

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

UNITED STATES OF AMERICA,)	Civil Action No. 1:90-cv-00229
)	
Plaintiff)	
)	
v.)	
)	
ROBERT BRACE, and ROBERT BRACE)	
FARMS, INC.,)	
)	
Defendants)	
)	

**MOTION TO VACATE CONSENT DECREE
AND TO DENY STIPULATED PENALTIES**

Defendants Robert Brace and Robert Brace Farms, Inc., through their attorneys, file this Motion to Vacate Consent Decree pursuant to Federal Rules of Civil Procedure (“FRCP”) 60(b)(5). This 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 Extraordinary Equitable Relief 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.

BACKGROUND

1. On October 4, 1990, the United States, on behalf of the Environmental Protection Agency ("EPA") filed against Defendants the original Clean Water Act action alleging violations of CWA Sections 301 and 404.

2. On December 16, 1993, this Court entered judgment in favor of Defendants, finding that their activities on the Murphy Farm did not require a CWA Section 404 permit "because they constitute[d]: (a) normal farming activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches," and consequently qualified for the CWA Section 404(f)(1) exemption (*United States v. Brace*, No. 90-229 (W.D. Pa. Dec. 16, 1993)). On June 8, 1994, the United States appealed this decision to the Third Circuit Court of Appeals.

3. On November 22, 1994, the Third Circuit Court of Appeals reversed and remanded this court's 1993 ruling, finding that Defendants' activities on the Murphy Farm did not qualify under the "normal farming activities" exemption under CWA Section 404(f)(1)(A) or under the "maintenance of drainage ditches" exemption under CWA Section 404(f)(1)(C) (*United States v. Brace*, 41 F. 3d 117, 138 (3rd Cir. Nov. 22, 1994)). On January 9, 1995, the Third Circuit denied Defendants' petition for rehearing, and on June 26, 1995 (*United States v. Brace*, No. 94-3076, (3rd Cir. 1995) (Sur Petition for Rehearing denied Jan. 9, 1995)), the U.S. Supreme Court denied

Defendants' petition for certiorari (*Brace et al. v. United States*, (3d Cir.), Certiorari denied (June 26, 1995)).

4. On September 23, 1996, this Court, on remand, approved a nine (9)-page Consent Decree (inclusive of a Wetlands Restoration Plan and hand drawn map) that the parties had previously executed on July 23, 1996 (Ex.1 CD, Restoration Plan, Attach A). Defendants agreed to the Consent Decree fearing that the Third Circuit's adverse ruling would require them to engage in significant remedial measures at much greater economic cost.

5. The "primary objective" of the Consent Decree Wetlands Restoration Plan ("Restoration Plan") allegedly covering only the Murphy tract was "to restore the hydrologic regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek" located within the Murphy tract. It directed the Defendants to undertake three steps to achieve this result. (Ex. 1 Restoration Plan Preamble, p. 1).

6. Paragraph 1 of the Restoration Plan had required the Defendants to remove/excavate the drainage tubes referred to as "the drainage tile system" [then] currently located in the wetlands" at three locations "marked as 'Set 1,'" "Set 2,'" and "Set 3 on Attachment A." "[A] total of six trenches" were to have been "excavated at a length necessary to intercept the drainage tubes located in the wetlands," and to be removed in twenty-five (25) foot length[s]," and then "filled in with the soil that was excavated from them." (Ex. 1 Restoration Plan Task 1, p. 1), (Ex. 2 Robert Brace Ct. Cl. Direct Testimony, at 133-134).

7. Task 2 of the Restoration Plan had required the Defendants to "fill in two surface ditches that run in a southwesterly direction into an unnamed tributary B." (Ex. 1 Restoration Plan Task 2, pp 1-2).

8. Task 3 of the Restoration Plan required the Defendants to install a “check dam [...] in [an] unnamed tributary A” that is “one and one-half (1 1/2) feet high, four (4) feet long, and as wide as the tributary bottom [...] and] constructed of concrete, gabions, or compacted rock.” Paragraph 3 of the Restoration Plan also required the Defendants to complete all work to restore the Murphy tract “if feasible, within ninety (90) days after entry of this Consent Decree and, in any event, no later than one year after entry of this Consent Decree.” (Ex. 1 Restoration Plan Task 3, p. 3).

9. EPA inspections and U.S. Department of Agriculture Soil Conservation Service (“USDA-SCS”) officials subsequently confirmed that Defendants had complied with the Consent Decree and its accompanying Restoration Plan after three days’ worth of work with the assistance of several hired help at considerable expense – well, within the required 90-day deadlines. (Ex. 2 Robert Brace Ct. Cl. Direct Testimony, at 134).

10. On November 25, 1998, Defendants filed suit in the Federal Court of Claims, claiming the government’s partial regulatory and physical “taking” of their private property for a public use (preservation of wetlands) without payment of just compensation in violation of the Fifth Amendment to the United States Constitution *Brace v. United States*, No. 98-897L (Ct. Cl. 2006). Defendants’ argument focused on how the agency Cease and Desist Orders issued to address alleged CWA Section 404 violations precluded their use of the property by compelling them to cease operation of a portion of the hydrologically integrated drainage system located within the 30-acre Consent Decree Area portion of the Murphy Farm and to restore said area to its prior October 1984 wetlands characteristics (rather than to its actual dry condition at such time). Defendants also claimed that EPA’s design of the Restoration Plan features denied them the ability to farm portions of their other farm tract properties due to periodic ongoing surface and subsurface flooding extending beyond the approximately 30-acre Consent Decree Area. *Brace v. United*

States, No. 98-897L (Ct. Cl. 2006) at 32. On August 4, 2006, the Federal Court of Claims dismissed Defendants' takings suit, in part, citing insufficient evidence had been produced at that time showing that "the flooding [was] the result solely of the restoration" and "that the area flooded exceed[ed] that which previously was wetlands." *Brace v. United States*, No. 98-897L (Ct. Cl. 2006), at 31-33. The Claims Court reached this conclusion even though it also had found that by the time Defendants had completed all three drainage systems installed on the adjacent hydrologically integrated 58-acre Murphy Farm and 69-acre Homestead Farm from 1977 through 1979, the tracts had become mostly dry, with the exception of times of excessive rainfall," and that Defendants conducted further maintenance of the third drainage system on the property during 1984 to repair damage caused by flooding. *Brace v. United States*, No. 98-897L (Ct. Cl. 2006), at 5.

11. U.S. Geological Survey ("USGS") and North American Datum ("NAD") satellite images of the Murphy Farm for the years 1968 (Ex. 3 October 9, 1968 Murphy Satellite Image Fig. 4, *Ecostrategies Rpt.*)¹, 1977 (Ex. 4 June 4, 1977 Murphy Sat Image),² 1983 (Ex. 5 May 11, 1983 Murphy Sat Image),³ and 1993 (Ex. 6 April 7, 1993 Murphy Sat Image)⁴ corroborate the finding

¹ The October 9, 1968 satellite image is designated as "Figure 4" within Defendants' expert 8-5-15 "Ecostrategies Civil Engineering Report" designated as Defendants' Exhibit D-15 during the deposition of Jeffrey Lapp on October 2, 2017.

² The June 4, 1977 satellite image, identified as "USGS ID AR1VECN00050250," is of a higher resolution than the same June 4, 1977 satellite image designated as "Figure 5," "Figure 5a," and "Figure 6" within the Government's expert "Stokely Report" dated December 18, 2017 (focused on Defendants' Marsh Farm tract) and identified among the "References & Documents Considered" (p. 8) as "USGS ID VECN00050250."

³ The May 11, 1983 satellite image, identified as "USGS ID NC1NHAP820123016," comprises part of the same satellite image designated in the Government's expert "Stokely Report" (focused on Defendants' Marsh Farm tract) and identified among the "References & Documents Considered" (p. 8) as "NC1NHAP820123016," and is designated as Exhibit 2 within the Susan Kagel Expert Rebuttal Report dated February 21, 2018 (focused on Defendants' Marsh Farm tract), and is also designated as "Figure 2," "Figure 3," "Figure 5" and "Figure 8" within Defendants' expert 8-5-15 "Ecostrategies Civil Engineering Report" designated as Defendants' Exhibit D-15 during the deposition of Jeffrey Lapp on October 2, 2017.

⁴ The April 7, 1993 satellite image, identified as "USGS ID N10NAPPW05586092," is of a higher resolution than and comprises part of the same April 7, 1993 satellite image designated as "Figure 7" and "Figure 7a" within the Government's expert "Stokely Report" dated December 18, 2017 (focused on Defendants' Marsh Farm tract) and identified among the "References & Documents Considered" (p. 8) as "cambridge_springs_ne_pa.sid."

of the U.S. Court of Claims that the Murphy Farm tract had been mostly dry by 1979, if not also thereafter, through at least 1993. The June 4, 1977 satellite image clearly shows, for example, contrary to the United States' claims, that there did not then exist an "Elk Creek" with a defined bed or bank running south of Lane Road as depicted on the PADEP 1998 Enclosure Map (Ex. 7 – PADEP 1998 Enclosure 1 Map) The June 4, 1977 satellite image taken during the growing season also reveals, contrary to United State assertions, that there did not then exist clearly defined ditches running through the Murphy Farm tract.

12. The clearly defined agricultural ditch the United States refers to as "Elk Creek" with northerly flowing waters had been excavated from the Sharp Road/Greenlee Road intersection north of Lane Road to the McKean/Waterford Township line beginning in 1977. As the May 11, 1983 satellite image taken at the beginning of the growing season shows, the excavation of the big ditch the United States refers to as "Elk Creek" had continued southward to and beyond Lane Road through the western side of the Murphy Farm tract. This ditch, along with many others running through the Murphy Farm tract and at least one appearing on the northeastern portion of the Homestead Farm tract⁵ had been excavated by Mr. Brace from 1977 through 1983. The 1983 satellite image clearly illustrates how Defendant Robert Brace's ditching activities had helped to hydrologically integrate his three-farm tract Waterford Township, PA farm and to gradually convert prior Murphy and Homestead Farm tract pasturelands and expand fields already cropped so they could be used for more profitable and harmonious crop production.

⁵ The extent of the improvements Defendant Robert Brace had made to the northeast portion of the Homestead Farm tract can be seen by comparing the 1977 and 1983 images. While the 1977 image, when magnified, shows a faint image of a stream running from across Greenlee Road to just above the farmhouse on the Homestead Farm tract, the 1983 image shows how that stream had been relocated, enlarged further defined as an agricultural ditch that served both that farm tract and the Murphy Farm tract.

13. As the result, the Murphy Farm remained mostly dry productive farmland from at least 1983 until to 1993, as the April 7, 1993 satellite image taken during the wet season clearly reveals. Neither the 1983 nor the 1993 satellite images reveal the Murphy Farm tract to be a marshland or bog as the United States has effectively portrayed it to be. The wet areas south of the boundary of the Murphy Farm tract, which can be seen in both the May 11, 1983 and April 7, 1993 satellite images, arose because of the recurring intrusion of beaver dams. Together with the 1996 Consent Decree Restoration Plan features requiring the plugging of surface ditches, the cutting of all drainage tile lines legally installed in legally excavated ditches, and the installation of a substantially relocated and overbuilt check dam, the recurring beaver dams and clogged culverts steadily contributed to the transformation of the Murphy Farm tract into a primordial wetland that had not previously existed during Defendant Robert Brace's lifetime. Both the 1998 PADEP Enclosure Map and a 2006 NAD satellite image of the Murphy Farm tract (Ex. 8 2006 Sat Image Ecostrategies Rpt. Fig. 7)⁶ reveal how, since the Restoration Plan's implementation in 1996, a large water body had formed within the Murphy Farm tract's southcentral area and south of the tract's southern boundary, and that, a smaller water body had formed along the farm tract's western side. As discussed above, these water bodies had formed with the assistance of numerous intruding beaver dams that Defendants were unable to remove without conflicting federal state and local regulatory advice, oversight and administrative delay.

14. Although the Murphy, Homestead and Marsh Farm tracts had remained mostly dry from 1979 through, at least, 1987, the January 11, 2005 expert testimony of EPA employee, Jeff Lapp revealed that the Restoration Plan he had been tasked with designing in 1996 had been intended

⁶ The 2006 satellite image is designated as "Figure 7" within Defendants' expert 8-5-15 "Ecostrategies Civil Engineering Report" designated as Defendants' Exhibit D-15 during the deposition of Jeffrey Lapp on October 2, 2017.

“to reintroduce the hydrology as it existed [in] 1984,” i.e., “to restore the hydrologic drive back to this wetland system, [...] [us[ing] a target date of 1984,” and that “the extent of impact of this restoration was solely on the 30-acre wetland tract.” (Ex. 9 EPA Jeff Lapp Ct. Cl. Direct Testimony, at 610-611). The Court’s findings did not address or otherwise raise as an issue the clear inconsistency between the stated purpose of the Restoration Plan and the actual physical dry condition of the site since 1979, which continued during the 1985-1987 period in question. This inconsistency has since remained a critically important genuine issue of material fact in both this Consent Decree enforcement action and related CWA violation action - 1:17-cv-00006-BR.

15. Between 1998 and 2006, Claimants made periodic efforts to have the Government to confirm the precise boundaries of the 30-acre Murphy tract restoration area and to verify whether EPA authorization was required to adjust or remove the check-dam constructed on the Murphy tract at EPA’s direction per the Court Order, to clean out drainage ditches clogged with vegetation on and beyond the Murphy tract, to remove beaver dams located on the Murphy tract and the contiguous and adjoining Marsh tract, and to clear two clogged culverts – one half-filled with concrete placed by the State of Pennsylvania Department of Transportation (“Penndot”) in 1978 at the north end of the contiguous and adjoining Marsh tract under Sharp Road near the intersection of Sharp and Greenlee Roads (Ex. 10 PennDot B/W & Color Photos), and the other located under South Hill/Lane Road on the north end of the Murphy tract. The United States had long known, or should have reasonably known, about the presence of these natural and man-made phenomena on said tracts, especially beaver dams and clogged culverts (Ex. 10 PennDot B/W & Color Photos of Beaver Dams and Sharp Road Culvert Obstructions), (Ex. 11 Corps 7-23-87 VN noting beaver dams), (Ex. 9 Direct Ct. Cl. Testimony EPA Jeff Lapp, at 662-663, discussing EPA curing of possible causes of water backup), and had known or should have reasonably known that these

phenomena had contributed significantly to the periodic ongoing surface flooding and subsurface erosion of all three tracts.

16. Since the 2006 Court of Claims ruling, Defendants have repeatedly sought to obtain information about the precise metes and bounds of the Consent Decree Area, and also to secure onsite visits and direction from U.S. Army Corps of Engineers (“Corps”) and EPA officials concerning their need to remove beaver dams and to clean and maintain overgrown agricultural ditches and related clogged culverts and drainage system tile running through the Murphy Farm, including the Consent Decree Area, and through or adjacent to portions of the Homestead Farm and Marsh Farm (“Marsh Farm”) tracts that have experienced surface and subsurface inundation and flooding. (Ex. 12 Devlin Ltr to Lazos 6-19-08), (Ex. 13 Nov.-Dec 2010 Erie Conserv. Dist. Ltr Exchge w/Brace and EPA Lapp), (Ex. 14 Brace Ltr to Lapp 1-11-11), (Ex. 15 Brace Ltr to Lapp 2-16-11), (Ex. 16 Lapp Ltr to Brace 3-14-11), (Ex. 17 Brace Ltr. to Lutte 4-18-11), (Ex. 18 Brace Ltr to Lutte 5-11-11), (Ex. 19 Brace Ltr to Lutte 6-15-11), (Ex. 20 Ronald Brace Depo 1-18), (Ex. 21 Randall Brace Depo 1-18). The Murphy and Homestead Farm tracts and a portion of the Marsh Farm tract had been covered by a USDA-SCS Soil and Water Conservation Plan (Ex. 22 USDA Soil & Water Conserv. Plan) that USDA has long recognized as comprising part of a larger “Farm 826, “Farm Tract No. 1356,” consisting of approximately 157 cropped and pastured (“farmed”) acres.

17. On multiple occasions, Defendants had alerted Corps and EPA officials about how sediment and debris had continued to accumulate and impede water flow within these ditches, culverts and drainage tile systems as the result of the Restoration Plan’s features contributing to and otherwise exacerbating a backwater situation caused by beaver dam blockages north and south of Lane Road on and along these farms tracts and clogged culverts and drainage tile. Defendants

have repeatedly advised the United States and its agents that these natural and manmade phenomena, together with certain Restoration Plan features, have triggered periodic ongoing surface and subsurface inundation and flooding extending beyond the imprecisely measured Consent Decree Area. In July 2017, after having suffered loss of property use and lost crop harvest revenues for more than twenty (20) years caused by ongoing periodic surface and subsurface inundation and flooding within the uplands of the Murphy Farm tract and portions of Defendants' Homestead and Marsh Farm tracts, Defendants finally filed an administrative action against the United States under the Federal Torts Claim Act seeking compensatory damages for the loss of the use of said real property for farming croplands, and for economic and other harm caused to them and their farming businesses and as the result of twenty (20) years of lost harvest revenues (ECF No. 156).

18. Defendants have remained conscientious about not violating the terms of the Consent Decree by discharging point-source pollutants into the approximately 30-acre Murphy Farm Consent Decree Area assuming the rough shape of a "U" as the Restoration Plan describes. For this reason, Defendants had continued to seek government authorization and cooperation allowing them to clean and maintain agricultural ditches and related culverts and the drainage tile systems bordering and/or adjacent to the Consent Decree Area within the Murphy Farm tract and on or adjacent to the Homestead and Marsh Farms tracts.

19. EPA has long contended that the purpose of Restoration Plan was "to restore the wetlands portion of the Murphy Farm to its [wet] state in 1985, prior to Mr. Brace's filling activities [...which] had occurred in 1985 forward." *Brace v. United States*, No. 98-897L (Ct. Cl. 2006) at p. 32. However, authentic historical aerial photography of the onsite hydrology and topography of then-existing drainage ditches at that time unequivocally showed, to the contrary, that the

Murphy Farm tract had already been historically drained and maintained by Defendants as “dry land capable of supporting the ongoing farming operation.” (Ex. 5 5-11-83 Murphy Satellite Image), (Ex. 6 4-7-93 Murphy Satellite Image). Based on this historical evidence, the Consent Decree’s purpose of restoring the Murphy tract 30-acre wetlands area in question to its actual physical state in 1984 would have necessarily meant restoring it to its proven mostly “dry” state at such time. The only possible way to restore the Murphy Farm tract to its original “wet” state would have been for the Consent Decree to have ordered restoration back to its physical condition prior to or during the early twentieth century before it even had been cultivated for livestock pasturing and hay cropping. Defendants, however, in 1977, had already commenced its conversion of the Murphy Farm tract from cultivated pastureland to cropland use, entailing the clearing of brush and expansion of drainage ditch construction activities undertaken pursuant to and as part of an overall Soil and Water Conservation Plan approved by the U.S. Department of Agriculture.

20. The United States Motion to Enforce Consent Decree and for Stipulated Penalties (ECF No., at 1-2) and Memorandum of Law in Support of the United States Motion to Enforce Consent Decree and for Stipulated Penalties (ECF No., at 21-23) convey the incorrect impression that the Consent Decree, including its Restoration Plan and hand drawn map, is a model of clarity that does not contain any ambiguities or infirmities that render it unworkable as designed and implemented, which is manifestly untrue. Defendants will show, to the contrary, that the Consent Decree Restoration Plan and hand drawn map contain various latent design ambiguities the United States has exploited by continued over-implementation, at Defendants’ ongoing legal and financial expense.

21. The United States has requested that this Court “modify the Consent Decree to increase the stipulated penalties to deter Defendants from violating the Consent Decree in the future.” (ECF

No. 206, at 1-2). As justification, the United States alleges that: 1) the Consent Decree was “‘specifically designed’ to fully restore the 30-acre wetland and permanently enjoin discharges of pollutants, including dredged or fill material, into that wetland;” 2) “‘time and experience’ have shown that Defendants have controverted th[e] aims” of the Consent Decree by “reversing the required restoration and undertaking the same actions already adjudged to violate the CWA;” and 3) the Consent Decree has consequently “failed to accomplish its purpose.” (ECF No. 207, at 22).

22. As set forth in its memorandum accompanying this motion, Defendants shall demonstrate that the first two United States allegations are false and misleading. With respect to the third allegation, Defendants agree with the United States that the Consent Decree has failed to accomplish its purpose, but for an entirely different reason. This failure is not attributable to any action of Defendants; rather, this failure is entirely due to the commission by the United States and its agents of ongoing acts of affirmative misconduct against the interests of Defendants in complying with the Consent Decree, as well as, against the interests of this Court in ensuring the administration of justice.

23. As explained in the supporting Memorandum of Law, this Court cannot ignore how the United States has intentionally and unconscionably over-implemented, and thus, committed multiple material violations of the Consent Decree Restoration Plan substantially inconsistent with and, in excess of its design specifications, purpose, and scope. This Court also cannot ignore how the United States intentionally had failed to secure written approval of those modifications without first securing written approval from Defendants or this Court in direct contravention of this Court’s Consent Decree Order entered on September 23, 1996, thereby robbing this Court of its retained jurisdiction in violation of Consent Decree paragraph 12. (Ex.1 CD, Restoration Plan, Attachment A).

WHEREFORE, 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 this enforcement action; 2) direct the United States to reimburse Defendants for all costs associated with the defense of the enforcement action and this motion, including attorney and expert fees; 3) schedule a physical hearing in the event this Court decides, despite overwhelming evidence of the United States' multiple acts of 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.

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