



U.S. Department of Justice

Environment and Natural Resources Division

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CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408

July 13, 2016

BY ELECTRONIC MAIL

Neal R. Devlin
Knox McLaughlin Gornall & Sennett, P.C.
120 West Tenth Street
Erie, Pennsylvania 16501-1461

Re: Violations of Consent Decree and CWA by Robert Brace & Robert Brace Farms, Inc.

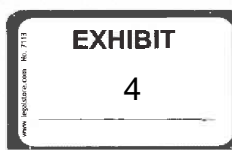
Dear Mr. Devlin,

I write in response to your May 5, 2016 letter following up on our April 5, 2016 meeting. As we expressed at that meeting, your clients, Mr. Robert Brace and Robert Brace Farms, Inc. (collectively "the Braces") are in violation of the September 23, 1996 Consent Decree ("Consent Decree") and of Sections 301 and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311 and 1344. While we appreciate the Braces' interest in resolving these violations, the United States does not believe the proposal described in your May 5 letter adequately accounts for the nature of the violations or the protection of the jurisdictional waters on the Brace property.

On January 11, 2016, the United States notified you by letter that the Braces were in violation of the Consent Decree, which (among other things) enjoined them from discharging pollutants into the 30-acre wetland adjacent to Elk Creek south of Lane Road ("CD area"). That letter detailed the United States' view of its authority and of the Braces' liability, so I will not repeat that explanation here. As you also know, EPA has identified additional CWA violations in waters north of Lane Road ("Marsh area").¹ The violations in the Marsh area have now been referred to the United States Department of Justice for civil prosecution. While your clients have expressed their views as to the history of the CD and Marsh areas, Mr. Brace's arguments regarding the CD area were unsuccessful in the earlier round of litigation on this matter—including before the United States Court of Appeals for the Third Circuit. Likewise, the United States believes the evidence supporting the violations at the Marsh area is equally unequivocal.

In light of this background, the United States' responds to your May 5 proposal as follows:

¹ By letter dated August 29, 2013 (attached to the January 11, 2016 letter as Exhibit 2), EPA and the United States Army Corps of Engineers notified Mr. Brace of violations at the Marsh area. See August 29, 2013 letter at p. 4.



Consent Decree Area

In your May 5 letter, you explained that the Braces believe that the August 5, 2015 EcoStrategies report identifies the “30 acre parcel mentioned in the Consent Decree.” After we sought clarification, you explained that, for settlement purposes only, the 32.4 acres outlined in blue in Figure 8 of the EcoStrategies Report, is the parcel referred to in your May 5 letter. The United States agrees that the 32.4 acre blue-outlined area, as evident in Figure 8 of the EcoStrategies report, encompasses the CD area. However, as the identified area is larger than the acreage subject to the Consent Decree, we believe all parties would benefit from a more precise demarcation² of the 30 acres under the District Court’s jurisdiction.

We understand from your letter that the Braces have declined the opportunity, as discussed at the April 5 meeting, to undertake their own demarcation, subject to the agreement of the United States, of the 30 acres covered by the Consent Decree (within the 32.4 acres identified in Fig. 8 of the Eco-Strategies Report). Accordingly, we are willing to have EPA personnel visit the property to demarcate those 30 acres.³ We would intend, and expect your clients’ agreement, that the resulting demarcation would become part of the existing Consent Decree or any modification of that Consent Decree.

Concurrent with the visit to the property to demarcate the 30-acre area, the United States would expect to review the current state of drainage tile installations or other activities in that area in order to assist in the development of a restoration proposal. Once the parties reach consensus as to the precise 30 acres covered by the Consent Decree, the United States would be willing to provide restoration guidelines for the CD area. While we will take new circumstances into account, the guidelines will reflect the restoration work that was required of the Braces under the Consent Decree’s original restoration plan, which the Braces have since violated. In addition, given the Braces’ knowing violations of the terms of the court-ordered Consent Decree, any resolution of the CD violations will require not only restoration, but also payment of civil and/or stipulated penalties.⁴

The United States cannot agree to the May 5 letter’s characterization of the “main ditch that flows through the Murphy, Homestead, and Marsh farms,” or to the suggestion that the Braces be allowed to “maintain” that “ditch” in whatever manner they see fit. The channel

² Please note that what we proposed at our April 5 meeting, and what we are now agreeing to perform, is a demarcation of the area subject to the Consent Decree—not a delineation of the extent of jurisdictional waters on the property.

³ The Braces have long been aware of the approximate location of the 30 acres covered by the Consent Decree, which was depicted in Exhibit A attached to the Consent Decree. However, the advancement in technology over the past 20 years will allow EPA to use advanced tools to recreate as clearly and closely as possible the depiction of the 30-acre CD area given the change in conditions over time.

⁴ Specifically, section 309(d) of the CWA provides for civil penalties of up to \$37,500 per day for each violation occurring after January 12, 2009 and through November 2, 2015, and up to \$51,570 per day for violations occurring after November 2, 2015. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; 81 Fed. Reg. 43095 (July 1, 2016). Additionally, the parties’ 1996 CD provides for stipulated penalties of \$250 per day for each requirement violated.

described is Elk Creek, which is a jurisdictional water of the United States. As EPA previously explained in 2011 and again in a letter dated August 29, 2013, the Braces' proposed efforts to remove beaver dams and similar debris do not implicate Section 404 of the CWA, provided there is no discharge of dredged or fill material. In those instances, the United States does not object to the Braces' proposed efforts, although they may still need to seek guidance from state and local authorities, such as the Pennsylvania Game Commission. However, any activities in Elk Creek that would result in a discharge of dredged or fill material, including actions to deepen, widen, dredge, channelize, and/or straighten, Elk Creek, remain subject to the limitations in Section 404 of the CWA and implementing regulations. We will not agree to any resolution of the Consent Decree violations that would run contrary to those limitations.

Marsh Area

The United States cannot agree to the Braces' suggestion that they "be able to make full use of the Marsh Property." Resolution of the potential violations of the CWA within the Marsh area will require removal of installed drainage tile in approximately fourteen acres of wetlands north of Lane Road (as identified in EPA's August 29, 2013 letter) and payment of civil penalties. If the Braces are unwilling to restore the impacted wetland in the Marsh area, the United States will go forward with the referral to pursue a remedy in district court.

In principle, we share your clients' preference to come to an agreement that "resolves all outstanding issues," *i.e.*, the violations of the Consent Decree and the CWA in the CD area and the violations of the CWA in the Marsh area, without further litigation. To be clear, any potential amicable resolution of this matter would necessarily include two components: (1) injunctive relief, in the form of restoration of impacted areas and compensatory mitigation for temporal losses, and (2) monetary penalties. In regard to the first component, as discussed above, the United States will require full restoration of the CD area and the Marsh area. The United States is happy to discuss the specifics of these requirements with you at greater length, but both injunctive relief and penalties are necessary components of any agreement resolving the violations.

Please contact me at your earliest convenience to schedule the site visit for the demarcation of the 30-acre CD area. If you have questions regarding the remainder of this letter, please give me a call at the telephone number below.

Sincerely,

/s/ Laura J. Brown

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CC:
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