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

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

UNITED STATES' INITIAL REPLY IN SUPPORT OF ITS MOTION TO ENFORCE CONSENT DECREE AND FOR STIPULATED PENALTIES

Pursuant to this Court's Order of February 8, 2017, ECF No. 97, Plaintiff United States of America ("United States") hereby files its initial reply in support of its Motion to Enforce Consent Decree and Stipulated Penalties ("Motion to Enforce"), ECF No. 82.

Introduction

As demonstrated in the United States' opening memorandum, ECF No. 83, Robert Brace and Robert Brace Farms, Inc., (collectively "Defendants" or "Brace") have violated the 1996 Consent Decree ("Decree") by draining, plowing, and planting the very wetlands that the Decree required Defendants to restore and protect. Defendants' Response, ECF No. 101, fails to rebut the United States' argument on the straightforward question before the Court—whether Defendants failed to comply with their obligations under the Decree. Rather, that Response, though chock full of hyperbolic, incendiary, and sophomoric rhetoric, *see* ECF No. 101 at 1-4, ultimately provides nothing more than irrelevant and baseless arguments that fail to justify Defendants' violations of the Decree's clear mandates—mandates that Defendants themselves

agreed to and this Court ordered. Throughout their Response, Defendants accuse the United States of unprofessional conduct, without proffering any evidence of it; re-litigate matters that courts in this Circuit and the Federal Circuit ruled upon long ago; mischaracterize the nature of those rulings; and mislead this Court about the events preceding the United States' filing its Motion to Enforce.[1] Yet nowhere in their Response do Defendants articulate a viable argument to support the position that they have not violated the Decree, ECF No. 83 - Ex. 2. Because the Defendants have, in fact, flagrantly violated the Decree, the Court should grant the United States' Motion to Enforce, order the relief it requested, and require Defendants to pay stipulated penalties and reimburse the United States' costs for pursuing this enforcement action, as required by the terms of the Decree.

Argument

Defendants argue that the relevant wetlands are exempt from government oversight, that their conduct is excusable because the Decree is ambiguous, that the United States authorized Defendants to drain and fill the Decree area, that the United States is equitably estopped from pursuing this matter, and that the United States may not enforce the Decree as a result of broad regulatory inconsistencies that impact wetlands regulations. As the United States demonstrates *infra*, Defendants' positions are unfounded, unsupported, and untenable.

[1] The United States will not retread the historical background of this case here. The United States Court of Appeals for the Third Circuit, *see United States. v. Brace*, 41 F.3d 117, 119-21 (3d Cir. 1994) ("*Brace I*"), *cert. denied*, 515 U.S. 1158 (1995); the United States Court of Federal Claims, *see Brace v. United States*, 72 Fed. Cl. 337, 339-46 (2006) ("*Brace II*"), *aff'd*, 250 F. App'x 359 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1258 (2008); and the United States' brief in support of its Motion to Enforce, *see* ECF No. 83 at 5-9, have set forth the relevant facts more than adequately. Thus, herein, the United States will address only the specific factual inaccuracies Defendants have advanced that bear on issues before the Court.

I. Collateral Estoppel and Law of the Case Bar Defendants from Re-Litigating Issues Related to the Status of the Wetlands Protected by the Decree.

Defendants endeavor to avoid the clear and agreed-upon requirements of the Decree by re-litigating the merits of the underlying 1990 action, which the Third Circuit already considered and rejected. In doing so, Defendants utilize a significant portion of their Response to falsely assert: that they are exempt from complying with the Clean Water Act ("CWA") because the Agricultural Stabilization and Conservation Service's ("ASCS") Swampbuster determination indicated that the area protected by the Decree is "prior converted wetlands," ECF No. 101 at 7-12; that the Third Circuit failed to "address[] the fundamental threshold matter of whether Brace's activities on the property in question qualified as . . . 'prior converted wetlands,'" *id.* at 11; and that "[t]he United States . . . failed to adequately address the legal significance of the Swampbuster determination," *id.* at 16. Even if these issues were somehow relevant to whether Defendants violated the terms of the Decree—which they are not—these issues were litigated and resolved in proceedings in this case that culminated in the Decree. *See Brace I*, 41 F.3d at 124-29. Thus the doctrines of collateral estoppel[2] and law of the case[3] bar Defendants from raising them again now.

That should be the end of the matter. But even if the Court were to entertain Defendants' contentions, they are wrong as a matter of law and fact. First, despite Defendants' assertions,

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[2] "Collateral estoppel, or issue preclusion, 'bars a second or successive litigation of an issue of fact or law that was actually litigated and resolved in an earlier litigation, even if the issue recurs in the context of a different claim.'" *Regan v. First Nat'l Bank of Pa.*, 2017 WL 590285, at *5 (W.D. Pa. Feb. 14, 2017) (quoting *Welch v. Bank of Am.*, 2014 WL 550595, at *6 (W.D. Pa. Feb. 11, 2014)).

[3] "The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Baldinger v. Ferri*, 2016 WL 7377079, at *1 (3d Cir. Dec. 20, 2016) (citations omitted) (internal quotation marks omitted). When acting on remand, as the Court is here, it "'must proceed in accordance with the mandate and the law of the case as established on appeal.'" *United States v. Moreno*, 2016 WL 7178775, at *2 (W.D. Pa. Dec. 9, 2016) (quoting *United States v. Kennedy*, 682 F.3d 244, 252-53 (3d Cir. 2012)).

ASCS classified the protected wetlands as "commenced conversion," and not "prior converted," because conversion had not been completed as of December 23, 1985.[4] *See* ECF No. 101 - Ex. B at 1 (September 21, 1988 determination that "conversion of the wetlands began before December 23, 1985, and will enable [Defendants] to complete the conversion . . . on the converted wetlands without losing USDA benefits."), 4 (identifying field numbers 14 and 15, the Decree-protected wetlands, as converted, not prior converted, wetlands); *see also* ECF No. 55 (Adjudication and Findings of Fact, *United States v. Brace*, Civ. No. 90-229 (W.D. Pa. Dec. 16, 1993) (attached hereto as "Exhibit 1")), at Findings of Fact ¶ 43 ("In the summer of 1988, Brace approached the ASCS in order to gain the status of 'commenced conversion from wetlands' with respect to the site . . . ."). While "prior converted cropland" is excluded from the definition of "waters of the United States," 40 C.F.R. § 230.2, neither "converted wetlands," nor "commenced conversion wetlands" (a subset of converted wetlands), are excluded from that definition or otherwise exempt from CWA Section 404 permitting requirements. *See Brace I*, 41 F.3d at 121, 127 ("The USDA Swampbuster Commenced and Third-Party Determinations form signed by Brace expressly states that '[t]he granting of a commencement . . . *does not remove other legal requirements* that may be required under State or *Federal water laws*.'") (citation omitted) (emphasis added);[5] *see also* ECF No. 101 - Ex. B at 2 ("Note: The granting of a commencement .

[4] The ASCS Determination was issued pursuant to the "Swampbuster" provision of the Food Security Act of 1985, 16 U.S.C. §§ 3801, et seq. That provision denies certain United States Department of Agriculture ("USDA") benefits to farmers who produce an agricultural commodity on converted wetlands, unless such conversion was completed prior to December 23, 1985, and are so designated as "Prior Converted," or conversion had commenced prior to December 23, 1985, and are so designated as "Commenced Conversion."

[5] *Cf. Maple Drive Farms Ltd. P'ship v. Vilsack*, 781 F.3d 837, 847 (6th Cir. 2015) (prior-converted wetland status inappropriate unless conversion complete on or before December 23, 1985); *Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 475 (7th Cir. 2005) (same); *Reichenbach v. U.S. Dep't of Agric.*, 2013 WL 74608, at *1 (S.D. Ind. Jan. 4, 2013) ("A 'prior converted cropland' is a converted wetland where (1) the conversion occurred prior to December 23, 1985; (2) an agricultural commodity had been produced at least once before December 23, 1985; and (3) as of December 23, 1985, the *(continued on next page)*

. . *does not remove other legal requirements* that may be required under State or *Federal water laws*.") (emphasis added). Indeed, the Third Circuit already considered the exact argument Defendants recycle here, holding that the Decree area was a wetland properly regulated under the CWA, that "Brace's activities were unpermitted and unauthorized when they occurred, and the [ASCS] 'commenced conversion' determination provides no basis for an after-the-fact legitimization of those activities." *Brace I*, 41 F.3d at 127.

Furthermore, Defendants' assertions that the area protected by the Decree "was dry," and the drainage work "was complete" by 1985, *see* ECF No. 101 at 7, are directly contrary to Defendant Robert Brace's sworn deposition testimony, the trial stipulations, and the factual findings by this Court, the Third Circuit, and the Court of Federal Claims. *See Brace I*, 41 F.3d at 123 ("The parties have stipulated that the site constituted wetlands at the time of Brace's activities."), 129 ("The evidence establishes that Brace's activities drained the site to convert it from a wetland to a new, non-wetland use" and that those activities continued into 1987); *see also, e.g.*, *Brace II*, 72 Fed. Cl. at 343 ("Between 1985 and 1987, in an effort to further drain his property, Mr. Brace installed tile and rubber tubing beneath the ground and removed various materials that were impeding the flow of water through the various ditches."); Ex. 1, ECF No. 55 at Findings of Fact ¶¶ 4, 33-34 (concluding that the Decree area was a wetland and that in "1986 and 1987, Brace Farms paid for excavation in the [Decree area] and the burying of plastic tubing, sometimes referred to as 'drainage tile,' in an effort to drain the site."); ECF No. 83 - Ex. 10 at 102:16-103:2 (Robert Brace testifying he installed drainage tile in the Decree area between September 1986 and April 1987).

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converted wetland did not support woody vegetation and met certain hydrologic criteria. A 'commenced conversion' is a wetland on which conversion began, but was not completed, prior to December 23, 1985.") (citing 7 C.F.R. §§ 12.2, 12.5).

Having raised these issues before the Third Circuit, the Court of Federal Claims, and the Federal Circuit, and those courts having issued rulings and made factual determinations regarding them (and the Supreme Court of the United States having denied Defendants' Petition for Writ of Certiorari in both instances), Defendants are barred from re-litigating those issues now.[6]

II. Alleged Ambiguity of the Decree Does Not Excuse Defendants' Blatant Violations of the Decree's Clear Requirements.

Although Defendants argue that the Decree is fundamentally flawed and ambiguous, *see* ECF No. 101 at 2, 22-23, that argument is flawed for at least two reasons.

First, Defendants can point to no ambiguity in the Decree that would sanction their draining and filling the very wetlands that are the subject of this litigation and that the Decree required them to restore and protect.[7] *Nowhere* in their Response do Defendants identify what they find confusing about the Decree, explain how they have lost their way after initially achieving compliance with the Decree, or articulate why they would be unable to duplicate the actions that brought them in compliance with the Decree in the first place.

[6] Although irrelevant to the United States' Motion to Enforce, Defendants also repeatedly assert that compliance with the Decree resulted in flooding that rendered their properties useless. *See* ECF No. 101 at 11-12, 14-15. In 2006, the Court of Federal Claims rejected this same argument holding that "in terms of causation, it has not been shown that the flooding is the result solely of the restoration" and "as a factual matter, there is no proof that the area flooded exceeds that which previously was wetlands," *Brace II*, 72 Fed. Cl. at 363, and concluding, in any event, that the properties had not been rendered useless. S*ee id.* at 353.

[7] The "Wetlands Restoration Plan" ("Plan"), incorporated into the Decree by reference, *see* ECF No. 83 – Ex. 2 at ¶ 4, clearly states that "[i]n order to restore the hydrology to the area," Defendants were to disable their drainage tile system, fill in surface ditches, and install a check dam. *Id*. at 7. The Plan also provides Defendants with *explicit* instructions to help them fulfill those requirements. *See id.* at 7-8. The check dam, for example, was to be "constructed of concrete, gabions, or compacted rock" and "one and one-half (1 1/2) feet high, four (4) feet long, and as wide as the tributary bottom." *Id.* at 8. Equally clear and specific instructions are provided for disabling the drainage system and filling the ditches. *See id.* at 7.

Second, even if the alleged ambiguities in the Decree were relevant, Defendants freely entered into the Decree, agreed to abide by its terms, and made no effort in more than 20 years to seek any modification to the Decree. Despite spurious claims to the contrary, *see* ECF No. 101 at 1 ("These directives and restrictions were contained within a deliberately ambiguous and nondescript consent decree the United States had drafted and compelled Brace to execute under duress . . . ."), 10 ("Brace executed the Consent Decree . . . under duress"), Defendants, represented by counsel, negotiated and willingly executed the Decree they now impugn. *Brace II*, 72 Fed. Cl. at 360 (concluding that Defendants executed the Decree voluntarily and rejecting the argument that they were compelled to do so by any outside force). Following execution of the Decree, which this Court found "fair" and "reasonable," ECF No. 83 - Ex. 2 at ¶ 2, multiple courts reviewed and applied it without issue, *see generally Brace II*, *aff'd*, 250 F. App'x 359 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1258 (2008), and Defendants successfully complied with it, *Brace II*, 72 Fed. Cl. at 344 (reviewing the specific requirements of the Decree and Plan and noting that Defendants satisfied them), and continued to do so for the better part of 20 years.[8]

[8] Over those two decades and through significant litigation, Defendants had no problem determining the relevant wetland's boundaries or understanding the Decree's requirements. During that time, they:

(1) stipulated to this Court that the area the Decree protects constituted wetlands, Ex. 1, ECF No. 55 at Findings of Fact ¶¶ 3-4;

(2) opposed the United States' appeal in the Third Circuit, e.g., Brief of Appellees, 1994 WL 16177581, at *1 (3d Cir. July 11, 1994) ("The district court . . . walked the Brace property, including the thirty acre site complained of by the government.") and *9 (describing Brace's activities on the 30 acres);

(3) petitioned the Supreme Court to review of the Third Circuit's opinion, e.g., Petition for Writ of Certiorari, 1995 WL 17048801, at *4 (Apr. 10, 1995) ("By late-1986, Brace had planted rye, oats, and hay on portions of the thirty acre Site.") and *7 ("This case involves a thirty acre site");

(4) initially complied with the Decree, *Brace II*, 72 Fed. Cl. at 344;

(5) appealed the Court of Federal Claims' ruling to the Federal Circuit, e.g., Brief of Appellant, 2007 WL 540753 (Feb. 2, 2007) (describing the remediation measures Defendants took "[c]onsistent with the Consent Decree" and stating that "the 'upland' portions of the Murphy Farm that were not part of the 30-acre site referred to in the Consent Decree were rendered unusable by the Decree."); and

(6) petitioned the Supreme Court to review of the Federal Circuit's opinion, e.g., Petition for Writ of Certiorari, 2008 WL 140513, at *7 (Jan. 7, 2008) ("In order to comply with the Consent Decree, Brace proceeded to remove miles of tile and disassemble the drainage system . . . .") and *20 ("The government required these actions to change the hydrologic regime of the 30-acre wetlands site on the property.").

During that lengthy period of time, Defendants had more than a fair opportunity to move to modify the Decree, but failed to do so;[9] nor have they cited to a sliver of evidence to support the notion that they sought the United States' assistance in modifying it. In fact, the Court of Federal Claims stated that, as of 2006, it was "uncontroverted that Mr. Brace never contacted the EPA, the Corps, any other Federal agency, or even the district court that entered the Consent Decree to complain that the effectuation of the restoration plan was causing his property to flood." *Brace II*, 72 Fed. Cl. at 363. Moreover, in direct contradiction to Defendants' assertions that they "repeatedly contacted the EPA endeavoring to work with them to address the drastic results the Consent Decree had caused (achieved)" and that "[i]t took more than four years, for Brace to convince the EPA to honor its testimony and engage him on the issue of the Consent Decree causing conditions on the property," ECF No. 101 at 14-15; *accord id.* at 20 ("Brace spent years attempting to get the EPA to meet with him to discuss the possibility of modifying the Consent Decree . . . . Ultimately, it took more than four [] years to have the EPA [] visit the site of the Murphy Farm . . . ."), Defendants failed to cite to a shred of evidence to demonstrate that they engaged with the United States between 2006 and January 2011. And even then, as the United States' opening brief explained, Defendants proceeded to blatantly violate the Decree. Defendants' arguments regarding ambiguity and duress are misplaced, irrelevant, and disingenuous and should therefore be disregarded.

[9] Although Defendants argue that the Decree "fails to provide for any procedural mechanism allowing the Parties to modify or adjust any one or more of its terms," ECF No. 101 at 2, it unequivocally sets forth that this Court maintained jurisdiction "for the purposes of enforcing, interpreting, and *modifying* this Consent Decree." ECF No. 83 – Ex. 2 at ¶ 12 (emphasis added); *see* also *Bronze Shields v. City of Newark*, 214 F. Supp.2d 443, 450-51 (D.N.J. 2002) ("[T]he Third Circuit has recognized that a court has inherent power to . . . modify a [consent] decree in response to changed circumstances.") (citation omitted) (internal quotation marks omitted); Fed. R. Civ. P. 60(b)(5) (on motion, party may seek relief from "from a final judgement, ordered or proceeding" if "applying it prospectively is no longer equitable."). Consequently, Defendants' inaction, and not the Decree's terms, was the only impediment to Defendants' moving to amend the Decree over the last 20 years.

III. Defendants Mischaracterize the Events Preceding the United States' Filing its Motion to Enforce.

Throughout their Response, Defendants assert that "[t]he EPA gave specific permission to Brace to perform activities that would result in draining portions of the Murphy Farm. These activities were permitted both on the Murphy Farm, and on the surrounding parcels." ECF No. 101 at 15; *accord id.* at 20-22. But that assertion misses the mark for at least two reasons. First, the record is crystal clear that neither EPA nor the Corps ever authorized Defendants to disturb the 30-acre wetland area covered by the Decree. Second, while neither the Corps nor EPA ever authorized Defendants to clear portions of Elk Creek, any statements made in the field relating to that work are irrelevant because that activity is not the subject of the United States' Motion to Enforce.

In January 2011, more than four years following the conclusion of *Brace II*, Defendants wrote to EPA to request that it "check the court records in an effort to determine the 30-acre boundary of the actual wetland."[10] Letter from Robert Brace to Jeffrey D. Lapp, EPA, at 1 (Jan. 11, 2011) (attached hereto as "Exhibit 2"). Brace followed that up with a February 2011 letter requesting that EPA assist them "in identifying the 30 acre wetland boundary" and "advise me if there is anything that is needed from the EPA prior to going in and cleaning the ditches on my upland properties." Letter from Robert Brace to Jeffrey D. Lapp, EPA, at 1 (Feb. 16, 2011) (attached hereto as "Exhibit 3"). In March 2011, EPA responded, providing Defendants with several maps and aerial photographs that delineated the boundaries of the Decree area. *See* ECF No. 83 - Ex. 11. In April 2011, Defendants contacted EPA by phone to express "a desire to remove beaver dams that were backing water up onto the property and to clean the ditches at various locations . . . ." ECF No. 83 - Ex. 1 at ¶ 14. In May 2011, EPA followed up with a site

[10] *See supra* note 8.

visit to look at the beaver dams. *Id.* at ¶ 15. Although no beaver dams were observed, EPA did observe a "clogged culvert." *Id.* At that meeting, EPA also provided Defendants with an aerial photograph depicting a "polygon outlining the 30 acres" subject to the Decree. *Id.*; E-Mail from Todd Lutte, EPA, to Robert Brace Farms Inc., at 1 (Sept. 12, 2011, 11:59 A.M. EST) (attached hereto as "Exhibit 4"). In October 2011, the Corps informed Defendants that removal of beaver dams "does not require a permit from the [Corps] provided there is no discharge of dredge or fill material to Waters of the United States." ECF No. 83 - Ex. 12 at 1. The Corps further advised Defendants that the Corps would need to complete a jurisdictional determination for the channels and culvert Defendants wished to clean and clear after the beaver dams were breached. *Id.* at 1-2. In May 2012, Defendants responded to the Corps, stating that they had "removed the beaver dams that were creating drainage problems" and requesting that the Corps visit the site to determine whether the channels were within federal regulatory jurisdiction under the CWA. *Id.* at 1.

The Corps and EPA visited Defendants' property in July 2012.[11] ECF No. 83 - Ex. 1 at ¶ 17. At no point did the Corps or EPA inform Defendants that they could discharge material into, drain, or install drainage tile or tubing in, any wetlands. Instead, Brace showed the Corps and EPA "channels that he wished to clear in a different area of the property . . . and asked if those

[11] Without explanation or citation to any support, Defendants falsely characterize this meeting as one designed for the United States "to both observe the condition and discuss with Brace what steps he could take to address the condition that the Consent Order had caused," ECF No. 101 at 15, and erroneously claim that "[t]he purpose of that meeting was to specifically identify the work that Brace could perform to comply with the EPA's testimony that the Murphy Farm was intended to be in the condition that was present in 1984." *Id*. at 20-21. That was not the agenda for the meeting. Rather, as Defendants' own words illustrate, the meeting involved a jurisdictional determination connected not to the Decree, but to "field ditches" at undisclosed locations on Brace's property. ECF No. 83 - Ex. 4 at 1 ("The site visit and meeting was actually held to inspect my field ditches following the removal of beaver dams . . . ."); ECF No. 83 - Ex. 12 at 1 ("I was wondering if you would be available sometime in the near future to revisit my farm to make your jurisdictional determination."); *see also* ECF No. 83 - Ex. 1 at ¶¶ 16-17.

channels could be maintained pursuant to a CWA exemption." *Id.* Brace "indicated that the channels he wished to clear were not tributaries of Elk Creek but had been created by his grandfather decades ago." *Id.* The Corps informed Defendants that *if* that were true, "maintenance activities *might* qualify for an exemption," but that the Corps would need to make a final determination as to those activities at a later date. *Id*. (emphasis added); *see also* ECF No. 83 - Ex. 4 at 1 ("[A]t the end of our meeting in July, you and Mr. Fodse had indicated that formal paperwork indicating your agreement and decision regarding the ditches and agricultural exemption would be forthcoming."). EPA also specifically and repeatedly stressed that Defendants should not perform any work within the 30-acre wetlands protected by the Decree. ECF No. 83 - Ex. 1 at ¶ 17.

In December 2012, the Corps issued a jurisdictional determination regarding the channels Brace claimed were created by his grandfather, informing Defendants that, *inter alia*, the channels were jurisdictional waters, a portion of which were located within the Decree area, and ordering them to cease any activity therein. ECF No. 83 - Ex. 5 at 1-2. Brace responded to this correspondence in January 2013 with a letter to EPA in which he indicated that, after the July 2012 meeting, Defendants "began proceeding with our clean up and maintenance efforts, *taking care to avoid the southern back section from Lane Road (where the 30 acre wetland is located), as you requested*." ECF No. 83 - Ex. 4 at 1 (emphasis added). Brace further assured EPA that "[t]he only work that was performed on the land south of Lane Road was ditch cleaning," and that no work was performed in the 30-acre Decree area. *Id.* at 2. On August 29, 2013, EPA and the Corps responded with a letter to Defendants addressing, *inter alia*, the channels that Brace adduced his grandfather created: "Upon further consideration and review, the Government's field determination was made in error; the reaches of Elk Creek and its tributaries on your property are

not agricultural ditches. Additionally, portions of these channels are within the 30-acre wetland site covered by the 1996 Consent Decree." ECF No. 83 - Ex. 6 at 3.[12] As a result of the error, EPA and the Corps assured Defendants they would face no enforcement action based upon Defendants' reliance thereon. *Id.*

The facts thus make two points clear and both undermine Brace's story. First, and most importantly, as Brace's own letters acknowledge, EPA consistently and repeatedly told Defendants not to disturb the 30-acre wetland area protected by the Decree. Nevertheless, Defendants tiled and drained the wetlands in violation of the Decree's plain terms, and so the United States' Motion to Enforce should be granted.

Second, even if there was confusion or miscommunication over the regulatory status of the "channels" (which turned out to be Elk Creek), it was Defendants who proceeded to perform work in those channels before receiving final written authorization from the Corps and EPA. More importantly, however, that work is not the subject of the United States' Motion to Enforce, and so Defendants' attempts to sow confusion about that issue are much ado about nothing.

IV. Defendants Cannot Establish Grounds for Equitable Estoppel.

Defendants aver that the United States' behavior "gives rise to equitable estoppel against the government" and that discovery will be necessary to develop that argument. ECF No. 101 at 21. They are incorrect on both counts—Defendants cannot, as a matter of law, sustain an equitable estoppel defense, and so discovery is unnecessary.

[12] Although irrelevant to the Court's decision, the United States notes that Defendants incorrectly claim that "[a]fter Brace had completed the work that the EPA specifically allowed, its counsel wrote to Brace advising him '[u]pon further consideration and review, the Governments [sic] field determination was made in error.'" ECF No. 101 at 15. Jeffrey D. Lapp (Associate Director, Office of Environmental Programs, EPA Region Three) and Scott A. Hans (Chief, Regulatory Branch, Corps Pittsburgh District) penned the August 29, 2013 letter to Brace, not EPA's counsel. ECF No. 83 - Ex. 6 at 5.

"A party attempting to estop another private party must prove: (1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment." *Crisci v. United States*, 2009 WL 3055314, at *3 (W.D. Pa. Sept. 21, 2009) (citing *Fredericks v. Comm'r*, 126 F.3d 433, 438 (3d Cir. 1997); *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987)), *aff'd*, 407 F. App'x 573 (3d Cir. 2010). To estop the government, defendants face a much higher bar—they must also demonstrate affirmative misconduct on the behalf of government officials. *Id.* "The additional element reflects the need to balance both the public interest in ensuring government can enforce the law without fearing estoppel and citizens' interests 'in some minimum standard of decency, honor, and reliability in their relations with their Government.'" *Fredericks*, 126 F.3d at 438. (quoting *Asmar*, 827 F.2d at 912). "[E]quitable estoppel claims against the government are disfavored." *Admiralty Condo. Ass'n, Inc. v. Director, Fed. Emergency Mgmt. Agency*, 594 F. App'x 738, 741 (3d Cir. 2014) (citing *Sanz v. U.S. Sec. Ins. Co.*, 328 F.3d 1314, 1320 (11th Cir. 2003)); *accord Castaneda-Cortez v. Sabol*, 2014 WL 2940853, at *5 (M.D. Pa. June 30, 2014) ("Assertions of equitable estoppel against the federal government are . . . rarely successful.") (citations omitted).

Defendants do not (and cannot) identify any misrepresentation, let alone affirmative misconduct, by government officials on which they reasonably relied to their detriment. Even if the Court were to consider the statement the Corps made during the July 2012 site visit, that certain channels *may* be agricultural ditches (later determined to be Elk Creek), that statement cannot be the basis for estoppel with respect to the United States' Motion to Enforce. Critically, Defendants have suffered no detriment resulting from that statement because the United States has neither brought any enforcement action related to the Defendants' work in Elk Creek nor required they replace the sediment they removed therefrom. ECF No. 83 - Ex. 6 at 3 ("Because

your performance of the sediment removal relied on information erroneously provided by the Government, we will exercise our enforcement discretion and forego any further action regarding the sediment removal activities already completed in Elk Creek at this location."). Rather, the United States' Motion to Enforce is based solely on Defendants' unlawful activities in the 30-acre wetlands protected by the Decree (which Mr. Brace, himself, confirmed that EPA advised him to avoid during the July 2012 site visit).[13] *See supra* Argument Part III. Thus, there are no facts in the record that provide a basis for equitable estoppel here.

Nor would discovery disclose any such facts. In this Circuit, one cannot establish affirmative misconduct on the government's behalf based on oral assertions alone. *Pediatric Affiliates v. United States*, 230 F. App'x 167, 170-71 (3d Cir. 2007) (citing *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 65 (1984); *United States. v. St. John's Gen. Hosp.*, 875 F.2d 1064, 1070 (3d Cir. 1989)); *McGinley v. United States*, 2013 WL 5466634, at *7 (D.N.J. Sept. 30, 2013) (quoting *Fredericks*, 126 F.3d 433 at 438; citing *Bachner v. Comm'r*, 81 F.3d 1274, 1282 (3d Cir. 1996)); *Crisci*, 2009 WL 3055314, at *3 (citing *Fredericks*, 126 F.3d 433 at 438; *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992)) and *5 ("Reliance is undermined when it is based on oral advice, unconfirmed by a writing.") (citations omitted); *Grandelli v. U.S. Dep't of*

[13] Even if the Corps' statement was material to the Motion to Enforce, it would still fall short of meriting estoppel for a variety of reasons. First, it was not a misrepresentation, but rather a conditional statement that Defendants were aware required further review. Second, a party cannot sustain an equitable estoppel defense if, as is the case here, the government's statement is the product of inaccurate information provided by the Defendant (that the channels were not a part of or tributaries to Elk Creek). *See Goldman v. Witt*, 1994 WL 905577, at *5 (D.N.J. Dec. 7, 1994). And, finally, the Corps' statement simply does not rise to the level of affirmative misconduct. *See United States v. Boccanfuso*, 882 F.2d 666, 670-72 (2d Cir. 1989) (rejecting estoppel argument for CWA claim based on Corps' mispresenting its jurisdiction and defendant's reliance thereon in placing a riprap); *United States v. Lewis*, 355 F. Supp. 1132, 1141 (S.D. Ga. 1973) (rejecting estoppel argument based on Corps' misrepresentation to developer); *see also, e.g., Admiralty Condo.*, 594 F. App'x at 741 (3d Cir. 2014) ("'[F]acts constituting a specific intent to injury on the part of a government official'" necessary to establish affirmative misconduct.) (quoting *Pratt v. United States*, 50 Fed. Cl. 469, 479 (2001)); *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1009 (9th Cir. 1986) (affirmative misconduct requires showing of a "deliberate lie" or a "pattern of false promises").

Treasury, 2006 WL 3337491, at *3 (E.D. Pa. Nov. 15, 2006). Here, Defendants already possess all the United States' written correspondence about the Decree area, but they do not contend that any of those writings provide a basis for estoppel. Instead, Defendants rely upon a solitary oral statement the Corps proffered during the July 2012 meeting. *See* ECF No. 101 at 21. Consequently, because Defendants already have whatever written correspondence they could conceivably rely upon as a basis for estoppel, and they cannot and have not identified a single supportive writing, estoppel is unwarranted and discovery will not provide any additional basis upon which to alter that conclusion.

Finally, to the extent that Defendants hope to find a basis for estoppel that is relevant to the 30-acre wetland parcel, they cannot do so as a matter of law. In particular, even if Defendants could point to evidence that EPA or the Corps had suggested they could drain and fill the wetlands covered by the Decree, Defendants could not have reasonably relied upon such advice because it would have contradicted the Court's order and the CWA. The Third Circuit has already held that the Decree area is a wetland subject to the CWA and the Decree, which required Defendants to disable their drainage system, clearly states that only this Court can modify its terms. Therefore, Defendants could not establish grounds for estoppel even if federal regulators advised them to drain the wetlands because Defendants never had an independent right to violate the Decree or drain and fill the wetlands under the CWA. *See United States v. One Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 115 F. Supp. 3d 544, 576 (E.D. Pa. 2015) (no detrimental reliance without loss of articulable legal right); *see also United States v. City of Hoboken*, 675 F. Supp. 189, 199 (D.N.J. 1987) ("'[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law.") (quoting *Heckler*, 467 U.S. at 63); *Am. Training Servs., Inc. v. Veterans*

Admin., 434 F. Supp. 988, 1001 (D.N.J. 1977) ("A governmental agency will not be bound by ordinary errors or omissions in the conduct of its employees because there is generally a prevailing public interest in correcting erroneous interpretations of policy. Neither will the government normally be bound by erroneous advice or by entry into an agreement which is not in accordance with the law.") (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)). Accordingly, Defendants cannot establish grounds for estoppel here and their suggested need for discovery must be rejected.

V. Defendants' Claims of Alleged Regulatory "Inconsistencies" Are Irrelevant

Defendants use three full pages of their brief to cite to "changing regulations, guidance documents, publications and Interagency Memoranda of Agreement ('MOAs') addressing CWA compliance," *see* ECF No. 101 at 16-19, to support an argument that regulatory "inconsistencies" bar the relief sought by the United States, *id.* at 24. The purported "changing regulations" and other documents cited by Defendants—many of which pre-date the Decree itself—are irrelevant to the question before the Court: whether Defendants violated the terms and conditions of the Decree by undoing the restoration it required. The relevant regulatory issues, including identification of the applicable statutory and regulatory scheme, were previously decided in *Brace I*. *See* 41 F.3d at 122-29. Therefore, the only document that is relevant to deciding whether Defendants have violated their court-ordered obligations is the Decree itself—the terms of which are as clear and unambiguous as the Defendants' violation thereof.

CONCLUSION

For these reasons, the United States respectfully requests that the Court grant its Motion to Enforce, order the relief requested therein, and enter the Proposed Order attached thereto.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2017, I served the foregoing United States' Reply in Support of its Motion to Enforce Consent Decree and for Stipulated Penalties on the following counsel for Defendants via ECF:

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