had written it (i.e., as it appears in the statute), therefore, the District Court in *Brace* should carefully consider: "Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[119] With such understanding, the District Court should heed the Supreme Court's admonition that an agency action interpreting a statute affecting the rights of private parties must be reviewed under the abuse of discretion standard. Pursuant to this standard, the Court should determine whether the decision was based on a consideration of all the relevant factors the statute set forth to guide the agency in the exercise of its discretion, and whether there has been a clear error of judgment.[120] Significantly, the United States Fish and Wildlife Service ("USFWS") in *Weyerhauser* did not cite *Chevron* in its brief to justify the agency's interpretation of the Endangered Species Act provision in question.[121]

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[114] Iselin v. U.S., 270 U.S. 245, 250 (1926) (The Court refused to extend coverage where Congress subjected specific categories of ticket sales to taxation but failed to cover another category, either by specific or by general language).

[115] Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Sturgeon v. Frost, 136 S. Ct. 1061, 1070 (2016).

[120] *See* Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 139 S. Ct. 361 (2018).

[121] Lisa Heinzerling, *Opinion Analysis: Frogs and Humans Live to Fight Another Day*, SCOTUSBLOG (Nov. 27, 2018), https://www.scotusblog.com/2018/11/opinion-analysis-frogs-and-humans-live-to-fight-another-day/ [https://perma.cc/9TUE-YNGE]; Lisa

Apparently, the Government sought to avoid providing the Supreme Court with the opportunity to overrule *Chevron*, in light of the strongly worded concurring opinions of Justices Alito, Scalia, and Thomas in *Perez v. Mortgage Bankers Ass'n,* which suggested it was time for the Court to revisit *Chevron* precedents.[122] In *Perez*, for example, Justice Thomas's concurrence emphasized how such deference tends to give effect to the interpretation rather than the regulations themselves, and consequently, to facilitating an unconstitutional transfer of judicial power (i.e., a transfer of the judge's exercise of interpretive judgment) to an executive agency and "an erosion of the judicial obligation to serve as a 'check' on the political branches."[123]

Heinzerling, *Argument Preview: Justices to Consider Critical-habitat Designation for Endangered Frog*, SCOTUSBLOG (Sept. 24, 2018), https://www.scotusblog.com/2018/09/argument-preview-justices-to-consider-critical-habitat-designation-for-endangered-frog/ [https://perma.cc/4RWR-4RSP].

[122] Perez v. Mort. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgement) (referring to how the *Paralyzed Veterans of America* doctrine "may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations." (citations omitted); *see id.* at 1211 (Scalia, J., concurring in the judgement) ("The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.'[citations omitted]. The Act guards against excesses in rulemaking by requiring notice and comment. Before an agency makes a rule, it normally must notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision in a statement of the rule's basis and purpose. [citations omitted] […] The APA exempts interpretive rules from these requirements. §553(b)(A). But this concession to agencies was meant to be more modest in its effects than it is today. For despite exempting interpretive rules from notice and comment, the Act provides that 'the *reviewing* court shall…interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action.' [citations omitted]. The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."); *see id.* at 1213 (Thomas, J., concurring in the judgment) ("I write separately because these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations. That line of precedents, beginning with *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), requires judges to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents 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.").

[123] *Perez,* 135 S. Ct. at 1210 (Thomas, J. concurring).

> Interpreting agency regulations calls for that exercise of independent judgment. Substantive regulations have the force and effect of law. Agencies and private parties alike can use these regulations in proceedings against regulated parties. Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties. Defining the legal meaning of the regulation is one aspect of that determination.[124]

The Thomas concurrence emphasized how, over time, such deference resulted in "allow[ing] agencies to change the meaning of regulations at their discretion and without any advance notice to the parties."[125] The United States Court of Appeals for the D.C. Circuit sought to address this problem by "requiring agencies to undertake notice and comment procedures before substantially revising definitive interpretations of regulations."[126]

One legal commentator argued *Chevron* was not decided based either on statute or precedent, but rather on "'institutional considerations' typical of the 'legal process' school of interpretation then dominant in the legal academy, which emphasized agency expertise . . . [and] democratic accountability."[127] According to the same commentator,

> [B]oth of those grounds now seem shaky. The idea that most decisions by regulatory agencies are based on non-political expert judgment now appears naïve. The most important regulatory choices are political or ideological in the most fundamental sense, as prioritizing one or another

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[124] *Id.* at 1219 (internal citations omitted); *See also id.* at n.4 (discussing how agency use of regulations has approached the unconstitutional exercise of legislative power).

[125] *Id.* at 1221 (citing Paralyzed Veterans of America, v. D.C Arena L.P., 117 F.3d 579 (D.C. Cir.).

[126] *Id.*

[127] Michael McConnell, *Kavanaugh and the 'Chevron Doctrine,'* HOOVER INSTITUTE (July 30, 2018), https://www.hoover.org/research/kavanaugh-and-chevron-doctrine [https://perma.cc/5VY8-NTHF].

> aspect of the public good, or one or another theory of economics or social justice.[128]

The Supreme Court, in two recent decisions, arguably narrowed the scope of its prior *Chevron* decision.[129]

In *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, the Court held that the extent to which a final agency action warrants deference from federal courts depends on whether the final agency action is "the equivalent or a 'legislative rule'" or "an 'interpretative' rule;'" only the former has the force and effect of law.[130] Consequently, an interpretative rule "may not be binding on a district court, and a district court therefore may not be required to adhere to it."[131] In addition, the Court held that it must be determined whether the litigant "has a 'prior' and 'adequate' opportunity to seek judicial review of the Order" within the statutory scheme in question.[132] Justices Thomas and Gorsuch further emphasized in their concurring opinion that an agency's "interpretati[on of] a statute does not 'determine the validity' of an agency order interpreting or implementing the statute" because only the court possesses the (Article III) authority to make such a determination.[133]

In *Kisor v. Wilkie*, the Supreme Court set forth a roadmap arguably cabining the scope of deference that the Court's prior ruling in *Auer v. Robbins* had accorded to an agency's reasonable interpretation of its own ambiguous regulations.[134] The Court, in *Kisor* held "[f]irst and foremost," that an agency's interpretation

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[128] *Id.*

[129] *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S.Ct. 2051, 2053 (2019) (focusing on whether the Hobbs Act required the district court to accept the FCC's legal interpretation of the Telephone Consumer Protection Act); Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (focusing specifically on whether courts should defer to an agency's reasonable interpretation of its own ambiguous regulations and guidance documents).

[130] *PDR Network,* 139 S. Ct. at 2055 (distinguishing between "legislative rule[s]" "issued by an agency pursuant to statutory authority" which have "the 'force and effect of law'" and "'interpretative rule[s]' which "simply 'advis[es] the public of the agency's construction of the statutes and rules which [they] administer[]' and lack[] 'the force and effect of law.'").

[131] *Id.*

[132] *Id* (citing 5 U.S.C. § 703 (2012)).

[133] *Id.* at 2057 (Thomas, J., concurring) ("As I have explained elsewhere, 'the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.'").

[134] 519 U.S. 452 (1997); *see also* Kisor, 139 S. Ct. at 2418 (explaining that Auer deference often does not apply).

of its own ambiguous rules does not deserve deference "unless the [agency] regulation is genuinely ambiguous."[135] The determination of whether a regulation is ambiguous requires the exhaustion of "all the 'traditional tools' of construction."[136] In other words, it entails a thorough review of "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."[137] Even where a district determines that an agency regulation is genuinely ambiguous, "the agency's reading must still be 'reasonable.'"[138]

Additionally, the district court "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight,"[139] which will depend on whether the agency's regulatory interpretation represents an "'authoritative' or 'official position'" rather than an "ad hoc statement not reflecting the agency's views."[140] According to the Court, only an "official position" will be entitled to controlling weight, and thus, judicial deference.[141] The Court, furthermore, held that "the agency's interpretation must in some way implicate its substantive [or policy] expertise" relative to the court's expertise in a given issue.[142] Finally, the Court held that to warrant *Auer* deference "an agency's reading of a rule must reflect 'fair and considered judgment,'" rather than a convenient agency litigation position or a defense of a past agency practice, and must not "create[] 'unfair surprise' to regulated parties."[143] This means, for all intents and purposes, that "[a] court must assess whether the interpretation is of the sort that Congress would want to receive deference."[144]

In reading the law as Congress had written it, the District Court should heed the U.S. Supreme Court's prior ruling in

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[135] *Id.* at 2415. (holding that, under Auer and Boles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), "[i]f uncertainty does not exist, there is no plausible reason for deference.").

[136] *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

[137] *Id.*

[138] *Id.*

[139] *Id.* at 2416.

[140] *Id.*

[141] *Id.* (explaining that an 'official position' is one that emanates from the agency's highest/head official (e.g., "the Secretary or his chief advisers"), is "'published in the Federal Register,'" is "approved by the agency head," and/or is "understood to make authoritative policy in the relevant context.").

[142] *Id.* at 2417.

[143] *Id.* at 2417-18.

[144] *Id.* at 2424.

United States v. Estate of Romani, which held, where two statutes supposedly covering a given subject matter are in conflict, "the more recent and specific provisions of" the later statute govern.[145] The question presented in *Estate of Romani* was whether the Federal Priority Statute required "that a federal tax claim be given preference over a judgment creditor's perfected lien on real property even though such a preference is not authorized by the Federal Tax Lien Act of 1966.[146] The Court sought to "harmonize the impact of the two statutes on the Government's power to collect delinquent taxes," noting how "[o]n several occasions this Court ha[d] concluded that a specific policy embodied in a later federal statute should control interpretation of the older federal priority statute" despite explicit amendment by later act."[147] In holding the Tax Lien Act of 1966 should be treated as the governing statute, the U.S. Supreme Court reasoned it was

> [T]he more specific statute, […] its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens[,…and i]t represents Congress' detailed judgment as to when the Government's claims for unpaid taxes should yield to many different sorts of interests (including, for instance, judgment liens, mechanics liens, and attorney's liens) in many different types of property (including, for example, real property, securities, and motor vehicles).[148]

Given these characteristics of the more recent statute, the Court determined "it would be anomalous to conclude that Congress intended the priority statute to impose greater burdens on the citizen than those specifically crafted for tax collection purposes."[149]

Clearly, the Food Security Act of 1985 ("FSA") is the more recent of the two federal statutes. Unlike the CWA, the FSA

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[145] United States v. Estate of Romani, 523 U.S. 517, 532 (1998).
[146] *Id.* at 519; 31 U. S. C. § 3713(a) (1982).
[147] *Romani,* 523 U.S. at 530.
[148] *Id.* at 532.
[149] *Id.*

includes specific provisions to address how wetlands and converted wetlands present on farmlands are to be treated as a matter of wetland conservation within "Title XII – Conservation."[150] Congress dedicated two Subtitles under Title XII in the FSA to this effort: one defines the terms "wetland" and "converted wetland," while the other focuses specifically on identifying preferable treatment for conversions of non-tidal pastured and hayed wetlands to croplands.[151] As the Supreme Court concluded in *Romani*, in seeking to harmonize the impact of the CWA and FSA in *Brace* and similar cases, , federal courts should find it anomalous to conclude that Congress intended the general "dredge" and "fill" provisions of CWA § 404 to impose greater burdens on citizen farmers like Mr. Brace, than those specifically crafted in the FSA for wetland conservation purposes.[152]

[150] Food Security Act of 1985, Pub. L No. 99–198 (HR 2100), 99 Stat. 1354 (1985).

[151] *Id.*

[152] *Romani,* 523 U.S. at 532.

III. THE DISTRICT COURT SHOULD UNDERSTAND HOW FEDERAL AGENCIES & COURTS PRIMARILY INFERRED CWA § 404 COVERAGE OF NON-TIDAL WETLANDS ADJACENT TO MANMADE DITCHES AND 'CONVERTED WETLANDS' FROM UNRELIABLE LEGISLATIVE HISTORY

A. Applicable 1977 Clean Water Act "(CWA") Statutory Text Not Addressing Wetlands or 'Converted Wetlands'

The applicable 1977 amendments to CWA § 404 were enacted on December 27, 1977.[153] The statutory language of CWA § 404 does not define the terms "wetland" or "converted wetland," nor does it express congressional intent that discharges of dredge and fill material into *non-tidal* wetlands adjacent to *manmade* agricultural ditches should be included within the definition of "waters of the United States," and consequently, subject to the jurisdiction of the CWA § 404 permitting regime. The absence of these definitions from the statutory text should have informed federal courts's interpretation of the § 404(f)(1)(A) and (C) exemptions, respectively, to "normal farming and ranching activities" and to irrigation ditch construction and drainage ditch maintenance activities.

Section 404(a) vests the Secretary of the Army, acting through the Chief of Engineers, with the authority to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[154] Pursuant to § 404(b), the Secretary of the Army possesses the authority to develop guidelines, in conjunction with the Administrator of the EPA, prohibiting the specification of a site.[155] Under § 404(c) the Administrator of the EPA can "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification as a disposal site.[156]

CWA § 404(f)(1)(A) exempts from § 404 general permitting the discharge of dredge or fill material from established farming and ranching activities, including plowing, seeding, cultivating,

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[153] Clean Water Act of 1977, Pub. L. No. 95-217, 99 Stat. 1600 (1977).
[154] CWA § 404(a).
[155] CWA § 404(b).
[156] CWA § 404(c).

and harvesting.[157] CWA § 404(f)(1)(C) exempts from general § 404 permitting discharges of dredge or fill material due to the construction and maintenance of drainage ditches.[158] The recapture provision (CWA § 404(f)(2)) applies despite the availability of either such exemption. It states that even incidental discharge of dredge or fill material will need a § 404 permit, if it changes the use of a wetland area by reducing the reach or impairing the flow or circulation of waters of the United States.[159] CWA § 404(g)(1) affords each state governor the opportunity "to administer its own individual and general permit program" for discharges "of dredged or fill material into the navigable waters (other than those waters" currently used or susceptible to use for interstate commerce, and tidal waters, "including wetlands adjacent thereto) within its jurisdiction."[160]

B. Agencies Regulations, Guidelines and Policy Statements Claiming 'Broad' CWA § 404 Jurisdiction to Cover Wetlands Adjacent to Manmade Agricultural Ditches and 'Converted Wetlands'

Numerous and frequently changing EPA and Corps regulations, guidelines and policy statements have been promulgated to implement the broad CWA § 404 jurisdiction that federal courts had inferred from legislative history.[161]

1. 1973 EPA Policy Statement

The first EPA policy statement on protecting wetlands was issued via federal register, but it did not address "converted wetlands."[162] However, since the EPA, before issuing this policy statement, had failed to follow public notice and comment procedures of the Administrative Procedure Act, the statement could not be considered a binding legislative rule upon EPA or the public.[163]

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[157] §1344(f)(1)(A).

[158] §1344 (f)(1)(C).

[159] Clean Water Act, 33 U.S.C.S. §1344(f)(2)

[160] CWA § 404(g)(1).

[161] CWA § 404(a).

[162] *See* Environmental Protection Agency; Protection of Nation's Wetlands Policy Statement, 38 Fed. Reg. 10834-35 (May 2, 1973).

[163] *See Recommendation 92-2*, Administrative Conference of the United States (Jun. 18, 1992), https://www.acus.gov/sites/default/files/documents/92-2.pdf

2. 1975 Corps Interim Final Regulations

Interim Corps regulations issued in 1975 defined "navigable waters of the United States" to cover "[f]reshwater wetlands including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation."[164] They did not expressly cover nontidal freshwater wetlands adjacent to tributaries of U.S. navigable waters.[165]

3. The 1977 Corps Final Regulations

The final 1977 Corps regulations explicitly excluded from the coverage of "waters of the United States" ("WOTUS") *nontidal* wetlands adjacent to tributaries to U.S. navigable waters, where said "tributaries" actually were "*nontidal drainage* and irrigation ditches excavated on dry land." (emphasis added).[166] In this context, "dry land" meant land other than "wetlands," which had been redefined as "[t]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that *under normal circumstances* do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[167] The preamble to these regulations clarified the agency had not intended "to assert jurisdiction over those areas

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[https://perma.cc/4TNH-9A32] ("Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of section 553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend the policy statement is unlawful or unwise, or that an alternative policy should be adopted. […] The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement. Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. […] Recommendations […] II. Policy Statements A. Notice of nonbinding nature. Policy statements of general applicability should make clear they are not binding.").

[164] Corps of Engineers, Department of the Army; Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31324(9)(h) (Jul. 25, 1975) (codified at 33 C.F.R. Pt. 209).

[165] *Id.*

[166] Corps of Engineers, Department of the Army; Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37144 (July 19, 1977) (codified at 33 CFR pt. 323).

[167] *Id.* at 31728 (emphasis added).

that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes."[168] This provision appeared to serve more as a "grandfather" provision addressing already converted wetlands rather than as a provision concerned with the contemporary treatment of wetlands in the process of conversion.

4. 1979 and 1980 EPA Detailed 404(b)(1) Guidance

The first detailed EPA rules interpreting § 404 amendments in the context of discharges of dredged or fill materials were issued in 1979 and 1980, respectively. They were released initially in the form of a proposed regulation, and then in the form of "final guidelines," both of which the EPA argued had "regulatory effect."[169] The proposed regulations defined the term "navigable waters" as "…waters of the United States," while the final guidelines defined "waters of the United States" as including: (1) "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;" (3) "…intrastate […] rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands; the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;" and "(7) wetlands adjacent to waters identified [above]."[170]

The 1979 proposed regulations and the 1980 EPA final guidelines defined the term "wetlands" as locations "inundated or saturated by surface or ground water" that support flora and fauna known to thrive in such conditions.[171] This includes but is not limited swamps, marshes, and bogs.[172] These rules defined the term "adjacent" as "bordering, contiguous, or neighboring."[173] The 1980 EPA Final 404(b)(1) Guidelines did not address the treatment of "converted wetlands," except to exclude it from the

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[168] *Id.*

[169] Guidelines for Specification of Disposal Sites for Dredged Material, 44 Fed. Reg. 54222 (Sept. 18, 1979) (codified at 40 C.F.R. pt. 230); Guidelines for Specification of Disposal Sites for Dredged Material, 45 Fed. Reg. 85336 (Dec. 24, 1980) (codified at 40 C.F.R. pt. 230).

[170] 44 Fed. Reg. at 54228; 45 Fed. Reg. at 85336.

[171] 44 Fed. Reg. at 54228; 45 Fed. Reg. at 85336.

[172] 44 Fed. Reg. at 54228; 45 Fed. Reg. at 85336.

[173] 44 Fed. Reg. at 54228; 45 Fed. Reg. at 85336.

definition of "waters of the United States," and thus, from EPA jurisdiction.[174]

5. 1982 Corps Interim Final Regulations

The first Corps regulation addressing these terms was issued in 1982.[175] The Corps defined the term "navigable waters of the United States," which framed the scope of its authorities to issue permits under the Clean Water Act, as being potentially narrower than the term "waters of the United States."[176] The 1982 interim final Corps regulations set forth a general definition of "navigable waters of the United States," that did "not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Part 323."[177] The 1982 regulations defined "navigable waters of the United States" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in in the past, or may be susceptible for use to transport interstate or foreign commerce."[178]

The 1982 Corps interim final regulations addressed the term "converted wetlands" in the context of the "normal farming activities" exemption.[179] These regulations stated for farming activities to qualify for such exemption, they should make up an on-going established farming operation,[180] which can include fields lying fallow as part of practiced conventional crop rotation techniques.[181] The 1982 regulations did not consider either conversion "activities which bring an area into farming," or lands remaining idle for so long that they require modifications to the hydrological regime to resume operations, as part of already established farming operation.[182] These regulations also

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[174] 44 Fed. Reg. at 54228; 45 Fed. Reg. at 85336.

[175] Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31794, 31811 (Jul. 22, 1982) (to be codified at 33 CFR § 323.2(c)-(d)).

[176] *Id.* at 31829 (to be codified at 33 CFR § 329.4).

[177] *Id.* (to be codified at 33 CFR § 329.1).

[178] *Id.* (to be codified at 33 CFR § 329.4).

[179] *Id.* at 31812 (to be codified at 33 CFR § 323.4(a)(1)(i)).

[180] *Id.*

[181] *Id.* (to be codified at 33 CFR § 323.4(a)(1)(ii)).

[182] *Id.*

implemented the CWA § 404(f)(2) recapture provision, as described in Section III.A above.[183]

6. 1984 Corps Final Regulations

The 1984 Corps final regulations adopted these definitions with minor, if any, changes. One of these changes denied the Nationwide Permit ("NWP") 26 exemption from CWA § 404 individual permitting otherwise available to discharges of dredge or fill material into one to ten acres of nontidal streams and rivers, including adjacent wetlands located above the headwaters of the WOTUS, if the discharges result in a "substantial adverse modification" to said waters.[184] The NWP 26 exemption will be denied even though the activity did not convert the WOTUS to dry land (i.e., cause a "loss" of the WOTUS).[185] The Corps apparently imposed this new recapture trigger to narrow the availability of this nationwide permit under CWA § 404(e)(1). "Generally, a substantial adverse modification occurs when a discharge eliminates the principal valuable functions of a water of the United States (including wetlands) even though the discharge *does not convert* the water to dry land."[186]

7. 1986 Corps Final Regulations

Only in the final regulations promulgated in 1986 did the Corps define "waters of the United States" as broadly as did EPA's 1980 final 404(b)(1) guidelines. The 1986 final regulations provide the prior definition of navigable waters did "not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 *and* 328."[187] The 1986 Corps regulations defined "waters of the United States" identically to

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[183] *Id.* at 31813 (to be codified at 33 C.F.R § 323.4(c)) (emphasis added) (describing the recapture provision as being triggered when the discharge of dredged or fill material into a WOTUS "is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject and the flow for circulation of waters of the United States may be impaired or the reach of such waters reduced.").

[184] Final Regulations for Controlling Certain Activities in Waters of the United States, 49 Fed. Reg. 39478, 39480 (Oct. 5, 1984) (to be codified at 33 CFR § 330.5(a)(26)).

[185] *Id.*

[186] *Id.* (emphasis added).

[187] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41251 (to be codified at 33 CFR § 329.1 (emphasis added).

the 1980 EPA regulations.[188] The regulations also define the terms "wetlands" and "adjacent"[189] identically to § 404(b) guidelines.[190] The "normal farming activities" exemption and recapture provisions contained within the 1982 regulations were later incorporated within the 1986 revisions to said regulations.[191] The 1986 regulations contained one new addition, which states "*conversion* of a wetland to a non-wetland is a change in use of an area of waters of the United States." (emphasis added).[192]

8. 1986 Corps Guidance – RGL 86-09 – 'Normal Circumstances' of 'Converted Wetlands

Corps Regulatory Guidance Letter ("RGL") 86-09 discussed the effect a conversion of a wetland to other uses would have upon federal jurisdiction.[193] The letter stated the Corps had "listed *swamps, bogs, and marshes* at the end of the definition at 323.2(c) to further clarify [the agency's] intent to include only truly aquatic areas" within the definition of "wetlands."[194] Corps RGL 86-09 emphasized "the phrase 'under normal circumstances'" in the definition of "wetlands" was intended for "areas that are not aquatic but experience an abnormal presence of aquatic vegetation."[195] The abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program.[196]

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[188] Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85336, 85346 (Dec. 24, 1980) (to be codified at 40 CFR § 230.3(s)); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41250 (Nov. 13, 1986) (to be codified at 33 CFR § 328.3(a)).

[189] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41251 (to be codified at 33 CFR § 328.3(b)-(c)).

[190] Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. at 85345 (to be codified at 40 CFR § 230.3(t)).

[191] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41233, 41234 (to be codified as 33 CFR § 323.4(a)(1)(i), 323.4(c)).

[192] *Compare* Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. at 31812, *with* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41325.

[193] *See* Clarification of "Normal Circumstances" in the Wetland Definition, Corps RGL 86-09, para. 3 (Aug. 27, 1986).

[194] *Id.* (emphasis added).

[195] *Id.*

[196] *See id.* at para. 4 ("The use of the phrase 'normal circumstances' is meant to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation.

The guidance letter distinguished 'natural circumstances' (i.e., where previously converted wetlands left unattended for a sufficient period of time "would revert to wetlands solely through the devices of nature) from 'normal circumstances.'"[197] These are based on the specific locations characteristics, its use and its history. If the wetland is altered to the point it no longer falls under WOTUS, then the land is not under Corps jurisdiction, unless these characteristics are restored.[198]

9. 1988 EPA Final Regulations

The EPA's 1988 final regulations set forth the procedures states and EPA must follow to apply for and review applications to administer the § 404 program.[199] These regulations define the terms "waters of the United States," and "wetlands."[200] They also provide the criteria required to establish eligibility for exemptions under "normal farming activities"[201] or the construction of irrigation ditches or the maintenance of drainage ditches.[202]

To qualify for the "normal farming activities exemption, the specified activities must be part of an "establish[ed] (i.e., ongoing) farming or ranching operation" and comply with later definitions."[203] Activities bringing an area into farming or ranching are not part of an established operation.[204] An operation ceases to be established (i.e., it is effectively "abandoned") "when the area in which it was conducted has been converted to another use, or [it] has lain idle so long that modifications to the hydrological regime are necessary to resume operations."[205] If an

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Several instances of aquatic vegetation to eliminate Section 404 jurisdiction have actually occurred. Because those areas would still support aquatic vegetation 'under normal circumstances,' they remain a part of the overall aquatic system intended to be protected by the Section 404 program; therefore, jurisdiction still exists.").

[197] *Id.* at para. 5.

[198] *Id.*

[199] Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20764, 20776-20787 (June 6, 1988) (to be codified at 40 CFR §§ 233.1-233.53).

[200] *Id.* at 20774 (to be codified at 40 CFR § 232.2(q), 232.2(r)).

[201] *Id.* at 20775 (to be codified at 40 CFR § 232.3(c)(1)(i)-(ii)).

[202] Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20764, 20775 (June 6, 1988) (to be codified at 40 C.F.R. pt. 232.3(c)(3)).

[203] *Id.*

[204] *Id.*

[205] *Id.*

activity does not occur within waters of the United States or does not include a discharge, then a § 404 permit is not needed, even if it is not part of an established agriculture operation.[206] These criteria are identical to those previously set forth in the 1982 Corps interim regulations.[207]

The regulations define "cultivating" as a physical way to treat soil so farming and ranching operations may improve their yield or quality of the products.[208] Harvesting is defined as physical measures employed directly upon farm or ranch crops within established agricultural lands to bring about their removal from farm and ranch.[209] In addition, the regulations define "minor drainage" as the

> (A) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities such as ditching and tiling, incidental to the planting, cultivating, protecting or harvesting crops, involve no discharge of dredged or fill material into waters of the United States, and as such, never require a Section 404 permit. (B) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries, or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural […] wetland crop production.[210]

These regulations also define "minor drainage" as:

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[206] Clean Water Act, 53 Fed. Reg. at 20776 (to be codified at 40 C.F.R. pt. 232.3(c)(1)(i)(A-B)).

[207] Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31794 (July 22, 1982).

[208] Clean Water Act, 53 Fed. Reg. at 20776 (to be codified at 40 C.F.R. pt. 232.3(d)(1)).

[209] Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20764, 20775-20776 (June 6, 1988) (to be codified at 40 C.F.R. pt. 232.3(d)(3)(i)).

[210] Clean Water Act, 53 Fed. Reg. at 20776 (to be codified at 40 C.F.R. pt. 232.3(d)(3)(i)(A-B)).

> (D) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not properly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exemption.[211]

Minor drainage is limited to established farming operations and does not include drainage related to wetland conversion. [212]

The abovementioned EPA regulatory exemption provisions are identical to those previously set forth in the 1982 Corps interim final regulations.[213] Furthermore, these regulations contain an almost identical recapture provision to that set forth in the 1982 Corps interim final regulations.

> Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraph (c) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the [WOTUS] into a use to which it was not previously subject, where the flow or circulation of [WOTUS] may be impaired or the reach of such waters reduced. Where the proposed discharge will result in

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[211] Clean Water Act, 53 Fed. Reg. at 20776 (to be codified at 40 C.F.R. pt 232.3(d)(3)(i)(D)).

[212] Clean Water Act, 53 Fed. Reg. at 20776 (to be codified at 40 C.F.R. pt 232.3(d)(3)(i)).

[213] Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31794, 31812 (July 22, 1982) (to be codified at 33 C.F.R. pt. 323.4(a)(2)).

> significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.[214]

10. 1990 Corps Guidance – RGL 90-07 – 'Normal Circumstances' of 'Prior Converted Cropland'

In September 1990, the Corps issued RGL 90-07.[215] The guidance letter distinguished the normal circumstances of wetlands subject to pre-December 23, 1985 completed conversions (identified as "prior converted croplands") as defined in § 512.15 of the National Food Security Manual ("NFSAM"), from the normal circumstances of "farmed wetlands" as defined by NFSAM § 512.35.[216] USDA regulations, meanwhile, state wetlands should support life that is typical of the area under "normal circumstances."[217]

The manual defines "farmed wetlands" as those manipulated and used for agricultural means before December 23, 1985 but were not fully converted at that time.[218] "Prior converted croplands," under the NFSAM are wetlands dredged, drained, filled, or in any other way manipulated before December 23, 1985 to make the production of an agricultural commodity possible. [219]

According to the RGL, the "normal circumstances" of farmed wetlands, including "areas with 15 or more consecutive days (or 10 percent of the growing season whichever is less) of inundation during the growing season," are such that wetland soil and hydrological conditions remain despite an absence of wetland vegetation due to cropping.[220] Thus, the § 404 permitting of farmed wetlands is required.[221] By contrast, the "normal circumstances" of prior converted croplands are such that they

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[214] Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20764, 20775–20776 (June 6, 1988) (to be codified at 40 C.F.R. pt. 232.3(b)); Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31794, 31812 (July 22, 1982) (to be codified at 33 C.F.R. pt. 323.4(c)).

[215] U.S. ARMY CORPS OF ENGINEERS, Reg. 90-07 (Sept. 26, 1990).

[216] *Id.*

[217] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. 35194, 35207 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12.1(b)(28)).

[218] NATIONAL FOOD SECURITY ACT MANUAL (SECOND) § 512.35 (1988).

[219] NATIONAL FOOD SECURITY ACT MANUAL (SECOND) § 512.15(a) (1988).

[220] U.S. ARMY CORPS OF ENGINEERS, *supra* note 215, at 2.

[221] *Id.* at ¶ 5.b-c.

"have been subject to such extensive and *relatively permanent physical hydrological modifications and alteration of hydro-phytic vegetation* that the resultant cropland constitutes the 'normal circumstances' for purposes of [S]ection 404 jurisdiction."[222] Thus, they are not subject to CWA § 404 jurisdiction.[223]

C. Judicial Resort to Legislative History in Absence of Express CWA § 404 Statutory Text Addressing Non-Tidal Wetlands Adjacent to Manmade Ditches and Converted Wetlands

Federal courts previously broadly inferred Congress's intent to have CWA § 404 cover *non-tidal* wetlands adjacent to manmade agricultural ditches and "converted wetlands" primarily from sources other than the statute itself. However, each of the following cases was decided prior to Congress's enactment of the Food Security Act of 1985,[224] and therefore, did not reflect Congress' subsequent intent to address converted wetlands in the context of agriculture under the FSA.

In *United States v. Holland*, the U.S. District Court for the Middle District of Florida reverted to unreliable legislative history rather than to the statutory text of the CWA.[225] It concluded Congress, in "defin[ing] away in the FWPCA" the test of navigability, intended for CWA jurisdiction to be broader than "navigable waters."[226]

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[222] *Id* (emphasis added).

[223] *Id.*

[224] Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 12211 (1985).

[225] United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).

[226] *Id.* at 672 ("The [Committee of Conference] conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." (quoting S. REP. NO. 92-1326 at 144 (1972) (Conf. Rep.), *reprinted in* LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS, 1972, at 327 (1972)); *id.* ("In presenting the Conference version to the House, Representative Dingell, a member of the Conference Committee, explained the Committee's intention on jurisdiction: 'The Conference bill defined the term 'navigable waters' broadly for water quality purposes. (502(7)). It means 'all the waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." (quoting LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS, 1972, at 250 (1972)); *id.* ("After a brief discussion of Court cases in which the judiciary has forced some expansion of the old navigability test for water quality purposes, Representative Dingell concluded: 'Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.'"); 373 F. Supp. at 673 ("Clearly, Congress has the power to eliminate the

In *Natural Resources Defense Council, Inc. v. Callaway,* the United States District Court for the District of Columbia interpreted CWA § 502(7), which defines "navigable waters" as "waters of the United States, including territorial seas," as evidencing Congress's intent for the CWA to be applied as broadly as constitutionally permissible, consistent with the Commerce Clause of the U.S. Constitution.[227] The D.C. District Court then ordered the Corps to publish proposed regulations clearly recognizing the full regulatory mandate of the Water Act within forty days of the Court's order.[228]

In *Leslie Salt v. Froehlke*, the Ninth Circuit Court of Appeals similarly held Congress clearly meant to expand the definition of navigable waters based on the legislative history.[229] The Court cited the Florida District Court's holding in *Holland*, which based its definition of "navigable waters" on a broad Constitutional interpretation of the Commerce Clause.[230]

In *Avoyelles Sportsmen's League, Inc. v. Marsh*, the Fifth Circuit Court of Appeals held "navigable waters" should be interpreted broadly by Congress.[231] The Court wrote a broad definition was needed to better control pollution being discharged

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"navigability" limitation from the reach of federal control under the Commerce Clause. . . . Now when courts are forced with a challenge to congressional power under the Commerce Clause a statute's validity is upheld by determining first if the general activity sought to be regulated is reasonably related to, or has an effect on, interstate commerce and, second, whether the specific activities in the case before the court are those intended to be reached by Congress through the statute.").

[227] Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) ("Congress by defining the term 'navigable waters' in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251 et seq. (the 'Water Act') to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.").

[228] *Id.*

[229] Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978).

[230] *Id.* at 754–55 ("It is clear from the legislative history of the FWPCA that for the purposes of that Act, Congress intended to expand the narrow definition of the term 'navigable waters,' as used in the Rivers and Harbors Act. This court has indicated that the term 'navigable waters' within the meaning of the FWPCA is to be given the broadest possible constitutional interpretation under the Commerce Clause.") (citing Cal. v. Envtl. Prot. Agency, 511 F.2d 963, 964 (9th Cir. 1975), *rev'd on other grounds sub nom.* Envtl. Prot. Agency v. State Res. Control Bd. 426 U.S. 200 (1976) ("Congress clearly meant to extend the Act's jurisdiction to the constitutional limit. . .").

[231] Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 915 (5th Cir. 1983).

from a point source.[232] In reference to the legislative history, the Appellate Court held conversions of wetlands into croplands did not constitute "normal farming activities" under § 404(f)(1), because that provision's "exemptions [from permitting] do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body."[233] Thus, the Court never reached the § 404(f)(2) recapture issue, which required there first be a "normal farming activity." It also ignored the Carter administration Council on Environmental Quality finding normal farming activities could include converting wetlands to arable land and not be subject to recapture,[234] so long as extensive areas of water were not converted to dry land.[235]

In *United States v. Huebner,* the Seventh Circuit Court of Appeals held navigable waters should be broadly interpreted.[236] The Appellate Court also held the legislative history of the 1977 CWA amendments persuaded it that the "normal farming activities" exemption should be interpreted narrowly in light of the broad purpose of the statute.[237] The Court in *Huebner* also found that the *Akers* Court[238] even went so far as to state, "[a]s

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[232] *Id.* ("The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, and includes the territorial seas and the Great Lakes. Through narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.") (quoting LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 1495 (1978).

[233] Avoyelles Sportsmen's League, 715 F.2d at 915.

[234] *See* The Ninth Annual Report of the Council on Environmental Quality, *supra* note 52.

[235] 123 CONG. REC. S39,188 (1977) (remarks of Sen. Muskie).

[236] United States v. Huebner, 752 F.2d 1235, 1240–41 (7th Cir. 1985).

[237] *Id.* ("Our review of the legislative history of the agricultural exemptions convinces us that because of the significance of inland wetlands, which make up eighty-five percent of the nation's wetlands,[9] Congress intended that Section 1344(f)(1) exempt from the permit process only 'narrowly defined activities…that cause little or no adverse effects either individually or cumulatively [and which do not] *convert more extensive areas of water into dry land* or impede circulation or reduce the reach and size of the water body.'" (emphasis added)) (citing 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, at 420 (1978) (statement of Rep. Harsha, member of the conference committee, during House debates).

[238] *See Akers,* 785 F.2d at 819.

the legislation's primary sponsor, [former Senator Muskie's] remarks are entitled to substantial weight."[239]

In *United States v. Riverside Bayview Homes, Inc.*, the U.S. Supreme Court reviewed the Corps's regulatory definition of the term "adjacent wetlands," in the context of "navigable waters."[240] The Court held deference should be given to the agency's reasonable construction of a stature provided it also does not challenge Congress's expressed intent.[241] According to the Court, such review was "limited to the question whether the agency's construction of the statute is reasonable, in light of the language, policies, and legislative history of the Act, for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams and other hydrographic features more conventionally identifiable as 'waters.'"[242] The Court also held agencies may consider legislative history and policies if the regulatory authority is unclear.[243] These approaches supported the regulatory authority to define waters as they did.[244]

In *United States v. Cumberland Farms of Connecticut*, the District Court held Congress's overwhelming goal was to prevent wetland conversion.[245] The Court reached this conclusion having looked to § 404's legislative history to define the scope of "normal farming activities" exemption under § 404(f)(1)(A) and the scope of the § 404(f)(2) recapture provision.[246] The Court extensively cited the legislative history to which the Circuit Courts in *Akers,*[247] *Huebner*,[248] and *Avoyelles Sportsmen's League*[249]

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[239] *Id.* citing Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564, 96 S.Ct. 2295, 2304, 49 L.Ed.2d 49 (1976); Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229, 1243 & n. 48 (D.C.Cir.1980).

[240] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).

[241] *Id.* at 131, citing Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc., 470 U. S. 116, 125 (1985); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 842-845 (1984).

[242] *Riverside Bayview Homes, Inc.,* 474 U.S. at 131.

[243] *Id.*

[244] *Id.* at 132.

[245] United States v. Cumberland Farms of Connecticut, 647 F. Supp. 1166 (D. Mass. 1986).

[246] 647 F. Supp., slip op. at 14.

[247] *Akers,* 785 F.2d at 819.

[248] *Huebner,* 752 F.2d at 1240–41.

[249] *Avoyelles Sportsmen's League, Inc.,* 715 F.2d at 925.

referred, and accorded the prior remarks of former Senator Muskie "substantial weight."[250]

The Third Circuit Court of Appeals in *United States v. Brace*, in citing many of these cases, gleaned unreliable snippets from the same legislative history and reached the same conclusion.[251] The Appellate Court held, "the two parts of Section 404(f) […when read together…] provide a narrow exemption for agricultural activities that have little or no adverse effect on the waters of the United States."[252]

As previously mentioned, at least one legal commentator found the Court's ruling in *Chevron* had been based neither on statute nor precedent, but rather on "'institutional considerations' typical of the 'legal process' school of interpretation then dominant in the legal academy, which emphasized agency expertise . . . [and] democratic accountability."[253] Given the rapid expansion of the administrative state since these cases had been decided, it is more than arguable these prior institutional presumptions are no longer valid.

Each of these decisions, moreover, preceded the U.S. Supreme Court's later ruling in *United States v. Lopez*. In *Lopez*, the Court held the Commerce Clause did not grant Congress authority to prohibit gun possession within 1,000 feet of a school on federalism grounds, because it did not qualify as a "commercial" use "substantially affecting" interstate commerce (i.e., it did not address the commerce of guns).[254] *Lopez* more broadly held the Commerce Clause limits Congressional power to "'commercial' uses that 'substantially affect' interstate commerce."[255]

The *Lopez* Court found Congress did not express the federal statute's purpose as displacing the states' historical police

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[250] *Cumberland Farms of Connecticut,* 647 F. Supp., slip op. at 13–14, citing 3 Leg. Hist. 474 (1977).

[251] *Brace*, 41 F.3d at 124 (3d Cir. 1994), *citing* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 926 (5th Cir. 1983); 3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act*, at 474 (1978).

[252] *Brace,* 41 F.3d at 124.

[253] *See* Michael McConnell, *Kavanaugh And The 'Chevron Doctrine*, STAN. U. HOOVER INST. (July 30, 2018), https://www.hoover.org/research/kavanaugh-and-chevron-doctrine [https://perma.cc/4YLY-B5VH].

[254] United States v. Lopez, 514 U.S. 549, 580–83 (1995).

[255] Vickie Sutton, *Wetlands Protection – A Goal Without a Statute*, 7 S.C. ENV. LAW REV. 179, 190 (1998).

power over education.[256] The Kennedy concurrence in *Lopez* concluded the statute's interference with state sovereignty and disruption of "the federal balance the Framers designed and that this Court is obliged to enforce" was significant.[257] At least two legal commentators concluded *Lopez* could potentially invalidate the application of federal agency regulations to wetlands and converted wetlands on Commerce Clause grounds.[258]

These commentators reasoned since the CWA regulations control the environment, rather than the commerce of wetlands, the CWA regulations intrude upon a traditional concern of the States and should be invalidated.[259] Indeed, Congress intended to delegate the obligation to maintain water quality under the CWA to the states.[260] Granted, at the time these articles had been written, the likelihood was small *Lopez* could successfully defeat Congress's CWA § 404 jurisdiction over freshwater nontidal wetlands, given federal courts' reluctance to define navigability under a plain meaning analysis where the term had been defined by the agency.[261] However, the Court's new perspective since having reviewed and tightened its *Chevron*, *Auer*, and *Seminole Rock* precedents on agency deference may today result in a different outcome.

V. THE DISTRICT COURT SHOULD UNDERSTAND THAT FEDERAL COURTS AND AGENCIES PRIMARILY IGNORED THE TEXT OF THE FSA WHICH CLEARLY ADDRESSED THE TREATMENT OF NON-TIDAL WETLANDS ADJACENT TO MANMADE DITCHES AND 'CONVERTED WETLANDS'

A. The Food Security Act is the Only Federal Statute that Addresses Wetland Conservation

The Food Security Act of 1985 "was the first [federal] statute to define 'wetland' using explicit terms and

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[256] *Lopez,* 514 U.S. at 602 (Thomas, J., concurring).

[257] *Id.* at 583 (Kennedy, J., concurring).

[258] *See* Sutton, *supra* note 255, at 187–190.

[259] *Id.*

[260] *See id.* at 187–190; *See also* Clean Water Act of 1977, Pub. L. No. 92-217, §1344 §404(g)(1), 91 Stat. 1601 (1977) (codified at 33 U.S.C. §1344(g)(1) (2019)).

[261] *See* Sutton *supra* note 255, at 190.

requirements."[262] In fact, Congress has never stated wetland protection as a goal, excluding the "Swampbuster" provision of the FSA.[263] By comparison, the Clean Water amendments of 1977 used the term 'wetland' only when discussing the State's role in § 404 administration.[264]

> [T]he history shows Congress intended to transfer the wetlands program, . . . as well as the . . . permitting program, to the states as soon as possible. Moreover, the use of the term 'navigable waters' as the source for jurisdiction over wetlands demonstrates the broad reading of the statute, which has also caused difficulties with implementation and jurisdiction.[265]

"'The result of this legislative [amendment] process was to leave the section 404 program substantially intact and to give the administering agencies little new guidance for the definition or delineation of wetlands.'"[266]

The FSA also was the first federal statute to require those in the industry to manage and protect wetlands for USDA benefits.[267] The FSA conditioned eligibility for USDA farm benefits, first, on producers not "converting" a wetland, and second, on producers securing an exemption for the conversion activity qualifying it as either commenced or completed prior to December 23, 1985.[268] From its enactment date, the FSA determined when actual conversion of a wetland occurred.[269] An actual conversion of a wetland, in other words, occurs if an agricultural commodity was produced on a converted wetland.

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[262] Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, HARV. ENVTL. L. REV. 201, 225–26 (1997).

[263] *See* Sutton *supra* note 255, at 179.

[264] *See* McBeth, *supra* note 262.

[265] *See* Sutton, *supra* note 255, at 179.

[266] *See* McBeth, *supra* note 262, at 226.

[267] *Id.* at 231.

[268] *Id.* at 232–233.

[269] *Id.* at 233, n.208; Food Security Act of 1985, Pub. L. No. 99-198, §1221(1), 99 Stat. 1354, 1507 (codified at 16 U.S.C. §3821(1)).

B. Food Security Act ("FSA") Statutory Text Defines Wetlands and 'Converted Wetlands' and Thereby Covers Nontidal Wetlands Adjacent to Manmade Agricultural Ditches and 'Converted Wetlands'

1. Relevant FSA Statutory Text

FSA § 1221(1) provides, "[e]xcept as provided in [FSA §] section 1222 and notwithstanding any other provision of law, following the date of enactment of this Act, any person who in any crop year produces an agricultural commodity on *converted wetland* shall be ineligible for" various otherwise available United States Department of Agriculture program loans, payments and benefits.[270]

Arguably, the "notwithstanding any other provision of law" language of FSA § 1221(1), which together with FSA § 1204 define "converted wetlands," conveys Congress's intent, in light of the FSA's enactment after the 1977 CWA amendments, that the "commenced conversions of wetlands" exemption not be affected by § 404, which did not address such term at all.[271]

FSA § 1222(a)(1) provides individuals will not become ineligible for benefits under FSA § 1221 because of agricultural production on a converted wetland so long as the conversion was before the Act's date of enactment.[272] FSA § 1201(a)(1)(A) defined the term "agricultural commodity" as "any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters."[273]

In stark contrast to § 404, FSA § 1201(a)(4)(A) defined the term "converted wetland," as "drained, dredged, filled, leveled, or otherwise manipulated" land allowing for agriculture commodity

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[270] Food Security Act of 1985, Pub. L. No 99-198, § 1221(1), 99 Stat. at 1507-08 (emphasis added).

[271] *See* Schneider v. United States, 27 F.3d 1327, 1331 (8th Cir. 1994) (holding that the "'notwithstanding any other provision of law'" in question regarding the finality of the Secretary's decision was "clear on its face" and "clearly expresse[d] Congress's intent to preclude judicial review and presents no ambiguity that would give rise to a presumption in favor of judicial review."); Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 796, 797 (9th Cir. 1996) (holding "that the phrase 'notwithstanding any other law' is not always construed literally," and that the "notwithstanding any other law" clause in question "directs the disregard only of the federal environmental and natural resources laws, with respect to Option 9 sales.").

[272] Food Security Act of 1985, Pub. L. No 99–198, § 1222(a)(1), 99 Stat. 1354, 1508 (codified at 16 U.S.C. 3822(a)).

[273] *Id.*

production.[274] It includes any activity resulting in the impairment or reduction of flow, circulation, or reach of water for such purposes.[275] In addition, the conversion activity must have been undertaken to ensure the possibility of agricultural commodity production which otherwise would not have been possible, and the manipulated land was a wetland before the action and was not considered a highly erodible cropland.[276] The FSA defines the term "wetland" apart from the definition of "converted wetland," which § 404 does not.[277] The FSA definition of a "wetland" is land primarily containing hydric soils and so saturated with water the ground will support hydrophytic flora.[278] Given the FSA's considered definitions of 'wetland' and 'converted wetland,' it is evident that Congress had intended for the FSA, unlike the CWA, to cover all tidal coastal wetlands and non-tidal freshwater wetlands.

The Food, Agriculture, Conservation, and Trade Act of 1990 ("FACTA") amended the FSA by empowering the USDA Secretary, and his/her likely delegatee to perform an onsite wetland determination at the landowner's or land operator's request, as opposed to a remote wetland determination based on aerial photographs; otherwise, FACTA required the USDA Secretary and his/her delegatee, to perform wetland delineations on wetland delineation maps as a condition of eligibility to receive farm program loans, payments or benefits.[279] FACTA, also, added a new section allowing land owners and operators to appeal the USDA Secretary determinations of their wetland status, and, in case such a determination is reversed on appeal, for eligibility to receive such loans, payments or benefits.[280]

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[274] *Id.*

[275] *Id.*

[276] Food Security Act of 1985, § 1201(a)(4)(A) (codified at 16 U.S.C. § 3801(a)(4)(A)).

[277] *See* Food Security Act of 1985 § 1201(a)(16) (codified at 16 U.S.C. § 3801(a)(16)) (amended 1990).

[278] Food Security Act of 1985 § 1201(a)(16) (codified at 16 U.S.C. § 3801(a)(16)) (amended 1990).

[279] Food, Agriculture, Conservation, and Trade Act of 1990, sec. 1422, §1222(a)(1), 104 Stat. 3359, 3573; *id.* at 3754.

[280] Food, Agriculture, Conservation, and Trade Act of 1990, sec. 1422, §1222(e), 104 Stat. 3359, 3574 (The Secretary shall exempt from the ineligibility provisions of section 1221 any action by a person upon lands in any case in which the Secretary determines that any one of the following does not apply with respect to such lands: (1) Such lands have a predominance of hydric soils. (2) Such lands are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions. (3) Such lands, under normal circumstances, support a prevalence of such vegetation.").

2. Congressional Intent and USDA

(a) 'Converted Wetland'

The Conference Committee Report accompanying the FSA indicates that the Conference Committee had adopted the House definition of "converted wetland" set forth in § 1201(a)(4)(A) and codified in 16 U.S.C. § 3801(a)(4)(A):

> The *House* bill defines the term 'converted wetland' to mean wetland that has been converted by certain activity making the production of agricultural commodities possible that would not have been possible but for such activity and that, before such activity was taken, was wetland and not highly erodible land nor highly erodible cropland with several exemptions listed. (Sec. 1201(4).) The *Senate* amendment is comparable with respect to 'converted wetland' except that it does not apply to highly erodible cropland (Sec. 1601(a)(4)(A), and though the exemptions are similar they are stated differently. The *Conference* substitute adopts the *House* provision" (italicized emphasis in original).[281]

(b) Pre-December 23, 1985 'Commenced Conversion'

The legislative history surrounding the "commenced conversion" exemption provision of the FSA is contained in the Congressional Record and Conference Report of the U.S. House of Representatives. The congressional record for December 17, 1985 indicates that the Conference Committee had reconciled the difference between the House preference that only "completed conversions" should be eligible for exemption, and the Senate's broader preference that "commenced conversions" should be eligible for exemption, by adopting the Senate's broader preference.[282]

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[281] H.R. REP. NO. 99–447 at 454–55 (1985) (Conf. Rep.).
[282] 131 CONG. REC. 36815, 37106 (1985).

The Conference Report accompanying the FSA corroborates this interpretation of the FSA commenced conversion provision. It states as follows:

> (7) *Exemption for wetland (Sec. 1222)*(a) The *House* bill exempts converted wetland from the program ineligibility provision of section 1202 if the land became converted wetland before the date of enactment of the bill. (Sec. 1203(a)(6).) The Senate amendment exempts converted wetland if the conversion of the wetland was commenced before the date of enactment of the bill. (Sec. 1622(a)(1).) The *Conference* substitute adopts the Senate amendment. The Conferees intend that conversion of wetland is considered to be "commenced" when a person has obligated funds or begun actual modification of the wetland." (italicized emphasis in original).[283]

This legislative history surrounding "commenced conversions" strongly suggests that USDA's addition of the term "completed conversion" in the final September 17, 1987 USDA regulations tracked the House version of the exemption from converted wetlands the Conference Committee Report had previously rejected. The USDA improperly went beyond the statutory text of FSA § 1222(a) and the Conference Report to create a new category of converted wetland for political purposes.

C. Food Security Act ("FSA") Regulations re 'Converted Wetlands'

1. 1986 USDA Interim Regulations

The interim FSA regulation's preamble stated that "Sections 1211 and 1221 of the Act [FSA] were designed to remove the incentive that certain benefits provided by the Department could give producers to cultivate highly erodible land or to convert wetlands for the purpose of producing an

[283] H.R. REP. NO. 99–447 at 460.

agricultural commodity."[284] The interim regulations define an "agricultural commodity" as "any crop planted and produced by annual tilling of the soil or on an annual basis."[285]

The interim regulations also rested the exemption from ineligibility to receive USDA program benefits set forth in §1222(a) upon a showing of "commenced conversion."[286] "A person shall not be determined to be ineligible for program benefits in as the result of the production of a crop of an agricultural commodity on: (i) Converted wetland if the conversion of such wetland was commenced before December 23, 1985,"[287] and such crop had been "planted during the period December 23, 1985, through June 27, 1986."[288] According to the interim regulations,

> The conversion of a wetland will be considered to have been commenced before December 23, 1985, *if,* before December 23, 1985, earth moving for the purpose of draining the wetland was actually started, *or* the person applying for the benefits has legally and financially committed substantial funds by entering into a contract providing for earth moving, or otherwise, for the purpose of converting the wetland. (emphasis added).[289]

The 1986 interim final regulations also defined the term "converted wetlands" consistent with FSA § 1201(a)(4):

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[284] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. 23496 (June 27, 1986).

[285] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. 23496, 23499, 23496, 23502 (June 27, 1986) (codified at 7 C.F.R. pt. 12).

[286] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23496, 23504.

[287] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23496, 23504.

[288] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23496, 23504.

[289] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23496, 23500 ("It has been determined that a person shall be considered to have commenced the conversion of a wetland by December 23, 1985, if, prior to December 23, 1985, such person: (1) Began substantial earth moving for the purpose of draining the wetland or (2) legally and financially committed substantial funds, by entering into a contract for earth moving, or otherwise, for the purpose of draining the wetland. The Department shall determine the amount of land which is exempt under this provision based upon the amount of land which would be drained by the earth moving required in the contract or, if there is no contract, which would be drained by the earth moving which had begun prior to December 23, 1985.").

> 'Converted wetland' means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) *for the purpose or to have the effect of making the production of an agricultural commodity possible* if: (i) Such production would not have. Been possible but for such action; and (ii) before such action (A) such land was wetland; and (B) such land was neither highly erodible land nor highly erodible cropland. (emphasis added).[290]

The 1986 interim regulations, furthermore, set forth criteria for determining whether land is a "converted wetland." For example,

> For the purpose of determining whether land is a converted wetland *in accordance with § 12.2(a)(6) of this part*, a wetland shall be determined to have been drained, dredged, filled, leveled, or otherwise manipulated *for the purpose or to have the effect of making* the production of an agricultural commodity possible, *if* the producer or any of the producer's predecessors in interest caused or permitted: (1) The removal of one or more of the hydric soils criteria of such wetland; *or* (2) The removal or destruction of hydrophytic vegetation on such wetland *and a prevalence of hydrophytic vegetation* is determined to exist on the same hydric soil map unit in the local area. (emphasis added).[291]

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[290] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. 23496-01, 23502 (June 27, 1986) (to be codified at 7 C.F.R. pt. 12.2 (1987)).

[291] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23507 (to be codified at 7 C.F.R. 12.32 (1987)) checked. Section 12.32(a) of the interim rule provides that a wetland shall be determined to have been drained, dredged, filled, leveled, or otherwise manipulated for the purpose or to have the effect of making the production of an agricultural commodity possible if (1) one or more of the hydric soils criteria of such wetland has been removed or (2) the hydrophytic vegetation on such wetland has been removed or destroyed. The removal of one or more of the hydric soils criteria or the removal or destruction of hydrophytic vegetation removes one or more of the criteria that characterizes an area as wetland. The removal of one or more of the hydric soils criteria or the removal or destruction of hydrophytic vegetation is an objective measure of the effect an action has on a wetland. It is a good indication as to whether the action has been taken

The interim regulations defined "[h]ydric soils" as "soils that, in an undrained condition, are saturated, flooded or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation."[292] The interim regulations defined "hydrophytic vegetation" as a plant growing (i) in water; or (ii) a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content."[293]

2. 1987 USDA Final Regulations

The final 1987 USDA "amended the interim rule published at 51 FR 23496 (June 27, 1986) and applied to crops planted after the effective date of this rule and to all determinations made after or pending on the effective date of this rule."[294] The final regulations nevertheless maintained the definitions of "hydric soils," "hydrophytic vegetation," and the criteria SCS shall use for determining the presence of each such wetland identification parameter set forth in the 1986 interim regulations.[295] The final regulations also maintained the definition of "wetland" set forth in the interim regulations.[296] The final regulations, like the interim regulations appear to follow the definition contained in the statute.[297] This definition appears to be consistent with the federal 3-parameter wetland identification/delineation standard set forth in the Corps 1987 Wetland Delineation Manual: hydric soils, hydrology, and

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for the purpose or to have the effect of making the production of an agricultural commodity possible on such wetland. Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23499. The interim regulations also provided that, "an agricultural commodity shall be considered to have been 'produced' on [...] converted wetland if the agricultural commodity has been planted." Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23499.

[292] Highly Erodible Land and Wetland Conservation, 51 Fed. Reg. at 23503 (to be codified at 7 C.F.R. pt. 12.2 (1987)).

[293] *Id.*

[294] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. 35194, 35194 (Sept. 17, 1987).

[295] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. at 35201 (to be codified at 7 C.F.R. pt. 12.2 (1987)); 7 C.F.R. pt. 12.31(a)-(b)(3)(iv)(B)(1987).

[296] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. at 35202 (to be codified at 7 C.F.R. pt. 12.2 (1987)).

[297] Food Security Act of 1985, Pub. L. No. 99-198, §1201, 99 Stat. 1354, 123-24 (1985) (to be codified at 16 U.S.C. § 3801).

hydrophytic vegetation.[298] It does not appear, however, that SCS was practically required to identify the presence of the wetland hydrology parameter.[299]

"SCS shall determine whether an area of a field or other parcel of land has a preponderance of hydric soils that are inundated or saturated," and "which meet criteria set forth in the publication 'Hydric Soils of the United States 1985'[…]which is incorporated by reference."[300] In addition, the SCS shall determine whether land has a prevalence of hydrophytic vegetation present:

> For purposes of the definition of 'wetland,' […] land shall be determined to have a prevalence of hydrophytic vegetation if (i) SCS determines through the use of the formula specified in paragraph (b)(3) […] that *under normal circumstances*, such land supports a prevalence of hydrophytic vegetation. The term 'normal circumstances' refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." (emphasis added).[301]

Further, "[i]n the event the vegetation on such land has been altered or removed, SCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil under the same hydrological conditions."[302]

Significantly, the final regulations amended the definition of "converted wetlands" found in the interim regulations.[303] A wetland was no longer deemed converted if further manipulations of the land (i.e., draining, dredging, filling, leveling) were required to make possible the production of an agricultural commodity.[304]

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[298] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. at 35207 (to be codified at 7 C.F.R. pt. 12.31 (1987)).

[299] *See generally id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. at 35201 (to be codified at 7 C.F.R. pt. 12.2 (1987)).

[304] *Id.*

> 'Converted wetland' means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) *that makes possible the production of an agricultural commodity without further application of the manipulations described herein* if (i) such production would not have been possible but for such action; and (ii) before such action, such land was wetland and was neither highly erodible land nor highly erodible cropland.[305] (emphasis added).

The final regulations also amended the criteria for identifying when a wetland has been converted. "Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland set forth in [7 CFR] § 12.2(a)(6):

> (1) Where hydric soils have been used for production of an agricultural commodity *and the drainage or other altering activity is not clearly discernible*, SCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under normal conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered a converted wetland. (emphasis added).[306]

> (2) Where woody hydrophytic vegetation has been removed from hydric soils which permits the production of an agricultural commodity, and wetlands conditions have not returned as the result of abandonment under § 12.33(b), the area will be considered to be converted wetland.[307]

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[305] *Id.*
[306] *Id.*
[307] *Id.* at 35208.

The final regulations explained how to apply the definition of "agricultural commodity" provided in the interim regulations. For example, "grasses not tilled annually […] do not meet the definition of an agricultural commodity," while "grass[es…] used as a high residue crop in a crop rotation, *as distinguished from permanent hayland or grassland*, the existing crop rotation and management techniques may be considered an acceptable conservation system for the field." (emphasis added).[308]

The regulations broadened the exemption from ineligibility to receive USDA program benefits for production of an agricultural commodity on converted wetlands if the conversion "was commenced or completed" before December 23, 1985.[309] In other words, the 1987 regulations added the new concept of "prior converted croplands" ("PCC"):

> The *conversion* of a wetland […] will be considered to have been *completed before December 23, 1985*, if, before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible *without further manipulation* described herein, where such production on the wetland would not otherwise have been possible. (emphasis added). […Pre-12-23-85] converted wetlands may be improved by additional drainage, provided that no additional wetland or abandoned converted wetland is brought into production of an agricultural commodity."[310] (emphasis added).

The regulations consider the conversion of a wetland to have *commenced* prior to December 23, 1985 if, before such date:

> (i) Any of the activities described in § 12.2(a)(6) [i.e., drained, dredged, filled, leveled, or otherwise

[308] *Id.* at 35196.

[309] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. at 35203 (to be codified at 7 C.F.R. pt. 12.5 (1987)).

[310] *Id.*

> manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water)] *were actually started on the wetland*; *or*
>
> (ii) The person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) *or* by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland. (emphasis added).[311]

According to USDA, the final 1987 regulations were intended to provide persons who *commenced* a conversion with the opportunity to complete that conversion without unnecessary hardships:

> The purpose of the determination of conversion commencement […] is to implement *the legislative intent that those persons* who had actually started conversion of wetland or obligated funds for conversion prior to the effective date of the Act (December 23, 1985) *would be allowed to complete the conversion so as to avoid unnecessary economic hardship*. (emphasis added).[312]

The final regulations thus provided directions to those who sought to qualify for their pre-December 23, 1985 commenced conversion:

> (i) All persons who believe they have a wetland or converted wetland for which conversion began but was not completed prior to December 23, 1985, must, before September 19, 1988, request ASCS to make a determination of commencement in order to be considered for exemption under § 12.4(d)(1)(i).
>
> (ii) A person must show that the commenced activity has been *actively pursued* or the

[311] *Id.*
[312] *Id.*

> conversion will not be exempt under this section. In this context, *'actively pursued' means that efforts toward the completion of the conversion activity have continued on a regular basis since initiation of the conversion, except for delays due to circumstances beyond the person's control.* […] Any conversion activity considered to be commenced under this section shall lose its exempt status if not completed on or before January 1, 1995. Only those wetlands for which the construction has begun or to which the contract or purchased supplies and materials relate may qualify for a determination of commencement. (emphasis added).[313]

A commenced conversion designation qualifies the converted area or the minimum area the commenced activity could convert for the exemption from ineligibility:

> The final regulations, moreover, ensure that the "production of an agricultural commodity on wetlands converted before, or for which the conversion was commenced before [12-23-85] is exempt from [7 CFR § 12] for the area which was converted *or the minimum area the commenced activity could convert*." (emphasis added). "Maintenance or improvement of these converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production. (emphasis added).[314]

The 1987 FSA regulations also imposed a new requirement on persons seeking a pre-December 23, 1985 conversion exemption "to show *when a wetland was converted or*

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[313] *Id.* at 35203–04.
[314] *Id.* at 35208.

when conversion was commenced."[315] To this end, "[c]rop history may be used in converted wetland determinations to analyze the extent of conversion and the purposes for which conversion was undertaken."[316] In addition to crop history data, persons must provide as evidence, "receipts," "drawings," "plans" or other materials showing conversion began or completed before December 23, 1985.[317] Further, the final 1987 regulations defined the term "abandonment" for "converted wetlands," a term distinct from both prior commenced conversions and prior converted wetlands.[318] Abandonment occurs where "cropping, management *or maintenance operations* related to the production of agricultural commodities on converted wetlands" ceases (emphasis added).[319] Where cropping, management or maintenance operations have ceased, the wetland is abandoned unless it can be proven there was no intent to abandon it.[320] If there is no crop production for five years, then wetland criteria must be determined.[321]

VI. FEDERAL COURTS SHOULD UNDERSTAND THAT THEY CAN EXERCISE THEIR EQUITABLE DISCRETION TO APPLY THE 1993 JOINT EPA-CORPS RETROACTIVE REGULATIONS TO ENSURE THE PROPER AND CONSISTENT PLAIN TEXTUAL MEANING OF 'CONVERTED WETLANDS' FOR CWA AND FSA PURPOSES

A. Joint EPA-Corps 1993 Regulations Distinguish Between Wetlands and 'Converted Wetlands' Retroactively for CWA and FSA Purposes, & Broadly Reference USDA-SCS NFSAM Guidance[322]

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[315] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. at 35200 (to be codified at 7 C.F.R. pt. 12.32 (1987)).

[316] *Id.*

[317] *Id.* at 35207.

[318] *Id.*

[319] *Id.*

[320] *Id.*

[321] *Id.* 12.33

[322] *See* Lawrence A. Kogan, CWA § 404: *How So Few Words Re Wetlands Have So Greatly Impaled Private Property Rights*, *supra*, n. 2, at Sec. II(A)4(m)(xviii)(II)(F), at 46, 48 (referring 33. CFR § 328.3(b)(6) and (c)(9) of Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency, *The Navigable Waters Protection Rule: Definition of 'Waters of the United States'* – Final Rule (Jan. 23, 2020) (prepublication rule), 85 Fed. Reg. 22250, 22255, 22317, 22320, 22326-27, (April 21, 2020) https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf).

In August 1993, following the close of discovery but prior to the trial in the action at bar, the EPA and the Corps issued joint regulations endeavoring "to codify existing policy as reflected in [Corps] RGL 90-07, that prior converted cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands […B]oth agencies continue[d] to follow the guidance provided by RGL 90-7, which interpret[ed] our regulatory definition of wetlands to exclude PC cropland."[323] Significantly, the regulation's preamble acknowledged how administrative/regulatory consistency between the CWA and FSA could be enhanced if the EPA and the Corps, like the USDA-SCS, learned to broadly and flexibly utilize the guidance contained in the National Food Security Act Manual ("NFSAM").[324]

The 1993 joint regulations effectively signaled the intent of the EPA and the Corps to harmonize the term "converted wetland" for purposes of ensuring consistency between CWA § 404 and FSA §§ 1204 and 1222.[325] These regulations achieved this objective by promoting increased interagency (EPA-USDA-Corps) consultation and going beyond the specific USDA-NFSAM provisions referenced in Corps RGL 90-07, as appropriate, when addressing "prior converted cropland" and "farmed wetland" issues.[326] These regulations accorded retroactive treatment to all pre-December 23, 1985 prior converted croplands as other than "waters of the United States" if they had not been "abandoned."[327] In determining whether a prior converted cropland had been abandoned, these regulations directed the EPA and the Corps to use the SCS provisions on 'abandonment,' – i.e., the September 17, 1987 regulation and the NFSAM provisions.[328]

Although the EPA-Corps August 25, 1993 regulation discusses the SCS abandonment standard in the context of prior converted cropland, it is clear the SCS abandonment standard the EPA referenced in the NFSAM was the same standard contained in the September 17, 1987 USDA regulations, and such

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[323] Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45031–32 (Aug. 25, 1993) (to be codified as amended in scattered sections of 33, 40 C.F.R).

[324] *Id.* at 45031–34.

[325] *Id.*

[326] *Id.*

[327] *Id.* at 45036–37 (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R pt.230).

[328] *Id.* at 40534.

standard applies to all "converted wetlands" – both to prior completed conversions and to prior commenced conversions.[329] Thus, if a prior commenced conversion was abandoned under circumstances other than those beyond the landowner's control (e.g., due to intentional disruption, thwarting and nullification of a prior commenced conversion by federal agencies collaborating with third-party environmental and wildlife groups for ideological reasons), such that it could no longer be "actively pursued" pursuant to 7 CFR § 12.5(d)(5)(ii)-(iii), and consequently, completed by January 1, 1995, the commenced conversion would have lost its exempt status, and thus, its eligibility to become prior converted croplands.[330]

Hence, the USDA-SCS treatment the EPA and the Corps accorded to prior converted croplands deemed "abandoned" (i.e., not actively pursued during a successive 5-year period), is arguably analogous to the treatment USDA-SCS accorded to prior commenced conversions deemed "abandoned" (i.e., not completed to become prior converted croplands) before the expiration of the four-year-plus January 1, 1995 window period the 1987 USDA regulations had provided.[331] In each case, the subject land would lose its exempt status under both the FSA and the CWA.[332]

In *Brace*, Defendants endeavored to complete their prior commenced conversion before January 1, 1995, so the 30-acre Murphy tract would be treated as prior converted cropland excluded from the definition of "waters of the United States," and thus from CWA § 404 jurisdiction.[333] By September 21, 1988, USDA had already designated the Murphy tract 30-acre area (Field 14 on the USDA Form SCS-CPA-026) as a "converted wetland" ("CW") also qualifying as a prior commenced conversion ("CC") under the FSA.[334] Defendants had intended to return to USDA to secure a determination that the agricultural commodity crops they had grown and harvested (i.e., produced) on the Murphy tract 30-acre area – rye in 1986 and oats and hay in 1987

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[329] Highly Erodible Land and Wetland Conservation, 52 Fed. Reg. 35194 (Sept. 17, 1987) (to be codified at 7 C.F.R. pt. 12).

[330] *See id.* at 121; *see also* ECF No. 279 supra note 80 at 34-35; Highly Erodible Land and Wetland Conservation Determination at 4, *Brace,* No. 1:90-cv-00229, ECF No. 279-202.

[331] *See id.*

[332] *See id.*

[333] *See Brace*, 41 F.3d at 119–20 (3d Cir. 1994).

[334] *See id.* at 121.

– had qualified that land as prior converted cropland ("PC") entitled to exclusion from CWA § 404 jurisdiction.[335] However, by this time, EPA, USFWS, and USDA-SCS officials had already intervened and begun to entirely disrupt these efforts. For example, in 1987 and 1988, these agencies had issued multiple administrative CWA violation notices, cease-and-desist orders and threats of federal litigation.[336]

DOJ-ENRD trial counsel, years ago, clearly admitted the Government had intentionally disrupted Mr. Brace's completion of his prior commenced conversion to "protect the wetland."[337] There is also the "subject of prior converted, prior commenced."[338] The court found this was not a prior converted crop land, and determined, by stipulation, "this was a wetland at the time of the discharges."[339] According to the Government, the only thing commenced conversion reveals is "Mr. Brace commenced the conversion."[340] As Mr. Brace himself says, "the EPA stopped him before he could complete the tubing, before he could complete the conversion" (emphasis added).[341]

USG counsel's admitted disruption of Defendant's prior "commenced conversion" of the Murphy tract 30-acre area, however, should have estopped EPA at trial from arguing

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[335] *See* Tr. of Non-Jury Trial Proceedings at 19-21, *Brace*, No. 1:90-cv-00229, ECF No. 279-40.

[336] *See Brace,* 41 F.3d at 119–21.

[337] *See* ECF No. 279-40, *supra* note 335, at 539.

[338] *Id.*

[339] *Id.*; *see* ECF No. 279 *supra* note 80 at 57 (arguing that the Government had improperly misrepresented to the District Court the character of the pretrial stipulation it had executed with Brace on November 26, 1993 regarding the wetland status of the 30-acre area. The stipulation was not a stipulation of fact grounded upon a scientifically valid wetland delineation of that specific area, but rather a stipulation of law grounded upon a general EPA-Corps regulatory definition of "wetland" which the district court could have reviewed *de novo*. Although the district court had found there was "a wetlands on stipulation," it proceeded to find "that not more than 25% of the site met the definition." (citing Findings of Fact and Conclusions of Law, at para. 4, ECF No. 55)); Neither the District Court nor the Third Circuit, however, ever considered the caselaw regarding the extent to which federal courts are bound by party stipulations of fact and law, The case law shows, to the contrary, that federal courts have disregarded stipulations of fact where they are manifestly untrue. *See* Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281 (1917). And, it shows federal courts have disavowed and ruled they are not bound by stipulations of law. *See* Swift, 243 U.S. at 289; Estate of Sanford v. Comm'r of Internal Revenue, 308 U.S. 39, 50-51 (1939); Independent Ins. Agents of America v. Clarke, 955 F.2d 731, 733 (D.C. Cir. 1992); Sebold v. Sebold, 444 F.2d 864, 870 n.8 (D.C. Cir. 1971); Hankins v. Lyght, 441 F. 3d 96, 104 (2d Cir. 2006); Becker v. Poling Transp. Corp., 356 F.3d 381 (2d Cir. 2004).

[340] ECF No. 279-40, *supra* note 335, at 539.

[341] *Id.*

Defendant Robert Brace had "abandoned" it, given the USDA-NFSAM's criteria for determination of abandonment.[342] Pursuant to those criteria, Mr. Brace's performance of ongoing management and maintenance activities (including agricultural ditch maintenance, drainage tile system repair/replacement work, mowing) had supported his "commenced conversion" of that area from farmed pasturelands and hay lands to croplands – i.e., in preparation for the planting of an agricultural commodity, had been "actively pursued" and actually produced an agricultural commodity in 1986 and 1987.[343] It would most likely have been completed, certainly before January 1, 1995, but for, the disruption caused by the issuance of multiple federal agency CWA violation notices, compliance orders and cease-and-desist letters.

USG's prior trial counsel proceeded during the 1993 trial to make the several gross factual misrepresentations.[344] First, they stated the Brace's had not farmed or pastured the land.[345] Rather, the Government argued there was no established ongoing farming despite actions, like leveling and spreading, intended to create farming opportunities.[346] The Government also argued the Brace's convergence of a wetland to pastureland was not considered farming and in fact was merely "hacking around in a wetland."[347] Apparently, USG counsel had ignored the 1993 EPA-Corps joint regulations, which directed EPA and the Corps to broadly follow SCS' application of the NFSAM Part 512 prior converted cropland and abandonment rules, which could be reasonably interpreted as containing a "non-degradation clause" protecting wetlands as they existed as of the date of the FSA's enactment.[348]

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[342] *See* ECF No. 279, *supra* note 80 at 61–62.

[343] *See id.* at 35, n.11

[344] *See generally* ECF No. 279-40, *supra* note 335.

[345] ECF No. 279-40, *supra* note 335, at 10.

[346] *Id.* at 538.

[347] *Id.* at 538–39.

[348] *See* Horn Farms, Inc. v. Johanns, 397 F.3d 472, 474-475 (7th Cir. 2005) (holding that the 1996 amendment to the 1985 Swampbuster provisions of 16 U.S.C. § 3821-24, which "added an exception for wetlands that had been drained and farmed, had reverted to wetland status, and then were restored to agricultural use… [i.e., for a] 'wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985)' […] [was] a non-degradation clause: the legislation protect[ed] wetlands as they actually existed on the date of [the FSA's] enactment."); *see also* Orchard Hill Building Co. v. U.S. Army Corps of Engineers, No.15-cv-06344 (N.D. Ill 2017), slip op. at 10 (noting how, due to "differing standards among" the

Section V.A of the joint EPA/Corps August 25, 1993 regulations emphasizes the overall federal policy goal of ensuring consistency in the implementation of both the CWA and FSA with respect to activities undertaken on agricultural lands.[349]

> We believe […] that effective implementation of the wetlands provisions of the Act [FSA] *without unduly confusing the public and regulated community* is vital to achieving the environmental protection goals of the Clean Water Act. *The CWA is not administered in a vacuum. Statutes other than the CWA and agencies other than EPA and the Corps have become an integral part of the federal wetlands effort*. We believe that this effort will be most effective if the agencies involved have, to the extent possible, consistent and compatible approaches to insuring wetlands protection. We believe that this rule achieves this policy goal in a manner consistent with the language and objectives of the CWA. (emphasis added).[350]

As these regulations state, furthermore, the EPA and the Corps "believe that farmers should generally be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the Section 404 program."[351] Such regulatory consistency (harmony) will be achieved by "recognizing SCS's expertise in making [] PC cropland determinations" and by "continu[ing] to *rely generally on determinations made by SCS*." (emphasis added).[352] This goal also will be achieved by having the EPA and the Corps utilize the NFSAM in the same manner as USDA-SCS, in conjunction with other agency guidance documents, presumably, the Corps's 1987 Wetlands Delineation Manual:

Corps, EPA, and NRCS (formerly the SCS), "farmers often found it difficult to comply with all three sets of regulations. Thus in 1993, an effort to provide consistency between the three agencies, the Corps and EPA jointly adopted a rule implementing the NRCS's [SCS's] prior conversion exemption for purposes of the CWA. 33 C.F.R. § 328.3(b)(2).").

[349] *See* Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45031–32 (Aug. 25, 1993) (to be codified as amended in scattered sections of 33, 40 C.F.R).

[350] *Id.*

[351] *Id.* at 45033.

[352] *Id.*

> We believe that *consistency with SCS policy will best be achieved by our utilizing the NFSAM in the same manner as SCS*, i.e., as a guidance document used in conjunction with other appropriate technical guidance and field-testing techniques to determine whether an area is prior converted cropland. […] EPA and the Corps will […] implement this exclusion in a manner following the guidance contained in the NFSAM and appropriate field delineation techniques, and will continue to rely, to the extent appropriate, on determinations made by the SCS. […] The fact that we have not incorporated by reference the actual provisions of the NFSAM into our rules does not undercut our ability to maintain consistency. Rather, as explained above, *we believe that utilizing the NFSAM as a guidance manual, as it is used by SCS, will enhance consistency in the administration of the Food Security and Clean Water Act programs* (emphasis added).[353]

Section V.B of the 1993 joint agency regulations further identifies how the FSA's distinction between farmed wetlands and prior converted cropland serves as a reasonable basis to distinguish between wetlands and non-wetlands under the CWA:

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

[353] *Id.*

> CWA. In addition to the fact that we believe this distinction is an appropriate one based on the ecological goals and objectives of the CWA, *adopting the SCS approach in this area will also help achieve the very important policy goal of achieving consistency among federal programs affecting wetlands*. (emphasis added).[354]

To recall, the jointly issued 1993 EPA-Corps regulations stated a very important "policy goal of achieving consistency among federal programs affecting wetlands" which the agencies believed, in light of the FSA's enactment, was "vital to achieving the environmental protection goals of the Clean Water Act."[355] They also emphasized "the CWA is not administered in a vacuum."[356] Thus, the distinction these regulations had made between farmed wetlands and prior converted cropland can be more broadly understood as the distinction between non-converted wetlands and "converted wetlands" for both CWA and FSA purposes.[357]

The 1993 joint EPA-Corps regulations offer the grandfather provisions of Sections V.H and III.G as an additional basis to conclude that actively pursued non-disrupted prior commenced conversions and prior converted croplands should be treated similarly for CWA and FSA purposes.[358] Section V.H is a subsection of Section V of the regulations entitled, "Revision to the Definition of 'Waters of the United States' to Exclude Prior Converted Cropland."[359] Section V generally recognizes prior converted croplands ("PC") as converted wetlands that no longer meet the 3-parameter wetlands definition set forth in the 1987 Corps Wetlands Delineation Manual, and thus, as falling outside the definition of WOTUS for both CWA and FSA purposes, under 33 CFR § 328.3(a)(8) and 40 CFR § 232.2.[360]

Section V.H, however, precluded exclusion from the definition of WOTUS, and thus, from § 404 jurisdiction, of all

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[354] *Id.* at 45032.

[355] Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45031–32 (Aug. 25, 1993) (to be codified as amended in scattered sections of 33, 40 C.F.R.).

[356] *Id.* at 45031.

[357] *Id.* at 45032.

[358] *See id.* at 45031–33.

[359] *Id.* at 45031.

[360] *See id.* at 45031–33.

converted wetlands "that were converted to prior converted cropland [("PC")] between 1972 and 1985 as a result of *unauthorized* discharges of dredged or fill material" (emphasis added).[361] This prohibition seemed to apply to all previously *non*-permitted/unauthorized wetlands conversion activities that relied upon a post-December 23, 1985 USDA-ASCS determination that they had been completed by December 23, 1985, and thus, qualified for PC status.[362]

Section III.G is a subsection of Section III of the regulations entitled, "Revisions to Definition of 'Discharge of Dredged Material 33 CFR 323.2(d) and 40 CFR 232.2(e)."[363] It appears to have been applied to cover prior converted croplands not qualifying under the grandfather provision of Subsection V.H. Section III, in accordance with CWA § 404 permitting, generally covered all discharges of dredged material into a WOTUS unless an applicable permitting exemption applied.[364] Section III.G, however, provided grandfather protection to exclude from the new definition "certain 'discharges of dredged material' that, in some Corps districts, were not considered to be subject to regulation under the previous definition of that term." (emphasis added).[365]

This latter grandfather provision had been intended to end the practice by different Corps districts of exercising their discretion and reaching inconsistent results which the regulated public had deemed unfair and inequitable.[366] It excluded from CWA § 404 permitting "discharges of dredged material associated with ditching, channelization, and other excavation activities in [WOTUS] where such discharges were not previously regulated and where such activities had commenced or were under contract prior to the date of publication of this final rule in the Federal Register."[367] These activities, if performed in a wetlands by a farmer, can easily be considered activities undertaken incident to the "conversion" of pastured or hayed wetlands to a crop farming use. In addition, such activities had to be "completed within one

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[361] Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45034 (Aug. 25, 1993) (to be codified as amended in scattered sections of 33, 40 C.F.R.).

[362] *Id.* at 45027.

[363] *Id.* at 45009–10.

[364] *See id.*

[365] *Id.* at 45027.

[366] *Id.*

[367] Clean Water Act Regulatory Programs, 58 Fed. Reg. 45027, 45037 (Aug. 25, 1993) (to be codified as amended in scattered sections of 33, 40 C.F.R.).

year from the date of publication of the final rule" (i.e., by Aug. 25, 1994).[368]

Section III.G provided an extension of the one-year grandfather period to "further ensure that implementation of the revised definition proceed[ed] in a fair and equitable manner."[369] The Corps could issue an extension concerning the grandfather clause on a case-by-case basis until August 25, 1996, depending on whether the discharger could demonstrate the activity was (1) pursued continuously or periodically, (2) submitted to the Corps a completed 404 individual permit for review by August 25, 1994, and (3) ensured such excavation activity did not continue beyond August 25, 1996.[370] If all three conditions had been met, the Corps allowed the discharger to complete the activity while the district office reviewed his/her permit application.[371]

B. USDA-NFSAM's Broad Approach for Exempting Previously Farmed Wetlands Converted for Crop Production

The SCS had used Part 512 of the NFSAM entitled "Wetland Conservation" to address various issues related to the conversion of wetlands for possible crop production.[372] NFSAM § 512.20(a), for example, states the SCS was responsible for determining whether federally assisted project activities in a wetland constituted a "prior conversion," which is "a wetland alteration completed prior to December 23, 1985."[373] NFSAM § 512.22(b)(3)(vii) states SCS also was responsible for determining

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[368] *Id.*

[369] Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45009–10 (Aug. 25, 1993) (to be codified as amended in scattered sections of 33, 40 C.F.R).

[370] *Id.* at 45027.

[371] *Id.* (At least one Corps district office notified the public that it had interpreted the one-year (to August 25, 1994) grandfather provision of Section III.G of these joint 1993 regulations as having excluded wetland conversion activities, such as ditching, channelization, and/or other excavation activities, presumably including side-casting and grubbing and clearing of sedimentation and debris inundated channel overbank and contiguous and adjacent areas. This means the Corps district office had interpreted the grandfather provision as covering both CWA § 404-unauthorized prior converted croplands and unauthorized prior commenced conversions of wetlands that would not have qualified under the Section V.H grandfather provision. *See* reproducing U.S. Army Corps of Engineers Walla, Walla District, Informational Public Notice: Excavation Activities, Placement of Pilings, and Prior Converted Cropland at 3 (Sept. 17, 1993), *Brace,* No. 1:90-cv-00229, ECF No. 279-185.

[372] *See* U.S. DEP'T OF AGRIC., NAT. RES. CONSERVATION SERV., NATIONAL FOOD SECURITY ACT MANUAL, SECOND EDITION at 512.20 (1988), *Brace,* No. 1:90-cv-00229, ECF No. 279-66.

[373] *Id.*

how much conversion had occurred. This is based on the amount of work completed, the materials purchased before December 23, 1985, and what work was completed, or planned for, either through contracting or materials.[374]

NFSAM § 512.22(b)(3)(vi) indicates such SCS determination, however, is typically dependent on the *ASCS* having first determined "Federally assisted project activities which convert wetlands or provide outlets for persons to convert wetlands for the production of an agricultural commodity […had] started before December 23, 1985."[375] In other words, such SCS determination requires first the ASCS had determined a commenced conversion had occurred because (1) conversion activities had already begun, or (2) funds were legally committed or otherwise expended, either through contracting or the purchase of materials.[376] In addition, NFSAM § 512.22(b)(3)(v) indicates such SCS determination also is dependent on the ASCS having first consulted with the U.S. Fish and Wildlife Service about the "commenced determination" it is evaluating.[377]

Most interesting, and arguably, most significant, is NFSAM § 512.31 entitled, "Use of Prior Converted Croplands (PC)," which groups together both pre-December 23, 1985 completed (prior) conversions AND pre-December 23, 1985 commenced conversions under one category of "converted wetlands" ("CW") eligible for one or more of the FSA exemptions.[378] NFSAM § 512.31 excludes any wetland converted before December 23, 1985 from the provisions of the FSA.[379] Individuals may continue to maintain and even improve drainage systems put in place on areas classified as prior converted wetlands, with the provison that conversion of new wetlands does not occur.[380] NFSAM § 512.31(a) considers wetlands given a commenced conversion determination as "prior conversions when the commenced activities are completed."[381] The area must also meet the prior converted cropland criteria and be completed before January 1, 1995.[382]

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[374] *Id.* at § 512.22 (b)(3)(vii)..
[375] *Id.* at § 512 (b)(1)(i)-(ii).
[376] *Id.*
[377] *Id.* at 512.22(b)(3)(v).
[378] *Id.* at 512.31.
[379] *Id.* at 512.31.
[380] *Id.*
[381] *Id.* at 512.31(a).
[382] *Id.*

NFSAM § 512.31(b) precludes landowners who obtained a prior commenced conversion ("CC") determination for a given area (field) from converting "additional wetland acres beyond that which ha[d] been determined to be commenced."[383] This treatment is consistent with NFSAM § 512.31's prohibition against landowners bearing a prior completed conversion ("PC") determination converting any additional wetlands.[384] NFSAM § 512.36 shows this consistency of treatment between prior conversions and commenced conversions in a chart entitled, "Summary of Use, Maintenance and Improvements of Various Wetlands Conditions," an excerpt of which is reproduced below:[385]

Wetland Condition	Use	Maintenance	Improvement
Prior Conversion (PC) Converted prior to 12/23/85 but not abandoned	Produce ag commodities	Yes	Yes
Commenced Conversion (CC)	Same as Prior Conversion When Completed	Yes	Yes

NFSAM § 512.32(a), furthermore, distinguishes the *post*-December 23, 1985 use of lands designated pre-December 23, 1985 commenced conversions from the use of *post*-December 23, 1985 converted wetlands (CW) "not subject to one or more of the exemptions."[386] Moreover, NFSAM § 512.35(c) distinguishes the use of *pre*-December 23, 1985 commenced conversions from farmed wetlands ("FW") of the kind discussed in Corps RGL 90-07.[387] The limitations the 1987 final USDA regulations impose

[383] *Id.* at 512.31(b).

[384] *See* Gunn v. U.S. Department of Agriculture, 118 F.3d 1233, 1235 (8th Cir. 1997) (holding wetlands that were converted to production of agricultural commodities before the cutoff date of December 23, 1985, "can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way.").

[385] NFSAM, *supra* note 372, at 512.36.

[386] *Id.* at § 512.32(a).

[387] *See* Gunn v. U.S. Department of Agriculture, 118 F.3d at 1238 (stressing USDA's distinction between wetlands and converted wetlands and identifying fields that a

upon the *post*-December 23, 1985 use of non-converted farmed wetlands are analogous to the limitations placed upon prior commenced conversions and prior completed conversions in only one respect: they prevent further drainage of the wetland as it previously existed on December 23, 1985.[388]

Finally, NFSAM § 512.16(a)-(c), like the September 17, 1987 final USDA regulations discussed above, set forth the USDA standard for "abandonment" which the August 25, 1993 joint EPA/Corps regulations directed such agencies to follow.[389] In such, the standard for abandonment is "is the cessation of cropping, management, or maintenance operations on prior converted croplands or farmed wetland."[390] The regulation goes on to define cropping, management or maintenance.[391] Cropping involves the rotation of grasses, legumes or other pasture products relating to development of an agricultural commodity.[392] Actions which support cropping, including "tillage, planting, mowing, harvesting, repair of drainage systems, *etc.*," are considered management or maintenance. [393]

To consider a prior converted wetland abandoned, the wetland must be both (1) unused, unmanaged or unmaintained for 5 successive years; and (2) not be involved in a USDA

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farmer failed to demonstrate as having been "commenced converted" pre-Dec. 23, 1985 as likely "farmed wetlands."); Barthel v. U.S. Department of Agriculture, 181 F.3d 934, slip op. at 6 (characterizing the farmer's land, which had not been designated either as "prior converted" or "commenced converted," consistent with NFSAM § 5.14.23(a) as "'farmed wetland pasture or hayland" i.e., as "wetlands that were manipulated and used for pasture or hayland prior to December 23, 1985, [which] still meet wetland criteria"…); *See also* 52 Fed. Reg. at 35208 (Sept. 17, 1987).

[388] *See Barthel,* 181 F.3d at 937-938, 939 (holding with respect to non-converted farmed wetlands, that the then "current [USDA] regulation on 'use of wetland and converted wetland' provides that changes in the watershed due to human activity which increases the water regime on a person's land, can result in a person being allowed 'to adjust the existing drainage system to accommodate the increased water regime.' 7 C.F.R. § 12.33(a)," provided "'the previously accomplished drainage or manipulation is not significantly improved upon , so that wetland characteristics are further degraded in a significant way'").

[389] 52 Fed. Reg. at 35195-6, 7 CFR § 12.33(b) (2019).

[390] NFSAM, *supra* note 372, at 512.16(a)-(c).

[391] *Id.* at 512.16(a)-(c).

[392] The 1987 USDA regulations similarly provide that, "grasses not tilled annually […] do not meet the definition of an agricultural commodity," while "grass[es…] used as a high residue crop in a crop rotation, *as distinguished from permanent hayland or grassland*, the existing crop rotation and management techniques may be considered an acceptable conservation system for the field." (emphasis added). *See* 52 Fed. Reg. at 35196 (Sept. 17, 1987).

[393] NFSAM, *supra* note 372, at 512.16(a)-(c).

conservation or restoration program.[394] Wetlands found to be abandoned are then classified as wetlands and fall under specific wetland provisions.[395] Much like the Corps' 1986 final regulations,[396] the NFSAM definition of "abandonment," in effect, treats agricultural ditch maintenance and tile drainage system repair and replacement related to a prior converted cropland, a prior commenced conversion when completed, or a previously farmed wetland, as the normal farming activities of an established farming operation, where grasslands (e.g., hay) and pasturelands are regularly rotated with crop production.[397]

CONCLUSION

Given the similarities and distinctions discussed, the U.S. District Court in *United States v. Brace* should conclude that USDA-SCS had previously determined Defendants' Murphy tract qualified as an FSA-"converted wetland" ("CW") because it had undergone a much more extensive degree of conversion than what is characteristic of a farmed wetland subject to CWA § 404 permitting pursuant to Corps RGL 86-9 and Corps RGL 90-07. Given these similarities and distinctions, USDA-ASCS determined the *pre-December 23, 1985* activities and expenses Mr. Brace had undertaken and incurred on the Murphy farm tract had constituted a prior commenced conversion rendering it eligible to receive USDA subsidies *and* to be treated as a prior converted cropland when completed.

In 1986 and 1987, Mr. Brace planted and harvested rye, oats and hay crops within the Murphy farm tract's 30-acre area.[398] This was the only remaining step necessary to qualify his prior commenced conversion ("CC") of that area as a prior converted cropland ("PC") under the FSA.[399] It was only in September 1988 that Mr. Brace secured from USDA-ASCS the commenced conversion designation for Field 14, which engendered a look-back to the conversion work he continuously pursued from 1977 through December 23, 1985.[400] Given Mr.

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394 *Id.*
395 *Id. See also* 33 C.F.R. § 328.3(c)(9) (2020).
396 33 C.F.R. § 323.4(a)(ii) (1986).
397 NFSAM, *supra* note 372, at 512.16(a)-(c).
398 *See generally* ECF No. 279-40, *supra* note 335.
399 *See generally id.*
400 *See id.*

Brace's planting and harvesting of rye, oats and hay crops in 1986 and 1987, USDA-ASCS only had designated the area as a CC rather than a PC.[401]

Once Mr. Brace obtained his CC, he would likely have been able to complete that prior commenced conversion of the Murphy farm tract by 1989 or 1990, significantly earlier than the January 1, 1995 statutory deadline. Mr. Brace was certainly on track to do just that, but for, the United States's successful disruption of it, which had been beyond his control to prevent.[402] Moreover, the District Court may reasonably conclude Mr. Brace had *not* "abandoned" his normal farming activities or his "commenced conversion" of the Murphy farm tract. Mr. Brace's prior "commenced conversion, once completed by 1989 or 1990, would have been treated as prior converted cropland excluded from CWA § 404 jurisdiction pursuant to the retroactive application of the 1993 joint EPA-Corps regulations broadly applying the NFSAM "converted wetland" ("CW") provisions.

In overturning the District Court's ruling in favor of the Braces, the Third Circuit Court of Appeals metaphorically "drank the Kool-Aid" comprised of unreliable legislative history snippets and wetland-related environmental zealotry bereft of supporting statutory text and common sense. Instead, the Appellate Court neglected to examine and determine the proper and correct plain textual meaning of the term "converted wetlands" for purposes of both Clean Water Act ("CWA") § 404 and Food Security Act of 1985 ("FSA") §§ 1204 and 1222. Had a proper plain textual meaning been applied in the original action at bar, Mr. Brace would have been enabled to complete his USDA-authorized prior commenced conversion of the Murphy tract 30-acre area (and of the adjacent Marsh tract 11-acre area).[403] Such a result would have been consistent with Congress's expressed intent of using the FSA as the prescribed doorway through which farmers, like Mr. Brace, could proceed CWA-permit-free to rotate their historically mixed agricultural land use from natural and cultivated wetland pasturing and haying to more productive cropping in furtherance of the nation's efforts to both promote agriculture, preserve wetlands and control soil erosion.

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[401] *See id.*
[402] *See id.*
[403] *See* ECF No. 279, *supra* note 80, at 41, 49.

As the USDA-SCS's former state biologist for the Commonwealth of Pennsylvania recently testified, "in Pennsylvania, it was merely a matter – for forested sites, it was merely a matter of taking the trees out and pull[ing] the stumps out. That was a conversion."[404] He also testified "that the NFSAM only had required Pennsylvania landowners operating north of the 40th parallel (i.e., located north of the southern Pittsburgh metro area) 'in areas that [originally] were forested […] to […] clear it and plant it to an agricultural commodity,' to secure a prior converted cropland ("PC") designation" – i.e., for it to become a PC.[405] "It never had to be effectively drained [to be converted…] [s]o there's a lot of PC in Pennsylvania that still has wetland hydrology and is on hydric soils."[406] Consequently, if an Erie farmer had cleared stems and stumps from a formerly wooded area and then planted a crop before December 23, 1985, "USDA would have designated that area as 'PC,' even if it had not effectively been drained and still effectively met the wetland hydrology parameter."[407]

In addition, the USDA Pennsylvania state biologist testified that Mr. Brace had received in 1988 the first, if not the only, USDA-authorized/designated "commenced conversion" within Pennsylvania.[408] He also testified that he hadn't been previously involved in any commenced conversion determination under the FSA outside Pennsylvania, and that he had not been aware Mr. Brace possessed a soil and water conservation plan he acquired in the mid-1970's and then updated.[409] Yet, both he and the USDA-SCS Conservationist proceeded to determine verbally, without reference to any USDA form documents, maps or images relating to Brace's commenced conversion (e.g., USDA-ASCS Form AD-1026 and attached map, USDA-SCS-CPA-026, etc.),[410] that the Murphy farm tract deserved the designation of "converted wetlands" ("CW") for FSA purposes.[411]

Finally, the District Court may reasonably conclude, the balance of equities tilt in Brace's favor because of the recently

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[404] Barry Isaacs Dep. at 26:2-4, Jan. 26, 2018, *Brace,* No. 1:90-cv-00229, ECF No. 279-56.

[405] ECF No. 279, *supra* note 80, at 53.

[406] *Id.* at 53-54; ECF No. 279-56, *supra* note 404, at 21:8–23:14.

[407] ECF No. 279, *supra* note 80, at 54.

[408] ECF No. 279-56, *supra* note 404, at 18:6-19:16.

[409] *Id.* at 31:8–34:21.

[410] *Id.* at 35:12–38:1; ECF No. 279, *supra* note 80, at 39–40.

[411] *See* ECF No. 279-56, *supra* note 404, at 30:17-32:12.

presented findings contained in Defendants' filings and expert reports. The Defendants' wetlands expert report rebuts the scientific validity of EPA's 1989-1990 wetlands delineation report which failed to meet the standards of the 1987 Corps Wetland Delineation Manual.[412] It also indicates that EPA's wetland evaluation ignored how Defendants had historically used the Murphy tract, along with two adjacent Brace farm tracts, as a single mixed agricultural farm engaged in cropping, cultivating hay, and cultivated and natural pasturing since the 1930's.[413]

The report also confirms how Brace had thereafter been prevented from removing recurring beaver dams on and around the site due to federal agency imposition of time-consuming and costly permit review processes which enabled the beaver dams to transform the wetland hydrology of the site in the interim.[414] Furthermore, said report corroborated the findings of the U.S. Court of Claims that the Murphy tract had been mostly dry by 1979,[415] until approximately 1993, and that the purpose of the 1996 consent decree was "to restore what one EPA official described as the 'hydrologic drive of the[] wetlands' to where it was in 1985."[416]

Moreover, the corrected report of Defendants' hydraulic/hydrologic engineering experts explains the quantitative hydraulic impact on Brace farm channel surface water levels and channel overbank and adjacent and contiguous areas, of five beaver dams present within and beyond the Murphy farm tract CDA, plus the qualitative impact of an additional large beaver dam located to the northwest of the Murphy farm tract CDA.[417]

Therefore, it remains more than possible the District Court may decide to exercise its equitable powers to ensure

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[412] Kagel Environmental, LLC Murphy Tract Wetland Rebuttal R. at 22-26, *Brace,* No. 1:90-cv-00229, ECF No. 279-199.

[413] This finding was consistent with Defendants's more recent discovery contained in the documented materials supporting a U.S. National Park Service National Historic Place Registry filing. Those documented materials provide historical proof that mixed agriculture had historically been practiced in Waterford Township and Erie County since, at least, the 1830's. *See* ECF 279, *supra* note 80, at 40.

[414] ECF No. 279-199, *supra* note 412, at 45–48.

[415] ECF No. 279, *supra* note 80, at 63; *see* Brace, 72 Fed. Cl. at 343 (2006).

[416] 72 Fed. Cl. at 344; *see* Jeffrey Lapp Dep. at 610:6-19, *Brace,* No. 1:90-cv-00229, ECF No. 279-8.

[417] ECF No. 279, *supra* note 80, at 87–91 (citing Hydrologic and Hydraulic Evaluation of Elk Creek on the Robert Brace Farm, *Brace,* No. 1:90-cv-00229, ECF No. 279-42).

justice is done in this action. Unfortunately, neither EPA nor the Corps had exercised their equitable discretion in favor of Mr. Brace before the 1993 bench trial, even though a joint agency administrative guidance issued barely two months after the original action had been filed would have directed them to do so. EPA and Corps enforcement personnel could have decided, as a matter of equity, *not* to refer Mr. Brace's case to DOJ-ENRD for civil prosecution because Mr. Brace had received misinformation from USG agency personnel upon which he reasonably relied regarding whether the discharge required a 404 permit.[418]

In sum, considering the prior EPA and Corps failure to examine the "equitable considerations" surrounding the Brace's case prior to initiating the 1990 enforcement action, the *Brace* District Court may now reasonably conclude justice and equity in the current CD enforcement action warrants such consideration. The District Court, therefore, should exercise its equitable powers to harmonize the plain text meaning of the term "converted wetlands" for both CWA § 404 and FSA §§ 1204 and 1222 purposes. This would enable Mr. Brace to complete his prior commenced conversion of the Murphy farm tract's approximate 30-acre area, which he would have accomplished in 1989 or 1990 by the planting and harvesting of crops (i.e., production of an agricultural commodity), but for the Government's improper disrupting actions.

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[418] *See EPA-Corps Guidance on Judicial Civil and Criminal Enforcement Priorities* (12-12-90), at 3, discussed in *Defendants' Redrafted Opposition/Response to United States Second Motion to Enforce Consent Decree and for Stipulated Penalties*, para. 21, at 17–19.