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

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT BRACE, ROBERT BRACE FARMS, Inc., Defendants.	)	Civil Action No. 90-229 (Erie)

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER

The United States submits this memorandum of law in support of its Motion for a Protective Order, ECF No. 168, filed pursuant to Federal Rule of Civil Procedure 26(c).[1] As explained in detail below, Defendants Robert Brace and Robert Brace Farms, Inc. ("Defendants") seek discovery on matters that are not relevant to the United States' Motion to Enforce the Consent Decree or any defenses Defendants may have. Moreover, the discovery they seek is not proportional to the needs of the case. Indeed, Defendants' have attempted to convert what the Court suggested would be a period of targeted discovery focused on one potential defense into extensive discovery aimed at challenging the settled facts, legal rulings, and judicial orders in this case. That discovery is neither consistent with the Court's intent nor permissible under the Federal Rules of Civil Procedure. The parties met and conferred on the matter, but were unable to come to a complete resolution. Thus, a protective order limiting discovery is warranted in this matter.

[1] The United States requests oral argument in this matter.

INTRODUCTION

The United States filed its Motion to Enforce on January 9, 2017, because Defendants, without moving for a modification under Federal Rule of Civil Procedure 60(b) or otherwise seeking relief from the Court, blatantly violated the Consent Decree in this matter by removing the restoration work required by the Decree. On April 7, 2017, this Court held a status conference to address several topics, including discovery. At that time, Defendants represented to this Court that they needed limited discovery regarding a 2012 site visit at Defendants' property. Tr. of April 7, 2017 Status Conference 7:20-8:5, ECF No. 128 (attached as Exhibit A); *see, e.g., id.* 7:22-8:5 ("The other thing as to why we need all of this discovery, your Honor, is we need to depose some folks who were at this meeting. There was a meeting in 2012, where my clients were there. And where Ms. Brown and her colleagues and clients were there. They were not the only people, there were a lot of people at that meeting. Many of whom heard what was discussed, what was permitted. I think those things go directly to the issue as to what the government told us we could do."); *id.* 22:25-23:3 ("The process, as I stated, we are going to depose eight people. I am mindful of being a good steward of my client's resources. We are not going to do unnecessary work."). Defendants further assured this Court that they needed to depose, at most, the "total of eight people" Defendants believed were present at that visit. *Id.* at 8:6-15, 22:25-23:1.[2]

[2] Following the April 7 status conference, the parties engaged in another ultimately unsuccessful mediation session before Judge Mitchell. Thereafter, in July, Defendants filed administrative claims under the Federal Tort Claims Act against EPA, U.S. Army Corps of Engineers, and Department of Interior's Fish and Wildlife Service alleging negligent and wrongful enforcement of the Consent Decree. And on July 31, 2017, Defendants withdrew their frivolous sanctions motion filed against the United States, ECF No. 160.

On June 15, 2017, this Court established a November 30, 2017 discovery deadline. ECF No. 146. Almost two months later, on August 10, 2017, Defendants e-mailed the United States a list of 24 individuals they wished to depose, most of whom had nothing to do with the 2012 site visit. Aug. 10, 2017 email from N. Devlin to L. Brown (attached as Exhibit B). Responding to Defendants' communication, the United States objected to the list on the grounds that Defendants had previously represented to this Court that they would only depose approximately eight individuals Defendants believed attended the 2012 site visit. We further reminded Defendants that Federal Rule of Civil Procedure 30(a)(2) required them to seek leave from the Court if they wished to exceed the 10 depositions provided for under the rules. Aug. 15, 2017 email from B. Uholik to N. Devlin (attached as Exhibit B). Additionally, the United States informed Defendants that it would seek a protective order from this Court to bar improper discovery. *Id.*

In response, Defendants disagreed with the United States' position on the reasonableness of their list of potential deponents and expressed their intention to expand discovery beyond the topic they relied upon to convince the Court that discovery was warranted. Instead, Defendants' interrogatories, requests for production, and other communications with United States' counsel indicate they now seek discovery on, among other things, alleged ambiguities within the 1996 Consent Decree, the site's status as jurisdictional waters of the United States, and the Food Security Act of 1985, 16 U.S.C. §§ 3801, *et seq*., designation of the 30-acre parcel covered by the Consent Decree ("the Consent Decree area") by the United States Department of Agriculture in the late 1980s. Aug. 16, 2017 email from N. Devlin to B. Uholik (attached as Exhibit B).

On August 22, 2017, Defendants served interrogatories and requests for the production of documents on the United States. Portions of those interrogatories and requests seek information

that is only relevant to Defendants' purported defenses based on Consent Decree ambiguity and Department of Agriculture determinations—issues that Defendants are legally barred from raising or re-litigating now. The United States therefore requested that Defendants revisit their requests and resubmit requests that comply with the Federal Rules. On September 8, 2017, the parties conferred and resolved some, but not all, of the problems the United States identified.

All indications are that Defendants are moving forward with their plans to elicit discovery on factual and legal matters that have already been resolved in this litigation or are otherwise barred as a matter of law. Such discovery is, of course, not only irrelevant and disproportional to the needs of this limited proceeding; it poses a wholly unwarranted waste of valuable time and resources, including the time and resources of witnesses who have personal and professional commitments beyond this lawsuit.

Therefore, the United States now moves this Court, pursuant to Federal Rule of Civil Procedure 26(c), for a protective order limiting the scope of discovery. In particular, we request an order that precludes Defendants from taking any discovery on the following topics: (a) the alleged ambiguity of the 1996 Consent Decree, including any discovery that predates, or that concerns individuals whose participation in this matter concluded before, January 14, 2005; (b) the designation of the 30 acres covered by the Consent Decree under the United States Department of Agriculture under the Food Security Act of 1985, 16 U.S.C. §§ 3801, et seq.; and (c) the Consent Decree area's status as a wetland and/or "water of the United States" under the Clean Water Act, 33 U.S.C. §§ 1251, et seq. We do not seek an order limiting the number of depositions at this time, as Defendants are required by rule to seek the Court's leave to take more than 10.

ARGUMENT

Pursuant to the Federal Rules of Civil Procedure, a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and* proportional to the needs of the case . . . ." Fed. R. Civ. P. 26(b)(1) (emphasis added). The party seeking discovery has the burden of demonstrating the relevance of the information sought. *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 209 F. Supp. 3d 810, 830 (W.D. Pa. 2016) (citations omitted). Information that is relevant only to claims or defenses that have been resolved or are barred as a matter of law, however, is not subject to discovery, *see, e.g.*, *17 Outlets, LLC Health Food Corp. v. ThurKen III, LLC*, 2016 WL 6781217, at *4 (D.N.H. Nov. 16, 2016) (barring discovery on "claims that have been resolved"), nor is discovery related to resolved or barred claims considered proportional to the needs of the case, *Liberty Int'l Underwriters Canada v. Scottsdale Ins. Co.*, 2017 WL 721105, at *2 (D.N.J. Feb. 23, 2017) (citation omitted).

I. DEFENDANTS' CLAIM THAT THE CONSENT DECREE IS AMBIGUOUS IS BARRED AS A MATTER OF LAW AND THUS DISCOVERY ON THIS CLAIM IS NEITHER RELEVANT NOR PROPORTIONAL TO THE NEEDS OF THIS CASE.

The United States first requests a protective order barring discovery to support Defendants' purported defense that the Consent Decree is ambiguous. Defendants have previously asserted that discovery is warranted as to several factual "disputes," including "[t]he reasonableness of the Government's interpretation(s) of the scope and purpose of the Consent Decree in collateral proceedings" and "[t]he ambiguities and deficiencies in the Consent Order including, but not limited to, the inaccurate measurement and description of the location of the area it covers and its purpose." Defs.' Resp. 4, ECF No. 126. In their Interrogatories and Requests for Production, Defendants now seek information dating back to their original

violations of the CWA in the late 1980s, including testimony from EPA and Army Corps personnel involved at the Site more than 25 years ago. *See* Defendants' Interrogatory No. 5 (attached hereto as Exhibit C) ("Identify all agents or other representatives of the United States Government who have been physically present on one or more of the Properties at Issue *since October 1, 1990*, and, for each individual, identify . . . (c) Any reports, notes, photos, communications or other documents referring to, related to, or generated in connection with each visit to one or more of the Properties at Issue.").

The Court should bar this discovery because it is untimely and irrelevant to the matter at hand. As the United States has consistently maintained, Defendants' claim that the Consent Decree is ambiguous—where Defendants voluntarily bargained for the Decree and operated under it without claiming ambiguity or confusion for more than 20 years—is barred as untimely and contrary to the "four corners" rule for interpreting consent decrees. Indeed, this Court recognized as much during the April status conference. *See* Tr. of April 7, 2017 Status Conference 8:15-23 ("It's not timely to argue about those points now.") (attached hereto as Exhibit A). And yet Defendants' recent communications with the United States and their overbroad discovery requests indicate that they intend to seek discovery on this misguided theory. *See, e.g.*, Defs.' First Set of Interrogs. & Reqs. for Production to Pl. 9-10 (Req. for Production Nos. 4-6) (attached hereto as Exhibit C). Because Defendants cannot overcome the legal barriers to this argument as a matter of law, and because it would not excuse their violation of the Decree anyway, they cannot show that this discovery is relevant to a valid claim or defense in this case. Accordingly, the United States requests a protective order barring discovery of extrinsic evidence on interpretation of the Consent Decree, including any discovery that

predates or that concerns individuals whose participation in this matter concluded before January 14, 2005.

A. Defendants cannot seek discovery for untimely defenses.

A protective order is warranted because Defendants' claim of ambiguity is untimely as a matter of law. Numerous courts, including courts in the Third Circuit, have held that any claim or defense seeking relief from a consent decree is unavailable where defendant was untimely in raising it—and the period for untimeliness was often well short of the period at issue in this case. *See, e.g.*, *Simmons v. Twin City Towing*, 425 F. App'x 401, 403 (5th Cir. 2011) (denying motion for relief filed nine years after judgment's entry as untimely under any circumstances); *United States v. Conner*, 1:97-CV-00085-BRW (E.D. Ark. Slip Op. May 22, 2017) (attached hereto as Exhibit D) (denying motion to set aside CWA consent decree 20 years after entry because defendant "made the conscious decision" to execute the consent decree and any issue therewith "was something that could have been discovered before [defendant] chose to sign the Consent Decree"); *Smalis v. Huntington Bank*, 565 B.R. 328, 334-35 (W.D. Pa. 2017) (denying relief from consent judgment after eight years as matter the Third Circuit's "reasonable time" requirement to revisit judgments); *United States v. Watts*, 2015 WL 332112, at *3 (E.D.N.Y. Jan. 23, 2015) (motion to vacate consent judgment untimely seven years after entry); *Uwalaka v. New Jersey*, 2013 WL 12091136, at *1 (D.N.J. Sept. 9, 2013) (attacks against consent judgments untimely more than one year after entry) (citing *Gordon v. Monoson*, 239 F. App'x 710, 713 (3d Cir. 2007)); *United States v. Brown*, 2010 WL 55469, at *3 (S.D. Fla. Jan. 7, 2010) (relief from consent judgment untimely eight years after entry); *R.C. by Alabama Disabilities Advocacy Program v. Nachman*, 969 F. Supp. 682, 700 (M.D. Ala. 1997) (four-year delay rendered motion

to vacate or modify consent decree untimely), *aff'd sub nom., R.C. v. Nachman*, 145 F.3d 363 (11th Cir. 1998).

More specifically, courts have consistently dismissed belated claims that a consent decree is ambiguous. For instance, in *Glover v. Johnson*, 934 F.2d 703, 708-09 (6th Cir. 1991), the Sixth Circuit held that "defendants' failure to request the court to clarify, explain, or modify" purportedly ambiguous language "in the decade since the order was served" precluded them from raising an ambiguity argument ten years after the consent order was entered. Similarly, the Ninth Circuit in *United States v. Schafer*, 600 F.2d 1251, 1252 (9th Cir. 1979), held that a defendant could not raise the "vagueness" of a consent decree as a defense four years after the decree was entered where defendant took no steps in the interim to modify it. *See also N.L.R.B. v. Sw. Bell Tel. Co.*, 730 F.2d 166, 173 n.7 (5th Cir. 1984) ("vagueness" claim untimely six years after consenting to consent decree's terms); *Salazar v. Dist. of Columbia*, 570 F. Supp.2d 105, 109-10 (D.D.C. 2008) ("ambiguity" claim untimely after 18 months), *rev'd in part on other grounds*, 602 F.3d 431 (D.C. Cir. 2010); *Rawlins ex rel. Wyatt v. King*, 803 F. Supp. 377, 389-91 (M.D. Ala. 1992) ("vagueness" claim untimely six years after consent decree entry).

The Consent Decree at issue here was negotiated and entered more than 20 years ago, and Defendants, evidently without any difficulty understanding what was required of them, complied with the Decree at that time by removing the tiling and drainage system they had installed in the 30-acre area, filling in the surface ditches, and building the required check dam. Defendants did not object to the terms of the Consent Decree when they voluntarily entered it in 1996 nor when they took steps to implement the Decree's Restoration Plan and have never sought a modification

to clarify any purportedly ambiguous language.[3] Defendants cannot now claim that ambiguity immunizes their decision to undo the very restoration work they performed to comply with the Consent Decree 20 years ago. *See Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 979 (11th Cir. 1986) (defendants' compliance with consent decree rebuts claim of vagueness), *cert. denied*, 479 U.S. 853 (1986). This is particularly true here because Defendants have failed to identify any circumstances that explain the gap between their agreement to the Consent Decree in 1996 and their assertion of alleged ambiguities more than two decades later. *See Middleton v. McDonald*, 388 F.3d 614, 617 (8th Cir. 2004) (movant identified "[n]o mitigating circumstances" to make a three-year delay reasonable). Because Defendants' assertions of ambiguity are untimely as a matter of law, discovery to support those assertions is not relevant to resolving the Motion to Enforce and should be barred as inconsistent with Rule 26(b).

B. Defendants are not entitled to seek discovery of extrinsic evidence with which to interpret the Consent Decree because it could not be relevant here.

Furthermore, Defendants must be barred from taking discovery that seeks extrinsic evidence concerning the interpretation of the Consent Decree because, even assuming, *arguendo*, that their ambiguity defense was not barred as untimely, they have not made and cannot make the requisite showing that the "four corners" rule for interpreting consent decrees must be set aside. As such, discovery seeking such evidence is not permissible under Rule 26(b).

As the Supreme Court has held, "the scope of a consent decree must be discerned within its four corners." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). The Third Circuit has explained that "[t]he 'four corners' rule of *Armour* is consistent with the ordinary principle

[3] *Cf. Brace v. United States*, 72 Fed. Cl. 337, 363 (2006) (noting that, as of January 14, 2005, Defendants had "never contacted the EPA, the Corps, any other Federal agency, or even the district court that entered the Consent Decree" to raise any concerns regarding the Decree or their compliance therewith).

of contract construction that resort to extrinsic evidence is permissible only when the instrument itself is ambiguous . . . ." *Fox v. U.S. Dep't. of Hous. & Urban Dev.*, 680 F.2d 315, 319 (3d Cir. 1982). In *Westfield Ins. Co. v. Icon Legacy Custom Modular Homes*, the United States District Court for the Middle District of Pennsylvania recently held that discovery of extrinsic evidence is only available where a litigant can:

> (1) point to specific language in the agreement itself that is genuinely ambiguous or that extrinsic evidence is likely to render genuinely ambiguous; and (2) show that the requested extrinsic evidence is also likely to resolve the ambiguity without imposing unreasonable expense.

2017 WL 2021514, at *1 (M.D. Pa. May 12, 2017).[4]

To satisfy the first requirement, a party cannot simply advance "bald assertions of ambiguity," but instead "must make some affirmative showing" that "the agreement's facial meaning" did not reflect the parties' objective, mutual intent as shown through "prior agreements and communications of the parties as well as trade usage or course of dealing.'" *Id.* at *5 (quoting *Aleynikov v. Goldman Sachs Grp., Inc.*, 765 F.3d 250, 263 (3d Cir. 2014). Here, Defendants have not fulfilled this requirement.

Defendants' obligations under the Consent Decree are clear and unambiguous. The Decree and incorporated Restoration Plan set out precisely what Defendants are required to do to comply: Defendants must disable and removing drainage tiles and tubing, fill in surface ditches, install a "check dam," and comply with a permanent injunction against the discharge of "any pollutants (including dredged or fill material) into the approximately 30-acre wetland site

[4] Consent decrees are reviewed "pursuant to principles of contract construction." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 2016 WL 6584915, at *12 (D.N.J. Nov. 5, 2016); *accord United States v. City of Erie, Pa.*, 2006 WL 3343896, at *1 (W.D. Pa. Nov. 17, 2006). Therefore, the twin requirements imposed under *Westfield* similarly apply here.

depicted in Attachment A of the Decree. 1996 Consent Decree (attached hereto as Exhibit G). These provisions are not "reasonably susceptible to at least two different interpretations." *McDowell v. Phil. Hous. Auth.*, 423 F.3d 233, 238 (3d Cir. 2005) (citing and quoting *United States v. New Jersey*, 194 F.3d 426, 430 (3d Cir. 1999)); *see also Westfield*, 2017 WL 2021514, at *1 ("A genuine ambiguity is an ambiguity about which reasonable minds could differ." (citing *Desabato v. Assurance Co. of Am.*, 213 F. Supp.3d 735, 743 (W.D. Pa. 2016)).

Indeed, Defendants' pattern of conduct belies their bald claim that the Decree is ambiguous. During the 1990 litigation that lead to the Consent Decree, Defendants (1) stipulated that the Consent Decree area, which they now claim they cannot identify, is a wetland[5]; (2) physically walked the Consent Decree area, which they now claim they cannot identify, with the district court prior to the Decree's entry;[6] (3) initially complied with the Consent Decree by, *inter alia*, removing the tiling and drainage system that they had installed in the 30-acre Consent Decree area, which they now claim they cannot identify;[7] and (4) described the location of the Consent Decree area, which they now claim they cannot identify, and assured EPA that they had

[5] ECF No. 102-1, Adjudication and Findings of Fact, *United States v. Brace*, Civ. No. 90-229 (W.D. Pa. Dec. 16, 1993), at Findings of Fact ¶¶ 3-4; *see also* Br. of Appellant Robert Brace, 2007 WL 540753 (Fed. Cir. Feb. 2, 2007) ("The Relevant Parcel is the 30-acre regulated portion of the Murphy Farm."); Pet'rs Pet. for Writ of Cert., 1995 WL 17048801, at *7 (Apr. 10, 1995) ("This case involves a thirty acre site").

[6] Br. of Appellees Robert Brace and Robert Brace Farms, Inc., 1994 WL 16177581, at *1 (3d Cir. July 11, 1994) ("The district court . . . walked the Brace property, including the thirty-acre site complained of by the government.").

[7] *Brace v. United States*, 72 Fed. Cl. at 344; *see also* Pet'r's Pet. for Writ of Cert., 2008 WL 140513, at *7 (Jan. 7, 2008) ("In order to comply with the Consent Decree, Brace proceeded to remove miles of tile and disassemble the drainage system . . . ."); Br. of Appellant Robert Brace, 2007 WL 540753 (describing the remediation measures Defendants took "[c]onsistent with the Consent Decree").

performed no work in that area.[8] Thus, there is no merit to Defendants' claim that the Consent Decree was ambiguous as to its coverage.

Defendants' suggestion that "the purpose of the Consent Decree is in question because it was not stated in the Consent Decree what its purpose really was," Tr. of Apr. 7, 2017 Status Conference 17:7-13, is likewise unsupported. The Decree's purpose could hardly be clearer:

> The primary objective of this [restoration] plan is to restore the hydrologic regime to the [Consent Decree area] wetlands adjacent to Elk Creek. In order to restore the hydrology to the area, the drainage tile system currently located in the wetlands is to be disabled, surface ditches filled in, and a check dam constructed.

Consent Decree ¶¶ 3-4, ECF No. 83-2; Wetlands Restoration Plan, Exhibit A to Consent Decree, ECF No. 83-2. Indeed, Defendants have previously acknowledged this unambiguous objective of the Consent Decree, stating in their brief appealing their unsuccessful 2006 takings claim that "[t]he *express purpose* of the Consent Decree is to 'restore the hydrologic regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek.'" Br. of Appellant Robert Brace, 2007 WL 540753 (emphasis added); *see also* Pet'r's Pet. for Writ of Cert., 2008 WL 140513, at *20 ("The government required these actions to change the hydrologic regime of the 30-acre wetlands site on the property."). Given Defendants' past conduct, representations, and their role in negotiating the Consent Decree, s*ee Cobell v. Babbit*, 37 F. Supp.2d 6, 16 (D.D.C. 1999) ("ambiguity is far less likely to be found" when party complaining of alleged ambiguity participated in drafting consent order), they cannot now credibly claim that either the Consent

[8] Letter from Robert Brace, Defendant, to Todd M. Lutte, EPA, at 1-2 (Jan. 17, 2013), ECF No. 83-4 ("Shortly after our meeting we began proceeding with our maintenance efforts, *taking care to avoid the southern back section from Lane Road (where the 30-acre wetland is located)* . . . .") (emphasis added).

Decree's boundaries or objective is ambiguous.[9] Moreover, Defendants' assertion that the Purpose of the Consent Decree is ambiguous does not meet the *Westfield* test, which requires Defendants to identify specific decree language *within* the Decree "that is genuinely ambiguous or that extrinsic evidence is likely to render genuinely ambiguous." 2017 WL 2021514, at *1; *accord id.* at *5.

Likewise, Defendants have failed to meet the second prong of the *Westfield* test, which requires that they "demonstrate that the requested extrinsic evidence is also likely to resolve the ambiguity without imposing unreasonable expense." 2017 WL 2021514, at *1. In fact, Defendants have made absolutely no showing of how the extrinsic evidence they wish to obtain is likely to resolve the alleged ambiguities that they have not yet identified under the first prong of the *Westfield* test, nor how such evidence would do so "without imposing unreasonable expense." Defendants' attempt to seek discovery as to extrinsic evidence regarding the Consent Decree should be barred as inconsistent with Rule 26(b).

C. Even if the Decree were ambiguous, it would not excuse Defendants' non-compliance.

Ambiguity is not a valid defense to the United States' Motion to Enforce the Decree and so cannot support Defendants' proposed discovery here. A party may not excuse consent decree noncompliance by asserting that the decree is ambiguous. *See Harris v. City of Phila.*, 47 F.3d

[9] Additionally, when Defendants feigned confusion about the boundaries of the 30-acre site in 2011—a decade and a half after their initial compliance with the Decree—EPA provided Defendants with the drawing of the area attached to the Consent Decree and aerial photographs illustrating the boundaries of the Consent Decree area. *See, e.g.*, Decl. of Todd M. Lutte ¶ 15, ECF No. 83-1; Letter from Jeffrey D. Lapp, EPA, to Robert Brace, Defendant, at 12-15 (Mar. 14, 2011), ECF No. 83-11; E-Mail from Todd Lutte, EPA, to Robert Brace, Defendant, at 1 (Sept. 12, 2011, 11:59 A.M. EST), ECF No. 102-4. Thereafter, Defendants confirmed they understood the protected wetlands' location and boundaries. *See* Letter from Robert Brace, Defendant, to Todd M. Lutte, EPA, at 1-2 (Jan. 17, 2013), ECF No. 83-4.

1311, 1325 (3d Cir. 1995) ("A party may not rely on its unilateral interpretation of the requirements of [a consent decree] as an excuse for noncompliance.") (citing *Halderman v. Pennhurst State Sch. & Hosp.*. 673 F.2d 628, 637 (3d Cir. 1982)). Instead, a party *must* seek clarification from the court or move for prospective relief under Rule 60(b) *before* it engages in "self-help" activities in violation of the decree. *See Pennhurst*, 673 F.2d at 637-38; *see also Employers Ins. of Wausau v. First State Ins. Grp.*, 324 F. Supp.2d 333, 338 (D. Mass. 2004) (holding that a Rule 60(b) motion, and not self-help, is the appropriate means of seeking relief from judgment); *cf. TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 885 (Fed. Cir. 2011) ("[W]here a party faced with an injunction perceives an ambiguity in the injunction, it cannot unilaterally decide to proceed in the face of the injunction and make an after-the-fact contention that it is unduly vague."); *Sec. & Exch. Comm'n v. Allen*, 2014 WL 99974, at *4 (N.D. Tex. Jan. 10, 2014) ("'[T]he proper remedy for vagueness is a motion for modification, clarification, or constructions, and vagueness may not be argued successfully as a defense to contempt without prior efforts to obtain clarification.'") (internal quotation omitted)); *In re Peck*, 155 B.R. 301, 307 (Bankr. D. Conn. 1993) (dismissing assertion that "Stipulated Order was too vague to be enforceable" where party acquiesced to order's entry and "at no time sought clarification of its scope and effect.").

Accordingly, Defendants' assertions that the Decree is ambiguous—or any assertion that the Decree's provisions are no longer appropriate in light of conditions at the Site, or were written in such a manner that they have not accomplished or are no longer needed to accomplish the Decree's purpose—could only be relevant to a party's claim or defense if this were a modification proceeding under Federal Rule of Civil Procedure 60(b). But they are not relevant here, where Defendants chose to violate the written terms of the Decree, and the matter before

the Court is a motion to enforce the Decree as against those violations. When a party fails to seek clarification and/or modification of the Consent Decree and, instead, engages in self-help, it leaves the court "with no alternative except restoration of the status quo ante . . . ." *Pennhurst*, 673 F.2d at 637. Therefore, because Defendants have never sought modification of the Consent Decree since its mutually consented entry 21 years ago, they are barred, as a matter of law, from raising alleged ambiguities as a defense in this enforcement proceeding. Thus, they must likewise be barred from seeking discovery related to such a claim of ambiguity. The Court should therefore issue a protective order barring discovery on this point.

II. DEFENDANTS' PURPORTED DEFENSE THAT THE CONSENT DECREE AREA IS PRIOR CONVERTED CROPLAND IS BARRED UNDER THE DOCTRINES OF LAW OF THE CASE, JUDICIAL ESTOPPEL AND COLLATERAL ESTOPPEL.

Defendants also assert that one of the defenses they intend to raise, and on which they seek discovery, is that the Consent Decree area does not fall within CWA Section 404 regulatory jurisdiction. Defendants' argument rests on their contention that the United States Department of Agriculture ("USDA") designated the Consent Decree area as "Prior Converted Cropland,"[10] under the Food Security Act of 1985, 16 U.S.C. §§ 3801, *et seq.*, and, therefore, it is not a wetland (and consequently not a "water of the United States") under the CWA. However, this defense, and any discovery related thereto, is barred under the doctrines of law of the case, judicial estoppel, and collateral estoppel. Accordingly, the United States requests a protective order preventing Defendants from seeking any discovery regarding the Consent Decree area's

[10] Under the Food Security Act of 1985, a "prior converted cropland" is a former wetland where (1) the conversion occurred prior to December 23, 1985; (2) an agricultural commodity had been produced at least once before December 23, 1985; and (3) as of December 23, 1985, the converted wetland did not support woody vegetation and it met certain hydrologic criteria. 7 C.F.R. § 12.2(a)(8). Prior Converted Cropland is not a wetland, *id.*; 33 C.F.R. § 328.3(b)(2); 40 C.F.R. § 232.2, and, therefore, is not a "water of the United States" under the CWA. 33 C.F.R. § 328.3(b)(2); 40 C.F.R. § 232.2.

designation as determined by USDA under the Food Security Act or its status as a wetland or "water of the United States" under the CWA.

A. Defendants' discovery requests are barred by the law of the case.

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Baldinger v. Ferri*, 674 F. App'x 204, 205 (3d Cir. Dec. 20, 2016) (internal quotation marks and citations omitted). The doctrine "applies equally to factual findings" as it does conclusions of law. *In re Jamuna Real Estate, LLC*, 392 B.R. 149, 169 (Bankr. E.D. Pa. 2008); *see Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 396-97 (3d Cir. 1994) (factual determinations expressly made or made by inference binding if not contested on appeal); *see also Original Brooklyn Water Bagel Co. v. Bersin Bagel Grp., LLC*, 817 F.3d 719, 728 (11th Cir. 2016); *Perez v. Stephens*, 784 F.3d 276, 280 (5th Cir. 2015). When acting pursuant to a remand, as this Court is here, it "'must proceed in accordance with the mandate and the law of the case as established on appeal.'" *United States v. Moreno*, 2016 WL 7178775, at *2 (W.D. Pa. Dec. 9, 2016) (quoting *United States v. Kennedy*, 682 F.3d 244, 252-53 (3d Cir. 2012)); *see also Original Brooklyn*, 817 F.3d at 728 ("Under the law of the case doctrine, the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal. The doctrine applies to issues decided explicitly and by necessary implication."); *Perez*, 784 F.3d at 280 ("Under law-of-the-case doctrine, 'the district court on remand, or the appellate court on a subsequent appeal, abstains from reexamining an issue of fact or law that has already been decided on appeal.'").

Prior to the trial on the merits in the original CWA enforcement action under this case number, Defendants *stipulated* that the Consent Decree area was a wetland as defined by the CWA. Docket No. 53 (attached hereto as Exhibit E). Following a trial on the merits, Judge Mercer found, *inter alia*:

- that the Consent Decree area was a wetland under the CWA, Docket No. 55, Conclusions of Law ¶¶ 4-5 (attached hereto as Exhibit F);
- that the Consent Decree area was a "water of the United States" subject to CWA Section 404 regulatory jurisdiction, *id.*, Conclusions of Law ¶¶ 3, 6-7; and
- that, pursuant to the Food Security Act, the USDA had issued Defendants a "commenced conversion" wetland designation for the Consent Decree area (and *not* a Prior Converted Cropland designation), *id.*, Findings of Fact ¶ 43; p. 14; Conclusions of Law ¶ 31.

On Appeal, the United States Court of Appeals for the Third Circuit held:

- that the Consent Decree area was a wetland under the CWA, *United States v. Brace*, 41 F.3d 117, 119-20, 122 (3d Cir. 1994);
- that the Consent Decree area was a "water of the United States" subject to CWA Section 404 regulatory jurisdiction, *id.* at 119-20, 122, 127-29;
- that, pursuant to the Food Security Act, the USDA had issued Defendants a Commenced Conversion Wetland designation for the Consent Decree area (and *not* a Prior Converted Cropland designation), *id.* at 121, 127;
- that a Commenced Conversion Wetland is subject to CWA Section 404 regulatory jurisdiction, *see id.* at 127; and
- that Defendants were liable for violations of CWA Section 404 as a result of the activities they conducted within the Consent Decree area without a permit. *Id.* at 126-130.

Additionally, by executing the Consent Decree, Defendants acknowledged that the Consent Decree area was a wetland, a "water[] of the United States," and that they had discharged pollutants therein without a permit in violation of CWA Section 404. *See* ECF No. 82-2.[11]

Under the Food Security Act, a Commenced Conversion Wetland is a wetland on which conversion began before but was *not* completed by December 23, 1985. *Reichenbach v. U.S. Dep't of Agric.*, 2013 WL 74608, at *1 (S.D. Ind. Jan. 4, 2013) (citing 7 C.F.R. § 12.2(a)(2)). The Commenced Conversion Wetland designation differs from a Prior Converted Cropland designation because, for land to be considered Prior Converted Cropland, the wetland conversion must be *completed* by December 23, 1985. *Id.* (citing 7 C.F.R. § 12.2(a)(2)). The two are thus mutually exclusive categories. As a consequence, the District Court's and the Third Circuit's holdings in this matter that the Consent Decree area is a Commenced Conversion Wetland, permanently enjoins Defendants from asserting, or seeking discovery on the notion, that the USDA designated the Consent Decree area as Prior Converted Cropland. That issue is settled law in this case.

Additionally, a Commenced Conversion Wetland can qualify as a "water of the United States" subject to CWA Section 404 jurisdiction, *see United States v. Brace*, 41 F.3d 117, 127 (3d Cir. 1994), but a Prior Converted Cropland cannot. *See Huntress v. U.S. Dep't of Justice*, 2013 WL 2297076, at *10 (W.D.N.Y. May 24, 2013) ("Lands that qualify as [Prior Converted

[11] *See also United States v. Krilich*, 303 F.3d 784, 792 (7th Cir. 2002) ("If a party believes that the waters at issue on his own property are not subject to the EPA's authority . . . he should not stipulate otherwise. But that is exactly what [party] did, to his continued dismay. He expressly agreed that certain waters on his property constituted 'waters of the United States,' subject to regulation by the EPA. Like most parties that enter into a settlement or plea agreement, he presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation.").

Cropland] . . . are categorically excluded from the definition of 'waters of the United States' and are therefore beyond the jurisdiction of the CWA." (citations omitted)). The law of the case determining that the Consent Decree area is a "water of the United States" precludes Defendants from asserting that their property received a Prior Converted Cropland designation, and from pursuing discovery on that issue. Again, that issue is settled law in this case.

Therefore, any defense, and thus any discovery related thereto, predicated upon the principle that the Consent Decree area is not a wetland under the CWA; is not a "water of the United States" under the CWA; is not subject to CWA Section 404 jurisdiction; or is not Commenced Conversion Wetland, is prohibited under the law of the case doctrine. The Court should therefore issue a protective order barring discovery on those topics.

B. Defendants' discovery requests are barred by judicial estoppel.

"Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that [it] has previously asserted in the same or in a previous proceeding." *Becker v. Bank of N.Y. Mellon Trust Co., N.A.*, 2016 WL 5816075, at *39 (E.D. Pa. Oct. 5, 2016) (internal quotation marks omitted) (alteration in original) (quoting *MD Mall Assoc., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d Cir. 2013)). It "requires that: (1) a party adopts a position clearly inconsistent with an earlier position and (2) the party had succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA*, 779 F.3d 214, 221-22 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). "The doctrine exists to protect the integrity of the judicial process and to prohibit parties from deliberately changing positions

according to the exigencies of the moment." *Becker*, 2016 WL 5816075, at *39 (citation and internal quotation marks omitted).

In the matter at bar, Defendants have changed their litigating position or seek discovery with the aim of doing so. Specifically, they seek to assert that the Consent Decree area is Prior Converted Cropland, and therefore not a wetland or "water of the United States," under the CWA. However, as established *supra*, Defendants have already stipulated that the Consent Decree area is a wetland under the CWA. Because land cannot be both Prior Converted Cropland under the Food Security Act, and a wetland under the CWA, Defendants' stipulation utterly conflicts with the position they desire to take now. That change in positions is impermissible under the doctrine of judicial estoppel, *see Complaint of Consolidated Coal. Co.*, 123 F.3d 126, 133 n.5 (3d Cir. 1997) (citing *Murray v. Silberstein*, 882 F.2d 61, 66 (3d Cir. 1989)) (party judicially estopped from taking position inconsistent with party's prior stipulation); *Pelltier v. U.S. Bank Nat'l Ass'n*, 2013 WL 6175665, at *5-6 (D.N.H. Nov. 26, 2013) (same); *HudsonReq v. Goob*, 2009 WL 789924, at *8 (W.D. Pa. Mar. 24, 2009) (same); *In re Air Safety Intern., L.C.*, 336 B.R. 843, 861 (S.D. Fla. 2005) (same); *Armco Inc. v. Glenfed Fin. Corp.*, 746 F. Supp. 1249, 1257 (D.N.J. 1990) (same), and thus Defendants are barred from advancing that position here or seeking discovery in support of that position. The Court should issue a protective order barring such discovery.

C. Defendants' discovery requests are barred by collateral estoppel.

"Issue preclusion, or collateral estoppel, prevents parties from re-litigating an issue that has already been litigated." *Peloro v. United States*, 488 F.3d 163, 174 (3d Cir. 2007). "'The prerequisites for the application of issue preclusion are satisfied when: '(1) the issue sought to be

precluded [is] the same as that involved in the prior action;[12] (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment.'" *Id.* (quoting *Burlington Northern R.R. Co. v. Hyundai Merch. Marine Co.*, 63 F.3d 1227, 1231–32 (3d Cir. 1995)) (alterations in original).

All the necessary elements are present here for the application of collateral estoppel. First, the United States seeks to preclude Defendants from seeking discovery or advancing the claims that were of great consequence in the original CWA Section 404 action—the Consent Decree area's status under the Food Security Act and the CWA. Second, as demonstrated *supra*, Defendants stipulated, or the District Court and Third Circuit determined (or both) during prior litigation in this case that the Consent Decree area was: (1) designated Commenced Conversion Wetland by the USDA; (2) a wetland under the CWA; and (3) a "water of the United States" subject to CWA Section 404 jurisdiction. Third, following a trial and appeal on the merits, the Third Circuit remanded the case back to the District Court "to enter judgment in favor of the United States," *Brace*, 41 F.3d at 130, and the parties executed the final Consent Decree judgment. And fourth, these conclusions were a necessary part of the Third Circuit's holding because the court could not have found Defendants liable for CWA Section 404 violations

[12] Although collateral estoppel and *res judicata* are typically applied in successive civil actions, courts have found their application appropriate under circumstances similar to those here, where a full adjudication of the law and facts has been made at an earlier stage in the same action. *See, e.g.*, *In re Kana*, 478 B.R. 373, 379 (Bankr. D.N.D. 2012) (quoting *In re Miller*, 153 B.R. 269, 273-74 n.3 (Bankr. D. Minn. 1993)); *see also Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 654 F. Supp. 1419, 1431 (D. Del. 1987) ("party to a consent decree would be barred by *res judicata* from bringing a new claim arising from the transaction covered by the consent decree"), *aff'd*, 988 F.2d 386 (3d Cir. 1993); *cf. Toscano v. Conn. Gen. Life Ins. Co.*, 288 F. App'x 36, 38 (3d Cir. 2008) ("Judicially approved settlement agreements are considered final judgments on the merits for the purposes of claim preclusion."); *In re Dougal*, 395 B.R. 880, 888 (Bankr. W.D. Pa. 2008) (entry of consent decree triggers *res judicata*).

without adjudicating the Consent Decree area's status under the CWA and the Food Security Act.[13]

Therefore, pursuant to the doctrine of collateral estoppel, Defendants are barred from re-litigating, and therefore seeking discovery regarding, the Consent Decree area's designation under the Food Security Act and its status as a wetland and "water of the United States" subject to CWA Section 404 jurisdiction.

D. Defendants' discovery requests are barred by *res judicata*.

The doctrine of *res judicata* bars parties from raising claims or defenses that were brought, or could have been brought, by those same parties in a prior proceeding on the same cause of action.[14] *See, e.g.*, *Rodrigues v. Unifund CCR, LLC*, 2017 WL 2391809, at *2 (3d Cir. 2017) (citing *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008)); *Joell v. Nw. Human Servs.*, 2013 WL 5823738, at *4 (E.D. Pa. Oct. 29, 2013) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). "It 'gives dispositive effect to a prior judgement if a particular issue, although not litigated, could have been raised in the earlier proceeding.'" *Joell*, 2013 WL 5823738, at *4 (quoting *CoreStates Bank, N.A. v. Huls Am. Inc.*, 176 F.3d 187, 194 (3d Cir. 1999)). Accordingly, even if this Court were to conclude that the Consent Decree area's designation under the Food Security Act and status as a "water of the United States" under the

[13] On appeal, Defendants argued, *inter alia*, that they "attempted several means of resolving the [CWA] dispute," including requesting a [Commenced Conversion Wetland] designation for the Consent Decree area from the USDA "for purposes of the [FSA]," Br. of Appellees Robert Brace and Robert Brace Farms, Inc., 1994 WL 16177581, at *31 (3d Cir. July 11, 1994), and that their reliance upon the USDA's Commenced Conversion Wetland determination should have insulated them from CWA Section 404 liability. *Id.* at 29-31. In their Petition for Writ of Certiorari, however, Defendants abandoned this argument. *See generally* Pet'rs Pet. for Writ of Cert., 1995 WL 17048801 (Apr. 10, 1995).

[14] *See supra* note 12.

CWA was not litigated in the prior CWA Section 404 litigation, Defendants had a full and fair opportunity to raise those defenses in the earlier proceeding, and so they are barred from raising them now. Thus, any discovery on that point must also be barred as irrelevant.

CONCLUSION

For these reasons, the United States respectfully requests that the Court grant its Motion for a Protective Order, ECF No. 168, and issue an order precluding discovery on issues that are time-barred or that have been previously decided as described above and as set forth in our Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2017, I served the foregoing United States' Memorandum of Law in Support of Motion for a Protective Order on the following counsel for Defendants via ECF:

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