

(Brace) EPA
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**KNOX
McLAUGHLIN
GORNALL
& SENNETT**

Attorneys & Counselors

Neal R. Devlin
ndeclin@kmgslaw.com

June 19, 2008

A Professional Corporation120 West Tenth Street
Erie, Pennsylvania 16501-1461
814-459-2800
Fax 814-453-4530509 North Main Street
Jamestown, New York 14701-5027
716-338-0413
Fax 716-484-7023

www.kmgslaw.com

RICHARD H. ZAMBOLDI
JACK M. GORNALL
HARRY K. THOMAS
MICHAEL A. FETZNER*
MICHAEL J. VISNOSKY
DONALD E. WRIGHT, JR.
RICHARD W. PERHACS
ROBERT G. DWYER
CHRISTINE HALL McCLURE
R. PERRIN BAKER
CARL N. MOORE
DAVID M. MOSIER
THOMAS A. TUPITZA
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BRIAN GLOWACKI*
FRANCIS J. KLEMENSIC
TIMOTHY M. SENNETT
JEFFREY D. SCIBETTA
PATRICIA K. SMITH
MARK T. WASSELL†
RICHARD A. LANZILLO
JOANNA K. BUDDE
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THOMAS C. HOFFMAN II
MARK J. KUJAR
TIMOTHY M. ZIEZIULA
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PETER W. YOARS, JR.*
TRACEY D. BOWES
BRYAN G. BAUMANN
NEAL R. DEVLIN
JOSEPH F. GULA, III+
NADIA A. HAVARD*
ELLIOTT J. EHRENREICH
TIMOTHY S. WACHTER
TIMOTHY D. IANNINI
JEREMY T. TOMAN**Of Counsel:**WILLIAM C. SENNETT
HARVEY D. McCLURE* Also licensed to practice in New York
† Also licensed to practice in Ohio
+ Registered Patent AttorneyPamela Lazos, Esq.
Office of Regional Counsel
US EPA Region 3
1650 Arch Street (3PM52)
Philadelphia, PA 19103-2029

RE: Robert Brace

Dear Attorney Lazos:

I am writing in follow-up to our recent telephone conference in which you requested that I provide a more detailed description of my client's concerns regarding the implementation of the Consent Order at issue. I have discussed this issue with my client and, below, is a brief summary of the relevant background and a detailed description of the actions my client believes must be taken to make the Consent Order's effects consistent with its underlying purpose.

Relevant Background

As you are well aware, the Consent Order has been the subject of substantial litigation. As a result of that litigation, the purpose and intended constraints of the Consent Order have been well established. This purpose became a central issue in the litigation and, in the end, was a material reason why the courts determined that a taking had not occurred.

The Consent Order was entered on June 25, 1996. As testified to by Mr. Lewis T. Steckler, and relied upon by the Court of Federal Claims, the Consent Order was intended to "restore what one EPA official described as the 'hydrologic drive of the wetlands' to where it was in 1985."¹ (Brace v. USA, 72 Fed. Cl. 337, 344 (2006)). Consistent with the Consent Order, and the restoration plan that was designed by the EPA, Mr. Brace removed miles of drainage tile, excavated trenches and installed a check dam.

¹ Lewis L. Steckler testified:

Q: You testified earlier today that the restoration plan for the 30 acres, which you observed on December 23rd and 24th of 1996, was to restore the property back to 1984, right? Is that what you said:

A: Yes.

EXHIBIT

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After Mr. Brace took these steps to comply with the Consent Order, the water table on Mr. Brace's property began to rise. As the Trial Court stated, "For reasons that are unclear, the water table on plaintiff's property has risen, indeed, so much, as to create a large pond on the lower half of the property." It was also established during the litigation that, as of 1984, and for at least 5 years prior, the property had been dry, except during periods of excessive rainfall.

As the Trial Court indicated, despite the purpose of the Consent Order and the unrebutted testimony that the Murphy Farm was consistently dry by 1979, after Mr. Brace removed the material required by the Consent Order and installed the required check dam, the water table on the Murphy Farm rose to the point where there is presently a large pond on that property. A copy of a recent aerial photograph showing this condition is enclosed with this letter and marked as the "First Photo."

The fact that the present condition of the Property appears to have exceeded the scope of the Consent Order was not only observed by the Trial Court, but was also used by the Court as a basis to comment on the fact that Mr. Brace had not sought modification or clarification of the Consent Order. "[P]laintiff neither sought modification of the decree, nor clarification from the EPA, either formally or otherwise, as to his obligations thereunder or his ability to use the upland portions of the farm property. After 1996, no EPA official has ever visited the property to determine whether the restoration plan had broader impacts than were intended." (Brace v. US, 72 Fed. Cl. At 345). During the trial, the concept of modification and clarification of the consent order was discussed by Robert Lapp. (Trial Transcript pp. 657 – 660, which are enclosed).

Specific Issues to Address

Based upon the purpose of the Consent Order, the effects it has had, and both the Court's and Mr. Lapp's statements regarding Mr. Brace's ability to seek clarification and modification, we would like to address three primary issues under the Consent Order that have prevented Mr. Brace from being able to make use of any of the Murphy Farm and portions of the Homestead Farm. The resolution of these issues is intended to allow Mr. Brace to make reasonable use of the "upland" portions of the Murphy farm and of his entire Homestead farm:

Specifically, Mr. Brace would like to discuss the following issues:

1. **The delineation of the wetlands on the Murphy Farm:** At present, Mr. Brace does not know the boundaries of the 30-acre wetland area on the Murphy Farm. In order to know the areas that he is permitted to use, Mr. Brace would like to have the wetland area staked so he can use the remainder of the property without fear of violating the consent order;
2. **An agreement to allow the use of the upland portions of the Murphy Farm and the Homestead Farm:** The second map enclosed with this letter includes a depiction, in red, of what Mr. Brace believes to be the boundary of the wetlands. As was clear during the trial, Mr. Brace wants to be able to use the remainder of his property for normal farming or residential purposes. Mr. Brace is concerned

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that, as presently written, the consent order may prevent that use due to the possibility that any disruption of the soil on the upland portions of the Murphy Farm could cause some sediment to enter the wetlands. In order to allow Mr. Brace to use the upland portions of his property for the growing of crops or residential uses, we would like an agreement (either through a clarification of the consent order, or some other vehicle) that Mr. Brace is permitted to engage in these types of activities on the upland portions of his property without violating the consent order.

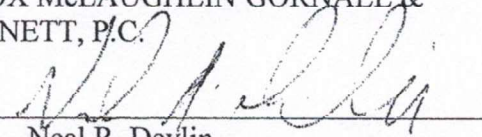
3. **Steps to return the water table in the upland portions of the Murphy Farm and the Homestead Farm to their pre-consent order condition:** The enclosed map also identifies areas (marked in green with the number 1) that are not within the wetlands but that have become excessively wet due to the consent order and restoration plan. These upland portions have become increasingly wet since the consent order and are getting progressively more wet. Currently, they are not useable without drainage. Additionally, and related to point one above, the wetlands itself appears to have exceeded the 30 acres that are at issue. Mr. Brace would like to reach an agreement with the EPA that those areas that are not within the 30-acre wetland site can be drained so that they can be used.

As you can see, Mr. Brace is not asking that he be allowed to conduct any activities on the wetlands. However, he is entitled to make full use of the remaining acreage on the Murphy Farm and all of the Homestead Farm. As the enclosed pictures show, the consent order has clearly exceeded its purpose by not only creating a pond that never before existed, but also by affecting non-wetland acreage. Mr. Brace's goal is simply to be able to use this non-wetland acreage without the threat of being found in contempt of the Consent Order.

I look forward to hearing from you regarding these issues. If you or any representative of the EPA would like to visit the property please let me know and we can certainly arrange for that visit.

Very truly yours,

KNOX McLAUGHLIN GORNALL &
SENNETT, P.C.

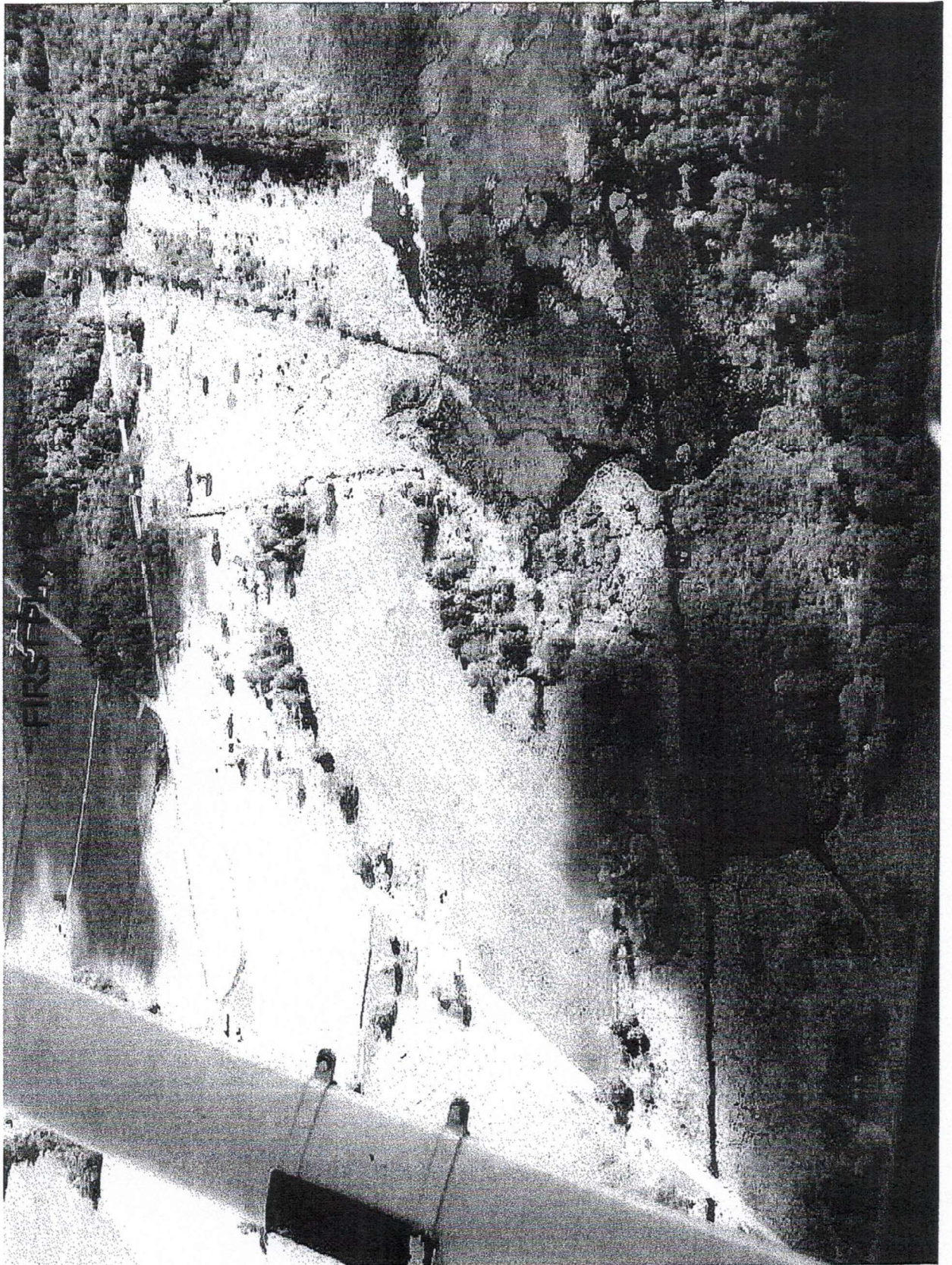
By: 

Neal R. Devlin

NRD
786818

copy with
enclosures
to:

Robert Brace



LAPP - CROSS

1 A That is correct.

2 Q Okay. And as you testified, the reason for
3 putting the check dam in was to back up the water to
4 create a higher water level in unnamed tributary A,
5 right?

6 A It was to re-create the bottom of that
7 unnamed tributary prior to its dredging.

8 Q Okay. Well, that was its function, its
9 conceptual function, but its physical appearance was
10 that it was a dam, right, against which water would
11 back up?

12 A Well, it is a shallow draft dam. It is a
13 check dam, and by check dam it's checking the water.
14 It is not a wholesale damming of that tributary.

15 Q Right.

16 A And it's a very low and shallow feature in
17 the bottom of that tributary. There is quite a bit of
18 bedded bank remaining for flow.

19 Q Right. Now, you testified that Mr. Brace
20 could come to the agency and talk about modification,
21 but if that modification involved decreasing the
22 hydrologic drive of this restoration plan, is it fair
23 to say the agency would look at askance at such a
24 proposal?

25 A I think what we would do is have a

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1 discussion, and again this is all supposition, but if
2 there was a need outside of the wetland area for
3 drainage for crop production, things like that, we
4 would look at what the alternatives would be, and see
5 if we could formulate some sort of activity that would
6 facilitate that drainage while trying to keep the
7 wetland area in tact.

8 Q Okay. But the agency is not open to any
9 alteration of the work that's done within the 30
10 acres?

11 A That is correct unless -- with the caveat --
12 again, all of that work was to correct very localized
13 water issues. Those drain tunnels had very limited
14 effect. Those drainage ditches that you referred to
15 have very limited surface water effect within the
16 wetland.

17 So the only issue may be the check dam. As
18 I said earlier, that was a very shallow dam designed
19 to replace the -- to bring back the original bottom,
20 if you will, so that there wasn't excessive movement
21 of water from the wetland out.

22 If that in fact was causing problems, then
23 what we would look at is possibly upstream solutions
24 or other ways to control that water, because, you
25 know, there is a fall on the property, and water is

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1 moving downhill. And so you may look at other ways to
2 correct the issue if there in fact is one.

3 Q Okay. But you don't see any of those
4 involving alternation of the work that was done under
5 the restoration plan?

6 A No, because I don't see how the work that
7 was done in the restoration plan would have had
8 significant upstream effects.

9 Q Okay. And that modification would have to
10 be approved both by EPA and the Justice Department,
11 wouldn't it?

12 A Yes, I believe so.

13 Q It would involve a modification of the
14 consent decree?

15 A Yes, I assume it would.

16 Q And under Justice Department regulations, to
17 your knowledge, are consent decrees such as the ones
18 in your cases also put out for public notice and
19 comment?

20 A I honestly don't know the process --

21 Q You don't. Okay.

22 A -- of that.

23 Q Fine enough.

24 Would it be fair to say Mr. Brace would
25 probably need to hire a lawyer to get this done?

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1 A Well, I don't know the answer to that,
2 because if let's say these -- let's say we had this
3 discussion.

4 Q Right.

5 A And we came up with a resolution. Certainly
6 that discussion could take place without lawyers. It
7 could be amongst the technical people. There could be
8 resolutions that would be done outside of the
9 restoration plan itself that would assist Mr. Brace.

10 As I believe I testified to earlier, there
11 was nothing in the consent decree that precluded
12 activity within the 30 acres; just that it had to be
13 authorized through the Clean Water Act.

14 Q Right.

15 A So if there were activities that could be
16 undertaken which would either meet one of the
17 exemptions or meet one of the nationwide permits, or
18 you know, perhaps it might be a permit application if
19 had to be significant. Those would be things that I
20 believe you could do and wouldn't undermine again the
21 consent decree or the restoration plan.

22 Q Right.

23 A So I can't answer whether you would need to
24 get a lawyer for that or not. I mean, you know, I
25 would say many or most instances we resolve both

