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

MOTION FOR RELIEF FROM JUDGMENT BASED ON EXTRAORDINARY CIRCUMSTANCES

Defendants Robert Brace and Robert Brace Farms, Inc., through their attorneys, file this Motion for Relief from Judgment Based on Extraordinary Circumstances pursuant to Federal Rules of Civil Procedure ("FRCP") 60(b)(6). This motion accompanies Defendants' Response and Opposition to the United States' Second Motion to Enforce Consent Decree and for Stipulated Penalties (ECF 214), and Defendants' Motion to Vacate Consent Decree and Deny Stipulated Penalties pursuant to FRCP 60(b)(5) (ECF No. 215) and Memorandum of Law Supporting Motion to Vacate Consent Decree and Deny Stipulated Penalties (ECF No. 216).

Defendants respectfully request that this Court exercise its equitable powers to recognize the extraordinary circumstances that justify allowing Defendants to prospectively continue and complete, by no later than three (3) years from the entry of judgment, the prior commenced conversion of their Murphy Farm tract previously authorized by the United States Department of Agriculture Agricultural Stabilization and Conservation Service ("USDA-ASCS") in September 1988, pursuant to Section 1222(a)(1) of the Food Security Act of 1985 ("FSA"), corresponding USDA implementing regulations (7 C.F.R. 12.5(d)(i)), consistent with subsequently issued 1993

joint EPA-Corps regulations retroactively treating their pre-December 23, 1985 prior commenced conversion as excluded from the jurisdiction of Clean Water Act ("CWA") Section 404.

INTRODUCTION

Defendants have not made allegations in this filing otherwise cognizable under Rules 60(b)(1) through 60(b)(5) in a collateral effort to circumvent the one-year time limitation imposed on relief more appropriately sought thereunder. Defendants are filing this Rule 60(b)(6) motion because they have severely suffered economically, emotionally, medically, legally and reputationally for over thirty (30) years (three decades) as the result of ongoing CWA litigation driven by the United States' abject disregard for the facts and the rule of law. Consequently, Defendants have no other adequate remedy at law available to them to secure the relief they seek.

Defendants now seek equitable relief from this Court that would avail them of the opportunity to secure the proper legal treatment that they had previously been granted by EPA and the Corps under both the CWA and the FSA. Defendants would have been able to realize such treatment had not overzealous federal agency officials abused their administrative discretion and surreptitiously collaborated with Government-funded third-party nonprofit environmental and wildlife organizations to intentionally disrupt, thwart and nullify the grand bargain Congress and then the agencies had reached that allowed Defendants and other farmers throughout the nation to complete their USDA-ASCS-authorized prior commenced conversion of farmed wetland pasturelands to croplands within the time period prescribed.

FACTUAL BACKGROUND

1. Since 1975, Defendants have operated a 157-acre fourth-generation family farm located in Waterford Township, Pennsylvania ("PA") comprised of three hydrologically

integrated farm tracts. In December 1975, Defendant Robert Brace acquired from his father legal title to two of those tracts (the "Homestead Farm" and "Murphy Farm" tracts) and acquired from neighbors the contractual right to farm the third such tract (the "Marsh Farm" tract). During the approximately forty (40) years prior to and following Defendants' acquisition of these tracts, they had been used, in part, for pasturing livestock, producing livestock feed and cropping, consistent with the USDA Soil and Water Conservation Plan that Defendant Robert Brace's father Charles Brace had developed with USDA assistance, and which Defendant Robert Brace later expanded and enhanced to increase soil productivity for the purpose of developing a more profitable cash crop farming business. (Ex. 1 Bob Affidavit Cl. Ct. 2002, at 2).

2. As part of his effort to increase soil productivity for cropping, Defendant Robert Brace, in 1976, had arranged for and began excavation and burying of plastic tubing known as "drainage tile" in the Murphy Farm tract to improve soil and agricultural drainage conditions. The excavation involved what later became to be known as "side-casting" (i.e., the depositing of excavated soil sediment and dirt next to the drainage ditches from which it was removed) and "incidental fallback" (i.e. excavated material that falls back into the drainage ditches). (Ex. 1 Bob Affidavit Cl. Ct. 2002, at 3).

3. When Defendant had undertaken these activities, the United States had not informed him that the dirt and soil that had been removed from the drainage ditches and redeposited on the ground nearby on the Murphy Farm tract required any federal permit. Although Defendant Robert Brace had been generally aware, in 1975, of how the CWA regulated discharges of pollutants into navigable rivers, streams and water bodies, he was entirely unaware that it covered what were commonly recognized as normal farming activities, including clearing, leveling draining, and improving soil and hydrologic conditions of farm

property for which permitting was required. As he understood it, CWA Section 404 exempted normal farming activities, including plowing, seeding, cultivating, drainage and tiling, harvesting and upland soil conservation practices, as well as, activities involving the construction and maintenance of irrigation and drainage ditches, from federal permitting. (Ex. 1 Bob Affidavit Cl. Ct. 2002, at 3-5).

4. On May 4, 1987, former Pennsylvania Game and Fish Commission ("PFGC") representative Andrew Martin entered Defendants' Murphy Farm tract without consent, an administrative or law enforcement warrant or probable cause, despite Defendants' clearly visible "No Trespass" signs. He then notified former U.S. Fish and Wildlife Service ("FWS") biologist David Putnam about observed unauthorized dredge and fill activities being undertaken on that property in violation of CWA Section 404. (Ex. 2 5-4-87 FWS Inspect Rpt). On May 5, 1987, the state and federal officials who reported and recorded the incident undertook an onsite visit of Defendants' Murphy Farm tract. On May 11, 1987, the FWS reported the incident to the U.S. Army Corps of Engineers ("Corps") Corps Buffalo District Office. (Ex. 3 5-11-87 FWS Kulp Ltr to Corps Col. Clark).

5. On June 16, 1987, former FWS biologist David Putnam dispatched a letter correspondence to James Pabody of the Corps Cleveland Projects Office including a draft wetland map of Defendants' Waterford Township, PA farm. The correspondence, which referred to the FWS May 11, 1987 correspondence, also was accompanied by three aerial photographs (Ex. 4 David Putnam 6-16-87 Ltr. to Pabody Corps) which the United States did not provide to Defendants during the recently concluded discovery period.

6. On July 15, 1987, the U.S. Environmental Protection Agency ("EPA") issued a Violation Notice and Order for Compliance inclusive of a restoration plan alleging Defendants'

unauthorized discharges of fill material consisting of dredged material, rock, sand, and agricultural waste into wetlands in violation of CWA Sections 301 and 404. The alleged wetlands were located adjacent to what was merely a farm drainage ditch that Defendants had constructed between 1977 and 1983. EPA referred to this ditch as "Elk Creek" and characterized it as a U.S. navigable water for the purpose of asserting federal jurisdiction over Defendants' Waterford, PA farm. EPA then threatened to assess up to $25,000 of civil penalties per day per violation and possible incarceration. (Ex. 5 EPA 7-15-87 VN/CD Order). This violation notice had been accompanied by the same map which appeared to be a restoration plan prepared by former FWS biologist, David Putnam, at the request of EPA representative James Butch (Ex. 6 David Putnam Depo., April 7, 1992 at 52), and which Mr. Putnam, the day before had provided to the Corps. (Ex. 7 David Putnam 6-16-87 Ltr. to Pabody Corps) Mr. Putnam had previously testified that the intent of the then proposed restoration plan was to restore all "[w]etlands drained prior to 1984 […] to the conditions that existed prior to the violation." (Ex. 6 David Putnam Depo., April 7, 1992 at 54). It also was accompanied by a handwritten cover letter authored by EPA representative James Butch which was released in typed form. (Ex. 8 EPA 7-15-87 VN Cover Ltr. Authored by Jim Butch); (Ex. 9 James Butch Depo March 1992, at 32-33).

7. On July 17, 1987, the FWS notified Defendants that their ditching and filling activities violated CWA Section 404. The FWS notice *inter alia* informed Defendants that the Food Security Act of 1985 ("FSA") denied farmers federal agricultural subsidies, crop insurance and other financial assistance if their filling and draining of wetlands took place after December 23, 1985, and that Defendants' draining and filling activities met the FSA definition of "converted wetlands." (Ex. 10 7-17-87 Perry Ltr).

8. On July 23, 1987, the Corps issued its Violation Notice and Cease-and-Desist Order to Defendants citing allegedly unauthorized placement of fill material into wetlands contiguous with Elk Creek on Defendants' property without the required CWA Section 404 permit. (Ex. 11 Corps 7-23-87 VN).

9. On March 1, 1988, the former regional FWS supervisor dispatched a letter correspondence to a former EPA Region III representative containing a draft restoration plan for Defendants' properties, the goal of which was "to restore all wetlands disturbed since October 1984." (Ex. 12 Kulp Ltr to Butch 3-1-88). The restoration plan, which had been developed by former FWS biologist David Putnam (Ex. 13 David Putnam Depo 1-26-18, at 200-201), had apparently been based upon the FWS' May 6, 1987 delineation by mostly aerial photography of "over 130 acres" of wetland area on Defendants' properties, and FWS' then tentative findings "indicat[ing] that the soils of the area [were] flooded by surface or ground water for a portion of most growing seasons," and that Claimants' "considerable" ditching and filling activities had adversely impacted that area.

10. In August 1988, Defendants applied with the USDA-ASCS to secure a determination that they had commenced their prior conversion of the Murphy Farm tract farmed wetlands to croplands before December 23, 1985, consistent with the FSA. (Ex. 1 Bob Affidavit Cl. Ct. 2002, at 6). In September 1988, after reviewing all of Defendants' activity and expenditure records, the USDA-ASCS determined that Defendants had initiated their prior commenced conversion of thirty-two and four-tenths acres of the fifty-eight (58)-acre Murphy Farm tract in 1977, before December 23, 1985,[1] consistent with the FSA which entitled

[1] The USDA-ASCS's September 1988 prior commenced conversion determination also covers approximately eleven (11) of the twenty (20) acre Marsh Farm tract that Defendants had previously secured the legal right to farm in 1975.

Defendants to USDA-ASCS cost-sharing. (Ex. 14 Commenced Conversion USDA filings & correspondence).

11. On October 4, 1990, Defendants' Murphy Farm tract prior commenced conversion determination, notwithstanding, EPA filed the original CWA violation action alleging CWA Section 404 violation. (Ex. 15 Original EPA Oct. 1990 Complaint). The original action was initiated six (6) years from the October 5, 1984 effective date of Corps regulations promulgated in response to a February 10, 1984 court settlement the Corps had reached with environmental groups, which revised the exemption from CWA Section 404 permitting for construction of agricultural irrigation ditches to include certain connections. (Ex. 49 FR 39478, 39482 (Oct. 5, 1984)). These 10-5-84 regulations did not discuss the CWA Section 404 treatment of constructed dual-function irrigation/drainage ditches that continued to qualify as exempt irrigation ditch construction activities under CWA Section 404(f)(1)(C). It was not until August 17, 1987, in jointly issued Regulatory Guidance Letter 87-07, that EPA and the Corps ultimately treated construction of dual-function irrigation/drainage ditches as non-exempt drainage ditch construction activities requiring a Corps permit. (Ex. 17 RGL 87-07, (Aug. 17, 1987)).

12. EPA also initiated the original action only eight (8) calendar days following the Corps' issuance of Regulatory Guidance Letter ("RGL") 90-07 (Ex. 18 RGL 90-07, (Sept. 26, 1990)). RGL 90-07 treated the "normal circumstances" of "prior converted cropland" consistent with USDA guidance (Section 512.15 of the August 1988 National Food Security Act Manual ("NFSAM")) interpreting the FSA's "Swampbuster" provisions (Ex. 19 P.L. 99–198, 99 Stat. 1504, 1508 Dec. 23, 1985) as other than "wetlands", thereby excluding them from CWA Section

404 jurisdiction as other than "waters of the United States." (Ex. 18 RGL 90-07, Sept. 26, 1990), at paras. a-e).

13. On August 25, 1993, within fewer than four (4) months prior to the December 1993 trial (and likely following the conclusion of the pre-trial discovery period) in the original CWA violation action, the EPA and Corps jointly issued regulations revising the definition of "waters of the United States" contained in Corps regulation 33 C.F.R. 328.3 and EPA regulation 40 C.F.R. 230.3. The joint agency regulations broadened and retroactively codified RGL 90-07's exclusion of prior converted cropland as defined in USDA-SCS's 1988 NFSAM guidance from CWA Section 404 jurisdiction and FSA Swampbuster penalties. (Ex. 20 - 58 FR 45008, 45031-45034 (Aug. 25, 1993)).

14. On December 16, 1993, this Court entered judgment in favor of Defendants, finding that their activities on the Murphy Farm tract 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)(A) "normal farming activities" exemption This Court did not address 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. *See United States v. Brace*, Civil Action No. 90-229 (WD Pa. 1993) (Findings of Fact para. 43 and Findings of Law para. 31).

15. 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 tract did not qualify under the "normal farming activities" exemption under CWA Section 404(f)(1)(A), and consequently, treated their ditching activities as non-exempt drainage ditch

activities requiring a Corps permit. (*United States. v. Brace*, 41 F. 3d 117, 138 (3rd Cir. Nov. 22, 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)). The Third Circuit did not address whether such activities had triggered the CWA Section 404(f)(2) recapture provision. *Id*.

16. The District Court did not have the reason or the opportunity to address the eligibility of Defendants' prior commenced conversion of approximately thirty-two and four-tenths (32.4)-acres of the Murphy Farm tract for the exclusion from CWA jurisdiction made available by the 1993 jointly issued EPA-Corps regulations. The District Court's findings of fact and conclusion of law reveal that the Court had considered Defendants' previous ability to secure the USDA-ASCS's "commenced conversion" designation under the FSA only for purposes of determining whether Defendants had maintained ongoing farming activities qualifying for the "normal farming activities" exemption of CWA Section 404(f)(1)(A). The District Court did not make factual findings or draw legal conclusions whatsoever concerning whether the approximate thirty-two and four-tenths (32.4)-acre portion of Defendants' Murphy farm tract designated as qualifying for the prior commenced conversion converted exclusion from federal jurisdiction under the CWA Section 404 Program altogether pursuant to the 1993 joint EPA-Corps regulations. These regulations are substantively distinct from those addressing the exemption of normal farming activities from CWA Section 404 permitting program.

17. The Third Circuit Court of Appeals also did not have the reason or the opportunity to address the eligibility of Defendants' prior commenced conversion of approximately thirty-two and four-tenths (32.4)-acres of the Murphy Farm tract for the exclusion from CWA jurisdiction made available by the 1993 jointly issued EPA-Corps regulations. Instead, its findings of fact and conclusions of law reveal that the Court had considered Defendants' previous ability to secure the USDA-ASCS's "commenced conversion" designation under the FSA only for purposes of determining whether Defendants had maintained ongoing farming activities qualifying for the "normal farming activities" exemption of CWA Section 404(f)(1)(A).

18. The Third Circuit Court of Appeals found, as a matter of fact and law, that the District Court "erred in relying upon a determination from the ASCS in September of 1988 that Brace had 'commenced conversion' of his property from wetland to cropland prior to December 23, 1985 [under the USDA Swampbuster provisions of the Food Security Act of 1985], as evidence of an 'established' farming operation' at the site." *United States v. Brace*, 41 F.3d 117, 127 (3d. Cir. 1994). It also concluded, as a matter of fact and law, that ASCS-designated "commenced conversion" activities are subject to CWA Section 404 permitting. 41 F.3d at 128. However, the Third Circuit's holding that a USDA-ASCS prior commenced conversion is subject to CWA Section 404 permitting requirements is narrower than what the United States would prefer the holding to be. As the Court stated, "[m]oreover, to the extent that the ASCS determination has *any relevance to our analysis of 'normal farming activities*,' it undermines such a conclusion. The very title of the determination – 'commenced conversion' – indicates that Brace's discharge activities *were not part of an ongoing farming operation*, but rather were

directed at converting the wetland to the farming operation of growing crops" (emphasis in original.) *Id*.

19. The final joint EPA-Corps regulations were neither issued nor available until August 25, 1993, fewer than four (4) months prior to the District Court bench trial. Barely one month later, Defendants entered into a pretrial stipulation with the U.S. Department of Justice ("DOJ") on September 26, 1993 which acknowledged that the approximately thirty-two and four-tenths (34.2)-acre area was a "wetland" and "water of the United States," and thus fell under federal jurisdiction. (Ex. 21 Pre-Trial Stipulation – "Wetlands"). The parties' pretrial stipulation defined the terms "wetlands" and "waters of the United States" by reference to the applicable Corps and EPA regulations - 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r), respectively, which cover activities *already subject to* the "CWA Section 404 program" that may or may not be eligible for an *exemption* from CWA 404 permitting. The pretrial stipulation does <u>not</u> reference the jointly issued August 1993 Corps and EPA regulations that address the *exclusion* from the CWA Section 404 program. Such regulations amended 33 C.F.R. § 328.3(a)(8) and 40 C.F.R. § 232.2 by <u>*thereafter*</u> adding new 33 C.F.R. § 328.3(a)(8) and amending 40 C.F.R. § 232.2 to exclude prior commenced conversions from CWA Section 404 jurisdiction altogether as other than "wetlands" that are "waters of the United States." (Ex. 20 - 58 FR 45008, 45031-45034 (Aug. 25, 1993)).

20. It is more than possible that with the quickly approaching trial Defendants' former counsels who had already prepared themselves for trial based on the CWA Section 404(f)(1)(A) and 404(f)(1)(C) *exemptions* defenses did not have the means, capacity or time to learn a new defense. Yet, it is sufficient to note that these joint EPA-Corps regulations were complex and involved input from other federal agencies, including the FWS and USDA. In addition, these

agencies had granted themselves a transition period to educate their officials to ensure against errors and confusion in administering the rules. While the joint rule adopted the approach previously taken by the Corps alone since September 1990 in RGL 90-07, EPA officials likely required more time to accept what they and their environmental activist group constituency a potentially significant compromise in wetlands policy.

21. On January 9, 1995, nine (9) days after the last day on which USDA regulations and NFSAM guidance had authorized the completion of Defendants' prior commenced conversion (by January 1,1995), the Third Circuit denied Defendants' sur 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*, (C.A. 3rd Cir.), Certiorari denied (June 26, 1995)).

22. On September 23, 1996, this Court, on remand, approved and entered as a judgment a nine (9)-page Consent Decree (inclusive of a Restoration Plan ("Exhibit A") and hand drawn map – "Attachment A") that the parties had previously executed on July 23, 1996 (Ex. 22 Consent Decree, Restoration Plan, Attach A). Defendants agreed to the Consent Decree fearing bank withdrawal of credit lines and potential bankruptcy amid the Third Circuit's adverse ruling requiring them to engage in significant remedial measures at much greater economic cost. (Ex. 23 Affidavit or Robert Brace, April 2018). EPA and USDA Soil Conservation Service ("SCS") officials subsequently confirmed that Defendants had complied with the Consent Decree and its accompanying Restoration Plan after three days' work by independent contracts at considerable expense – well, within the required 90-day deadline. (Ex. 24 Bob Brace Depo, Ct. Cl., at 134).

23. Defendants' Response/Opposition to United States Motion to Enforce Consent Decree and Stipulated Penalties (ECF No. 214) and Defendants' Federal Rules of Civil Procedure 60(b)(5) Motion to Vacate Consent Decree and Deny Stipulated Penalties (ECF No. 215) and Memorandum of Law Supporting Motion to Vacate Consent Decree and Deny Stipulated Penalties (ECF No. 216) clearly explain how the United States has committed multiple intentional violations of the Consent Decree and its Restoration Plan entered as an Order of this Court on September 23, 1996. to establish a primordial wetland that had not previously existed on Defendants' Murphy Farm tract since it had been farmed by the Brace family during the early twentieth century.

24. The United States has established this fictional wetland by substantially relocating and substantially overbuilding the Restoration Plan-required check dam (and thereby creating a sustainable attractive nuisance for beaver dams) and, thus, materially modifying the Consent Decree without securing this Court's prior written approval and entry of said modifications as a new Court Order. The United States apparently committed these multiple Consent Decree violations to ensure that Defendants could not, in the future, continue and complete their USDA-ASCS-determined prior commenced conversion of said farm tract pursuant to the jointly issued 1993 EPA-Corps regulations.[2]

25. This Court certainly possesses the equitable powers to ensure Defendants' ability on a prospective basis to secure the legal protection these regulations would provide, especially considering the extraordinary circumstances surrounding the United States' prior affirmative misconduct in endeavoring to disrupt, thwart and nullify Defendants' prior USDA-ASCS-

[2] To the extent the USDA-ASCS's September 1988 prior commenced conversion determination also covered approximately eleven (11) of the twenty (20) acre Marsh Farm tract that Defendants had secure the legal right to farm in 1975, the United States committed these multiple Consent Decree violations to prevent Defendants also from continuing and completing their USDA-ASCS-determined prior commenced conversion of those eleven (11) acres.

determined and authorized commenced conversion of the Murphy Farm tract, and thereafter, preventing Defendants from completing said conversion subsequent to the issuance of the 1993 regulations, in abject disregard for the legal and policy bases underlying the 1993 regulations, the FSA and the USDA's NFSAM guidance.

WHEREFORE, Defendants respectfully request that this Court exercise its equitable powers to recognize the extraordinary circumstances that justify allowing Defendants to prospectively continue and complete, by no later than three (3) years from the entry of judgment, the prior commenced conversion of their Murphy Farm tract previously authorized by the United States Department of Agriculture Agricultural Stabilization and Conservation Service ("USDA-ASCS") in September 1988, pursuant to Section 1222(a)(1) of the Food Security Act of 1985 ("FSA"), corresponding USDA implementing regulations (7 C.F.R. 12.5(d)(i)), consistent with subsequently issued 1993 joint EPA-Corps regulations retroactively treating their pre-December 23, 1985 prior commenced conversion as excluded from the jurisdiction of Clean Water Act ("CWA") Section 404.

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.