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

UNITED STATES OF AMERICA, Plaintiff v. ROBERT BRACE, ROBERT BRACE FARMS, INC., and ROBERT BRACE and SONS, INC. Defendants	)	Civil Action No. 90-229

DEFENDANTS' RESPONSE TO UNITED STATES' MOTION FOR PROTECTIVE ORDER PRECLUDING THE OCTOBER 24 & 25TH DEPOSITIONS OF EDWARD LEWANDOWSKI, LEWIS STECKLER AND CARROLL LESIK

The United States' new Motion for a Protective Order (ECF No. 180) filed pursuant to Rule 26(c) of the Federal Rules of Civil Procedure ("FRCP"), like the Government's previously filed Motion for a Protective Order (ECF No. 168), is essentially a disguised FRCP Rule 56 Motion for Summary Judgment. It seeks to deny Defendants' requests for discovery of pre-1996 information concerning the true meaning and intent of the Consent Decree that is the subject matter of the current enforcement action (ECF No. 82), even though genuine disputes as to the material facts of this case remain which this discovery would uncover.

Witness Specific Information

The forthcoming depositions of three USDA employees whose recollection of the processes used within United States Department of Agriculture ("USDA")'s Soil Conservation Service ("SCS") and Agricultural Stabilization and Conservation Service ("ASCS") to secure "prior converted cropland" and "commenced conversion" designations related to the properties at issue will show how materially relevant these designations are for purposes of resolving one of the

Restoration Plan's latent ambiguities giving rise to this Consent Decree enforcement action, as will the three depositions of former U.S. Department of Interior Fish & Wildlife Service ("DOI-FWS") employees Edward Perry, Charles Kulp and David Putnam to whom the United States refers in footnote 1 of its new Motion. All of these depositions will not only corroborate what had transpired with each such designation, but they also will be helpful in determining the actual physical condition of the 30-acre area during the temporal period to which the Restoration Plan relates, and the potential effects the Restoration Plan would have beyond the 30-acre area. (Ex. 1)[1]

Lewis Steckler is a former District Conservationist of the USDA-SCS (now called the Natural Resources Conservation Service), who "work[ed] with landowners in applying soil and water conservation practices to their farms," had previously testified about the materially relevant "prior converted cropland" and "commenced conversion" designations at the U.S. District Court in 1992 (Ex. 2) and at the U.S. Court of Claims in 2005. (Ex. 3, pp. 698-718), (Ex. 4, pp. 734-765). A review of his prior testimonies reveals that Mr. Steckler provided much more detailed answers and covered more issues (including the intended impact and Defendants' implementation of the 1996 Consent Decree Restoration Plan (Ex. 5, pp. 718-733)) in his 2005 testimony than in his 1992 testimony, and that these testimonies are not necessarily consistent with one another. Perhaps, after several more years of reflection, Mr. Steckler could recall these designation processes and their significance, as well as, the Restoration Plan's intended impacts on areas beyond the 30-acre alleged wetland area with greater clarity, to help resolve the Restoration Plan's latent ambiguities.

[1] Exhibit 1 contains a March 1, 1988 letter correspondence from FWS Supervisor Charles Kulp to EPA Representative James Butch, copied to David Putnam, detailing the features of the proposed DOI-FWS restoration plan that had apparently been accompanied by an image of the proposed DOI-FWS restoration plan that is upside down relative to its legend.

Edward Lewandowski is also a former USDA-SCS Conservation Technician who testified in 1991 that he "[did] all the layout work pretty much in the Erie County area of conservation practices," including primarily "layouts and designs of […] tile drainage," (Ex. 6). His SCS tile drainage layout work was later corroborated by Mr. Steckler's 1992 testimony (Ex. 2, p. 35), and by the 2005 U.S. Court of Claims testimony of Mr. Joseph Burawa, a former ASCS employee (now deceased) who had "administer[ed] all the farm programs that Congress put out […] that came through [his] office," and who had testified that his ASCS office had considered farmers as being exempt from the Clean Water Act from 1977 to 1984. (Ex. 7, pp. 65, 73, 77).

Carroll Lesik is a former USDA-ASCS employee who attended the September 14, 1988 Erie ASCS Committee Meeting at which the 30-acre area had been originally designated a "commenced conversion," and also served as the ASCS Erie County Executive Director at the subsequent February 8, 1989 ASCS Committee Meeting at which that "commenced conversion" designation had been reaffirmed. (Ex. 8). Her deposition, as well, will be helpful in establishing how the "commenced conversion" designation of the 30-acre wetland area bears upon the physical condition of that area during the temporal period in question, for purposes of clarifying the Restoration Plan's otherwise ambiguous primary objective.

Relevance of This Testimony and Related Evidence

The testimony of these witnesses and production of the information of which the United States seeks to preclude discovery through the filing of both of these protective orders would help Defendants and this Court to resolve the 1996 Consent Decree's longstanding but unaddressed latent ambiguities which have led the United States to assert in this action that Defendants committed new violations of the 1996 Consent Decree and Clean Water Act ("CWA") Section 404 occurring at unspecified dates during the period spanning 2012 – 2015. As Defendants explained

in its recently filed Brief in Opposition to United States' Motion for a Protective Order (ECF No. 179), the 1996 Consent Decree includes its accompanying Wetlands Restoration Plan ("Restoration Plan") referred to therein as "Exhibit A," and also a hand drawing of the approximately 30-acre wetland area located on Defendants' Murphy farm tract ("Hand Drawn Map") referred to therein as "Attachment A," which the 1996 Consent Decree incorporates by reference within its Paragraphs 3, 4, 7 and 8. (Ex. 9). This Court previously entered the Consent Decree, including Exhibit A and Attachment A, as a consent judgment on September 23, 1996.

Among the numerous latent ambiguities riddling the Consent Decree, including its Restoration plan and Hand Drawn Map, that Defendants identified in its recent filing, is that relating to "2) the Restoration Plan's failure to identify the temporal period to which the hydrologic regime, and thus, [the] physical condition [to which], of the 30-acre wetlands portion of the Murphy farm tract (in contrast to that of the remaining 28-acre upland portion of the overall 58-acre Murphy farm tract) is to be restored." (ECF No. 179, p. 2). As Defendants further explained in their recent filing, "[n]either the Restoration Plan's preambular paragraph, nor the Restoration Plan overall, defines, let alone, identifies the temporal period to which the hydrologic regime of the 30-acre wetlands portion of the Murphy farm tract (in contrast to the remaining 28-acre upland portion of the overall 58-acre Murphy farm tract) must be restored. […] The identification of the temporal period to which the hydrologic regime of the 30-acre wetlands portion of the Murphy farm tract (in contrast to the remaining 28-acre upland portion of the overall 58-acre Murphy farm tract) must be restored is materially relevant to Defendants' prior (2012-2015), current (2017) and ongoing future ability to comply with the Consent Decree's Restoration Plan." (ECF No. 179, p. 20).

Evidence extrinsic to the Consent Decree's Restoration Plan overwhelmingly indicates that the temporal period to which the hydrologic regime of the 30-acre Murphy tract wetlands area must be restored is likely sometime between 1984 and 1985, reflecting the physical condition of said area at that time. Defendants' most recent filing also indicated that extrinsic evidence, "including authentic historical aerial photography and expert interpretational analysis of it and other maps and images revealing historical onsite hydrology and topography of then-existing drainage ditches and channels at that approximate time period," would show that the conversion of the Murphy tract had already been commenced or completed, in part, consistent with an approved and authorized USDA SCS Conservation Plan, before December 23, 1985, such that it was sufficiently 'dry' to support Defendants' ongoing farming operation,' consistent with Defendants' expert's August 5, 2015 report. (ECF No. 179, pp. 20-21, 23). In other words, evidence will show that portions of the Murphy tract had already received the coveted prior converted cropland and 'commenced conversion' designations from the USDA-SCS and USDA Agricultural Stabilization and Conservation Service ("ASCS") identifying said conversion as having been commenced or completed before December 23, 1985.

The "commenced conversion" designation had placed the 30-acre area on a direct path towards securing the "prior converted cropland" designation. Indeed, had the United States not previously instituted this legal action against Defendants and administratively enjoined the completion of Defendants' commenced conversion activities in the 30-acre area, Defendants would very likely have completed the conversion of that area prior to January 1, 1995. This would have enabled Defendants to secure prior converted cropland treatment for the 30-acre area, as defined by the USDA's National Food Safety Manual ("NFSAM" 1988) (Ex. 10), and the prior converted cropland exclusion from the definition of "waters of the United States", and

consequently, from federal Clean Water Act jurisdiction, consistent with applicable retroactive joint EPA-Corps and USDA regulations (58 FR 45008, 45031-45034 (Aug. 25, 1993), (Ex. 11), (Ex. 12), (Ex. 13) and (Ex. 14).[2] According to Sections 512.22(b) (which defines "commenced conversions" (Ex. 15)), and 512.31(a) the USDA's National Food Safety Manual ("NFSAM" (Title 180 2d. Edition, Aug. 1988) entitled, "Use of Prior Converted Croplands," "[w]etlands 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). (Ex. 16). Section 4, Paragraph 91(A)(1)-(2) of the ASCS Handbook on Highly Erodible Land Conservation and Wetland Conservation Provisions for State and County Offices ("6-CP"), entitled "Exemptions," furthermore, states that "[a] person shall not be determined ineligible for program benefits because of producing an agricultural commodity on […] [c]onverted wetland, if the conversion began before December 23, 1985." (Ex. 17, p. 97). "Conversion will be considered

[2] *See* 7 C.F.R. § 12.5(b)(2)(i)-(iii) ("(i) The purpose of a determination of a commenced conversion made under this paragraph is to implement the legislative intent that those persons who had actually started conversion of a wetland or obligated funds for conversion prior to December 23, 1985, would be allowed to complete the conversion so as to avoid unnecessary economic hardship. (ii) All persons who believed they had a wetland or *converted wetland for which conversion began but was not completed prior to December 23, 1985*, must have requested by September 19, 1988, FSA to make a determination of commencement in order to be considered exempt under this section. (iii) Any conversion activity considered by FSA to be commenced under this section lost its exempt status if such activity [w]as not competed on or before January 1, 1995. For purposes of this part, *land on which such conversion activities were completed by January 1, 1995, shall be evaluated by the same standards and qualify for the same exemptions as prior converted croplands*" (emphasis added).) *See also* 52 FR 35194, 35197 (9-17-87), referring to prior revisions made to 7 C.F.R. 15.5(d) ("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. […] 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.")

as having begun before December 23, 1985, if […t]he draining, dredging, leveling, filling, or other manipulation including any activity that results in impairing or reducing the flow, circulation, or reach of water was actually started on the wetland before December 23, 1985," OR "[t]he person applying for benefits has expended or legally committed substantial funds before December 23, 1985, by either […e]ntering into a contract for installation of any of the activities described [above, OR…] [p]urchasing construction supplies or material for the primary and direct purpose of converting the wetland." *Id*. In other words, a "commenced conversion" designation is tantamount to a preliminary "prior converted cropland" determination that will mature retroactively upon completion of the identified activities before January 1, 1995. Therefore, these are not, as the United States has misrepresented, "mutually exclusive categories." (ECF No. 169, p. 18).

In addition, it is important to emphasize how extrinsic evidence will show that, *because of* the United States' premeditated intervention and cut-off of Defendants' commenced conversion activities, which, in effect, by virtue of the Consent Decree and its Restoration Plan, has since caused the reversion of this 30-acre portion of the Murphy tract to wetlands (i.e., due to lack of maintenance of drainage and of the land containing the 30-acre area that created circumstances beyond Defendants' control), the United States is arguably now estopped under applicable USDA, EPA and Corps regulations from characterizing Defendants' commenced conversion of the 30-acre area as having been "abandoned."[3] Hence, *but for* the intentionally disruptive legal action brought by the United States which had been used to apply the Clean Water Act's prohibitions to Defendants' property for the first time in 1987 (Ex. 18, p. 53), and the subsequently imposed

[3] *See* 16 U.S.C. § 3822(b)(1)(G) ("Exemptions – No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances: […] (G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of – (i) the lack of maintenance of drainage, dikes, levees, or similar structures; (ii) the lack of management of the lands containing the wetland; or (iii) circumstances beyond the control of the person."). See also 16 U.S.C. § 3822(b)

ambiguous 1996 Consent Decree, notwithstanding the more permissive provisions of the Food Security Act ("FSA") of 1985 ((16 U.S.C. § 3822(b)(1)(G)), P.L. 99–198, 99 Stat. 1504, Dec. 23, 1985; Federal Agricultural Improvement and Reform Act of 1996 (Ex. 19) and P.L. 104-127, 110 Stat. 888, 988, April 4, 1996) "once a PC, always a PC") (Ex. 20) and corresponding USDA, Corps, (Ex. 21) and joint EPA-Corps regulations (referenced above), the physical condition of the Murphy tract, including its 30-acre area, would have been sufficiently dry before January 1, 1995 to be retroactively considered prior converted croplands during the 1984-1985 temporal period, the same temporal period to which the Restoration Plan was intended to bring the area's hydrologic regime, as the United States' star witness, Jeffrey Lapp, had previously testified.

In summary, by permitting these depositions to move forward, the Court will be enabling the admission of extrinsic evidence that will assist in the resolution of long unaddressed latent ambiguities continuing to plague the Consent Decree's Restoration Plan which have rendered Defendants susceptible to ongoing United States allegations of Consent Decree and CWA noncompliance.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny the United States' new Motion for a Protective Order.

Respectfully submitted,

By: */s/ Lawrence A Kogan*
Lawrence A. Kogan, Esq. (*Pro Hac Vice*)
(NY # 2172955)
100 United Nations Plaza
Suite #14F No.
New York, New York, 10017

Telephone: (212) 644-9240
Fax: (646) 219-1959
Email: lkogan@koganlawgroup.com
Attorneys for Defendants,
Robert Brace, Robert Brace Farms,

Respectfully submitted,

By: /s/ Neal R. Devlin
Neal R. Devlin, Esq. (PA ID No. 89223)
Alexander K. Cox, Esq. (PA ID 322065)
120 West Tenth Street
Erie, PA 16501-1461
Telephone: (814) 459-2800
Fax: (814) 453-4530
Email: ndevlin@kmgslaw.com
Attorneys for Defendants,
Robert Brace, Robert Brace Farms,

1857865.v1