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Evolving Wetlands Science is a Landowner's Greatest Nightmare: Lessons from the Field

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Peter and Carol, thank you again for inviting me in to speak and I appreciate you all for sticking around this long in the day when you could be doing other things.

The title of my presentation is "Evolving Wetlands Science is a Landowner's Greatest Nightmare: Lessons from the Field." Lessons from the field will… My discussion will basically feature three different cases that I'm representing landowners in three different jurisdictions. Actually, two of them are in Pennsylvania, one is by the western side of Pennsylvania by Lake Erie, another one is on the eastern side of Pennsylvania by the Delaware River and the third case is out in Michigan halfway up the peninsula near Saginaw, Michigan. But the first case, since my client is here I will do him the justice and honor of talking about his case first and that is political, of course.

I have two handouts that you may have received by now and one of them references that particular case. It's the "Ducking the Truth" article. In a nutshell, this is a case, which affects all farmers throughout the country because in its infinite wisdom when congress amended the Clean Water Act in 1977 they created a legal fiction in the statute in order to preserve wetlands. Back in the '70s wetlands were considered to be good things not bad things as they had previously been viewed. Therefore, they had to be protected at all costs even if it meant constitutional rights. So, they used a method that is often used in Napoleonic legal systems. They created a strict liability regime, which means if you violate the word of the statute without even causing any environmental damage you can be assessed tens of thousands of dollars in penalty a day and you're guilty as charged. You could be merely accused of violating the statute and you are guilty as charged. Now, I think we've seen a little bit of this recently in the Kavanaugh hearings on Capital Hill. A mere accusation is equal to guilt and you have to defend yourself. That's the Napoleonic legal system. That's not Anglo-American common law.

The "Ducking the Truth" article is a Law Review article that will be released probably next week when I file a response to a summary judgment motion in this case. This case is actually two parallel cases. Mr. Brace has three adjacent farm tracts that are part of one farm but the government creates the fiction that it's three different farms. So, they brought two different lawsuits, forum shopping with two different judges in the same western district of Pennsylvania. Both lawsuits were brought eleven days before President Trump was inaugurated. It was brought, and signed off by, one of the Clinton cronies, John Cruden, who was the head of DOJ, [Department of Justice] Environment Natural Resource division, which is the runaway train I'm told of the Department of Justice. They are legacy bureaucrats going back to in the Clinton Administration and the Obama Administration that don't wish to adhere to reason. All they want to do is threaten. All they want to do is intimidate. All they want to do is drive your client's legal bill up to the sky so your client basically relents and gives up. That's what we're facing here.

This article only talks about a portion of the case but it was research that was triggered during depositions that we had held last year. I come into the deposition of a former Fish and Wildlife officer who had been integrally involved thirty years ago with my client and drove this case up the flagpole. Actually no, it was a soil conservation service gentleman from the USDA [United States Department of Agriculture] who's supposed to be on the farmer's side. He had his cap turned around on the table so when I walked in he wasn't wearing his baseball cap and I didn't know what it said. But we went to the deposition. I wanted to know what he knew from way back then. By the time it was done, we closed it

off, and he put his baseball cap back on. On top of it it said "Ducks Unlimited." Now, Ducks Unlimited is one of those interesting groups that pretend to be a wildlife preservation group but really they're a hunting group. Really what their goal was, and still is, is to make sure that wetlands are protected to create a habitat for the ducks so they can grow up so they can be shot by the… Okay, that's what this is all about. Also, Ducks Unlimited back in the '80s and '90s had a mutually beneficial relationship with the federal government. At times when the federal government was short on cash they would fund wetland restoration programs for the government. When the government was flush with cash then they would fund Ducks Unlimited.

There's a whole history of how Ducks Unlimited basically endeavored and was successful in undoing former USDA determinations that were allowed under the Food Security Act of 1985. Because of all of the controversy that the Clean Water Act amendments of '77 created where they basically created a legal fiction that if you had pasturing and if you had haying that were in an uncultivated form and you wanted to switch to cultivated crop, cultivated cropping, that was two different uses of your land. If you converted from one use to the other you violated the Clean Water Act and needed a permit to exercise your own private property rights. That's what this farmer was doing. He had three tracts that were all under USDA conservation plan, all approved, different fields growing different products. Prior to that he had pasturing. He used it as a dairy farm. What he did was under the old law and it was grandfathered, he would take streams that didn't have any bed or bank, you know just trickling streams. Then he'd excavate them and have water and create a schematic and have the water flow more efficiently in order to make the land more productive. He was grandfathered under part of that. Then the Food Security Act came out because under the Regan Administration all of the controversy the government then under Reagan wanted to give the farmers a break so they created another statute, USDA presiding over that statute.

So, you couldn't beat the wetlands rules and nobody really knew, by the way, what wetlands were back then. It was a developing emerging science. You couldn't even have good scientists on your side at that time because nobody really knew what they were doing. In fact, in 1987 the Army Corps wetland delineation manual just came out in '87. In any event, they enacted Food Security Act of '85, which gave farmers the ability to, up to a certain date, to convert that pastureland and that hay field into more productive crops. Even though the statute said all you had to do was commence that conversion by the enactment date of this statute, which was December of '85.

There were fights within congress and debates and lawsuits from the greens trying to prevent that from happening. So, they created a new standard of regulations where it wasn't whether you had commenced it by the enactment date anymore, you had to complete it by the enactment date. So, people were always trying to catch up with the moving goalposts. This gentleman was one of those people. Now, this is thirty years ago. Ultimately what happened was he won in a trail court. The judge walked his farm and said, "This isn't wetland. Most of it's not a wetland. You didn't change uses of land. You had one continuous farm. The decision that you had changed from pasturing to farming it is still farming. It's ranching, the definition of ranching. You let your cows roam." Unfortunately, the Third Circuit of Appeals had a different notion because they were more aligned at this time with the Clinton Administration. They overturned the district court decision in the farmer's favor and they ruled that his change of use or change of field use from pasture to crop was a conversion of a wetland. He was forced into a consent decree. The consent decree basically said, "You've got an undefined area." In fact, the government never even did a wetland delineation. They never did a jurisdictional determination. Even to this day they have never done it and they admitted in testimony. But they said, "You violated the words of the statute. You're guilty." You have to work your way out of that hole.

We have a consent decree in 1996 signed. He had to take that property put it off to the side. He couldn't use it. The problem is the way this area is naturally addressed is that it's a wet area. It's by Lake Erie. It's the Lake Erie aqua system. It's naturally wet and beavers seem to populate the area naturally. Mr. Brace was aware of the beaver problem and typically in the history of farming in that area and landowner use before he would be able to remove beaver without a problem. It was typical. Beavers conflict with human development. The beavers get in the way. They cause flooding. They cause clogging of road culverts. They cause clogging of agricultural ditches and flooding. Back then he was allowed to remove those beaver dams except when it came to Clean Water Act. He had a game commission officer, which in Pennsylvania has the right to walk onto your property even if it's well-posted, without warrant, without consent. He can just walk on if he sees something in an open field. If it was Fish and Boat Commission, that's another statute and that's a different story altogether. But this

guy happened to be the Game Commission. He ended up contacting all the federal agencies to start all of this up. He had five different federal agencies plus three or four different state agencies on him at the same time. If he wasn't lawyered up back then they would have accused him of criminal violation which they did. Actually, they tried to get him on criminal but he was able to lawyer his way out of that fortunately for him and his family.

But the problem is that this consents decree… I'll bring it up to the present. He had beaver coming back and forth. He had to remove those beaver. They wouldn't let him out from under the beaver. So he sought them to come onto the site, see the flooding that occurred for fifteen years, give him authorization to clean the ditches, to take the sediment off the land, to clear it out and let him farm the land again. The USDA already gave him his conversion under the Food Security Act on part of the land. He has agricultural ditches. He just wanted to maintain the agricultural ditches. They said, "Okay." They came on and gave him a verbal "yes." Two people: EPA [Environmental Protection Agency], Army Corps. Within three months he had it all taken care of. The problem is they went back and reneged on what they said. They never told him. Consent decree violation, Clean Water Act violation.

Now, he also did that on the other adjacent parcel, which was never deemed a wetland. They had no signs on this. But they had "eyes from the sky," which is aerial photographic interpretation, otherwise known as API. In fact, that's just a desktop review and they can make a determination that you have a wetland based on a desktop. They don't have to come down and do the science, do the soil sample, do the water hydrology evaluation, or do the vegetation evaluation. But you are guilty until you prove your innocence.

So, we've got two lawsuits running here. We have a summary judgment by the government saying, "We don't have a genuine issue of material fact." And I've got to tell you that's a bunch of bunk because there's so much in here that a judge with any half of an intellect would figure this out. One of the things I always find interesting when dealing with DOJ is they take scientific opinion from an expert report and they try to convert it into fact through a summary judgment motion like putting out affidavits by the experts and then attaching the reports to it. What they do is they just repeat the conclusions in the report of findings as fact which were once previously opinion. Eight hundred pages they served us, which I'm now going through. What [unintelligible] science, okay? It created all types of standards They don't even follow the 1987 manual. What is the normal condition of the site? That's a scientific question. You have to do a historical aerial photo evaluation. You have to go down to ground truth, on the ground through the vegetation, your hydrology and your soil evaluation, whether you have a true wetland. It's pretty much saturated or inundated for at least fifteen days during the growing season. That's a general definition.

But they don't necessarily have to follow their own guidelines. Because if they posit the normal condition to be a pristine meadow, anything you do in farming even though it's been done for sixty years is a disturbance which allows them to not have to do certain steps in the guidelines and they can do a reference-type comparison. They go find some pristine natural park and say, "This is what it would have been if they didn't farm." That's the fiction that they create. They've got legal fiction. They've got scientific fiction. You, as the defendant, have to prove your way out of this hole. It costs you lots of money. It costs you time. It costs you financial uncertainty because you can't do your business.

That in a nutshell, is the Brace case. But it's not just about the Brace family. It's about every farmer in the United States who has to deal with the same thing. If you go out and plow your fields you'll need a permit, basically, because if you go down below six inches of surface you are creating a disturbance to the natural condition of the land. It's presumed to be meadow if it's wet.

There's also a second case in Pennsylvania that I represent, with all due deference to Mr. Brace, because I'll hear it later, he has given out a folder full of information on that table that I would recommend that each of you read because it's historical. It shows you a progression in the way of government thinking and private response. Let me mention another thing in regarding what I've learned from this case as it applies to Third Circuit law. Generally speaking people have heard of the Chevron deference doctrine, from former Justice Scalia, where Judges are not to ordain on the interpretation of a regulation because the experts are usually those in the agency. So, you will defer to any ambiguity in the interpretation of a regulation to the agency.

When it comes to science, judges are not science smart. They basically grant double deference on the science. So, you have an incredible burden of proof and persuasion of production and persuasion to overcome in order to persuade the judge in a case. It's interesting because I met Justice Scalia at a New York Athletic Club meeting about five or six years ago and the most popular question during Q & A was, "Don't you want to overturn Chevron?" And he said, "Are you all stupid?" And we asked why. He said, "Do you want judges to make that call?" We said, "Yeah. The agencies aren't honest anymore."

Going back to the eastern Pennsylvania case, there we have a different type of property in use. We had a dump-yard in the town of Morrisville where Robert Morris signed the Declaration of Independence. He was one of the signatories. A man comes in from Europe. He wants to build a garage business, a mechanic's business he had and he sees this empty lot that's used as an informal municipal dump. He wants to buy the property and he wants to clear it out of all the thousands of tires and pieces of concrete and steel that are buried underneath. He buys the property, starts removing it, and fills it up with sand. Wrong thing. He shouldn't have done that. He should have asked the government first if it was a wetland. They determined through the eyes in the sky that it was a wetland using the national wetland inventory mapping from the U.S. Fish & Wildlife. It's claimed to be the standard bearer of accuracy, which means really it's not accurate. There are lots of flaws in it. They have this whole page of caveats for those who use a national wetland inventory map, which is something we're arguing now in the Brace case. The government doesn't want to hear about it. But anyway, they took this poor guy and he said it wasn't a wetland and he gets all the experts to come in and say it's not a wetland but his lawyers aren't as strong. He's saying, "This is not a wetland. I'm going to continue to move soil in and out to clean it up." Well, they imprisoned this man. He was in prison for five years, then on probation for another four or three. He came out a broken man.

His family pretty much is destitute. They don't have any income. The two daughters, who I now work with, and his widow, who is still around — she's almost ninety I believe — they have never had the ability to defend themselves because they were without financial means. I talked to them. I ended up pulled in through somebody in D.C. who worked for them before. I don't know if any of you know Paul Kavanaugh who used to formerly work for Washington Legal. We are now preparing a wetlands report that actually shows that contrary to what the government alleges as eighty-five to ninety percent, eleven and a half out of fourteen acres they believe is wetland, but they haven't done any delineation since 1995 and they've never done a jurisdictional determination. One of the tricks that the government plays is they make it seem that you're requesting a jurisdictional determination but since you didn't use the magic words "we want an *approved* jurisdictional determination" which a formal determination, which can be appealed in court, they issue a preliminary one which has no boundaries. In this case with the Braces they did the same thing. In the Pozsgai case, it's *United States v. Poszgai*, both of these are in the law school books for setting precedent back in the '80s. But they didn't have the science, but you're still guilty as charged. They didn't have a basis for entering your property but they can still enter your property. You don't have much of a right, constitutionally speaking, when they start exercising strict liability statute.

I'll keep Carol up to speed on what happens once we submit the scientific wetlands report that actually provides the first wetland delineation in twenty-three years. The Army Corps has to respond to it and then we have appeal rights to go to court for the first time. Basically, the case has been in remission. In fact, by the way, Waste Management has been involved in this case talking about corporate lobbying. They're going to mitigate. They keep on having to turn the soil over because of all the bad things that they said this man put in the soil and they turned it over several times already. But Waste Management needs to mitigate other wetlands violations they committed on other properties. They need this property. There isn't much open space in that part of eastern Pennsylvania. I just wanted to add that in there just to bring in that corporatism side.

Third case: The Michigan peninsula. I have a client up there that owns four earthen dams. They're actually licensed under one joint FERC, Federal Energy Regulatory Commission, license. The license runs for thirty years and he assumed it back about fifteen years ago so it's got another fifteen to run. Essentially, he has been dealing with the nightmare of the Michigan Department of Environmental Quality. Michigan has a special status. Other than New Jersey, Michigan is the only other state of the fifty states that has the ability to enforce its own Clean Water Act 404, its own wetlands provisions which can be stricter than the feds. It's almost like California's waver on Clean Air Act. They can make it stricter than the federal standard. Every Democratic and Republican governor of Michigan seems to

rejoice in the fact that they have this special status but they don't really know what the impact is upon the landowner because they don't really care to look.

When you look carefully enough… I have another handout here and it's on my letterhead and it is entitled "The Europeanization of the Great Lakes Wetlands Laws and Regulations." In the course of representing these three clients I came upon these U.S.-Canada environmental water quality treaties that go back to 1978. I'm trying to figure out what's in these treaties and how does it affect the way the states implement their wetlands laws. And what's the interface between the state and the federal government on this.

We found out that back in the '90s when these treaties were first being updated from the '70s and '80s there were European legal nostrums placed in these treaties. There were European science standards. I don't know if any of you are familiar with, I mean, usually there's the direct line of evidence standard, the effects causes, why that's proof. If you don't have enough evidence in a straight linear progression to prove any harm you get to do the mixing bowl approach known as "weight of the evidence." A little of this, a little of that and you can draw all types of circumstantial conclusions together from the evidence parcels that you have in order to make a single result. That result would have the modicum of the scientific validity. This first took hold in the First Circuit in 2011. There's a *Milward v. Acuity [Milward v. Acuity Specialty Products Group, Inc.]* case that I'm actually writing a separate paper for Washington Legal Foundation to show how the progression of this weight of the evidence has gone across the country in the last five to six or seven years. It's interesting how weight of the evidence is an international standard promoted at the World Trade Organization, promoted through the United Nations' environmental program treaties when they don't have enough evidence to prove it will cause any environmental harm.

If you've heard any of my presentations over the last fifteen years, that would be with Carol, I talked about something known as the European Precautionary Principle, which is the "better safe than sorry" nostrum which means you don't need to focus on a probability of risk of harm you need to only focus on that hazard, the intrinsic characteristics of the substance or product or an activity rather than whether it can cause you any harm through use.

We've got the podium that's got wood with varnish. This varnish is a bad chemical. It's a toxic chemical. It could, potentially, harm you. Okay? If you were to inhale the fumes, if you were to lick the chemical when wet, if you were to chomp on the dry wood, you might ingest some of that chemical. But that's a use, a specific use of exposure. They regulate not on the specific use or exposure with precautionary principle they regulate on the hazard itself. The fact that it exists without regard to you. That is burden of proof on the economic operator to show that you are harmless rather than the burden of proof on the government to show that you are doing something harm*ful*. Same thing with wetlands. It's all Napoleonic law. The government is always correct and you're always wrong.

So, in this particular case with the dams we have DEQ coming in talking about wetlands but they've never done a wetland identification. They talk about floodplain violations. They've never measured the floodplain to any scientific standard that you could articulate. They look at soil erosion into inland streams and waterways. You need to hire a storm water operator that needs to be on call 24/7 if you've got any earth moving going on your property even if it's not near the stream. It could potentially erode into the stream. But the burden is on you. One of the things we found out in those divisions because I went over to depose MDEQ, and that was a good deal of fun just like the DOJ. The lawyers are always arrogant from the government. Their noses are up in the air and you, being the defendant's counsel, you must kowtow to them and respect them especially when they're in their thirties and they're entitled to respect. They don't need to earn it from you.

The bottom line was I asked them, I said, "How do you know if somebody's violating the law?" "Oh, well, we have this MiWaters template on software on the web. People can just type a complaint anonymously onto the web and we have to review all the complaints." I'm speaking to the head, now, of the regulatory office of the Bay City Saginaw district of MDEQ. I said, "Okay. Do you just walk onto people's land because you think that something occurred because someone made a complaint? Do you have any evidence of any kind?" He goes, "Well, we do eyes up in the sky. We check up on the property." And the open fields option allows the government come in and spy on your property from satellite, from aerial photography, from airplanes coming over. They can sent a drone over and take pictures. You don't have an expectation of privacy except around the curtilage of your home. This goes

back to 1984, the *Oliver* case *[Oliver v. United States]*. But in Pennsylvania they even take it more ridiculously.

In any event, he said, "I go out and I do a weighing of the possibility of violation." I said, "Really? Are there any defined standards?" "No. no. We exercise our discretion." Then I said, "Okay. Well, what do you do then if you need to go out to somebody's property?" "Well, we have to write them to no risk, small risk, moderate risk, great risk. For anything moderate risk and higher we can even ask for an administrative warrant to enter your property even though there's no evidence." The bottom line is that the way federal and state government now operate, you are servants to them they are no longer servants to you. Something got messed up over the last thirty years. You can't lay this at the feet of Barack in Wonderland. You can't. He was the most recent perpetrator of this but you have to go back to Bush 43. You have to go back to Clinton. You have to go back to Bush 41 because really the "no net loss of wetlands" rule started with Bush 41. It was an informal policy and then it started to grow legs and guidelines and it became enmeshed in regulation. The point is most people didn't see it because most people thought that government worked for them. Government doesn't work for you anymore.

Looking at the Kavanaugh hearings you see the drama between the congress against the executive branch. Everyone looks at that drama because it's really the allocation of power between the federal government branches. Or it's with the court. How dare a judge legislate from the bench and take that prerogative away from congress? Or from the executive for that matter because the executives now legislate also through regulation. You also see federalism argued. The Republicans famous for saying "states' rights" and everybody applauds wildly about the notion of states' rights. But that all depends upon who's in state government. It's a government to government relationship. Do you ever hear anybody talking about the Bill of Rights? Do you ever hear anybody talking about protecting the people or having the people exercise their rights and having the government either at the state or federal level account to them if they prevent them from exercising their rights? I don't hear anything. Do you?

That's the lesson here to be learned, that we are presuming that government is looking out for us. That may have been the paternalistic government of the Roosevelt era following the footsteps of a major depression. We don't have that type of a paternalistic government anymore. We have a government with an agenda at all levels, local, state, and federal, of its own. They feed on more regulation because it creates more jobs.

I was married in northern Virginia thirty-one years ago and it was pretty rural back then. If you look at northern Virginia now it looks like a suburb of New York. Traffic is just as bad, in fact, it could be worse because they never developed the roads. The point is that they created so many new jobs in Washington during the Obama era that it would blow your mind. But you can't excuse your state governments either. I know you're all crazy about your governor here. And I know you're all crazy about your very honest and moral legislature.

Audience member: Crazy is the word.

Mr. Kogan: The question is, who's crazier, the people in the asylum or the people outside the asylum? What you have is unaccountable government. The reason it's unaccountable is because all of us have failed in holding them to account. And with that. I'll open the floor up to questions.

Audience member: I would like to clarify, if I can, a couple of things there. The biggest problem I continue to say is…You said it right but people don't understand administrative law over a constitutional republic. I every agency they propagate their own laws and make laws and they determine law and that's why you and I as citizens of this country have no due process and that's why Kavanaugh and what we're talking about right now are the same. In administrative law we do not have due process. I keep referring back to the landowner in the Brace case and go to Call to Action part 2 where Vicki's dad is on there. If you review those two cases you can understand a lot of it. But we talked about mitigation. Mitigation costs $100,000 to $200,000 an acre if they fine you with an acre here that you want to use. For $200,000 you can use that property if you mitigate it.

Mr. Kogan: The other interesting thing is that the executive branch was to faithfully execute the laws that congress enacts. That was when there was separation of power. The executive branch now, since

the Clinton Administration, manages itself. When they manage themselves they serve all sorts of roles, legislative, executive and judicial.

Thank you very much.

Ms. LaGrasse: Sam Kazman may know the answer because he dates back this far. About fifteen years ago we had a speker from the Competitive Enterprise Institute who presented a report using all government numbers, I think, that they already had superseded the decline of wetlands and there was several years of no net loss of wetlands and the wetlands had grown very significantly in the U.S.

Mr. Kogan: Well, it's interesting that you say that because now they have a net gain policy. It's no longer no net loss, it's now net gain.

Ms. LaGrasse: Well, that's certainly a gain. That's so ironic. Thank you very much.

Audience member: I want to give Larry, publicly, a lot of credit for what he's done for the last two years. These laws are so complicated. I don't know if anybody can do it except Larry. But again, you've got to be aggressive and what I try to say and I continue to try to say, as I told Larry, there's got to be an end to this. It's so frustrating putting people through this.