

Ducking the Truth About the Great 'Commenced Conversion' Conspiracy Against America's Farmers

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I. *Background*

As I previously reported in the *American Agriculturalist*¹ and other media sources,² Erie, Pennsylvania farmer, Robert Brace, was among a select group of American farmers who, before the end of September 1988, had vigilantly secured a coveted "commenced conversion" ("CC") determination with respect to certain of his farm fields from the U.S. Department of Agriculture's Agricultural Stabilization and Conservation Service ("USDA-ASCS").

The official CC designation rendered the conversion of his designated fields from wetlands to croplands eligible to receive USDA program funding pursuant to the exemption (from USDA financial program benefit ineligibility) available under the Food Security Act of 1985 ("FSA"),³ as if USDA had designated those CC fields as "prior converted" ("PC") croplands.⁴

The official CC designation evidenced that Mr. Brace had, consistent with the FSA and then-applicable regulations,⁵ provided sufficient documentation to show that he had both actually physically commenced and committed substantial financial funds toward the conversion from wetlands to croplands of portions of two farm fields situated within two of three contiguous and adjacent farm tracts comprising his hydrologically integrated farm located in Waterford Township, Pa. For these purposes, permissible conversion activities included the excavating and dredging, clearing, leveling, draining and filling, etc. of dikes and ditches in wetlands so as to impair or reduce the follow, circulation or reach of water.⁶

The application of these FSA statutory provisions and corresponding USDA implementing regulations, and of subsequent Clean Water Act ("CWA") regulations the U.S. Army Corps of Engineers ("Corps") issued in September 1990⁷ and the Corps and the Environmental Protection Agency ("EPA") jointly issued in August 1993⁸ with retroactive effect to the FSA's enactment date (December 23, 1985), also rendered the official USDA-ASCS CC designation of those fields presumptively eligible for the exclusion from "waters of the United States" definition, and consequently, from CWA Section 404 jurisdiction, as if USDA had designated such CC fields as PC croplands.⁹ Mr. Brace's CC determination had qualified for this exclusion, at least, until the government was able to affirmatively show that he had not "actively pursued" and completed his "commenced conversion" within the FSA regulation's prescribed 10-year period (on or before Jan. 1, 1995)¹⁰ (i.e., he had "abandoned" said conversion¹¹) due to circumstances *other than* those beyond Mr. Brace's control.¹²

The evidence to-date reveals, however, that EPA and the Corps, led by the U.S. Fish & Wildlife Service ("FWS") Pennsylvania Field Office (within Region 5),¹³ intentionally interfered with,¹⁴

actively contested¹⁵ “on “relevance grounds,”¹⁶ and then disregarded¹⁷ the Erie County USDA-ASCS Committee’s CC determination for the two commenced-converted Brace farm fields in question.¹⁸ These Federal agencies also failed, thereafter, to affirmatively establish that Mr. Brace had not completed (i.e., he abandoned) the conversion of those fields before the expiration of the FSA regulation’s prescribed window due to circumstances other than those beyond his control. Presumably, senior local FWS officials had acted aggressively against Mr. Brace based on their broad reading of the FWS’ “consultative” role under the FSA¹⁹ which, in no instance, could have legitimately been construed as legally binding on the local USDA-ASCS Committee. The government subsequently brought an action against Mr. Brace for violation of CWA Section 404 in October 1990, on the ostensible grounds that Mr. Brace’s commenced conversion of wetlands into croplands had destroyed the habitat of North American migratory birds and the quality of wetland waters. This litigation²⁰ has continued virtually unabated for 27 years, most recently in the form of an action to enforce an allegedly violated consent decree,²¹ despite the ongoing presumptive PC status of Mr. Brace’s authorized CC under the statutory and regulatory exclusions noted above, the steady disclosure of new information resulting from extended discovery²² granted notwithstanding the government’s considerable opposition,²³ and the Brace’s subsequent filing of a countersuit,²⁴ which together have incrementally diminished the government’s case against him.

II. *Outside Governmental Influences Revealed in Prior Official FWS Documents*

Newly revealed evidence clearly shows how the FWS also had interfered with local USDA-ASCS Committee CC determinations in Minnesota, North Dakota and South Dakota at approximately the same time. This evidence is contained in prior witness statements and exhibits submitted to the U.S. House of Representatives Committee on Agriculture during the hearing Ag Committee Chairman E. (Kika) De La Garza had convened in Moorhead, Minnesota on June 24, 1988.²⁵ Indeed, these submissions indicate how very closely senior officials from FWS’ National and Region 3 Offices²⁶ had worked with prominent nongovernmental environmental and wildlife extremist groups and special interest groups (hunting groups portraying themselves as wildlife conservation groups) to ensure the reversal of USDA-ASCS CC determinations.

For example, four official 1988 FWS documents previously submitted during the June 24, 1988 House Agriculture Committee hearing²⁷ as exhibits accompanying a 50-page prepared statement of the National Wildlife Federation (“NWF”) discussed below shed light on the extent of the FWS’ extensive interference with local USDA-ASCS CC determinations in those states, particularly on private lands situated within public drainage districts containing temporary wetlands.

The first of these FWS documents, was a January 14, 1988 correspondence²⁸ issued by former FWS Regional Director (Region 3), James C. Gritman²⁹ and directed to the nonprofit Wildlife Management Institute (“WMI”),³⁰ a virtual hunting group-in-disguise,³¹ in apparent response to a December 18, 1987 letter correspondence previously received from WMI’s Western Field Representative, Keith Harmon.³² The 1-14-88 FWS letter expressed alarm about FWS field operative observations that the USDA agencies had not been implementing the Swampbuster provisions “fully consistent with the purposes, intent, and letter of the Food Security Act or the step-down regulations,” and that the FWS’ “role with U.S. Department of Agriculture agencies ha[d] been continual hair-splitting that accommodate[d] more drainage.” This first FWS document also indicated that Gritman had apparently shared with WMI a non-publicly disclosed FWS Region

3 memorandum he had been dispatched to the FWS National Director to “see this issue elevated to the investigation level so that corrective measures are implemented through the appropriate oversight channels.” Among the names copied on this letter correspondence were Jan Goldman-Carter,³³ a former and current Counsel of the National Wildlife Federation (“NWF”), and former NWF Prairie Wetland Resource Center Director, Wayne ‘Skip’ Baron.³⁴

The second of these FWS documents, a February 23, 1988 memorandum³⁵ from FWS National Director, Frank H. Dunkle,³⁶ to the Regional Directors of FWS Regions 1-7, was an apparent response to the prior January 1988 Region 3 Director’s memorandum. Entitled, “Fish and Wildlife Service Responsibility in Swampbuster Implementation,” it raised to the national level “[s]erious questions regarding the effectiveness of Swampbuster implementation efforts,” and instructed all FWS Regional Directors to “offer the greatest possible technical support to agencies of the Department of Agriculture as they proceed[ed] with field implementation” of the FSA’s Swampbuster provisions. This memorandum also recommended that each FWS Region use the form then being “utilized by Region 3 to report observed wetland modifications.”

The third of these FWS documents, a March 8, 1988 memorandum³⁷ bearing the same title, from then Acting FWS Region 3 Director (Assistant Regional Director), John Popowski,³⁸ to the former Directors of the FWS Region 3 Branch of Special Projects (BSP) and Division of Endangered Species and Habitat Conservation (EHC), is an apparent response to the February 23, 1988 Dunkle memorandum. It noted with alarm how “Swampbuster, however conceived and legislated in Washington, has had minimal success in Region 3 in preserving wetlands on private lands involved in Department of Agriculture commodity programs.” It also emphasized how the USDA SCS and ASCS: 1) “ha[d] transformed wetlands into non-wetlands through lax interpretation of the regulations” and frequently failed to consult with FWS except where USDA standards were unable resolve an issue; 2) differed with FWS over what constituted a Swampbuster “violation;” and 3) decried the loss of Type 1 wetland potholes “needed for duck pairing activity in the early spring.” The memo recommended the protection of “the prairie pothole, playa, and seasonally flooded and ponded wetland values that existed as of December 23, 1985.”

The fourth of these FWS documents, a March 9, 1988 memorandum³⁹ from Lloyd Jones,⁴⁰ former Supervisor of the FWS’ North Dakota Wetland Habitat Office to the FWS’ Region 6 Farm Bill Coordinator, contained responsive comments to the February 23, 1988 Dunkle memorandum that were apparently intended also to be incorporated into the FWS’ forthcoming proposals for the 1990 Farm Bill, which ultimately proceeded “to make the act of drainage a violation,”⁴¹ in service to the FWS’ campaign against already commenced conversions. The memorandum emphasized how ASCS county offices in North Dakota had negatively reacted to the FWS’ 1986 and 1987 reporting of hundreds of “potential violations” of the FSA’s Swampbuster provisions. “ASCS response has been that it is not the responsibility of the Service [FWS] to report potentials, they do not want the information and they have reacted by going to the press accusing the Service of being ‘Spies in the Sky.’”

This fourth FWS document also referenced then ongoing efforts of FWS to reach memorandums of understanding with the USDA-SCS to define the processes for making wetland determinations and minimal effect determinations under the FSA. Although it remains unknown whether these specific efforts succeeded, it can be confirmed that the FWS’ mother agency, the U.S. Department

of Interior, subsequently executed a broader memorandum of agreement (“MOA”)⁴² with USDA, EPA and the Corps in January 1994. The 1994 interagency MOA covered the USDA’s implementation of the FSA Swampbuster provisions for purposes of both FSA Section 1222 and CWA Section 404 compliance. In particular, the MOA’s Section IV.A stated that, “wetland delineations made by [USDA-]SCS on agricultural lands, *in consultation with FWS*, will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction” (emphasis added). Section V.C of the MOA identified how USDA-SCS would “certify SCS wetland delineations made prior to November 28, 1990, [...] to ensure the accuracy of” those prior determinations. This MOA Section effectively enabled FWS and the other federal agencies to retroactively reconsider and revise prior USDA-SCS-directed wetlands decisions that had informed prior positive USDA-ASCS commenced conversion determinations without affording the regulated farming community the due process of law to which they were constitutionally entitled under the Administrative Procedure Act.

III. *Outside Governmental & Non-Governmental Influences Revealed in Prior Agency-Wildlife Group MOUs, and Environmental & Wildlife Group Testimonies & Initiatives*

Apart from the purely interagency MOA discussed above, the FWS had executed on March 14, 1984 a memorandum of understanding (“MOU”) with the Interior Department’s Bureau of Land Management (“BLM”), the USDA Forest Service (“USDA-FS”) and Ducks Unlimited, Inc., (“DU”) a hunting group posing as a wildlife habitat conservation organization. DU’s mission⁴³ has long been to “conserve[], restore[], and manage[] wetlands and associated habitats for North America’s waterfowl.” This MOU (“84-SMU-004”), a copy of which the government has thus far refused to produce in discovery in the Brace case,⁴⁴ “provide[d] the foundation to establish a dynamic habitat improvement program on public lands within the National Forest System branch of the Forest Service.” As the relevant sections of two successor USDA-FS-DU MOUs describing the 1984 MOU (i.e., Section III.D of “99-SMU-028,” executed on Dec. 14, 1998,⁴⁵ and Sections A, B.5, C.1, C.3, C.4, D.1, and D.2 of “09-SU-11132422-326,” executed on Oct. 9, 2009⁴⁶) have since revealed, however, DU had helped to expand the 1984 MOU’s original public lands scope of coverage to include “riparian areas and associated uplands *on private lands*” (emphasis added) situated within DU and federal agency-identified wetland ecosystems and watershed areas for the purpose of protecting North American migratory bird wetlands habitats for hunters and birdwatchers, consistent with DU’s “landscape approach to habitat conservation.”⁴⁷ The DU website, furthermore, reveals that DU has long helped to shape successive Farm Bills (e.g., 2007,⁴⁸ 2012,⁴⁹ 2014,⁵⁰ 2018⁵¹) to ensure against further conversion of wetlands to croplands for its members’ benefit. Several government deponents in the Brace case have testified they had held DU memberships during the 1980’s.

Although DU had not participated in the June 1988 House AG Committee hearing, the National Wildlife Federation (“NWF”) did. In fact, the NWF’s extensive June 1988 prepared testimony⁵² also had been submitted on behalf of the Minnesota Conservation Federation (its affiliate), the Natural Resources Defense Council (“NRDC”), the Environmental Defense Fund (“EDF”), etc.⁵³ alleging *inter alia* that general improprieties and abuses had been committed by USDA Soil Conservation Service (“USDA-SCS”) and ASCS officials in Minnesota, North Dakota and South Dakota in implementing the FSA’s Swampbuster rules. In addition, said testimony alleged, more specifically, how such USDA officials in Minnesota and North Dakota had rendered unsupported

commenced conversion (CC) determinations in favor of farmers, at the expense of both wetlands and wildlife.⁵⁴ To this end, the NWF testimony, in part, emphasized how approximately “87% of the ducks bred in the lower 48 states breed in the Dakotas, Minnesota and Montana.”⁵⁵ The NWF testimony, furthermore, implored Congress to tighten up the FSA’s Swampbuster provisions to create a chilling effect against additional conversions of wetlands to farmlands in “the palustrine wetlands of South Florida, the Nebraska Sandhills and Rainwater Basin, the pocosins of the North Carolina coastal plain, [...] western riparian wetlands, [...] and] the prairie potholes and the Lower Mississippi River bottomlands.”⁵⁶ Evidence unearthed several years later (in 1992) by the Pennsylvania Landowners Association reveals how well funded the NWF, NRDC and EDF had been to implement their apparently joint *national* commenced conversion disruption agenda.⁵⁷

The Minnesota⁵⁸ and North Dakota⁵⁹ chapter offices and the national office⁶⁰ of the Wildlife Society, “an international association of [current and former] professional wildlife managers working in the public [governmental] and private sectors,” also submitted prepared testimony at the June 1988 hearing. The Wildlife Society’s national office emphasized how “the commenced conversion determination regulations [had been] interpreted inappropriately” by the USDA-ASCS which had allegedly failed to “require appropriate and adequate evidence necessary to enforce [and strictly interpret] conversion determination regulations.”⁶¹

The National Audubon Society,⁶² as well, submitted prepared testimony to the House Ag Committee for use at the June 1988 hearing. It expressed support for retaining the FSA’s Swampbuster provisions to ensure that “further conversion of wetlands [...] to croplands would be greatly reduced.” More extensive narrative reports issued in 1988⁶³ and 1989⁶⁴ by two wetland management districts of the Audubon Society’s North Dakota chapter detailed shortcomings of the ASCS’s Swampbuster compliance monitoring process, including commenced conversion determinations, that echoed those described by the NWF.

As the testimonies of these environmental and wildlife groups disclosed, they had worked closely with the FWS and other federal agencies since, at least, 1985, influencing the shape and tenor of subsequent revisions of the FSA and USDA implementing regulations against farmer interests. Indeed, farmer groups, such as the Minnesota, North Dakota and South Dakota Farmers Unions⁶⁵ and the Minnesota Association of Wheat Growers,⁶⁶ testified at these 1998 Ag Committee hearings about how these outside groups collectively managed to largely shape both the interim (June 1986, July 1986) and final (September 1987) regulations the USDA adopted for the purpose of implementing the FSA’s Swampbuster provisions, including those governing commenced conversion determinations, in ways that harmed farmers’ constitutionally protected private property rights.

IV. *Outside Governmental & Non-Governmental Influences Revealed in Prior U.S. Government Accounting Office Report*

Former House Agriculture Committee Chairman E. (Kika) De La Garzak further sought to politicize the environmental and wildlife group testimonies alleging rampant FSA Swampbuster violations in Minnesota, North Dakota and South Dakota by using them as the basis to request that the U.S. General Accounting Office (now the U.S. Government Accountability Office (“GAO”)⁶⁷) conduct an investigation of USDA’s questioned practices. The GAO ultimately agreed and issued

its reported findings in September 1990 (Report RCED-90-206),⁶⁸ less than one month prior to the commencement of the government's suit against Mr. Brace.

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

"Implementing the act's swampbuster exemption provision has, in some instances, been a source of controversy because the criteria used to make decisions for group projects have frequently changed [...] as ASCS developed the final program rules and regulations [...] ASCS has amended or modified the exemption criteria for commenced conversion decisions several times since the publication of the interim rules in June 1986. [...] *These changes occurred for a variety of reasons, such as litigation by environmental groups and requests from special interests.* Table 4.1 highlights the changes in USDA's criteria between June 1986 and December 1989. [...] Further, application of the criteria has not always been consistent; the documentation provided does not, in many instances, support the exemption decisions; and consultation with the Fish and Wildlife Service was not always carried out as required by law" (emphasis added).⁶⁹

The GAO report concluded that "the changing criteria and sometimes *contradictory nature of commenced conversion decisions*" (emphasis added) led to county committee and other ASCS official decisions resulting in the draining of wetlands, especially where group projects were involved. It noted that, as the result of these phenomena, the National Wildlife Federation had repeatedly intervened and requested the ASCS to modify its commenced conversion decisions during 1987-1989.⁷⁰

Although the GAO report appears to have addressed mostly alleged drainage district group project irregularities leading to insufficient or nonenforcement of frequently changing commenced conversion documentary criteria,⁷¹ its scope arguably had been intended to be much broader. For example, it cited how USDA-ASCS' then latest national statistics had allegedly shown that "producers requested 5,259 exemptions for commenced conversions," of which "45 percent were approved, 13 percent were denied, and the remaining 42 percent were pending" as of April 1989, when national reporting was suspended due to inaccurate data.⁷² In addition, the GAO recommended that the Agriculture Secretary "(1) monitor the application of the wetlands commenced conversion criteria so the decisions made are consistent and (2) enforce the requirements of the Fish and Wildlife Service consultations on commenced conversion decisions in order to utilize its expertise in the area."⁷³

V. *Outside Non-Governmental Influences Revealed in Prior Environmental and Wildlife Group Litigation & Legal Scholarship*

During September 1988, at approximately the same time the Erie County, Pennsylvania ASCS Committee had granted Mr. Brace's two fields a commenced conversion determination covering

no more than 35 acres in total, the Bottineau County, North Dakota ASCS Committee granted the Bottineau County Water Resource District a commenced conversion determination covering 139 square miles. Unable to persuade the national ASCS Deputy Administrator to reverse that decision, the National Wildlife Federation brought suit in 1989 in the U.S. District Court for the District of North Dakota.⁷⁴ The District Court dismissed the NWF's complaint on the ground that "appellants' injuries were insufficient to give them standing under *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)."⁷⁵

The Eight Circuit Court of Appeals reversed the District Court's ruling holding that the NWF had established Article III standing to present its members' claims before the federal courts.⁷⁶ It reached this conclusion based, in part, on congressional findings regarding the value of wetlands which had been included in an FSA-related bill originating in 1985 in the House Merchant Marine and Fisheries Committee⁷⁷ that was ultimately enacted into law as the "Emergency Wetlands Resources Act of 1986."⁷⁸ The NWF had referenced this same 1985 committee bill language, as explained in a related House Committee report,⁷⁹ in its submitted prepared testimony during the June 1988 House Ag Committee hearing.⁸⁰

At least one colored law review article authored by the former Counsel to the NWF's Prairie Wetlands Resource Center (Anthony N. Turrini) discussed the *NWF v ASCS* litigation in glowing terms.⁸¹ It highlighted how the Eight Circuit Court of Appeals had found that "the link between the wrongful issuance of a commenced determination and injury resulting from wetland drainage [was] not too speculative to support standing."⁸² It also concluded that, by "allowing nonfarmers to sue the ASCS," the Court's ruling effectively compelled farmers "who intend[ed, thereafter,] to convert wetlands to consider the cost of litigation and possibility of having invalid exemptions reversed by a federal court."⁸³

The article's author, moreover, recycled the FWS and NWF argument that had attributed nonenforcement of the FSA's Swampbuster provisions to the "organizational structure of the ASCS," which he condescendingly referred to as having been comprised of "locally elected county committees [that] misconstrue[d], misappl[ied], or ignore[d] swampbuster in order to excuse farmers for wetland drainage."⁸⁴ Furthermore, the author disparaged the ASCS as "institutionally biased," ASCS personnel as "lack[ing] technical expertise [and formal training] in wetland issues," and part-time ASCS committee members as "sometimes personally biased" and "hav[ing] little professional or financial incentive to enforce laws or regulations with which they disagree[d]."⁸⁵ Finally, the author discussed the NWF's extensive role in drawing attention to and ensuring the stricter implementation and enforcement of the FSA's Swampbuster provisions⁸⁶ and in triggering the 1990 GAO report which focused, in part on improper commenced conversion determinations.⁸⁷ Given the timing and sequence of this NWF litigation relative to the FWS administrative challenges to USDA-ASCS commenced conversion determinations, both in the Brace case and in the Midwest, the likelihood these events had been thoughtfully choreographed should not be overlooked.

VI. *Outside U.S. Influences Revealed in Previously Executed International and Interstate Waterfowl & Water Quality Agreements*

FWS⁸⁸ and Ducks Unlimited, Inc.⁸⁹ publications, the Wildlife Society's June 1988 prepared testimony discussed above, the text of the then applicable North American Wetlands Conservation Act of 1989,⁹⁰ and the 1998 and 2009 USDA-FS-DU MOUs⁹¹ reveal that the elaborate domestic public-private sector campaign to end the conversion of wetlands to croplands was premised, in part, on the perceived need to fulfill the legal obligations imposed by international treaties intended to protect migratory birds and their wetland habitats. These agreements include, in reverse chronological order, the North American Waterfowl Management Plan ("NAWMP")⁹² (executed in May 1986 by the Minister of the Environment Canada and the U.S. Secretary of the Interior in and in 1994 by Mexico), the prior Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere,⁹³ and the earlier 1916⁹⁴ and 1936⁹⁵ Migratory Bird Conventions the U.S. executed with Canada and Mexico, respectively.

The NAWMP, in particular, emphasized how, as of 1986, the waterfowl industry had generated "in excess of several billion dollars annually," how the 1916 Migratory Birds Convention had been established "to ensure conservation of migratory birds, and how the "[r]eversing or modifying [of] activities that destroy or degrade waterfowl habitat [was] imperative to the future success of waterfowl management."⁹⁶ It also highlighted how the most important nesting habitat of numerous duck species are the prairie pasturelands that have been converted to "intensively farmed land," the "unaltered natural environments along the Great Lakes-St. Lawrence lowlands, in the boreal forest, and in coastal lowlands and estuaries" (i.e., "natural wetlands"), and the "wetlands in the eastern farmlands [which were] also be being drained and cultivated at an increasing rate."⁹⁷

The NAWMP recommended that the signatory parties "induce farmers and ranchers to manage their lands for waterfowl production," and to promote "[s]oil, water and wetland conservation [...] on [their] private lands." In other words, the "goal would be to protect and improve prairie wetlands for duck production by ensuring that wetland basins are conserved, along with an adequate amount of nearby upland nesting cover"⁹⁸ Lastly, the NAWMP pointed out how "the financial participation of private conservation organizations,⁹⁹ such as Ducks Unlimited,¹⁰⁰ [...was] critical to the implementation of the NAWMP."¹⁰¹ To this end, it recommended that the signatory governments should conduct research "on the effects of land use practices on the breeding success of waterfowl," and should, "in cooperation with such conservation organizations as Ducks Unlimited" develop and demonstrate to farming interests "methods of integrating sound agricultural land use with duck production."¹⁰² Stated differently, the United States Government ultimately sought to persuade American farmers such as Mr. Brace to breed waterfowl on their private croplands deemed by FWS to be of marginal economic value primarily to cultivate more remunerative game prey and haute cuisine, not to mention, "aesthetic, conservational, and recreational values" for nonfarmer third parties.

The FWS subsequently initiated the national "Partners for Fish and Wildlife Program" in 1987,¹⁰³ which induced farmers to execute voluntary agreements to restore fish and wildlife habitat on their private lands in exchange for receiving FWS technical assistance and cost-sharing. "The Partners Program in Pennsylvania [...] began in 1988,¹⁰⁴ primarily as a wetland restoration program" targeting the habitats of "migratory birds, anadromous fish, and Federally-listed threatened and endangered species. [...] Restoration efforts [have] focus[ed] on *returning hydrology to formerly drained wetlands by removing or disabling field drainage tiles, plugging drainage ditches, and constructing low berms to further inhibit drainage*" (emphasis added).¹⁰⁵ The PA Partners Program

closely cooperated with the Pennsylvania Game Commission and Fish and Boat Commission – two law enforcement agencies, as well as, with Duck Unlimited, Inc. to achieve these goals. Such close cooperation was consistent with the testimony of at least one recent deponent in the Brace case, a former PA Game Commission “law enforcement” field officer. He had testified twenty-five (25) years ago that PA Game Commission field officers who had other states bordering and/or migratory bird routes in their districts would frequently be deputized by the FWS to enforce federal game (species and habitat) laws.¹⁰⁶

Along with the NAWMP, the Great Lakes Water Quality Agreement of 1978 (“GLWQA ‘78”) which the U.S. and Canada executed on November 22, 1978 had been intended to govern the mutual rights and obligations of all Basin jurisdictions, including the Great Lakes States, to use, conserve, and protect Basin water resources. These rights and obligations were subsequently reaffirmed by the Governors of the eight (8) Great Lakes States and the Premiers of Quebec and Ontario Provinces in the preamble to the Great Lakes Charter – Principles for the Management of Great Lakes Water Resources, executed on February 11, 1985.¹⁰⁷ These rights and obligations were again reaffirmed in the 1987 Protocol to the Great Lakes Water Quality Agreement of 1978 (“GLWQA ‘87”), executed on November 18, 1987.¹⁰⁸ The GLWQA ‘87 instructed the signatory parties to pay “direct particular attention to the identification and preservation of significant wetland areas in the Great Lakes Basin Ecosystem which are threatened by dredging and disposal activities.”¹⁰⁹ It also directed the parties to identify, preserve and, where necessary, rehabilitate “[s]ignificant wetland areas in the Great Lakes System that are threatened by urban and agricultural development...”¹¹⁰

The Great Lakes Charter and the GLWQA ‘87 were each subsequently amended and supplemented in June 2001,¹¹¹ and September 7, 2012,¹¹² respectively. On December 13, 2005, the eight (8) Great Lakes States, the Province of Ontario and the Government of Quebec executed a new international agreement known as the Great Lake-St. Lawrence River Basin Sustainable Water Resources Agreement.¹¹³ On the same day, the same eight (8) Great Lakes States executed an interstate (regional) compact subsequently approved by Congress, known as the Great Lakes—St. Lawrence River Basin Water Resources Compact,¹¹⁴ for purposes of implementing that international agreement. Each of these agreements, unlike the earlier agreements discussed above, however, incorporated controversial international sustainable development environmental law concepts such as the precautionary principle that effectively [Europeanized](#) ¹¹⁵and thereby drastically altered, contrary to the U.S. Declaration of Independence, the Constitution and the Bill of Rights, the way U.S. federal and state wetlands laws were thereafter implemented against private landowners, especially farmers.

VII. *Conclusion*

The Trump administration has repeatedly hailed how it has relieved America’s farmers of their prior regulatory burdens¹¹⁶ and “ended the regulatory assault on [their] way of life.”¹¹⁷ Nevertheless, merely delaying by two years the implementation of the former Obama administration’s “Waters of the U.S.” (“WOTUS”) rule which extends EPA and the Corps’ already expansive CWA Section 404 wetlands jurisdiction over private farmlands,¹¹⁸ while endeavoring to rescind it,¹¹⁹ doesn’t go nearly far enough to guarantee this relief. President Trump’s more informed advisers likely recognize that he is facing a deeply entrenched regulatory and law

enforcement legacy bureaucracy linked to the “deep state;”¹²⁰ but, they may not realize that they must go back much farther in time, perhaps to 1977, or at least, to 1984 or 1985, to properly address the wetlands regulatory juggernaut that has steadily decimated our nation’s small and medium-sized farms. Specifically, he must both work with Congress and direct the heads of those federal agencies that participated in the prior conspiracy/choreography of curtailing the completed or commenced conversions of wetlands to croplands (i.e., FWS, EPA, Corps and USDA), to reclaim, reestablish and reaffirm for all of America’s farmers, especially Mr. Brace, their former PC and CC exclusions from FSA funding ineligibility and CWA Section 404 wetlands jurisdiction. Doing less or simply ignoring the magnitude of this problem will spell the end of America’s traditional farming communities as we have come to know them.

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ENDNOTES

¹ See Lawrence A. Kogan *Attorney Clarifies Brace’s Wetlands Case Against EPA*, American Agriculturalist (Dec. 14, 2017), available at: <http://www.americanagriculturalist.com/epa/attorney-clarifies-brace-s-wetlands-case-against-epa> .

² See Lawrence A. Kogan, *When Assessing Burdens for Farmers, Other Landowners, White House Shouldn’t Duck Overhaul of Wetlands Regulatory Juggernaut*, The WLF Legal Pulse (Feb. 9, 2018), available at: <https://wlflegalpulse.com/2018/02/09/when-assessing-burdens-for-farmers-other-landowners-white-house-shouldnt-duck-overhaul-of-wetlands-regulatory-juggernaut/>; The Kogan Law Group, P.C., Press Release - *30-Year-Old EPA Wetlands Case Takes Favorable Turn for Aggrieved Pennsylvania Farmer* (July 12, 2017), available at: <https://www.pr.com/press-release/723108>; Lawrence A. Kogan, *Update: Justice May Yet be Served in 30-Year-Old EPA Wetlands Case Against Small Erie, PA Farmer*, WLF Legal Pulse (July 11, 2017), available at: <https://wlflegalpulse.com/2017/07/11/update-justice-may-yet-be-served-in-30-year-old-epa-wetlands-case-against-small-erie-pa-farmer/>; Lawrence A. Kogan, *US Food Security and Farmers’ Livelihoods at Stake in “Waters of the US” Rule Rewrite*, The WLF Legal Pulse (April 20, 2017), available at: <https://wlflegalpulse.com/2017/04/20/us-food-security-and-farmers-livelihoods-at-stake-in-waters-of-the-us-rule-rewrite/>; Lawrence A. Kogan, *EPA Disregard for “WOTUS” Prior Converted Cropland Exclusion Kills Ag Jobs and Contributes to Nation*, Canada Free Press (April 29, 2017), available at: <http://canadafreepress.com/article/epa-disregard-for-wotus-prior-converted-cropland-exclusion-kills-ag-jobs-an> .

³ See P.L. 99-198 (99 Stat. 1354, 1507-1508) (Dec. 23, 1985)) (16 U.S.C. 3822(a)(1) – “The Food Security Act of 1985 (‘FSA’),” specifically, FSA Secs. 1221 and 1222(a)(1). See also P.L. 101-624, 104 Stat. 3359, 3572-3573 (Nov. 28, 1990) – the “Food, Agriculture, Conservation, and Trade Act of 1990,” Secs. 1421(b) and 1422(b) amending FSA Secs. 1221 and 1222; P.L. 104-127 (110 Stat. 888, 987-989) (April 4, 1996) - the “Federal Agriculture Improvement and Reform Act of 1996,” Secs. 321 and 322 amending FSA Secs. 1221 and 1222, as previously amended.

⁴ See 7 CFR 12.5(d)(1)(i), 52 FR 35194, 35203 (Sept. 17, 1987) (“A person shall not be determined to be ineligible for program benefits under [Sec.] 12.4 as the result of the production of an agricultural commodity on: (i) Converted wetland if the conversion of such wetland was commenced *or* completed before December 23, 1985” (emphasis added). See also P.L. 99-198 (99 Stat. 1354, 1508), FSA Sec. 1222(a)(1).

⁵ See 7 CFR 12.5(d)(3), 52 FR 35194, 35203; 7 CFR 12.5(d)(5)(iv), 52 FR 35194, 35203-35204.

⁶ See P.L. 99-198 (99 Stat. 1354, 1504), FSA Sec. 1201(4)(A); 7 CFR 12.2(a)(6), 52 FR 35194, 35201.

⁷ See U.S. Army Corps of Engineers, Regulatory Guidance Letter (RGL 90-7), “SUBJECT: Clarification of the Phrase ‘Normal Circumstances’ as it Pertains to Cropped Wetlands (Sept. 26, 1990; exp. Dec. 31, 1993), Sec. 5.d.

⁸ See 33 CFR 328.3(a)(8) and 40 CFR 230.3, 58 FR 45008, 45031-45033, 45036-45037 (Aug. 25, 1993).

⁹ See Lawrence A. Kogan, *US Food Security and Farmers’ Livelihoods at Stake in “Waters of the US” Rule Rewrite*, The WLF Legal Pulse (April 20, 2017), *supra*; Lawrence A. Kogan, *Update: Justice May Yet be Served in 30-Year-Old EPA Wetlands Case Against Small Erie, PA Farmer*, WLF Legal Pulse (July 11, 2017), *supra*.

¹⁰ See 7 CFR 12.5(d) (5) (iii), 52 FR 35194, 35204.

¹¹ See RGL 90-7, Sec. 5.e; 58 FR 45033-45034, Sec. V.G.

¹² See 7 CFR 12.5(d)(5)(ii), 52 FR 35194, 35203-35204; 7 CFR 12.33(b), 52 FR 35194, 35208. See also P.L. 104-127 (110 Stat. 888, 988-989) (April 4, 1996), Secs. 322(b)(1)(A) and 322(b)(2)(G)(i)-(iii).

¹³ See U.S. Fish and Wildlife Service, *Pennsylvania Field Office*, available at: <https://www.fws.gov/northeast/pafo/>.

¹⁴ See United States Department of the Interior Fish and Wildlife Service, *Letter Correspondence from David J. Putnam, Fish and Wildlife Biologist to James Butch, Environmental Protection Agency* (Feb. 2, 1989, available at: <https://nebula.wsimg.com/7f81484d50d4f783297405192e560145?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>).

¹⁵ See Erie County ASCS Committee, *Minutes of Meeting of September 14, 1988* (9/14/88), at Sec. 3.D, available at: <https://nebula.wsimg.com/8799c04a0cf48228e4336be4e8b15006?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>; See also Erie County ASCS Office, *Letter Correspondence from Joseph Burawa, County Exec. Dir. to Robert Brace* (9/14/88); United States Department of Agriculture, Agricultural Stabilization and Conservation Service, Erie County ASCS Office, *Letter Correspondence from Carroll S. Lesik, County Exec. Dir. to David Putnam, U.S. Department of Interior Fish & Wildlife Service* (1/19/89); United States Department of the Interior Fish and Wildlife Service, *Letter Correspondence from Edward Perry, Acting Supervisor, to Carroll S. Lesik, County Exec. Dir. USDA-ASCS* (2/7/89); Erie County ASCS Committee Minutes of Meeting of February 8, 1989 (2/9/89), at Sec. 5.E.

¹⁶ See *United States v. Brace*, No. 1990-229 (WD Pa.), Deposition of David J. Putnam (April 7, 1992), at p. 45, available at: <https://nebula.wsimg.com/edf29054de6a40c3e85ff64d1c78a57c?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1> (Former U.S. Department of Justice Trial Attorney, David A. Dana, Esq. stated as follows: “Just for the record, not to be repetitive, the United States has a standing objection on relevance grounds to questions regarding the commenced determination of the swampbuster provisions since it’s [an] entirely separate program unrelated in this case as to whether a violation occurred of the Clean Water Act.”)

¹⁷ See Lawrence A. Kogan, *EPA Disregard for “WOTUS” Prior Converted Cropland Exclusion Kills Ag Jobs and Contributes to Nation*, Canada Free Press (April 29, 2017), *supra*.

¹⁸ See Executed Forms AD-1026, “Highly Erodible Land and Wetland Conservation Certification” (9-7-88); “Data Needed for Swampbuster Commenced and Third-Party Determinations” (8-31-88); “Highly Erodible Land and Wetland Conservation Determination” (and accompanying map) (9-15-88), available at: <https://nebula.wsimg.com/01fc8086088f602011be83939d257cb4?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

¹⁹ See P.L. 99-198 (99 Stat. 1354, 1508) (Dec. 23, 1985), FSA Sec. 1223(2) (16 U.S.C. 3823(2)).

²⁰ See *United States v. Brace - Brief Summary* (WDPA 2017), available at: <https://nebula.wsimg.com/88e02bc126e19c1928175c26d76f81f9?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

²¹ See *United States v. Brace*, Civil Action No. 90-229, Doc. 83 - *United States’ Memorandum of Law in Support of Motion to Enforce Consent Decree and for Stipulated Penalties*, available at: <https://nebula.wsimg.com/4ef9465362dec48ce3b8a9a520f2aace?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

²² See *United States v. Brace*, Civil Action No. 1:90-cv-00229, Doc. 203, *Order*, available at: <https://nebula.wsimg.com/10b72133f5fc3543cee58521124acd80?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

²³ See *Brace Wins Battle Against U.S. Government Effort to Shut Down Discovery in 30-Year Old Prior Converted Cropland/Clean Water Act Wetlands Case*, available at: <https://nebula.wsimg.com/0ba88023faa6b25a391dfe6ef1e42b40?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

²⁴ See The Kogan Law Group, P.C., Press Release - *30-Year-Old EPA Wetlands Case Takes Favorable Turn for Aggrieved Pennsylvania Farmer* (July 12, 2017), available at: <https://www.pr.com/press-release/723108>.

²⁵ See U.S. House of Representatives Committee on Agriculture, *Review of the Sodbuster and Swampbuster Provisions of the Food Security Act of 1985 and Drought Conditions in Minnesota and Upper Midwest*, Serial No. 100-106 (100th Cong., 2d Sess., June 24, 1988), available at: <https://catalog.hathitrust.org/Record/002776195>.

²⁶ See U.S. Fish & Wildlife Service, *Conserving the Nature of America - Regional Map*, available at: <https://www.fws.gov/where/>.

²⁷ See U.S. House of Representatives Committee on Agriculture, *Review of the Sodbuster and Swampbuster Provisions of the Food Security Act of 1985 and Drought Conditions in Minnesota and Upper Midwest*, Hearing Report Serial

No. 100-106 (100th Cong., 2d Sess.) (June 24, 1988), available at: <https://nebula.wsimg.com/c43e6279bc8ec3ead104e240e9bd0c04?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

²⁸ See United States Department of the Interior Fish and Wildlife Service, *Letter Correspondence from James Gritman to Keith W. Harmon*, Wildlife Management Institute (Jan. 14, 1989), available at: <https://nebula.wsimg.com/af42a2167c28184c949efc12ea11bbb4?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

²⁹ See Department of the Interior Fish and Wildlife Service New Release, *Jim Gritman Named Director of Fish and Wildlife Service's North Central Region* (Dec. 21, 1987), available at: <https://www.fws.gov/news/Historic/NewsReleases/1987/19871221.pdf>.

³⁰ See The Wildlife Management Institute, *About the Wildlife Management Institute*, <https://wildlifemanagement.institute/about>.

³¹ See The Wildlife Management Institute, *WMI Board of Directors*, available at: <https://wildlifemanagement.institute/about/board>.

³² See Dr. Keith Harmon, Field Representative, Wildlife Management Institute, available at: <https://books.google.com/books?id=ewFEAQAAAJ&pg=PA1874&lpg=PA1874&dq=keith+harmon+%2B+wildlife+management+institute&source=bl&ots=LVV2gHfYoH&sig=8FA7F0KW1-SXvbnFan-zj9nPOwA&hl=en&sa=X&ved=0ahUKewjAiKWruYLZAhWmTN8KHfRMB1YQ6AEINTAF#v=onepage&q=keith%20harmon%20%2B%20wildlife%20management%20institute&f=false>.

³³ See Environmental Law Institute, *National Wetlands Awards, Awardee, 1993 Nonprofit Category, Jan Goldman-Carter*, available at: <http://elinwa.org/awards/recipients/jan-goldman-carter>; See also River Network, *Jan Goldman-Carter, Director, Wetlands and Water Resources, National Wildlife Federation*, Before the United States House of Representatives Subcommittee on Water, Power, and Oceans of the Committee on Natural Resources, Hearing on ‘Empowering States and Western Water Users Through Regulatory and Administrative Reforms’ (April 13, 2016), available at: http://democrats-naturalresources.house.gov/imo/media/doc/testimony_goldman-carter.pdf.

³⁴ See The Wildlife Society North Dakota Chapter Newsletter (Jan. 1991), at p. 5 (“Panel Discussion – The 1985 Farm Bill, Its Results’ and the 1990 Farm, Agriculture, Conservation, and Trade Act Predictions”), available at: <https://ndctws.files.wordpress.com/2014/10/jan1991.pdf>.

³⁵ See United States Department of the Interior Fish and Wildlife Service, Memorandum from FWS National Director, Frank H. Dunkle, to the Regional Directors of FWS Regions 1-7, *Fish and Wildlife Service Responsibility in Swampbuster Implementation* (Feb. 23, 1998), available at: <https://nebula.wsimg.com/8d3d3c52eeb0d1cfa8201079b47c9a25?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

³⁶ See Department of the Interior News Release, *President Reagan Selects Frank H. Dunkle To Head Interior's Fish and Wildlife Service* (March 25, 1986), available at: <https://www.fws.gov/news/Historic/NewsReleases/1986/19860325.pdf>.

³⁷ See United States Department of the Interior Fish and Wildlife Service, Memorandum from Acting Regional Director, Region 3, John Popowski, to FWS Region 3 Branch of Special Projects (BSP) and Division of Endangered Species and Habitat Conservation (EHC), *Fish and Wildlife Service Responsibility in Swampbuster Implementation* (March 8, 1988), available at: <https://nebula.wsimg.com/bbcac294562b01f6ad8519a13e0f9eca?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

³⁸ See Department of the Interior, U.S. Fish and Wildlife Service, *Endangered Species Technical Bulletin*, Vol. XIII No. 1 (Jan. 1988) at p. 2, available at: <https://www.fws.gov/endangered/news/pdf/1988%20Jan%20Vol%20XIII%20No%201.pdf>.

³⁹ See United States Department of the Interior Fish and Wildlife Service, Memorandum from Lloyd Jones, Supervisor of the FWS’ North Dakota Wetland Habitat Office to the FWS’ Region 6 Farm Bill Coordinator, *Comments on Director's Memo of 2-23-88 – Requesting Information on Swampbuster* (March 9, 1988), available at: <https://nebula.wsimg.com/06c2610c6e448ea1caa46311a66dbafc?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁴⁰ See Department of the Interior Fish and Wildlife Service News Release, *Prairie Wetlands, Traditional Havens for Wildlife, Proving Boon to Drought-Stricken Midwest Farmers* (Aug. 24, 1988), available at: <https://www.fws.gov/news/Historic/NewsReleases/1988/19880824.pdf>.

⁴¹ See Anthony N. Turrini, *Swampbuster: A Report from the Front*, 24 Indiana Law Review 1507, 1511 (1991), available at: <https://journals.iupui.edu/index.php/inlawrev/article/view/2935/2859> (“In a major victory for

conservationists, swampbuster was amended to make the act of drainage a violation. Farmers who manipulate wetlands are ineligible for subsidies until they restore the affected wetland to its original condition.”)

⁴² See Memorandum of Agreement Among the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior, and the Department of the Army, *Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act* (1-6-94), available at: <https://nepis.epa.gov/Exe/ZyPDF.cgi/200053FC.PDF?Dockey=200053FC.PDF>.

⁴³ See Ducks Unlimited, *About Ducks Unlimited*, available at: <http://www.ducks.org/about-du>.

⁴⁴ See *United States v. Brace*, Civil Action No. 90-229, *United States’ Response to Defendants’ Second Set of Requests for Production*, available at: <https://nebula.wsimg.com/a3a572730def44994e7b616e1e88ba96?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁴⁵ See *Memorandum of Understanding between the USDA Forest Service and Ducks Unlimited, Inc.* (99-SMU-028) (Dec. 14, 1998), available at: <https://nebula.wsimg.com/95578550b923091d8fea65bcb040701?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁴⁶ See *Service-Wide Memorandum of Understanding Between Ducks Unlimited, Inc. and United States Department of Agriculture Forest Service* (09-SU-111132422-326) (Oct. 9, 2009), available at: <https://nebula.wsimg.com/f73821dd999fb2ff68af5978d7efef49?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁴⁷ See Ross Melinichuk, *Ducks Unlimited’s Landscape Approach to Habitat Conservation*, *Landscape and Urban Planning*, Vol. 32, Issue 3, pp. 211-217 (Elsevier 1995), at abstract, available at: <https://www.sciencedirect.com/science/article/pii/016920469507002C>.

⁴⁸ See Ducks Unlimited, *Getting it Done in the Great Lakes, Farm Bill Summary – What is the Farm Bill*, available at: http://www.ducks.org/media/Conservation/GLARO/ documents/ library/ policy/FarmBill_GL.pdf.

⁴⁹ See Scott Yaich, *Wetlands and the Farm Bill*, Ducks Unlimited, available at: <http://www.ducks.org/conservation/public-policy/farm-bill/wetlands-and-the-farm-bill/page1>.

⁵⁰ See Ducks Unlimited, *Farm Bill – The Importance of Farm Bill Policy to Ducks Unlimited*, available at: <http://www.ducks.org/conservation/public-policy/farm-bill>.

⁵¹ See Ducks Unlimited, *Wetlands, Waterfowl, and the Farm Bill*, available at: <http://www.ducks.org/conservation/public-policy/farm-bill/wetlands-waterfowl-and-the-farm-bill>.

⁵² See National Wildlife Federation, *Statement of the National Wildlife Federation on the Application of the Food Security Act of 1985, Title XII, Subtitle C (“Swampbuster”)*, Before the House Committee on Agriculture, Field Hearings, Moorehead, Minnesota, presented by John Rose, Minnesota Conservation Federation (June 24, 1988), available at: <https://nebula.wsimg.com/5529377423c30b61763b65e05715f819?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁵³ See National Wildlife Federation, *Statement of the National Wildlife Federation on the Application of the Food Security Act of 1985, Title XII, Subtitle C (“Swampbuster”)*, Before the House Committee on Agriculture, Field Hearings Moorehead, Minnesota, presented by John Rose, Minnesota Conservation Federation, Submitted on Behalf of National Wildlife Federation, Fergus Falls Fish and Game Club, Minnesota Conservation Foundation, Natural Resources Defense Counsel and Environmental Defense Fund (June 24, 1988), pp. 1-50 (pp. 108-160 of the House Ag. Comm. Rpt.).

⁵⁴ *Id.*, at pp. 8-14 (pp. 118-124 of the House Ag Comm. Rpt).

⁵⁵ *Id.*, at p.18 (p. 128 of the House Ag. Comm. Rpt.)

⁵⁶ *Id.*, at pp. 42-44 (pp. 152-154 of the House Ag. Comm. Rpt.)

⁵⁷ See [Pennsylvania Landowners Association, Inc.](#) Newsletter, *One of the Reasons it Never Ends* (May 5, 1992), at pp. 4-6, available at: <https://nebula.wsimg.com/602774fc22822be8e026d5096f0548e8?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1> (showing a combined annual budget for NWF, EDF and NRDC of \$110.216 million).

⁵⁸ See The Wildlife Society Minnesota Chapter, *Letter Correspondence from Ed Boggess, President to Honorable E. (Kika) de la Garza, Chairman, Committee on Agriculture* (June 21, 1988), available, at: <https://nebula.wsimg.com/cb35cc6ebcc384658b262e65734635f6?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁵⁹ See The Wildlife Society North Dakota Chapter, *Letter Correspondence William J. Berg, President to the Honorable Arland Stangeland, House Agriculture Committee* (June 14, 1988), available at:

<https://nebula.wsimg.com/c1fbf4b26ecc8f04c6c235a95ab6a23d?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁶⁰ See The Wildlife Society, *Letter Correspondence from Harry E. Hodgdon, Executive Director to the Honorable E (Kika) de la Garza, Chairman* (July 11, 1988), available at: <https://nebula.wsimg.com/ad49d408af16f235539ca9d2ad9dc8fa?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁶¹ *Id.*, at p. 3.

⁶² See *Statement of Daniel Svedarsky, Teacher, on Behalf of the National Audubon Society and the Minnesota Chapter, Wildlife Society*, Before the House Committee on Agriculture, Field Hearings, Moorehead, Minnesota (June 24, 1988), available at: <https://nebula.wsimg.com/6e23f38797e7af279cbead5bfa95b779?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁶³ See Audubon Wetland Management District and Audubon Garrison Wetland Management District, *Narrative Report 1988*, at p. 17, available at: <https://ecos.fws.gov/ServCat/DownloadFile/40207?Reference=40499>.

⁶⁴ See Audubon Wetland Management District and Audubon Garrison Wetland Management District, *Narrative Report 1989*, at pp. 18-19, available at: <https://ecos.fws.gov/ServCat/DownloadFile/41561?Reference=41603>.

⁶⁵ See *Statement of Karl Limvere, Assistant State Secretary, North Dakota Farmers Union* Before the House Committee on Agriculture, Field Hearings, Moorehead, Minnesota (June 24, 1988), at p. 14, available at: <https://nebula.wsimg.com/33bfcaaf1ae93998c42b0da57e7319c6?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁶⁶ See *Statement of Gary Rudningen, President, Minnesota Association of Wheat Growers*, Before the House Committee on Agriculture at the Full Field Committee Hearing, Moorehead, Minnesota (June 24, 1988), at p. 2, available at: <https://nebula.wsimg.com/5309e6f6ea72b5346fa2be05482de41e?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁶⁷ See Frederick M. Kaiser, *GAO: Government Accountability Office and General Accounting Office*, CRS Report for Congress (RL30349) (Sept. 10, 2008), at Summary and CRS-1, available at: <https://fas.org/sgp/crs/misc/RL30349.pdf>.

⁶⁸ See United States General Accounting Office, Report to the Chairman, Committee on Agriculture, House of Representatives, *Farm Programs: Conservation Compliance Provisions Could Be Made More Effective* (GAO/RCED-90-206 (Sept. 24, 1990), available at: <https://nebula.wsimg.com/247d21c6cc7b406698d56ce1529d121f?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁶⁹ *Id.*, at pp. 27-29, 32-33.

⁷⁰ *Id.*, at p. 31.

⁷¹ *Id.*, at pp. 31-32.

⁷² *Id.*, at p. 28.

⁷³ *Id.*, at p. 34.

⁷⁴ See *National Wildlife Federation v. ASCS*, 901 F.2d 673, 20 Env'tl. L. Rep. 20,801 (8th Cir. 1990), slip op. at 2.

⁷⁵ See *National Wildlife Federation v. ASCS*, No. A4-89-067, slip op. at 4 (N.D. Aug. 2, 1989).

⁷⁶ See *National Wildlife Federation v. ASCS*, 901 F.2d 673, 20 Env'tl. L. Rep. 20,801 (8th Cir. 1990), slip op. at 4, 6 (“The injuries appellants allege their members will suffer because of the actions of the ASCS--a decrease in water supplies and of soil moisture for growing crops, a decrease in the purity of the water they use for domestic needs, a decrease in wetlands and wetland wildlife available to them for aesthetic purposes--are more than an identifiable trifle. They ‘are statements of specific injury experienced by ascertainable individuals who’ live in or recreate in the Bottineau District. Coalition for the Environment, 504 F.2d at 156. Thus, appellants have alleged sufficient injury to establish standing under *SCRAP* and *Morton*. ‘An interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected.’ *Defenders of Wildlife*, 851 F.2d at 1040 (relying on *SCRAP* and *Morton*). See also, *Coalition for the Environment*, 504 F.2d at 167. [...] We find, for the reasons specified above, that appellants have standing to present their claims to the federal courts.”).

⁷⁷ *Id.*, slip op. at 4-5, citing 16 U.S.C. Sec. 3901 (1988).

⁷⁸ See P.L. 99-645, “Emergency Wetlands Resources Act of 1986” (100 Stat. 3582) (Nov. 10, 1986), Sec. 2(a)(1),(2), (4), (5) and (6) (16 U.S.C. Sec. 3901).

⁷⁹ *Id.* citing H.R. Rep. No. 271 Part 2, 99th Cong., 1st Sess. 86-87.

⁸⁰ See *National Wildlife Federation, Statement of the National Wildlife Federation on the Application of the Food Security Act of 1985, Title XII, Subtitle C (“Swampbuster”)*, Before the House Committee on Agriculture, Field

Hearings Moorehead, Minnesota, presented by John Rose, Minnesota Conservation Federation, Submitted on Behalf of National Wildlife Federation, Fergus Falls Fish and Game Club, Minnesota Conservation Foundation, Natural Resources Defense Counsel and Environmental Defense Fund (June 24, 1988), *supra* at pp. 27-28 (pp. 137-138 of the House Ag. Comm. Report).

⁸¹ See Anthony N. Turrini, *Swampbuster: A Report from the Front*, 24 *Indiana Law Review* 1507 (1991), *supra* at 1515-1516.

⁸² *Id.*, at 1516.

⁸³ *Id.*

⁸⁴ *Id.*, at 1513.

⁸⁵ *Id.*, at 1513-1514.

⁸⁶ *Id.*, at 1509-1512.

⁸⁷ *Id.*, at 1515.

⁸⁸ See U.S. Fish & Wildlife Service Migratory Bird Program, *North American Waterfowl Management Plan – A Model for International Conservation*, available at: <https://www.fws.gov/birds/management/bird-management-plans/north-american-waterfowl-management-plan.php>.

⁸⁹ See Ducks Unlimited, *NAWMP – North American Waterfowl Management Plan*, available at: <http://www.ducks.org/conservation/public-policy/nawmp-north-american-waterfowl-management-plan>.

⁹⁰ See P.L. 101-233, “North American Wetlands Conservation Act of 1989” (103 Stat. 1968-1969) (Dec. 13, 1989), Secs. 2(a)(9), 2(a)(11), 2(a)(12), and 2(a)(13) (16 USC 4401).

⁹¹ See Memorandum of Understanding between the USDA and Ducks Unlimited, Inc. (99-SMU-028) (Dec. 14, 1998), *supra* at Secs. II-III, p. 2. See also Service-wide Memorandum of Understanding Between Ducks Unlimited, Inc. and United States Department of Agriculture Forest Service (09-SU-11132422-326) (Oct. 9, 2009), *supra* at Secs. B and C, pp. 2-3.

⁹² See United States Department of the Interior Fish and Wildlife Service and Environment Canada, *North American Waterfowl Management Plan – A Strategy for Cooperation* (May 1986), available at: <https://nebula.wsimg.com/66813738944138a282ece4c3ced152aa?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

⁹³ See Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (executed on Oct. 12, 1940, ratified on April 15, 1941, and proclaimed on April 30, 1942), available at: <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treay-WesternHemisphere.pdf>.

⁹⁴ See Convention Between the United States and Great Britain for the Protection of Migratory Birds, 11 *The American Journal of International Law*, No. 2 (April 1917), available at: <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treaty-Canada.pdf>.

⁹⁵ See Mexico-United States: Convention for the Protection of Migratory Birds and Game Mammals, 31 *The American Journal of International Law* No. 3 (July 1937), available at: <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treaty-Mexico.pdf>.

⁹⁶ See United States Department of the Interior Fish and Wildlife Service and Environment Canada, *North American Waterfowl Management Plan – A Strategy for Cooperation* (May 1986), *supra*, at p. 1.

⁹⁷ *Id.*, at p. 11.

⁹⁸ *Id.*, at p. 14.

⁹⁹ See U.S. Fish & Wildlife Service Migratory Bird Program, *Bird Conservation Partnerships & Initiatives*, available at: <https://www.fws.gov/birds/management/bird-conservation-partnership-and-initiatives.php>.

¹⁰⁰ See Ducks Unlimited, *Measuring Conservation Success – How do Current Waterfowl Populations and Habitat Levels Stack Up Against the Goals of the North American Waterfowl Management Plan?*, available at: www.ducks.org/conservation/conserving-wetlands-waterfowl/measuring-conservation-success.

¹⁰¹ See United States Department of the Interior Fish and Wildlife Service and Environment Canada, *North American Waterfowl Management Plan – A Strategy for Cooperation* (May 1986), *supra*, at p. 14.

¹⁰² *Id.*, at p. 15.

¹⁰³ See U.S. Department of the Interior – For Employees, *DOI News: Partners for Fish and Wildlife Program Celebrates 25 Years* (9/7/12), available at: <https://www.doi.gov/employees/news/Partners-for-Fish-and-Wildlife-Program-Celebrates-25-years>.

¹⁰⁴ See U.S. Fish & Wildlife Service, *Partners for Fish and Wildlife in Pennsylvania – Restoring Habitat for Future Generations* (Oct. 2010), available at: https://www.fws.gov/northeast/EcologicalServices/pdf/partners/pa_2010_pffw_program_final.pdf.

¹⁰⁵ See U.S. Fish and Wildlife Service, *Partners for Fish and Wildlife Program Summary* (Sept. 2001), available at: <https://www.fws.gov/northeast/partners/PDF/PA-needs.pdf> (“Wetland restoration techniques focus on returning hydrology to formerly drained wetlands by removing or disabling field drainage tiles and plugging drainage ditches.”).

¹⁰⁶ See *United States v. Brace*, No. 1990-229 (WD Pa.), Deposition of Andrew Martin (March 18, 1992), at pp. 50-52, available at:

<https://nebula.wsimg.com/3946322d6644e0f169e5f1e9e9da71c3?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1> (“Former Pa. Game Commission official Andrew Martin testified as follows: “Q. I believe, Mr. Martin, you testified that you also contacted a David Put[nam]? A. That is correct. Q. He is with the U.S. Fish and Wildlife Service. What is his job? A. Biologist. Q. And? A. I am not sure what all his duties entail. Q. How long [have] you known Mr. Put[nam], if you have? A. Approximately 15 years. Q. Fifteen years? A. Yes. Q. I believe you said you had been deputized as an agent for the Fish and Wildlife Service? A. Yes. Q. How does that work? A. Field officers that have adjoining states and/or have migratory bird routes in their districts would frequently be deputized by the Department of Interior through the U.S. Fish and Wildlife Service to enforce the federal game laws. My district happened to border – well, of course, the north is Canada and to the east was New York. And very definitely had a lot of migratory birds in y district and so that goes with the district. More so that the officer or the individual person, that goes with the district. Q. And there is a formal relationship of any kind as far as the Fish and Wildlife’s authority over you. Could they give you direction? A. They could, yes. Q. In his capacity as a deputy? A. Yes.”)

¹⁰⁷ See *The Great Lakes Charter – Principles for the Management of Great Lakes Water Resources* (Feb. 11, 1985), available at: <https://www.internationalwaterlaw.org/documents/regionaldocs/Local-GW-Agreements/1985-GL-Charter.pdf>.

¹⁰⁸ See *Revised Great Lakes Water Quality Agreement of 1978, as Amended by Protocol Signed November 18, 1987*, available at: http://www.ijc.org/files/tinymce/uploaded/GLWQA_e.pdf.

¹⁰⁹ *Id.*, at Annex 7.3.

¹¹⁰ *Id.*, at Annex 13.3.

¹¹¹ See *The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter* (June 18, 2001), available at: https://www.michigan.gov/documents/deq/deq-ogl-Annex2001_260204_7.pdf.

¹¹² See *Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983, and on November 18, 1987* (Signed Sept. 7, 2012, Entered into force, Feb. 12, 2013), available at: https://binational.net/wp-content/uploads/2014/05/1094_Canada-USA-GLWQA_e.pdf.

¹¹³ See *Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement* (Dec. 13, 2005), available at: www.glsregionalbody.org/Docs/Agreements/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf.

¹¹⁴ See *Great Lakes-St. Lawrence River Basin Water Resources Compact* (Dec. 13, 2005), available at: <http://www.glscompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Water%20Resources%20Compact.pdf>.

¹¹⁵ See Lawrence A. Kogan *The Europeanization of the Great Lakes States’ Wetlands Laws & Regulations*, prepared for the Clare County, Michigan Farm Bureau Legislative Breakfast (June 26, 2017), available at: <https://nebula.wsimg.com/cc88e67ef1abace7ef0a31b33115ee42?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1>.

¹¹⁶ See, e.g., Ken Maschhoff, *Trump’s First 100 Days Bring Regulatory Relief For Farmers*, *Des Moines Register* (April 26, 2017), available at: <https://www.desmoinesregister.com/story/opinion/columnists/2017/04/26/trumps-first-100-days-bring-regulatory-relief-farmers/306647001/>.

¹¹⁷ See Christina Wilkie, *Trump to farmers: I’ve ended the ‘regulatory assault on your way of life’*, *CNBC* (Jan. 8, 2018), available at: <https://www.cnb.com/2018/01/08/trump-to-farmers-i-ended-the-regulatory-assault-on-your-way-of-life.html>.

¹¹⁸ See Coral Davenport, *E.P.A. Blocks Obama-Era Clean Water Rule*, *New York Times* (Jan. 31, 2018), available at: <https://www.nytimes.com/2018/01/31/climate/trump-water-wotus.html>. See also Ariel Wittenberg, *Clean Water Rule – No Time to Waste for Trump Admin’s Assault on WOTUS*, *E&E News* (April 14, 2017), available at: <https://www.eenews.net/stories/1060053119>; Juliet Eilperin and Abby Phillip, *Trump Directs Rollback of Obama-era Water Rule He Calls ‘Destructive and Horrible,’* *The Washington Post* (Feb. 28, 2017), available at: <https://www.washingtonpost.com/news/energy-environment/wp/2017/02/27/trump-to-direct-rollback-of-obama-era-water-rule-tuesday/>.

¹¹⁹ See Chuck Abbott, *Trump Administration Says WOTUS Is On Its Way Out*, *Successful Farming* (6/28/17), available at: <https://www.agriculture.com/news/business/trump-administration-says-wotus-is-on-its-way-out>.

¹²⁰ Cf. Mike Lofgren, *Essay: Anatomy of the Deep State*, Moyers & Company (Feb. 21, 2014), available at: <http://billmoyers.com/2014/02/21/anatomy-of-the-deep-state/>; Mike Lofgren, *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government* (Penguin © 2016), available at: <https://www.amazon.com/Deep-State-Constitution-Shadow-Government/dp/0143109936>; Greg Grandin, *What is the Deep State?*, *The Nation* (Feb. 17, 2017), available at: <https://www.thenation.com/article/what-is-the-deep-state/>; Michael Goodwin, *The GOP Memo Proves the 'Deep State' is Real*, *New York Post* (Feb. 3, 2018), available at: <https://nypost.com/2018/02/03/the-gop-memo-proves-the-deep-state-is-real/>; Emma M. Ashford, *The Deep State Isn't What You Think*, *The National Interest* (Feb. 11, 2018), available at: <http://nationalinterest.org/feature/the-deep-state-isnt-what-you-think-24455>.