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

UNITED STATES OF AMERICA Plaintiff, v. ROBERT BRACE, ROBERT BRACE FARMS, Inc., and ROBERT BRACE and SONS, Inc., Defendants.	)	Civil Action No. 1:17-cv-00006-BR

UNITED STATES' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

The United States respectfully moves the Court pursuant to Federal Rule of Federal Rule of Civil Procedure 12(c) for partial judgment on the pleadings on Defendants' First, Second, Third, and Fourth affirmative defenses. For the reasons discussed in the attached Memorandum of Law, Defendants fail to state facially plausible defenses, and accordingly, the Court should enter judgment in favor of the United States on Defendants' affirmative defenses.

Dated: April 16, 2018

Respectfully submitted,

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UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

The United States respectfully moves this Court pursuant to Federal Rule of Civil Procedure 12(c) to enter judgment in the United States' favor on Defendants' First, Second, Third, and Fourth Affirmative Defenses as legally insufficient. As detailed below, Defendants' First and Second Affirmative Defenses (estoppel and fraudulent inducement) are equitable defenses that are not available against the government when it acts in the public interest, as the United States is here. But even if the Court finds that equitable defenses are available here, Defendants have not alleged – and cannot allege – facially plausible estoppel and fraud defenses. Similarly, Defendants' allegations in support of their Third Affirmative Defense (exemption) and Fourth Affirmative Defense (fair notice), even when accepted as true, fail to state facially plausible affirmative defenses. Thus, the United States requests that the Court enter judgment in the United States' favor on Defendants' First through Fourth Affirmative Defenses.

STATUTORY BACKGROUND

The Clean Water Act ("CWA") is intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Under CWA

section 301(a), 33 U.S.C. § 1311(a), no person may discharge a pollutant, including dredged or fill materials, into "navigable waters" without a permit issued by the United States Army Corps of Engineers ("Corps") under CWA section 404. 33 U.S.C. § 1344(a); *see generally* 33 C.F.R. pts. 320, 325. CWA section 309(a), 33 U.S.C. § 1319(a), provides that where a section 301 violation has occurred, EPA may issue an administrative compliance order "requiring such person to comply with such section," or initiate a civil enforcement action. *Id.* § 1319(a)(3).

FACTUAL AND PROCEDURAL BACKGROUND

On January 9, 2017, the United States commenced this civil action under section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), against Defendants Robert Brace, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc. ("Defendants"). Compl., ECF No. 1. The United States alleges that Defendants violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants into wetlands at a property known as the "Marsh Site" without a permit issued by Corps. *Id.* ¶¶ 43-53.

In their original answer, Defendants asserted a number of affirmative defenses. Answer and Affirmative Defenses to Compl. ¶¶ 54-64, ECF No. 7. The United States moved to strike eight of Defendants' affirmative defenses on March 17, 2017, ECF No. 17. The Court agreed that Defendants' "affirmative defenses [were] not adequately pled under any standard," and struck the defenses to which the United States objected. January 25, 2018 Order 2, ECF No. 40. The Court granted Defendants leave to amend their answer and affirmative defenses. *Id.* at 2-3.

Defendants filed an amended answer on February 9, 2018, and attempted to re-plead several of their original affirmative defenses. Am. Answer to Compl. And Affirmative Defenses ¶¶ 54-80, ECF No. 44. The United States now moves for judgment on the pleadings because Defendants have failed again to state legally sufficient affirmative defenses.

LEGAL STANDARD

A motion for judgment on the pleadings as to affirmative defenses under Federal Rule of Civil Procedure 12(c) "is considered using the same standards as when considering a motion to dismiss claims under Rule 12(b)(6)." *United States v. 0.28 Acre of Land*, 2009 WL 4408194, at *2 (W.D. Pa. Nov. 25, 2009) (citation omitted); *see also Pa. Gen. Energy Co., LLC v. Grant Twp.*, 139 F. Supp. 3d 706, 711 (W.D. Pa. 2015) (noting that the "only difference" between Rule 12(b)(6) and Rule 12(c) motion is when they can be filed). Thus, a defense should be dismissed if "it fails to state a claim that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In making this determination, a court must first "accept as true all of the allegations contained in [the pleading]," except for those that are "legal conclusions." 556 U.S. at 678-79. Thereafter, the court is to assess whether the defense is plausible on its face. *See id.* at 679.

ARGUMENT

I. Defendants' First and Second Defenses Should Be Dismissed Because They Are Neither Applicable Here Nor Facially Plausible.

A. Equitable Affirmative Defenses Are Unavailable Against the Government when Acting to Protect the Public Interest and Welfare.

Defendants' First and Second Affirmative Defenses (equitable estoppel and fraudulent inducement[1]) are equitable defenses that seek to bar the United States' enforcement of the CWA based on alleged oral misrepresentations made by EPA and Corps employees during a July 2012 field inspection. But equitable defenses are not available to bar the government, acting in its sovereign capacity, from enforcing laws to protect the public interest and welfare. *See, e.g.*, *Pan-American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 506 (1927) (equitable

[1] Fraud is considered an equitable defense. *See Loglan Inst., Inc. v. Logical Language Grp., Inc.*, 962 F.2d 1038, 1042 (Fed. Cir. 1992) (describing equitable affirmative defenses as including "unclean hands, estoppel, *fraud*, acquiescence, and waiver" (emphasis added)); *see also Black's Law Dictionary* (10th ed. 2014) (defining equitable defense and providing fraud as an example).

defenses shall not be asserted against the United States to "frustrate the purpose of its laws or to thwart public policy"); *Nat'l Labor Relations Bd. v. Kingston Cake Co.*, 206 F.2d 604, 611 (3d Cir. 1953) ("[unclean hands] doctrine does not apply since this is a proceeding by a governmental agency seeking enforcement of its order in the public interest"); *United States v. Kramer*, 757 F. Supp. 397, 427, 428 (D.N.J. 1991) ("equitable defenses cannot be asserted against the government when it acts in its sovereign capacity to protect the public health and safety" (internal quotation marks omitted)); *United States v. Vineland Chem. Co.*, 692 F. Supp. 415, 423-24 (D.N.J. 1988) (noting importance of environmental law compliance and that equitable defenses are unavailable against the government).

In this CWA enforcement action, the United States is indisputably acting in its sovereign capacity to protect the public interest and welfare in "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Thus, the Court should dismiss Defendants' equitable defenses—estoppel and fraudulent inducement—because they are unavailable against the United States. *See F.D.I.C. v. White*, 828 F. Supp. at 311 ("[P]ublic policy clearly militates against the assertion of equitable defenses of estoppel, waiver or unclean hands . . . these defenses are insufficient as a matter of law . . . .").

B. Defendants' Equitable Estoppel Defense Is Not Facially Plausible.

But even if the Court finds that equitable defenses are available in this case, Defendants' Amended Answer fails to state plausible estoppel and fraudulent inducement defenses against the government according to the standard laid out in *Iqbal*. The Supreme Court has held that "equitable estoppel will not lie against the Government as it lies against private litigants." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419 (1990) (citing cases holding that "the Government could not be bound by the mistaken representations of an agent . . ."); *see also*

Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."). To invoke estoppel against the government, a defendant must show not only the traditional elements, but also that government officials engaged in "affirmative misconduct." *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987). Although the Supreme Court has not foreclosed the possibility that "extreme circumstances" could estop the government, it has consistently "reversed every finding of estoppel [against the government] that [it] ha[s] reviewed." *Richmond*, 496 U.S. at 422-23, 434.

To support an estoppel defense, Defendants must show (1) that the Government made a "misrepresentation," (2) that Defendants "reasonably relied" upon said misrepresentation, (3) that Defendants' reliance was "to [their] detriment," and (4) that there was "affirmative misconduct on the part of the government." *Asmar*, 827 F.2d at 913. Here, even when accepting all of Defendants' factual allegations as true, Defendants fail to state a legally sufficient defense to estop the government because Defendants cannot demonstrate that (1) their reliance on any alleged misrepresentation by government officials was reasonable, and (2) the government official's behavior in this case amounted to affirmative misconduct.

1. Defendants' Reliance on Alleged Oral "Authorizations" is Unreasonable as a Matter of Law.

Defendants' estoppel defense fails because their reliance on alleged oral "authorizations" made by government officials in the field was unreasonable as a matter of law.[2] Those who assert estoppel claims against the government bear a heavy burden because they "are expected to

[2] Contrary to Defendants' allegations, the government officials here never authorized Defendants to clear, grub, ditch, and drain the wetlands, the illegal activities that are the basis for this enforcement action. However, in considering a Rule 12(c) motion, the Court must take the non-movants' allegations as true.

know the law and may not rely on the conduct of Government agents contrary to law." *Heckler*, 467 U.S. at 63. For this reason, "the government [will not] normally be bound by erroneous advice . . . which is not in accordance with the law." *Am. Training Servs., Inc. v. Veterans Admin.*, 434 F. Supp. 988, 1001 (D.N.J. 1977).

To reinforce this principle, the Third Circuit and courts within the Circuit have consistently held that it is unreasonable for a party to rely solely on the oral representations of government officials. *Pediatric Affiliates v. United States*, 230 F. App'x 167, 170-71 (3d Cir. 2007) ("[O]ral expression of opinion simply does not rise to the level of an estoppel") (citations omitted); *Fredericks v. Comm'r of Internal Revenue*, 126 F.3d 433, 442-43 (3d Cir. 1997) ("[Defendant's] reliance would have been unreasonable had it been based solely on the initial *oral* misrepresentation . . . ." (emphasis added)); *Crisci v. United States*, 2009 WL 3055314, at *5 (W.D. Pa. Sept. 21, 2009), *aff'd*, 407 F. App'x 573 (3d Cir. 2010) ("Reliance is undermined when it is based on oral advice, unconfirmed by a writing"); *see also McGinley v. United States*, 2013 WL 5466634, at *7-8 (D.N.J. Sept. 30, 2013) (represented party's reliance upon oral statements unreasonable); *Grandelli v. U.S. Dep't of Treasury*, 2006 WL 3337491, at *3 (E.D. Pa. Nov. 15, 2006) (reliance upon oral statements is unreasonable, particularly when contradicted by other writings).

Here, Defendants possess all the United States' written correspondence about activities at the Marsh Site, but they do not (and cannot) contend that any of those writings provides a basis for estoppel. Instead, Defendants only allege that they relied on *oral* statements made by an EPA inspector, Todd Lutte, during a field inspection. Am. Answer ¶¶ 57-58. Defendants' reliance on the alleged oral representations, unconfirmed by writing, was unreasonable as a matter of

law.[3] Thus, when the reliance component of Defendants' estoppel defense is stripped of legal conclusions, all that remains are allegations that do not make out a plausible claim of reasonable reliance, even when they are assumed to be true. For this reason, Defendants' estoppel defense fails to satisfy the *Iqbal* standard and should thus be dismissed.

2. Defendants Fail to State a Plausible Claim of Affirmative Misconduct on the Part of the Government.

Defendants' estoppel defense also fails because Defendants do not plausibly contend that Mr. Lutte (or any other government official) engaged in affirmative misconduct. To qualify as affirmative misconduct sufficient to estop the government, the alleged behavior must be something more than a "mere omission or negligent failure." *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992); *see also id.* ("rare and extreme circumstances [are] necessary to allow an estoppel claim to run against the government"); *Crisci*, 2009 WL 3055314, at *3 ("Affirmative misconduct requires more than a mere omission, negligent failure, or erroneous advice . . . .") (citations omitted). Indeed, to show affirmative misconduct, Defendants are required to show evidence of more egregious behavior, such as an intent to mislead. *See Syndor v. Office of Pers. Mgmt.*, 336 F. App'x 175, 182 (3d Cir. 2009); *see also Admiralty Condo. Ass'n, Inc. v. Director, Fed. Emergency Mgmt. Agency*, 594 F. App'x 738, 741 (3d Cir. 2014) ("'[F]acts constituting a specific intent to injury on the part of a government official'" necessary to establish affirmative misconduct) (citation omitted); *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1009 (9th Cir. 1986) (affirmative misconduct requires showing of a "deliberate lie" or a "pattern of false promises").

[3] Moreover, a finding of reasonable reliance based on the pleaded facts would be in conflict with the principle that "the government [will not] normally be bound by erroneous advice." *Am. Training Servs.*, 434 F. Supp. at 1001.

Here, Defendants' claim of affirmative misconduct would fail even if one were to assume that Defendants' factual allegations are true. Like the petitioner in *Syndor* whose estoppel claim failed to make the required showing of affirmative misconduct, 336 F. App'x at 182, Defendants here fail to allege that there was any intent to mislead or engage in any other form of malicious conduct on the part of the government, *see* Am. Answer ¶¶ 54-70. Indeed, all Defendants can muster on this point is their legal conclusion that "[the government's alleged] authorization was the result of affirmative misconduct, as [it] failed to follow mandatory federal regulations." Am. Answer ¶ 63. When this legal conclusion is ignored as *Iqbal* requires, 556 U.S. at 678-79, there is nothing left in Defendants' estoppel claim that could ever rise to the level of affirmative misconduct, *see* Am. Answer ¶¶ 54-65.[4] *See United States v. Boccanfuso*, 882 F.2d 666, 670-72 (2d Cir. 1989) (rejecting estoppel argument for CWA claim based on Corps misrepresenting its regulatory jurisdiction and defendant's reliance thereon); *United States v. City of Hoboken*, 675 F. Supp. 189, 199 (D.N.J. 1987) (rejecting equitable estoppel defense "as a matter of law" where defendants claimed to rely on EPA's conduct that was inconsistent with the law); *United States v. Lewis*, 355 F. Supp. 1132, 1141 (S.D. Ga. 1973) (rejecting estoppel argument based on Corps' misrepresentation to developer); *see also Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1552-54 (3d Cir. 1996) (plaintiffs did not show the "extraordinary circumstances" required for estoppel because they could not make "a showing of affirmative acts of fraud or similarly inequitable conduct"). Thus, even when one assumes Defendants' factual allegations are true, Defendants'

[4] While the "evidentiary standard[s]" and "pleading requirements" should not be conflated, the Supreme Court stated in *Iqbal* that "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a [pleading] suffice if it tenders naked assertions devoid of further factual enhancement." 556 U.S. at 678 (internal quotation marks and citations omitted). Here, Defendants' estoppel allegations are nothing more than a "[t]hreadbare recital[] of the elements of a cause of action, supported by mere conclusory statements," a pleading which, according to the Supreme Court, "do[es] not suffice." *Id.* at 678.

pleading falls well short of the "rare and extreme circumstances necessary to allow an estoppel claim to run against the government." *Pepperman*, 976 F.2d at 131. Accordingly, Defendants' First Affirmative Defense should be dismissed.

C. Defendants' Fraud and/or Fraudulent Inducement Defense Is Not Facially Plausible.

Defendants' fraudulent inducement affirmative defense relies on the same factual allegations as their estoppel defense. Am. Answer ¶¶ 66-70. Like Defendants' estoppel defense, their assertion that the government engaged in fraudulent inducement is legally insufficient. A successful claim of fraudulent inducement requires a demonstration of the following:

> (1) a representation; (2) which is material to the transaction . . . ; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) ***with the intent of misleading another into relying on it***; (5) ***justifiable reliance*** . . . ; and (6) the resulting injury was proximately caused by the reliance.

Johnson v. State Farm Life Ins. Co., 695 F. Supp. 2d 201, 209 (W.D. Pa. 2010). As is the case with their estoppel defense, Defendants fail to make out a plausible claim of both an intent to mislead on the part of the government officials and justifiable reliance on their part. *See* Am. Answer ¶¶ 66-70.

Moreover, Defendants' vague descriptions of the alleged misrepresentation fail to meet the heightened pleading standard required for allegations of fraud under Federal Rule of Civil Procedure 9(b). Affirmative defenses subject to Rule 9(b) require a party to plead: "(1) a *specific false representation* [or omission] of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage." *In re Rockefeller Ctr. Properties, Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002) (emphasis added). Defendants' allegations fall well below this standard. For instance, Defendants do not even

identify the "work activity" Mr. Lutte allegedly authorized, which serves as the "misrepresentation" element of their defense. Accordingly, Defendants' Second Affirmative Defense should also be dismissed according to the pleading standard laid out in *Iqbal*.

II. Defendants' Exemption Defense Is Not Facially Plausible.

Defendants' Third Affirmative Defense, Am. Answer ¶¶ 71-77, appears to allege three separate exemption defenses predicated on: (1) Defendants' receipt of a "Swampbuster" determination issued by the United States Department of Agriculture ("USDA") pursuant to the Food Security Act of 1985, *see* Am. Answer ¶¶ 72, 74, 76, 77; (2) Defendants' pre-1977 activities undertaken pursuant to "an amended soil and water conservation plan," Am. Answer ¶ 73; and (3) "Defendants' consistent use of the property at issue for agricultural purposes." Am. Answer ¶ 75.[5] Nevertheless, none of these alleged defenses meets the *Iqbal* standard.

Congress enacted the "Swampbuster" provisions of the Food Security Act in 1985, "to combat the disappearance of wetlands" by dissuading farmers from converting them to farmable land. *Gunn v. U.S. Dep't of Agric.*, 118 F.3d 1233, 1235 (8th Cir. 1997) (citing 16 U.S.C. §§ 3801, 3821-24). Swampbuster achieves this goal by denying access to USDA farm benefits to any farmer "who, after, December 23, 1985, converts a wetland in a way that production of an agricultural commodity is possible." *Durbin v. Farm Service Agency*, 2007 WL 1114986, at *1 (S.D. Ohio Apr. 13, 2007); *accord Orchard Hill Building Co. v. U.S. Army Corps of Eng'rs*, 2017 WL 415078, at *10 (N.D. Ill. Sept. 19, 2017). Of the nine (or more) land designations

[5] Although this Court must take Defendants' factual allegations as true for the purposes of ruling on this motion, Defendants' allegations within their Third Affirmative Defense directly conflict with their own admissions elsewhere. Defendants assert that they engaged in activities on the Marsh Site prior to 1977, *see* Am. Answer ¶ 73, and that they received a Swampbuster determination on the Marsh Site for actions undertaken prior to December 23, 1985, *see* Am. Answer ¶¶ 72, 74, 76, 77, while simultaneously admitting that they did not own or conduct any work on the Marsh Site until May 2012. *Compare* Am. Answer ¶¶ 26-27, 38 *with* Compl. ¶¶ 26-27, 38.

available under the Swampbuster provisions, *see* 7 C.F.R. § 12.2 (e.g., wetland, converted wetland, artificial wetland, commenced-conversion wetland, farmed wetland, and prior-converted cropland), only ***prior-converted cropland*** is exempt from the CWA. *See* 33 C.F.R. § 328.3; 40 C.F.R. §§ 230.3, 232.2. "Prior-converted cropland" is a converted wetland where (1) the conversion occurred prior to December 23, 1985; (2) an agricultural commodity had been produced at least once before December 23, 1985; and, (3) as of December 23, 1985, the converted wetland did not support woody vegetation and it met certain hydrologic criteria." *Reichenbach v. U.S. Dep't of Agric.*, 2013 WL 74608, at *1 (S.D. Ind. Jan. 4, 2013) (citing 7 C.F.R. § 12.2(a)(8)). Land may be prior-converted cropland ***if, and only if***, the conversion was entirely complete by December 23, 1985—thus, land that constituted wetlands as of December 23, 1985, is not and can never be prior-converted cropland. *See Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 475-76 (7th Cir. 2005); *Maple Drive Farms Family Ltd. P'ship v. Vilsack*, 2012 WL 6212905, at *7-8 (W.D. Mich. Dec. 13, 2012) (holding that "the controlling question is the wetland status of the property on December 23, 1985"), *rev'd and remanded on other grounds*, 781 F.3d 837, 847-48 (6th Cir. 2015) (affirming that December 23, 1985, is the crucial date).

Defendants do not allege that they received the ***only*** Swampbuster determination (prior-converted cropland) from USDA for the Marsh Site that is relevant under the CWA. *See* Am. Answer ¶ 72. Instead, they merely aver that they received *some* determination, but do not identify which nor specify its relevance. *Id.* However, even if Defendants had alleged that USDA had issued a prior-converted cropland determination for the Marsh Site,[6] it would not

[6] Defendants did not allege this fact because they cannot do so. Their Amended Answer clearly states that Defendants had "the right to complete conversion of wetlands to croplands" they "commenced prior to December 23, 1985," but were "interrupted" from doing so. Am. Answer ¶ 76. Accepting Defendants' assertions as true, the Court must conclude that although the conversion began before December 23, 1985, it was not completed by that date. Therefore, the Marsh Site could not possibly be prior-converted cropland.

have been relevant. USDA determinations do not support an affirmative defense to any CWA action. The regulations promulgated pursuant to the CWA are clear—authority for determining CWA regulatory jurisdiction remains with EPA. *See* 33 C.F.R. § 328.3 ("Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the C[WA], the final authority regarding C[WA] jurisdiction remains with EPA."); 40 C.F.R. §§ 230.3 (same), 232.2 (same). Therefore, Defendants' failure to aver facts from which the Court could conclude that the Marsh Site is a prior-converted cropland (e.g., that it was completely converted by December 23, 1985; that an agricultural commodity was produced at least once therefrom before December 23, 1985; and that, as of December 23, 1985, the Marsh Site did not support woody vegetation) is fatal to this inadequately pleaded defense.

Nor does it make any difference whether Defendants have undertaken work on the Marsh Site pursuant to a "soil and water conservation plan authorized and consented to by a federal agency," *see* Am. Answer ¶ 73,[7] or consistently used the Marsh Site for "agricultural purposes" since acquiring it in 2012, Am. Answer ¶ 75. Not only are such statements so vague that they fail to meet even lax notice pleading standards, but they do not even constitute recognized affirmative defenses as pled. The CWA does not recognize either a "soil and water conservation plan" or an "agricultural purposes" land use exemption to the unpermitted discharge of dredged or fill material into a water of the United States. *See* 33 U.S.C. § 1344(f)(1). At best, the CWA exempts some discharges related to certain listed normal farming activities, but only those specified, and *only if* those discharges are made pursuant to an established, ongoing farming enterprise on the relevant property. Discharges that are directed towards bringing that land *into* a

[7] Defendants' failure to identify what "federal agency" issued the plan is conspicuous given that "the final authority regarding C[WA] jurisdiction remains with EPA." *E.g.*, 33 C.F.R. § 328.3

farming use, whether re-starting a dormant operation or commencing a new one, are prohibited. *See United States v. Brace*, 41 F.3d 117, 125-27 (3d Cir 1994); *Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs*, 2016 WL 4717986, at *19-20 (E.D. Cal. June 10, 2016); *United States v. Brink*, 795 F. Supp. 2d 565, 582-83 (S.D. Tex. 2011); 33 U.S.C. §§ 1344(f)(1)(A), (f)(2); 33 C.F.R. § 323.4(a)(1); 40 C.F.R. § 232.3(c)(1). Thus, because Defendants have not alleged facts from which the Court could conclude that the Marsh Site supported an established, ongoing farming enterprise *at the time* Defendants purchased the property in 2012, the purported "soil and water conservation plan" and "agricultural purposes" defenses must be rejected.

III. Defendants' "Fair Notice" Defense Is Not Facially Plausible.

Similarly, Defendants' Fourth Affirmative Defense, Am. Answer ¶¶ 78-80, which asserts that Defendants did not receive "fair notice of the relevant agency's interpretation of regulations and statutes," *Id.* ¶ 79, also fails to satisfy the *Iqbal* standard. First, Defendants' mistake or ignorance of the law is not an appropriate affirmative defense to an action enforcing the CWA—a strict liability statute. *See United States v. Wilson*, 133 F.3d 251, 262-63 (4th Cir. 1997); *United States v. Sheyenne Tooling & Mfg. Co., Inc.*, 952 F. Supp. 1414, 1418-19 (D.N.D. 1996); *Cty. of Hoboken*, 675 F. Supp. at 199; *see also Kelly v. U.S. E.P.A.*, 203 F.3d 519, 522 (7th Cir. 2000) ("[N]othing in the statute makes good faith or a lack of knowledge a defense. . . . Civil liability under the C[WA] . . . is strict."); *cf. Portland Pipe Line Corp. v. City of S. Portland*, 2017 WL 6757556, at *103 (D. Me. Dec. 29, 2017) ("[F]air notice does not require 'an explicit or personalized warning' and it 'neither excuses professed ignorance of the law nor encourages deliberate blindness to the obvious consequences of one's actions.'") (citation omitted). Further, to provide sufficient notice, a statute need only give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Hawai'i Wildlife Fund v. Cty. of Maui*,

2018 WL 1569313, at *9 (9th Cir. Feb. 1, 2018) (citation and internal quotation marks omitted); *accord Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 442 (W.D. Pa. 2013). The CWA and its regulations clearly define wetlands, waters of the United States, and dredged and fill material, and prohibit discharging dredged or fill material into waters of the United States without a permit. *See* 33 U.S.C. §§ 1311, 1344, 1362; 33 C.F.R. §§ 323.2, 328.3; 40 C.F.R. §§ 230.3, 232.2. Thus, they provide fair notice as a matter of law. *United States v. Robertson*, 875 F.3d 1281, 1293 (9th Cir. 2017); *United States v. Tull*, 769 F.2d 182, 186 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987); *see United States v. Oxford Royal Mushroom Prod., Inc.*, 487 F. Supp. 852, 855 (E.D. Pa. 1980).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant its motion and enter judgment in its favor on Defendants' Affirmative Defenses 1-4, ECF No 44, ¶¶ 54-80.

Dated: April 16, 2018

Respectfully submitted,

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