IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff v. ROBERT BRACE, and ROBERT BRACE FARMS, INC., Defendants	)	Civil Action No. 1:90-cv-00229

DEFENDANTS' RESPONSE AND OPPOSITION TO UNITED STATES SECOND MOTION TO ENFORCE CONSENT DECREE AND FOR STIPULATED PENALTIES[1]

Defendants Robert Brace and Robert Brace Farms, Inc., through their attorneys, file this Response and Opposition to the United States' Second Motion to Enforce Consent Decree and for Stipulated Penalties pursuant to the Clean Water Act ("CWA") (ECF No. 206) and Memorandum of Law Supporting the United States' Second Motion to Enforce Consent Decree and Stipulated Penalties (ECF No. 207). Defendants' Response and Opposition is accompanied by two related motions Defendants have filed under Federal Rules of Civil Procedure ("FRCP") 60(b)(5) and 60(b)(6).

Defendants respectfully request that this Court deny the United States Motion to Enforce Consent Decree and Stipulated Penalties and request for reimbursement of costs incurred to enforce the Consent Decree, abate all assessed penalties and interest, with prejudice,, direct the United States to reimburse Defendants for all costs associated with the defense of this action,

[1] Defendants note that the multi-decade, intricate factual history, and complex administrative and legal framework involved in this case necessitated a response that is longer than typical. However, the detail in this response is necessary to fully understand issues at hand, and the baseless nature of the United States claims.

including attorney and expert fees, and exercise its equitable powers to ensure the United States is equitably estopped from continuing to benefit from the various intentional misrepresentative, deceitful, unconscionable, inequitable acts of affirmative misconduct that it and its agents have perpetrated over a five-year period for the purpose of inducing Defendants' reliance thereon that the United States knew Defendants would rely on, and upon which Defendants did rely to their legal, economic, emotional and medical detriment.

INTRODUCTION

1. The United States has disingenuously brought this enforcement action against Defendants alleging two types or levels of violations: Clean Water Act violations relating to the Injunction; and Consent Decree violations relating to the Restoration Plan. The acts of Defendants the United States alleges constitute violations of the Injunction were based on actions that the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") had previously authorized Defendants to undertake.[2] The acts of Defendants the United States alleges to constitute violations of the Consent Decree Restoration Plan simply did not occur as due as a due diligence review of the evidence reveals.

2. That the United States now believes it can hold Defendants responsible for relying upon its prior authorization which it has since disavowed and revoked, and for engaging in activities that the United States has failed to factually confirm and validate. is a poster child for the runaway

[2] The United States also has brought a second action against Defendants based on similar previously authorized activities undertaken on the adjacent Marsh Farm tract which is currently pending before the Honorable Judge Rothstein (1:17-cv-00006-BR).

administrative state[3] and the 'statist' conception of legal rights[4] facilitated by unthoughtful judicial deference[5] to agency determinations that threatens the fiber of the U.S. Constitution and the constitutional rights of all Americans. Indeed, U.S. Supreme Court Chief Justice John Roberts, joined by Justices Kennedy and Alito, observed in *City of Arlington v. Federal Communications Comm'n*, 133 S. Ct. 1863, (2013), how administrative agencies, today,

> "as a practical matter…exercise legislative power,…executive power…and judicial power…", and how the "accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan[, but rather,] a central feature of modern American government. […] 'The administrative state 'wields vast power and touches almost every aspect of daily life' […] The Framers could hardly have envisioned today's 'vast and varied bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities. […] '[T]he administrative state with its reams of regulations would leave them rubbing their eyes.' […] And the federal bureaucracy continues to grow…" *Id*., at 1877-1878 (Roberts, J., Kennedy, J. and Alito, J., dissenting), quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) and *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting) quoted in *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 755, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). *See also Id*., at 1877, citing The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) (The "'accumulation of all

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[3] *See, e.g.*, Richard Epstein, *The Perilous Position of the Rule of Law*, 36 HARV. J. OF LAW & PUB. POL'Y 5, 18 (2013), available at: http://www.harvard-jlpp.com/wp-content/uploads/2013/01/36_1_005_Epstein.pdf; Adam Candeub, Transparency in the Administrative State, 51 HOUS. L. REV. 385 (2013), available at: http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1505&context=facpubs; Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 347 (2009), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1193016 and https://www.jstor.org/stable/41553554?seq=1#page_scan_tab_contents; Richard Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 1 NYU J. of Law & Liberty 491 (2008), available at: http://www.law.nyu.edu/sites/default/files/ECM_PRO_060974.pdf.

[4] *See* Jerry L. Mashaw, *"Rights" in the Federal Administrative State*, Faculty Scholarship Series. Paper 1149, 1129-1173 (1983), available at: http://digitalcommons.law.yale.edu/fss_papers/1149/?utm_source=digitalcommons.law.yale.edu%2Ffss_papers%2F1149&utm_medium=PDF&utm_campaign=PDFCoverPages .

[5] *See, e.g.*, Richard O. Faulk, *America's Administrative State: Tracking the Origins and Consequences of Judicial Deference to Federal Agencies*, Washington Legal Foundation Critical Legal Issues WORKING PAPER SERIES No. 196 (Aug. 2016), available at: http://www.wlf.org/Publishing/publication_detail.asp?id=2589; Jeffrey B. Wall and Owen R. Wolfe, *Why 'Chevron' Deference for Hybrid Statutes Might Be a No-No*, Washington Legal Foundation Legal Opinion Letter, Vol. 25 No. 16 (June 24, 2016), available at: http://www.wlf.org/upload/legalstudies/legalopinionletter/062416LOL_Wall.pdf; Gregory F. Jacob and Lynsey Ramos, *Judicial Review of Informal Agency Pronouncements: Any Clearer After Young v. UPS and Perez v. MBA?*, Washington Legal Foundation Legal Backgrounder, Vol. 30 No. 16 (July 31, 2015), available at: http://www.wlf.org/upload/legalstudies/legalbackgrounder/073115LB_Jacob.pdf.

> powers, legislative, executive, and judiciary, in the same hands,…may justly be pronounced the very definition of tyranny.'")

In reviewing the historical and current facts of the case at bar and the government's false and unfounded allegations, it is incumbent upon this Court to exercise its equitable powers in favor of Defendants in recognition of these justices' unmistakable warning.

3. This action also demonstrates the lengths to which the United States government will go – even if it engenders its officials ignoring relevant applicable law and engaging in deceitful, inequitable, unconscionable and otherwise improper conduct – to secure a favorable *legacy* ruling and *return on investment* of millions of dollars of U.S. taxpayer funds needlessly expended to prosecute an honest hardworking third-generation Erie, Pennsylvania family farmer for following the law, relying on government advice and exercising his constitutionally protected private property rights.[6] The United States, in other words, has employed a "win at any cost" "ends justifies means" approach to governance that poses a grave threat to the administration of justice.

FACTUAL BACKGROUND

4. Defendant Robert Brace has been engaged in farming in Erie County, Pennsylvania for approximately sixty (60) years. In December 1975, he purchased two working farms from his parents for their fair market value in arms' length transactions. One of the farms, the "Homestead Farm tract", consisted of 80 acres of farmland, while the other, the "Murphy Farm tract," consisted

[6] *See* James Madison, *Property*, National Gazette (March 29, 1792), available at: http://teachingamericanhistory.org/library/document/property/, reproduced in *James Madison: Writings*, ed. Jack N. Rakove (New York: Library of America, 1999), 515-517 ("This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.").

of 57 acres of farmland. He was raised in this area and observed farming on the Murphy Farm tract for his entire life. Defendant Robert Brace purchased the Murphy Farm tract for $45,000, its then current fair market value. (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 1-2).

5. From time to time during the fifty years prior to 1987, the condition of the land comprising the Murphy Farm tract, which includes the approximately 30-acre portion referred to in the current enforcement action as the "Consent Decree Area," had physically changed. In some periods, substantially all of the land was in production for different crops. In other periods, it was used for pasturing or lay fallow. The natural drainage patterns were disrupted from time to time by beaver dams which, unless removed, caused precipitation to back up and saturate the soil and even inundate portions of the land adjacent to drainage. Manmade agricultural drainage also was disrupted through natural deterioration and lack of maintenance. Throughout this period, the property was a farm and used for farming before Defendant Robert Brace's father had acquired it. (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 2).

6. When Defendant Robert Brace acquired the Murphy Farm tract in December 1975, he had been familiar with how the USDA's Soil and Conservation Service ("USDA-SCS") and former Agricultural Stabilization and Conservation Service ("USDA-ASCS") had provided cooperative technical and financial assistance to Erie County farmers, including his father, in improving soil conditions of farm property to make it more productive for farming. From 1975-1985, these agencies of the USDA actively encouraged farmers in the vicinity, including Defendant, to develop agricultural drainage plans and to actually create, maintain, improve, and expand agricultural drainage systems on farms in Erie County and elsewhere in the region. (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 4), (Ex. 2 Lewandowski Depo '11-17, *infra*), (Ex. 3 Steckler Depo. '11-

17, *infra*), (Ex. 4 SCS Nat'l Eng. Handbook, Sec. 16, at 1-2, explaining interrelationship of surface and subsurface drainage systems).

7. Recognizing these opportunities, Defendant Brace had planned to continue and expand the family farming business by improving the land. He had intended to improve the conditions of the soil which, although highly productive for farming, had been considered poorly drained and in need of drainage to make it suitable for production of cash crops, such as cabbage and potatoes. Since, by 1975, the then existing drainage system and the natural drainage of the land had deteriorated, he recognized the need to repair and expand the drainage system to render the farm workable. (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 2).

8. In 1976, Defendant Robert Brace had arranged for and began excavation and burying of plastic tubing known as "drainage tile" in the Murphy Farm tract to improve soil and agricultural drainage conditions for purposes of rendering the soil suitable for row crops that could generate higher revenues than pasturing livestock or producing livestock feed. The excavation involved what later became to be known as "side-casting" (i.e., the depositing of excavated soil sediment and dirt next to the drainage ditches from which it was removed) and "incidental fallback" (i.e. excavated material that falls back into the drainage ditches). (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 3).

9. When Defendant had undertaken these activities, the United States had not informed him that the dirt and soil that had been removed from the drainage ditches and redeposited on the ground nearby on the Murphy Farm tract required any federal permit. Although Defendant Robert Brace had been generally aware, in 1975, of how the CWA regulated discharges of pollutants into navigable rivers, streams and water bodies, he was entirely unaware that it covered what were commonly recognized as normal farming activities, including clearing, leveling draining, and

improving soil and hydrologic conditions of farm property for which permitting was required. As he understood it, CWA Section 404 exempted normal farming activities, including plowing, seeding, cultivating, drainage and tiling, harvesting and upland soil conservation practices, as well as, activities involving the construction and maintenance of irrigation and drainage ditches, from federal permitting. (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 3-5).

10. On May 4, 1987, a former Pennsylvania Game and Fish Commission ("PFGC") representative (Ex. 5 5-4-87 FWS Inspect Rpt.) entered Defendants' Murphy Farm tract without consent, an administrative or law enforcement warrant or probable cause. He then notified the U.S. Fish and Wildlife Service ("FWS") about observed unauthorized dredge and fill activities being undertaken on that property in violation of CWA Section 404. (Ex. 5 5-4-87 FWS Inspect Rpt.). On May 5, 1987, the state and federal officials who reported and recorded the incident undertook an onsite visit of Defendants' Murphy Farm tract. On May 11, 1987, the FWS reported the incident to the Corps. (Ex. 6 5-11-87 FWS Kulp Ltr. to Corps Col. Clark).

11. On July 15, 1987, the U.S. Environmental Protection Agency ("EPA") issued a Violation Notice and Order for Compliance/Cease and Desist order to Defendants alleging their unauthorized discharge of fill material consisting of dredged material, rock, sand, and agricultural waste into wetlands adjacent to Elk Creek, a U.S. navigable water, in violation of CWA Sections 301 and 404, and threatening to assess up to $25,000 of civil penalties per day for any violation of the Order, and possible incarceration for any willful violation thereof. (Ex. 7 EPA 7-15-87 VN/CD Order).

12. On July 17, 1987, the FWS notified Defendants that their ditching and filling activities violated CWA Section 404. The FWS notice *inter alia* informed Defendants that the Food Security Act of 1985 ("FSA") denied farmers federal agricultural subsidies, crop insurance and other

financial assistance if their filling and draining of wetlands took place after December 23, 1985, and that Defendants' draining and filling activities met the FSA definition of "converted wetlands." (Ex. 8 7-17-87 Perry Ltr.).

13. On July 23, 1987, the U.S. Army Corps of Engineers issued a Violation Notice and Cease-and-Desist Order to Defendants citing allegedly unauthorized placement of fill material into wetlands contiguous with Elk Creek on Defendants' property without the required CWA Section 404 permit. (Ex. 9 Corps 7-23-87 VN).

14. On March 1, 1988, the former regional FWS supervisor dispatched a letter correspondence to a former EPA Region III representative containing a draft restoration plan for Defendants' properties, the goal of which was "to restore all wetlands disturbed since October 1984." (Ex. 10 Kulp Ltr. to Butch 3-1-88). The restoration plan had apparently been based upon the FWS' May 6, 1987 delineation by mostly aerial photography of "over 130 acres" of wetland area on Defendants' properties, and FWS' then tentative findings "indicat[ing] that the soils of the area [were] flooded by surface or ground water for a portion of most growing seasons," and that Claimants' "considerable" ditching and filling activities had adversely impacted that area. Neither the EPA's Order nor the FWS' proposed restoration plan expressly referred to the 130 acres identified in the FWS correspondences noted above. Yet, the EPA previously prosecuted the original CWA violation action, and is currently prosecuting the new Consent Decree enforcement action against the Murphy Farm tract and the new CWA violation action against the Marsh Farm tract as if these tracts mostly comprise the 130 acres to which the FWS had previously referred. Many of those acres, however, actually extend far beyond such properties' boundaries into the regional watershed, as the map accompanying a June 16, 1987 FWS correspondence to the Corps clearly shows. (Ex. 11 6-16-87 Putnam Ltr. to Corps w/ watershed map).

15. In August 1988, after having received these notices of violation and compliance orders, Defendants contacted USDA-ASCS and requested that the Murphy Farm tract be granted the status of "commenced converted" wetlands for which the conversion to produce croplands had begun prior to December 23, 1985. (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 6). In September 1988, the USDA-ASCS granted that request based on the conversion activities undertaken, the related expenditures incurred, and the farming activities that occurred on the Murphy Farm tract commencing prior to December 1985. (Ex. 12), (Ex. 12A), (Ex. 12B) Commenced Conversion USDA filings & correspondence).

16. In April 1990, after having received these notices of violation and compliance orders, Defendants endeavored to apply to the U.S. Army Corps of Engineers ("Corps") for an after-the-fact ("ATF") federal permit. On May 11, 1990, the Corps informed the Defendants that it would not entertain any ATF at that time because of the pending enforcement action the United States intended to pursue. (Ex. 1 Robert Brace Affidavit Cl. Ct. 2002, at 6), (Ex. 13 Ingersoll Draft Motion to Secure ATF (1990)). Apparently, the Corps' reaction to Defendants' request was consistent with the longstanding Corps general policy (which apparently continues to this day) of not processing a permit application with respect to property for which EPA has issued a compliance order. *See Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), slip op. at 5, citing 33 C.F.R. §326.3(e)(1)(iv) (2011).

17. EPA filed the original CWA violation action on October 4, 1990. (Ex. 14 Original CWA Complaint) The original action was specially timed action had been initiated six (6) years from the October 5, 1984 effective date of U.S. Army Corps of Engineers ("Corps") regulations promulgated in response to a February 10, 1984 court settlement the Corps had reached with environmental groups. The regulation *inter alia* subordinated private property rights to public

interest rights and revised the exemption from CWA Section 404 permitting for construction of agricultural irrigation ditches to include certain connections. (Ex. 15 49 FR 39478, 39482 (Oct. 5, 1984)). In addition, the United States initiated this suit only eight (8) calendar days following the Corps' issuance of Regulatory Guidance Letter ("RGL") 90-07 (Ex. 16 RGL 90-07, (Sept. 26, 1990)). RGL 90-07 treated the "normal circumstances" of "prior converted cropland" defined by USDA guidance (Section 512.15 of the August 1988 National Food Security Act Manual ("NFSAM")) interpreting the "Swampbuster" provisions of the Food Security Act of 1985 ("FSA") (P.L. 99–198, 99 Stat. 1504, Dec. 23, 1985) as other than "wetlands", thereby excluding them from the penalty of U.S. Department of Agriculture ("USDA") cost-sharing ineligibility under the FSA AND from CWA regulatory jurisdiction as other than "waters of the United States." (Ex. 16 RGL 90-07, (Sept. 26, 1990), at paras. a-e).

18. On August 25, 1993 (during the course of the original CWA violation action but prior to trial), the EPA and the Corps jointly issued regulations revising the definition of "waters of the United States" contained in Corps regulation 33 C.F.R. 328.3 and EPA regulation 40 C.F.R. 230.3. This regulation broadly and retroactively codified the Corps' then current policy in RGL 90-07, to exclude prior converted cropland as similarly defined in the USDA-SCS's 1988 NFSAM, from both Food Security Act ("FSA") cost-sharing ineligibility AND CWA Section 404 regulatory jurisdiction. (Ex. 17 58 FR 45008, 45031-45034 (Aug. 25, 1993)). (The United States has long disputed the relevance of these regulations to this case, but, as Defendant's accompanying FRCP 60(b)(5) Motion to Vacate and FRCP 60(b)(6) Motion for Extraordinary Equitable Relief discuss, neither the District Court nor the Third Circuit Court ever had the opportunity to address its application to Defendants' September 1988 prior commenced conversion determination.)

19. On December 16, 1993, this Court entered judgment in favor of Defendants, finding that their activities on the Murphy Farm tract did not require a CWA Section 404 permit "because they constitute[d]: (a) normal farming activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches," and consequently qualified for the CWA Section 404(f)(1) exemption (*United States v. Brace*, No. 90-229 (W.D. Pa. Dec. 16, 1993)). On June 8, 1994, the United States appealed this decision to the Third Circuit Court of Appeals.

20. On November 22, 1994, the Third Circuit Court of Appeals reversed and remanded this court's 1993 ruling, finding that Defendants' activities on the Murphy Farm tract did not qualify under the "normal farming activities" exemption under CWA Section 404(f)(1)(A) or under the "maintenance of drainage ditches" exemption under CWA Section 404(f)(1)(C) (*United States. v. Brace*, 41 F. 3d 117, 138 (3rd Cir. Nov. 22, 1994)). On January 9, 1995, the Third Circuit denied Defendants' petition for rehearing, and on June 26, 1995 (*United States v. Brace*, No. 94-3076, (3rd Cir. 1995) (Sur Petition for Rehearing denied Jan. 9, 1995)), the U.S. Supreme Court denied Defendants' petition for certiorari (*Brace et al. v. United States*, (C.A. 3rd Cir.), Certiorari denied (June 26, 1995)).

21. On September 23, 1996, this Court, on remand, approved a nine (9)-page Consent Decree (inclusive of a Restoration Plan and hand drawn map) that the parties had previously executed on July 23, 1996 (Ex. 18 Consent Decree, Restoration Plan, and Attachment A). Defendants agreed to the Consent Decree fearing bank withdrawal of credit lines and the Third Circuit's adverse ruling requiring them to engage in significant remedial measures at much greater economic cost. EPA inspections and USDA Soil Conservation Service ("SCS") officials subsequently confirmed that Defendants had complied with the Consent Decree and its accompanying Restoration Plan

after three days' worth of work with the assistance of several hired help at considerable expense – well, within the required 90-day deadline. (Ex. 1. Robert Brace Affidavit Ct. Cl. 2002at 134).

22. On November 25, 1998, Defendants filed suit in the Federal Court of Claims, claiming the government's partial regulatory and physical "taking" of their private property for a public use (preservation of wetlands) without payment of just compensation in violation of the Fifth Amendment to the United States Constitution (*Brace v. United States*, No. 98-897L (Ct. Cl. 2006)). Defendants' argument focused on how the agency Cease and Desist Orders had precluded their use of the property by compelling them to cease operation of a portion of their hydrologically integrated drainage system located within the 30-acre Consent Decree Area portion of the Murphy Farm tract, and compelled their restoration of said area to a prior physical wet condition in October 1984 that did not then actually exist. Defendants also claimed that EPA's design of the Consent Decree Restoration Plan features denied them the ability to farm portions of their other farm tract properties due to periodic ongoing surface and subsurface flooding. *Brace v. United States*, No. 98-897L (Ct. Cl. 2006), at 31-32.

23. On August 4, 2006, the Federal Court of Claims dismissed Defendants' takings suit, in part, citing insufficient evidence had been produced at that time showing that "the flooding [was] the result solely of the restoration" and "that the area flooded exceed[ed] that which previously was wetlands." (*Id*.) The Claims Court reached this conclusion even though it also had found that by the time Defendants had completed all three drainage systems installed on the adjacent hydrologically integrated 58-acre Murphy Farm tract and 69-acre Homestead Farm tract from 1977 through 1979, the tracts had become mostly dry, and that Defendants had conducted further maintenance of the third drainage system on the property during 1984 to repair damage caused by flooding. (*Id*., at 5).

24. U.S. Geological Survey ("USGS") and North American Datum ("NAD") satellite images of the Murphy Farm for the years 1968 (Ex. 19 October 9, 1968 Murphy Satellite Image Fig. 4, Ecostrategies Rpt.)[7], 1977 (Ex. 20 1977 Murphy Sat Image),[8] 1983 (Ex. 21 May 11, 1983 Murphy Sat Image),[9] and 1993 (Ex. 22 April 7, 1993 Murphy Sat Image)[10] corroborate the finding of the U.S. Court of Claims that the Murphy Farm tract had been mostly dry by 1979, if not also thereafter, until at least 1993. The June 4, 1977 satellite image clearly shows, for example, contrary to the United States' claims, that there did not then exist an "Elk Creek" with a defined bed or bank running south of Lane Road as depicted on the PADEP 1998 Enclosure Map (Ex. 23 2006 Sat Image Ecostrategies Rpt. Fig. 7) The June 4, 1977 satellite image taken during the growing season also reveals, contrary to United State assertions, that there did not then exist clearly defined ditches running through the Murphy Farm tract.

25. The clearly defined agricultural ditch the United States refers to as "Elk Creek" with northerly flowing waters had been excavated from the Sharp Road/Greenlee Road intersection north of Lane Road to the McKean/Waterford Township line beginning in 1977. As the May 11, 1983 satellite image taken at the beginning of the growing season shows, the excavation of the big

[7] The October 9, 1968 satellite image is designated as "Figure 4" within Defendants' expert 8-5-15 "Ecostrategies Civil Engineering Report" designated as Defendants' Exhibit D-15 during the deposition of Jeffrey Lapp on October 2, 2017.

[8] The June 4, 1977 satellite image, identified as "USGS ID AR1VECN00050250," is of a higher resolution than the same June 4, 1977 satellite image designated as "Figure 5," "Figure 5a," and "Figure 6" within the Government's expert "Stokely Report" dated December 18, 2017 (focused on Defendants' Marsh Farm tract) and identified among the "References & Documents Considered" (p. 8) as "USGS ID VECN00050250."

[9] The May 11, 1983 satellite image, identified as "USGS ID NC1NHAP820123016," comprises part of the same satellite image designated in the Government's expert "Stokely Report" (focused on Defendants' Marsh Farm tract) and identified among the "References & Documents Considered" (p. 8) as "NC1NHAP820123016," and is designated as Exhibit 2 within the Susan Kagel Expert Rebuttal Report dated February 21, 2018 (focused on Defendants' Marsh Farm tract), and is also designated as "Figure 2," "Figure 3," "Figure 5" and "Figure 8" within Defendants' expert 8-5-15 "Ecostrategies Civil Engineering Report" designated as Defendants' Exhibit D-15 during the deposition of Jeffrey Lapp on October 2, 2017.

[10] The April 7, 1993 satellite image, identified as "USGS ID N10NAPPW05586092," is of a higher resolution than and comprises part of the same April 7, 1993 satellite image designated as "Figure 7" and "Figure 7a" within the Government's expert "Stokely Report" dated December 18, 2017 (focused on Defendants' Marsh Farm tract) and identified among the "References & Documents Considered" (p. 8) as "cambridge_springs_ne_pa.sid."

ditch the United States refers to as "Elk Creek" had continued southward to and beyond Lane Road through the western side of the Murphy Farm tract. This ditch, along with many others running through the Murphy Farm tract and at least one appearing on the northeastern portion of the Homestead Farm tract[11] had been excavated by Mr. Brace from 1977 through 1983. The 1983 satellite image clearly illustrates how Defendant Robert Brace's ditching activities had helped to hydrologically integrate his three-farm tract Waterford Township, PA farm and to gradually convert prior Murphy and Homestead Farm tract pasturelands and expand fields already cropped so they could be used for more profitable and harmonious crop production.

26. As the result, the Murphy Farm remained mostly dry productive farmland from at least 1983 until to 1993, as the April 7, 1993 satellite image taken during the wet season clearly reveals. Neither the 1983 nor the 1993 satellite images reveal the Murphy Farm tract to be a marshland or bog as the United States has effectively portrayed it to be. The wet areas south of the boundary of the Murphy Farm tract, which can be seen in both the May 11, 1983 and April 7, 1993 satellite images, arose because of the recurring intrusion of beaver dams. Together with the 1996 Consent Decree Restoration Plan features requiring the plugging of surface ditches, the cutting of all drainage tile lines legally installed in legally excavated ditches, and the installation of a substantially repositioned and overbuilt check dam, the recurring beaver dams and clogged culverts steadily contributed to the transformation of the Murphy Farm tract into a primordial wetland that had not previously existed during Defendant Robert Brace's lifetime. Both the 1998 PADEP Enclosure Map and a 2006 NAD satellite image of the Murphy Farm tract (Ex. 23 2006

[11] The extent of the improvements Defendant Robert Brace had made to the northeast portion of the Homestead Farm tract can be seen by comparing the 1977 and 1983 images. While the 1977 image, when magnified, shows a feint image of a stream running from across Greenlee Road to just above the farmhouse on the Homestead Farm tract, the 1983 image shows how that stream had been relocated, enlarged further defined as an agricultural ditch that served both that farm tract and the Murphy Farm tract.

Sat Image Ecostrategies Rpt. Fig. 7)[12] reveal how, since the Restoration Plan's implementation in 1996, a large water body had formed within the Murphy Farm tract's southcentral area and south of the tract's southern boundary, and that, a smaller water body had formed along the farm tract's western side. As discussed above, these water bodies had formed with the assistance of numerous intruding beaver dams that Defendants were unable to remove without conflicting federal state and local regulatory advice, oversight and administrative delay.

27. The record reveals that, since the 2006 Court of Claims ruling, Defendants had repeatedly sought to obtain information about the precise metes and bounds of the Consent Decree Area, and also to secure onsite visits and direction from Corps and EPA officials concerning their need to remove beaver dams and to clean and maintain overgrown agricultural ditches and related clogged culverts and drainage system tile running through the Murphy Farm tract, including the Consent Decree Area, and through or adjacent to portions Homestead Farm tract and Marsh Farm tract ("Marsh Farm tract") experienced surface and subsurface flooding. (Ex. 24 Devlin Ltr. to Lazos 6-19-08), (Ex. 25 Nov.-Dec 2010 Erie Conserv. Dist. Ltr. Exchge w/Brace and EPA Lapp), (Ex. 26 Brace Ltr. to Lapp 1-11-11), (Ex. 27 Brace Ltr. to Lapp 2-16-11), (Ex. 28 Lapp Ltr. to Brace 3-14-11), (Ex. 29 Brace Ltr. to Lutte 4-18-11), (Ex. 30 Brace Ltr. to Lutte 5-11-11), (Ex. 31 Brace Ltr. to Lutte 6-15-11), (Ex. 32 Ronald Brace Depo 1-18), (Ex. 33 Randall Brace Depo 1-18). The Murphy and Homestead Farm tracts and a portion of the Marsh Farm tract (to which Defendants had secured farm rights in 1975 and title in 2012) had been covered by a USDA-SCS Soil and Water Conservation Plan (Ex. 34 USDA Soil & Water Conserv Plan). that USDA has long

[12] The 2006 satellite image is designated as "Figure 7" within Defendants' expert 8-5-15 "Ecostrategies Civil Engineering Report" designated as Defendants' Exhibit D-15 during the deposition of Jeffrey Lapp on October 2, 2017.

recognized as comprising part of a larger "Farm 826, "Farm Tract No. 1356," consisting of approximately 157 cropped and pastured ("farmed") acres.

28. These correspondences also reveal that Defendants were conscientious about not violating the terms of the Consent Decree by discharging point-source pollutants into the approximately 30-acre Murphy Farm tract Consent Decree Area. For this reason, Defendants sought government authorization to clean and maintain agricultural ditches and related culverts and drainage tile bordering and/or adjacent to the Consent Decree Area within the Murphy Farm tract and on or adjacent to the Homestead and Marsh Farm tracts. On multiple occasions, Defendants had alerted Corps and EPA officials about how sediment and debris had continued to accumulate and impede water flow within these ditches, culverts and drainage tiles as the result of the Consent Decree Restoration Plan's features contributing to and exacerbating a backwater situation caused by beaver dam blockages north and south of Lane Road that triggered periodic ongoing surface and subsurface flooding and inundation extending beyond the Consent Decree Area.

29. In early July 2017, Defendants notified this Court of its filing of an administrative action under the Federal Torts Claim Act against the United States seeking compensatory damages to real property and restitution of lost harvest revenues as the result of surface and subsurface inundation and flooding caused by the United States' tortious implementation of the Consent Restoration Plan.. (ECF No. 156).

30. Defendants succeeded in securing the first onsite visit to their Waterford Township, PA farm by EPA representative Todd Lutte during late May-early June 2011 (Ex. 30 Brace Ltr. to Lutte 5-11-11), (Ex. 31 Brace Ltr. to Lutte 6-15-11). This was soon followed up by a second September 8, 2011 onsite visit by Corps representative Michael Fodse (Ex. 92 Fodse notes), (Ex. 36 Fodse 10-7-11 email to Brace). During these onsite visits, the federal agency officials inspected

the agricultural ditches/channels affected by certain beaver dams north and south of Lane Road and considered whether federal rules governed their possible removal. Although several of the beaver dams identified had been removed later that year with the assistance of the PA Game Commission, (Ex. 35 Fodse notes of 9-8-11 visit, p. 1) (Ex. 32 Ronald Brace Depo, at 103), the ditches/channels failed to fully drain.

31. Defendants were next able to secure an onsite visit with these same representatives on July 24, 2012, which occurred without the presence of counsel. Defendants believed that the purpose of the visit/meeting was simply to identify those channels and ditches that Defendants could clean and maintain as agricultural ditches pursuant to the agricultural ditch maintenance exemption from CWA Section 404 permitting. (Ex. 37 Brace Ltr to Lutte 1-13). Corps representative Fodse and EPA representative Lutte, however, had intended the visit for purposes of the Corps undertaking a preliminary legally nonbinding and unappealable jurisdictional determination. (Ex. 38 Brace Email to Fodse 5-30-12), (Ex. 39 Hans 12-19-12 Ltr), (Ex. 40 RGL 08-02, June 28, 2008), (Ex. 41Corps JD Instruct Guidebook). In fact, Mr. Fodse had previously insisted that Defendants *needed* such a determination (Ex. 36 Fodse 10-7-11 email to Brace) (Ex. 35, Fodse notes of 9-8-11 visit), but had failed to disclose to Defendants, who had never had requested and were entirely unfamiliar with such procedure, its "voluntary" nature or its legal implications (Ex. 41 Corps JD Instruct Guidebook).

32. It was during the July 2012 visit that Corps representative Fodse and EPA representative Lutte had walked and then designated the main channel area the government refers to as "Elk Creek" consisting of tributaries and reaches located both north and south of Lane Road as agricultural ditches (main, lateral and sublateral ditches) that could be cleaned and maintained to facilitate drainage under said CWA Section 404 permit exemption. Corps representative Fodse

also had requested that Defendant Robert Brace's son, Randall Brace, measure the approximate distance of the main channel area that Messieurs Fodse and Lutte had walked and/or viewed during that visit, which Defendants, one week later, informed them came to approximately 9/10 of a mile. (Ex. 42 Rhonda McAtee email to Fodse 7-31-12). Clearly, Defendants were unaware how such information would later be used against them. Soon after having secured that verbal authorization from Corps representative Fodse and EPA representative Lutte, which has since been confirmed by Mr. Lutte's October 3, 2017 deposition testimony and the sworn statement of a third party then present, Defendants proceeded in the summer and fall of 2012 to clean (excavate, side-cast, clear and plow) that area for purposes of facilitating its agreed upon drainage (via installation of drainage tile). Defendants' actions were undertaken in good faith as comprising normal ditch maintenance activities incident to normal farming practices in detrimental reliance upon these federal agency officials' verbal representations at that time.

33. In late December 2012, Defendants received a letter correspondence from Scott Hans, Chief, Regulatory Branch of the Corps' Pittsburgh District Office (Ex. 39 Hans 12-19-12 Ltr.). The Hans letter insinuated that Defendants had requested a jurisdictional determination of the main channel the government refers to as "Elk Creek" and of "an unnamed tributary to Elk Creek," and indicated, in part,[13] how the Corps had determined that approximately 4,750 linear feet of said channel and tributary "*are* jurisdictional waters of the United States" (emphasis added). This letter also directed Defendants to "immediately Cease and Desist any discharge of dredged or fill material into the waters of the United States identified herein," and requested an additional site visit "to clarify jurisdiction and review unauthorized activities."

[13] This letter also alleged that Defendants had undertaken unauthorized activities on the Marsh Farm tract and on approximately 2,200 linear feet of the channel the government refers to as "Elk Creek" adjacent to the Marsh Farm tract, which activities are the subject of the litigation before The Honorable Judge Rothstein in related action (1:17-cv-00006-BR).

34. Soon after receiving the December 2012 correspondence, Defendants sought written clarification from EPA representatives regarding the surprising conclusion the Corps had drawn from the July 24, 2012 onsite visit. (Ex. 43 1-4-13 Brace email to Lutte), (Ex. 44 1-17-13 Brace Ltr to Lutte), (Ex. 45 1-23-13 Brace Ltr to Lapp). On March 20, 2013, EPA representative Lutte responded by stating that Defendants' activities south of Lane Road "may be in violation of the Consent Decree" and that Defendants' activities north of Lane Road "may be an unauthorized impact" requiring a CWA Section 404 permit. Mr. Lutte also stated that another onsite visit "sometime in May or earlier" was "necessary" but did not suggest a meeting date. (Ex. 46 Lutte 3-20-13 Ltr to Brace).

35. On April 30, 2013, Defendants emailed EPA representative Lutte about confirming a meeting date considering the quickly approaching 2013 planting season. (Ex. 47 4-30-13 Brace email to Lutte). Mr. Lutte responded the next day (May 1, 2013) by stating that due to budget constraints no meeting could yet be scheduled. (Ex. 48 5-1-13 Lutte email to Brace). On May 6, 2013, Defendants responded by emphasizing the importance of securing EPA's authorization to plant crops within the recently cleaned areas on the Murphy Farm tract before the optimal part of the 2013 growing passed by (Ex. 49 5-6-13 Brace Email to Lutte). On May 23, 2013, having not yet received a response from EPA representative Lutte, Defendants emailed him again indicating that they had "completed all of [their] spring planting with the exception of the 15 acres […] on the […] Marsh property." (Ex. 50 5-23-13 Brace email to Lutte). Defendants conscientiously endeavored to secure EPA's authorization to plant the areas they had been authorized to facilitate the drainage of located south of Lane Road within the Consent Decree Area, and withheld planting of the areas they had been authorized to facilitate the drainage of located north of Lane Road. Later that day, EPA Counsel Pam Lazos responded to Defendants email by proposing that a joint

agency onsite visit take place on June 27, 2013, which Defendants accepted the following day. (Ex. 51 5-23-13 Lazos email to Brace),[14] (Ex. 52 5-24-13 Brace email to Lazos).

36. On June 27, 2013, in heavy-to-moderate rain, numerous federal and state officials descended upon Defendants' Waterford, PA farm to collect wetland data samples for purposes of discussing potential CWA violations and undertaking a wetland delineation and jurisdictional determination with respect to the main channel area north of Lane Road as well as Defendants' Marsh Farm tract, presumably, pursuant to the agencies' exercise of their enforcement jurisdiction. (Ex. 35 Fodse Notes of 9-8-11 Visit). However, no federal representatives devoted time to observe or inspect Defendants' Murphy Farm tract at that time.

37. On August 29, 2013, Defendants received a letter correspondence jointly authored by Corps representative Hans and EPA representative Lapp. (Ex. 53 8-29-13 joint EPA-Corps ltr). It indicated the EPA and Corps had concurred that the agencies had not, on July 24, 2012, authorized the majority of the work Defendants performed on the Murphy and Marsh Farm tracts. The agencies identified as unauthorized: 1) the "dredging of Elk Creek and its tributaries; [2)] "conversion of wetlands on the former Marsh property through draining, ditching, and side-casting; installation of tile drains; and [(3)] channel alterations and wetland conversion within the 30-acre wetland site subject to the 1996 Consent Decree."

38. The August 29, 2013 joint EPA-Corps letter also stated that, following EPA representative Lutte's onsite visit in late May or June 2011, EPA had "emphasized that all activities in waters of the United States south of Lane Road would require a Clean Water Act permit prior to initiating activities." This statement, however, conflicts with Mr. Lutte's email of September 12, 2011 (Ex. 54 Lutte 9-12-11 email to Brace). The joint agency letter, furthermore, admitted that

[14] EPA Counsel Lazos' 5-24-13 email also addressed Defendants' Marsh Farm tract which is currently the subject of the litigation before The Honorable Judge Rothstein in related action (1:17-cv-00006-BR).

representatives Lutte and Fodse had mistakenly authorized "the removal of sediment from Elk Creek and its tributaries south of Lane Road [based on the erroneous determination that such area] was exempt from regulation under the Clean Water Act," and consequently, stated that the United States "will exercise its enforcement discretion and forego any further action regarding [such] activities." Notwithstanding their admission and forbearance, the agencies, nevertheless, proceeded to characterize those very same activities as unauthorized potential or actual CWA Section 404 violations to the extent they occurred *within the Consent Decree Area* and north of Lane Road, denying their representatives had ever discussed them. The United States, in other words tried to cover up that agency representatives had authorized these activities, as well, within the Consent Decree Area and has intentionally fabricated allegations of CWA Section 404 violations that now serve as the foundation of this current enforcement action.

39. Since the issuance of their jointly authored August 2013 document, the Corps and EPA had dispatched representatives Fodse and Lutte to Defendants' Waterford, Pennsylvania ("PA") site on two additional occasions: 1) a November 13, 2013 aerial surveillance flight conducted by Corps representative Fodse and PA Fish and Boat Commission representative James Smolko, of Defendants' Waterford, PA Farm and reported they had observed corn rows and trenching within the 30-acre Consent Decree area. (Ex. 55 Fodse notes 11-13 flyover); (Ex. 56 Fodse 10-6-17 Depo, pp. 1-4, 172-178).

40. On May 2015, EPA representative Lutte conducted another onsite visit to document then current conditions and whether any activities had since occurred within the Consent Decree Area. (Ex. 57 Lutte 10-3-17 Depo, pp. 1-6, 285-286).

41. On January 9, 2017, the United States filed its first Motion to Enforce Consent Decree and for Stipulated Penalties (ECF No. 82) and accompanying Memorandum of Law in Support of

Motion to Enforce Consent Decree and for Stipulated Penalties (ECF No. 83). This enforcement action arose because of the parties' disagreement over the scope and extent of such government authorizations.

42. On June 15, 2017, considering the Court's prior and timely disposal of the entire judicial record relating to the original action, this Court generously granted Defendants 6 (six) months of discovery (ECF No. 146) to secure historically and currently relevant documentation and information vis-à-vis government production requests and federal and state government witness depositions.

43. On January 19, 2018, this Court graciously extended this discovery period an additional 30 days, at Defendants' request and on the eve of an anticipated federal government shutdown, to enable Defendants to secure experts to rebut three (3) lengthy and technically complex scientific expert reports the United States had delivered to Defendants on the eve of two weeks of federal holidays. (ECF No. 203). Defendants have since moved this Court, once again, for an extension of the discovery period until June 29, 2018, to enable their experts to conduct, for the very first time, essential scientific studies of Defendants' Murphy and Homestead Farm tracts (properties) made necessary by the United States' unauthorized breach of an October 3, 2017 joint stipulation precluding its direct and indirect use of data and information that it and its employees and experts had obtained from an October 16-17 onsite visit to Defendants' Waterford, PA hydrologically integrated farm. (ECF No. 208), (ECF No. 209).[15]

ARGUMENT

I. United States Allegations that Defendants Committed Acts of CWA Noncompliance in the Consent Decree Area Violating e the Injunction Are False and Without Foundation Because Each of the Acts Had Been Authorized by Federal Agency Representatives

[15] Defendants filed a similar motion (ECF No. 47) in the Marsh Farm tract CWA Section 404 violation action (1:17-cv-00006-BR), which the Court granted on March 30, 2018 (ECF No. 49).

In its Memorandum of Law in Support of Second Motion to Enforce Consent Decree and For Stipulated Penalties (ECF No. 20) the United States claims that Defendants' activities, which include their clearing, ditching, draining, plowing and planting of wetlands, had been undertaken "*in defiance of* the Consent Decree's permanent injunction against discharging any pollutants into the protected wetlands" and without authorization from Corps representative Fodse and EPA representative Lutte. (emphasis added). (ECF No. 207, at 1, 7). As discussed below, the facts will show that these allegations are false, illogical and without foundation.

1. *The Government's Designation of Elk Creek and its Tributaries South of Lane Road as "Agricultural Ditches" Eligible for CWA-Exempt Maintenance Applies to Nearly All of the Tributaries and Reaches Within the Consent Decree Area*

To the contrary, the evidence reveals that, on July 24, 2012, Corps representative Fodse and EPA representative Lutte verbally authorized Defendant Robert Brace's sons, Randall and Ronald Brace to undertake such activities throughout the entire Murphy Farm south of Lane Road, both within and beyond the Consent Decree Area, except for the southcentral and southwestern portions of the Consent Decree Area. The EPA and Corps thereafter admitted as much in their jointly issued August 29, 2013 letter, more than thirteen (13) months after the July 2012 onsite visit:

> "On July 24, 2012, a joint site visit was conducted by EPA and the Corps. During the site visit, staff represented that the removal of sediment *from Elk Creek and its tributaries south of Lane Road* was exempt from regulation under the Clean Water Act. At this visit, *the channels were laden with sediment*, from adjacent agricultural activities, and the boundaries of the Consent Decree were not clearly identified. […] Upon further consideration and review, the Government's field determination was made in error; the reaches of Elk Creek and its tributaries on your property are not agricultural ditches. Additionally, *portions of these channels are within the 30-acre wetland site covered by the 1996 Consent Decree*" (emphasis added).

(Ex. 53 8-29-13 EPA-Corps Ltr, p.3)

The United States, however, has not admitted that *nearly all* of "Elk Creek and its tributaries south of Land Road" are located *within* the Consent Decree Area. (Ex. 58 PADEP ENCLOSURE 1 MAP). It also has not explained how it was possible for these representatives to have authorized the removal of sediment without also authorizing the excavation and the temporary side-casting necessary to remove the sediment from the main channel referred to as "Elk Creek" and from such tributaries.

Representative Fodse has since testified under oath that he "didn't know that those channels [he designated as exempt agricultural ditches] *were in the consent decree* at the time" (emphasis added). (Ex. 56 Fodse 10-6-17 Depo at 93-94). In his October 6, 2017 testimony, representative Fodse also describes one such channel as follows: "we were looking at the area […] identified as a dashed line along the northern portion of the lower U section of the consent decree. […t]hat was south of Lane Road […that] looks like it's *within the consent decree area*" […] at the northern portion of the lower U portion *of the U-shape consent decree* (emphasis added). (*Id*., at 97-99) (Ex. 58 PADEP ENCLOSURE 1 map).

When Corps representatives Fodse and Lutte (both biologists lacking an engineering degree) entered the Murphy Farm for the July 24, 2012 onsite visit they did not carry with them the hand drawn map accompanying the Consent Decree. Instead, they carried with them a map provided by EPA representative Lutte that "showed the consent decree area as a blue shaded hatched area." (Ex. 56 Fodse 10-6-17 Depo at 95-96), (Ex. 59 EPA IMG 0078009), (Ex. 60 USACE 0000351)

. A review of this image reveals a solid blue shaded area that reflects only Elk Creek and two of its tributaries; it did not contain a hatched area as representative Fodse mistakenly recalled. Representatives Fodse and Lutte had not been unaccompanied by a Corps hydraulic/hydrologic engineer professionally capable of observing and assessing the surface and subsurface inundation

and flooding of the Consent Decree Area, and/or the extent of its contribution to the surface and subsurface inundation and flooding of other portions of Defendants' 157-acre hydrologically integrated Waterford Township, PA farm. If these United States representatives had based their determination on their biological non-engineering training and this less than detailed map, it is obvious that they had been ill prepared for the July 24, 2012 onsite meeting, and that the United States had apparently belittled the critical importance that such meeting had held to Defendants' farming operations.

EPA representative Lutte has similarly since testified under oath, on October 3, 2017, that he and representative Fodse had authorized the dredging and sediment removal from the entire length of Elk Creek running through the Consent Decree Area, as well as the maintenance of that channel. (Ex. 57 Lutte 10-3-17 Depo at 266, 291, 293). Representative Lutte also testified that, "at the time of the visit, [he…] believed it [Elk Creek] to be from the bridge over Lane Road and Elk Creek to where Elk Creek goes under Greenlee Road." (Ex. 57 Lutte 10-3-17 Depo at 266). In his October 3, 2017 testimony, Representative Lutte further clarifies his description of Elk Creek within the Consent Decree Area as follows:

> "I'm pointing to the area where Elk Creek crosses under Lane Road at the northwest portion of the Murphy tract that is demarcated as the Consent Decree area, and the portion of the blue line on this map which coincides with the Consent Decree area and makes a U shape and concludes at the top of the hatched area demarcated as Lane Road on the Murphy tract. […] I believed that Mike Fodse had – was speaking of that section, and […] if it would qualify as an agricultural ditch, he [Defendant] would be allowed to dredge […] that portion of Elk Creek."

(Ex. 57 Lutte 10-3-17 Depo at 295-296).

The problem, however, is that representative Lutte failed in his recent testimony to accurately identify the location of Elk Creek relative to the Consent Decree Area.

As the map depicted in Exhibits 17-18 accompanying the United States' Memorandum of Law clearly indicate (ECF No. 207-17), (ECF No. 207-18), (ECF No. 207-19), Elk Creek located south of Lane Road is the blue line that can traced from the northwest portion of the Consent Decree Area beginning at Lane Road southeastwardly toward and passing beyond the southern boundary of the Murphy Farm. The channel running roughly horizontally across the Murphy Farm depicted as a dashed line located along the bottom of the "U" and exiting to Greenlee Road within and through the Consent Decree Area potentially constituting one lateral or sublateral ditch/tributary to Elk Creek to which the August 2013 letter refers. There is also a channel depicted as a roughly vertical dashed line running from that horizontal dashed line northward until it forks into two dashed lines running further northward in two directions toward Lane Road, each constituting lateral or sublateral ditch/tributary to Elk Creek to which the August 2013 letter refers. Lastly, there is an additional blue line running from Lane Road southward passing through the roughly horizontal dashed line toward the southern boundary of the Murphy Farm which then turns horizontal and runs across the Murphy Farm to meet up with Elk Creek which the map officially refers to as a tributary to Elk Creek. In other words, representative Lutte's more recent technically incorrect testimony reveals that he still does not understand the physical difference between the main channel the government refers to as "Elk Creek" and other channels/tributaries feeding into it, and consequently, that he remains uncertain about those portions of the Consent Decree Area within which he and representative Fodse had authorized Defendants' activities.

2. *Express Authorization to Maintain Agricultural Ditches and "to Farm" Necessarily Includes Excavating, Sediment Removal, Side-casting, Tile Repair/ Replacement/Installation and Clearing of Adjacent Areas*

The evidence, furthermore, shows that, on July 24, 2012, Corps representative Fodse and EPA representative Lutte verbally authorized Randall and Ronald Brace, on behalf and under the

direction of Defendants, to excavate and clean the main channel/ditch and its laterals and sublaterals/tributaries within the Consent Decree Area pursuant to the CWA Section 404 agricultural ditch maintenance exemption, *for the very purpose of* facilitating surface and subsurface drainage (i.e., removal of excess water from the soil surface and below the soil surface) of those areas. (Ex. 4 SCS Nat'l Eng. Handbook, Sec. 16 at 9, explaining functions of "main ditch," laterals" and "sublaterals"). Representatives Lutte and Fodse did not specify the level to which Elk Creek and their tributaries south of Lane Road were to be drained. The primary method of achieving subsurface drainage is through installation of drainage tile to supplement natural drainage. (*Id*., at 1). These representatives had known or should have known that Defendants had long ago installed a tile drainage system on the centrally located Murphy Farm to facilitate the drainage of its three adjacent hydrologically integrated Waterford Farm tracts the hydraulics of which had been significantly disrupted by the severing of multiple drainage tile lines within the Consent Decree Area per step 1 of the Consent Decree's Restoration Plan. Federal representatives Fodse and Lutte also had understood or should have understood how the surface and subsurface inundation and flooding of the Consent Decree Area facilitated the further inundation and surface and subsurface flooding of other portions of Defendants' 157-acre hydrologically integrated Waterford Township, PA farm.

According to Edward Lewandowski, a former USDA-SCS Agriculture Conservation Program conservation technician in Erie County who had previously worked with Defendant Robert Brace during 1977-1979 to design and develop tile drainage systems for several of the fields on his Waterford, PA farm (Ex. 2 Lewandowski Depo '11-17 Depo, at 19-20), (Ex. 61 Lewandowski 4-14-91 Depo, at 4-5), (Ex. 62 Lewandowski 4-14-91 Depo Exhibit C Tile Install Rpt), (Ex. 63 Lewandowski Grassed Waterway Data Sheet), "one of the major practices in Erie County [was]

tile drainage" (Ex. 61 Lewandoski 4-14-91 Depo, at 2-3), and it was a normal farming practice and often necessary, considering the hydrology of the fields, for farmers to place drainage tile in watercourses to provide an outlet that facilitates water flow to the lowest elevation. In fact, according to Mr. Lewandowski, in order to maintain the drainage system outlet placed in a watercourse, it is necessary to clean out the watercourse in the normal course of ditch maintenance and even to repair the tile lines connected to the outlet if there is sediment buildup in their bottoms. "Every tile system has to have a watercourse. […] That's part of drainage of your farmland, and a lot of farmers need that furiously." (Ex. 2 Lewandowski Depo '11-17, at 16-18, 73-76, 92-93). *See also* (Ex. 33 Randall Brace Depo 1-18, at 63), (Ex. 32 Ronald Brace Depo 1-18, at 53), (Ex. 64 Robert Brace 1-9-18 Depo, at 184), (Ex. 4 SCS Nat'l Eng. Handbook, Sec. 16, at 2, explaining normal practice of improving channels into which drainage tile outlets are placed to prevent flooding).

Corps representative Fodse and EPA representative Lutte, furthermore, effectively authorized Randall and Ronald Brace, acting on behalf and under the direction of Defendants, to clear adjacent areas to prevent growth and debris from later reentering the main ditch/channel, laterals and sublaterals to impede the flow of water as part of the normal farming activity of agricultural ditch maintenance they had been authorized to perform. (Ex. 65 RA-1, Randall Brace Depo), (Ex. 33 Randall Brace Depo 1-18, at 59-65, 132-137), (Ex. 66 RO-1, Ronald Brace Depo), (Ex. 32 Ronald Brace Depo 1-18, at 21-25), (Ex. 67 USDA Agriculturalist Plan Bureau Book 1916, at 3-5, explaining the importance of drainage tile outlets), (Ex. 68 Univ. of Wisc. Ag School Tile Drainage, at 2, explaining the importance of drainage tile outlets and removal of trees, brush and other debris from the drainage ditch as part of normal maintenance). Representatives Fodse and Lutte, at no time during the July 24, 2012 onsite visit or before dispatch of Corps representative

Hans' December 19, 2012 correspondence, either defined agricultural ditch maintenance activities or excluded from such term any specific farming activity. Had they bothered to review Corps Regulatory Guidance Letter 07-02 (July 4, 2007) (Ex. 69 RGL 07-02 (July 4, 2007)) prior to their July 24, 2012 onsite visit, they would have discovered that the Corps defines the term "drainage ditch maintenance" to

> "generally include, but [] not [be] limited to, activities such as [e]xcavation of accumulated sediments back to original contours[, r]e-shaping of the side slopes[, b]ank stabilization to prevent erosion where reasonably necessary using best management practices [,…a]rmoring, lining and/or piping […] where a previously armored, lined, or piped section is being repaired and all work occurs within the footprint of the previous work[, and [r]eplacement of existing control structures, where the original function is not changed and original approximate capacity is not increased. Maintenance is generally viewed as involving activities that keep something in its existing state or proper condition or preserve it from failure or decline. […]"

(Ex. 69 RGL 07-02 (July 4, 2007), at 3-4).

As the result, Randall and Ronald Brace, acting on behalf and under the direction of Defendants, reasonably understood the scope of the authority they had received to conduct agricultural ditch maintenance on Elk Creek and its tributaries and reaches south of Lane Road within the Consent Decree Area.

Randall and Ronald Brace also reasonably understood the authority they received from representatives Fodse and Lutte "to farm" any one or more of such areas as allowing them to do whatever was necessary to make it farmable, including clearing the brush, tiling, preparing it for cropping, and cropping. (Ex. 33 Randall Brace Depo at 132-133), (Ex. 32 Ronald Brace Depo at 21-25. 53, 65, 69). However, Randall and Ronald Brace have testified under oath that they did not

excavate any new drainage ditches or clean any new areas pursuant to that authorization. (Ex. 33 Randall Brace Depo 1-18, at 65),[16] (Ex. 32 Ronald Brace Depo 1-18, at 66-67).[17]

Randall and Ronald Brace, furthermore, reasonably understood that the authority representatives Fodse and Lutte had granted them to tile within the Consent Decree Area was limited to *replacement* of previously *existing* disabled drainage tile; it did not include the installation of *additional drainage tile lines*. (Ex. 32 Ronald Brace Depo 1-18, at 45-48), (Ex. 66 RO-1, Ron Brace Depo), (Ex. 33 Randall Brace Depo 1-18, at 37-38), (Ex. 65 RA-1, Randall Brace Depo). RGL-07-02 defines "drainage ditch construction" activities requiring CWA Section 404 permitting as "work that results in the *extension or expansion* of an existing structure" (emphasis added). (Ex. 69 RGL 07-02 (July 4, 2007), at 4). On the other hand, RGL 07-02, as discussed above, defines "drainage ditch maintenance" activities exempt from CWA Section 404 permitting as including "*[r]eplacement* of existing control structures, where the original function is not changed and original approximate capacity is not increased. […It…] is generally viewed as involving activities that keep something in its *existing* state or proper condition or preserve it from failure or decline" (emphasis added). (Ex. 69 RGL 07-02 (July 4, 2007), at 4-5). The CWA Section 404 permitting exemption for drainage tile *replacement* is logically consistent with the exclusion from CWA Section 404 jurisdiction over groundwater flowing through tile drainage systems which does not constitute "waters of the United States." *See* 40 C.F.R. § 122.2(2)(v). Once again, it must be recalled that representatives Fodse and Lutte had authorized Randall and Ronald Brace to undertake these activities as part of agricultural ditch maintenance, because the excess surface

[16] "Q. Did you, after Lutte and Fodse told you you could work in that area, by that area, I mean the consent decree area, did you excavate any new ditches? A. No. Everything that we did was existing."
[17] "Q. […] You said that your brother Randy, clean out what you call agricultural ditches and we call Elk Creek. Did he clean anything else out there? Did he excavate anything new? A. He didn't excavate anything that Todd and Fodse told us that he couldn't excavate. And that is why the ditches I outlined, to my knowledge, that's all he dug out."

water had caused subsurface inundation and flooding within the Consent Decree Area exacerbated by the previous cutting in 1996 of drainage tile lines in compliance with the Consent Decree, which had, in turn, caused ongoing periodic surface and subsurface inundation and flooding beyond the Consent Decree Area on Defendants' Murphy Farm tract uplands and on portions of their hydrologically integrated Homestead and Marsh Farm tracts.

Randall and Ronald Brace also had been aware of those areas where representatives Fodse and Lutte had expressly directed them not to "farm." Randall and Ronald Brace each testified specifically about the southcentral and southwestern portions of the Consent Decree Area that they could not farm and must leave untouched (*Id.*), (Ex. 33 Randall Brace Depo 1-18, at 61-62, 64-65, 137-140), (Ex. 65 RA-1 – Randall Brace Depo), (Ex. 32 Ronald Brace Depo 1-18, at 67), (Ex. 66 RO-1- Ronald Brace Depo). Defendant Robert Brace had previously confirmed this understanding in his January 17, 2013 letter correspondence to EPA representative Lutte responding to the December 19, 2012 Hans Corps letter accusing Defendants, following the July 24, 2012 onsite meeting, of Consent Decree and/or CWA Section 404 violations.

> "Shortly after our meeting we began proceeding with our clean up and maintenance efforts, *taking care to avoid the southern back section* from Lane Road (where the 30 acre wetland is located) as you requested. The only work that was performed on the land south of Lane Road was ditch cleaning. You had indicated to both of my sons, Randy and Ronnie, that this was allowed, as long as we stayed out of the back [of the] 30 acre wetland area. Be assured, we did not disturb that area" (emphasis added).

(Ex. 44 1-17-13 Brace Ltr to Lutte).

This paragraph reaffirms Defendants' understanding that they were to avoid the "southern back section" of the 30-acre Consent Decree Area, just as Randall and Ronald Brace had testified and marked in the mapped exhibit images accompanying their testimonies. The omission of the bracketed words "of the" in the third sentence of this 1-17-13 letter was a typographical error, and

when inserted into the sentence they, consistent, with the paragraph's first sentence, reflect this understanding: "as long as we stayed of the back of the 30 acre wetland area." (Ex. 44 1-17-13 Brave Ltr to Lutte), (Ex. 64 Robert Brace Depo 1-9-18, at 185).

3. *Express Authorization "to Farm" and Subsequent Silence/Non-Responses to Repeated Requests to Plant Crops Where Refusal was Possible Constitutes Tacit Approval of Crop Plantings*

The evidence, moreover, shows that even though Corps representative Fodse and EPA representative Lutte had, in July 2012, verbally authorized Randall and Ronald Brace (on behalf of and under the direction of Defendants) "to farm" the areas adjacent to Elk Creek and its tributaries south of Lane Road located within the Consent Decree Area, which Defendants reasonably understood as including the planting of those areas with crops, Defendant Robert Brace conscientiously endeavored on several occasions prior to the commencement of the 2013 growing season (in late April and early May) (Ex. 64 Robert Brace Depo 1-9-18, at 138) to notify representative Lutte of his request for express authorization to proceed with such activity. (Ex. 47 4-30-13 Brace Email to Lutte), (Ex. 49 5-6-13 Brace Email to Lutte). Initially, Defendant Brace sought for representative Lutte to travel to the Murphy Farm so that he could show him precisely where he wanted to plant. When it became apparent that federal budget constraints would prevent representative Lutte from traveling to Erie for this purpose (Ex.48 5-1-13 Lutte email to Brace), Defendant Brace, once again, notified him of his request for express written authorization to plant within the Consent Decree Area. However, a response from representative Lutte on this issue was not forthcoming – he neither provided authorization nor refused to provide authorization verbally or in writing. With the economically critical planting (growing) season upon him, Defendant Robert Brace reasonably and validly interpreted representative Lutte's repeated silence on this issue as not prohibiting but rather tacitly authorizing/consenting to his planting of those areas, and

he proceeded to plant crops within the cleared areas of the Consent Decree Area, and notify representative Lutte about this action. (Ex. 50 5-23-13 Brace email to Lutte).[18] *See, e.g., In re: Prudential Ins. Co. America Sales Practice Litigation Agent Action*, 148 F.3d 283, 306 (3d Cir. 1998) (stating that "silence on the part of those receiving notice is construed as tacit consent to the court's jurisdiction."); *Edwards v. Wyatt*, Nos. 07-1466 & 07-1602 (3d Cir. 2009), slip op. at 14 (stating that"[u]nder the Restatement, Pennsylvania courts will supply a reasonable missing term based on 'a tacit agreement or common tacit assumption or where a term can be supplied by logical deduction from agreed terms or circumstances.' RESTATMENT (SECOND) OF CONTRACTS §204 cmt. c (1981)"); *L.L. v. Evesham Township Board of Education*, No. 15-3596 (3d Cir. 2017), slip op. at 6 (holding that, "[t]he complaint about the teacher's purposed tacit acceptance of the student's use of a racial epithet and the other complaints, if proved at trial, are sufficient to support an inference that the School District's actions were discriminatory."); *Expeditors International of Washington, Inc. v. Official Creditors Committee of CFLC, Inc.*, 166 F.3d 1012, Ninth Circuit (1999) (stating that "[t]he Second Circuit has held that the understanding of parties 'may be inferred from the resolution of a prior dispute between the parties or from tacit acceptance of a clause repeatedly sent to the offeree in an order confirmation document'"), quoting *New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 31 (2d Cir. 1997); (Ex. 70 Black's Law Dictionary "Tacit").

This evidence has been further corroborated by the notarized statement of Mr. Ronald Bosworth, the only non-family non-federal employee to attend the July 24, 2012 onsite visit of federal agency representatives Fodse and Lutte. Mr. Bosworth is a thirty-year-plus veteran of the

[18] The United States has not alleged as part of this enforcement action that husk and leaf droppings from Defendants' harvesting of corn previously planted in an area adjacent to an agricultural ditch as government authorized constitutes a forbidden dredge and fill of a wetland that is different than grass cuttings which are not prohibited, it has yet provided any legal source in support of that allegation.

United States Air Force, and a former Legislative Assistant to two Pennsylvania State Senators. (Ex. 71 Affidavit of Ronald Bosworth).

II. United States Allegations that Defendants Committed Acts in the Consent Decree Area Violating the Consent Decree Are False and Have Never Been Factually Confirmed or Validated

1. *The Government Has Failed to Produce Demonstrative Evidence Proving that Defendants Committed Three Violations of the Consent Decree*

The prior arguments invalidating each of the unfounded allegations of Injunction violations are reason alone why the United States' motion should be denied. However, the United States' motion also should be denied with respect to each of the unfounded specific Consent Decree violations alleged, separately and independently, for the reason that no evidence susceptible to independent confirmation and validation has been proffered to support them.

The United States' Memorandum of Law also alleges that Defendants violated three of its obligations under the Consent Decree: "(1) Defendant's violation of the requirement to disable tile drainage at the Site; (2) Defendants' violation of the requirement to fill in surface ditches at the Site; and (3) Defendants' violation of the requirement to install a check dam in the unnamed tributary adjoining the Site" (ECF No. 207, at 16), "by: (1) re-installing drainage tiles; (2) re-excavating two surface ditches; and (3) removing the check dam, thereby again disrupting the hydrologic regime of the 30-acre wetland." (ECF No. 207, at 15.) However, the United States has failed to undertake sufficient due diligence to factually confirm and validate that such acts of violation had actually occurred.

These unfounded allegations reveal Plaintiff's discovery of the true breadth and extent of the federal agency representatives' ostensibly erroneous determination which may not be an error at all. The United States' apparent goal, since the FWS' early 1987 violation notice (Ex.6 5-11-87

FWS Kulp Ltr to Corps Col. Clark), has been to classify Defendants' privately-owned 157-acre hydrologically integrated three farm tract Waterford Township Farm as "wetlands" adjacent to "waters of the United States – i.e., as public property for purposes of asserting federal regulatory jurisdiction and control over it. For example, in addition to asserting enforcement jurisdiction over the Consent Decree Area based on these alleged violations, the United States has also asserted regulatory jurisdiction over eighty-five (85%) percent of Defendant's Marsh Farm tract as the related legal action currently before this court readily shows.[19] and over portions of Defendants' Homestead Farm tract north of Lane Road and adjacent to Elk Creek as the accompanying exhibit received during discovery shows. (Ex. 72 USACE 0000090, Expanded Detailed USG Site Map). And, Plaintiff asserts that these violations had been committed defiantly and routinely since August 29, 2013, in contravention of the Consent Decree and as putatively confirmed by federal agency representatives' November 2013 aerial and May 2015 onsite investigations of the Murphy Farm.

2. Unfounded Allegation of Consent Decree Violation #1 – Reinstallation of Drainage Tile

The United States bases this allegation, in part, on Corps representative Fodse's observations and the aerial photographs he and PFBC representative Smolko had taken during a November 13, 2013 aerial flyover of Defendants' Waterford, PA farm, during which representative Fodse reported he had observed "…trenching within the 30 acre Consent Decree area." (Ex. 55 Fodse notes 11-13 Flyover). This allegation also is based in part, on the May 20, 2015 onsite observations of EPA representative Lutte, who reported that "Ten drainpipe outlets were observed in and along the channel of Elk Creek and its association unnamed tributaries all within the limits of the 30-

[19] *See* 1:17-cv-00006-BR currently before the Honorable Judge Rothstein (ECF No.

acre wetland Site covered by the Consent Decree." (Ex. 73 Lutte Decl., at para. 29). This claim relates to Task #1 of the Consent Decree Restoration Plan – "Excavation of trenches: removal of drainage tubing." (Ex. 18 Consent Decree, Restoration Plan and Attachment A, Task 1). The United States, however, has endeavored to divorce these subsequent observations from the reality of the prior authorization that representatives Fodse and Lutte had granted to Defendants to engage in agricultural ditch maintenance activities in the main channel and its laterals and sublaterals (otherwise known as Elk Creek and its tributaries and reaches) south of Lane Road that included by physical necessity the authorization of this activity within the Consent Decree Area.

a. Prior Authorizations Consistent with Laws discussed in Section I.1 above, nearly all of the main channel and its laterals and sublaterals south of Land Road fall within the Consent Decree Area. And, as discussed in Section 1.2 above, representative Fodse's and Lutte's authorization to conduct agricultural ditch maintenance activities included, consistent with relevant Corps regulatory guidance and regulations (Corps Regulatory Guidance Letter 07-02 and 40 C.F.R. § 122.2(2)(v)), tiling activities that had been limited to *replacement* of *existing* drainage tile that had been disabled by their prior cutting in 1996 in compliance with the Consent Decree; these authorized activities did not entail installation of *additional* lines of drainage tile.

To recall, the primary purpose of these and other agricultural ditch maintenance activities Defendants had undertaken by the end of 2012 in reliance upon representatives Fodse's and Lutte's July 24, 2012 authorization, was to facilitate surface and subsurface drainage (i.e., removal of excess water from the soil surface and below the soil surface) of those surface areas within the Consent Decree Area that had become inundated and flooded which, in turn, caused the surface and subsurface inundation and flooding of Defendants' Murphy Farm tract uplands and portions of their hydrologically integrated Homestead and Marsh Farm tracts located beyond the Consent

Decree Area. In their recently executed and notarized affidavits, Randall and Ronald Brace have explained how they had limited their tiling activities in support of agricultural ditch maintenance to merely replacing disabled existing drainage tile and had not installed additional tile lines in the Consent Decree Area. (Ex. 74 Affidavit of Randall Brace), (Ex. 75 Affidavit of Ronald Brace).

The United States, moreover, has since provided no demonstrable evidence showing that Defendants' tile drainage activities conducted within six (6) months of the Fodse-Lutte July 24, 2012 authorization failed to satisfy the agricultural ditch maintenance exemption per RGL 07-02, and triggered the recapture provisions of CWA Section 404(f)(2) because of the *possible* "conversion" of the Consent Decree Area to agricultural use. (Ex.53 8-29-13 EPA-Corps Ltr. , at 4 – "It also *appears* that portions of the area subject to the Consent Decree *may* have been converted to agricultural use" (emphasis added); (Ex. 76 USDOJ/EPA VN 1-11-16, at 2 – referring to 8-29-13 joint EPA-Corps Ltr.). If conversion had occurred in 2012 as quickly and easily as the United States now claims (i.e., within a few short *months*), it strains credulity also to conclude that the United States' had correctly determined thirty (30) years ago that Defendants had not succeeded, as had been determined by the USDA-ASCS, to have initiated its prior commenced conversion of these same wetlands to agricultural use by December 23, 1985, and that such commenced conversion had not been completed several *years* later by the time Defendants had received their first federal agency violation notice in 1987. The United States cannot have it both ways.

Had federal representatives Fodse and Lutte possessed engineering degrees as well as biology degrees or been accompanied by a Corps hydraulic/hydrologic engineer to the July 24, 2012 onsite visit, they would have been able to observe and assess the extent to which the surface and subsurface inundation and flooding of the centrally located Consent Decree Area facilitated the

surface and subsurface inundation and flooding of other portions of Defendants' 157-acre three farm tract hydrologically integrated Waterford Township, PA farm. These representatives also would have understood Defendants' need, consistent with local, regional and national farming practices recognized by the USDA SCS and other learned sources extensively sited in Section I.2 above, to utilize tile subsurface drainage to help achieve surface drainage of the Consent Decree Area – the primary purpose they had engaged in the agricultural ditch maintenance activities that representatives Fodse and Lutte had authorized on July 24, 2012. (Ex. 73 Lutte Decl., at para. 26).

Representatives Fodse and Lutte, therefore, should have expected rather than acted surprised about the trenches and tile drainage outlets they observed during their respective November 2013 aerial and May 2015 reconnaissance visits to Defendants' farm. Since these United States representatives had neither established a working definition of "agricultural ditch maintenance" to which Defendants must adhere nor excluded or forbade any activities from said term, they had effectively tacitly authorized Defendants to undertake *inter alia* tile drainage repair, installment/replacement activities these same representatives and the United States now claim as Consent Decree violations, as discussed extensively in Sec. 1.3 above.

Consequently, this Court must find that no such violation of the Consent Decree had occurred, and must especially consider how the United States had over-implemented the Restoration Plan to deny Defendants the exemption for which its prior ditching activities had qualified under CWA Section 404(f)(1)(C).

b. Over-Implementation of Drainage Tile Removal

Task 1 of the Consent Decree Restoration Plan calls for excavation of three sets of two parallel trenches to a depth of five (5) feet at each of three specified locations. "The first set shall be located parallel to the western side of Elk Creek (marked as 'Set 1' on Attachment A." "The

second set shall be located parallel to the southern side of […] 'unnamed tributary A'(marked as 'Set 2' on Attachment A)." "The third set shall be located parallel to the northern side of […] 'unnamed tributary B' (marked as 'Set 3' on Attachment A)." (Ex. 18 Consent Decree, Restoration Plan and Attachment A, at 1(a)).

The Restoration Plan also assigns a distance for each such trench from the tributary and from one another. It requires the first trench in each of three sets of trenches to be "located at a distance of twenty-five (25) feet from the bank of the referenced waterway." It requires the second trench in each of the three sets of trenches to be "located at a distance of fifty (50) feet from the first trench (a total of seventy-five (75) feet from the bank of the waterway." (Ex. 18 Consent Decree, Restoration Plan and Attachment A, at 1(b)).

The Restoration Plan, however, does not assign a fixed length to any of the three sets of trenches described above, which may vary trench to trench depending on the discretion of "the EPA or its representative." Such discretion was to be exercised to ensure that each of the excavated trenches was long enough "to intercept the drainage tubes located in the wetlands." And, when such a drainage tube was intercepted during excavation, the Restoration Plan directed that "a twenty-five (25) foot length of the drainage tube shall be removed." "Upon removal of all intercepted drain tile, the area shall be inspected by EPA (or its representative)," and evaluated for approval. Once inspected and approved, the trenches were to be filled in with the excavated soil and the drainage tile disposed of. (Ex. 18 Consent Decree, Restoration Plan and Attachment A, at 1(c)).

Former USDA-SCS representative Lewis Steckler testified under oath that he was the sole United States representative present to oversee the Restoration Plan's implementation on December 23-24, 1996, and that it was his job to know whether the Restoration Plan had been

followed properly. "Yes. They wanted to be sure it was completed to the – whatever they deemed necessary to undo the drainage that was done." (Ex. 3 Steckler Depo '11-17, at 81). Former representative Steckler had then been present at the request of officials from the FWS State College, PA offices and the U.S. Department of Justice ("DOJ"), given his proximity to the Brace Farm having then served as a District Conservationist for the USDA SCS/Natural Resource Conservation Service ("NRCS") in Erie County. (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 718-719), (Ex. 3 Steckler Depo '11-17, at 4, 77, 82).

Former representative Steckler testified that, during the two-day period, he had taken his camera and had "documented the event on film." He also described numerous photos he had taken of the excavated trenches and removed drainage tile. Several of these pictures had been taken from Greenlee Road and further inland on the Murphy Farm Tract, (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 720-721, 725-729), (Ex. 3 Steckler Depo '11-17, at 74, 77-80). Presumably, these were photos of the two sets of excavated parallel trenches adjacent to "unnamed Tributary A" and unnamed Tributary B. Former representative Steckler also testified that he had taken photographs of the trench excavation and tile removal work that had been performed closest to South Hill/Lane Road adjacent to Elk Creek. (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 725-726). The United States, however, has failed to turn over to Defendants any of these photographs during the recently completed non-expert discovery period.

Furthermore, former representative Steckler testified that, based on his knowledge at the time, "the restoration plan was to turn that particular 30-acre site that was referred to in the restoration plan […] to the water conditions before up to 1984" – i.e., to restore the property back to 1984. (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 729, 753). He also testified that there actually were drainage ditches that had been *constructed* in the approximate 30-acre wetland area – i.e. the

Consent Decree Area – on Defendant Robert Brace's Murphy Farm tract within which drainage tile had been installed *before 1984*, and that he thought "some of them" had been *filled in* pursuant to the Restoration Plan. (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 752, 754-755).

Former representative Steckler, moreover, testified that he had "had a copy of the restoration plan" (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 722) and that he had "probably glanced" at the hand drawn map accompanying the Consent Decree to evaluate whether the work had been done properly. (Ex. 3 Steckler Depo '11-17, at 78-79). Yet, former representative Steckler also testified under oath that while he had then been present to observe the Restoration Plan implementation work, neither he nor the USDA had officially signed off on ("approved") it – i.e., had certified that the Restoration Plan's implementation work had been performed properly – since he "had no input into that at all." (Ex. 3 Steckler Depo '11-17, at 81-82). "I was the closest government employee to go and document it, that was actually done, because somebody was going to have to drive State College or Philadelphia and they go clearance through my State office for me to do it." Indeed, former representative Steckler testified that he "didn't keep track of every ditch that was filled out, especially if we [USDA] didn't have anything to do with it," presumably referring to ditches excavated and drainage tile installed at Defendants' expense *without* USDA cost-sharing in October 1984. (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 753-754), (Ex. 78 USDA-ASCS Oct. 1984 Cost-Sharing Approval Forms).

Although he had been present on December 23-24, 1996 to "[t]o document the removal of drainage tiles and a couple of ditch blocks, [and to observe…] where they blocked off the drainage ditches" (Ex. 3 Steckler, Depo. '11-17, at 77), former representative Steckler was less than careful to ensure that Defendants' legally grandfathered and partially self-financed prior commenced

conversion work had been preserved and protected from the Restoration Plan implementation consistent with applicable relevant law and regulations.

Based on representative Steckler's prior oversight of drainage tile removal within the Consent Decree Area, this Court can reasonably conclude that the United States had ensured the Restoration Plan's over-implementation. As discussed in Defendants' Motion to Vacate Consent Decree, the United States had more than likely directed former representative Steckler to ensure that all drainage tile, including drainage tile installed legally in legally constructed dual-function irrigation/drainage ditches qualifying for the CWA Section 404(f)(1)(C) irrigation ditch construction exemption from Corps permitting until August 17, 1987 were cut and removed to teach Defendants a lesson. (Ex. 79 RGL 87-07, Aug. 17, 1987). These CWA 404-exempt dual-function irrigation/drainage ditches had served to irrigate (through pumping) the drier contour field portions of the Murphy tract as they drained the wetter portions of excess water.

Consequently, this Court also can reasonably conclude that Defendants' replacement of such previously removed pre-1984 and pre-1987 disabled drainage tile within the Consent Decree Area pursuant to the authorization that federal agency representatives Fodse and Lutte had granted them did not constitute a Consent Decree violation. Therefore, this Court must find that no such violation of the Consent Decree had occurred and abate all penalties the United States has assessed to-date for said violation.

c. Unfounded Allegation of Consent Decree Violation #2 – Re-excavation of Two Surface Ditches

The United States bases this allegation on EPA representative Lutte's May 20, 2015 onsite observations of new "surface ditches cut into the south side of Elk Creek that discharged to the southern border of the Brace property within the Consent Decree area which traverses the southern

border of the Brace property" (Ex. 73 Lutte Decl., at para. 30). This claim relates to "Task 2" of the Consent Decree Restoration Plan – "Fill in Two Surface Ditches." The United States, however, has utterly failed to provide any demonstrative evidence proving that the surface ditches identified in the May 20, 2015 photographs (i.e., photos 15-18) are the very same two original surface ditches that Defendants had "plugged" pursuant to Task 2 of said plan. The United States, furthermore, has failed to provide any demonstrative evidence proving that the two surface ditches they observed are other than preexisting ditches that had been overgrown and then cleaned as part of the agricultural ditch maintenance activities that representatives Fodse and Lutte had previously authorized, or if not preexisting, constituted drainage ditches.

A careful review of the description of Task 2 and the hand drawn map of the Consent Decree Restoration Plan, and of the maps included as exhibits to the United States' Memorandum of Law (ECF No. 207-17 and ECF No. 207-18), which the United States apparently has not undertaken, reveals that Defendants have not touched either of the two surface ditches so described which remain plugged to this day. Task 2 describes "two surface ditches that run in a southwesterly direction into unnamed tributary B." (Ex. 18 Consent Decree, Restoration Plan and Attachment A, Task 2). The center bottom of the hand drawn map shows a box entitled "Surface Ditches to be Plugged" with accompanying arrows pointing to two parallel squiggly lines running from northeast to southwest, or "in a southwesterly direction into unnamed tributary B," consistent with that description. Task 2 directed Defendants as follows: "The two surface ditches that run in a southwesterly direction into unnamed tributary B, as indicated on Attachment A, shall be filled in beginning at the mouth for a distance of at least twenty-five (25) feet."

The southernmost point or "mouth" of the right squiggly line (surface ditch to be plugged) depicted on the hand drawn map begins approximately at the junction with the dashed line labeled

"Tributary B" on said map (a ditch excavated more than forty (40) years ago by Defendant Robert Brace), which corresponds to the southernmost dashed line on ECF No. 207-17 and ECF No. 207-18. The right squiggly line (surface ditch) depicted on the hand drawn map corresponds to unnamed "Tributary 62651 to Elk Creek" depicted on ECF No. 207-17 and ECF No. 207-18. The southernmost point or "mouth" of the left squiggly line (surface ditch to be plugged) depicted on the hand drawn map begins considerably to the left (west) of the southernmost dashed line labeled "Unnamed Tributary B" on said map. The left squiggly line (surface ditch) depicted on the hand drawn map also is located much closer to the encircled area depicted as "Brush" on said map, which corresponds to the shaded area depicted on ECF No. 207-17 and ECF No. 207-18 bordering the wetland area to the left (west) that is situated within the Murphy Farm property boundary above "800'" on the latter map's distance/scale.

Randall and Ronald Brace recently testified under oath that, on behalf and under the direction of Defendants, they had left untouched, per representative Lutte's express instruction, the southcentral and southwestern portions (i.e., the southern portion) of the Consent Decree Area. (Ex. 33 Randall Brace Depo 1-18, at 61-62, 64-65, 137-140), (Ex. 65 RA-1 – Randall Brace Depo, orange circle), (Ex. 32 Ronald Brace Depo 1-18 at 67), (Ex. 66 RO-1- Ronald Brace Depo, area west of southmost purple line), (Ex. 44 1-17-13 Brace Ltr to Lutte). The PADEP Enclosure Map (Ex. 58) clearly reveals that the left squiggly line (surface ditch to be plugged) depicted on the hand drawn map – Attachment A (Ex. 18) falls within the southcentral portion of the Consent Decree Area situated to the left (west) of unnamed "Tributary 62651 to Elk Creek" that Ronald and Randall Brace have sworn under penalty of perjury they had left untouched and never disturbed. In their recently executed notarized affidavits (Ex. 74 Affidavit of Randall Brace .), (Ex. 75 Affidavit of Ronald Brace) , Randall and Ronald Brace have stated that the southcentral

portion of the Consent Decree Area has remained heavily submerged under water and has not been accessible by foot (i.e., only by boat), and that for this reason, they had not, and could not possibly have physically reached this area to unplug the ditch depicted as the left squiggly line on the hand drawn map. Randall and Ronald Brace also have stated in their recently executed affidavits that they have not unplugged the southernmost portion of the right squiggly line (surface ditch to be plugged) depicted on Attachment A (Ex. 18) corresponding to unnamed "Tributary 62651 to Elk Creek" in PADEP Enclosure Map (Ex. 58). Indeed, their affidavits explain how they recently walked to that area, recorded GPS readings and took measurements using a measuring tape beginning from the junction of that tributary (right squiggly line) on Attachment A (Ex. 18) with the southernmost horizontal dashed line depicted on Attachment A (Ex. 18), northward to a distance of approximately 25-30 feet and arrived at the remaining ditch plug *which remains* there to the present day. The ditch plug is depicted in the May 20, 2015 onsite visit photo #18 (Ex. 80 USG Photo #18– Bates EPA0001121) referenced in paragraph 30 of the Lutte declaration.

The recently notarized affidavits of Ronald and Randall Brace each also admit that they, on behalf of and under the direction of Defendants, shortly after the July 24, 2012 onsite visit, excavated the isolated ditch depicted in the May 20, 2015 onsite visit photo #17 (Ex. 81 USG Photo #17 Bates EPA0001120) referenced in paragraph 30 of the Lutte declaration. Their affidavits state that this isolated ditch, which runs from northwest to southeast, is located approximately below the "F" mark on the map illustrated by Ronald Brace (Ex. 66 – RO-1) and at the "D" mark on the map illustrated by Defendant Robert Brace (Ex. 81 USG Photo #17 Bates EPA0001120); it does not actually connect with unnamed "Tributary 62651 to Elk Creek" depicted in the PADEP Enclosure map (Ex. 58). Its purpose was to exclusively serve as a physical boundary to ensure that Defendants would not inadvertently enter or impact the southcentral portion of the

Consent Decree Area which representative Lutte emphatically warned they could not "farm." (Ex. 32 Ronald Brace Depo Jan.'18, at 69), (Ex. 64 Robert Brace Depo 1-9-18, at 185). The affidavits of Randall, Ronald Brace and Robert Brace also reaffirm that the isolated boundary ditch does not drain any waters from the Consent Decree Area. (Ex. 74 Affidavit of Randall Brace Affid.), (Ex. 75 Affidavit of Ronald Brace), (Ex. 82 Affidavit of Robert Brace)

Therefore, the United States' allegation that Defendants violated their second obligation under the Consent Decree Restoration Plan to fill in two surface ditches by re-excavating them is false, unfounded and unsupported by the evidence. Consequently, this Court must find that no such violation of the Consent Decree had occurred, and abate all penalties the United States has assessed to-date for said violation.

d. Unfounded Allegation of Consent Decree Violation #3 – Removing the Check Dam

The United States bases this allegation on EPA representative Lutte's May 20, 2015 onsite visit observation that the check dam required by the Consent Decree Restoration Plan had been "removed from Elk Creek." (ECF No. 207, at 9, 13), (Ex. 73 Lutte Decl., para. 31), (Ex. 83 5-20-15 EPA Photo #12 ID DSCF0072). This claim relates to "Task 3" of the Consent Decree Restoration Plan – "Install Check Dam." (Ex. 18 Consent Decree, Restoration Plan and Attachment A). Plaintiff implies that an April 26, 2016 email from counsel encouraging Defendants to "agree to reposition the check dam" to facilitate settlement evidences *ipso facto* that the check dam had, in fact, been "removed" (ECF No. 207 at 9); but Plaintiff fails to provide any empirical evidence to support that claim. (Ex. 64 Robert Brace Depo 1-9-18, at 193-196).

Task 3 of the Consent Decree Restoration Plan directed the Defendants to install a check dam "in unnamed tributary A at the location indicated on Attachment A." Attachment A depicts the

location of the check dam as being near "Maple Trees" no longer present on the western side of the Murphy Farm tract just to the west of the highest point of the red hatch-marked area at the bottom of the "U," and just below the "47-" of the Parcel ID# of the Murphy Farm Tract as shown on the PADEP Enclosure Map (Ex. 58). As the Affidavits of Robert, Randall and Ronald Brace state, a comparison of these two maps with the GPS coordinates taken by Defendant's contractor, Centerra, Co-oP, reveals that the location of the check dam as installed is approximately several hundred yards (four hundred sixty (460) feet) to the east of the location depicted on Attachment A as the location of the check dam as designed. (Ex. 74 Affidavit of Randall Brace), (Ex. 75 Affidavit of Ronald Brace). Apparently, the United States had unilaterally changed the location of the check dam at the time it was installed without first securing Defendants' and this Court's written approval, and a Court Order in *flagrant* violation of Consent Decree paragraph 12. (Consent Decree, Restoration Plan, Attachment A).

Task 3 of the Restoration Plan describes the dimensions of the check *dam* as follows: "This *dam* shall be one and one-half (1 ½) feet high, four (4) feet long, and as wide as the tributary bottom" (emphasis added). It further states that "[t]he *dam* shall be constructed of concrete, gabions, or compacted rock" (emphasis added). The Consent Decree Restoration Plan provides no photograph or sketch of the dam's design to accompany this description. (Ex. Randall Brace Depo, Def. & US counsels' exchange at 32-33), but apparently, there exists a government photograph of "the check dam that was indicated in the restoration plan" which the United States has failed to hand over to Defendants during the recently completed discovery period, as identified and discussed in the January 13, 2005 deposition of Lewis Steckler. (Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 722, 728). The Consent Decree Restoration Plan, furthermore, does not

state whether concrete blocks as opposed to solid concrete would be acceptable to fulfill the check dam requirements.

The United States exhibit accompanying the Memorandum of Law sets forth an image of the actual check dam, as of May 20, 2015, during a relatively drier time of the year when it was not submerged under water. (Ex. 84 5-20-15 EPA Photo #12 Bates # EPA00001114). That image depicts three concrete blocks arranged in a relatively parallel but somewhat overlapping formation that appears to utilize the length of two of the three blocks positioned somewhat corner-to-corner to roughly represent the actual width of the dam.

The recently executed and notarized affidavits of Randall and Ronald Brace set forth the actual measurements of these three concrete blocks and of the approximate width of the main ditch at the current water's edge (rather than at the edge of the opposite bank bottoms which is currently fully submerged) as of this filing. The actual height of the concrete blocks measures approximately twenty-four to twenty-five (24-25) inches, which is approximately *one-half (1/2) foot or six (6-7) inches taller* than the Consent Decree Restoration Plan Task 3 check dam specification of one and one-half (1 ½) feet or eighteen (18) inches high. In addition, the actual width of each of the concrete blocks is twenty-four and one-half (½) inches wide. Furthermore, the actual length of the *dam* measured from the perspective of the channel (represented by the aggregate of the widths of each of the three concrete blocks lying side by side in the scattered formation in which they now appear) is approximately six (6) feet or seventy-two to seventy-three (72-73) inches (twenty-four (24 ½) inches wide x 3), which is approximately two (2) feet or *twenty-four (24) inches longer* than the Consent Decree Restoration Plan Task 3 check dam specification of four (4) feet or forty-eight (48) inches long. (Ex. 74 Affidavit of Randall Brace), (Ex. 75 Affidavit of Ronald Brace)

The recently executed and notarized affidavit of Defendant Robert Brace recalls that the width of the tributary bottom which Step 3 of the Consent Decree Restoration Plan required to be used as the measurement of the width of the check dam at the time of installation was approximately four (4) feet. In Mr. Brace's opinion, since the length of each of the concrete blocks recently measured is six (6) feet, even one of the blocks when set lengthwise across the width of the tributary bottom *would have exceeded the tributary bottom's natural width by approximately two (2) feet and overlapped a portion of its side or bank*. Alternatively, the tributary bottom would have required excavation to accommodate the six (6) foot length of the concrete block of which there is no demonstrative evidence yet proffered by the United States. Mr. Brace is concerned about the real possibility that two of the three concrete blocks had been intentionally placed corner to corner, unbeknownst to him with USDA representative Steckler's prior approval, so that they, together, measured an aggregate length of twelve (12) feet spanning across *both* the width of the tributary bottom *and* across one of the tributary sides – *a full eight (8) feet more than the four (4) feet Task 3 of the Restoration Plan had required for the dam's overall width*. According to Mr. Brace, a check dam with an effective width spanning two levels – tributary bottom and tributary side – would *also have increased the height of the dam by two (2) or more additional feet*. This certainly would have withheld a great deal more of waterflow than would a dam naturally measuring only four (4) feet wide at the tributary bottom and one and one-half (1 ½) feet high. (Ex. 82 Affidavit of Robert Brace)

Randall and Ronald Brace recently testified under oath that they did not reposition or remove the check dam, including when they had conducted their authorized agricultural ditch maintenance activities within the Consent Decree Area in 2012. (Ex. 32 Ronald Brace Depo 1-18, at 33-36), (Ex. 33 Randall Brace Depo 1-18, at 66-67). The United States fails to mention that the blocks

had long been submerged under water and enveloped in several feet of sediment (*Id*.) which likely contributed to their eroded appearance, as they are currently as of this filing date. (Ex. 74 Affidavit of Randall Brace, [Photo exhibits part of affidavit April, 2, 10, 2018), (Ex. 75 Affidavit of Ronald Brace, Photo exhibits part of affidavit April 2, 10, 2018). The United States also fails to mention the several beaver dams within the vicinity of the check dam in the Consent Decree Area (Ex. 32 Ronald Brace Depo 1-18, at 61-62) had been removed by Randall and Ronald Brace, on behalf and under the direction of Defendants, as part of the ditch maintenance activities representatives Fodse and Lutte had authorized during the July 24, 2012 onsite visit.

The United States, furthermore, fails to mention and has not ruled out the real possibility that the channel had narrowed as the result of encroaching natural growth during the approximate19-year period (as of May 20, 2015) since the check dam had been installed, and that it is such natural growth that is seen in the government photograph below two of the three concrete blocks. The United States has not accused Defendants of inadvertently "moving" the three blocks comprising the check dam incident to undertaking their previously authorized ditch maintenance activities in the Consent Decree Area; presumably, the United States accepts that this may have occurred considering the condition of the check dam and of the surrounding site at that time of that onsite visit. Rather, the United States has accused Defendants of engaging in the *intentional* activity of "removing" the check dam from Elk Creek without providing any demonstrative evidence to support that allegation.

Moreover, the United States has failed to mention that the check dam had been installed with former USDA representative Steckler's informal approval in implementation of Task 3 of the Restoration Plan during December 23-24, 1996, perhaps during one of the wettest times of the year, and that it had rained during the evening of the 23rd. (Ex. 77 Lewis Steckler Ct. Cl.

Testimony 1-13-05, at 719, 725-726). The aggregate widths of the three roughly parallel but overlapping concrete blocks had been utilized as the "length" of the check dam (from the water level perspective), while the roughly identical height of the three concrete blocks lying roughly side-by-side had been utilized as the "height" of the check dam. Two of the three blocks positioned lengthwise somewhat corner-to-corner across the channel, meanwhile, had been utilized as the "width" of the dam spanning approximately twelve (12) feet across both the channel bottom and one of the channel sides.

Finally, the United States has failed to mention that the check dam had been installed at the precise location, along Defendants' main ditch running horizontally across just below the center upland contour field of the Murphy Farm tract, where there is marked change both the direction and depth of the channel causing flowing waters to cascade downward they pass through the area from east to west. According to former representative Steckler, the check dam's placement at this location was intentional and the expanded design specifications were likely deemed necessary to prevent channel erosion:

> "the check dam was to correct a change in a channel where part of the channel was deeper than another part, and they were afraid this was going to be a source of erosion in the ditch, so that the check dam was installed to allow the water to flow over this point without eroding a lot of the ditch that was already there."

(Ex. 77 Lewis Steckler Ct. Cl. Testimony 1-13-05, at 728).

As the result, the actual check dam installed was measurably larger – two (2) feet longer, two (2) or more feet higher, and anywhere from two (2) to eight (8) feet wider – than what the Consent Decree Restoration Plan specifications had called for.

Former USDA representative Lewis Steckler had been present at that time to "[t]o document the removal of drainage tiles and a couple of ditch blocks, [and to observe…] where they blocked

of the drainage ditches." (Ex. 3 Steckler Depo. '1117, at 77). In other words, he was directed by the United States to be present to ensure that the three (3) Tasks required by the Restoration Plan had been implemented consistent with its terms. However, he apparently, he failed, on behalf of the United States, to apprise Defendants and this Court of the significant difference between the check dam's actual dimensions and its specified dimensions. The United States, through representative Steckler, well knew how these added dimensions would have increased the check dam's carrying capacity and its ability to substantively diminish the hydraulic and hydrologic flow of water not only through the Consent Decree Area, but also throughout the Defendants' entire 157-acre hydrologically integrated Waterford Township, PA farm.

Therefore, the United States' allegation that Defendants violated their third obligation under the Consent Decree Restoration Plan to install a check dam by "removing" it is false, unfounded and unsupported by the evidence. Consequently, this Court must find that no such violation of the Consent Decree had occurred and abate all penalties the United States has assessed to-date for said violation. And, since the United States has knowingly failed for more than twenty-one (21) years to disclose to Defendants or this Court (in violation of Consent Decree para. 12 requiring Court approval for any written Consent Decree modification) that the check dam installed in 1996 on Defendants' Murphy Farm in implementation of the Consent Decree Restoration Plan was/is measurably larger than the check dam that had legally been required, this Court possesses the discretion and the equitable powers to impose sanctions upon the United States or otherwise vacate or substantially modify, if not, vacate the Consent Decree in Defendants' favor.

III. The United States Should be Equitably Estopped from Disavowing and Revoking its Agents' Prior Authorizations Upon Which Defendants, in Good Faith, Detrimentally Relied as the Result of United States Affirmative Misconduct

1. *Where Affirmative Misconduct is Shown Government Misrepresentations that Induce Reasonable Reliance to the Detriment of Citizens Actions Can Be Equitably Estopped*

To invoke the traditional doctrine of equitable estoppel,

> "the party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse,' [fn] and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading."

See Heckler v. Community Health Services of Crawford City, Inc., 467 U.S. 51, 59 (1984), quoting *Wilber National Bank v. United States*, 294 U. S. 120, 124-125 (1935). The doctrine "is used to prevent a litigant from asserting a claim or a defense against another party who has detrimentally changed his position in reliance upon the litigant's misrepresentation or failure to disclose some material fact." *Community Health Services of Crawford County v. Califano*, 698 F.2d 615, 620 (3d Cir.1983).

"[T]o succeed on a traditional estoppel defense the litigant must prove (1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment." *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987). *See also Cotter v. Newark Housing Authority*, No. 10-2153 (3d Cir. 2011), slip op. at 8, quoting *O'Malley v. Dep't of Energy*, 537 A.2d 647, 651 (N.J. 1987); *PNC Bank v. Amerus Life Ins. Co.*, No. 06-3743 (3d Cir. 2007), slip op. at 15-16 quoting *Novelty Knitting Mills v. Siskind*, 457 A.2d 502, 503-504 (Pa. 1983);, *U.S. Bank Nat'l Assoc. v. First Amer. Title Ins. Corp.*, No. 13-2594 (3d Cir. 2014), slip op. at 7.

The doctrine of equitable estoppel, however, does not apply similarly against government conduct. The U.S. Supreme Court has held that, "[…] the Government may not be estopped on the same terms as any other litigant," given "the interest of the citizenry as a whole in obedience to the rule of law." 467 U.S. at 60. To successfully invoke equitable estoppel against the government, "[a] litigant must not only prove the traditional elements of estoppel, but she also

must prove affirmative misconduct on the part of the government." *Asmar*, 827 F. 2d at 912; *Peralta v. Attorney General of the United States*, No. 10-2536 (3d Cir. 2011), slip op. at 4, quoting *Mudric v. Att'y Gen.*, 469 F.3d 94, 99 (3d Cir. 2006) ("To prevail on [an] equitable estoppel claim, [a litigant] must establish '(1) a misrepresentation; (2) upon which he reasonably relied; (3) to his detriment; and (4) affirmative misconduct.'"). In *Heckler*, the U.S. Supreme Court recognized that there are some cases in which

> "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."

467 U.S. at 60 (citing *St. Regis Paper Co. v. United States*, 368 U. S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government"); *Federal Crop Insurance Corp. v. Merrill*, 332 U. S., at 387-388 (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street"); *Brandt v. Hickel*, 427 F. 2d 53, 57 (CA9 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"); *Menges v. Dentler*, 33 Pa. 495, 500 (1859) ("Men naturally trust in their government, and ought to do so, and they ought not to suffer for it"). *See also Giglio v. United States*, 405 U. S. 150, 154-155 (1972)).

The Third Circuit Court of Appeals has firmly embraced the notion that affirmative government misconduct may be estopped where necessary to show the public that the acts of federal agencies and officials have "imperiled the 'interest of citizens in some minimal standard

of decency, honor, and reliability in their dealings with their Government." *See U.S. v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992); *Fredericks v. Commissioner of Internal Revenue*, 126 F.3d 433 (3rd Cir. 1997), slip op. at 8;*so Community Health Servs. of Crawford County v. Califano*, 698 F.2d 622 (3d Cir. 1983), quoting *Brandt v. Hickel*, 427 F. 53, 56-57 (9th Cir. 1970) (holding that "[…] *some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement*") (emphasis added).

2. *Cases Where Government Affirmative Misconduct Has Been Established and Equitably Estopped*

a. Community Health Servs. of Crawford County v. Califano

In. *Califano*, the Secretary of Human and Health Services ("HHS") had sought to recoup overpayments made to the nonprofit Community Health Services of Crawford County, PA ("CHS") as the Medicare cost reimbursement procedures required. 698 F.2d at 618. The Third Circuit Court of Appeals found that the HHS' financial agent (Travelers Insurance Companies) had "on five separate occasions spanning over two years advised CHS not to offset" the grants it had received from a third party under the Comprehensive Employment and Training Act of 1975 ("CETA") because they qualified as seed money exceptions to the general Medicare reimbursement offset requirements. Those instructions were thereafter reaffirmed by Traveler's approval of CHS' cost reports.

The Court held that CHS had been "*induced* into submitting those expenses without offsetting the CETA grants by the affirmative instructions of the Secretary's agent." 698 F.2d at 622. It also held that "CHS acted in good faith" in reliance upon those instructions, and that it was "reasonable

for CHS to follow Travelers' instructions […] because it was adhering to the administrative process mandated by Medicare." *Id*., at 622-623. The Court, furthermore, held that, as the result of CHS's reliance on Traveler's erroneous advice, "CHS was harmed by diligently fulfilling its government-imposed duties within the Medicare system" *Id*., i.e., its making of unreimbursed expenditures and incurrence of unreimbursed obligations exceeding $70,000. *Id*., at 623. "Moreover, the source of the harm suffered by CHS [was] the intermediary's failure to pass on CHS' inquiry to the proper authority and its providing the answer itself." *Id*. "Although CHS fulfilled its administrative duties in presenting its question to Travelers, Travelers knowingly violated statutory and procedural guidelines in failing to communicate it to the proper authority within HHS from June 1975 to August 1977." *Id*., at 623.

Ultimately, the Third Circuit Court of Appeals held that "the intermediary's advice was not only erroneous, it constituted *affirmative misconduct* in relation to CHS" (emphasis added) (*Id*.), and that "the District Court erred in concluding that equitable estoppel did not lie against" the HHS Secretary. The Court reversed the District Court's summary judgment and remanded the case "with the direction that it grant [CHS'] petition to estop the Secretary from recouping the alleged overpayment." *Id*., at 628. In reaching its decision, the Court emphasized "the injustice to CHS and the people it serves if it [was] required to refund the alleged overpayments. The extra monies were used to expand CHS' services to meet serious human needs" (*Id*., sy 627.), and that "the repayment of those 'costs' may cause a significant diminution of some home health care availability to ill and poor people in a rural medically underserved area." *Id*. The Court characterized the case as one in which the Government effectively argued that "'We, just like the King and his agents, can do no wrong, regardless of the grievous consequences we cause innocent people.'" *Id*.

b. Fredericks v. Commissioner of Internal Revenue

In *Fredericks*, the IRS had assessed the taxpayers (the Fredericks) a penalty in 1992 of more than $28,000 for taxable year 1977, even though the usual three-year statute of limitations ("SOL") for taxable year 1977 should have by then expired. To secure more time to audit the taxpayers' 1977 return which included their participation in a tax shelter then under IRS investigation, one IRS agent in 1980 requested that the Fredericks grant an indefinite waiver of the SOL which they could later revoke if desired. The taxpayers shortly thereafter executed the appropriate form and dispatched it to the IRS which recorded it upon receipt. From 1981-1983, three different IRS agents requested that the taxpayers execute three additional one-year SOL extensions on a different IRS form because they could not locate the original indefinite extension form which apparently had been lost. The taxpayers reluctantly executed these forms for each of the successive tax years requested. The Fredericks did not again hear from the IRS until mid-1992 at which time the IRS issued a tax deficiency notice and penalty for the tax year ended 1977. The IRS first then notified the taxpayers that it possessed the long lost original Form 872-A (indefinite SOL extension) and intended to rely on that form instead of the third Form 872 (one-year extension) as the basis for its assessment. 126 F.3d at 435-438.

The Third Circuit Court of Appeals reversed the U.S. Tax Court which ruled that the Fredericks had failed to prove the elements of estoppel. *Id*., at 437. The Third Circuit instead held that, "the IRS *misrepresented* to Fredericks that the Form 872-A [indefinite SOL extension] was not on file and 'probably lost in the mail' [and…t]he IRS' request for three short-term extensions of the statute of limitations reinforced this misrepresentation and *induced* Fredericks to rely on the agreed-upon termination dates in those Forms 872 [one-year extensions]" (emphasis added). *Id*., at 440.

> "The government's misrepresentation went beyond mere erroneous oral advice from an IRS agent; it consisted of *affirmative, authorized acts* inducing Fredericks to sign and rely on the terms of the Form 872 on three different occasions in three different years. Moreover, the IRS' *misleading silence* after finding and deciding to rely on the Form 872-A, coupled with its *failure to notify Fredericks of its decision* and its effective revocation of the third Form 872, constitute affirmative misconduct" (emphasis added). *Id*.

The Third Circuit reasoned that the authority to act, as well as the failure to do so when such authority exists, can give rise to an estoppel claim." *Id*., citing *Ritter v. United States*, 28 F.2d 265, 267 (3d Cir. 1928) ("The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government."). It also emphasized that the misrepresentations in *Frederick* "were more egregious than" those in *Califano*, where "the government [had] immediately notified the health provider upon realizing the erroneous nature of its prior misrepresentations." *Id*.

3. *Equitable Estoppel Applies in the Case at Bar to Prevent the Government from Benefiting at Defendants' Expense from Multiple Acts of Affirmative Misconduct Over the Course of Five Years Upon Which Defendants Relied*

In the case at bar, United States agency representatives, for a period of no less than five years, had made various misstatements and committed various misdeeds upon which Defendants reasonably relied to their legal and economic detriment that constitute affirmative government misconduct worthy of being equitably estopped by this Court.

a. <u>The United States Induced Defendants to Believe They Could Never Maintain Elk Creek and its Tributaries South of Lane Road as Agricultural Ditches and "Farm" the Adjacent Areas Located Within the Consent Decree</u>

The United States readily admits that Defendants justifiably relied upon the express verbal and tacit authorizations representatives Fodse and Lutte had granted them during their July 24, 2012 onsite visit to undertake assorted exempt agricultural ditch maintenance activities consistent with

normal farming practices within the Consent Decree Area. (Ex. 53 8-29-13 EPA Corps Ltr, at 3), (Ex. 57 Lutte 10-3-17 Depo, at 266). However, the Corps and EPA have since endeavored to cover up how much broader in scope and magnitude these prior erroneous authorizations were than the United States had originally anticipated. If the United States had truthfully acknowledged the full extent of these errors, it would have quickly become obvious that their representatives had single-handedly reversed the Third Circuit Court of Appeals' 1994 decision against Defendants and nullified the entire legal basis underlying the execution and enforcement of the Consent Decree that is the subject of the current action. Such an admission would thereby render the current enforcement action moot and subject it to dismissal.

Through sheer force of repetition and intimidation, the Corps and EPA have endeavored for more than five (5) years to persuade/induce Defendants that they have no chance of securing the agricultural ditch maintenance exemption for the activities they had previously undertaken within the Consent Decree Area pursuant to representatives Fodse's and Lutte's authorization, no matter how hard they try in the court of public opinion or in a court of law. For example, the Corps' Cease and Desist letter of 12-19-12 refers to the Third Circuit's opinion as the basis for the Corps' subsequent disavowal and revocation of its representative's prior authorization. (Ex. 39 Hans 12-19-12 Ltr., at 1). Similarly, the EPA and Corps devoted an entire section of their 8-29-13 jointly issued Violation Notice to discussing how the Third Circuit and the Court of Claims decisions served as the basis for their disavowed and revoked authorization. (Ex. 53 8-29-13 joint EPA-Corps ltr, at 2-3). The 8-29-13 violation notice, furthermore betrays the government's effort to induce Defendants to believe that they have no choice but to rely upon the United States' understanding of this case and to submit to its administrative and legal position and demands if they wish to resolve it. The United States next endeavored to cover up the errors of its Corps and

EPA agents and to induce Defendants' compliance, in a January 16, 2016 DOJ/ENRD-issued EPA Compliance Order. The DOJ and EPA, devoted an entire "Background" section within that order to, once again, reaffirm the judicial history of this case and the legal basis underlying the Consent Decree. (Ex. 76 USDOJ/EPA VN 1-11-16, at 1, 3).

The January 16, 2016 order clearly shows that the United States, for more than five (5) years, has repeatedly refused to acknowledge and account for the significant misrepresentations of its agents and concerning the scope and magnitude of the agricultural ditch maintenance activities they had previously authorized Defendants to perform on the Murphy Farm tract in and adjacent to Elk Creek and its associated tributaries and reaches south of Lane Road within the Consent Decree Area. The United States knew Defendants would steadfastly rely upon that authorization and interpret and execute it consistent with normal customary farming practices, and Defendants did, in fact, so rely upon that authorization to their great financial, legal, emotional, medical and reputational detriment.

The facts reveal that the United States intentionally and unconscionably sought to cover up its agents' grievous errors for a long enough period of time to induce Defendants to engage in behavior that was inimical to their interests and beneficial to the government. Similarly, the IRS in *Fredericks v. IRS* had covered up and not disclosed its agents' discovery of long lost IRS Forms 872-A the Fredericks had filed until after three tax years had already passed, in order to secure for the government an open-ended statute of limitations ("SOL") with which to audit the taxpayers' income tax returns and tax shelter. Since the taxpayers had relied on the same IRS agent representations on three different occasions that such forms had been lost, it agreed to provide the Service with three year-to-year extensions via Forms 872, only to be later assessed more than $28,000 of tax plus penalties for a tax year on which the statute of limitations should have already

expired. The Third Circuit held that such cover-up which persisted for three years constituted affirmative misconduct which the government knew and intended the taxpayers would rely upon, and upon which they did, in fact, rely to their economic and legal detriment. The Court of Appeals therefore held that the IRS should be estopped from imposing such tax and penalty against the taxpayers, and consequently, economically benefiting from its affirmative misconduct at the taxpayers' expense.

Likewise, in *Community Health Servs. of Crawford County v. Califano*, the HHS' paid financial agent dispensed erroneous advice to a charitable healthcare provider over the course of two-to-three years regarding how to submit reimbursable expenditures to Medicare. In particular, the HHS agent intentionally misinformed the healthcare provider not to offset against those expenditures payments it had received in the form of grants from another company for employing its personnel in furtherance of the charity's expanded operations. The HHS financial agent advised the healthcare provider to continue this practice although the HHS financial agent well knew that HHS had not yet formulated or adopted a policy to address such practice, and that Medicare would likely require such funds to be offset against the healthcare provider's expenditures before they were submitted to Medicare for reimbursement, and even though the agent had failed to contact HHS to seek a determination about its rendering of such advice .

The Third Circuit Court of Appeals found that the HHS's agent had intentionally provided erroneous advice to the charitable healthcare provider knowing it would rely upon such information, and then covered up the fact and withheld it from both HHS and the charitable healthcare provider until after such provider actually relied upon it and Medicare sought repayment from the healthcare provide for the over-reimbursements. The Court held that the agent's misrepresentations and cover-up constituted affirmative misconduct on the part of HHS, and

estopped HHS and its agent from deriving an economic benefit at the charitable healthcare provider's and its patients' economic expense.

The same result should obtain in the case at bar where the United States failed to disclose its agents' material errors until thirteen (13) months after they had been committed and Defendants had already conducted the agricultural ditch maintenance activities in contention over the course of two (2) growing seasons. This Court must hold that the United States' known cover-up of its Corps and EPA representatives' erroneous authorizations and such agencies' subsequent intentional inducement of Defendants to rely upon and accept Plaintiff's legal position and to abandon any efforts to challenge it, upon which defendants, in fact, relied until February 2017, to its economic and legal detriment, constitutes affirmative government misconduct. As the result of such United States affirmative misconduct, portions of each of the three farm tracts located on Defendants' 157-acre hydrologically integrated Waterford Township, PA farm outside the Consent Decree Area were subject to ongoing periodic surface and sub-surface inundation and flooding, which caused twenty-one (20)-plus years of property damage and significant lost crop harvest revenues, and denied Defendants their constitutional right to utilize their private property to earn a living in their chosen profession of farming. (ECF No. 156). *See Burney v. Young*, 133 S.Ct. 1709 (2013) *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (holding that "the Privileges and Immunities Clause protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling'"). Consequently, this Court must find that the United States should be estopped from benefitting from such conduct at Defendants' expense by disavowing its agents' prior authorization of Defendants' agricultural ditch maintenance activities.

b. The United States Advised/Induced Defendants to Consent to a Jurisdictional Determination ("JD") of Elk Creek and Tributaries It Later Characterized as Request Without Informing Them About What a Requested JD Was or What it Legally Engendered

In a September 12, 2011 email that followed his late May-early June 2011 onsite visit to Defendants' Waterford Township, PA farm, EPA representative Lutte recognized Defendants' desire to remove beaver dams that had backed up the channel the government refers to as "Elk Creek" which crosses South Hill Lane [Lane Road]" and caused sediment to accumulate "within the channel further blocking the culvert which flows under South Hill Lane." (Ex. 54 Lutte 9-12-11 email to Brace). Representative Lutte also recognized Defendants' desire once the beaver dams were removed "to clean the channel and the culvert" so that the water which had then been "encroaching into [their] agricultural fields can drain properly." (*Id*.) He then advised Defendants that although EPA authorization for ditch maintenance activities was not required, they may be authorized by the Corps under nationwide permits about which Corps representative could advise them. Representative Lutte's email also referred to the aerial photo outlining the Consent Decree Area he had left with Defendants during that spring 2011 visit. (*Id*.)

In an October 7, 2011 email following his September 8, 2011 onsite visit to Defendants' Waterford Township, PA farm, Corps representative Michael Fodse, reaffirmed Defendants' desire to remove beaver dams and clean the channel and culvert passing under Lane road of accumulated sediment to stop the encroachment of waters into Defendants' agricultural fields. (Ex. 36 Fodse 10-7-11 email to Brace). Referring to the same map EPA provided to Defendants, representative Fodse indicated that the Corps considered the watercourses providing hydrology to the wetland within the Consent Decree Area as legally distinct from the wetlands themselves. Representative Fodse also therein advised Defendants that, "[o]nce the Beaver Dams have been

breached, the *[Corps] will need to conduct a Jurisdictional Determination* on the channel to determine if activities (dredging) within it would require a permit under the [CWA]" (emphasis added) (*Id*), but he did not explain to Defendants what a "jurisdictional determination" ("JD") was or what it legally engendered.

On May 30, 2012, Defendants reached out to Corps representative Fodse via email after having not heard from him since October 7, 2011. Justifiably believing representative Fodse's prior email statement that the Corps required a JD of the channel for Defendants to secure an agricultural ditch maintenance exemption under CWA 404, Defendants sought to schedule such another onsite visit with Mr. Fodse at Defendant's Waterford Township, PA farm as soon as possible for that purpose. (Ex. 38ex. 43

Brace 5-30-12 email to Fodse). Anxious about moving forward with the cleaning of the main ditch and culverts after having removed the beaver dams, Defendants dispatched a June 12, 2012 follow-up email to representative Fodse to confirm the date of the next onsite visit during which he could "conduct [his] determination." Representative Fodse responded via email on June 18, 2012, but still did not explain to Defendants what a JD was or what it legally engendered. (Ex. 85 Brace-Fodse Emails June 2012). Several emails entitled "Jurisdictional Determination Meeting" were thereafter exchanged between Defendants and representative Fodse on July 5, 2012 concerning possible onsite visit dates, with the parties ultimately agreeing to July 24, 2012. The parties finally agreed to a meeting time of 9:30 a.m. after a series of emails exchanged on July 23, 2012. (Ex. 86 Brace-Fodse Emails July 2012). In none of these emails either did Corps representative Fodse ever explain to Defendants what a JD was or what it legally engendered.

Defendants continued to believe that the Corps had required representative Fodse to conduct a JD at the July 24, 2012 onsite visit, and representative Fodse continued to withhold information

from Defendants at that visit regarding what a JD was and what it legally engendered. Representative Fodse's silence enabled him to request during the visit that Randall Brace measure off the distance of the length of the main ditch flowing through Defendants three adjacent farm tracts, beginning at Sharp Road and running south across Lane Road and then east through the Consent Decree Area until Greenlee Road. Both during and prior to the July 24, 2012 onsite visit, Representative Fodse and the Corps falsely led Randall Brace to believe assured him that a JD based on his measuring off of the length of Elk Creek and its tributaries would help the government to allow Defendants to maintain the clogged agricultural ditches within the Consent Decree Area that were causing flooding rendering the uplands partially nonfarmable. (Ex. 36 Fodse 10-7-11 email to Brace). Several days after the onsite visit, Defendants informed representative Fodse that the measurement was approximately 9/10 of a mile (or 4,750 feet). (Ex. 42 Rhonda McAtee email to Fodse 7-31-12).

It was not until after they received the December 19, 2012 "Cease and Desist" letter from representative Fodse's superior Scott Hans that Defendants unexpectedly learned that they had not merely "consented" to the JD representative Fodse had advised they *needed*, but that they had instead "requested" it. (Ex. 39 Hans 12-19-12 Ltr, referring to their "request" for a JD), (Ex. 73 Lutte Decl., at 18). EPA representative Lutte has similarly misrepresented that Defendants had initiated contact with the Corps "about providing a jurisdictional determination." (Ex. 73 Lutte Decl., at para. 16). The evidentiary record, however, nowhere indicates that Defendants *requested* from representative Fodse a JD of the main ditch the United States refers to as "Elk Creek" or its tributaries; nor does the evidentiary record anywhere indicate that the United States had ever informed Defendants about what a JD was and what it legally engendered. Rather, the evidence clearly indicates that Defendants had only *consented* to a JD in reliance upon representative

Fodse's statement that a JD was required to secure the agricultural ditch maintenance exemption necessary to sustain their family's economic viability by continuing their generations-old farming operations at their Waterford, PA farm.

It is legally significant that the Corps' 12-19-12 letter had characterized the JD it apparently conducted during and following the July 24, 2012 onsite visit as having been "requested" by Defendants. It also is legally significant that the 12-19-12 Corps letter was unaccompanied by the required Preliminary JD Form identifying the supporting data it reviewed, which states that "This preliminary JD finds that there *'may be'* waters of the United States on the subject project site…" (emphasis added) (Ex. 40 RGL 08-02, June 28, 2008), (Ex. 41 Corps JD Instruct Guidebook). Furthermore, it is legally significant that while the 12-19-12 letter emphatically stated "it was confirmed that approximately 4,750 linear feet of an unnamed tributary (unt) to Elk Creek and Elk Creek are jurisdictional waters of the United States," it nevertheless requested "[a]n additional site visit with USEPA to clarify jurisdiction" and suggested Defendants provide a delineation of existing streams and wetlands before such a visit is scheduled. (Ex. 39 Hans 12-19-12 Ltr.).

The letter's structural inconsistency which sowed confusion among Defendants strongly indicates that the United States intentionally choreographed the issuance of a Preliminary JD to Defendants based on the Corps' false characterization of Defendants' *consent to* a JD as a *request for* a JD. That intentional mischaracterization then enabled the Corps to merely "advise" or temporarily conclude that since the 4,750-foot section of the main ditch is located within the Consent Decree Area it was not eligible for the agricultural ditch maintenance exemption. A "Preliminary JD" is merely advisory in nature, legally nonbinding, and not appealable administratively. By comparison, an "Approved JD" which precisely defines the limits of jurisdictional waters, identifies and delineates onsite water bodies and wetlands, is legally binding

for five (5) years, and is immediately administratively appealable, and ultimately judicially reviewable. 33 C.F.R. § 331.2. *See United States Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___ (2016), slip op. at 7-10 (holding that a Corps Approved JD is a final agency action judicially reviewable under the Administrative Procedure Act because there is no other adequate remedy at law).

That intentional mischaracterization, together with the Corps' intentional failure to provide Defendants with the required Preliminary JD Form and/or the sources of the agency's legal support for its determination, further induced Defendants' reliance upon the Corps which then denied Defendants any avenue for administrative appeal, an administrative hearing or, for that matter, judicial review of that determination, and consequently their constitutional right to procedural due process. (Ex. 40 RGL 08-02, June 28, 2008, at 2-3), (Ex. 87 RGL 07-01, at 5-6), (Ex. 41 Corps JD Instruct Guidebook). The United States was well aware that Defendants would rely on and tolerate such misrepresentations and misdeeds.

As the result of the Corps multiple affirmative acts of misconduct over the course of several years (2011-2012), Defendants were compelled to rely entirely on the United States for guidance on how to proceed forward to secure the critically important agricultural ditch maintenance exemption for Elk Creek and its tributaries and reaches south of Lane Road. Defendants also were precluded from securing an appeal and/or administrative hearing to refute the Corps' determination. As the result of the Corps multiple affirmative acts of misconduct over the course of several years, Defendants also were compelled to address mounting allegations of CWA Section 404 and/or Consent Decree violations and potential penalties, to endure several additional EPA and Corps onsite visits from 2013-2015, and four additional years of economic and legal uncertainty at great financial, emotional and physical cost to Defendants and their families and

especially to Defendant Robert Brace who has since been stricken with painful and debilitating ailments requiring ongoing medical treatments and prescription medications.

Such legal gamesmanship on the part of the United States was intentional, mean-spirited and unwarranted, and thus, unquestionably constituted affirmative misconduct over several years upon which Defendants detrimentally relied at their expense. Therefore, this Court must find that the United States should be estopped from using its Preliminary JD as the legal basis for characterizing Elk Creek and its tributaries and reaches located south of Lane Road within the Consent Decree Area as "waters of the United States" and exercising against Defendants its enforcement jurisdiction over such area.

c. The United States Advised/Induced Defendants to Believe They Had No Legal Option But to Prospectively Secure EPA/Corps Written Permit Approval for Agricultural Ditch Maintenance Activities Until It Decided to Initiate Legal Action Four Years Later

From December 19, 2012, until January 16, 2016, Defendants remained at the mercy of EPA and the Corps without any legal recourse but facilitating "voluntary" administrative compliance and possible settlement of allegations of Defendants' unauthorized activities in the Consent Decree Area at a substantial cost to them. On the one hand, the United States had induced Defendants into believing that the August 29, 2013 letter jointly authored by EPA and the Corps on EPA Region III letterhead was an EPA Violation Notice/Compliance Order that could be appealed to this Court consistent with the U.S. Supreme Court's decision in *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012) reached only five (5) months before Defendants' receipt of said letter. On the other hand, a close legal review of that letter indicates that it was no such animal, at least with respect to Defendants' Consent Decree-related activities. (Ex. 53 8-29-13 joint EPA-Corps Ltr.).

The joint-service 8-29-13 letter was entitled "Applicability of Clean Water Section 404(f) Exemptions at Brace Farms." Yet, it contained a conclusory discussion about allegedly unauthorized activities Defendants had committed on and adjacent to several of their hydrologically integrated farm tract properties in violation of CWA Section 404 – namely, on and adjacent to the Murphy Farm tract located south of Lane Road, and on and adjacent to the Marsh Farm tract located north of Lane Road. (Ex. 53 8-29-13 EPA-Corps Ltr., at 1).

The 8-29-13 letter provided a reasoned but flawed basis for the conclusions EPA and the Corps had drawn with respect to the Murphy Farm tract Consent Decree Area. EPA determined that recent modifications made to Elk Creek and its tributaries and reaches south of Lane Road without a Corps permit (as discussed in Section I above) under the presumption they were exempt as agricultural ditch maintenance activities "*may have*" converted those watercourses to a new agricultural use subject to the recapture provisions of CWA Section 404(f), thereby rendering such activities *possible* violations of the CWA and/or the Consent Decree. (Ex. 53 8-29-13 EPA-Corps Ltr., at 3-4). The letter also provided a reasoned but flawed basis for the conclusions EPA and the Corps had drawn with respect to the similar activities Defendants had performed on the Marsh Farm tract, and in Elk Creek and its tributaries and reaches north of Lane Road in reliance upon representative Fodse's and Lutte's erroneous representations. (Ex. Lutte 10-3-18 Depo., at 296-300 indicating Fodse's authorization to dredge and remove sediment in Elk Creek and associated tributaries north of Lane Road). The letter characterized these activities (dredging, side-casting, clearing, grubbing, and installation of drain tiles) as *actual* rather than *possible* violations of the CWA Section 404(f) recapture provisions (Ex. 53 8-29-13 EPA-Corps Ltr,. at 4), but no evidence has yet been presented.

The letter's characterization in different paragraphs of basically the same activities that Defendant had conducted on the hydrologically integrated Murphy Farm and Marsh Farm tracts at approximately the same time as both possible and actual violations sowed confusion among Defendants. Defendants' confusion then justifiably rose to the level of consternation and alarm upon reviewing EPA's "summary" conclusion, characterization of next steps as entailing an "enforcement action," and recommendation to consider possible restoration and remediation options. Evidently, EPA and the Corps: 1) concluded that, "[a]t this time, you *are* in violation of the Clean Water Act. **No further work in waters should be conducted without the written approval of the Corps and/or EPA**" (bold emphasis in original; italicized emphasis added); 2) stated that it "has the lead on this enforcement action and is reviewing enforcement options"; and 3) directed Defendants to "contact Mr. Todd Lutte […] within 45 days […] to discuss possible options to restore and remediate the Section 404 violations." (Ex. 53 8-29-13 EPA-Corps Ltr., at 4). These three written representations ostensibly indicated that EPA had issued a final compliance order and had been considering enforcement options available under 33 U.S. Code § 1319(a)(3) and 33 U.S. Code § 1319(b) in the event Defendants' compliance were not forthcoming, but this was not abundantly clear to either Defendants or their counsels.

Had EPA actually issued a final compliance order with respect to Consent Decree Area-related activities, Defendants would have been entitled, pursuant to the U.S. Supreme Court's decision in *Sackett v. Environmental Protection Agency*, to immediately secure judicial review of that compliance order as a final agency action under the Administrative Procedure Act for which there was no adequate remedy at law, before EPA commenced an enforcement action. 566 U.S., slip op. at 7-10. However, this apparently did not constitute a compliance order since EPA and the Corps had left open several items still requiring a resolution – e.g., the need for a wetland delineation to

be performed at Defendants' expense, and "the need for further review and investigation to determine if a violation of the Clean Water Act or the Consent Decree has occurred." (Ex. 53 8-29-13 EPA-Corps Ltr., at 4).

The anxiety surrounding Defendants' uncertain legal status did not abate as the result of the CWA Section 309(a) administrative Violation Notice the U.S. Department of Justice ultimately issued on EPA's behalf on January 11, 2016 (Ex. 76 USDOJ/EPA VN 1-11-16). Contrary to the direction a June 2012 EPA Office of Civil Enforcement Director Memorandum provided, the 1-11-16 DOJ-ENRD Violation Notice failed to inform Defendants of their right to challenge the determination violations under the APA before an action to enforce the Injunction or Consent Decree was commenced in implementation of the U.S. Supreme Court's *Sackett* decision. (Ex. 88 EPA Sackett Compliance Order Memo 6-19-12 & accompanying EPA 7-10-12 Ltr to U.S. Senator Inhofe, re same). Indeed, this document did not justifiably appear to Defendants and their counsel to rise to the level of a judicially reviewable EPA Compliance Order since it failed to order Defendants' compliance.

The 1-11-16 DOJ-ENRD Violation Notice instead alleged for the first time that Defendants "are in violation of the […] Consent Decree *and* of [CWA] Sections 301 and 404" with respect to the activities they had undertaken on the Murphy Farm tract and in Elk Creek and its associated tributaries within the Consent Decree Area following the July 24, 2012 onsite visit as EPA and the Corps observed during their subsequent May 20, 2015 onsite visit. (Ex. 76 USDOJ/EPA VN 1-11-16 , at 2). The 1-11-16 letter also only stated that "the United States [*was] within its rights to seek* stipulated penalties and/or statutory penalties for the CWA and CD violations" therein described. It did not state that such an enforcement action had yet been decided. Consequently, the United States craftily ensured that Defendants would remain in virtual legal limbo, unsure of whether they

could successfully secure judicial review of the DOJ-ENRD Violation Notice and whether and when they would fall subject to Consent Decree-related stipulated penalties computed on a daily basis as well as possible statutory penalties, the potential imposition of government Consent Decree enforcement costs and the costs of meeting Consent Decree and statutory restoration obligations.

From as early as December 19, 2012 until January 11, 2016, the United States cleverly endeavored to secure Defendants' compelled "voluntarily" CWA compliance in lieu of initiating an action to enforce Consent Decree paragraph 3 – "Injunction" – concerning the alleged CWA statutory violations, without providing Defendants their day in court. It achieved this objective by ensuring that the Corps did not issue an Approved JD that would eligible for judicial review pursuant to the March 2016 *Hawke* decision, and by ensuring that EPA did not issue a final Compliance Order that would be eligible for judicial review pursuant to the March 2012 *Sackett* decision.

The United States also achieved this objective by intentionally inducing Defendants to believe that the joint EPA-Corps 8-29-13 Violation Notice and the subsequent DOJ-ENRD 1-11-16 Violation Notice were potentially judicially reviewable Compliance Orders when they actually were nothing of the sort. A close reading of the DOJ-ENRD 1-11-16 Violation Notice, furthermore, that DOJ did <u>not</u> declare that Defendants had actually "failed" "to perform any requirement in paragraph 4, 5, and 6" of the Consent Decree to invoke the stipulated penalty provisions of Consent Decree paragraph 8. And the subsequently exchanged series of correspondences, including privileged settlement discussions between the parties, following the 1-11-16 DOJ-ENRD Violation Notice's issuance but prior to the 1-9-17 filing of the current enforcement action do not similarly invoke Consent Decree paragraph 8. the United both stipulated

and assessed penalties continued to accrue and Defendants had no real choice but to rely on the inconsistent representations contained in the Corps and EPA 12-19-12 and 8-29-13 agency letters each of which contained some but not all of the elements of a final appealable administrative order. The United States was well aware that Defendants would rely on and tolerate such misrepresentations and misdeeds.

Meanwhile, the government continued to withhold its decision to file a final EPA Compliance Order until an additional calendar year had passed by. By the time the United States finally filed the present Injunction and Consent Decree enforcement action on January 9, 2017, Defendants had suffered in legal limbo for a total period of five (5) years, which this Court should rightfully consider a gross abuse of administrative process to gain maximum (extortive) leverage against Defendants without providing them the due process of law the U.S. constitution guarantees them.

As the result of EPA's and the Corps multiple acts of affirmative misconduct committed during 2013-2016, the United States intentionally kept Defendants in the dark concerning their legal rights and remedies. In other words, Defendants were effectively denied their right to judicial review of a significant agency action, and consequently their constitutional right to procedural due process. As the result of EPA's and the Corps multiple acts of affirmative misconduct, Defendants were compelled to address additional alleged violations and mounting potential CWA Section 404 and/or Consent Decree penalties. As the result of EPA's and the Corps multiple acts of affirmative misconduct, Defendants also were compelled to endure several additional EPA and Corps onsite visits from 2013-2015 as well as possible new onsite visits during 2016, and five additional years of economic and legal uncertainty at great financial, emotional and physical cost to Defendants and their families and especially to Defendant Robert Brace who has since been stricken with

painful and debilitating ailments requiring ongoing medical treatments and prescription medications.

Such legal gamesmanship on the part of the United States was intentional, mean-spirited and unwarranted, and thus, unquestionably constituted affirmative misconduct over several years upon which Defendants detrimentally relied at their expense. Therefore, this Court must find that the United States should be estopped from enforcing the Consent Decree as the government has specified in its Motion to Enforce and supporting Memorandum of Law, and from exercising its enforcement jurisdiction over the Consent Decree Area pursuant to CWA Section 404.

IV. The United States' Interpretation of the Consent Decree Stipulated Penalties Provision is Inequitable, Incorrect, Without Foundation, and Unwarranted

Consent Decree paragraph 8 provides that, if after entry of the Consent Decree, "Defendants fail to perform any requirement in paragraph 4, 5, and 6, then *upon receipt of written notice of such failure from Plaintiff*, Defendants will pay a stipulated penalty of $250 for each day of failure…" (emphasis added). The United States handily asserts that it "provided written notice on January 2016 of Defendants' Consent Decree violations." (ECF No. 207, p. 16). However, a close review of the DOJ-ENRD 1-11-16 Violation Notice reveals that the DOJ-ENRD intentionally conflated alleged CWA violations of the Injunction per Consent Decree paragraph 3, with alleged violations of the Restoration Plan per Consent Decree paragraph 4, for the specific purpose of triggering the stipulated penalty provisions of Consent Decree paragraph 8. The Government utilized this "catch-all" approach to intentionally confuse Defendants and to secure additional stipulated penalties to which it was not otherwise entitled under the Consent Decree.

Significantly, the United States failed to clearly distinguish between the alleged Injunction and Consent Decree violations. The DOJ-ENRD 1-11-16 Violation Notice alleged only a single

unsubstantiated violation of the Restoration Plan – Defendants' alleged removal of the check dam previously installed per Restoration Plan Task 3. The DOJ-ENRD 1-11-16 Violation Notice did not allege a specific violation of Restoration Plan Task 1 (only that they "observed" "[t]en drain outlets" which the United States failed to establish as other than pre-existing). It also did not allege a specific violation of Restoration Plan Task 2 (relating to previously plugged surface ditches). Therefore, it would be manifestly inequitable for this Court to construe the ambiguous DOJ-ENRD 1-11-16 Violation Notice as constituting sufficient written notice of a Defendants' failure to comply with Consent Decree paragraph 4. In any event, only a proven failure to comply with Consent Decree paragraph 4 (Restoration Plan) triggers the $250 per day stipulated penalty provision of Consent Decree paragraph 8, calculated on a *per day* basis for any one or more demonstrable violations/failures committed on a given day, rather than a per violation/failure, per day basis.

Despite the Government's own affirmative misconduct, its disavowal and revocation of its prior express authorization to Defendants to perform the activities that are being alleged as CWA violations of the Injunction, the United States has endeavored to characterize such activities as violations of the Consent Decree Restoration Plan, which they are clearly not. As the result, the Government now seeks an unconscionable monetary penalty in excess of $600,000 along with an increase in the stipulated penalties going forward.

The Government's requested relief is inequitable, contrary to the terms of the Consent Decree, and well beyond what the Government's own expert concluded Defendants had the ability to pay. "[F]rom the standpoint of remedy [a consent decree] is an equitable decree[]" which means if it is violated, the court is awarding "an equitable remedy." *See Cook v. City of* Chicago, 192 F.3d 693, 695 (7th Cir. 1999) (Posner, J.); *see also United States v. Local 359, United Seafood Workers*, 55

F.3d 64, 69 (2d Cir. 1995) ("[A] consent decree . . ., by its very nature, vests the court with equitable discretion to enforce the obligations imposed upon the parties."). As a result, a district court—as part of its "independent, judicial interests" in administering the consent decree, *id.*—has discretion in the amount to award as stipulated penalties. *See Harris v. City of Phila.*, 47 F.3d 1311, 1321 (3d Cir. 1995) ("We also review the imposition of stipulated penalties under an abuse of discretion standard."). Likewise, as an "equitable order", enforcement of a consent decree is "subject to the usual equitable defenses." *Cook*, 192 F.3d at 695. Here, the Court should exercise this discretion and reject the Government's request for penalties.

As a fundamental matter, any award of penalties imposed on Defendants is inequitable given the Government's affirmative misconduct and, indeed, express authorization to conduct the activities that form the basis for the Injunction-related penalties. For all the reasons explained in detail above, the Court should exercise its equitable discretion and refrain from imposing monetary penalties on Defendants. In the event the Court does decide to award penalties, it should not award the unreasonable and unconscionable penalties requested by the Government, for a variety of reasons.

First, the Government's request for treble penalties based on what it alleges to be three distinct violations is not supported by the text of the Consent Decree. The Consent Decree provides that "if the Defendants fail to perform any requirement in paragraph 4, 5, and 6 . . . Defendants will pay a stipulated penalty of $250 for each day of failure." Here, the Government alleges violations of only paragraph 4, which states that "Defendants will perform restoration in accordance with the wetlands restoration plan, which is attached hereto as Exhibit A and made a part thereof." The plain reading of these terms is clear: If Defendants fail to perform the restoration in accordance with the Wetlands Restoration Plan, Defendants will pay a stipulated penalty of $250 for each *day*

of failure. Nowhere does the Consent Decree support the Government's preferred, warped interpretation that daily penalties are to be enforced based on each activity required by the Restoration Plan. Had the parties wanted to impose a per-activity penalty calculation, they could have easily done so. For example, they could have included a simple sentence saying as much or even included a few words "per violation" somewhere in the Consent Decree—yet they chose not to do so. A Consent Decree is to be interpreted as a contract, which means the Court is required "to give effect to the parties' 'objective manifestations of their intent' rather than attempt to ascertain their subjective intent." *Griesmann v. Chemical Leaman Tank Lines, Inc*., 776 F.2d 66, 72 (3d Cir. 1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1009 (3d Cir. 1980)). In other words, "[a] consent decree must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Harris v. City of Philadelphia*, 47 F.3d at 1350 (citing *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Here, the Government's tortured reading of the Consent Decree requires an interpretation of the Consent Decree far from "as it is written," and thus it should be rejected by the Court. At minimum, the provisions at issue here are subject to multiple reasonable interpretations, and therefore ambiguous, which means they are to be construed in favor of the party against whom the consent decree is sought to be enforced—i.e., the Defendants. *Harris v. City of Phila.*, 47 F.3d 1311, 1326 (3d Cir. 1995). Either way, the Court should reject the Government's unsupported, treble, "per-violation" damages calculation.

Second, the Government's request for penalties for each day this litigation has been pending is inequitable, as it penalizes the Defendants for taking advantage of their right to judicial review of the Government's allegations. *See United States v. Witco Corp.*, 76 F.Supp. 2d 519, 530-31 (D. Del. 1999). In *Witco*, the Court held that the accrual of penalties during litigation was

inappropriate because it penalized the Defendant from taking advantage of the dispute resolution process available to them. 76 F., Supp. 2d at 530-31. Moreover, the litigation at issue arose following Defendant's "good faith" opposition to the assessment of penalties. *Id*. That is the case here—Defendants have taken a position, in good faith, that they have not violated the consent decree, based on the express authorization of Government officials. Like the Defendants in Witco, they should not now be penalized for disputing that alleged violation. In yet another attempt to drive up the penalties on Defendants, the Government rejects reliance on *Witco* and instead urges the Court to rely on the distinguishable case *United States v. Alshabkhoun*, 277 F.3d 930, 934-35 (7th Cir. 2002). *See* ECF No. 207 at 17. According to the Government, the Court should follow *Alshabkhoun* because "the environmental harms" resulting from the alleged violations have continued during the pendency of litigation. But the Government has presented zero evidence of any actual environmental harm from Defendants' expressly authorized activities. While the activities at most may be technical violations of the statute, there is nothing in the record that Defendants' activities caused any actual damage or harm to the environment. *Alshabkhoun* is distinguishable for another critical reason: The litigation in that case was initiated by Defendants "without any . . . legitimate basis," unlike in *Witco*—and here—in which the Defendants' position was taken in "good faith." Given the position taken by Defendants in good faith and in reliance on the Government's express representations, the Court should follow *Witco* and not penalize Defendants for taking advantage of judicial review of the Government's allegations.

Likewise, the Government's request for penalties for the entire year from the date it sent written notice to Defendants (January 11, 2016) until the filing of its Motion to Enforce (January 9, 2017) is also inequitable. As explained above, the Notice issued by the DOJ on behalf of the EPA on January 11, 2016 did not constitute a final Compliance Order of which Defendants could seek

judicial review, and then DOJ waited a year before initiating any litigation. The combined result of which was the accrual of daily penalties without the opportunity for judicial review by the Defendants. The Government should not be able to game the system for an additional year's worth of penalties. Accordingly, the Court should exercise its equitable discretion and not include this approximately one year's worth of time in the calculation of any penalties. *See Cook*, 192 F.3d at 694-98 (affirming district court's decision to apply doctrine of laches in calculating stipulated penalties so as to exclude time during which Plaintiff failed to take action to enforce claim).

Third, the Court should take the Government's own calculation of the Defendants' ability to pay into account in assessing this stipulated penalty, given that the penalty the Government seeks to impose is well beyond what the Government believes Defendants can afford. After months of intensive discovery regarding the financial conditions of Defendants—ostensibly for the purpose of assessing Defendants' ability to pay any penalty—the Government produced an expert report stating that Defendants could afford a penalty of no more than $400,000. (Ex. 89 Leo Expert Report). This report was authored by Vincent A. Leo, CPA, who was retained by the Government to "evaluate the financial condition and ability of [Defendants] to pay a civil penalty . . .", and it was based on the comprehensive financial records of Defendants and their related entities (including all tax returns, financial statements, QuickBooks records, and property records and appraisals). And yet, after dedicating extensive resources to this endeavor, the Government never mentions this amount in the several pages it devotes to the size of the penalty that should be imposed on Defendants. Instead, the Government suggests that absent the stipulated penalties in the Consent Decree, Defendants would be facing penalties at least 10 times what the Government seeks, and perhaps in excess of $29 million. Yet again, the Government misleads, because the Government knows that based on their own expert report, such a penalty could never be imposed

on Defendants under these circumstances. This is because under the Clean Water Act, one element a Court must consider in determining the amount of a civil penalty is "the economic impact of the penalty on the violator." 33 U.S.C. § 1319(d). Indeed, this was the Government's basis for seeking such expansive financial discovery from Defendants. (Ex. 90 DOJ Email, re basis for discovery). Because Defendants cannot afford a penalty beyond in excess of $400,000—as the Government itself admits, but has not disclosed to the Court—the Court should not impose any stipulated penalties above that amount.

Finally, the Court should not modify the stipulated penalties in the Consent Decree. The Defendants, in good faith, relied on governmental officials in performing the activities the Government now claims are violations of the Consent Decree. For this reason, it is not the case, as the Government contends, that there have been "pervasive violations" or "substantial non-compliance" of the Consent Decree. To the contrary, there was a good faith dispute on the part of the Defendants about what was permitted, and misconduct on behalf of the Government. This is far from the type of case, such as those cited by the Government, necessitating an increase in stipulated penalties. Moreover, as the Government itself contends, a penalty well below what they are requesting here is "sufficient to deter future violations of the law" and thus there is no reason to amend the Consent Decree to add even further penalties. *See* (Ex. 89 Leo Expert Report).[20]

WHEREFORE, this Court should deny the United States' Motion to Enforce Consent Decree and Stipulated Penalties and request for reimbursement of costs incurred to enforce the Consent Decree, abate all assessed penalties and interest, and with prejudice. , direct the United

[20] For all these same reasons, Defendants object to an award of costs and expenses to the Government. And in the event the Court disagrees and does enter such an award, Defendants request an opportunity to oppose and dispute the evidence of costs and expenses presented by the Government.

States to reimburse Defendants for all costs associated with the defense of this action, including attorney and expert fees, and exercise its equitable powers to ensure the United States is equitably estopped from continuing to benefit from the various intentional misrepresentative, deceitful, unconscionable, inequitable acts of affirmative misconduct that it and its agents have perpetrated over the course of a five-year period for the purpose of inducing Defendants' reliance thereon that the United States knew Defendants would rely on, and upon which Defendants did rely to their legal, economic, emotional, medical and reputational detriment.

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