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

UNITED STATES OF AMERICA, Plaintiff v. ROBERT BRACE, ROBERT BRACE FARMS, INC., and ROBERT BRACE and SONS, INC. Defendants	)	Civil Action No. 1:17-cv-00006-BR

DEFENDANTS' OPPOSITION TO UNITED STATES' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

INTRODUCTION

1. This action stems from the same set of very troubling facts and circumstances that serve as the basis for the United States' disingenuous consent decree enforcement action filed in related Civil Action No. 1:90-cv-00229 currently before this Court, and consequently, suffers many of the same infirmities that plague the parallel consent decree enforcement action. Defendants respectfully request that this Court exercise its equitable powers to ensure the United States is equitably estopped from continuing to benefit from the same 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. If the United States had its way, the federal government could, at will, perpetrate any number of acts of affirmative misconduct against Defendants and Defendants would have available to them neither an adequate remedy at law nor any equitable defenses.

Defendants, in other words, would thereby be entirely at the mercy of the unaccountable administrative discretion exercised by federal agency officials which U.S. Supreme Court Chief Justice John Roberts and Associate Justices Kennedy and Alito warned about in *City of Arlington v. Federal Communications Comm'n*, 133 S. Ct. 1863, 1877-1878 (2013). This may be the status quo ante with respect to foreign governments around the world, but this is not acceptable in the United States of America where the rule of law rather than the rule of men is said to govern.

FACTUAL BACKGROUND

2. On January 9, 2017, the United States filed this action against Defendants simultaneous with related Civil Action No. 1:90-cv-00229 currently before this Court, alleging unauthorized discharges of pollutants (dirt) into alleged wetlands in alleged violation of CWA Section 404.

3. On March 17, 2017, *prior to the commencement of discovery and before the factual record was developed*, the United States filed its Motion to Strike Affirmative Defenses, broadly alleging grounds of *legal* insufficiency, namely, that "equitable defenses are not available to bar the government, acting in its sovereign capacity, from enforcing its laws to protect the public interest and welfare." (ECF No. 17, at 6). The United States also broadly asserted that since the United States was acting in its sovereign capacity "to protect the public's interest in 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters'" in the case at bar, the equitable defenses Defendants had alleged in their initial answer "are unavailable and should be stricken." (ECF 17, at 7). Furthermore, the United States previously asserted that these defenses should be denied on grounds of *factual* insufficiency because they had not been pleaded with sufficient specificity, did not sufficiently allege the basic elements of an equitable estoppel defense, and did not sufficiently allege that the United States engaged in affirmative misconduct. (ECF No. at 8-10).

4. On April 7, 2017, *prior to commencement of factual discovery*, Defendants filed their Opposition to United States' Motion to Strike Affirmative Defenses. (ECF No. 21). Defendants argued how the applicable case law indicates that federal courts within this Circuit have refused to strike equitable defenses when brought against the Government, particularly, "prior to the commencement of discovery" and "before a factual record has been developed." *See United States ex rel. Spay v. CVS Caremark Corp.,* No. 09-4672, 2013 U.S. Dist. LEXIS 58273, at *34-35 n.12; *United States v. Consolidation Coal Co.*, Civil Action No. 89-2124, 1991 U.S. Dist. LEXIS 15229, at *16-18; *United States v. Marisol, Inc.*, 725 F. Supp. 833, 844-45 (M.D. Pa. 1989). (ECF No. 21 at 2-3). In addition, Defendants argued that their "affirmative defenses – on their own, or when combined with the other filings in two related cases – put the Government on 'fair notice' of its defenses," in satisfaction of FRCP Rule 8. (ECF No. 21 at 7).

5. On January 25, 2018, during the period of discovery, this Court struck some of Defendants' affirmative defenses, on grounds of *factual* insufficiency, *without* prejudice, and granted Defendants leave to amend their pleading no later than February 9, 2018. (ECF No. 40).

6. On February 9, 2018, Defendants filed their Amended Answer (ECF No. 44) setting forth with sufficient factual detail the grounds for alleging their affirmative defenses. (ECF No. 44 at ¶¶ 54-65, 66-70, 71-77).

7. In its April 16, 2018 Motion for Partial Judgment on the Pleadings (ECF NO. 52), the United States no longer disputes the factual sufficiency of Defendants' affirmative defenses, but instead seizes upon Judge Rothstein's statement in this Court's Order of January 25, 2018, that, "[c]iting to a slew of cases, the United States raises serious and valid criticisms regarding the substance of Defendants' affirmative defenses." (ECF No. 40 at 1). Plaintiffs now intimate that this Court is inclined to deny the availability of equitable defenses, as a matter of law, in any case

where a federal government agency seeks enforcement of its order in the public interest, and in its capacity as a sovereign. (ECF No. 52 at 4, 5).

8. The factual circumstances giving rise to Defendants' prior request that the U.S. EPA and Army Corps authorize them to undertake agricultural ditch maintenance activities in Elk Creek north of Lane Road and on the Marsh Farm tract was this Court's September 23, 1996 Order in related Civil Action No. 1:90-cv-00229, covering an adjacent farm tract (i.e., the "Murphy Farm tract). Both the Marsh and Murphy Farm tracts comprise a portion of Defendants' 157-acre three-farm tract hydrologically integrated Waterford, Pennsylvania farm. (*See* ECF No. 214 at para. 21), (ECF No. 214-18), (ECF No. 214-1 at 134).[1] Defendants have claimed that EPA's design and implementation of the Consent Decree Restoration Plan features, particularly, the agency's intentional relocation and substantial overbuilding of the Restoration Plan check dam feature in blatant violation of this Court's 9-23-96 Order, and EPA's failure when designing said Plan to consider the potential and actual impacts of the recurring presence of beaver dams on the Marsh and Murphy Farm tracts and poorly designed culverts at the northern and southern boundary areas of the Marsh Farm tract creating their own additional dam/backwater effect, about which the United States had previously been aware in 1996, had given rise to year-after-year periodic ongoing surface and subsurface inundation and flooding of portions of Defendants' Marsh and other farm tracts beyond the Consent Decree Area. (ECF No. 214 at para. 22), (ECF No. 215, at para. 13), (ECF No. 215-8, at Fig. 7), (ECF No. 216 at pp. 15-31), (ECF No. 216-28, at pp. 21, App. D at 2 of 3, App. G), (ECF No. 216-50, at 10), (ECF No. 216-1), (ECF No. 216-29, at 4, 74, 77-82), (ECF No. 216-30, at 718-719, 720-722, 725-729, 752-755), (ECF No. 216-31), (ECF No. 216-25), (ECF No. 216-32), (ECF No. 216-33), (ECF No. 216-34 at 32-33), (ECF No. 216-35), (ECF No. 216-31), (ECF

[1] Defendants' expressly incorporate by reference its filings in the related 90-229 case cited herein. All references to ECF Nos. 214, 215, 216, 220, and 221 are to docket entries in 90-229.

No. 216-36, at 2), (ECF No. 216-37), (ECF No. 216-9, at 33-34), (ECF No. 216-38 at 19-23, 28-31, 33, 36-37, 47-48, 57-59, 67, 152), (ECF No. 216-39), (ECF No. 216-10, at 59-60, 107-108, 112-115), (ECF No. 216-40, at 16, 21, 117-119, 121, 137), (ECF No. 216-41), (ECF No. 216-42, at 32, 50-54), (ECF No. 216-43, at 98), (ECF No. 216-9, at 50-52, 56, 58, 101), (ECF No. 216-11, 662-663, 676-679, 685-686), (ECF No. 216-26, at 3, App. C, Photos 1-4).

9. Defendants had repeatedly sought to obtain information and to secure onsite visits and direction from Corps and EPA 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 all three of Defendants' farm tracts - Murphy, Homestead and Marsh - which had experienced surface and subsurface flooding as the result of the United States' design and implementation of the Restoration Plan features. (ECF No. 214, at paras. 26-27) (ECF No. 214, at paras. 27-28), (ECF No. 214-24), (ECF No. 214-25), (ECF No. 214-26), (ECF No. 214-27), (ECF No. 214-28), (ECF No. 214-29), (ECF No. 214-30), (ECF No. 214-31), (ECF No. 214-32), (ECF No. 214-33), (ECF No. 214-34), (ECF No. 215, at 18), (ECF No. 216, at pp. 29-30, 40, 43), (ECF No. 216-11, at 679, 685-686), (ECF No. 216-28, at 21, App D at 2 of 3, App. G), (ECF No. 216-26, at 3, App. C, Photos 1-4), (ECF No. 216-35).

10. Defendants exchanged numerous correspondences with Corps and EPA officials from 2008 through 2011 evidencing how Defendants had sought authorization to clean and maintain agricultural ditches and related culverts and drainage tile on and adjacent to the Marsh and Homestead Farm tracts, as well as those bordering and/or adjacent to the Consent Decree Area within the Murphy Farm tract to address the ongoing period surface and subsurface inundation and flooding of such tracts. (ECF No. 214, at paras. 27-28, and ALL accompanying exhibits).

11. Defendants had finally succeeded in securing the government's first onsite visits to

the Waterford Township Pennsylvania farm by EPA and Corps representatives to address such issues during the spring (May-June) and fall (September) of 2011, and thereafter, on July 24, 2012. (ECF No. 214, at paras. 30-32), (ECF No. 214-30), (ECF No. 214-31), (ECF No. 214-36), (ECF No. 214-35), (ECF No. 214-32, at 103), (ECF No. 214-37), (ECF No. 214-38), (ECF No. 214-39), (ECF No. 214-40), (ECF No.214-41), (ECF No.214-42).

12. It was during the July 24, 2012 onsite visit that that Corps representative Michael Fodse and EPA representative Todd 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. (ECF No. 214, at para. 32), (ECF No. 214-42). 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). (ECF No. 214-57, at 296-300) (indicating Fodse's authorization to dredge and remove sediment in Elk Creek and associated tributaries north of Lane Road). 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. (ECF No. 214, at para. 32).

13. During late December 2012, Defendants received a correspondence from Corps representative Scott Hans disavowing the government representatives' prior authorization to un-

dertake agricultural ditch maintenance activities north and south of Lane Road and declaring approximately 4,750 linear feet of the ditch/channel the government refers to as "Elk Creek" jurisdictional "waters of the United States." It 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. (ECF No. 214, at para. 33, and fn 13), (ECF No. 214-39). Following Defendants' requests for clarification of such disavowal, EPA representative Lutte responded that "Defendants' activities north of Lane Road (including on the Marsh Farm tract) "may be an unauthorized impact requiring a CWA Section 404 permit," and suggested that another onsite visit was required to clarify the government's findings. (ECF No. 214, at para. 34), (ECF No. 214-43), (ECF No. 214-44), (ECF No. 214-45), (ECF No. 214-46).

14. During April and May 2013, Defendants attempted on several occasions to confirm another onsite meeting with EPA representative Lutte considering the then quickly approaching 2013 planting season. Defendants emphasized the importance of securing EPA's authorization to plant crops within the recently cleaned areas, including on the Marsh Farm tract before the optimal part of said growing season passed by. Defendants conscientiously endeavored to secure EPA's authorization to plant the areas they had been authorized to facilitate the drainage of north of Lane Road. (ECF No. 214 at para. 35), (ECF NO. 214-47), (ECF No. 214-48), (ECF No. 214-49), (ECF No. 214-50), (ECF No. 214-51), (ECF No. 214-52).

15. On June 27, 2013, numerous federal and state officials visited Defendants' 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. (ECF No. 214, at para. 36), (ECF No. 214-35).

15. On August 29, 2013, Defendants received a letter correspondence jointly authored by Corps representative Hans and EPA representative Lapp, indicating that the agencies had disavowed their prior authorization of the majority of the work Defendants had performed on the Marsh Farm tract and Murphy Farm tract. (ECF No. 214, at paras. 37-38) (ECF No. 214-35).

ARGUMENT

I. United States Allegations that Defendants Committed Acts of CWA Noncompliance on the Marsh Farm Tract Are False and Without Foundation Because Each of the Acts Had Been Authorized by Federal Agency Representatives

1. *The Government Designated Elk Creek and its Tributaries North of Lane Road as "Agricultural Ditches" Eligible for CWA-Exempt Maintenance and Authorized Defendants to Engage in Agricultural Ditch Maintenance in Elk Creek North of Lane Road and on the Marsh Farm Tract*

The evidence reveals to the contrary, that, on July 24, 2012, Fodse and Lutte verbally authorized Defendants to undertake such activities in Elk Creek and its tributaries north of Lane Road and on the Marsh Farm tract. (ECF No. 214-33, at 153-155), (ECF No. 214-65), (ECF No. 214-34, at 85-96), (ECF No. 214-66), (ECF No. 214-82, at 3), (ECF No. 214-71, at 2-3). Lutte has similarly since testified under oath, on October 3, 2017, that he and 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. (ECF No. 214-57, at 266, 291, 293,).

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; Tacit Authorization to Plant Crops*

The evidence shows that, on July 24, 2012, Fodse and Lutte orally authorized Defendants to excavate and clean the main channel/ditch and its laterals and sublaterals/tributaries north of Lane Road 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. Representatives Lutte and Fodse did not specify the level to which Elk Creek and their tributaries north of Lane Road were to be drained. The primary method of achieving subsurface drainage is through installation of drainage tile to supplement natural drainage. (ECF No. 214, at pp. 27-29), (ECF No. 214-33, at 63), (ECF No. 214-32, at 53), (ECF No. 214-64, at 184), (ECF No. 214-4, Sec. 16 at 1, 2, 9), (ECF No. 214-2, at 16-18, 19-20, 73-76, 92-93), (ECF No. 214-61, at 2-3, 4-5), (ECF No.214-62, Depo Ex. C Tile Install Rpt.), (ECF No. 214-63, Data Sheet).

The evidence shows that the Defendant Brace had secured rights verbally and via a hand-shake agreement from Mr. Marsh to farm and maintain the Marsh tract and its adjacent ditches and tributaries in 1976 (Ex. 5 at 225-228), and then, he acquired title to the Marsh tract (comprised of two tax parcels) in May 2012. (Ex. 1). In addition, in 1984, Defendants acquired the right to keep Elk Creek north of the Marsh Farm tract running to the Sharp Road-Greenlee Road intersection free of debris and beaver dams, (Ex. 2), and Defendants, thereafter, reached similar ditch maintenance agreements with other adjacent landowners. (Ex. 3).

The evidence also shows that the western portion of the Marsh Farm tract had been previously cultivated/farmed (cropped, hayed and pastured) by the Marshes and by Defendant Robert Brace's cousins (Ex. 5 at 229-230), (Ex. 4, at para. 33, 36-38), and that the eastern portion of the Marsh Farm tract had been designated by the United States Department of Agriculture Agricultural and Stabilization Conservation Service as prior commenced conversion eligible for USDA cost-sharing. (ECF No. 216-20), (ECF No. 221-12), (ECF No. 221), (ECF No. 221-10, at 21-22), (ECF No. 221-13, at 2-3), (ECF No. 221-14), (Ex. 4 – Susan Stokely Rebuttal Report 2-21-18, at ¶ 34).

Moreover, the United States failed to establish a working definition for agricultural ditch maintenance activities when its representatives authorized Defendants to undertake such activities

in Elk Creek north of Lane Road and on the Marsh Farm tract. (ECF No. 214 at pp. 28-29), (ECF No. 214-69). As the result, Ronald and Randall Brace, acting on behalf and under the direction of Defendant Robert Brace, reasonably understood the scope of the authority they had received to conduct agricultural ditch maintenance on Elk Creek and its tributaries and reaches north of Lane Road. In addition, the Randall and Ronald Brace reasonably understood that United States representatives Fodse and Lutte had authorized them, acting on behalf of and under the direction of Defendant Robert Brace, 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. (ECF No. 214-65), (ECF No. 214-33, at 59-65, 132-137), (ECF No. 214-66), (ECF No. 214-32 at 21-25), (ECF No. 214-67 at 3-5), (ECF No. 214-68, at 2). Furthermore, the Braces reasonably understood the authority United States representatives Fodse and Lutte granted them "to farm" such area as allowing them to do whatever was necessary to make it farmable, including clearing the brush, tiling, preparing it for cropping and cropping. (ECF No. 214 at 29), (ECF No. 214-33, at 132-133), (ECF No. 214-32 at 21-25, 53, 65, 69). Randall and Ronald Brace also were aware of those areas where representatives Fodse and Lutte had expressly directed them not to "farm." (ECF No. 214, at 31-32), (ECF No. 214-33, at 61-62, 64-65, 137-140), (ECF No. 214-65), (ECF No. 214-32, at 67), (ECF No. 214-66), (ECF No. 214-44), (Ex. 5).

The evidence also shows that Lutte tacitly authorized Defendants to plant crops on the Marsh Farm tract through his failure to respond and continued silence to Defendants' several written inquiries dispatched during April and May 2013 notifying Mr. Lutte of the critically important 2013 crop season. (ECF No. 214, at 32-33). The Third Circuit, like other circuits, has recognized and inferred the existence of a tacit agreement in the face of silence from a party receiving adequate

notice from another party, where the parties have had a prior dealing/dispute. *See e.g., In re: Prudential Ins. Co. America Sales Practice Litigation Agent Action*, 148 F.3d 283, 306 (3d Cir. 1998); *Edwards v. Wyatt*, Nos. 07-1466 & 07-1602 (3d Cir. 2009), slip op. at 14; *L.L. v. Evesham Township Bd. of Educ*, No. 15-3596 (3d Cir. 2017), slip op. at 6.

II. 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, Detrimental 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 Cnty. 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 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). 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; *Califano*, 698 F.2d 622 (3d Cir. 1983), quoting *Brandt v. Hickel*, 427 F. 53, 56-57 (9th Cir. 1970); *See also* (ECF No. 214, at pp. 55-58).

2. *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*

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 north of Lane Road in Elk Creek and its tributaries and reaches and on the Marsh Farm tract. 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 United States unconscionably and intentionally 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. The United States thereafter induced Defendants to believe they could never maintain Elk Creek and its tributaries north of Lane Road as agricultural ditches and "farm" the adjacent areas.

(ECF No. 214, at 58-62). In addition, the United States also induced Defendants to consent to a jurisdictional determination ("JD") of Elk Creek and its tributaries north and south of Lane Road that it later characterized as a "requested" "preliminary" JD without informing them about what a requested "preliminary" JD was or what it legally engendered. This enabled the United States to prevent Defendants from appealing the Corps JD, administratively or judicially, thereby compelling them to address mounting alleged violations of CWA Section 404, to endure additional EPA and Corps onsite visits from 2013-2015, and four additional years of economic and legal uncertainty at great financial, emotional and physical costs 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. (ECF NO. 214, at 63-68). The United States also induced Defendants to believe they had no legal option but to prospectively secure EPA/Corps written permit approval for agricultural ditch maintenance activities north of Lane Road and on the Marsh tract until it decided to initiate legal action four years later.

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 for new alleged CWA Section 404 violations. 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. This result obtained because the United States was certain not to issue a final agency compliance order until January 2017 which could have been appealed to this Court, thereby, effectively denying Defendants their right to judicial review of a significant agency action, and consequently, their constitutional right to procedural due process. (ECF No. 214, at 68-74).

By the time the United States finally filed the present action and the Injunction and Consent Decree enforcement action in the related action (Civil Action No. 1:90-cv-00229) 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. The United States was well aware that Defendants would rely on and tolerate such misrepresentations and misdeeds, and Defendants did, in fact, rely upon such misrepresentations and misdeeds at their extreme expense.

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. 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. And, since the factual record in this matter therefore remains incomplete, it is premature for this Court to grant Plaintiffs Motion for Partial Summary Judgment at this time.

WHEREFORE, Defendants respectfully request that this Court deny the United States Motion for Partial Judgment on the Pleadings.

Respectfully submitted,

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