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' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT BASED ON EXTRAORDINARY CIRCUMSTANCES

Defendants Robert Brace and Robert Brace Farms, Inc., through their attorneys, file this Memorandum of Law in Support of Motion for Relief from Judgment Based on Extraordinary Circumstances pursuant to Federal Rules of Civil Procedure ("FRCP") 60(b)(6).

This motion accompanies Defendants' Response and Opposition to the United States' Second Motion to Enforce Consent Decree and for Stipulated Penalties (ECF 214), and Defendants' Motion to Vacate Consent Decree and Deny Stipulated Penalties pursuant to FRCP 60(b)(5) (ECF No. 215) and Memorandum of Law Supporting Motion to Vacate Consent Decree and Deny Stipulated Penalties (ECF No. 216).

Defendants respectfully request that this Court exercise its equitable powers to recognize the extraordinary circumstances that justify allowing Defendants to prospectively continue and complete, by no later than three (3) years from the entry of judgment, the prior commenced conversion of their Murphy Farm tract previously authorized by the United States Department of Agriculture Agricultural Stabilization and Conservation Service ("USDA-ASCS") in September 1988, pursuant to Section 1222(a)(1) of the Food Security Act of 1985 ("FSA"), corresponding

USDA implementing regulations (7 C.F.R. 12.5(d)(i)), consistent with subsequently issued 1993 joint EPA-Corps regulations retroactively treating their pre-December 23, 1985 prior commenced conversion as excluded from the jurisdiction of Clean Water Act ("CWA") Section 404.

I. Third Circuit Federal Courts Must Consider Certain Factors Before Exercising Their Equitable Discretion Under FRCP 60(b)(6)

In the Third Circuit, "courts are to dispense their broad powers under 60(b)(6) only in "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Cox v. Horn*, 757 F. 3d 113, 120 (3d Cir. 2014), citing *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993). Rule 60(b)(6) relief may be justified where intervening "changes in decisional law […are] paired with certain circumstances. […] A district court addressing a Rule 60(b)(6) motion premised on a change in decisional law must examine the full panoply of equitable circumstances in the particular case before rendering a decision." *Satterfield v. District Attorney of Phila.*, No. 15-2190 (3d. Cir. 2017), slip op. at 3, citing *Cox.* Such a "case-dependent analysis" is "rooted in equity." *Scatterfield*, slip op. at 18, citing *Cox*, 757 3d. at 124. It is a "'flexible, multifactor approach […] that takes into account all the particulars of a movant's case,' even where the proffered ground for relief is a post-judgment change in the law." *Scatterfield*, slip op. at 18, quoting *Cox*, 757 F.3d at 122.

Courts exercising their equitable discretion under Rule 60(b)(6), must evaluate various factors,

> "*inter alia*, '[1] the general desirability that a final judgment should not be lightly disturbed; [2] the procedure provided by Rule 60(b) is not a substitute for an appeal; [3] the Rule should be liberally construed for the purpose of doing substantial justice; [4] whether, although the motion is made within the maximum time, if any, provided by the Rule, the motion is made within a reasonable time; [5] whether there are any intervening equities which make it inequitable to grant relief; [6] any other factor that is relevant to

> the justice of the [order] under attack…'" *Lasky v. Continental Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986), quoting 7 J. Moore J. Lucas, Moore's Federal Practice at ¶ 60.19, pp. 60-164 — 60-165 (2d ed. 1985).

Courts also may consider additional factors, including "whether there is merit in the defense or claim, as the case may be," and "if relief is sought from a judgment rendered after a trial on the merits, whether the movant had a fair opportunity to present his claim or defense…" *Lasky*, 804 F. 2d at 256, quoting 7 J. Moore J. Lucas, Moore's Federal Practice at ¶ 60.19, pp. 60-164. "*Cox* requires a weighing of the equitable factors at play in a particular case, and *the nature of the change in law itself is highly relevant to that analysis*" (emphasis added). *Scatterfield*, slip op. at 21. "[A] a proper demonstration of actual innocence by [a movant] should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction." *Id*.

As with any motion filed pursuant to Rule 60(b), a Rule 60(b)(6) motion must be filed within a "reasonable time," and "the circumstances of each case" determine "[w]hat constitutes a 'reasonable time.'" *See In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 383 F. App'x 242, 246 (3d Cir. 2010). "As a general matter, a Rule 60(b)(6) motion filed more than one year after final judgment is untimely unless 'extraordinary circumstances excuse the [party's] failure to proceed sooner." *Ortiz v. Pierce*, No. 08-4877, 2014 WL 3909138, at *1 (D. Del. 2014 (citing *Ackerman v. United States*, 340 U.S. 193, 202 (1950)).

II. The United States' Extraordinary Efforts to Disrupt USDA-ASCS' Authorization of Defendants' Prior Commenced Conversion of 32.4 Acres of Murphy Farm Tract

1. FWS' 1987 Initial Efforts to Frame the Issues

FWS biologist David Putnam was the foremost U.S. government official outside of the EPA intent upon disrupting the USDA-ASCS' prior commenced conversion determination with respect to Defendants' Murphy Farm tract. Mr. Putnam's prior 1992 testimony reveals that, one

day following EPA's issuance of its July 15, 1987 Violation Notice (Ex. 1 EPA V/N (7-15-87)), he had helped prepare and dispatch, on behalf of Charles Kulp, former Supervisor of the FWS State College, PA offices, a July 16, 1987 correspondence to a Gene Thompson, State Director of the USDA-ASCS. "The purpose of this document was to advise [ASCS] that we believed the activities *could be* a violation of the Food Security Act. […] I don't believe any action was taken. We never received a response to this" (emphasis added). (Ex. 2 David Putnam Depo 4-7-92, at 42-43.); (Ex. 3 Putnam Depo 1-26-18 at 30-31 ("I would draft any correspondence that would be associated with [an assigned case…], most any correspondence. They [Mr. Perry and Mr. Kulp…] might write some of their own, but most if it I would draft.").

Mr. Putnam also drafted a separate correspondence for Edward Perry, former Assistant Supervisor of the FWS State College, PA offices, that had been dispatched to Defendant Robert Brace on July 17, 1987. (Ex. 4 Putnam Dec. 1987 Memorandum Chronological Listing of Events, at 2); (Ex. 5 Ed Perry Ltr. to Bob Brace (7-17-87)). The certified Perry correspondence *inter alia* advised Defendant Robert Brace about his violation of the FSA:

> "The purpose of this letter is to advise you that the Food Security Act of 1985 provides that anyone who produces an annual row crop in converted wetlands will be ineligible for most federal agricultural subsidies, crop insurance, and assistance on their entire agricultural operation. The areas where filling and draining activities have take place since December 23, 1985, meet the definition of the 'converted wetlands' [("CW")] in the Act. Anyone who produces an annual crop on these converted wetlands may be subject to the 'swampbuster' provisions of the Act. Therefore, we are advising the USDA of your wetland conversion. You may wish to contact the Erie County offices of the Soil Conservation Service or Agricultural Stabilization Conservation Service for further information on this matter."

(Ex. 5 FWS Perry Ltr. to Robert Brace (7-17-87)). Neither Mr. Perry nor his supervisor Mr. Kulp apparently investigated prior to dispatching this correspondence whether the allegedly illegal conversion activities had been commenced prior to December 23, 1985, which would

have rendered such activities and the crops produced therefrom after 12-23-85 entirely legal under the FSA. Six days later, the Corps issued their Cease and Desist Order to Defendants. (Ex. 6 Corps C/D Order 7-23-87)).

On November 18, 1987, former FWS biologist David Putnam "attended the Erie County Council of Sportsmen Clubs to discuss wetland values and the Service's involvement in the 404 program." (Ex. 4 Putnam Dec. 1987 Memo at 3). He attended this meeting just following a multiparty meeting at Defendants' Waterford Township, PA farm in which the FWS, Corps, EPA, and three state agencies participated, along with representatives from former U.S. Congressman Tom Ridge. Mr. Putnam's notes had indicated that the FWS would be meeting with the USDA-SCS "to discuss a restoration plan that [would] protect the regulated wetlands and not interfere with draining of existing agricultural operations." (Ex. *Id*.). It became apparent several years later that Mr. Putnam had likely been speaking publicly with the Council of Sportsmen Clubs about the Brace case, as had been subsequently revealed in an August 1991 interview published in the Pennsylvania Sportsman. (Ex. 2 David Putnam Depo, 4-7-92 at 62-63) (referencing the article's middle column which stated, "One landowner claimed he wanted to drain a wetland to grow cabbage. When we check it, it was skunk cabbage he was growing in patches around the trees he forgot to clear off the field. The site appeared to be more suitable to golfing than farming."). As Mr. Putnam admitted during his deposition testimony, since the case was a high visibility case, he spoke publicly in response to the many questions he received about it. (Ex. 2 David Putnam Depo, 4-7-92, at 64.) In fact, former FWS representative Putnam also testified that EPA had intentionally raised the public profile of the Brace through issuance of a press release. (Ex. *Id.*, at 64-65) in an apparent effort to alert and gain support from the environmental community for its wetlands restoration efforts against Defendants.

1. Defendants Apply for and Secure USDA-ASCS Commenced Conversion Determination for Murphy Farm Tract 32.4 Acre Area

With the July 1987 EPA Violation Notice, FWS Perry FSA correspondence and the Corps Cease and Desist Order in mind, Defendant Robert Brace promptly conferred with local USDA officials about the September 18, 1988 commenced conversion application deadline imposed by the final USDA regulations implementing the FSA (7 C.F.R. §12.5(d)(5)(i)). He was then advised to apply for protection from the FSA's Swampbuster prohibition (Ex. 7 52 FR 35194, 35197, 35203 (Sept. 17, 1987)).

On August 31, 1988, Defendant Robert Brace dutifully submitted a request to the Erie County offices of the USDA-ASCS for commenced conversion on the required USDA-ASCS form, Form ASCS-492 entitled "Data Needed for Swampbuster Commenced and Third-Party Determinations." (Ex. 8 ASCS Form ASCS-492). The form identified the conversion activities he had continuously undertaken from April 28, 1977 through May 8, 1987, including the construction of ditches and installation of drainage tile systems costing $28,524, as evidenced by attached invoice statements, on portions of his 157-acre three farm-tract Waterford Township, PA farm designated by USDA as "Farm 826." The form even emphasized the deadline as follows: "**This form must be submitted no later than September 19, 1988. No commencement requests will be considered after that date**" (boldfaced type in original). (Ex. 9 Executed Brace USDA-ASCS Form – Data Needed for Swampbuster Commenced). The form had been filled out by the USDA-ASCS and then signed by Defendant Robert Brace. (Ex. 10 Lewis Steckler Depo 11-30-17, at 51).

After conferring with USDA officials, Defendant Robert Brace also dutifully submitted to the Erie County ASCS Committee, on August 31, 1988, USDA-ASCS Form AD-1026 entitled "Highly Erodible and Wetland Conservation Certification." (Ex. 9 Executed Brace USDA-

ASCS Form AD-1026). He indicated on the form that an agricultural commodity would be produced in crop year 1988 or during the term of a requested USDA loan on portions of Farm tract Farm 826, Tract 1356 that had not previously been used for production of agricultural commodities during the period spanning 1981-through 1985 – the period during which he had engaged in ongoing conversion activities while farming other portions of the Murphy and Homestead Farm tracts. (Ex. 9 Executed Brace USDA-ASCS Form AD-1026, at Line 6). He also indicated, in response to the question on Line 7, that an agricultural commodity would be produced on the fields noted above on portions of Farm 826, Tract 1856 that had been improved, drained or modified or converted after December 23, 1985. (Ex. 9 Executed Brace USDA-ASCS Form AD-1026, at Line 7). Based on this discussion with USDA officials, Defendant Robert Brace had been informed and understood that this statement would be interpreted as revealing his plan to continue his conversion of the areas indicated until completed, consistent with the 1987 USDA final regulations that authorized pre-December 23, 1985 commenced conversions could be completed no later than January 1, 1995. This interpretation is supported by the title of Part A of the Form AD-1026 – "Part A – Producer's Intentions for Use of Land." (Ex. 9 Executed Brace USDA-ASCS Form AD-1026, at Part A).

On September 7, 1988, Erie County ASCS Executive Director, Joseph Burawa, signed off on the Defendant Robert Brace's executed USDA-ASCS Form AD-1026. He also checked off the box indicating that he had referred Mr. Brace's request for a commenced conversion to the USDA-SCS for a determination which was "[n]eeded prior to the producer's certification in Part C" imposed on applicants "[a]s a condition of eligibility for any USDA loans." (Ex. 9 Executed Brace USDA-ASCS Form AD-1026, at Lines 10 and 11 (referring to "Part C – Use Certification (Completed by producer))."

Once former USDA-SCS technician Lewis Steckler received the AD-1026 from the Erie County USDA-ASCS office along with an accompanying map and cropping history, he "contacted Mr. Brace to tell him [he] would be walking over his fields" to examine them. (Ex. 11 Lewis Steckler Depo, 3-18-92 at 25); (Ex 10 Lewis Steckler Depo, 11-30-17, at 52-53). Mr. Steckler conducted this field check after having reviewed the soil types of the fields published in the Erie County Soil Survey. (Ex. 11 Lewis Steckler Depo, 3-18-92, at 25-26). Former USDA-SCS representative Steckler testified under oath that he was the individual who filled out the Form SCS-CPA-026 entitled, "Highly Erodible Land and Wetland Conservation Determination" reflecting September 7, 1987 as the date of the USDA-ASCS request, using the information contained on the Form AD-1026 and accompanying maps. (Ex. 12 USDA Form SCS-CPA-026); (Ex. 10 Lewis Steckler Depo, 11-30-17, at 51-52).

Former USDA-SCS representative Steckler also testified that both he and the ASCS had made the notations appearing on the map sketch that contains a statement "Not to Scale." (Ex. 11 Lewis Steckler Depo, 3-18-92 at 26, 28); (Ex. Map Sketches for Farm 826, Tract 1356 accompanying Form AD-1026). In addition, he testified that the symbols notated on the map sketch "pretty much correspond[ed] to what [he] put on here." (Ex. 11 Lewis Steckler Depo, 3-18-92 at 28). "N.O." referred to not highly erodible fields, "H.E.L." referred to highly erodible fields, "P.C." referred to prior converted fields, and "C.W." referred to converted wetlands. (Ex. *Id.*). According to Mr. Steckler, the "PC" marked on fields 1, 4, 6, 8, 10 and 13 of Line 13 of the USDA Form SCS-CPA-026 was roughly where drainage tile had already been installed, indicating a cropping history. (Ex. 10 Lewis Steckler Depo, 11-30-17, at 54); (Ex. USDA Form SCS-CPA-026, at Line 13 – "Prior Converted Wetlands (PC)"). "If [a field] didn't have the cropping history, [the SCS] did not put a PC on it." (Ex. 10 Lewis Steckler Depo, 11-30-17, at

21-22, 61). If a field, such as field 14 or field 15 marked on the USDA Form SCS-CPA-026, was undergoing changes that would enable it to be cropped, the SCS "put a CW on it for converted wetland." (Ex. 10 Lewis Steckler Depo, 11-30-17, at 21-22). In fact, former representative Steckler had inserted the following handwritten note on Line 16 of Form SCS-CPA-026: "Commenced filed with ASCS," and designated the two fields as totaling 43.4 acres. (Ex. 12 USDA Form SCS-CPA-026), at Line 16 – "Converted Wetlands (CW)"). "It wasn't designated until after the County Committee approved it. […W]e labeled the piece that we're talking about as CW. […] After the County Committee granted the commenced, it may have changed […] to […] commenced conversion." (Ex. 10 Lewis Steckler Depo, 11-30-17, at 25). And, when performing these field evaluations, former representative Steckler testified that they relied upon those portions of the National Food Security Act Manual ("NFSAM") that applied to the SCS field offices. (Ex. 10 Lewis Steckler Depo, 11-30-17, at 27-28).

On September 14, 1988, the Erie County ASCS Executive Committee approved Defendants' request for an FSA swampbuster commenced conversion determination for Field 14 (i.e., for approximately thirty-two and four-tenths (32.4) acres of the Murphy Farm tract) and for Field 15 (approximately eleven (11) acres of the adjacent Marsh Farm tract). According to County Executive Committee Meeting minutes of that day, the

> "County Committee reviewed a request for swampbuster commenced by FSN 826 Robert H. Brace. Committee noted wetlands determination was completed by U.S. Fish and Wildlife on tract 1356. Producer has been assessed a fine for converting wetlands and the process is now in litigation. Oats was planted on the area in 1987 and clover hay was harvested in 1988. After review invoices submitted by Mr. Brace and conferring with Lew Steckler, SCS, County Committee determined that drainage commenced prior to December 23, 1985, and approved ASCS-492."

(Ex. 13 Erie Cty ASCS Comm. Mtg. Minutes 9-14-88, at 2-3).

Thereafter, on September 21, 1988, Erie County ASCS Executive Director Joseph Burawa dispatched a letter correspondence to Defendant Robert Brace apprising him of the Committee's determination that his "conversion of wetlands began before December 23, 1985, and [would] enable [him] to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits." (Ex. 14 Erie Cty Exec. Comm. Chair Joseph Burawa 9-21-88 Ltr.to Brace). The letter indicated that the determination had been based on the Committee's review of the submitted invoices evidencing pre-December 23, 1985 conversion construction activities, the expenditures incurred for such purpose, and "concurrence with Lew Steckler, District Conservationist, SCS." (Ex. *Id.*).

1. USDA-SCS and USFWS Officials' Extraordinary Efforts to Disrupt, Thwart and Nullify USDA-ASCS' Murphy Farm Prior Commenced Conversion Determination and Subject Defendants' Activities to CWA Section 404 Corps Permitting

a. <u>USDA-SCS Personnel Commenced Conversion Disruption Efforts</u>

Former representative Steckler has since raised, in two separate pre-trial depositions, two issues about the ASCS Erie County Executive Committee's September 14, 1988 commenced determination. First, Mr. Steckler has emphasized that he had not been present at the September 14, 1988 meeting (because of a prior commitment), and therefore, he couldn't have conferred with the Committee at the meeting before its determination. (Ex. 11 Lew Steckler Depo, 3-18-92, at 29,31); (Ex. 10 Lew Steckler Depo, 11-30-17, at 60). Although former representative Steckler testified that he had no input into the County Committee's decision, he nevertheless acknowledged that the commenced determination was the ASCS Committee's decision. (Ex. 10 Lew Steckler Depo, 11-30-17, at 60). Mr. Steckler raised this objection even though he also has since testified that he didn't then even know what a "converted wetland" was because Defendant Robert Brace's commenced conversion request "was the first one we ever did […] it [was] the

first time we ever had a CW" in the State of Pennsylvania. (Ex. 10 Lew Steckler Depo, 11-30-17, at 56, 59, 70).

As the result of his admitted inexperience with CW determinations, former representative Steckler testified that he had contacted a SCS specialist skilled as a wetlands biologist from Harrisburg, PA for guidance. (Ex. 10 Lew Steckler Depo, 11-30-17, at 55-56, 60); (Ex. 15 Barry Isaacs Depo, 1-26-18, at 31) (indicating Mr. Steckler indirectly involved him in the Brace matter). That specialist was former USDA-SCS State Biologist, Barry Isaacs, who started with SCS in 1977 in Indiana and had first reported to Harrisburg, PA in July 1987 (Ex. 15 Barry Isaacs Depo, 1-26-18, at 7). Former representative Isaacs testified that, at the time, he hadn't previously been "involved in any commenced conversion determination. I think his [Mr. Brace's] was the only one, and I wasn't directly involved in it." (Ex. 15 Barry Isaacs Depo, 1-26-18, at 31.) "[W]e may have only had one of these in Pennsylvania." (Ex. 15 Barry Isaacs Depo, 1-26-18, at 30). Former representative Isaacs also testified that at the time the SCS had convened multi-state and national training sessions discussing new or amended editions of the NFSAM, he "[doesn't] ever remember commenced conversion examples really being discussed." (Ex. 15 Barry Isaacs Depo, 1-26-18, at 45)

Following a deposition recess, former representative Isaacs clarified this previous statement by testifying that he doesn't "ever remember commenced conversion examples really being discussed *with the other wetland memorandum agreement agencies*" (emphasis added). (Ex. 15 Barry Isaacs Depo, 1-26-18, at 63). This revised statement apparently was intended by United States counsel to disguise the prior extent of SCS intra-agency ignorance and/or confusion regarding the legal status of commenced conversions and the relationship between a SCS converted wetland ("CW") determination and an ASCS commenced conversion ("CC")

determination of the same field(s). Mr. Isaacs' reference to memorandum agreement agencies' failure to adequately discuss the CC designation, therefore, should be construed as intentionally misleading primarily because the first MOU between the SCS and ASCS governing their respective responsibilities under the FSA had not been executed until January 9, 1990, approximately one and one-half (1 ½) years following the September 1988 Steckler-Isaacs Brace-case phone discussion. (Ex. 16 1-9-90 MOU Btwn SCS-ASCS re FSA, etc.).

Former SCS representative Isaacs did recognize that they had then been focusing on a potential converted wetland (CW) violation of the FSA which, he believed, would materialize if an ASCS commenced conversion determination had not been made on such fields, and the commenced conversion was not thereafter completed. Yet, Mr. Issacs remained uncertain regarding the ultimate legal status of a commenced conversion determination. (Ex. 13 Barry Isaacs Depo, 1-26-18, at 28).

> "The commenced conversion, they were eligible to receive program payments while they had that commenced conversion label. […] Whatever the outcome was. *If they didn't complete it, it could become a CW*. I mean, that was basically NRCS' job […] to keep FSA [Farm Service Agency, formerly ASCS] apprised, you know, of the technical situation out there on the land. If the landowner got to the point where they could plant a crop, I don't even – I honestly don't know what ASCS, FSA's process was at the end. […] *I don't know if it stayed a CC, if it became a PC. I don't – I honestly don't know*. You seriously would have to go the Farm Service Agency, ASCS, because that - I don't recall that being in our guidance. That was FSA's, ASCS' job" (emphasis added).

(Ex. 13 Barry Isaacs Depo, 1-26-18, at 28-29).

Ultimately relying on land use information verbally provided by former representative Steckler and discussing with him what the NFSAM guidance at that time had prescribed, former USDA representatives Isaacs and Steckler determined that the fields (Fields 14 and 15) in question were converted wetlands (CW). (Ex. 13 Barry Isaacs Depo, 1-26-18, at 32). In addition,

former representative Isaacs testified, that, in the absence of satellite images and computers being then available in Harrisburg, he had worked with Mr. Steckler's and a FWS official's unvalidated verbal conclusion that Defendants' fields had previously been forested wetlands. (Ex. 13 Barry Isaacs Depo, 1-26-18, at 32, 38-39).

There are three problems with this conclusion. First, it hadn't been scientifically validated precisely *when* (during what period of time in history) Defendants' fields had constituted forested wetlands. Second, this thesis doesn't survive the test of time considering three Government satellite images of the Murphy and Marsh Farm tracts taken during 1968 (Ex. 17 October 9, 1968 Murphy Satellite Image Fig. 4, Ecostrategies Rpt.), 1977 (Ex. 18 June 4, 1977 Murphy Sat Image) and 1983 (Ex. 19 May 11, 1983 Murphy Sat Image) that reveal Defendants' fields 14 and 15 as *other than* forested wetlands. Third, the third-party opinion Mr. Isaacs had relied upon in addition to Mr. Steckler's opinion that Defendants' fields had been converted forested wetlands, was that of FWS biologist David Putnam (Ex. 13 Barry Isaacs Depo, 1-26-18, at 44) who, along with his FWS colleagues, had been determined, to disrupt, thwart and nullify Defendants' ASCS commenced conversion determination.

Former representative Steckler also testified that the Erie County ASCS Executive Committee had rendered its commenced determination even though he had not done all the field work and submitted to the Erie County ASCS Executive Committee his completed USDA Form SCS-CPA-026 and accompanying map bearing the CW and PC and HEL designations corresponding to the field numbers until the day after the commenced conversion determination had been made (i.e., September 15, 1988). (Ex. 11 Lew Steckler Depo, 3-18-92, at 29,31); (Ex. 10 Lew Steckler Depo, 11-30-17, at 60, 71). However, Mr. Steckler conceded that he had probably conducted two field visits to Defendant Robert Brace's Waterford Township, PA farm

given the number of fields involved, thereby implying that one of such visits had likely occurred *before* September 14, 1988. (Ex. 10 Lew Steckler Depo, 11-30-17, at 57, 59.) Former representative Steckler also conceded that he had spoken with former Erie County ASCS Executive Director, Joseph Burawa about the Brace case on various occasions before the September 14, 1988:

> "*Joe and I looked at it. We talked about it [before the meeting.] We talked about it. They knew what areas was going to be CW. It wasn't a surprise.* […] Well, I saw him every day over coffee. […] We likely talked about it. We talked about business all the time. Like I said, there was a good working relationship between the two offices" (emphasis added).

(Ex. 10 Lew Steckler Depo, 11-30-17, at 71-73).

In other words, former representative Steckler had admitted that former Executive Director Burawa had secured from him sufficient information regarding the location and nature of the Brace Farm fields then being reviewed for a commenced conversion determination, that upon Mr. Burawa's sharing of such information with the Committee, the Committee was able to competently render its CC determination on September 14, 1988. This fact was substantiated by former representative Steckler's further concession that, although he hadn't been present at the September 14, 1988 meeting, his September 15, 1988 CW determination had supported the Erie County ASCS Executive Committee's commenced conversion determination for Defendants' Field 14 and Field 15. (Ex. 10 Lew Steckler Depo, 11-30-17, at 70 ("Q. Now, did your determination support their determination? A. That's kind of what – when I talked to my specialist in Harrisburg, again, that's kind of what he said. […] Well, they knew which field it was because they had the map."). Given how these facts effectively extinguish the credibility of any claim made by former representative Steckler that the ASCS commenced conversion determination had been flawed, reasonable persons can easily conclude that the DOJ had

intentionally counseled him, beginning in 1992, to raise serious questions about the propriety of the ASCS Committee's prior September 14, 1988 CC determination in favor of Defendants. Former representative Steckler's efforts certainly would appear to be consistent with the subsequent standing objections that DOJ counsel, David Dana had raised during the 1992 Steckler and Putnam depositions regarding the relevance of the FSA to the United States' 1990 CWA action, as discussed below.

b. USFWS & EPA Personnel Commenced Conversion Disruption Efforts

Sometime prior to January 19, 1989, former FWS biologist David Putnam or one of his supervisors (Kulp or Perry) contacted the ASCS Pennsylvania State Executive Director, Don Unangst expressing his objection to the Erie County ASCS Executive Committee's September 14, 1988 Brace-favorable commenced conversion determination, and his interest in attending the next scheduled County Executive Committee meeting to discuss that determination. On January 19, 1989, newly elected County Executive Director Carrol Lesik responded to Mr. Putnam with an invitation to attend the February 8, 1989 Executive Committee meeting. (Ex. 20 Carol Lesik 1-19-89 Ltr. to FWS Putnam).

On February 2, 1989, former FWS representative Putnam dispatched a detailed letter correspondence to former EPA representative James Butch setting forth his "preliminary analysis of records submitted by Mr. Brace regarding agricultural drainage." (Ex. 21 David Putnam 2-2-89 Ltr to EPA Butch, at 1). Mr. Putnam's letter unmistakably reveals an effort to challenge *post-hac* the ASCS Committee's determination that the conversion activities in which Defendants had engaged and the costs they incurred for those activities had qualified for the commenced conversion determination. (Ex. 3 David Putnam Depo 1-26-18, at 124-125).

In an effort to show that these conversion activities were not ongoing and continuous, the February 2, 1989 letter points out that "[n]o receipts were submitted to [the ASCS Committee to] document work contracted in 1983, 1984, or 1985," although "ASCS documents and a bill apparently submitted by Mr. Brace to ASCS and statements made by Mr. Brace refer to ditch work on the property in October 1984." (Ex. 21 David Putnam 2-2-89 Ltr to EPA Butch). In an effort to show that such conversion activities had not been authorized by ASCS programs, the letter points out that the ASCS had made cost-share payments to Defendant Robert Brace or his contractors for drainage tile installation or ditch work during 1977-1979, even though, "[i]t appeared to [him] that underground drainage was not an approved practice under ASCS' Agricultural Conservation Program (ACP) in 1979." (Ex. *Id*., at 1-2). And, in an effort to show that ASCS improperly included a $1,008 1984 cost-share payment to Defendants in its commenced conversion determination, the letter points out how the post-October 4, 1984 "work to open ditches and grade, relevel and seed crop areas following flood damage to Mr. Brace's property" had "most likely" taken place in "the headwaters of Elk Creek" and violated CWA Section 404, because it "would not be eligible for Nationwide Permit #26." (Ex. *Id*., at 2).[1]

On February 7, 1989, one day before the February 8, 1989 ASCS Erie County Executive Committee meeting, former FWS State College, PA Office Assistant Supervisor, Edward Perry dispatched a correspondence to the Committee's Executive Director Carrol Lesik that was most likely authored by former FWS biologist David Putnam. (Ex. 3 Putnam Depo 1-26-18 at 30-31

[1] Former ASCS Erie County Executive Director, Joseph Burawa had later testified before the U.S. Court of Claims during Defendants Takings Action, that his ASCS Office had operated under the presumption/interpretation, from 1977 through 1984, that farmers were exempt from the Clean Water Act. (Ex. 22 Joseph Burawa Depo, 1-11-05, at 76-77). Mr. Burawa also testified in 2005 that the 1984 cost-sharing payment was made in response to Defendants' request to undertake emergency conservation measures to repair a ditch damaged by flooding and debris. (Ex. 22 Joseph Burawa Depo, 1-11-05, at 74). Furthermore, Mr. Burawa testified in 2005 that he appeared to testify at the request of Defendant Robert Brace and not by the United States. He emphasized he did so without compensation because he thought Robert Brace was "doing the right thing. I think he left an area that looked bad and looks a lot better today…" Ex. 22 Joseph Burawa Depo, 1-11-05, at 83).

("I would draft any correspondence that would be associated with [an assigned case…], most any correspondence. They [Mr. Perry and Mr. Kulp…] might write some of their own, but most if it I would draft."). The letter set forth a presumptuous recitation of the applicable section of the ACSC Handbook for State and County Offices entitled, "Highly Erodible Land Conservation and Wetland Conservation Provisions," (Ex. 23 FWS Ed Perry 2-7-89 Ltr to ASCS Lesik, at 1-2) and a detailed refutation of the ASCS Committee's evaluation of qualifying expenditures supporting its positive commenced conversion determination of the Brace Murphy and Marsh Farm tracts. For example, the FWS alleged that Defendants had failed to submit any pre-12-23-85 contracts or plans that would commit funds to post-12-23-85 work, show completion of specific tasks already performed and planned future tasks, or any receipts for pre-12-23-85-purchased materials. In fact, the FWS alleged that only $2,400 of the more than $28,000 of conversion-related expenditures Defendants had incurred and which the ASCS had approved actually qualified for the CC designation. The FWS even challenged the $1,008 of expenditures Defendants had incurred to repair the Murphy Farm tract's main ditch in 1984 as the result of storm damage to maintain its prior conversion, as having no relation to Defendants' conversion activities. (Ex. 23 FWS Ed Perry 2-7-89 Ltr to ASCS Lesik, at 2-3).

Moreover, the FWS alleged that Defendants' had failed to submit conversion-related expense receipts for three consecutive years (1983, 1984 and 1985) which is flagrantly untrue. To the contrary, Defendants' had previously submitted to the ASCS expense receipt records for eight (8) of the eleven (11) successive years spanning from 1977 through 1987, which more than adequately demonstrates that Defendants had "actively pursued" conversion activities on a regular basis since their initiation, consistent with 7 C.F.R. § 12.5(d)(5)(ii). (Ex. 7 52 FR 35194,

35203-35204 (Sept. 17, 1987); (Ex. 24 Brace Conversion Expenditure Records 1977-1987).[2] Defendants did not submit expenditure receipts/reimbursement requests for only three of those years – 1980, 1983 and 1985 – during which it incurred out-of-pocket conversion expenditures for which no ASCS cost-sharing had been sought. Applicable FSA-implementing regulations do not require that *all* expenditures a farmer incurred to engage in conversion activities be submitted to ASCS for reimbursement to secure a commenced conversion determination.

Most offensive of all, was the FWS' grossly inaccurate and manifestly false allegation that

> "most of the wetland areas south of South Hill Road maintained their wetland characteristics after the last channel excavation in 1982 until they were cleared and tiled in 1986, provid[ng] additional support to the argument that work prior to 1983 would not convert the wetlands."

(Ex. 23 FWS Ed Perry 2-7-89 Ltr to ASCS Lesik, at 3). Much to the contrary, Government satellite images of the Murphy Farm tract clearly show a stark difference between June 1977 (Ex. 18 June 4, 1977 Murphy Sat Image) and May 1983 (Ex. 19 May 11, 1983 Murphy Sat Image). The June 4, 1977 satellite image reveals Defendants' April 1977 initiation of conversion work at the northern downstream end of the prior narrow farm drainage ditch lacking both bed and bank which the United States now refers to as "Elk Creek." And, the May 11, 1983 satellite image unmistakably reveals Defendants' continuation of such excavation work south of Lane Road to convert a practically non-existent and barely visible drainage ditch into a sizeable and highly efficient dual-function irrigation-drainage ditch connected to a series of newly excavated dual-function ditches throughout the Murphy Farm tract. The fact that Defendants' 1977-1983 excavation work had not, by 1983, completely converted the Murphy Farm tract so that

[2] Defendants submitted conversion expenditure records for the following eight (8) years: 1977, 1978, 1979, 1981, 1982, 1984, 1986 and 1987.

agricultural commodity production could take place in 1983, 1984 or 1985, does not mean that the ongoing conversion of the Murphy Farm tract did not commence prior to December 23, 1985. It also did not signify that the ongoing conversion of the fields Defendants had worked on or had designated to be worked on as of December 23, 1985 could not be completed after December 23, 1985 12-23-85, consistent with the FSA and federal implementing regulations. The FWS, the self-professed expert on commenced conversions had, once again drawn the incorrect legal conclusion from its flawed understanding of the applicable rules.

Presumably, the February 7, 1989 Perry letter had been dispatched as an exercise of the FWS' consultation status under FSA Section 1223(2), which directs the Agriculture Secretary to consult with the Interior Secretary on the determination of exemptions under FSA Section 1222, an authority which 7 C.F.R. § 12.6(b)(5) had subsequently delegated from the Agriculture Secretary to the ASCS and from the Interior Secretary to FWS. (Ex. 25 P.L. 99–198, 99 Stat. 1504, 1508 Dec. 23, 1985); (Ex. 7 52 FR 35194, 35204 (Sept. 17, 1987)). Nevertheless, even if the FSA implementing regulations (7 C.F.R. § 12.6(b)(3)(viii) and 7 C.F.R. § 12.6(b)(5), respectively,) had charged the ASCS with determining whether Defendants' fields qualified as a pre-12-23-85 commenced conversion, and also had required the ASCS to consult with FWS on that commenced conversion determination, FWS could not have reasonably and legitimately construed its consultative status as requiring the ASCS Erie County Executive Committee to render FWS' preferred determination in this matter if the Committee otherwise had sufficient grounds to reach the determination it had made. Hence, it was ASCS' and not FWS' legal responsibility under the FSA and federal implementing regulations to determine whether the conversion of Defendants' Murphy and Marsh Farm tracts had been commenced before December 23, 1985.

On February 8, 1989, the ASCS Erie County Executive Committee convened its monthly meeting with both former SCS representative Lew Steckler and former FWS representative David Putnam in attendance. (Ex. 26 Erie Cty ASCS Exec. Comm. Mtg Mins. 2-8-89). Much to the chagrin of these former representatives, the Committee once again reviewed the materials Defendants had previously submitted and voted to uphold their prior commenced conversion determination for Defendants' Murphy Farm and Marsh Farm tracts:

> "Swampbuster Commenced – A swampbuster commenced determination made by County Committee on September 14, 1988, was reviewed with Dave Put[nam] from U.S. Fish and Wildlife on FSN 826 Robert Brace. Putnam felt that ditching doesn't constitute commencing converting wetlands and that he was not in complete agreement with COC [County Committee] determination. *It should be noted that County Committee's determination still remained the same as of Sept. 14, 1988, which is that drainage commenced prior to December 23, 1985*" (emphasis added).

(Ex. 26 Erie Cty ASCS Exec. Comm. Mtg Mins. 2-8-89, at 3).

It is more than theoretically possible that these federal agency officials had harbored a certain bias in favor of wetlands restoration that they were not concerned about expressing to members of the public, including Defendants. Former SCS technician Lewis Steckler testified during his March 1992 deposition that he had learned of the Government's lawsuit against Defendants by having spoken to former FWS biologist David Putnam (Ex. 11 Lewis Steckler Depo, 3-18-92, at 13). And, Mr. Putnam confirmed during his recent January 26, 2018 deposition testimony his prior working relationship with former SCS representative Lewis Steckler. (Ex. 3 David Putnam Depo, 1-26-18, at 193-194 (referencing his close work with SCS technician Lewis Steckler on "quite a few projects […] in Erie Country. He helped us a lot with our wetland restoration programs.")).

The affidavit of Beverly Brace indicates that former USDA-SCS technician Lewis Steckler had worn a hat bearing the name and logo of the nonprofit organization Ducks Unlimited, Inc. into his January 2018 deposition, apparently representing his former and/or current affiliation with that group. (Ex. 27 Beverly Brace Affidavit) Similarly, former FWS biologist David Putnam recently testified that he had been a member of the Ducks Unlimited organization for approximately ten (10) years. According to Mr. Putnam, "we had a local chapter of Ducks Unlimited, but […] my job also involved restoring wetlands, and we received funding from Ducks Unlimited for some period of time. Four or five or six years we probably received funding from Ducks Unlimited." (Ex. 3 David Putnam Depo 1-26-18, at 156-157). Mr. Putnam also recalled that he had likely had worn a Ducks Unlimited hat into the office and out in the field, including at Defendants' farm, during his work for the FWS. (Ex. *Id*., at 159, 165-166. In fact, Mr. Putnam testified that FWS employees had been "encouraged to wear [Ducks Unlimited hats into work] because they were funding a lot of our habitat restoration activities. […] The Fish and Wildlife Service gave them millions, and then they in other programs gave us back." (Ex. *Id*., at 164. "Depending on the source of the funding, whether it was government funds or settlements from environmental funds, but definitely the government supported Ducks Unlimited doing conservation work on the ground." (Ex. *Id*., at 188-190). "The interested public, people who cared about wetlands or cared about wildlife habitat, they would have a pretty good sense of that." (Ex. *Id*., at 192). He also testified that FWS had undertaken extensive outreach efforts to the agricultural community including via the distribution of fliers in state USDA offices. (Ex. *Id*., at 192-193).

Mr. Putnam also testified that he had overseen the FWS "Partners for Fish and Wildlife Program" in Pennsylvania for which he authored a portion of at least one article discussing the

restoration of wetlands subject to agricultural use and drainage. (Ex. *Id*., 169-171); (Ex. 28 FWS Partners for Fish & Wildlife Program Write-up 2001). According to Mr. Putnam, "the essence of the Partners Program was to restore wetlands' undoing – a lot of it was a government program undoing what prior government programs had done. That was the bulk of it." (Ex. 3 David Putnam Depo, 1-26-18, at 178). Lastly, Mr. Putnam testified that, although Ducks Unlimited is "portrayed as a duck hunter group [,…] they have more non-hunters than they do hunters." (*Id*., at 184-185). The problem with this program that Mr. Putnam failed to acknowledge in his testimony, is that its direct and indirect (intentional) effect was also to disrupt and undo farming business planning opportunities and reasonable investment-backed expectations in abject disregard for the interests of Pennsylvania farmers and their families.

2. *DOJ-ENRD Officials' Extraordinary Efforts to Frame the Issues, Disrupt, Thwart and Nullify USDA-ASCS' Murphy Farm Commenced Conversion Determination and Subject Defendants to CWA Section 404 Corps Permitting*

The United States Department of Justice Environment and Natural Resources Division ("DOJ-ENRD"), through counsel, David A. Dana, made clear for the first time, during the March 17, 1992 pre-trial deposition of local Erie County farmer Adrian Sharp, that the generations-old practice of farming had been redefined in statute and regulations by Congress and the federal agencies for legal purposes in Clean Water Act Section 404. Mr. Sharp, now deceased, had been a local resident and farmer who had resided a short distance from Defendants' 157-acre three-farm-tract hydrologically integrated Waterford Township, Pennsylvania farm since 1906. He had been willing to testify on Defendants' behalf about his familiarity with the farming practices in the general area (Ex. 29 Adrian Sharp Depo, 3-17-92, at 3). The following exchange between DOJ-ERND Counsel Dana, the witness and Defendants' Counsel Ward lays bare what the Government had in mind:

> "Q. Now, obviously you are familiar with the area. And would you – Your testimony is you are familiar with the farming practices in the general area? A. Oh, sure. Q. And that would include crop farming and pasture farming? A. Sure. *Mr. Dana: There's an objection as to – You can obviously use the word 'farming' as the witness understands it. But we may adopt a different definition of farming*. For just general purposes, You might just want to – I just want it noted for the record. Mr. Ward: What other word would you use*? Mr. Dana: Just to differentiate crop farming from pasture or cattle farming*. Mr. Ward: So down the road your argument is going to be that cattle – raising beef or livestock is not agricultural? Mr. Dana: No, no. I'm not saying what our argument is. I just want it to be clear as to what the witness is saying when uses the word 'farming'" (emphasis added).

(Ex. 29 Adrian Sharp Depo, 3-17-92, at 6-7). The relevance of DOJ-ENRD Counsel Dana's comments became clearer to Defendants later in the deposition when Mr. Sharp discussed how the flooding caused by recurring beaver dams pre-1977 in and around Defendants' farm had dictated how Defendant Robert Brace's father, Charles Brace, had used portions of the farm, at certain times, for mostly pasture farming, and at other times for crop farming.

> "Q. […] Now, generally what does that area – What has it looked like over the years? Do you recall? A. For many years it was all farm land. Then the beavers got in there and kind of dammed up the water and made this so as they couldn't farm it so good. They could pasture it. But their water backed up there from the beaver dam. Q. And, in 1977, do you recall how that piece of property was being used? At that time, I believe Mr. Brace's father owned the farm. A. Yes. Q. Up until '77. A. Mostly pasture land. […] Because these beavers, see, they would back that water up here and ruin it for plow land [...] Q. What other kind of activity did he do? A. Cabbage and potatoes. Q. Any other crops? A. Hay. Corn, I suppose. I know he used to raise potatoes and cabbage there a lot."

(Ex. 29 Adrian Sharp Depo, 3-17-92, at 11-18; *see also* 11-16). Clearly, Government Counsel Dana had alluded to the *legal fiction* CWA Section 404(f)(1)(A) created to define "normal farming activities" as an exemption from Corps 404 permitting.

A day later, during the pre-trial deposition of USDA-SCS technician Lewis Steckler, DOJ-ENRD counsel, David A. Dana, set forth what became the Government's standing objection to any discussion of the application of the Food Security Act of 1985 to this case:

> "As I informed Mr. Ward [Defendants' prior counsel], the United States' position is that Swampbuster law, *Commenced Conversion*, the Food Security Act, and any prior converted/nonconverted designation in the case, have no relevance in the case to a question of whether there were discharges that were illegal and therefore shouldn't be considered. *That relevance objection is a continuing one to any questions regarding these matters, broadly construed* (emphasis added)."

(Ex. 11 Lewis Steckler Depo. 3-18-92, at 17).

Less than a month later, the DOJ-ENRD, through counsel, David A. Dana, reiterated the Government's prior standing objection to any discussion of the application of the Food Security Act to this case during the April 1992 pre-trial deposition of former FWS biologist, David Putnam:

> "Just for the record, not to be repetitive, the United States has *a standing objection on relevance grounds* to questions regarding the *commenced determination* of the swamp buster provision since *its' [an] entirely separate program unrelated in this case as to whether a violation occurred of the Clean Water Act*" (emphasis added).

(Ex. 2 David Putnam Depo 4-7-92, at 45). The transcripts from these three 1992 depositions lay bare the Government's prior framing of the original action in this case solely around Clean Water Act Section 404, much like an Alice-in-Wonderland fantasy devoid of context and divorced from the realities of the world in which these farmers, and farmers throughout the nation all lived.

III. The United States' Extraordinary Efforts to Disrupt USDA-ASCS Prior Commenced Conversion Determinations in the Midwest

As the following discussion reveals, the FWS, a federal agency of the U.S. Department of the Interior, had already been challenging ASCS County Executive Committee commenced

conversion decisions in other parts of the nation, but especially in the Midwest and Great Plains, by the time it had set its sights on Pennsylvania.

1. *FWS National Office and Regions 3 & 6 Officials' Efforts to Disrupt Midwest and Great Plains ASCS County Executive Committee Prior Commenced Conversion Determinations*

Historical evidence clearly shows how the FWS also had interfered with local USDA-ASCS County Executive Committee prior commenced conversion determinations in Minnesota, North Dakota and South Dakota during approximately the same period (i.e., during the mid-to-late 1980's). This evidence is contained in prior witness statements and exhibits submitted to the U.S. House of Representatives Committee on Agriculture during the hearing Committee Chairman E. (Kika) De La Garza had convened in Moorhead, Minnesota on June 24, 1988. (Ex. 30 U.S. Cong. Ag Comm. Hrg. Rpt Intro. 6-24-88). Similarly, these documents reveal how closely FWS National and Region 3 senior officials (Ex. 31 FWS Regional Map) worked with prominent nongovernmental environmental and wildlife organizations, including National Wildlife Federation and Environmental Defense Fund, and special interest groups such as Ducks Unlimited, to ensure the reversal of USDA-ASCS commenced conversion determinations, and how these overzealous groups played a major role at such hearings.

a. <u>FWS National Office and Region 3 Officials' Extraordinary Efforts</u>

On January 14, 1988, former director of FWS Region 3 (Midwest), James C. Gritman (Ex. 32 Gritman 12-87 FWS News Rel.) dispatched a letter correspondence to the nonprofit Wildlife Management Institute ("WMI") in apparent response to a December 18, 1987 letter correspondence drafted by Keith Harmon, WMI's Western Field Representative (Ex. 33 Keith Harmon 1971-signed Ltr). WMI was a virtual hunting group-in-disguise. The 1-14-88 FWS letter expressed alarm about FWS field operative observations that the USDA agencies had not been implementing the Swampbuster provisions "fully consistent with the purposes, intent, and

letter of the Food Security Act or the step-down regulations." It also expressed dismay that FWS' "role with U.S. Department of Agriculture agencies ha[d] been continual hair-splitting that accommodate[d] more drainage." (Ex. 34 FWS Region 3 1-14-88 Ltr). The 1-14-88 letter also indicated that Mr. Gritman had apparently shared with WMI a non-publicly disclosed FWS Region 3 memorandum that he had previously dispatched to the FWS National Director to "see this issue elevated to the investigation level so that corrective measures are implemented through the appropriate oversight channels." (Ex. *Id*.). Among the names copied on this letter were Jan Goldman-Carter, a former and current Counsel of the National Wildlife Federation ("NWF") (Ex. 35 Jan Goldman-Carter Mgr. NWF Clean Water Act Restoration Program); (Ex. 36 Jan Goldman-Carter NWF Testimony (4-13-16)) and 1993 recipient of the National Wetlands Award (Ex. 37 Jan Goldman-Carter Nat'l Wetland Award), and former NWF Prairie Wetland Resource Center Director, Wayne 'Skip' Baron. (Ex. 38 Skip Baron Spkr ND Wildlife Society Mtg 2-6-91).

On February 23, 1988, FWS National Director Frank H. Dunkle (Ex. 39 FWS Frank Dunkle 3-25-86 News Rel.) issued a memorandum to the Regional Directors of FWS Regions 1-7 entitled, "Fish and Wildlife Service Responsibility in Swampbuster Implementation" (Ex. 40 FWS Nat'l Office Dunkle Memo 2-23-88), in apparent response to the undisclosed January 1988 memorandum that FWS Region 3 Director Gritman had previously shared with the WMI. The 2-23-88 memorandum raised to the national level "[s]erious questions regarding the effectiveness of Swampbuster implementation efforts," and instructed all FWS Regional Directors to "offer the greatest possible technical support to agencies of the Department of Agriculture as they proceed[ed] with field implementation" of the FSA's Swampbuster provisions. In addition, the 2-23-88 memorandum also recommended that each

FWS Region use the form then being "utilized by Region 3 to report observed wetland modifications." (Ex. *Id.*)

On March 8, 1988, former Acting FWS Region 3 Director (Assistant Regional Director) John Popowski (Ex. 41 FWS Reg. 3 Popowski - FWS Endangered Species Tech. Bull. (Jan. 1988)) issued a memorandum bearing the same title to the former Directors of the FWS Region 3 Branch of Special Projects (BSP) and Division of Endangered Species and Habitat Conservation (EHC), in apparent response to the Dunkle memorandum. The Popowski memorandum noted with alarm how "Swampbuster, however conceived and legislated in Washington, has had minimal success in Region 3 in preserving wetlands on private lands involved in Department of Agriculture commodity programs." It also emphasized how the USDA SCS and ASCS: 1) "ha[d] transformed wetlands into non-wetlands through lax interpretation of the regulations" and frequently failed to consult with FWS except where USDA standards were unable resolve an issue; 2) differed with FWS over what constituted a Swampbuster "violation;" and 3) decried the loss of Type 1 wetland potholes "needed for duck pairing activity in the early spring." The memo recommended the protection of "the prairie pothole, playa, and seasonally flooded and ponded wetland values that existed as of December 23, 1985." (Ex. 42 FWS Rgn 3 John Popowski Memo 3-8-88).

b. FWS Region 6 Officials' Extraordinary Efforts

On March 9, 1988, Lloyd Jones (Ex. 43 FWS Rgn 6 Lloyd Jones DOI Press Rel. 8-24-88), the former Supervisor of the FWS Region 6 (Great Plains) Bismarck, North Dakota Wetland Habitat Office issued a memorandum to the FWS Region 6 Farm Bill Coordinator, containing responsive comments to the 2-23-88 Dunkle memorandum. These comments had been apparently intended to be included in FWS' forthcoming 1990 Farm Bill proposals. The

1990 Farm Bill, when enacted, made "the act of drainage a violation." (Ex. 44 Turrini L. Rev. Swampbuster – A Rpt from the Front, at 1511).

The Jones memorandum (Ex. 45 FWS Rgn 6 Lloyd Jones Memo 3-9-88) emphasized how ASCS county offices in North Dakota had negatively reacted to the FWS' 1986 and 1987 reporting of hundreds of "potential violations" of the FSA's Swampbuster provisions. "ASCS response has been that it is not the responsibility of the Service [FWS] to report potentials, they do not want the information and they have reacted by going to the press accusing the Service of being 'Spies in the Sky.'" (Ex. *Id*.) The Jones memorandum also referenced then ongoing efforts of FWS to reach memorandums of understanding with the USDA-SCS to define the processes for making wetland determinations and minimal effect determinations under the FSA.

c. Federal Interagency Extraordinary Efforts to Retroactively Disrupt

Although it remains unknown whether these specific efforts succeeded, it can be confirmed that the FWS' mother agency, the U.S. Department of Interior ("DOI"), subsequently executed a broader memorandum of agreement ("MOA") with USDA, EPA and the Corps on January 6, 1994 (Ex. 46 USDA-EPA-Corps Wetlands MOA 1-6-94), during the United States' appeal of this Court's 1993 ruling in favor of Defendants. The 1994 interagency MOA covered the USDA's implementation of the FSA Swampbuster provisions for purposes of both FSA Section 1222 and CWA Section 404 compliance. In particular, the MOA's Section IV.A stated that, "wetland delineations made by [USDA-]SCS on agricultural lands, in consultation with FWS, will be accepted by EPA and the Corps for the purposes of determining Section 404 wetland jurisdiction" (emphasis added). Section V.C of the MOA identified how USDA-SCS would "certify SCS *wetland delineations made prior to November 28, 1990*, […] to ensure the

accuracy of" those prior determinations. This MOA Section effectively enabled FWS and the other federal agencies to *retroactively* reconsider and revise prior USDA-SCS-directed wetlands decisions that had informed prior positive USDA-ASCS commenced conversion determinations without affording the regulated farming community the due process of law to which they were constitutionally entitled under the Administrative Procedure Act.

1. *FWS' and Enlisted Third Party Groups' Efforts to Disrupt Midwest and Great Plains ASCS County Executive Committee Commenced Conversion Determinations*

a. Federal Interagency-Ducks Unlimited MOUs Facilitating Enforcement-Related Disruption

Prior to the execution of the federal interagency MOA discussed above, the FWS had apparently already executed a March 14, 1984 Memorandum of Understanding ("MOU") with Bureau of Land Management ("BLM") (FWS' sister DOI agency), USDA Forest Services ("USDA-FS") and the nonprofit Ducks Unlimited, Inc. ("DU"), which is referred to in updated MOU's as "84-SMU-004." The United States failed to produce this document during the discovery period.

This 1984 MOU had apparently been so important that the DOI announced its execution in a special agency press release dated, March 14, 1984. (Ex. 47 DOI Press Rel. – FWS-BLM-USDA-FS-DU MOU 3-14-84). According to the press release, DU would "fund projects to restore wetlands and increase waterfowl production on lands owned or leased by" the DOI's FWS and BLM, and by USDA's FS (i.e., public lands). The MOU had been billed as "the most ambitious cooperative public and private effort to improve and develop wildlife habitat in U.S. conservation history." (Ex. *Id.*). "The activities [would] involve cooperation with State agencies as well as the Federal Government and [would] be carried out principally in Alaska, Montana, the Dakotas, and Minnesota, which together produce the vast majority of ducks and geese hatched in the United States." (Ex. *Id.*). "Ducks Unlimited [would] review proposals from

Federal and State agencies for high priority habitat improvement projects that the agencies themselves cannot presently fund." (Ex. *Id*.). The problem with this archetype, however, was that it provided the FWS and USDA-FS with the ability to *unofficially* engage in indirect regulatory creep through designation of adjacent private lands as "wetlands" under the Clean Water Act if they had been identified by National Wetland Inventory mapping or an USDA-SCS wetland evaluation as falling within the same watershed as the public lands under their management. (Ex. 48 FWS David Putnam Ltr. to Pabody Corps 6-16-87); (Ex. 49 Edwards Expert Rpt. 12-18-17); (Ex. 50 Brooks Expert Rpt. 12-18-17).

The relevant sections of two successor USDA-FS-DU MOUs describing the 1984 MOU, moreover, reveal that DU had helped to expand the 1984 MOU's original *public* lands scope of coverage to also include *private* lands. For example, Section III.D of "99-SMU-028," executed on December 14, 1998 (Ex. 51 USDA-FS-DU MOU, 12-14-98) and Sections A, B.5, C.1, C.3, C.4, D.1, and D.2 of "09-SU-11132422-326," executed on October 9, 2009 (Ex. 52 09-SU-11132422-326 MOU, 10-9-09) *officially* expand the agencies' and DU's scope of regulatory authority over "riparian areas and associated uplands on private lands" if they had been situated within DU and federal agency-identified wetland ecosystems and watershed areas. The purpose of the program was to protect North American migratory bird wetlands habitats for hunters and birdwatchers, consistent with DU's "landscape approach to habitat conservation" which embraced the North American Waterfowl Management Plan to which the FWS had been and remains a signatory party. (Ex. 53 NA Waterfowl Mgmt Plan (May 1986); (Ex. 54 DU Landscape Approach to Habitat Conserv.). The DU website, furthermore, reveals that DU has long helped to shape successive Farm Bills in 2007 (Ex. 55 DU Flyer re 2007 Farm Bill Lobbying), 2012 (Ex. 56 DU Blog re 2012 Farm Bill Lobbying), 2014 (Ex. 27 DU Blog re 2014

Farm Bill Lobbying) and 2018 (Ex. 58 DU Blog re 2018 Farm Bill Lobbying) to ensure against further conversion of wetlands to croplands for its members' benefit.

As discussed above, several United States deponents in this action have testified they had previously held DU memberships during the 1980's when Defendants had been subject to federal agency enforcement proceedings (and may still hold them today). And, as discussed above, although Ducks Unlimited has long publicly portrayed itself as a wildlife habit conservation organization the mission of which is to "conserve[], restore[], and manage[] wetlands and associated habitats for North America's waterfowl," many of its members have long been avid hunters and sportsmen who have benefited from the organization's public perception.

b. Environmental and Wildlife Group Policy-Related Disruption Efforts

The National Wildlife Federation ("NWF") served as an important witness during the House Agriculture Committee's June 24, 1988 field hearings. Its fifty (50)-page prepared testimony sheds light on the extent of the FWS' extensive interference with local USDA-ASCS commenced conversion determinations in the Midwest and Great Plains Regions, particularly, those granted to private landowners situated within public drainage districts containing temporary wetlands. (Ex. 59 NWF Prepared Stmnt HR Ag Comm Hrg 6-24-88). Said testimony had been submitted also on behalf of the Minnesota Conservation Federation (its affiliate), the Natural Resources Defense Council ("NRDC"), and the Environmental Defense Fund ("EDF") among other groups. (Ex. *Id.*) The NWF testimony alleged that general improprieties and abuses had been committed by USDA Soil Conservation Service ("USDA-SCS") and ASCS officials in Minnesota, North Dakota and South Dakota in implementing the FSA's Swampbuster rules. It also alleged, more specifically, how such USDA officials in Minnesota and North Dakota had

rendered unsupported commenced conversion (CC) determinations in favor of farmers, at the expense of both wetlands and wildlife. (Ex. *Id*., 8-14).

The NWF testimony, in part, emphasized how approximately "87% of the ducks bred in the lower 48 states breed in the Dakotas, Minnesota and Montana." (Ex. *Id*., at p. 18). The NWF testimony, furthermore, implored Congress to tighten up the FSA's Swampbuster provisions to create a chilling effect against additional conversions of wetlands to farmlands in "the palustrine wetlands of South Florida, the Nebraska Sandhills and Rainwater Basin, the pocosins of the North Carolina coastal plain, […] western riparian wetlands, […and] the prairie potholes and the Lower Mississippi River bottomlands." (Ex. *Id*., at 42-44). Evidence unearthed several years later (in 1992) by the Pennsylvania Landowners Association revealed how well funded the NWF, NRDC and EDF had been to implement their apparently national commenced conversion disruption agenda. (Ex. 60 PLA Newsletter – It Never Ends 5-5-92).

The Minnesota and North Dakota chapter offices and the national office of the Wildlife Society, "an international association of [current and former] professional wildlife managers working in the public [governmental] and private sectors," also submitted prepared testimony at the June 1988 hearing. (Ex. 61 MN Chap. Wildlife Soc. Stmt. 6-21-88); (Ex. 62 ND Chap. Wildlife Soc. Stmt. 6-14-88). The Wildlife Society's national office emphasized how "the commenced conversion determination regulations [had been] interpreted inappropriately" by the USDA-ASCS which had allegedly failed to "require appropriate and adequate evidence necessary to enforce [and strictly interpret] conversion determination regulations." (Ex. 63 Nat'l Office Wildlife Soc. Stmt. (7-8-88, at 3).

The National Audubon Society, as well, submitted the prepared statement of one of its members (Daniel Svedarsky, a teacher) to the House Agriculture Committee for use at the June

1988 hearing. (Ex. 64 Natl Audubon Soc. Svedarsky Stmt. (June 1988). Mr. Svedarsky's statement expressed support for retaining the FSA's Swampbuster provisions to ensure that "further conversion of wetlands […] to croplands would be greatly reduced." More extensive narrative reports issued in 1988 and 1989 by the Garrison Wetland Management District of the Audubon Society's North Dakota chapter documented shortcomings of the ASCS's Swampbuster compliance monitoring process, including commenced conversion determinations, that echoed those described by the NWF. (Ex. 65 Audubon Soc. ND Garrison Wetland Mgt Dist Rpt (1988)), at 1-5, 16-18; (Ex. 66 Audubon Soc. ND Garrison Wetland Mgt. Dist. Rpt. (1989), at 1-5, 16 -19).

As the testimonies of these environmental and wildlife groups disclosed, they had worked closely with the FWS and other federal agencies since, at least, 1985, influencing the shape and tenor of subsequent revisions of the FSA and USDA implementing regulations against farmer interests. Indeed, farmer groups, such as the Minnesota, North Dakota and South Dakota Farmers Unions and the Minnesota Association of Wheat Growers submitted their own statements at these June 1988 hearings corroborating the influence that the influential environmental group-federal agency partnership had wielded. These farmer groups testified how said partnership managed to largely shape both the interim (June 1986, July 1986) and final (September 1987) regulations the USDA adopted for the purpose of implementing the FSA's Swampbuster provisions, including those governing commenced conversion determinations, in ways that harmed farmers' constitutionally protected private property rights. (Ex. 67 NDFU, MFU & DFU Stmt. (June 1988)); (Ex. 68 MN Assoc. of Wheat Growers Stmt. (June 1988)).

The testimonies and prepared statements provided by these environmental and wildlife groups during the June 1988 House Agriculture Committee field hearings created such an

impression with former Committee Chairman E. (Kika) De La Garzak, that he requested the U.S. General Accounting Office (now the U.S. Government Accountability Office) ("GAO") to investigate USDA-ASCS County Executive Committees' questioned practices. The GAO agreed to this request and ultimately issued its report and findings in September 1990, within one month of the United States' filing of the original complaint in this action. (Ex. 69 GAO Rpt. RCED-90-206 (Sept. 1990)).

Chapter 4 of the GAO report repeated many of the claims the FWS, National Wildlife Federation and Wildlife Society previously advanced concerning group drainage district projects in North Dakota:

> "Implementing the act's swampbuster exemption provision has, in some instances, been a source of controversy because the criteria used to make decisions for group projects have frequently changed […] as ASCS developed the final program rules and regulations […] ASCS has amended or modified the exemption criteria for commenced conversion decisions several times since the publication of the interim rules in June 1986. […] *These changes occurred for a variety of reasons, such as litigation by environmental groups and requests from special interests*. Table 4.1 highlights the changes in USDA's criteria between June 1986 and December 1989. […] Further, application of the criteria has not always been consistent; the documentation provided does not, in many instances, support the exemption decisions; and consultation with the Fish and Wildlife Service was not always carried out as required by law" (emphasis added).

(Ex. 69 GAO Rpt. RCED-90-206 (Sept. 1990), 27-29, 32-33). The GAO report concluded that "the changing criteria and sometimes *contradictory nature of commenced conversion decisions*" (emphasis added) led to county committee and other ASCS official decisions resulting in the draining of wetlands, especially where group projects were involved. It noted that, as the result of these phenomena, the National Wildlife Federation had repeatedly intervened and requested the ASCS to modify its commenced conversion decisions during 1987-1989. (Ex. *Id*., at 31).

Although the GAO report appears to have addressed mostly alleged drainage district group project irregularities leading to insufficient or nonenforcement of frequently changing commenced conversion documentary criteria, its scope arguably had been intended to be much broader. (Ex. *Id*., at 31-32). For example, it cited how USDA-ASCS' then latest national statistics had allegedly shown that "producers requested 5,259 exemptions for commenced conversions," of which "45 percent were approved, 13 percent were denied, and the remaining 42 percent were pending" as of April 1989, when national reporting was suspended due to inaccurate data. (Ex. *Id*., at 28). In addition, the GAO recommended that the Agriculture Secretary "(1) monitor the application of the wetlands commenced conversion criteria so the decisions made are consistent and (2) enforce the requirements of the Fish and Wildlife Service consultations on commenced conversion decisions in order to utilize its expertise in the area." (Ex. *Id*., at 34).

c. Environmental and Wildlife Group Litigation-Related Disruption Efforts

During September 1988, at approximately the same time the USDA-ASCS Erie County Executive Committee had granted Mr. Brace's two fields a commenced conversion determination covering no more than 43.4 acres in total, the Bottineau County, North Dakota ASCS Committee granted the Bottineau County Water Resource District a commenced conversion determination covering 139 square miles. Unable to persuade the national ASCS Deputy Administrator to reverse that decision, the National Wildlife Federation (NWF) brought suit in 1989 in the U.S. District Court for the District of North Dakota. *See National Wildlife Federation v. ASCS*, 901 F.2d 673, 20 Envtl. L. Rep. 20,801 (8th Cir. 1990), slip op. at 2. The District Court dismissed the NWF's complaint on the ground that "appellants' injuries were insufficient to give them standing under *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31

L.Ed.2d 636 (1972)." *See National Wildlife Federation v. ASCS*, No. A4-89-067, slip op. at 4 (N.D. Aug. 2, 1989).

The Eight Circuit Court of Appeals reversed the District Court's ruling holding that the NWF had established Article III standing to present its members' claims before the federal courts. *See National Wildlife Federation v. ASCS*, 901 F.2d 673, 20 Envtl. L. Rep. 20,801 (8th Cir. 1990), slip op. at 4, 6. The Circuit Court reached this conclusion based, in part, on congressional findings regarding the value of wetlands which had been included in an FSA-related bill originating in 1985 in the House Merchant Marine and Fisheries Committee that was ultimately enacted into law as the "Emergency Wetlands Resources Act of 1986." *See National Wildlife Federation v. ASCS*, 901 F.2d 673, slip op. at 4-5, citing 16 U.S.C. Sec. 3901 (1988); (Ex. 70 P.L. 99-645, "Emergency Wetlands Resources Act of 1986" (100 Stat. 3582) (Nov. 10, 1986)), at Sec. 2(a)(1),(2), (4), (5) and (6) (16 U.S.C. Sec. 3901). The NWF had referenced this same 1985 committee bill language, as explained in a related House Committee report, in its submitted prepared testimony during the June 1988 House Ag Committee hearing. *See National Wildlife Federation v. ASCS*, 901 F.2d 673, slip op. at 4-5, citing H.R. Rep. No. 271 Part 2, 99th Cong., 1st Sess. 86-87. (Ex. 59 NWF Prepared Stmnt HR Ag Comm Hrg 6-24-88, at 27-28).

At least one influential but biased law review article authored by the former Counsel to the NWF's Prairie Wetlands Resource Center discussed the *NWF v ASCS* litigation in glowing terms. (Ex. 44 Turrini L. Rev. Swampbuster – A Rpt from the Front, at 1515-1516) It highlighted how the Eight Circuit Court of Appeals had found that "the link between the wrongful issuance of a commenced determination and injury resulting from wetland drainage [was] not too speculative to support standing." (Ex. *Id*., at 1516). It also concluded that, by "allowing nonfarmers to sue the ASCS," the Court's ruling effectively compelled farmers "who

intend[ed, thereafter,] to convert wetlands to consider the cost of litigation and possibility of having invalid exemptions reversed by a federal court." (Ex. *Id*.).

The article's author, moreover, recycled the FWS and NWF argument that had attributed nonenforcement of the FSA's Swampbuster provisions to the "organizational structure of the ASCS," which he condescendingly referred to as having been comprised of "locally elected county committees [that] misconstrue[d], misappl[ied], or ignore[d] swampbuster in order to excuse farmers for wetland drainage." (Ex. *Id*., at 1513). The article also disparaged the ASCS as "institutionally biased," ASCS personnel as "lack[ing] technical expertise [and formal training] in wetland issues," and part-time ASCS committee members as "sometimes personally biased" and "hav[ing] little professional or financial incentive to enforce laws or regulations with which they disagree[d]. (Ex. *Id*., at 1513-1514). Finally, the author discussed the NWF's extensive role in drawing attention to and ensuring the stricter implementation and enforcement of the FSA's Swampbuster provisions (Ex. *Id*., at 1509-1512), and in triggering the 1990 GAO report which focused, in part on improper commenced conversion determinations. (Ex. *Id*., at 1515). Given the timing and sequence of this NWF litigation relative to the FWS administrative challenges to USDA-ASCS commenced conversion determinations, both in the case at bar, and in the Midwest and Great Plains, this Court should not overlook the likelihood these events had been thoughtfully choreographed.

IV. FSA Legislative History and Increasingly Consistent USDA, EPA & Corps CWA Regulations Show that Defendants Should Have Been Able to Continue and Complete the USDA-ASCS-Determined Prior Commenced Conversion of the Murphy Farm Tract Without a CWA Section 404 Permit

1. *The FSA's Legislative History Shows that Congress Originally Focused on the Prior Commenced Conversion Exemption to Converted Wetlands USDA Funding Ineligibility*

a. General Framework

The Food Security Act of 1985 "was the first [federal] statute to define [codify] 'wetland' using explicit terms and requirements. (Ex. 71 McBeth Harv. Env.'l L.Rev. at 226, 232). By comparison, the Clean Water amendments of 1977 used the term 'wetland' only "in addressing the potential delegation to the states of administration of the section 404 program. 'The result of this legislative process was to leave the section 404 program substantially intact and to give the administering agencies little new guidance for the definition or delineation of wetlands.'" (Ex. 71 McBeth Harv. Env.'l L.Rev. at 226).

The FSA also was the first federal state to "require[] agricultural producers to protect wetlands on the farms they own or operate in order to be eligible for USDA farm program benefits." (Ex. 71 McBeth Harv. Env.'l L.Rev. at 231). The FSA conditioned eligibility for USDA farm benefits, *first*, on producers not "converting" a wetland, and *second*, on producers securing an exemption for the conversion activity that qualified it as either commenced or completed prior to December 23, 1985. (Ex. 71 McBeth Harv. Env.'l L.Rev. at 232-233). From the enactment date of the FSA (December 23, 1985), Section 1221(1) (16 U.S.C. 3821(1)) "was used to determine when a wetland was *actually* 'converted'" (emphasis added). (Ex. *Id*., at 233, fn. 208). *See* P.L. 99-198, 99 Stat 1354, 1507 (1985), at 16 U.S.C. 3821(1). An actual conversion of a wetland, in other words, had been found to occur (i.e., "triggered") if an agricultural commodity was produced on a converted wetland. And, from the enactment date of the Food, Agriculture, Conservation, and Trade Act of 1990 ("FACTA") which amended the FSA (November 28, 1990), new Section 16 U.S.C. 3821(b)(1) "[was] used to determine when a wetland [was] deemed 'converted.'" (Ex. *Id*., at 233, fn. 209). See P.L. 101-624, 104 Stat. 3359, 3572 (Nov. 28, 1990). A deemed conversion of a wetland had been found to occur (i.e., "triggered") if the conversion was undertaken "for the purpose, or to have the effect, of making

the production of an agricultural commodity possible on such converted wetland;" i.e., "when an agricultural commodity could be produced on it, even if the commodity has not yet been produced." (Ex. *Id*., at 231, fn 202).

b. Congressional Intent and USDA Constantly Changing Implementation

i. Confusion Over 'Converted Wetland'

FSA Section 1201(a)(4)(A) defines the term "converted wetland" ("CW") for purposes of evaluating possible producer ineligibility for USDA financial support programs as follows:

> "The term 'converted wetland' means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if – (i) such production would not have been possible but for such action; and (ii) before such action (I) such land was wetland; and (II) such land was neither highly erodible nor highly erodible cropland."

The legislative history surrounding the definition of the term "converted wetland" ("CW") supports this reading. The Conference Committee Report accompanying the FSA (H.R. 2100) indicates that Committee had adopted the House definition of "converted wetland" set forth in FSA Section 1201(a)(4)(A) and codified in 16 U.S.C. § 3801(a)(4)(A):

> "The *House* bill defines the term 'converted wetland' to mean wetland that has been converted by certain activity making the production of agricultural commodities possible that would not have been possible but for such activity and that, before such activity was taken, was wetland and not highly erodible land nor highly erodible cropland with several exemptions listed. (Sec. 1201(4).) The *Senate* amendment is comparable with respect to 'converted wetland' except that it does not apply to highly erodible cropland (Sec. 1601(a)(4)(A), and though the exemptions are similar they are stated differently. The *Conference* substitute adopts the *House* provision" (italicized emphasis in original; underlined emphasis added).

(Ex. 72 H.R. Conf. Rept. 99-447, Food Security Act of 1985, accompanying H.R. 2100, 99th Cong., 1st Sess. (Dec. 17, 1985) at 454-455). The preamble to interim USDA FSA-implementing regulations issued during June 1986 (and interim 7 C.F.R. § 12.2(a)(6)) adopt the same definition of "converted wetland" ("CW") as Congress included in the statute:

> " Section 1201(a)(4) of the Act defines converted wetland as wetland that has been drained, dredged, filled, leveled or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if such production would not have been possible for such action, and before such action, such land was wetland and such land was neither highly erodible land nor highly erodible cropland. Section 12.32(a) of the interim rule provides that a wetland shall be determined to have been drained, dredged, filled, level, or otherwise manipulated for the purpose of making the production of an agricultural commodity possible if: (1) one or more of the hydric soils criteria of such wetland has been removed or (2) the hydrophytic vegetation on such wetland has been removed or destroyed. […] SCS will determine the prevalence of hydrophytic vegetation as it existed prior to the alteration based upon the occurrence of such vegetation typically found on the same soil map unit in the local area."

(Ex. 73 51 Fed. Reg. 23496, 23499 (June 27, 1986). *See also* interim 7 C.F.R. § 12.2(a)(6); 7 C.F.R. § 12.32(a)). No doubt contributing to the farming community's confusion, 7 C.F.R. § 12.2(a)(6) of the final USDA FSA-implementing regulations issued during September 1987 revised the definition of "converted wetland" arguably beyond the text of the FSA and the interim regulations mirroring that statute. As discussed above in Section III.2.b, farmers from the Midwest and Great Plains states had testified in June 1988 about how the FWS and environmental and wildlife groups had largely shaped these regulations. The final regulations stated that a wetland shall be considered a "converted wetland" when it:

> "has been drained, dredged, filled, leveled or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity *without*

> *further application of the manipulations described herein* if (i) such production would not have been possible but for such action; and (ii) before such action such land was wetland and was neither highly erodible land nor highly erodible cropland" (emphasis added).

(Ex. 7 52 F.R. 35194, 35197 (Sept. 17, 1987).

It also required to SCS to make this determination. *See* 7 C.F.R. § 12.6(c)(2)(i) (SCS shall make the following determinations which are required to be made in accordance with this part: (i) Whether land is […] a wetland or a converted wetland...''). As discussed, below, the final regulation's revision of the term "converted wetland" is best understood as relating to the final regulation's addition of the new term "prior converted cropland" which is not contained in the text of the FSA.

ii. Pre-12-23-85 'Completed Conversion' – New Term Not in FSA

The final regulations' revision of the term "converted wetland" had been intended to correspond with said regulation's simultaneous addition of the new concept of "completed conversion" or a conversion completed before December 23, 1985:

> "With regard to wetlands converted prior to the effective date of the Act, § 12.5(d)(2) was added to the final rule to make clear that determinations regarding whether the *conversion of wetland was completed prior to December 23, 1985* will be based upon consideration of the types of activities set forth in the definition of what constitutes a 'converted wetland' Section 12.5(d)(1)(i) of the final rule makes it clear that *wetlands converted prior to December 23, 1985* are exempted from the rule by the law. Therefore, those converted wetlands may be improved by additional drainage, provided that no additional wetland or abandoned converted wetland is brought into production of an agricultural commodity." (emphasis added).

(Ex. 7 52 F.R. 35194, 35197 (Sept. 17, 1987). 7 C.F.R. § 12.5(d)(2) further elaborated on the new term pre-12-23-85 "completed conversion." It provided that:

> "The *conversion* of a wetland, for purposes of this section, is considered to have been *completed before December 23, 1985* if

> before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible *without further manipulation described herein* where such production on the wetland would not otherwise have been possible" (emphasis added).

(Ex. 7 52 F.R. 35194, 35203, at 7 C.F.R. § 12.5(d)(2)).

iii. Pre-12-23-85 'Commenced Conversion'

The legislative history surrounding the "commenced conversion" exemption provision of the FSA is contained in the Congressional Record and Conference Report of the U.S. House of Representatives. The congressional record for December 17, 1985 indicates that the Conference Committee had reconciled the difference between the House preference that only "completed conversions" should be eligible for exemption, and the Senate's broader preference that "commenced conversions" should be eligible for exemption, by adopted the Senate's broader preference:

> "*(7) Exemption for wetland (Sec. 1222)*(a) The House bill exempts converted wetland from the program ineligibility provision of section 1202 if the land became converted wetland before the date of enactment of the bill. (Sec. 1203(a(6). The Senate amendment exempts converted wetland if the conversion of the wetland was commenced before the date of enactment of the bill. (Sec. 1622(a)(1). The Conference substitute adopts the Senate amendment. The Conferees intend that conversion of wetland is considered to 'commenced' when a person has obligated funds or begun actual modification of the wetland" (italicized emphasis in original; underlined emphasis added).

(Ex. 74 131 Cong. Rec.-House (Dec. 17, 1985), at H12380). The Conference Report accompanying the FSA (H.R. 2100) corroborates this interpretation of the FSA commenced conversion provision. It states as follows:

> "(7) *Exemption for wetland (Sec. 1222)*(a) The House bill exempts converted wetland from the program ineligibility provision of section 1202 if the land became converted wetland before the date

> of enactment of the bill. (Sec. 1203(a)(6).) The Senate amendment exempts converted wetland if the conversion of the wetland was commenced before the date of enactment of the bill. (Sec. 1622(a)(1).) The Conference substitute adopts the Senate amendment. The Conferees intend that conversion of wetland is considered to be "commenced" when a person has obligated funds or begun actual modification of the wetland" (italicized emphasis in original; underlined emphasis added).

(Ex. 72 H.R. Conf. Rept. 99-447, Food Security Act of 1985, accompanying H.R. 2100, 99th Cong., 1st Sess. (Dec. 17, 1985) at 460.) This legislative history surrounding "commenced conversions" strongly suggests that the final 1987 USDA regulations' addition of the term pre-12-23-85 "completed conversion" tracked the House version of the exemption from converted wetlands the Conference Committee Report had previously rejected.

The FSA's term "commenced conversion" was elaborated upon in the preamble to interim FSA-implementing regulations the USDA had issued during June 1986. The preamble stated as follows:

> "Section 1222(a) of the Act provides, in part, that no person shall become ineligible under the wetland conservation provisions for program benefits as the result of the production of a crop of an agricultural commodity on converted wetland *if the conversion of such wetland was commenced before the date of enactment of the Act (December 23, 1985).* It has been determined that a person shall be considered to have *commenced* the conversion of a wetland by December 23, 1985, if, prior to December 23, 1985, such person: (1) Began substantial earth moving for the purpose of draining the wetland or (2) legally and financially committed substantial funds, by entering into a contract for earth moving, or otherwise, for the purpose of draining the wetland. The Department shall determine the amount of land which is exempt under this provision based upon the amount of land which would be drained by the earth moving required in the contract or, if there is no contract, which would be drained by the earth moving which had begun prior to December 23, 1985." (emphasis added).

(Ex. 73 51 Fed. Reg. 23496, 23500 (June 27, 1986). *See also* interim 7 C.F.R. § 12.5(d)(2)(i) and (2)). The interim USDA regulations also provided commenced conversions with protection

against ineligibility with respect to post-12-23-85 crop production if the commodity crops had been planted during the period spanning December 24, 1985 and June 27, 1986 (the interim regulation's effective date). (Ex. 73 51 Fed. Reg. 23496, 23504).

USDA final regulations issued during September 1987 revised the definition of "commenced conversion" contained in the interim regulations. The preamble stated as follows:

> "USDA has revised the definition of 'commenced' in § 12.5(d)(3) and (4) of the final rule *to clarify what constitutes commencement of conversion prior to December 23, 1985* and to assure that commencement of conversion determinations are based on *one or more* of the following criteria: (1) the conversion activity was actually started before December 23, 1985; or (2) the person expended or committed substantial funds by entering into a contract for the installation of a drainage activity or for construction supplies and materials for the conversion prior to December 23, 1985. The final rule also provides that a person seeking a determination of conversion commencement under this exemption *must request the determination within one year following publication of this rule*, must demonstrate that the conversion of the wetland has been actively pursued and *must complete the conversion by January 1, 1995*" (emphasis added).

(Ex. 7 52 F.R. 35194, 35197 (Sept. 17, 1987). *See also* 7 C.F.R. § 12.5(d)(3)-(4)). 7 C.F.R. § 12.5(d)(3) of the final regulations identified when a wetland conversion could be considered "commenced" prior to December 23, 1985. It stated as follows:

> "(3) Except as provided under paragraph (d](4) of this section [applicable to drainage districts], the conversion of a wetland is considered to have been commenced before December 23, 1985 if before such date: (i) Any of the activities described in § 12.2(a)(6) were actually started on the wetland; or (ii) The person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland."

(Ex. 7 52 F.R. 35194, 35203). The final regulations charged the ASCS with the responsibility of determining whether the conversion of a wetland was commenced prior to December 23, 1985. 7

C.F.R. § 12.6(b)(3)(viii). Said regulations also required the ASCS to "consult" with FWS on pending commenced conversion determinations. 7 C.F.R. § 12.6(b)(5).

iv. Commenced Conversion Completion Requirement

A commenced conversion, therefore, is a conversion that, although initiated prior to December 23, 1985, had not been completed prior to December 23, 1985, and consequently, required an additional fixed time period to complete. The preamble to the final regulations states that "a person seeking a determination of conversion commencement […] must demonstrate that the conversion of the wetland has been actively pursued and must complete the conversion by January 1, 1995. (Ex. 7 52 F.R. 35194, 35197). 7 C.F.R. § 12.5(d)(5)(ii) provides that unless

> "the commenced activity has been actively pursued [,…] the conversion will be exempt under this section. In this context, 'actively pursued' means that efforts towards the completion of the conversion activity have continued on a regular basis since initiation of the conversion, except for delays due to circumstances beyond the person's control."

7 C.F.R. § 12.5(d)(5)(iii) provides that [a]ny conversion activity considered to be commenced under this section shall lose its exempt status if not completed on or before January 1, 1995."(Ex. 7 52 F.R. 35194, 35203-35204). Thus, the final 1987 USDA regulations provided an exemption from USDA funding ineligibility for a converted wetland if the wetland's conversion either had been commenced *or* completed before December 23, 1985:

> "Section 12.5(d)(1)(i) has been revised to clarify that the production of agricultural commodities on converted wetlands is exempt *if the conversion was commenced or completed prior to December 23, 1985*. This change implements the intent of Congress to exempt the production of agricultural commodities on converted wetlands if conversion was completed prior to December 23, 1985, as well as on converted wetlands where the conversion was commenced prior to December 23, 1985."

(Ex. 7 52 F.R. 35194, 35197 (Sept. 17, 1987); 7 C.F.R. § 12.5(d)(1)(i); (Ex. 7 52 F.R. 35194, 35203).

In conclusion, the final 1987 USDA regulations treated both pre-12-23-85 commenced conversions *and* pre-12-23-85 completed conversions as having met the minimal threshold definition of "converted wetland" even though commenced conversions required "further manipulations until completed. According to USDA, there was a clear and unequivocal policy rationale underlying this treatment of pre-12-23-85 commenced conversions:

> "The purpose of the determination of conversion commencement […] is to implement the legislative intent that those persons who had actually started conversion of wetland or obligated funds for conversion prior to the effective date of the Act (December 23, 1985) *would be allowed to complete the conversion so as to avoid unnecessary economic hardship*" (emphasis added).

7 C.F.R. § 12.5(d)(5); (Ex. 7 52 F.R. 35194, 35203).

1. *Corps Efforts to Ensure Some Consistent Treatment of Converted Wetlands for FSA & CWA Purposes*

In September 1990, approximately one month prior to the United States' filing of the original complaint in the case at bar, the Corps issued RGL 90-07. (Ex. 75 RGL 90-07, Sept. 26, 1990). RGL 90-07 distinguished the normal circumstances of wetlands subject to pre-12-23-85 completed conversions (identified as "prior converted croplands") as defined in Section 512.15 of the National Food Security Manual (180-V-NFSAM, Second Ed., Aug. 1988) ("NFSAM"), from the normal circumstances of "farmed wetlands" as defined by NFSAM Section 512.35. 7 C.F.R. § 12.31(b)(2)(i) defined "normal circumstances" as "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed."

NFSAM Section 512.35 defines "farmed wetlands" as "wetlands that were manipulated and used to produce[] an agricultural commodity prior to December 23, 1985, *but had not been completely converted prior to that date* and therefore are not prior converted wetlands" (emphasis added). (Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.35). NFSAM Section 512.15(a) defines "prior converted croplands" as "wetlands that before December 23,

1985, were drained, dredged, filled, leveled, or otherwise manipulated for the purpose, or to have the effect of, making the production of an agricultural commodity possible." (Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.15(a).

According to RGL 90-07, the "normal circumstances" of farmed wetlands, including "areas with 15 or more consecutive days (or 10 percent of the growing season whichever is less) of inundation during the growing season," are such that they "continue to exhibit important wetland values." Since "the basic soil and hydrological characteristics [of wetlands] remain," "even though the vegetation has been removed by cropping," farmed wetlands are subject to CWA Section 404. (Ex. 75 RGL 90-07, at paras. 5.b, 5.c.); (Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec.512.15(b)(3). By contrast, the "normal circumstances" of prior converted croplands are such that they "have been subject to such extensive and relatively permanent physical hydrological modifications and alteration of hydro-phytic vegetation that the resultant cropland constitutes the 'normal circumstances' for purposes of [S]ection 404 jurisdiction" – i.e., hydro-phytic vegetation no longer predominates. Thus, they are not subject to CWA Section 404 jurisdiction. (Ex. 75 RGL 90-07, at paras. 5.c, 5.d.)

1. *EPA-Corps Efforts to Ensure Consistent Treatment of Converted Wetlands for FSA & CWA Purposes by Broadly Referencing USDA-SCS NFSAM Guidance*

In August 1993, EPA and Corps issued joint regulations that endeavored "to codify existing policy as reflected in RGL 90-07, that prior converted cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands […B]oth agencies continue to follow the guidance provided by RGL 90-7, which interprets our regulatory definition of wetlands to exclude PC cropland." (Ex. 77 58 Fed. Reg. 45008, 45031, 45032 (Aug. 25, 1993)). Significantly, the regulation's preamble acknowledges how administrative/regulatory consistency between the CWA and FSA could be enhanced if the EPA

and the Corps, like the USDA-SCS, learned to broadly and flexibly utilize the guidance contained in the National Food Security Act Manual ("NFSAM").

The 1993 joint regulations, in effect, enabled EPA and the Corps to more generally consult and go beyond the specific NFSAM provisions referenced in RGL 90-07, as appropriate, when addressing "prior converted cropland" and "farmed wetland" issues. (Ex. 77 58 Fed. Reg. 45008 at 45031-45034). The lasting effect of these regulations was to accord *retroactive* treatment to ALL pre-12-23-85 converted wetlands eligible for the USDA cost-sharing exemption, whether pre-12-3-85 prior conversions OR pre-12-23-85 commenced conversions destined to be completed before January 1, 1995, but for circumstances beyond the control of the landowner (i.e., intentional disruption, thwarting and nullification of a prior commenced conversion by federal agencies collaborating with third-party environmental and wildlife groups for ideological reasons). Indeed, the 1993 EPA-Corps joint regulations could be reasonably interpreted as containing a "non-degradation clause" protecting wetlands as they actually existed as of the date of the FSA's enactment. *See Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 474-475 (7th Cir. 2005) (holding that the 1996 amendment to the 1985 Swampbuster provisions of 16 U.S.C. § 3821-24, which "added an exception for wetlands that had been drained and farmed, had reverted to wetland status, and then were restored to agricultural use, [i.e., for a] wetland previously identified as a converted wetland (if the original conversion of the wetland was **commenced before December 23, 1985) […] [was] a non-degradation clause: the legislation protect[ed] wetlands as they actually existed on the date of [the FSA's] enactment.**").[3] *See Orchard Hill Building Co. v. U.S. Army Corps of Engineers*, No.15-cv-06344 (N.D. Ill 2017),

[3] *Cf. Maple Drive Farms Ltd. Partnership v. Vilsack*, 781 F.3d 837, 847 (6th Cir. 2015) (wherein the Court upheld the USDA's slightly different interpretation of this added exemption as applying "'where the conversion occurred [i.e., was completed] prior to December 23, 1985…'" rather than where the conversion was commenced before December 23, 1985.) The added provision was 16 U.S.C. § 3822(b)(2)(D)).

slip op. at 10 (noting how, due to "differing standards among" the Corps, EPA and NRCS (formerly the SCS), "farmers often found it difficult to comply with all three sets of regulations. Thus, in an effort to provide consistency between the three agencies, the Corps and EPA jointly adopted a rule implementing the NRCS' [SCS's] prior conversion exemption for purposes of the CWA. 33 C.F.R. § 328.3(b)(2)").

Sections C and E of the regulation's preamble, for example, explain that, in "*recognizing SCS's expertise* in making [] PC cropland determinations, we will continue to rely *generally* on determinations made by SCS. […] W]e believe that *farmers should generally be able to rely* on SCS wetlands determinations for purposes of complying with *both* the Swampbuster program and the Section 404 program" (emphasis added). To facilitate such general reliance, the agencies previously committed themselves to ensuring regulatory consistency:

> "We believe that consistency with SCS policy will best be achieved by our *utilizing the NFSAM in the same manner as SCS*, i.e., as a guidance document used in conjunction with other appropriate technical guidance and field testing techniques to determine whether an area is prior converted cropland. […] EPA and the Corps will […] implement this exclusion in a manner following the guidance contained in the NFSAM and appropriate field delineation techniques, and will continue to rely, to the extent appropriate, on determinations made by the SCS. […] The fact that we have not incorporated by reference the actual provisions of the NFSAM into our rules does not undercut our ability to maintain consistency. Rather […] *we believe that utilizing the NFSAM as a guidance manual, as it is used by SCS*, *will enhance consistency in the administration of the Food Security and Clean Water Act programs*" (emphasis added).

Ex. 77 58 Fed. Reg. 45008 at 45033, at Secs. C and E).

The EPA and Corps' emphasis of the need to maintain consistency in the administration of the Food Security and Clean Water Act programs is an unmistakable policy justification/basis for promulgating the jointly issued 1993 regulations. Section B of the preamble further supports this reading. It states as follows:

> "In utilizing the SCS definition of PC cropland for purposes of Section 404 of the CWA, *we are attempting, in an area where there is not a clear technical answer, to make the difficult distinction between those agricultural areas that retain wetland character sufficiently that they should be regulated under Section 404, and those areas that [have] been so modified that they should fall outside the scope of the CWA*. […] We believe that the distinctions under the Food Security Act between PC cropland and farmed wetlands provides a reasonable basis for distinguishing between wetlands and non-wetlands under the CWA. In addition to the fact that we believe this distinction is an appropriate one based on the ecological goals and objectives of the CWA, *adopting the SCS approach in this area will also help achieve the very important policy goal of achieving consistency among federal programs affecting wetlands*" (emphasis added).

(Ex. 77 58 Fed. Reg. 45008 at 45032).

The SCS had used Part 512 of the NFSAM entitled "Wetland Conservation" to address various issues related to the conversion of wetlands for possible crop production. NFSAM Section 512.20(a), for example, states that the SCS was responsible for determining whether federally assisted project activities in a wetland constituted a "prior conversion," which is "a wetland alteration that was completed prior to December 23, 1985." (Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.20(a)). NFSAM Section 512.22(b)(3)(vii) states that SCS also was responsible for determining

> "the extent of the area on which conversion ha[d] commenced. The determination [was] based on the extent of the work done, contracted for, or supplies or materials purchased prior to December 23, 1985. The extent of work allowed is limited to the physical extent of work done, contracted for or materials purchased."

(Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.22(b)(3)(vii).

NFSAM Section 512.22(b)(3)(vi) indicates that such *SCS* determination, however, is typically dependent on the *ASCS* having first determined that "Federally assisted project activities which convert wetlands or provide outlets for persons to convert wetlands for the

production of an agricultural commodity […had] started before December 23, 1985." In other words, such SCS determination requires first that the ASCS had determined a commenced conversion had occurred because:

> "(i) any of the construction activities including flood water reductions that would convert wetland were actually started; or (ii) the person applying for benefits ha[d] expended or legally committed substantial funds either be entering into a contract, or by purchasing construction supplies or material for the direct purpose of converting the wetland."

(Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.22(b)(1)(i)-(ii)). In addition, NFSAM Section 512.22(b)(3)(v) indicates that such *SCS* determination also is dependent on the *ASCS* having first consulted with the U.S. Fish and Wildlife Service about the "commenced determination" it is evaluating. (Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.22(b)(3)(v).

Most interesting, and arguably, most significant, is NFSAM Section 512.31 entitled, "Use of Prior Converted Croplands (PC)," which groups together both pre-12-23-83 completed (prior) conversions AND pre-12-23-83 commenced conversions under one category of "converted wetlands" eligible for one or more of the FSA exemptions. Section 512.31 states,

> "[…W]etlands that were converted prior to December 23, 1985 are not subject to the provisions of the FSA. Therefore, drainage facilities installed on prior converted croplands may be improved or maintained as desired by the person provided no new wetland is converted […]"

(Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.31). Section 512.31(a) states:

> "Wetlands that have been given a **commenced conversion determination are considered prior conversions when the commenced activities are completed** and the area meets the criteria for prior converted croplands. Otherwise, the area will be mapped according to the conditions found. **All commenced activities must be completed before January 1, 1995 to receive the (PC) determination**" (emphasis added).

Section 512.31(b) precludes landowners who obtained a prior commenced conversion determination for a given area (field) from converting "additional wetland acres beyond that which ha[d] been determined to be commenced." (Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.31(a)-(b)). This treatment is consistent with NFSAM Section 512.31's prohibition against landowners bearing a prior completed conversion determination converting any additional wetlands. *See Gunn v. U.S. Department of Agriculture*, 118 F.3d 1233, 1235 (8th Cir. 1997) (holding "[w]etlands that were converted to production of agricultural commodities *before* the cutoff date of December 23, 1985, 'can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way'" (emphasis in original)). NFSAM Section 512.36 shows this consistency of treatment between prior conversions and commenced conversions in a chart entitled, "[s]ummary of use, maintenance and improvements of various wetlands conditions:"

Wetland Condition	Use	Maintenance	Improvement
Prior Conversion (PC) Converted prior to 12/23/85 but not abandoned	Produce agricultural commodities	Yes	Yes
Commenced Conversion (CC)	Same as Prior Conversion When Completed	Yes	Yes

(Ex. 76 180-V-NFSAM, Second Ed., Aug. 1988, at Sec. 512.36).

NFSAM Section 512.32(a), furthermore, distinguishes the post-12-23-85 use of lands designated pre-12-23-85 commenced conversions from the use of post-12-23-85 converted wetlands (CW) "not subject to one or more of the exemptions." Moreover, NFSAM Section 512.35(c) distinguishes the use of pre-12-23-85 commenced conversions from farmed wetlands (FW) of the kind discussed in RGL 90-07. *See Gunn v. U.S. Department of Agriculture,* 118

F.3d at 1238 (stressing USDA's distinction between wetlands and converted wetlands and identifying fields that a farmer failed to demonstrate as having been "commenced converted" pre-12/23/85 as likely "farmed wetlands."); *Barthel v. U.S. Department of Agriculture*, 181 F.3d, slip op. at 6 (characterizing the farmer's land, which had not been designated either as "prior converted" or "commenced converted," consistent with NFSAM Section 5.14.23(a) as "'farmed wetland pasture or hayland" i.e., as "wetlands that were manipulated and used for pasture or hayland prior to December 23, 1985, [which] still meet wetland criteria"…).[4]

Given the similarities and distinctions discussed above, this Court may reasonably conclude that USDA-SCS' (Steckler/Barry) determination that Defendants' Murphy Farm tract (Field 14) (and Marsh Farm tract (Field 15)), as described and depicted on Form SCS-CPA-026 and accompanying map, had qualified them as FSA converted wetlands (CW) which had undergone a more extensive degree of conversion than a farmed wetland for CWA Section 404 purposes under RGL 90-07. And, given these similarities and distinctions, this Court may reasonably conclude that USDA-ASCS' (Burawa/Lesik) determination that the activities and expenses Defendants had undertaken and incurred on Fields 14 and 15 prior to December 23, 1985 had constituted commenced conversions, qualifying them as FSA-exempt converted wetlands (CW) which, had they been completed by January 1, 1995, without United States disruption beyond Defendants' control, would have been treated as prior conversions (prior

[4] The limitations the 1987 final USDA regulations impose upon the *post*-12-23-85 use of nonconverted farmed wetlands are analogous to the limitations placed upon prior commenced conversions and prior completed conversions in only one respect: they prevent further drainage of the wetland as it previously existed on December 23, 1985. *See Barthel v. U.S. Department of Agriculture*, 181 F.3d 934 (8th Cir. 1999), slip op. at 7-8 (holding with respect to nonconverted farmed wetlands that the then "current [USDA] regulation on 'use of wetland and converted wetland' provides that changes in the watershed due to human activity which increases the water regime on a person's land, can result in a person being allowed 'to adjust the existing drainage system to accommodate the increased water regime.' 7 C.F.R. § 12.33(a)," provided "the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way.'") *Id*., slip op. at 9-10; 52 FR 35194, 35208 (Sept. 17, 1987)).

converted cropland) excluded from CWA Section 404 jurisdiction under the more broadly construed 1993 joint EPA-Corps regulations.

V. This Court Should Exercise its Equitable Powers to Equitably Toll the Period in Which Defendants Can Continue and Complete the USDA-ASCS-Determined Prior Commenced Conversion of the Murphy Farm Tract

In *Von Eye v. United States*, 92 F.3d 681 (8th Cir. 1996) slip op. at 4, the Eighth Circuit Court of Appeals held that although "[u]nder 7 C.F.R. § 12.5(b) (5) (iii), conversion activities allowed under the commenced conversion exemption must be completed on or before January 1, 1995 [,…] the government accepts [and…] we agree that […] **under certain circumstances the time limitation in 12.5(b)(5)(iii) could be equitably tolled.**" *See also Bowen v. City of New York*, 476 U.S. 467, 480, 106 S. Ct. 2022, 2030, 90 L. Ed. 2d 462 (1986) ("traditional equitable tolling principle' applicable to period for appealing administrative decision"); *Lyng v. Payne*, 476 U.S. 926, 936, 106 S. Ct. 2333, 2340, 90 L. Ed. 2d 921 (1986) ("If, for example, a farmer had filed a loan application prior to the expiration of the loan deadline and a court determined that the denial of the application after the deadline's expiration was arbitrary, capricious and not in accordance with law, the appropriate remedy under the APA would be to direct that the application be granted or reconsidered.").

In *Von Eye*, the landowner, like Defendant Robert Brace, had sought a commenced conversion following his 1988 receipt of a violation notice alleging he potentially violated the Swampbuster Act. Von Eye set forth a plan to use a backhoe and dirt scraper to cut four channels "so all [approximately 20 acres of] the farm ground would be drained. […] The ditches fed water through two township-owned culverts set underneath a public road, and eventually drained into a state-owned slough." 92 F3d., slip op. at 2, citing *Von Eye v. United States*, 887 F. Supp. 1287, 1289 (D.S.D. 1995). In addition, the Court found these documents indicated that "the project was initiated in 1984 and completed in 1986, […] and in 1987." 92

F3d., slip op. at 2. The Court, furthermore, found that, in June 1989, the ASCS committee determined the project as so described was eligible for the commenced conversion exemption without explicit limits being placed upon the scope of conversion activities. *Id*., slip op. at 2. The Court, furthermore, found that, in 1990, Von Eye had reported problems he experienced with one of the culverts to the local township board and, in November 1990, had the township "culvert replaced [at the township's expense] with a larger culvert, which was set six inches lower in the ground." *Id*., slip op. at 2. The Court, moreover, found that the SCS notified Von Eye on November 14, 1991 that "any further wetland manipulation activities were not authorized by the commenced conversion exemption, and that the USDA National Appeals Division ("NDS") had "determined, on December 6, 1993, that conversion actions [he] completed […] prior to November 14, 1991, including the lowering of the culverts, would be exempted from the Swampbuster Act, because [, as the NDS had found,] Von Eye had not been 'notified of the scope and effect of the activities authorized by the county committee's original approval of the commenced conversion exemption. In addition, Von Eye was allowed to maintain any conversion manipulations completed before November 14, 1991." *Id*., slip op. at 2-3.

Von Eye subsequently appealed to the District Court the NDS' conclusion that "manipulation activities" he had "commenced after November 14, 1991, were not included in [his] commenced conversion exemption," alleging that the NDS had abused its discretion in denying him the ability to complete his conversion project. Id., at 3. Von Eye thereafter appealed to the 8th Circuit after the District Court had dismissed his complaint. The Court of Appeals found that, "[s]ince 1991, long before the 1995 deadline, Von Eye attempted to convince the government to allow him to complete his drainage project," and that "if Von Eye had succeed in his appeal […] he would have [had] the opportunity to request that the district

court, on remand, equitably toll the period in which he could complete his drainage project." *Id*., slip op. at 4-5. Nevertheless, the Court upheld the District Court's conclusion (which upheld the NDS conclusion) as other than arbitrary and capricious based on the following reasoning:

> "In describing his conversion plan to the ASCS, Von Eye referred only to the construction of four channels dug with a backhoe and a dirt scraper, and did not mention the lowering of culverts. *Von Eye did not project a completion date some six years after initiating his conversion activities*, but rather stated that he had completed the project in 1986 and 1987. As noted by the NDS, *there was no evidence that Von Eye had committed substantial funds to the conversion activities he planned to engage in*, […] *nor has Von Eye demonstrated undue hardship*" (emphasis added). *Id*., slip op. at 6.

The Court of Appeals' decision apparently rested on the statement Von Eyes had made in his ASCS application that he had completed the commenced conversion project in 1986 and 1987. In the Court's view, any subsequent work performed beyond the scope of maintaining the prior work (e.g., ditch maintenance, culvert cleaning) that had been completed in 1987, would constitute a new project not covered by the previous commenced conversion determination by ASCS and NDS.

The facts of the case at bar are significantly distinct from the facts in *Von Eyes*, and therefore, this Court, in the exercise of its equitable powers, should equitably toll the period in which Mr. Brace can complete his drainage project. Unlike the landowner in *Von Eyes*, Defendants in the case at bar submitted to the USDA-ASCS invoices totaling more than $28,000 for a time period that spanned 1977-1987 evidencing work performed and expenditures incurred during eight of eleven successive years to convert specific areas south and north of South Hill Road, namely, Murphy Farm tract Field 14, including the Consent Decree Area (and eleven of

twenty acres of Marsh Farm tract Field 15)[5] for possible agricultural production of commodity crops and had actually harvested such crops on Field 14 in 1987.

Unlike the landowner in *Von Eyes*, Defendants in the case at bar presented strong evidence of materials and supplies that Defendants had purchased and of work performed on a continuous and regular basis in these areas in 1977, 1978, 1979, 1981, 1982, 1984, 1986 and 1987. Although the work/cost documentation Mr. Brace had submitted to the ASCS Erie County Executive Committee skipped a year here and there (i.e., 1980, 1983, and 1985), the lack of documentation for those three years did not prove that Defendants had not worked at all on the project during those years, especially if he had engaged in self-financed conversion activities (i.e., hadn't requested cost-sharing from USDA) during those years. Thus, the SCS had ultimately designated each of Field 14, including the parcel containing the 30-acre Consent Decree Area, and Field 15, as "converted wetlands" (CW), and the ASCS had granted each of these areas (fields) a "commenced conversion" designation that, pursuant to the 1993 jointly issued EPA-Corps regulations, should have been recognized as excluding said areas (fields) from CWA Section 404 jurisdiction pending Defendants' completion of the conversion pre-January 1, 1995, but for circumstances beyond Defendants' control – i.e., the Government's intentional disruption, thwarting and nullification of such effort.

The FWS even acknowledged that alterations of ("work in the channel of") Elk Creek north and south of South Hill Road had occurred during this period and prior to December 23, 1985, (Ex. 23 FWS Perry Ltr. to ASCS Lesik 2-7-89) which had "facilitated drainage on the north side of the road", as it incorrectly alleged that "no work had been documented between 1982 and 1986." Such findings have since been corroborated by Government satellite images of

[5] Defendants' Marsh Farm tract is the subject of a second United States action which is currently pending before the Honorable Judge Rothstein (1:17-cv-00006-BR).

the Murphy Farm tract in 1977 (Ex. 18 June 4, 1977 Murphy Sat Image) and 1983 (Ex. 19 May 11, 1983 Murphy Sat Image) that quite clearly reveal all of the conversion-related ditch work Defendants had performed in Fields 14 and 15 (corresponding to submitted expenditure-related documentation) that enabled USDA-SCS and USDA-ASCS to render their prior 1988 determinations.

Unlike in *Von Eyes*, the FWS, EPA and Corps in the case at bar, never proffered any evidence to prove that Defendants had not "actively pursued" "on a regular basis" the conversion of Fields 14 and 15 as the USDA-ASCS had determined, which determination "implicat[ed] substantial agency expertise" deserving of significant judicial deference. *See Durbin v. Farm Service Agency*, 2:05-cv-00566-NMK (S.D. OH 2007) (wherein the Court noted that "the dispute about the existence of wetland and conversion of a part of that wetland are 'classic examples of factual disputes implicating substantial agency expertise' to which this Court owes significant deference." *Id*., slip op. at 21, citing *Downer v. U.S. Department of Agriculture Soil and Conservation Service*, 97 F.3d 999, 1002 (8th Cir. 1996) "(evaluating [*inter alia*] (1) "whether the areas in question were wetlands; (2) whether such wetlands were converted; [and] (3) whether the conversion was commenced before December 23, 1985 […]')." The Court thus concluded that, "deference to the agency's determination is 'particularly appropriate' in this instance." *Id.*, slip op. at 21. See also *Holly Hill Farm Corp., v. United States*, 447 F.3d 258, 266 (4th Cir. 2006) ("An agency 'must be permitted 'to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'' *Downer v. United States*, 97 F.3d 999, 1002 (8th Cir. 1996) (quoting *Marsh V. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L.Ed2d 377 (1989))").

VI. *Conclusion*: This Court Should Exercise its Equitable Powers to Enable Defendants to Complete Their 1988 Prior Commenced Conversion of the Murphy Farm Tract Disrupted Due to Extraordinary Circumstances that Remain Beyond Their Control

This Court should not ignore how, approximately thirty (30) years ago, officials from FWS, together with third-party environmental and wildlife organizations such as Ducks Unlimited, Inc. and the National Wildlife Federation with which the United States USDA had formal funding, cooperation and sue-and-settle relationships, had collaborated to disrupt, thwart and nullify Defendants' 1988 USDA-determined prior commenced conversion of the Murphy Farm tract (and Marsh Farm tract). This Court also should not ignore how this partnership's efforts vis-à-vis Defendants was part of a larger national and multi-regional ideological campaign conspiracy [6] to legally disrupt and reverse local USDA-ASCS committee prior commenced conversion determinations. These intentionally mischievous acts prevented Defendants from completing their prior commenced conversion within the prescribed regulatory deadline of January 1, 1995. This Court also should not ignore how the DOJ-ENRD, on behalf of EPA, thereafter, framed the original complaint in this action, along with subsequent pre-trial discovery for the specific purpose of precluding any potential application of the retroactive 1993 jointly issued EPA-Corps regulations to Defendants' prior commenced conversion of their farmland so that it would be deemed as excluded from CWA Section 404 jurisdiction.

This Court, furthermore, should not ignore the more than twenty-one (21) years of United States affirmative misconduct following this Court's entry of the September 23, 1996 Consent Decree as a judgment, as discussed extensively in Defendants recent detailed filings and accompanying exhibits (ECF No. 214), (ECF No. 215), (ECF No. 216).

[6] *See* John Vogel, *Federal Swampbuster Conspiracy Cited in Law Review*, American Agriculturist (March 26, 2018), available at: http://www.americanagriculturist.com/epa/federal-swampbuster-conspiracy-cited-law-review.

In summary, such affirmative acts of misconduct included: 1) delaying, denying and ignoring Defendants' good faith requests for onsite visits to their Waterford Township, PA farm to resolve Restoration Plan-induced flooding and inundation exaggerated by the presence of beaver dams and the occurrence of clogged state- and county-installed culverts about which the United States had long known, ignored and failed to factor into its Restoration Plan design; 2) disavowing and revoking authorizations previously granted to Defendants, and upon which Defendants detrimentally relied, to conduct agricultural ditch maintenance activities in and along Elk Creek and its tributaries and reaches south of Lane Road and within the Consent Decree Area which the United States well knew engendered many different types of interrelated and ancillary tasks constituting normal farming activities recognized in EPA and Corps regulations and regulatory guidance; 3) imposing on Defendants an unrequested nonfinal nonbinding Corps jurisdictional determination in 2012, and withholding from Defendants a final EPA compliance order that would have allowed them to seek judicial review in 2016 for purposes of vigorously refuting the false and unsubstantiated allegations underlying the EPA-Corps Violation Notice and Corps Cease and Desist Order pursuant to the Administrative Procedure Act, thereby placing Defendants in legal and financial jeopardy for an additional four year period, and denying Defendants their due process right of administrative appeal, and ultimately, recourse to the federal courts, and their freedom to economically operate their farming business as a viable going concern; and 4) substantially overdesigning and relocating the check dam called for by the Consent Decree Restoration Plan Task 3, through commission of multiple violations of the Consent Decree, an Order of this Court, thereby providing the United States with ample opportunity to ensure its over-implementation of the Restoration Plan had created a much wetter and saturated physical environment replete with artificially induced hydrology and vegetation

within and beyond the Murphy Farm tract's Consent Decree Area than had actually existed between 1979 and 1987. This Court should not ignore how each of these affirmative acts of misconduct had been intended to prevent Defendants from ever completing their prior commenced conversion of the Murphy Farm tract (and Marsh Farm tract).

As the result of being unable to complete their thirty (30)-year-old prior commenced conversion, and of being subjected to more than twenty-one (21) years of ongoing Government harassment, Defendants and their families have had no choice but to endure severe economic, emotional, medical, legal and reputational harms and hardships without any adequate remedy at law available to them. This Court should not ignore the likelihood that such harassment will only continue should this Court decide not to exercise its equitable powers prospectively in Defendants' favor. Defendants have not sought the procedure provided by FRCP 60(b)(6) as a substitute for an appeal at law which continues to remain unavailable to Defendants.

Much to the contrary, there is no cost-effective, affordable and adequate remedy at law available to Defendants at this time. Indeed, the record reveals that Defendants had unsuccessfully pursued the only known legal remedy previously available to them in 1998 – they filed a Fifth Amendment "Takings" action in the U.S. Court of Claims seeking compensation for the Government subjecting the Murphy Farm tract to Corps CWA Section 404 permitting and over-designing and over-implementing this Court's 1996 Consent Decree, as well as, for the Government's disruption, thwarting and nullification of their legal right to complete their prior commenced conversion. *See Brace v. United States*, No. 98-897L (Ct. Cl. 2006) (described in ECF No. 214, paras. 22-23). Defendants, however, had been unaware at such time, about how the 1993 administration wetlands policy released one day prior to the 1993 joint EPA-Corps regulations' issuance had actively rejected legislation in Congress that would have compensated

landowners under a regulatory "takings" analysis. (Ex. 78 WH OEP Policy 8-24-93, at Sec. V.C., pp 9-11, Sec. V.L, pp. 22-23); (Ex. 79 Lamunyon Nebraska L.Rev. (1994), at 174) ("The administration supports the recent EPA decision to remove areas classified as 'prior converted wetlands' from inclusion in the 'waters of the United States,' [fn] but does not support legislation concerning compensation to landowners under a 'takings analysis.' Fn 69"); *See* Pennsylvania Landowner's Association, ***Call to Action***, video (1992), https://www.youtube.com/watch?v=4KeJLH34ryM&feature=youtu.be .

By enabling Defendants to complete their prior commenced conversion of the Murphy Farm tract in prospective exercise of its equitable powers, this Court, furthermore, will not be disturbing a prior judgment of this Court or of the Third Circuit Court of Appeals. As previously discussed, neither this Court nor the Third Circuit Court of Appeals had the opportunity to address the 1993 regulations' application to Defendants' prior commenced conversion of the Murphy Farm tract given the United States sustained objections during the pretrial discovery period to the relevance of the Food Security Act of 1985 to Clean Water Act Section 404. Consequently, this Court is currently not barred from considering the application of such regulations to Defendants' prior commenced conversion on the grounds of res judicata, collateral estoppel or the law of the case doctrines. The 1993 jointly issued EPA-Corps regulations constitute an intervening change in the law to which federal courts have since given credence which has given rise to multi-circuit decisional law. *See United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1039 (N.D. Ill 1998) (discussing the applicability of the prior converted cropland exclusion from CWA Section 404 jurisdiction contained with the 1993 regulations); *Orchard Hill Building Co. v. U.S. Army Corps of Engineers*, No.15-cv-06344 (N.D. Ill 2017), slip op at 10 (discussing the underlying policy of the 1993 regulations to establish for

farmers consistency between conflicting federal agency standards for wetlands determinations); *Huntress v. U.S. Dep't of Justice*, No. 12-CV-1146S, (W.D.N.Y. 2013) WL 2297076, at *12 (discussing the prior converted cropland and abandonment rules contained in the 1993 regulations); *New Hope Power Company v. United States Army Corps of Engineers*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010), slip op. at 4, 15-16 (discussing the prior converted cropland and abandonment rules contained in the 1993 regulations); *Belle Company LLC v USACE* 13-30262-CV0 (5th Cir 2014), slip op. at 2-3; *United States v. Righter*, No. 1:08-CV-0670, 2010 WL 2640189 (M.D. Pa. 2010), at *2 & n.4 (discussing the prior converted cropland and abandonment provisions of the 1993 regulations); *Murray Energy Corp. v. EPA*, No. 15-3751 (6th Cir. 2015), brief for Respondent at 133 and fn 32 (1-30-17) ("Pursuant to EPA and Corps regulations, wetlands that qualify as 'prior converted cropland' are categorically excluded from the definition of 'waters of the United States.' *See, e.g.*, 33 C.F.R. § 328.3(b)(2); *see also* 58 Fed. Reg. 45,008, 45,034 (Aug. 25, 1993)").

Substantial justice requires this Court to liberally construe FRCP 60(b)(6) to prospectively afford Defendants the opportunity to complete their prior commenced conversion of the Murphy Farm tract (and of the Marsh Farm tract) of which they had long ago been illegally deprived by the Government's unexpected choreographed collaboration with related third parties, and by the Government's unexpected subsequent multiple acts of affirmative misconduct related to its over-design and over-implementation of the Restoration Plan and manifest multiple violations of the Consent Decree itself. These are intervening equities which make it equitable to grant relief in this case. *See* (ECF No. 214), (ECF No. 215, (ECF No. 216) and accompanying exhibits.

This Court also should prospectively exercise its equitable discretion under FRCP 60(b)(6) at this time, notwithstanding the passage of many years, since Defendants' prior inability to complete its commenced conversion of the Murphy Farm tract (and Marsh Farm tract) had been due to circumstances beyond their control. As previously discussed, federal courts would likely conclude that the extraordinary circumstances presented in the case at bar would justify as reasonable the equitable tolling of the January 1, 1995 limitation period contained within the USDA's 1987 FSA-implementing regulations, especially where Defendants would require no more than three (3) years from the date of entry of judgment to complete their prior commenced conversion of such fields.

Moreover, this Court's retroactive application of the 1993 jointly issued regulation for the purpose of recognizing Defendants' prior commenced conversion of the Murphy Farm tract (and of the Marsh Farm tract) as excluded from CWA Section 404 jurisdiction on the condition that said conversion is completed, and upon its actual completion with retroactive effect, three (3) years from the date of entry of this order, would be reasonable under the standard applied for determining whether a regulation may be applied retroactively. *National Wildlife Federation v. Marsh*, No. 82-3632 (D.D.C. Dec. 17, 1984), 15 ELR 20116 (1985), citing *Pennzoil Co. v. DOE,* 680 F.2d 156 (Temp. Emer. Ct. App. 1982). Various federal courts have deemed the 1993 regulations to be a reasonable exercise of such agencies' authority, the regulations' application to enable Defendants to complete their prior commenced conversion and exclude it from CWA Section 404 jurisdiction in the case at bar would not produce a result contrary to statutory design or legal or equitable principles.

In addition, the FSA and CWA treatment of wetlands at the time of Defendants' prior 1988 commenced conversion determination was far from being settled law upon which

Defendants could dependably rely, and the application of the 1993 regulations for purposes of enabling Defendants to complete their prior commenced conversion within three (3) years of the date of entry of judgment would not impose an undue burden upon Defendants that would create a manifest injustice. *National Wildlife Federation v. Marsh*, No. 82-3632 (D.D.C. Dec. 17, 1984), 15 ELR 20116 (1985), citing *United States v. Exxon Corp.,* 561 F. Supp. 816 (D.C.D.C. 1983); *Buccaneer Point Estates, Inc. v. United States,* 729 F.2d 1297, 1299 [14 ELR 20406] (11th Cir. 1984).

Lastly, based on the detailed analysis herein provided, this Court should reasonably conclude that the nature of the change in law triggered by the 1993 regulations' retroactive application to the case at bar weighs heavily in Defendants' favor, that the Defendants, following both the advice of counsel and the advice of federal officials, had been innocently exploited by the United States on an ongoing basis for several decades, and that had Defendants a cost-effective, affordable and adequate remedy at law currently available to them, their invocation of the 1993 regulations would provide them with a meritorious defense or claim. Hence, this Court should reasonably conclude that extraordinary circumstances in addition to an intervening change in regulatory and decisional law justify its exercise of equitable powers pursuant to FRCP 60(b)(6) to enable Defendants to complete their prior commenced conversion by no later than three (3) years of the date of entry of judgment.

Respectfully submitted,

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