



U.S. Department of Justice

Environment and Natural Resources Division

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January 11, 2016

VIA E-MAIL & FIRST CLASS MAIL

Neal Devlin, Esquire
Knox, McLaughlin, Gornall & Sennett, P.C.
120 West Tenth Street
Erie, PA 16501-1461

Re: Notice of Violation of Consent Decree, *United States v. Robert Brace, et al.*, Civ. Action No. 90-229 (W.D. Pa.)

Dear Mr. Devlin:

This letter serves as written notice that your clients, Robert Brace and Robert Brace Farms, Inc., Defendants in the above referenced action, are in violation of the September 23, 1996 Consent Decree ("CD") and of Sections 301 and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311 and 1344. The CD is attached here as Exhibit 1.

As discussed in detail below, Defendants' violations include the discharge of dredged and fill material into approximately 18 acres of wetlands that were required to be restored under the CD. As a result of the violations, described below, Defendants are liable to the United States for stipulated and/or statutory penalties, as well as injunctive relief, including restoration of the property.

Background

On October 4, 1990, the United States filed a complaint against Robert Brace and Robert Brace Farms, Inc. for violations of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, for the unpermitted discharge of pollutants by dredging, filling, leveling and draining waters of the United States, specifically 30 acres of wetlands adjacent to Elk Creek. After trial, on December 22, 1993, the United States District Court for the Western District of Pennsylvania entered judgment on behalf of the Defendants finding that Defendants' activities were exempt from the permitting requirements under CWA Section 404, 33 U.S.C. § 1344. On November 22, 1994, the Third Circuit Court of Appeals reversed the District Court's decision, found that the agricultural exemption did not apply to Defendants' activities, held that Defendants were liable for CWA violations, and remanded the case to the District Court to assess penalties. *See United States v. Brace*, 41 F.3d 117, 120 (3d Cir. 1994). The United States Supreme Court denied Defendants' petition for certiorari. Thereafter, on September 23, 1996, the parties entered into the CD to resolve Defendants' liability.



The Consent Decree

The CD permanently enjoins Defendants from discharging any pollutants (including by the dredging, filling, leveling and draining of waters) within the approximately 30-acre wetland site at issue in the action, unless such discharge is in compliance with the CWA. The CD also requires that Defendants: (1) restore the wetlands in accordance with a restoration plan attached to the CD; (2) pay a \$10,000 civil penalty; and (3) record the CD with the applicable lands office. If Defendants fail to comply with those requirements, the parties stipulated to a \$250 penalty per day for each day of Defendants' failure. The CD also makes Defendants responsible for any expenses and costs incurred by the United States in enforcing the CD. The CD remains in effect.

Violations of the Consent Decree

By letter dated August 29, 2013 (attached here as Exhibit 2), the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("USACE") notified Defendants of potential CWA and CD violations associated with the conversion of wetlands to agricultural land and with sediment removal activities in tributary channels within the 30-acre wetland site covered by the CD. Defendants were advised that EPA and the USACE were aware that some of the sediment removal in the area, in violation of the CWA and CD, had already occurred at the time of a July 2012 inspection, and that any additional work involving a discharge of dredged or fill material within the area would require a Department of the Army Permit.

As you know, on May 20, 2015, we, along with representatives from the EPA, USACE, Pennsylvania Department of Environmental Protection ("PADEP"), Pennsylvania Fish and Boat Commission ("PAFBC"), the Brace family, and a consultant on behalf of the Brace family, met at the Brace property and visited the area subject to the CD. During that site visit, EPA confirmed the discharge of dredged and/or fill material into approximately 18 acres of wetlands within the 30-acre wetland site covered by the CD. These wetlands had been cleared, drained, plowed and planted. Ten drain outlets were observed in and along the channel of Elk Creek and its associated unnamed tributaries, all within the limits of the 30-acre wetland site covered by the CD. Additionally, a check dam required under the CD (*see* Exhibit 1, Consent Decree at Exhibit A) was removed from Elk Creek and an unauthorized earthen crossing was observed in Elk Creek. These actions violate CWA Section 301 and the permanent injunction set forth in the CD, and have effectively reversed the restoration required by the CD.

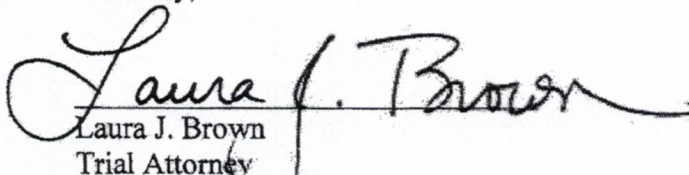
After the site visit, EPA received and reviewed a copy of the August 5, 2015 "Wetland Evaluation Report, Homestead, Murphy, and Marsh Farms, Waterford Borough, Erie County, Pennsylvania" prepared by EcoStrategies, Civil Engineering, PLLC, on behalf of Robert Brace & Sons, Inc. ("Report"). The stated "goal" of the Report is "to provide an understanding of the property, and land use history, explain the agricultural exemption and describe the past and present conditions of the hydrology and wetlands on the property." Report at 1. The Report requests that EPA allow Mr. Brace to continue to pursue his original farming goals. *Id.* at 4.

The EPA will not agree to such a request because doing so: (1) would ignore the Third Circuit Court of Appeals' decision finding that the agricultural exemption did not apply to Mr. Brace's property, *see United States v. Brace*, 41 F.3d 117, 127-28 (3d Cir. 1994); (2) would contravene the CD, as discussed above; and (3) would not be consistent with the objectives of the CWA.

Please be advised that the United States is within its rights to seek stipulated penalties and/or statutory penalties for the CWA and CD violations described above, as well as to enforce the CD to require Defendants to restore and/or mitigate the damages caused by their unlawful actions, and to seek any additional relief available. Moreover, to the extent the United States seeks to enforce the CD, Defendants are liable to the United States for costs associated therewith.

The United States is willing to meet with you and your clients to discuss the CD and CWA violations described in this letter. If you would like to arrange for either an in-person or telephonic meeting, please contact me at your earliest convenience to schedule such a meeting.

Sincerely,


Laura J. Brown
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
(202) 514-3376
laura.j.s.brown@usdoj.gov

cc: Pam Lazos, Esq., U.S. EPA, Region III

Attachments

Sherri Huntley

To: Devlin, Neal
Subject: RE: Brace

Hi Neal,

Friday at noon is fine. We will be here in the office so please call here.

Our family cannot and will not accept the violations on the consent decree when we have never been out of compliance. These fines/penalties are unreasonable and unjustified. There should be no fines/penalties (reference the letter from the EPA, where it was stated we would have no fines based on their mistakes) when we have been in compliance all these years. Where are the facts that the EPA is using? We have provided our facts time & time again and have received no facts proving these alleged allegations.

Based on the comments from the letter yesterday we feel the DOJ is not addressing the facts but rather using the comments from Andy Martin with regards to us building a golf course (as mentioned in the "Nice Sanctuary"). In Judge Mencer's decision he stated that we proved that we were farming, no golf course was being built. During Andy's deposition for charges against us, he stated he was "having a mid-life crisis". Should a man going through a mid-life crisis be able to make comments that have affected our land for 30 years?

In August of 2013 the EPA was in charge of this situation (we have a voicemail from Gary Moore, PA Fish Commission indicating that information) but still the DOJ is using the letter sent to us from Mr. Smolka, PA Fish Commission & Mr. Michael Fodse, Corp of Engineers. They ignored the law at that time and wanted to put us in jail. After his visit to the farm, Mr. Smolka contacted the Conservation District and was told we were in compliance. Even after receiving this information, Mr. Smolka & Mr. Fodse conspired against our family by pursuing these allegations. They also conspired against us on our land in Garland. These guys are immune to everyone & everything.

This information should not be classified as confidential, because it needs to be made public.

We agree that the EPA should be clarifying the resolutions to these alleged violations, but we feel Jeff Lapp should be the lead man based on testimony during Judge Allegra's trial when these questions were directed to him. During that trial, he indicated under oath that he would be the lead person on any questions.

Sincerely,
The Brace Family

From: Devlin, Neal [mailto:ndevlin@kmgslaw.com]
Sent: Wednesday, July 13, 2016 4:03 PM
To: 'Sherri Huntley' <bracefarmsinc@gmail.com>
Subject: RE: Brace

Bob and Family:

I recognize that the letter is a disappointment, particularly the part about civil penalties. My conversations with the EPA had been decent, although we never discussed the idea of civil penalties because I did not want to raise it, in case they did not. I do note that they do not talk about the amount of civil penalties they are looking for. While I am not optimistic on that, it remains an open issue.