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 TO VACATE CONSENT DECREE AND TO DENY STIPULATED PENALTIES

Defendants Robert Brace and Robert Brace Farms, Inc., through their attorneys, file this Memorandum of Law in Support of Motion to Vacate Consent Decree and Injunction and to Deny Stipulated Penalties pursuant to Federal Rules of Civil Procedure ("FRCP") 60(b)(5).

This memorandum and its underlying motion accompanies Defendants' Response and Opposition to the United States' Second Motion to Enforce Consent Decree and for Stipulated Penalties and Defendant's Motion for Relief from Judgment Based on Extraordinary Circumstances pursuant to FRCP Rule 60(b)(6).

Defendants respectfully request that this Court exercise its equitable powers to vacate the Consent Decree in its entirety because of significant changes in factual and legal circumstances and unforeseeable obstacles that have rendered the Consent Decree's continued enforcement inequitable to and unworkable for Defendants. Defendants also respectfully request that this Court: 1) deny the United States Motion to Modify Consent Decree Stipulated Penalties and its request for reimbursement of costs incurred to file the enforcement action and this motion; 2) direct the

United States to reimburse Defendants for all costs associated with the defense of this motion, including attorney and expert fees; 3) to schedule a physical hearing in the event this Court decides, despite overwhelming evidence of United States affirmative misconduct, that the Consent Decree should not be vacated; and 4) to convene contempt proceedings to determine whether the United States should be held in contempt for having perpetrated multiple material violations of the Restoration Plan and Consent Decree in contravention of this Court's Consent Decree Order entered on September 23, 1996, and to consider the appropriateness of imposing civil coercive contempt fines as a deterrent to similar future behavior.

I. The 1996 Consent Decree Must Be Construed as a Contract Using Extrinsic Evidence to Discern the True Meaning and Intent of the Restoration Plan's Latently Ambiguous Provisions

Third Circuit and Pennsylvania law precedents require this Court to construe the 1996 Consent Decree as a contract. "A consent judgment is to be interpreted as a contract, to which the governing rules of contract interpretation apply." *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 148 (3d Cir. 1994). Under Pennsylvania law, "a consent decree is an agreement into which parties enter rather than a judicial determination of matters in controversy, and its terms bind the parties to the decree." *Commonwealth of Pennsylvania v. UPMC*, No. 334 M.D. 2014 (Pa. Commonwlth. 2015), slip op. at p. 24, citing *Dulles v. Dulles*, 85 A.2d 134, 137 (Pa. 1952). *See also Corman v. National Collegiate Athletic Association*, No. 1 M.D.2013 (Pa. Commonwlth. 2013), citing *Lower Frederick Twp. v. Clemmer*, 518 Pa. 313, 328, 543 A.2d 502, 510 (1988). A Consent Decree must therefore be interpreted "to give effect to the parties' 'objective manifestations of their intent' rather than [to] attempt to ascertain their subjective intent." *Griesmann v. Chemical Leaman Tank Lines, Inc.*, 776 F.2d 66, 72 (3d Cir. 1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1009 (3d Cir. 1980)). "A consent decree must be construed as it is written, and not as

it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Harris v. City of Philadelphia*, 47 F.3d 1311, 1350 (3d. Cir. 1995) (citing *United States v. Armour & Co.*, 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)). However, any ambiguities must be interpreted in favor of the party against whom the consent decree is sought to be enforced. *Harris v. City of Philadelphia*, 47 F.3d 1311, 1326 (3d Cir. 1995).

"[T]he interpretation of a contract is ordinarily a matter of state law…" *Zuber v. Boscov's,* 871 F.3d 255, 258 (3d Cir. 2017) (citing *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 468 (2015)). "In Pennsylvania, '[t]he fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties.' Where writing is 'clear and unequivocal,' the intent of the parties is found 'in the writing itself…A contract contains an ambiguity if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" *Indian Harbor Ins. Co. v. F&M Equipment, Ltd.*, 804 F.3d 310, 313 (3d Cir. 2015) (citing *Murphy v. Duquesne Univ.*, 777 A.2d 418, 429 (Pa. 2001)).

Where the terms of a contract are ambiguous the Court as factfinder may "examine all the relevant extrinsic evidence to determine the parties' mutual intent." *Duquesne Light Co. v. Westinghouse Electric Corporation*, 66 F.3d 604, 613 (3d Cir. 1995). *See also Zuber v. Boscov's*, 871 F.3d at 258 (citing *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) ("'When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself.' […] 'When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances.'")). "Ambiguities may be either patent or latent. A patent ambiguity appears on the face of the instrument and arises from the defective, obscure, or insensible language used. *Steuart v. McChesney*, 498 Pa. 45, 444

A.2d 659 (1982). Latent ambiguities arise from extraneous or collateral facts which render the meaning of a written contract uncertain although the language, on its face, appears clear and unambiguous. [fn] Id." *Metzger v. Clifford Realty Corporation*, 327 Pa. Superior Ct. 377, 378 (1984); 476 A.2d 1, 5 (Pa. Super. 1984) (citing *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659 (1982)).

II. Extrinsic Evidence Will Help This Court to Ascertain How the United States Has Exploited the 1996 Consent Decree Restoration Plan's Latently Ambiguous Provisions Against Defendants

1. *The Latently Ambiguous Objective(s) of the 1996 Consent Decree Restoration Plan*

a. The Restoration Plan's Primary Objective is to Deny Legal Recognition to Defendants' Pre-October 1984 Agricultural Ditch Construction (Conversion) Activities

The Restoration Plan expresses its objective in opaque, if not, obfuscated language the true meaning of which can be discerned only through review of the extrinsic evidence. It states that: "The primary object of this plan is to restore the hydrologic regime to the U shaped, approximately 30-acre wetlands adjacent to Elk Creek." (Ex. 1 CD Wetlands Restoration Plan at 1).

Extrinsic evidence reveals that the term "hydrologic regime" is latently ambiguous. Although the United States has claimed it is limited only to the hydrologic regime of the Consent Decree Area, extrinsic evidence shows that it was more likely intended to encompass the hydrologic regime of most of Defendants' 157-acre three tract hydrologically connected farm. The U.S. Fish and Wildlife Service ("FWS") had, in 1987, identified and illustrated pictorially the extensive hydrological integration or interconnectedness of the three adjacent farm tracts and their alleged connection to the regional watershed. (Ex. 2- FWS David Putnam Ltr to Corps, Jim Pabody &

accompanying watershed maps 6-16-87). The United States' recent expert has since reached the same conclusion. (Ex. 3 Robert Brooks DOJ Expert Report, 12-18-17, at pp. 9-15).

Extrinsic evidence also reveals that the plain meaning of the term "restore" includes "to put or bring back into existence or use, and to bring back to or put back into a former or original state: renew."[1] Clearly, the term "restore" concerns a former temporal period and physical state to which the hydrologic regime must be brought back.

Neither the preambular paragraph, nor the body of the Restoration Plan, however, defines or identifies the temporal period or physical state to which the hydrologic regime of the approximately 30-acre "Consent Decree Area" must be restored/brought back. A review of all the extrinsic evidence reveals that the intended temporal period could be October 1, 1984, which is the last date before December 23, 1985, the effective date of the Food Security Act of 1985, on which Defendants had sought and USDA-ASCS had approved cost-sharing (reimbursement) for Defendants' maintenance of a preexisting legally constructed dual-function irrigation/drainage ditch running through the center of the Murphy Farm tract that had suffered recent storm damage. (Ex. 4 - 1984 USDA-ASCS Cost-Sharing Approval Forms). The USDA-ASCS subsequently determined, in September 1988, that the expenditure for such work ($1,008), and other expenditures Defendants had incurred for related work started as early as 1977, evidenced their prior commenced conversion of what is now referred as the Consent Decree Area before December 23, 1985.

The "restore date" could also be October 5, 1984, the effective date of the final Corps regulations revising the CWA Section 404(f)(1)(C) agricultural irrigation ditch construction exemption to also cover certain specified irrigation ditch connections. This regulatory revision

[1] Merriam Webster Online Dictionary, *Restore*, available at: https://www.merriam-webster.com/dictionary/restore.

followed a settlement the United States had reached to resolve protracted litigation with environmental groups. (Ex. 5 - 49 FR 39478, 39482 (Oct. 5, 1984)); (Ex. 6 - NWF Settlement Agreement at para. 22, revising 33 C.F.R. § 323.4(a)(3)); *National Wildlife Federation v. Marsh*, No. 82-3632 (D.D.C. Feb. 10, 1984).

Extrinsic evidence shows, for example, that the Restoration Order incorporated within one of two EPA documents dated July 15, 1987 and entitled "Findings of Violation and Order for Compliance." One of these documents was far more detailed than the other and referred to the October 5, 1984 date within its "Order for Compliance" section. It directed Defendants to:

> "2. a) Restore, in accordance with the attached plan, all wetlands disturbed *since October 5, 1984* by plugging with concrete all main drainage tiles at an excavated break in the pipe. The break shall be aluminum distance of 15 feet from Elk Creek and at a maximum distance of 50 feet from Elk Creek. […] 3. Refrain from any further disturbance of the areas that were naturally vegetated/federally regulated wetlands on or subsequent to *October 5, 1984* in order to enable wetlands to naturally revegetate with the indigenous wetland plant species" (emphasis added).

(Ex. 7 - EPA V/N & OTC, -7-15-87). (Ex. 7A – Short EPA V/N & OTC 7-15-87).

This early Restoration Plan was thereafter enhanced by the FWS in a March 1, 1988 correspondence dispatched by former FWS State College, PA Supervisor Charles Kulp to EPA Region III (Philadelphia) Office Representative James Butch who had been handling the Brace matter. The FWS correspondence was accompanied by draft Restoration Plan maps the FWS had prepared, and it referred more generally to a "restore date" of October 1984 ("to restore all wetlands disturbed *since October 1984*") (emphasis added). (Ex. 8 FWS Charles Kulp Ltr, 3-1-88), (Ex. 9 – Putnam Depo 1992 at 52-55).

Representative Jeff Lapp subsequently became the primary developer/designer of the Consent Decree Restoration Plan with assistance from counsel and other technical staff members. (Ex. 10

Jeff Lapp Depo Testimony 10-2 -17, at 63, 66). He testified under oath in January 2005 that the purpose of the Restoration Plan was to "correct[] the activities that occurred on the [Murphy Farm tract] site "in order to reintroduce the hydrology *as it existed [in…] 1984*" (emphasis added). (Ex. 11 - Jeff Lapp Ct. Cl. Testimony at 525). As Representative Lapp further testified, "[t]he goal of this restoration plan was to restore the hydrologic drive back to this wetland system, and we used a *target date of 1984* […] to remedy those activities which had occurred *from 1984 onward*. […] I recall at the time that the enforcement coordinator […had information…] that the activities *had occurred in 1985 forward*" (emphasis added). (Ex. 11 - Jeff Lapp Ct. Cl. Testimony at 610). Representative Lapp's more recent October 2017 deposition testimony continues to reflect that confusion: "The first line is to restore all wetland disturbance *since October 1984*." (emphasis added). (Ex. 10 - Jeff Lapp Depo Testimony 10-3-17, at 125).

If the hydrologic regime of the approximate 30-acre Consent Decree Area had been restored to its physical state (condition) as of October 1-5, 1984, it would have been properly described as mostly dry. *Brace v. United States*, No. 98-897L (Ct. Cl. 2006), at 5 ("[…] by the end of 1979, the site was dry, with the exception of times of excessive rainfall."). (The property's mostly dry condition was largely attributable to Defendants' construction and maintenance of dual-function irrigation/drainage ditches that had then been exempt under CWA Section 404(f)(1)C), until Aug. 17, 1987. (Ex. 12 - October 9, 1968 Murphy Satellite Image Fig. 4, Ecostrategies Rpt.), (Ex. 13 - June 4, 1977 Murphy Sat Image), (Ex. 14- May 11, 1983 Murphy Sat Image), (Ex. 15 - April 7, 1993 Murphy Sat Image).

EPA's decision to deny the CWA Section 404(f)(1)(C) irrigation ditch construction exemption to constructed dual-function irrigation/drainage ditches like those running through Defendants' Murphy Farm tract, appears not to have occurred until actually much later in time – perhaps, as

late as August 17, 1987. The record reveals that it had likely been derived from a February 8, 1985 EPA General Counsel ("G.C.") memorandum which referred to the Corps 1984 regulations. It stated as follows:

> "Another issue that has been raised is the applicability of [Section] 404(f)(1)(C) to construction of ditches that can serve as either irrigation or drainage ditches. "*The [1984] regulations and preamble do not explicitly address this issue*. However, since the statute clearly does not exempt the construction of drainage ditches,[fn] and the legislative history indicates that limitation was deliberate and important, it follows that dual function ditches[fn] should be considered drainage ditches, i.e., their construction is not exempt" (emphasis added).

(Ex. 16 - EPA GC Memo CWA 404(f), 2-8-85, at 151-152).

Since this February 8, 1985 EPA G.C. memorandum arguably did not rise to the level of an agency policy memorandum or an interpretative regulatory guidance document that could be considered normatively binding, it could not then have been legally bound Defendants. *See, e.g., New Hope Power Company v. United States Army Corps of Engineers*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010) (holding that agency official's memorandum reflecting current agency policy that is normatively binding on regulated community without affording opportunity for public notice and comment violates the U.S. Administrative Procedure Act.).

The first official regulatory guidance document issued by a federal agency on this issue with the potential to have legally bound Defendants was Corps Regulatory Guidance Letter ("RGL") 87-07 developed in cooperation with EPA, which had been issued on August 17, 1987. Although the 1984 regulations (33 C.F.R. § 323.4(a)(3); 40 C.F.R. § 232.3(c)(3)) had failed to address dual-function irrigation/drainage ditches, these agencies, in RGL 87-07, exercised their administrative discretion to determine prospectively that dual-function irrigation/drainage ditch construction activities no longer would be exempted as constructed irrigation ditches under CWA Section 404(f)(1)(C). (Ex. 17 - RGL 87-07 (Aug. 17, 1987), at para. 5.d.). Therefore, if Corps RGL 87-07

indeed served as the legal source of EPA's determination that Defendants' dual-function ditching activities on the Murphy Farm tract in 1987 had violated CWA Section 404, EPA could not have legally invalidated Defendants' ditch construction activities, or Defendants' related USDA-ASCS-approved October 1984 ditch maintenance activities, until the RGL became effective on August 17, 1987.

The record is devoid of evidence showing that EPA had then demonstrated such activities as triggering the CWA Section 404(f)(2) recapture provision, and EPA's original complaint, which alleged violations of unpermitted activities conducted between October 5, 1984 and May 1987, fails to mention the August 17, 1987 date which had shielded such activities with the CWA Section 404(f)(1)(C) exemption. Thus, extrinsic evidence calls into serious question the United States' claim in the current enforcement action that October 5, 1984 rather than August 17, 1987 represents the temporal period to which the hydrologic regime of the Consent Decree Area must be restored.

b. The Restoration Plan's Unstated Secondary Objective Is to Deny Defendants the Ability to Complete Their Prior USDA-Authorized Commenced Conversion of the Consent Decree Area

The Restoration Plan's inclusion of the term "primary" before the word "objective" implies, if not, strongly suggests that there is at least one "other" objective that the United States, as drafter of the Restoration Plan, had intentionally left unstated. Arguably, the United has endeavored to implement the Consent Decree Restoration Plan in a manner that would prevent Defendants from ever resuming and completing their prior commenced conversion of the Murphy Farm tract's 30-acre wetlands now referred to as the Consent Decree Area.

On December 23, 1985, Congress enacted the "Swampbuster" provisions of the Food Security Act of 1985 ("FSA") (Sec. 1222(a)(1), 16 U.S.C. 3822(a)(1)) to preserve agricultural wetlands by

limiting USDA cost-sharing of commenced conversion activities undertaken *after* December 23, 1985. The FSA, therefore, allowed cost-sharing on any such activities undertaken prior to December 23, 1985. (Ex. 18 - Pub. L. 99-198, Dec. 23, 1985, at (Sec. 1222(a)(1), 16 U.S.C. 3822(a)(1)). In September 1987, the USDA promulgated regulations that clarified the legal treatment of pre-December 23, 1985 prior commenced conversion activities which could legally continue only until January 1, 1995. (Ex. 19 - 52 FR 35194, 35197, 9-17-87). In September 1988, the USDA-ASCS determined that Defendants' prior commenced conversion activities on the hydrologically integrated Murphy Farm and Marsh Farm tracts designated, respectively, as "Field 14" and "Field 15" of USDA "Farm 826, Tract 1356," were eligible for cost-sharing consistent with FSA Section 1222(a)(1), because they had been initiated as early as 1977, and had continued up until the FSA's effective date – December 23, 1985. (Ex. 20 - USDA-ASCS Commenced Conversion Docs) The United States disregarded the USDA regulations that had authorized Defendants to continue their conversion activities until January 1, 1995, and it proceeded to recapture such activities under CWA Section 404(f)(2), even though Defendants' May 1987 continued conversion activities had been grandfathered.

The United States previously argued, on the one hand, that since Defendants *had* completed their conversion of such wetland in May 1987 by reducing or impairing reach flow or circulation sufficiently to change its use, CWA Section 404 permitting was required. *See* RGL 87-07, at para. 7.[2] The United States then argued, on the other hand, that since Defendants had not completed

[2] Construction of dual-function irrigation/drainage ditches intended, in part, to convert wetlands prior to RGL 87-07's August 17, 1987 effective date would arguably have been grandfathered from the Corps CWA Section 404 permitting requirement, unless EPA or the Corps were able to establish that such conversion had then been *completed* – i.e., it satisfied the "reduction in reach/impairment of flow or circulation" requirement AND the "change in use" requirement of the CWA Section 404(f)(2) recapture provisions. *See* RGL 87-07, at para. 7. It does not appear that the District Court or the Third Circuit Court of Appeals ever addressed whether or not Defendants' dual-function ditch construction activities qualified for the CWA Section 404(f)(1)(C) irrigation ditch construction permitting exemption, or whether such activities had triggered the CWA Section 404(f)(2) recapture provision. *See United States v. Brace*, 41 F.3d 117, 39 ERC 1823 (3d Cir. 1994).

their conversion by December 23, 1985 consistent with FSA Section 1222(a)(1), they *had not* reduced or impaired reach flow or circulation sufficiently to change its use to complete their commenced conversion of such lands to qualify for the exclusion from CWA jurisdiction under Corps Regulatory Guidance 90-07. (Ex. 21 - RGL 90-07 (Sept. 26, 1990)). In other words, the United States had employed two contradictory legal arguments simultaneously to secure federal jurisdiction of Defendants' Murphy Farm tract.

The record shows DOJ's opposition to the subject of commenced conversions as early as 1992, during the pre-trial discovery period which had followed the issuance of the Corps RGL 90-07 but preceded the issuance of the 1993 EPA-Corps regulation. For example, during the deposition of FWS representative David Putnam, one of two former FWS officials who had previously objected to the USDA-ASCS' grant of the commenced conversion designation to Defendants' Murphy and Marsh Farm tracts, the DOJ counsel expressed the following objection:

> "[T]he 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. 9 - FWS David Putnam Depo 4-7-92, at 45).

The DOJ's opposition to the "commenced conversion" designation was next evident in its more recently filed Motion for a Protective Order pursuant to FRCP 26(c) (ECF No. 168). The United States Motion and its Supporting Memorandum were clearly intended to persuade this Court to preclude discovery on matters that the United States deemed "not relevant to the United States' Motion to Enforce the Consent Decree or any defenses Defendants may have." (ECF No. 169). The United States *inter alia* specifically endeavored to "bar[…] Defendants from seeking discovery regarding *the Consent Decree area's designation under the Food Security Act of 1985*,

16 U.S.C. §§ 3801, et seq. as determined by the United States Department of Agriculture" (emphasis added). (ECF 168). Contrary to what the United States' previous Supporting Memorandum had argued, neither the District Court nor the Third Circuit rulings had addressed the eligibility of a prior commenced conversion for the exclusion from CWA jurisdiction made available by the 1993 jointly issued EPA-Corps regulations noted below. (ECF No. 179, at 44-47, 53-54).

The United States' opposition to the concept of converted wetlands was most recently expressed in a 2013 Corps-EPA Violation Notice (Ex. 22 - Joint EPA-Corps VN 8-29-13, at 4) wherein the agencies stated that, "It also appears that portions of the area subject to the Consent Decree *may have been converted* to agricultural use"). This same notice was later referred to in a January 2016 DOJ-EPA Compliance Order (Ex. 23 - USDOJ/EPA CO 1-11-16 at 2).

From the time of this Court's entry of the Consent Decree as a judgment in September 1996, the United States has endeavored to prevent Defendants from resuming and completing their USDA-ASCS-authorized prior commenced conversion activities covering the Murphy Farm tract. Through its ongoing implementation of this Consent Decree, the United States has denied Defendants the legal opportunity to explore whether those activities could still qualify retroactively for the exclusion from CWA Section 404 jurisdiction that remains available under the subsequently issued 1993 joint EPA-Corps regulations. Pursuant to the August 1993 joint EPA-Corps regulations, prior commenced conversions of wetlands are retroactively treated as excluded from CWA Section 404 jurisdiction and eligible for FSA cost-sharing. (Ex. 24 - 58 FR 45008, 45031-45034 (Aug. 25, 1993)).

Since, however, neither the District Court nor the Third Circuit Court of Appeals had addressed such issue or regulations in their previous rulings, it is doubtful that this Court had been made

aware of this subject matter outside the scope of this enforcement action. Although the United States has refused to discuss with Defendants or this Court the relevance of this regulation, it has nevertheless endeavored, through implementation of this Consent Decree and Restoration Plan, to prevent Defendants from invoking it.

2. *The Latently Ambiguous Scope of the 1996 Consent Decree Restoration Plan 'Hydrologic Regime'*

The Restoration Plan's preambular paragraph states as follows: "The primary objective of this plan is to restore the *hydrologic regime* to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek" (emphasis added). (Ex. 1 – CD, Restoration Plan, Attach A). Neither the preambular paragraph nor body of the Restoration Plan, however, defines the term "hydrologic regime" and how to distinguish the "hydrologic regime" of the approximately 30-acre Consent Decree Area within the Murphy Farm tract from the "hydrologic regime" of the remaining portions, including contour fields, of the Murphy Farm tract and of the Homestead and Marsh Farm tracts comprising Defendants' 157-acre three farm tract hydrologically integrated Waterford Township, PA farm. (Ex. 25 - PaDEP Map – Enclosure 1), (Ex. 26 – Aug. 2015 Ecostrategies Johnson Rpt., at 2-3, Fig. 5 – "Integrated Drainage Network"). The issue surrounding the "scope" of the hydrologic regime necessarily has both physical and legal dimensions. Although EPA representative Lapp had previously testified that "the extent of impact of this restoration was solely on the 30-acre wetland tract" (Ex. 11 - EPA Jeff Lapp Ct. Cl. Testimony, at 610-611), the facts do not bear this out.

a. <u>United States' Intentional Failure to Define Consent Decree Area Boundaries Has Long Impaired Defendants' Farming Activities Beyond the Consent Decree Area</u>

The hydrologic regime of the Consent Decree cannot be accurately determined if the Consent Decree boundaries themselves remain in doubt. The Restoration Plan's (Exhibit A) accompanying hand drawn map (Attachment A), for example, contains the following caveat: "All locations are approximate; Map not to Scale," i.e., it fails to set forth the precise metes and bounds of the Murphy Farm tract's "U-shaped approximately 30-acre wetlands adjacent to Elk Creek." (Ex. 1 - CD Restoration Plan, Attachment A). Extrinsic evidence, however, sheds light on why the United States has failed to establish such boundaries to this day.

EPA representative Lapp recently testified under oath that, although he was the primary EPA official who had designed ("crafted") the Consent Decree Restoration Plan (Exhibit A) with assistance from counsel and other technical staff members, he had not been involved in the creation of the hand drawn map (Attachment A). (Ex. 10 - Jeff Lapp Depo Testimony 10-3-17, at 63, 66, 77-78). EPA representative Lapp's recent testimony under oath also reflects the admission that the United States had failed to perform and still has not performed an on-the-ground engineering survey to confirm the precise metes and bounds of the Consent Decree Area. (Ex. 10 - EPA-Jeff Lapp Depo 10-3-17, at 73).

According to representative Lapp such a survey was not required, because the actual metes and bounds of "the approximate 30-acre area […] was done through the analysis of the wetland upland boundary in concert with aerial photo interpretation which […] is fairly accurate." (Ex. 10 - EPA-Jeff Lapp Depo 10-3-17, at 74-75). In other words, the wetland boundaries of the Consent Decree Area had been performed only by means of a "desktop review" without the benefit of "ground-truthing" based on FWS National Wetland Inventory mapping which is not frequently accurate. (Ex. 27 - Susan Kagel Def. Expert Rpt. 2-21-18, at par. 28). EPA representative Lapp, furthermore, recently testified that the wetlands within the Consent Decree Area had originally been delineated

in 1990, which served as the basis for the United States then asserting enforcement jurisdiction and for the subsequent drafting and execution of the Consent Decree Restoration Plan and accompanying hand drawn map in 1996. He furthermore testified that the Consent Decree Area has not been re-delineated since 1990, even though, as he admitted, soil, vegetation and hydrology can change over time. (Ex. 10 - EPA-Jeff Lapp Depo 10-3-17, at 170-172).

The United States has continued since the Restoration Plan's implementation, and especially since 2009, to exploit the Consent Decree Area's lack of precise boundary measurements to incrementally assert federal jurisdiction over and to deny Defendants' use of increasing portions of their privately owned 157-acre three farm tract hydrologically integrated Waterford Township, PA farm i.e., beyond the Consent Decree Area. The Defendants have experienced great difficulty to ensure that their farming activities, including agricultural ditch maintenance activities on and adjacent to the two bordering upland portions of the Murphy Farm tract and on the nearby Homestead Farm tract, do not encroach on or become point sources of pollution for the Consent Decree Area. The United States, however, has been less than cooperative, in fact, establishing false pretenses as the trigger for the Consent Decree and CWA violation actions currently before this Court (1:90-cv-90-229 and 1:17-cv-00006).

The United States and its experts have continued to ignore the close physical proximity and hydrological and hydraulic integration of the surface water and subsurface drainage tile networks shared by Defendants' three Waterford Township, PA farm tracts (Ex. 28 - Edwards Expert Report 12-17). As discussed below, the extrinsic evidence reveals a sufficient basis for this Court to conclude that the referenced expert report's omission of any evaluation of the Murphy Farm tract hydrology was intentional to avoid addressing the significant impact caused to that hydrology by the United States' unilateral material modifications to the check dam's location and design. (Ex.

50 - Edwards Depo 2-21-18, at 10, "the presence or absence […of the features of the Restoration Plan…] was not a factor in the analysis that I performed.") It is for this reason that, Defendants have had no choice but to request additional scientific discovery time from this Court for its recently retained engineers to demonstrate such critically important linkages (ECF No. 208) which would reveal how the United States' implementation of the Consent Decree Restoration Plan, especially the relocation and overbuilding of the check dam, has been intended to impact far beyond the approximately 30-acre Consent Decree Area.

As the result of such United States conduct, the Consent Decree Area and other portions of Defendants' 157-acre three-farm tract hydrologically integrated farm have been periodically inundated and flooded at the surface and subsurface levels. This has effectively extended the Consent Decree Area's already imprecise physical boundaries, and to deprive Defendants of many years of crop harvest revenues and their constitutionally protected right to use their private property to earn a living by farming. Therefore, this Court must vacate this Consent Decree to halt the United States' ongoing effort to assert increasing CWA regulatory jurisdiction and control over Defendants Waterford Township, PA farm.

b. United States' Intentional Over-Implementation of Restoration Plan Drainage Tile and Check Dam Features Has Long Impaired Defendants' Farming Activities Beyond Consent Decree Area

i. United States Over-Implementation of Drainage Tile Removal

Task 1 of the Consent Decree Restoration Plan calls for excavation of three sets of two parallel trenches to a depth of five (5) feet at each of three specified locations. "The first set shall be located parallel to the western side of Elk Creek (marked as 'Set 1' on Attachment A." "The second set shall be located parallel to the southern side of […] 'unnamed tributary A'(marked as 'Set 2' on Attachment A)." "The third set shall be located parallel to the northern side of […]

'unnamed tributary B' (marked as 'Set 3' on Attachment A)." (Ex. 1 - CD Restoration Plan at 1(a)).

The Restoration Plan also assigns a distance for each such trench from the tributary and from one another. It requires the first trench in each of three sets of trenches to be "located at a distance of twenty five (25) feet from the bank of the referenced waterway." It requires the second trench in each of the three sets of trenches to be "located at a distance of fifty (50) feet from the first trench (a total of seventy five (75) feet from the bank of the waterway." (Ex. 1 - CD Restoration Plan at 1(b)).

The Restoration Plan, however, does not assign a fixed length to any of the three sets of trenches described above, which may vary from trench to trench depending on the discretion of "the EPA or its representative." EPA was required to exercise its discretion to ensure that each of the excavated trenches was long enough "to intercept the drainage tubes located in the wetlands." This, presumably, meant ALL drainage tubes located in the Consent Decree Area. The Restoration Plan also stated that when a drainage tube was intercepted during excavation of each of the trenches, "a twenty five (25) foot length of the drainage tube shall be removed." "Upon removal of all intercepted drain tile, the area shall be inspected by EPA (or its representative)," and evaluated for approval, again, at such person's discretion. Once inspected and approved, the trenches were to be filled in with the excavated soil and the drainage tile disposed of. (Ex. 1 - CD Restoration Plan at 1(c)).

Task 1 of the Restoration Plan, however, does not discriminate between the types of ditches that had been previously constructed, i.e., whether they had qualified for the CWA Section 404 exemption from Corps permitting, for purposes of determining whether the drainage tile placed within them should also be CWA Section 404-exempt or should be removed. Rather it directed

the removal of all drainage tile. In other words, the United States first failed to properly recognize whether the previously installed drainage tile had been placed into a dual-function irrigation/drainage ditch that had qualified for the irrigation ditch construction exemption available under CWA Section 404(f)(1)(C) until August 17, 1987. It then failed to accord that drainage tile similar exempt treatment.

Former USDA-SCS representative Lewis Steckler testified under oath that he was the sole United States representative present to oversee the Restoration Plan's implementation on December 23-24, 1996, and that it was his job to know whether the Restoration Plan had been followed properly. "Yes. They wanted to be sure it was completed to the – whatever they deemed necessary to undo the drainage that was done." (Ex. 29 - Lewis Steckler Depo Testimony 11-30-17, at 81). Former representative Steckler had then been present at the request of officials from the FWS State College, PA offices and the U.S. Department of Justice ("DOJ"), given his proximity to the Brace Farm having then served as a District Conservationist for the USDA SCS/Natural Resource Conservation Service ("NRCS") in Erie County. (Ex. 30 - Lewis Steckler Ct. Cl. Testimony 1-13-05, at 718-719), (Ex. 29 - Lewis Steckler Depo Testimony 11-30-17, at 4, 77).

Former representative Steckler testified that, during the two-day period, he had taken his camera and had "documented the event on film." He also described numerous photos he had taken of the excavated trenches and removed drainage tile. Several of these pictures had been taken from Greenlee Road and further inland on the Murphy Farm Tract, (Ex. 30 - Lewis Steckler Ct. Cl. Testimony 1-13-05, at 720-721, 725-729), (Ex. 29 - Lewis Steckler Depo Testimony 11-30-17, at 74, 77-80). Presumably, these were photos of the two sets of excavated parallel trenches adjacent to "unnamed Tributary A" and unnamed Tributary B. Former representative Steckler also

testified that he had taken photographs of the trench excavation and tile removal work that had been performed closest to South Hill/Lane Road adjacent to Elk Creek. (Ex. 30 - Lewis Steckler Ct. Cl. Testimony 1-13-05, at 725-726). The United States, however, has failed to turn over to Defendants any of these photographs during the recently completed non-expert discovery period.

Furthermore, former representative Steckler testified that, based on his knowledge at the time, "the restoration plan was to turn that particular 30-acre site that was referred to in the restoration plan […] to the water conditions before up to 1984" – i.e., to restore the property back to 1984. (Ex. 30 - Lewis Steckler Ct. Cl. Testimony 1-13-05, at 729, 753). He also testified that there actually were drainage ditches that had been *constructed* in the approximate 30-acre wetland area – i.e. the Consent Decree Area – on Defendant Robert Brace's Murphy Farm tract *before 1984*, and that he thought "some of them" had been *filled in* pursuant to the Restoration Plan. (Ex. 30 - Lewis Steckler Ct. Cl. Testimony 1-13-05, at 752, 754-755).

Former representative Steckler, moreover, testified that he had "had a copy of the restoration plan" (Ex. 30 - Lewis Steckler Ct. Cl. Testimony 1-13-05, at 722) and that he had "probably glanced" at the hand drawn map accompanying the Consent Decree to evaluate whether the work had been done properly. (Ex. 29 - Lewis Steckler Depo Testimony 11-30-17, at 78-79). Yet, former representative Steckler also testified under oath that while he had then been present to observe the Restoration Plan implementation work, neither he nor the USDA had officially signed off on ("approved") it – i.e., had certified that the Restoration Plan's implementation work had been performed properly – since he "had no input into that at all." (Ex. 29 - Lewis Steckler Depo Testimony 11-30-17, at 81-82). "I was the closest government employee to go and document it, that was actually done, because somebody was going to have to drive State College or Philadelphia and they go clearance through my State office for me to do it." *Id*.

Former USDA representative Steckler was well aware of and later recalled that some ditches constructed and containing installed drainage tile prior to August 17, 1987 had been removed during the United States' December 1996 Consent Decree Restoration Plan implementation. In fact, he testified that he "didn't keep track of every ditch that was filled out, especially if we [USDA] didn't have anything to do with it," presumably referring to ditches excavated and drainage tile installed at Defendants' expense *without* USDA cost-sharing in October 1984. (Ex. 30 - Lewis Steckler Ct. Cl. Testimony at 753-754), (Ex. 31 - USDA-ASCS Oct. 1984 Cost-Sharing Approval Forms). Although he had been present in December 1996 to "[t]o document the removal of drainage tiles and a couple of ditch blocks, [and to observe…] where they blocked off the drainage ditches" (Ex. 29 - Lewis Steckler, Depo Testimony 11-30-17, at 77), former representative Steckler was less than careful to ensure that Defendants' legally grandfathered self-financed prior commenced conversion work had been preserved and protected from the Restoration Plan implementation consistent with applicable relevant law and regulations.

The United States had more than likely directed former representative Steckler to ensure that all drainage tile, including drainage tile installed in constructed dual-function irrigation/drainage ditches qualifying for the CWA Section 404(f)(1)(C) exemption from Corps permitting until August 17, 1987 were cut and removed to teach Defendants a lesson. For this reason, this Court should conclude that Task 1 of the Restoration plan had been <u>intentionally over-implemented</u> at Defendants' expense.

ii. United States Over-Implementation of Check Dam Installation

Task 3 of the Consent Decree Restoration Plan directed the Defendants to install a check dam "in unnamed tributary A at the location indicated on Attachment A." (Ex. 1 – CD, Restoration Plan, Attach A). Attachment A depicts the location of the check dam as being near "Maple Trees"

no longer present on the western side of the Murphy Farm tract just to the west of the highest point of the red hatch-marked area at the bottom of the "U," and just below the "47-" of the Parcel ID# of the Murphy Farm Tract as shown on the "PADEP (1998) "ENCLOSURE 1" map. (Ex. 25 - PADEP Enclosure 1 Map). As the Affidavits of Robert, Randall and Ronald Brace state, a comparison of these two maps with the GPS map recently developed by Defendant's contractor, Centerra, Co-oP, reveals that the United States had unilaterally changed the location of the check dam at the time it was installed without first securing Defendants' and this Court's written approval, in *flagrant* violation of the Consent Decree.

Defendants have compared the GPS coordinates taken of the location where the check dam should have been placed per the Restoration Plan Task 3 specifications, with the GPS coordinates of where the check dam had actually been installed on December 23-24, 1996. They have reasonably concluded that the United States directed the check dam to be moved to a new location that is approximately several hundred yards (four hundred sixty (460) feet) to the east of the area depicted on Attachment A, near a significant curve and elevational drop in the ditch. (Ex. 32 - Affidavit of Randall Brace and Exhibits), (Ex. 33 - Affidavit of Ronald Brace and Exhibits). This new location is also much closer to the Murphy Farm tract's larger eastern fields where twenty-five (25) foot sections of most, if not, all of the pre-August 17, 1987 installed drainage tile lines had been cut and removed per Restoration Plan Task 1. The Court may reasonably conclude that this location was chosen because it would optimize the check dam's ability to inundate and flood at the surface and subsurface levels a much greater portion of the Murphy Farm tract's eastern and northern fields than the check dam would have been able to achieve had it been installed consistent with Restoration Plan specifications. As discussed below, however, the United States' unilateral and undisclosed modification of the check dam's location was intended, along with other unilateral

and undisclosed modifications to the check dam's physical dimensions to impose a maximum adverse impact on Defendants' 157-acre three farm tract hydrologically integrated Waterford Township, PA farm.

Task 3 of the Consent Decree Restoration Plan also describes the dimensions of the check *dam* as follows: "This *dam* shall be one and one-half (1 ½) feet high, four (4) feet long, and as wide as the tributary bottom" (emphasis added). It further states that "[t]he *dam* shall be constructed of concrete, gabions, or compacted rock" (emphasis added). (Ex. 1 – CD, Restoration Plan, Attach A). The Consent Decree Restoration Plan provides no photograph or sketch of the dam's design to accompany this description (Ex. 34 - Randall Brace Depo, Def. & US counsels' exchange at 32-33). Apparently, however, there exists a government photograph(s) of "the check dam that was indicated in the restoration plan" which the United States has failed to hand over to Defendants during the recently completed discovery period. Former USDA representative Steckler previously testified about the photograph(s) he had taken. (Ex. 30 - Lewis Steckler Ct. Cl. Depo, at 722, 728). The Consent Decree Restoration Plan, furthermore, does not state whether concrete blocks as opposed to solid concrete would be acceptable to fulfill the check dam requirements. As discussed below, the United States and its agent, Lewis Steckler, exploited these latent ambiguities to the detriment of Defendants as is discussed below.

The United States exhibit accompanying the Memorandum of Law Supporting Motion to Enforce Consent Decree and Stipulated Penalties (ECF No. 207) sets forth a photographic image of the actual check dam, as of May 20, 2015, during a relatively drier time of the year when it was not submerged under water. (Ex. 35 - 5-20-15 EPA Photo #12 EPA 0001114). That image depicts three concrete blocks arranged in a relatively parallel but somewhat overlapping formation that

appears to utilize the length of two of the three blocks positioned somewhat corner-to-corner to roughly represent the actual width of the dam.

The recently executed and notarized affidavits of Robert, Randall and Ronald Brace set forth the actual measurements of these three concrete blocks, the approximate width of the main ditch at the current water's edge and the approximate width of the channel bottom, and the approximate actual height and length of the dam. Their affidavits are accompanied by GPS-referenced photographs that reveal the components of the check dam as they appear on April 2, 2018 and April 9, 2018. (Ex. 32 - Affidavit of Randall Brace and Exhibits), (Ex. 33 - Affidavit of Ronald Brace and Exhibits). The check dam components, but for being partially submerged in water and ensconced in sediment, are likely in the same position in which they appeared when installed in December 1996, if not also during the United States' May 20, 2015 onsite visit to Defendants' farm.

The actual height of the concrete blocks measures approximately twenty-four to twenty-five (24-25) inches, which is approximately *one-half (1/2) foot or six (6-7) inches taller* than the Consent Decree Restoration Plan Task 3 check dam specification of one and one-half (1 ½) feet or eighteen (18) inches high. However, since one of the blocks six (6) foot in length comprising the width of the dam had been placed entirely on the side of the ditch at a markedly higher elevation than the ditch bottom, the actual working height of the dam has been much higher than the one and one-half foot (1 ½) height dimension the Restoration Plan requires.

In addition, the actual width of each of the concrete blocks is twenty-four and one-half (½) inches wide. Furthermore, the actual length of the *dam* measured from the perspective of the channel (represented by the aggregate of the widths of each of the three concrete blocks lying side by side in the scattered formation in which they now appear) is approximately six (6) feet or

seventy-two to seventy-three (72-73) inches (twenty-four (24 ½) inches wide x 3), which is approximately two (2) feet or *twenty-four (24) inches longer* than the Consent Decree Restoration length specification of four (4) feet or forty-eight (48) inches long.

The recently executed and notarized affidavit of Defendant Robert Brace recalls that the width of the tributary bottom which Step 3 of the Consent Decree Restoration Plan required to be used as the measurement of the width of the check dam at the time of installation was approximately four (4) feet. In Mr. Brace's opinion, since the length of each of the concrete blocks recently measured is six (6) feet, even one of the blocks when set lengthwise across the width of the tributary bottom would have *exceeded the tributary bottom's natural width by approximately two (2) feet and overlapped a portion of its side or bank*. Alternatively, the tributary bottom would have required excavation to accommodate the six (6) foot length of the concrete block of which there is no demonstrative evidence yet proffered by the United States. Mr. Brace is concerned about the real possibility that two of the three concrete blocks had been intentionally placed corner to corner, unbeknownst to him with USDA representative Steckler's prior approval, so that they, together, measured an aggregate length of twelve (12) feet spanning across *both* the width of the tributary bottom *and* across one of the tributary sides – *a full eight (8) feet more than the four (4) feet Task 3 of the Restoration Plan had required for the dam's overall width*. According to Mr. Brace, a check dam with an effective width spanning two levels – tributary bottom and tributary side – would certainly have withheld a great deal more of waterflow than would a dam naturally measuring only four (4) feet wide at the tributary bottom.

The United States has failed to mention that the check dam was installed with former USDA representative Steckler's informal approval in implementation of Task 3 of the Restoration Plan on December 23-24, 1996, during the annual wet season and a documented precipitation event

(Ex. 30 - Steckler Ct. Cl. Depo, at 719, 725-726, discussing how it had rained during the evening of the December 23). The aggregate widths of the three roughly parallel but overlapping concrete blocks had been utilized as the "length" of the check dam (from the water level perspective), while the roughly identical height of the three concrete blocks lying roughly side-by-side had been utilized as the "height" of the check dam. Two of the three blocks positioned lengthwise somewhat corner-to-corner across the breadth of the channel, meanwhile, had been utilized as the "width" of the dam spanning approximately twelve (12) feet across both the channel bottom and one of the channel sides. (Ex. 35 - 5-20-15 EPA Photo #12 EPA 0001114).

The United States also has failed to mention that the check dam had been installed along Defendants' main ditch (running horizontally across just below the center upland contour field of the Murphy Farm tract) where there is a marked change both in the direction and depth of the channel causing flowing waters to cascade downward as they pass through the area from east to west. The record reveals, furthermore, that this was precisely the location at which Defendant Robert Brace had undertaken pre-October 5, 1984 agricultural ditch maintenance repairs to correct storm-related erosion damage to the ditch he had previously begun to convert, for which the USDA-ASCS had provided reimbursement of $1,008 ("cost-sharing") in July 1984, and had subsequently determined in September 1988 to constitute part of the demonstrable evidence of his pre-December 23, 1985 "commenced conversion" of the Murphy Farm tract consistent with the Food Security Act of 1985. (Ex. 31 1984 USDA-ASCS Approval Forms ACP 245, PA-209). (Ex. 19 - Sept. 1988 ASCS Commend Conversion Docs). As Defendants will show in their accompanying FRCP 60(b)(6) motion, the FWS had most strenuously opposed the characterization of this repair and endeavored to disrupt and nullify the inclusion of this expense as part of the FWS' effort to disrupt and nullify the USDA-ASCS' commenced conversion determination.

According to former representative Steckler, the check dam's placement at this location was intentional and the modified design specifications were "deemed" necessary, as a matter of administrative discretion, to prevent channel erosion:

> "[T]he check dam was to correct a change in a channel where part of the channel was deeper than another part, and they were afraid this was going to be a source of erosion in the ditch, so that the check dam was installed to allow the water to flow over this point without eroding a lot of the ditch that was already there."

(Ex. 30 Steckler Ct. Cl. Depo, at 728).

As the result, the actual check dam installed was measurably larger – two (2) feet longer, two (2) or more feet higher, and anywhere from two (2) to eight (8) feet wider – than what the Consent Decree Restoration Plan specifications had called for. In addition, it had been moved (repositioned) several hundred yards (approximately 460 feet) east of where the Restoration Plan's Attachment A hand drawn map had specified.

Neither the United States or its former representative, Lewis Steckler, however, has yet informed this Court of the Government's material unilateral modification to Task 3 of the Restoration Plan *in flagrant violation of the Consent Decree*. The United States well knew how these added material modifications to the check dam's original Court-approved dimensions and the material modification of the check dam 's original Court-approved location would have increased the check dam's carrying capacity and its ability to substantively diminish the hydraulic and hydrologic flow of water not only through the Consent Decree Area, but also throughout the Defendants' entire 157-acre hydrologically integrated Waterford Township, PA farm.

These United States unilateral modifications to Task 3 of the Restoration Plan, like the United States' over-implementation of Task 1 of the Restoration Plan, have since had a lasting adverse impact on Defendants' ability to exercise their constitutionally protected right to utilize their four

generation 157-acre three farm tract hydrologically integrated Waterford Township, PA farm to earn a living by farming. (*See* Defendants' Response and Opposition to ECF No. 206 and ECF No. 207), (ECF 156)). Thus, affirmative Government misconduct certainly appears to be ongoing phenomenon since the earlier United States actions during 1989-1990 that successfully disrupted, thwarted and nullified the USDA-ASCS' twice-determined "commenced conversion" of the Murphy Farm tract's approximate 30-acre wetland, which Defendants will address in detail in their accompanying FRCP 60(b)(6) Motion for Relief From Judgment Based on Extraordinary Circumstances.

c. United States Intentional Failure to Address Additional Impacts of Known Natural/Manmade Phenomena Has Long Impaired Defendants' Farming Activities Beyond Consent Decree Area

The United States has long known, both prior to and following the Consent Decree's execution and implementation, about the recurring presence (nuisance) of beaver dams on Defendants' 157-acre three farm tract hydrologically integrated Waterford Township, PA farm. (Ex. 36 - FWS Charles Kulp Ltr to Corps Col. Clark, 5-11-87, at 2), (Ex. 37 - Corps Col. Clark VN 7-23-87), (Ex. 9 - FWS David Putnam Depo 4-7-92, at 33-34), (Ex. 38 - EPA Todd Lutte Depo 10-3-17, at 19, 23, 29-30, 33, 66), (Ex. 39 - EPA Todd Lutte Email to Brace 9-12-11), (Ex. 10 - EPA Jeff Lapp Depo 10-2-17, at 59-60, 113-114 (pre-Consent Decree), 115), (Ex. 40 - Corps Mike Fodse Depo 10-6-17 at 16, 21), (Ex. 41 - Corps Mike Fodse Email 10-7-11), (Ex. 42 - Corps Scott Hans Depo 10-6-17 at 32, 50, 52-54). *See also Brace v. United States*, No. 98-897L (Ct. Cl. 2006) at p. 32 (citing "evidence, including testimony and earlier deposition statements by Mr. Brace, that flooding of this property ha[d] occurred in the past, at times attributable to presence of beaver dams."). Although EPA representative Jeff Lapp had been aware of the presence of such beaver dams he and the EPA had failed to consider their potential and actual impacts on Defendants' farm

when developing the Consent Decree Restoration Plan. (Ex. 10 - EPA Jeff Lapp Depo 10-2-17 at 115). Presumably, had representative Lapp conferred with USDA field experts, he would have quickly learned how beaver dams present on a farm can create havoc. Former USDA-SCS representative Edward Lewandowski, who previously served as a drainage tile technician on Defendants' Waterford Township, PA farm, recently testified that if a watercourse becomes dammed up by beavers, it could have an effect on the tile drainage system to the extent sediment builds up in the tile drainage outlets. (Ex. 43 - USDA Lewandowski Depo Transcript 11-29-17, at 98).

The United States has long known, both prior to and following the Consent Decree's execution and implementation, about the status of two Elk Creek-related clogged culverts – one located at the intersection of Sharp and Greenlee Roads, and the other located under South Hill/Lane Road. (Ex. 38 - EPA Todd Lutte Depo 10-3-17 at 19-22, 28, 30-31, 37, 47-48, 57-59, 67, 152), (Ex. 9 - EPA Jeff Lapp Depo 10-2-17 at 50-52 56, 58 and 101 (pre-Consent Decree)), (Ex. 11 - EPA Jeff Lapp, Ct. Cl. Testimony at 662-663), (Ex. 40 - Corps Mike Fodse Depo 10-6-17 at 117-119, 121, 137), (Ex. 42 - Corps Hans Depo 10-6-17 at 50-51, 53). Although EPA representative Jeff Lapp had been aware of the presence of a clogged culvert on Lane Road as far back as 1990, he and the EPA had failed to consider the potential and actual backwater impacts upon Defendants' farm caused by blockages in either or both of these downstream culverts when developing the 1996 Consent Decree Restoration Plan. (Ex. 10 - EPA Jeff Lapp Depo 10-2-17, at 107-108, 112).

EPA representative Jeff Lapp previously testified under oath that, to the best of his knowledge, no EPA U.S. government employees had gone back, between 1996 and January 2005, to see whether the Consent Decree Wetland Restoration Plan had been functioning as intended. (Ex. 11 - EPA Jeff Lapp Cross Testimony Ct. Cl. at 676-679). He also testified that, if EPA were to go

back for such purposes they would look only to examine the root cause of a problem, would not examine an otherwise known factor(s), together with an element of the Restoration Plan, e.g., the check dam, that could be exacerbating or substantially contributing to the problem, and would not actually assist Defendants in making physical modifications to the Consent Decree's Wetlands Restoration Plan that would eliminate its unintended consequences. (Ex. 11 - EPA Jeff Lapp Cross Testimony Ct. Cl., at 679). Representative Lapp previously testified, moreover, that if Defendants had informed EPA that the Restoration Plan had caused water, soil and plants to migrate into areas beyond the Murphy Farm tract's 30-acre Consent Decree Area to uplands that were not previously wetlands, EPA "would have to work with [them]," and together with the other federal agencies involved they would need to consider that as other than a normal circumstance and decide whether to restore the uplands or to re-delineate those uplands as wetlands. (Ex. 11 - EPA Jeff Lapp Cross Testimony Ct. Cl., at 685-686). The extrinsic evidence, however, reflects otherwise.

As Defendants' accompanying Response/Opposition to United States Motion to Enforce and Stipulated Penalties discusses, on multiple occasions since 1998, but especially since 2006, Defendants had repeatedly requested authorization from the United States to: 1) to remove various beaver dams that reappeared in Elk Creek and its tributaries north of Lane Road adjacent to the Marsh Farm tract and upstream therefrom south of Lane Road within and beyond the Consent Decree Area; 2) remove or adjust features of the check dam installed on the Murphy Farm tract; 3) to clean the agricultural drainage ditches and tile drainage systems clogged with vegetation and debris on the Murphy and Homestead Farm tracts; 4) to remove beaver dams located on the Murphy and Marsh Farm tracts; and 5) to clear the two clogged culverts – one located under Lane Road between the Murphy and Marsh Farm tracts – and one located within a 1978-PennDOT-

constructed bridge situated at the north end of the Marsh Farm tract at the intersection of Sharp and Greenlee Roads.

The corrugated steel Sharp Road Culvert is located at 41°58'59.5"N 80°02'49.2"W, roughly 1,800-2,000 feet NNW of the Lane Road Culvert. The Sharp Road Culvert measures approximately 79-84 inches in diameter including a concrete and riprap base liner measuring 12-24 inches high which extends approximately 16 feet upstream of the inlet and approximately 12 feet downstream of the outlet. (Ex. 28 - Edwards Expert Report 12-17 at 21, App. D at 2 of 3, App. G), (Ex. 26 - Ecostrategies Johnson Anecdotal Report 8-15 at 3). "[T]he top of the concrete at the invert of the Sharp Road Culvert (inlet side or east side) is 1.75 feet higher than the invert on the Lane Road culvert (outlet side or north side) which is located upgradient. In other words, the concrete fill in the Sharp Road Culvert created a dam that backed up water resulting in 1.75 feet of standing water for more than 1,800 feet up to the Lane Road Culvert and beyond." (Ex. 26 - Ecostrategies Johnson Anecdotal Report 8-15, at 3, App. C, Photos 1-4). Each of Defendants' requests described above effectively constituted a request to modify the Consent Decree to make it workable for them to which the United States subsequently failed to consent.

Although Defendants had been unaware until shortly before this filing of the United States' prior unilateral modification of the Restoration Plan's Task 3 specifications, it has remained fully aware of how the United States had drafted Restoration Plan Task 1 in apparent total disregard for Defendants' prior legal right to the CWA Section 404(f)(1)(C) exemption. The United States, at least initially, had responded positively to Defendants' requests for authorization to engage in CWA Section 404-exempt agricultural ditch maintenance activities within the Consent Decree Area. This occurred after its representatives had observed firsthand inundation, flooding and sediment buildup within and beyond the Consent Decree Area during their July 24, 2012 onsite

visit to Defendants' farm. The United States, however, retracted and repudiated that authorization shortly thereafter, characterizing the previously authorized agricultural ditch maintenance activities, including the excavation of ditches, repairing of drainage tiles and clearing of the adjacent areas of debris in Elk Creek and its associated tributaries and reaches, as CWA Section 404 non-exempt violations. The United States has since squarely refused to agree to any modification of the Restoration Plan to make it more workable for Defendants, because, in its view, the Restoration Plan is operating "as intended."

As the result of the United States' disavowed prior authorization and related affirmative misconduct, portions of each of the three properties located on Defendants' 157-acre three farm tract hydrologically integrated Waterford Township, PA farm outside the Consent Decree Area continue to be subject to ongoing periodic surface and sub-surface inundation and flooding which has resulted in property damage and significant lost crop harvest revenues. In addition, Defendants have been denied their constitutional right to utilize their private property on other portions of their hydrologically integrated farm to earn a living in their chosen profession of farming. (ECF No. 156). *See Burney v. Young*, 133 S.Ct. 1709 (2013) *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (holding that "the Privileges and Immunities Clause protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling'").

III. The 1996 Consent Decree Must be Vacated Due to Significant Legal and Factual Changes in Circumstances and Unforeseen Obstacles that Have Rendered its Continued Enforcement Inequitable and Unworkable

During the parties' first status conference convened before this Court, the Court emphasized the need to find "some middle ground […] whereby we keep Elk Creek clean and Mr. Brace can farm his land." (Ex. 44 - *United States v. Brace*, No. 90-229 Status Conf. 4-7-17 at 15). According

to the Court, "the right answer in this case may not be a decision on the current Consent Decree[;] it might be to try to find a better way forward." *Id*., at 17). "Let's try to go about this in a way that will satisfy the regulations that [government is] sworn to uphold and to give this farmer some relief from government interference." *Id*., at 19.

Defendants agree with this Court's effort to remain fair minded; however, it is abundantly clear from the record that the Consent Decree as designed and implemented by the United States has overly and unduly interfered with Defendants' right and ability to farm their land without government regulatory intrusion. The United States' numerous unilateral and undisclosed material modifications of the Consent Decree Restoration Plan in violation of this Court's 1996 Order demonstrates the Governments' contempt for this Court and the administration of justice. The United States' conduct also betrays its reliance on federal jurisprudence evidencing the judiciary's reluctance to impose civil or criminal fines and penalties as well as other sanctions against federal agencies and their senior officials for their affirmative misconduct.[3] Therefore, to deter the United States from acting in contempt of this Court's Orders in the future, this Court must send the Government a clear signal by vacating the Consent Decree and denying the United States Motion to Modify the Consent Decree.

As Defendants discuss below, the Consent Decree and Injunction should be vacated in favor of an arrangement that is equitable and workable for Defendants who have long been respectful of the rule of law and responsible stewards of the environment.

Although contractual in nature, a consent decree is, nevertheless, "enforceable as a judicial decree that is subject to the rules generally applicable to other judgments or decrees []." *Rufo v.*

[3] *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 Harv. L. Rev. 685 (2018), available at: https://harvardlawreview.org/2018/01/the-endgame-of-administrative-law/.

Inmates of Suffolk County Jail, 502 US 367, 378-380 (1992), citing *Railway Employees v. Wright,* 364 U.S. 642, 650-651 (1961); FRCP 60(b)(5). "[A] party may be relieved from a final judgment or decree where it is no longer equitable that the judgment have prospective application." *Rufo v. Inmates of Suffolk County Jail*, 502 US at 380. This means that the party seeking to modify or vacate a consent decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree," and showing that "the proposed modification is suitably tailored to the changed circumstance." *Id*., at 383.

The Third Circuit Court of Appeals, in *Democratic National Committee v. Republican National Committee*, 673 F.3d 192 (3d Cir. 2012), clarified how a party seeking to vacate or modify a consent decree pursuant to FRCP 60(b)(5) can meet the "significant change in circumstances" test set forth in *Rufo*.

> "Such a party must establish at least one of the following four factors by a preponderance of the evidence to obtain modification *or* vacatur: (1) a significant change in factual conditions; (2) a significant change in law; (3) that 'a decree proves to be unworkable because of unforeseen obstacles'; *or* (4) that "enforcement of the decree without modification would be detrimental to the public interest" (emphasis added).

673 F.3d at 202. In *DNC v. RNC*, the Third Circuit also noted how a decree may be modified if "'law has changed to make legal what the decree was designed to prevent.'" *Id*.

The Third Circuit in *DNC v. RNC*, furthermore, identified additional factors a court should consider before vacating or modifying a consent decree pursuant to FRCP 60(b)(5). These include:

> 1) "'the circumstances leading to entry of the injunction and the nature of the conduct sought to be prevented;" 2) "the length of time since entry of the injunction;" 3) "whether the party subject to its terms has complied or attempted to comply in good faith with the injunction; and" 4) the likelihood that the conduct or conditions sought to be prevented will recur absent the injunction."

Id. at 202-03 (quoting *Bldg. & Constr. Trades Council of Phila. & Vicinity, AFLCIO v. NLRB ("BCTC")*, 64 F.3d 880, 888 (3d Cir. 1995)).

Moreover, the Court of Appeals advised that "[i]n weighing these factors, 'the court must balance the hardship to the party subject to the injunction against the benefits to be obtained from maintaining the injunction.'" "[T]he court should also 'determine whether the objective of the decree has been achieved.'" *DNC v. RNC*, 673 F.3d at 202 (quoting *BCTC*, 64 F.3d at 888). The Court of Appeals also held, in *DNC v RNC*, that for a change in fact or law to be "significant" it must "render[] the prospective application of the decree inequitable." *Id*.

1. *A Significant Change in Legal Circumstances Has Rendered Continued United States Enforcement of the Consent Decree Inequitable for Defendants*

From the date this Court entered the Consent Decree as a final judgment the United States has construed the Consent Decree's stated "primary objective" and its unstated secondary objective in total disregard of the rule of law. The United States has intentionally over-designed and over-implemented the Restoration Plan Task 1 to improperly deny to Defendants' the pre-August 17, 1987 CWA Section 404(f)(1)(C) irrigation construction exemption for dual-function irrigation/drainage ditch construction activities (and related October 1984 USDA-ASCS-authorized ditch maintenance repair work) they performed within the Consent Decree Area. The extrinsic evidence also shows how the United States has intentionally over-implemented Restoration Plan Task 3 to keep most of the Murphy Farm tract and other portions of Defendants' 157-acre three farm tract hydrologically integrated Waterford Township, PA farm artificially wet on a periodic ongoing basis. This has effectively denied Defendants the opportunity to explore whether they can continue and complete their pre-December 23, 1985 initiated prior commenced conversion activities on the Murphy Farm tract to secure the retroactive exclusion from CWA

Section 404 jurisdiction that remains available under 1993 jointly issued EPA-Corps regulations. (Ex. 24 - 58 FR 45008 45031-45034, Aug. 25, 1993). The availability to Defendants of the legal protections afforded by the 1993 regulations represents a *significant change in legal circumstances* that this Court must consider as a basis for vacating this Consent Decree.

This Court certainly possesses the equitable powers to ensure Defendants' ability on a prospective basis to secure the legal protection these regulations would provide. The United States had intentionally mischaracterized Defendants' dual-function irrigation/drainage ditch construction activities as CWA Section 404(f)(1)(C) non-exempt drainage construction activities, even though they should have properly been treated as exempt irrigation ditch construction activities until the August 17, 1987 effective date of RGL 87-07. This Court should vacate this Consent Decree to prevent the United States from continuing such inequitable treatment of Defendants in the future. It also would enable Defendants to prospectively invoke the 1993 jointly issued EPA-Corps regulations that would retroactively allow Defendants to continue and complete these previously USDA-ASCS-authorized prior commenced conversion activities on the Murphy Farm tract consistent with the FSA and the exclusion from CWA Section 404 jurisdiction the 1993 regulations provide.

Neither the District Court nor the Third Circuit ever addressed Defendants' legal rights to engage in pre-August 17, 1987 *dual-function irrigation/drainage ditch construction activities* (and related drainage tile installation activities) pursuant to CWA Section 404(f)(1)(C) and RGL 87-7. Rather both courts had addressed only whether Defendants' post-October 4, 1984 agricultural ditch maintenance activities evidenced the existence of "normal farming activities" that would qualify for the CWA 404(f)(1)(A) normal farming activities exemption or instead qualified as non-exempt drainage ditch construction activities. *See United States v. Brace*, Civil Action No. 90-229 (WD

Pa. 1993) (Findings of Fact para. 43 and Findings of Law para. 31); *United States. v. Brace*, 41 F. 3d 117, 127-128 (3rd Cir. 1994) (noting the District Court's finding "that Brace's conduct in 'preserving and regularly cleaning the existing drainage system on the site' was exempt from the permit requirement as 'maintenance of the drainage system' under Section 404(f)(1)(C). *Id*., at 23"), and at 26 (noting that "[t]he exemption from the permit requirements under Section 404(f)(1)(C) for 'maintenance of drainage ditches' applies to 'any discharge of dredged or fill material that may result from …the maintenance (but not construction) of drainage ditches'" (underlined emphasis in original)).

Moreover, since the 1993 joint EPA-Corps regulations had been issued three months prior to the District Court bench trial (and likely following the conclusion of the pre-trial discovery period), neither the District Court nor the Third Circuit Court of Appeals in the original action had the reason or opportunity to then address them. This Court now has both the reason and the opportunity to do so for purposes of evaluating the significant change in legal circumstances that justify prospective application of the 1993 regulations on Defendants' behalf. Given the posture of the prior action, the doctrines of res judicata, collateral estoppel and law of the case do not operate to bar this Court from undertaking this analysis and reaching this conclusion. Consequently, this Court should vacate this Consent Decree and Injunction to prevent the United States from continuing to impose inequitable legal treatment upon Defendants.

2. *Significant Changes in Factual Circumstances Have Rendered Continued Enforcement of the Consent Decree and Injunction Unworkable Due to Unforeseen Physical Obstacles*

EPA representative Jeffrey Lapp, the Restoration Plan's chief developer, had testified under oath that the Restoration Plan had been designed to affect only the approximate 30-acre Consent Decree Area. (Ex. 11 - EPA Jeff Lapp Ct. Cl. Direct Testimony, at 525, 610-611). The evidence,

however, shows that the United States has long misrepresented this fact and intentionally over-implemented Restoration Plan Task 3.

The United States intentionally ensured that the check dam had been designed one way by representative Lapp and implemented another way by former USDA-SCS representative Lewis Steckler. As discussed above in Section II.2.b.ii, the check dam had been substantially overbuilt, strategically relocated several hundred (approximately 460) feet to the east of the location depicted on Attachment A – the hand drawn map previously approved by this Court. The check dam when installed had been relocated to a critical location along the Consent Decree Area's main ditch where there is both a curve and an elevational drop of several feet. It then was installed on December 23-24, 1996 during the wettest time of the year during a documented precipitation event. Each of these unilateral and undisclosed Restoration Plan Task 3 design modifications were undertaken without prior written approval having been obtained from Defendants or this Court. Such United States' affirmative misconduct was knowingly perpetrated in violation of the Consent Decree previously approved by this Court and entered as a Court Order. It also created unforeseen physical obstacles to Defendants' exercise of their constitutionally protected right to use their private properties located beyond the Consent Decree Area to pursue their chosen means of earning a living through farming.

The United States well knew that the check dam's substantial relocation (moved approximately 460 feet to the east from the location specified by Restoration Plan Attachment A) (Ex. 1- Consent Decree Attachment A), (Ex. 45 - RA-1 Map, Randall Brace Depo), (Ex. 46 - Affidavit of Robert Brace), (Ex. 32 - Affidavit of Randall Brace and Exhibits, at Centerra Map), (Ex. 33 - Affidavit Ronald Brace and Exhibits, at Centerra Map), *and* its substantially increased physical dimensions (height, length and width, would withhold a much greater volume of water flowing southwest from

the Defendants' Homestead Farm tract, and would likely inundate and flood a much larger land area on the Murphy Farm tract, especially its eastern and northern fields. The United States also knew that such a substantial redesign of the check dam at the time of installation inconsistent with the Court-approved Restoration Plan design specifications would likely as well, adversely impact other Brace Farm fields located downstream beyond the Consent Decree, then would otherwise have been possible had the check been installed properly.

The United States also well knew that such a radical change in Restoration Plan design specifications would not have been possible had the United States fulfilled its legal obligations under the Consent Decree. The United States had been obligated to secure Defendants' written agreement and the approval and Order of this Court as the Consent Decree expressly mandates. Apparently, the United States thought of itself as being above the law.

The United States has continued to further over-implement the Restoration Plan to the extent of its ongoing failure to help Defendants address persistent beaver dam infestation within and beyond the Consent Decree Area that exacerbates and compounds the already devastating effects caused by the United States' illegally repositioned and substantially oversized check dam. As discussed above in Section II.2.c, the United States and its chief Restoration Plan developer, Jeffrey Lapp, had long known about Defendants' beaver dam infestation problem, but chose not to include it as a factor in the Plan's design specifications. As the result, beavers that frequently erect and lodge dams in different locations along Elk Creek and its tributaries north and south of Lane Road adversely affect the volume, direction and velocity of waters flowing through the Consent Decree Area to other portions of Defendants' Waterford Township, PA farm. These beaver dams have individually and collectively withheld prodigious amounts of water, and they and their debris have triggered blockages in various of the state- and county-installed culverts

serving Defendants' farm tracts and Defendants' agricultural ditches and drainage tile lines within and beyond the Consent Decree Area.

The United States also has continued to further over-implement the Restoration Plan to the extent of its ongoing failure to help Defendants address poorly designed and engineered state-and county-installed culverts within and beyond the Consent Decree Area. As discussed above in Section II.2.c, the United States and its chief Restoration Plan developer, Jeffrey Lapp, had long known about Defendants' culverts problem, but chose not to include it as a factor in the Plan's design specifications. The Sharp Road culvert located at the intersection of Sharp and Greenlee Roads north of the Defendant's Marsh Farm tract is situated downstream and at a lower elevation than the Lane Road culvert located between Defendants' Marsh Farm and Murphy Farm tracts. The Sharp Road culvert's physical characteristics, namely its sizable (> 1-2 ft.) concrete liner, however, cause it to function as a dam. Such features raise the height of the Sharp Road culvert's bottom to an elevation that is approximately 1.75 higher than the upstream Lane Road culvert, thereby creating, at times, significant upstream backwater flows in Elk Creek and its tributaries and reaches. (Ex. 26 - Ecostrategies Johnson Report 8-15, at 3, Appendix C, photos 1-4). It also renders that culvert more susceptible to obstructions and debris, especially from the many beaver dams that had been lodged on Defendants' three hydrologically integrated farm tracts. (Ex. 28 - Edwards Expert Rpt. at App. G PennDOT photos), (Ex. 47 - RO-1 Ronald Brace Depo Map), (Ex. 45 - RA-1 Randall Brace Depo Map).

The persistently unaddressed conditions of recurring beaver dams and poorly designed and operating culverts that often become laden with sediment, debris and other obstructions sufficiently raise water levels to have their own deleterious impact on Defendants' ability to operate their farm. However, when these natural and manmade phenomena are combined with the

much oversized and repositioned check dam, and the previously removed Murphy Farm tract drainage tile (that Defendants only recently replaced with United States authorization), the resultant ongoing periodic inundation and flooding has continued to extend far beyond the Consent Decree Area to substantially impair the use of other portions of Defendants' 157-acre three farm tract hydrologically integrated Waterford Township, PA farm.

Since the check dam had largely remained submerged under water from the time of its installation in 1996 until the United States onsite visit of May 20, 2015 (Ex. 35 - EPA-Corps Photo #12 EPA 0001114 5-2-15 onsite visit), Defendants did not suspect and were unable to discern that the United States had drastically repositioned and overbuilt it in violation of the Consent Decree. Therefore, Defendants could not have foreseen, anticipated or prevented the adverse physical consequences that had arisen from these improper and unauthorized United States acts of affirmative misconduct. This Court must conclude that the United States' intentional over-implementation of the Restoration Plan and at least four (4) undisclosed intentional violations of the Consent Decree constitute a sufficient equitable basis to vacate the Consent Decree and Injunction. Defendants request such prospective relief to deter the United States from engaging in any further affirmative misconduct that causes physical inundation and flooding to their 157-acre three farm tract hydrologically integrated Waterford Township, PA farm, and any further physical, economic, emotional, medical and reputational harm to Defendants and their fourth-generation family farming business.

3. *Additional Factors Justify Vacating the Consent Decree and Injunction in their Entirety*

Consideration of additional factors further justifies vacating the Consent Decree and Injunction in Defendants' favor.

This Court, for example, should take note of the legal and factual circumstances surrounding the entry of the Consent Decree and Injunction. Defendants agreed to execute the Consent Decree and abide by the Injunction to avoid the likelihood that the United States would impose much larger stipulated penalties against them, and that the banks would cancel their credit lines and thereby trigger their potential bankruptcy. Since Defendants and the United States did not have equal bargaining power, the Consent Decree was far from the typical arm's-length agreement that two willing parties would ordinarily consummate. The U.S. Department of Justice, a law enforcement agency, certainly had much greater financial and human resources, more information and data, and significantly more legal leverage and influence (i.e., compulsion power) at their disposal than did Defendants, a small closely held family business. Defendants had no choice but to rely upon what appeared to be the United States' good faith and technical expertise in developing and implementing a Consent Decree Restoration Plan that would achieve its stated objective without imposing any further detrimental economic, legal, emotional, medical and reputational harm upon Defendants and their families.

Under Pennsylvania law, the unequal dynamic between the United States and Defendants would constitute a special relationship wherein "one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other." *See Becker v. Chicago Title Insurance Co.*, No. 03-2292, 2004 U.S. Dist. LEXIS 1988, at *23 (E.D. Pa. 2004), citing *LM Bev. Co. v. Guinness Import Co.*, 1995 U.S. Dist. LEXIS 19443, * 13-14 (E.D. Pa. Dec. 29, 1995) (quoting *Commonwealth. Dep't of Transp. v. E-Z Parks*, 620 A.2d 712, 717 (Pa.Commw. 1993)). And, under Pennsylvania law, that relationship would give rise to and impose on the United States a fiduciary duty to act responsibly, equitably, fairly and ethically

in its dealings with Defendants.[4] Much to Defendants' dismay and consternation, the United States' over-implementation and unilateral modification of the Restoration Plan to-date, in violation of the Consent Decree, has proven that reliance misplaced and resulted in extensive physical, economic, emotional, medical and reputational harm to Defendants and their families for more than a twenty-year period.

The United States' affirmative misconduct since the execution and entry of the Consent Decree and Injunction aptly demonstrates that the conduct of Defendants the Restoration Plan had sought to prevent was far greater in scope than the focus of the Third Circuit Court of Appeals ruling and the stated objective of the Restoration Plan itself. The fact that the United States has not yet acknowledged its affirmative misconduct should prove to this Court that, if the Consent Decree and Injunction are not vacated, the United States will continue to over-implement the Restoration Plan it had illegally modified to effectively "lock-up" of Defendants' Waterford PA farm. Such misconduct would operate to prevent Defendants from prospectively engaging in conduct legally authorized by the 1993 EPA-Corps regulations (continuing Defendants' prior commenced conversion until completion outside of the jurisdiction of CWA Section 404) that neither this Court nor the Third Circuit had anticipated or been aware of. In other words, this Court should vacate the Consent Decree and Injunction because the conduct sought to be prevented would no longer need to be prevented by operation of subsequent law with retroactive effect. See *Democratic Nat'l Comm., v. Republican Nat'l Comm*., 671 F. Supp. 2d 575 (D.N.J. 2009), *aff'd* 673 F.3d 192 (3d Cir. 2012), cert. denied, 133 S. Ct. 931 (2013), (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 US at 388 (holding "that a decree may be modified 'if law has changed to make legal what the decree was designed to prevent.'")).

[4] *See Hanaway v. Parkersburg Group*, 132 A.3d. 461 (Pa. Super. 2015), quoting *eToll, Inc. v. Elias/Savion Adver.*, 811 A.2d 10, 22 (Pa.Super. 2002).

This Court, furthermore, should consider that more than twenty-one (21) years have passed since entry of the Consent Decree and Injunction. It should take note especially of how the United States had utilized this long period of time to exploit administrative law at Defendants' expense. For example, the United States utilized these two decades to delay, deny and ignore responding to Defendants' good faith efforts to secure 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.

This Court also should take note, as discussed extensively above and in Defendants' Response/Opposition to United States 2d Motion to Enforce Consent Decree and Stipulated Penalties, of Defendants' good faith efforts over the course of the past ten (10) years to first secure United States authorization 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, and then to comply with such authorization once granted consistent with what 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. Likewise, this Court should recall the United States' bad faith, after having granted such authorization to Defendants, in soon disavowing and revoking that authorization for purposes of fabricating the patently false and unsubstantiated Consent Decree and CWA violations upon which to premise the current Consent Decree and Injunction enforcement action.

This Court, in addition, should take note of how the United States used the past two decades to impose on Defendants an unrequested nonfinal nonbinding Corps jurisdictional determination in 2012, and to withhold from Defendants until 2016 a final EPA compliance order that would

allow them to seek judicial review for purposes of vigorously refuting the false and unsubstantiated allegations underlying EPA-Corps Violation Notice and Corps Cease and Desist Order pursuant to the Administrative Procedure Act *See* 5 U.S.C. § 550 et seq. These crafty legal maneuvers placed Defendants in legal limbo and financial jeopardy (resulting in the freezing of bank credit lines and severely reduce cash flow) for an additional four (4) years during which they had effectively been denied 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.

Moreover, this Court should take note of how the United States utilized the past twenty-one (21)-plus years following the substantial overdesign and repositioning of the check dam called for by Restoration Plan Task 3, in violation of the Consent Decree. This long period of time provided 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, in furtherance of the Plan's ambiguously drafted primary and unstated secondary objectives.

The United States would have this Court imagine, in Alice in Wonderland-like fashion, that the Consent Decree Area's physical condition, as of October 5, 1984, was a primordial wetland devoid of human agricultural activity. It also would have this Court believe that unless the Consent Decree and Injunction are enforced, Defendants "will continue to damage the wetland hydrology, cause long-term harm to the affected wetlands, and reverse the restoration work this Court Ordered under the Consent Decree." (ECF No. 207 at 1). This Court should, instead, recognize the Government's effort for what it truly is - a self-serving fantasy refuted by an abundance of contrary extrinsic evidentiary reality.

Finally, this Court should vacate the Consent Decree and Injunction because, on balance, the economic, emotional, medical and legal hardships Defendants have been compelled to endure during the past twenty-one (21) years due to United States misconduct and intransigence, far exceeds the unsubstantiated damage to the environment the United States alleges to have occurred and to be incurred in the future, if any at all. The United States argues that, unless the wetlands are restored, it "will continue to be deprived of the benefit of the bargain it obtained in signing the Consent Decree in the first place." (ECF No. 207, at 1). Yet, the United States conspicuously fails to acknowledge how, on December 23-24, 1996, it vitiated and thus deprived itself of that bargain when it committed multiple material Consent Decree violations by unilaterally relocating and overdesigning the check dam without first notifying Defendants and this Court and securing their written approval as Consent Decree, paragraph 12 requires. The United States also silently overlooks how, in violating the Consent Decree in this manner, it robbed this Court of its jurisdiction and, thereby, undermined the administration of justice.

IV. This Court Should Deny the United States' Motion for Stipulated Penalties Due to the Government's Failure to Demonstrate Defendants' Alleged Consent Decree Violations, its Own Multiple Acts of Affirmative Misconduct and Multiple Material Violations of the Consent Decree, and Because its Interpretation of the Consent Decree Stipulated Penalties Provision is Inequitable, Incorrect and Without Foundation

Despite the Government's inability to confirm actual Consent Decree violations, its own multiple acts of affirmative misconduct and multiple material violations of the Consent Decree, the United States now seeks an unconscionable monetary penalty in excess of $600,000 along with an increase in the stipulated penalties going forward.

Consent Decree paragraph 8 provides that, if after entry of the Consent Decree, "Defendants fail to perform any requirement in paragraph 4, 5, and 6, then *upon receipt of written notice of such failure from Plaintiff*, Defendants will pay a stipulated penalty of $250 for each day of

failure…" (emphasis added). (Ex. 1 – CD, Restoration Plan, Attach A). The United States handily asserts that it "provided written notice on January 2016 of Defendants' Consent Decree violations." (ECF No. 207, p. 16). However, a close review of the DOJ-ENRD 1-11-16 Violation Notice reveals that the DOJ-ENRD intentionally conflated alleged CWA violations of the Injunction per Consent Decree paragraph 3, with alleged violations of the Restoration Plan per Consent Decree paragraph 4, for the specific purpose of triggering the stipulated penalty provisions of Consent Decree paragraph 8. The Government utilized this "catch-all" approach to intentionally confuse Defendants and to secure additional stipulated penalties to which it was not otherwise entitled under the Consent Decree. (Ex. 23 - DOJ 1-11-16 VN).

Significantly, the United States failed to clearly distinguish between the alleged Injunction and Consent Decree violations. The DOJ-ENRD 1-11-16 Violation Notice alleged only a single unsubstantiated violation of the Restoration Plan – Defendants' alleged removal of the check dam previously installed per Restoration Plan Task 3. The DOJ-ENRD 1-11-16 Violation Notice did not allege a specific violation of Restoration Plan Task 1 (only that they "observed" "[t]en drain outlets" which the United States failed to establish as other than pre-existing). It also did not allege a specific violation of Restoration Plan Task 2 (relating to previously plugged surface ditches). Therefore, it would be manifestly inequitable for this Court to construe the ambiguous DOJ-ENRD 1-11-16 Violation Notice as constituting sufficient written notice of a Defendants' failure to comply with Consent Decree paragraph 4. In any event, only a proven failure to comply with Consent Decree paragraph 4 (Restoration Plan) triggers the $250 per day stipulated penalty provision of Consent Decree paragraph 8, calculated on a *per day* basis for any one or more demonstrable violations/failures committed on a given day, rather than a per violation/failure, per day basis.

The Government's requested relief is inequitable, contrary to the terms of the Consent Decree, and well beyond what the Government's own expert concluded Defendants had the ability to pay. "[F]rom the standpoint of remedy [a consent decree] is an equitable decree[]" which means if it is violated, the court is awarding "an equitable remedy." *See Cook v. City of* Chicago, 192 F.3d 693, 695 (7th Cir. 1999) (Posner, J.); *see also United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995) ("[A] consent decree . . ., by its very nature, vests the court with equitable discretion to enforce the obligations imposed upon the parties."). As a result, a district court—as part of its "independent, judicial interests" in administering the consent decree, *id.*—has discretion in the amount to award as stipulated penalties. *See Harris v. City of Phila.*, 47 F.3d 1311, 1321 (3d Cir. 1995) ("We also review the imposition of stipulated penalties under an abuse of discretion standard."). Likewise, as an "equitable order", enforcement of a consent decree is "subject to the usual equitable defenses." *Cook*, 192 F.3d at 695. Here, the Court should exercise this discretion and reject the Government's request for penalties.

As a fundamental matter, any award of penalties imposed on Defendants is inequitable given the Government's affirmative misconduct and, indeed, express authorization to conduct the activities that form the basis for the Injunction-related penalties. For all the reasons explained in detail above, the Court should exercise its equitable discretion and refrain from imposing monetary penalties on Defendants. In the event the Court does decide to award penalties, it should not award the unreasonable and unconscionable penalties requested by the Government, for a variety of reasons.

First, the Government's request for treble penalties based on what it alleges to be three distinct violations is not supported by the text of the Consent Decree. The Consent Decree provides that "if the Defendants fail to perform any requirement in paragraph 4, 5, and 6 . . . Defendants will

pay a stipulated penalty of $250 for each day of failure." Here, the Government alleges violations of only paragraph 4, which states that "Defendants will perform restoration in accordance with the wetlands restoration plan, which is attached hereto as Exhibit A and made a part thereof." The plain reading of these terms is clear: If Defendants fail to perform the restoration in accordance with the Wetlands Restoration Plan, Defendants will pay a stipulated penalty of $250 for each *day* of failure. Nowhere does the Consent Decree support the Government's preferred, warped interpretation that daily penalties are to be enforced based on each activity required by the Restoration Plan. Had the parties wanted to impose a per-activity penalty calculation, they could have easily done so. For example, they could have included a simple sentence saying as much or even included a few words "per violation" somewhere in the Consent Decree—yet they chose not to do so. A Consent Decree is to be interpreted as a contract, which means the Court is required "to give effect to the parties' 'objective manifestations of their intent' rather than attempt to ascertain their subjective intent." *Griesmann v. Chemical Leaman Tank Lines, Inc*., 776 F.2d 66, 72 (3d Cir. 1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1009 (3d Cir. 1980)). In other words, "[a] consent decree must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Harris v. City of Philadelphia*, 47 F.3d at 1350 (citing *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

Here, the Government's tortured reading of the Consent Decree requires an interpretation of the Consent Decree far from "as it is written," and thus it should be rejected by the Court. At minimum, the provisions at issue here are subject to multiple reasonable interpretations, and therefore ambiguous, which means they are to be construed in favor of the party against whom the consent decree is sought to be enforced—i.e., the Defendants. *Harris v. City of Phila.*, 47 F.3d

1311, 1326 (3d Cir. 1995). Either way, the Court should reject the Government's unsupported, treble, "per-violation" damages calculation.

Second, the Government's request for penalties for each day this litigation has been pending is inequitable, as it penalizes the Defendants for taking advantage of their right to judicial review of the Government's allegations. *See United States v. Witco Corp.*, 76 F.Supp. 2d 519, 530-31 (D. Del. 1999). In *Witco*, the Court held that the accrual of penalties during litigation was inappropriate because it penalized the Defendant from taking advantage of the dispute resolution process available to them. 76 F., Supp. 2d at 530-31. Moreover, the litigation at issue arose following Defendant's "good faith" opposition to the assessment of penalties. *Id*. That is the case here—Defendants have taken a position, in good faith, that they have not violated the consent decree, based on the express authorization of Government officials. Like the Defendants in Witco, they should not now be penalized for disputing that alleged violation.

In yet another attempt to drive up the penalties on Defendants, the Government rejects reliance on *Witco* and instead urges the Court to rely on the distinguishable case *United States v. Alshabkhoun*, 277 F.3d 930, 934-35 (7th Cir. 2002). *See* ECF No. 207 at 17. According to the Government, the Court should follow *Alshabkhoun* because "the environmental harms" resulting from the alleged violations have continued during the pendency of litigation. But the Government has presented zero evidence of any actual environmental harm from Defendants' expressly authorized activities. While the activities at most may be technical violations of the statute, there is nothing in the record that Defendants' activities caused any actual damage or harm to the environment. *Alshabkhoun* is distinguishable for another critical reason: The litigation in that case was initiated by Defendants "without any . . . legitimate basis," unlike in *Witco*—and here—in which the Defendants' position was taken in "good faith." Given the position taken by

Defendants in good faith and in reliance on the Government's express representations, the Court should follow *Witco* and not penalize Defendants for taking advantage of judicial review of the Government's allegations.

Likewise, the Government's request for penalties for the entire year from the date it sent written notice to Defendants (January 11, 2016) until the filing of its Motion to Enforce (January 9, 2017) is also inequitable. As explained above, the Notice issued by the DOJ on behalf of the EPA on January 11, 2016 did not constitute a final Compliance Order of which Defendants could seek judicial review, and then DOJ waited a year before initiating any litigation. The combined result of which was the accrual of daily penalties without the opportunity for judicial review by the Defendants. The Government should not be able to game the system for an additional year's worth of penalties. Accordingly, the Court should exercise its equitable discretion and not include this approximately one year's worth of time in the calculation of any penalties. *See Cook*, 192 F.3d at 694-98 (affirming district court's decision to apply doctrine of laches in calculating stipulated penalties so as to exclude time during which Plaintiff failed to take action to enforce claim).

Third, the Court should take the Government's own calculation of the Defendants' ability to pay into account in assessing this stipulated penalty, given that the penalty the Government seeks to impose is well beyond what the Government believes Defendants can afford. After months of intensive discovery regarding the financial conditions of Defendants—ostensibly for the purpose of assessing Defendants' ability to pay any penalty—the Government produced an expert report stating that Defendants could afford a penalty of no more than $400,000. (Ex. 48 - Leo Expert Report). This report was authored by Vincent A. Leo, CPA, who was retained by the Government to "evaluate the financial condition and ability of [Defendants] to pay a civil penalty . . .", and it was based on the comprehensive financial records of Defendants and their related entities

(including all tax returns, financial statements, QuickBooks records, and property records and appraisals). And yet, after dedicating extensive resources to this endeavor, the Government never mentions this amount in the several pages it devotes to the size of the penalty that should be imposed on Defendants.

The Government instead suggests that, absent the stipulated penalties in the Consent Decree, Defendants would be facing penalties at least 10 times what the Government seeks, and perhaps in excess of $29 million. Yet again, the Government misleads, because the Government knows that based on their own expert report, such a penalty could never be imposed on Defendants under these circumstances. This is because under the Clean Water Act, one element a Court must consider in determining the amount of a civil penalty is "the economic impact of the penalty on the violator." 33 U.S.C. § 1319(d). Indeed, this was the Government's basis for seeking such expansive financial discovery from Defendants. (Ex. 49 DOJ Email re basis for discovery). Because Defendants cannot afford a penalty beyond in excess of $400,000—as the Government itself admits, but has not disclosed to the Court—the Court should not impose any stipulated penalties above that amount.

Finally, the Court should not modify the stipulated penalties in the Consent Decree. The Defendants, in good faith, relied on governmental officials in performing the activities the Government now claims are violations of the Consent Decree. For this reason, it is not the case, as the Government contends, that there have been "pervasive violations" or "substantial non-compliance" of the Consent Decree. To the contrary, there was a good faith dispute on the part of the Defendants about what was permitted, and misconduct on behalf of the Government. This is far from the type of case, such as those cited by the Government, necessitating an increase in stipulated penalties. Moreover, as the Government itself contends, a penalty well below what

they are requesting here is "sufficient to deter future violations of the law" and thus there is no reason to amend the Consent Decree to add even further penalties. (Ex. 48 - (Leo Expert Report).[5]

V. This Court Possesses the Equitable Power to Hold the United States in Contempt and Impose Coercive Fines to Deter Future Multiple Material Intentional Violations of the Consent Decree

As discussed above, a consent decree is "enforceable as a judicial decree that is subject to the rules generally applicable to other judgments or decrees []." *Rufo v. Inmates of Suffolk County Jail*, 502 US 367, 378-380 (1992), citing *Railway Employees v. Wright,* 364 U.S. 642, 650-651 (1961); FRCP 60(b)(5).

Although rare, federal courts have, on occasion, imposed coercive civil contempt fines or a determinate fine schedule on federal agencies, and even ordered incarceration of federal agency officials for acting in contempt of a court order. *See, e.g., American Rivers v. U.S. Army Corps of Engineers,* 274 F. Supp. 2d 62 (D.D.C. 2003); *Am. Rivers*, No. 03-cv-00241 (D.D.C. July 18, 2003) (order), ECF No. 106. (District Court ordered Army Corps to appear for contempt hearing, found agency in contempt, and scheduled large coercive civil contempt fines ($500,000 per day for seven days) due to new administration Corps failure to comply with injunction requiring compliance with prior administration U.S. Fish & Wildlife Service Biological Opinion imposing flow conditions on Missouri River); *Land v. Dollar,* 190 F.2d 623, 648 (D.C. Cir. 1951) (D.C. Circuit Court of Appeals ordered imprisonment of U.S. Secretary of Commerce and other officials for five days if failed to comply with injunction Court had issued); *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956) (Sixth Circuit Court of Appeals committed Securities and Exchange Commission General Counsel to U.S. Marshall for refusing to turn over to the court confidential agency material

[5] For all these same reasons, Defendants object to an award of costs and expenses to the Government. And in the event the Court disagrees and does enter such an award, Defendants request an opportunity to oppose and dispute the evidence of costs and expenses presented by the Government.

relating to SEC investigation of a company subject to private shareholder action for corporate mismanagement); *Save Domestic Oil, Inc. v. United States*, 24 Ct. of Int'l Trade, 534 U.S. 994, 1015 (2000); *Save Domestic Oil, Inc. v. United States*, 25 Ct. Int'l Trade 927 (2001); *Save Domestic Oil v. United States*, 53 F. App'x 72 (Fed. Cir. 2002) (Nos. 02-1042, 02-1043) (criminal contempt proceedings initiated by U.S. Court of International Trade against U.S. Department of Commerce for initiating bad faith frivolous appeal without stay to Federal Circuit while delaying its compliance with Court Order directing agency to reconsider its dismissal of petition for antidumping duties, resulting in jailing of agency attorneys in courthouse detention area for four hours); *Forest Service Employees for Environmental Ethics v. United States Forest Service*, 530 F. Supp. 2d 1126, 1136 (D. Mont. 2008) (District Court, in response to U.S. Forest Service's multiple missed deadlines to perform court-ordered environmental impact analysis of its use of chemical fire retardants, issued order scheduling a hearing on whether to issue a contempt finding, laying out agency bad faith, and directing parties "to address the appropriateness and efficacy of the following sanctions the court is considering," including jailing or placement of the Undersecretary of Agriculture under arrest, or enjoining agency to use only water in fighting fires). What these cases unmistakably show is that some federal courts have not shied away from endeavoring to hold the Government and its high officials legally and publicly accountable where they have clearly abused the judicial process.

This Court should carefully review the dissent of former U.S. Supreme Court Justice Robert H. Jackson in *Land v. Dollar*, 341 U.S. 737, 748, 750 (1951) (Jackson, J., dissenting), responding to the Supreme Court's grant of certiorari to the U.S. Department of Justice's petition for cert invoking the defense of sovereign immunity and seeking a stay from the D.C. Circuit Court of Appeals' imposition of sanctions for DOJ's flouting of its contempt order. Disturbed that his

fellow justices had been reluctant to consider the jailing of high officials, Justice Jackson commented how this would send the wrong message to the public about the accountability of the government where bad faith government conduct had been demonstrated:

> It is the [Supreme] Court that is now on trial. . . The spectacle of this Court stalling the enforcement efforts of lower courts while there is outstanding a judgment that some of the Nation's high officials are guilty of contempt of court is not wholesome. The evil influence of such an example will be increased by delay. This Court should exercise utmost care lest it appear to be indifferent to a claim of official disobedience."

341 U.S. at 749-750.

Had former Justice Jackson's legitimate prior concerns been adequately addressed by the U.S. Supreme Court at that time, then, perhaps, the United States, in the case at bar, would not have contemptuously and repeatedly violated this Court's Order of September 23, 1996 without fear of penalty. Given the United States' ongoing abject disregard for that prior Order and this Court's legal and equitable responsibility to uphold the rule of law and ensure the administration of justice, this Court can and should send the Government a crystal clear message that it will convene contempt proceedings for the purpose of evaluating the propriety of issuing coercive civil contempt fines and imposing other appropriate remedies to address such recurring misbehavior.

VI. Conclusion

For the reasons set forth above, and as elaborated upon in Defendants' Response/Opposition to the United States' Motion to Enforce Consent Decree and Stipulated Penalties, this Court should exercise its equitable powers to vacate the Consent Decree in its entirety because of significant changes in factual and legal circumstances and unforeseeable obstacles that have rendered the Consent Decree's continued enforcement inequitable to and unworkable for Defendants. Such exercise of this Court's equitable powers would ensure the United States is equitably estopped

from continuing to benefit from its multiple material Consent Decree violations and the various intentional misrepresentative, deceitful, unconscionable, inequitable acts of affirmative misconduct that it and its agents have perpetrated over the course of a five-year period for the purpose of inducing Defendants' reliance thereon that the United States knew Defendants would rely on, and upon which Defendants did rely to their legal, economic, emotional, medical and reputational detriment.

Defendants also respectfully request that this Court: 1) deny the United States Motion to Modify Consent Decree Stipulated Penalties and its request for reimbursement of costs incurred to file the enforcement action and this motion; 2) direct the United States to reimburse Defendants for all costs associated with the defense of this motion, including attorney and expert fees; 3) to schedule a physical hearing in the event this Court decides, despite overwhelming evidence of United States affirmative misconduct and material Consent Decree violations, that the Consent Decree should not be vacated; and 4) to convene contempt proceedings to determine whether the United States should be held in contempt for having perpetrated multiple material violations of the Restoration Plan and Consent Decree in contravention of this Court's Consent Decree Order entered on September 23, 1996, and to consider the appropriateness of imposing civil coercive contempt fines as a deterrent to similar future behavior.

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,
Inc. and Robert Brace and Sons, Inc.

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,
Inc., and Robert Brace and Sons, Inc.