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. 90-229

DEFENDANTS' BRIEF IN OPPOSITION TO UNITED STATES' MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

The United States' Motion for a Protective Order (ECF No. 168) filed pursuant to Rule 26(c) of the Federal Rules of Civil Procedure ("FRCP") is essentially a disguised FRCP Rule 65 Motion for Summary Judgment. It seeks to deny Defendants' requests for discovery of pre-1996 information and admission into evidence of pre-January 14, 2005 Federal Court testimony of the Government's star witness concerning the true meaning and intent of the Consent Decree that is the subject matter of the current enforcement action (ECF No. 82), even though genuine disputes as to the material facts of this case remain which these discovery and testimonies would uncover.

Production of such information and admission of such testimony would enable Defendants and this Court to resolve the 1996 Consent Decree's longstanding but unaddressed latent ambiguities which have led the United States to assert in this action that Defendants committed new violations of the 1996 Consent Decree and Clean Water Act ("CWA") Section 404 occurring at unspecified dates during the period spanning 2012 – 2015. The 1996 Consent Decree includes its accompanying Wetlands Restoration Plan ("Restoration Plan") referred to therein as "Exhibit

A," and also a hand drawing of the approximately 30-acre wetland area located on Defendants' Murphy farm tract ("Hand Drawn Map") referred to therein as "Attachment A," which the 1996 Consent Decree incorporates by reference within its Paragraphs 3, 4, 7 and 8. This Court previously entered the Consent Decree, including Exhibit A and Attachment A, as a consent judgment on September 23, 1996.

The Consent Decree, including its Restoration Plan and hand drawn Map have remained riddled with latent ambiguities since its execution by the parties and its entry into judgment by this Court, and the parties have failed to resolve these latent ambiguities ever since. These latent ambiguities concern: 1) the Restoration Plan's failure to define the term "hydrologic regime" and to distinguish the "hydrologic regime" of the 30-acre wetland area of the Murphy farm tract from the "hydrologic regime" of the remaining 28-acre upland portion of the overall 58-acre Murphy farm tract; 2) the Restoration Plan's failure to identify the temporal period to which the hydrologic regime, and thus, physical condition, of the 30-acre wetlands portion of the Murphy farm tract (in contrast to that of the remaining 28-acre upland portion of the overall 58-acre Murphy farm tract) is to be restored; 3) the Consent Decree and Restoration Plan's failure to set forth in Attachment A the precise metes and bounds of the Murphy farm tract's "U-shaped approximately 30-acre wetlands adjacent to Elk Creek;" 4) the Restoration Plan's failure to explain the specifications, purposes and/or effects of each its three key features or components, and whether they were intended, by design, to impact areas only within the Consent Decree area or to also impact areas beyond the Consent Decree area; 5) the Restoration Plan's failure to anticipate how several known natural and manmade phenomena present within and beyond the Consent Decree area of Defendants' Murphy tract could potentially (inadvertently) adversely impact the proper operation of one or more of the Plan's three features/components to result in the Plan's and those features'

malfunction; 6) the Restoration Plan's failure to include modification provisions and a defined administrative process to address the issue of modification with Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") officials.

These unresolved latent ambiguities have served, since 1996, to prevent Defendants from fully farming the remaining portions of their three contiguous and adjacent farm tracts totaling approximately 146 acres free from interruption and economic loss, and from remaining in compliance with the Consent Decree, including its Restoration Plan and Hand Drawn Map, and the requirements of Clean Water Act ("CWA") Section 404. Indeed, these latent ambiguities have enabled EPA and Corps officials to allege without substantiation that Defendants have violated both the terms of the 1996 Consent Decree, including its Restoration Plan and Hand Drawn Map, and the requirements of CWA Section 404 at unspecified dates during the period spanning 2012-2015. Such latent ambiguities, furthermore, had apparently masked the prior participation of other federal agencies as well as state agencies in the original development and design of the 1996 Consent Decree, including its Restoration Plan and Hand Drawn Map, which led to the current enforcement act.

Defendants seek discovery from the United States of pre-1996 federal and state agency aerial photography, satellite imagery, digital data, field logs, samples tests of soil, vegetation and hydrology, wetland delineation reports, jurisdictional determination analyses, and other information and data, and seek, admission into evidence of the pre-January 14, 2005 Federal Court testimony provided under oath and penalties of perjury by the Government's star witness, Jeffrey Lapp of the EPA, directly relating to the design, development and implementation of the 1996 Consent Decree, including the several features of its Restoration Plan "Exhibit A" and its imprecise Hand Drawn Map "Attachment A". This discovery and testimony are highly relevant and

indispensable to resolving these unaddressed latent ambiguities and to ensuring Defendants' current and ongoing compliance with the Consent Decree documents, as the Court deems necessary,[1] and with CWA Section 404.

Therefore, the Court should deny the United States' overbroad and unsubstantiated motion for a protective order which, if granted, would undermine Defendants' ability to resolve these ambiguities and to ensure its current and ongoing regulatory compliance, as well as, the public policy underlying the discovery process in general, the intent of the 2015 amendment to FRCP 26(b),[2] and this Court's Order of June 15, 2017. (ECF No. 146)[3]

RELEVANT FACTS AND PROCEDURAL BACKGROUND

The United States filed its Motion to Enforce the 1996 Consent Decree, including its accompanying Restoration Plan "Exhibit A" and Hand Drawn Map "Attachment A," on January 9, 2017. (ECF No. 82). In its Memorandum of Law supporting this Motion (ECF No. 83), the United States alleged Defendants had undertaken various unauthorized activities at unspecified dates spanning the period 2012-2015, including the clearing, ditching, draining, plowing and planting of "wetlands that were required to be restored pursuant to the Consent Decree, violating the Consent Decree and the Clean Water Act." (ECF No. 83, pp. 1, 6-8). The United States *inter alia* requested that this Court compel Defendants' restoration of the wetlands, compliance with the Consent Decree, payment of penalties, reimbursement of United States' fees and costs, and that

[1] *See* Transcript of April 7, 2017 Status Conference, p. 17 ("I'm thinking the right answer in this case may not be a decision on the current Consent Decree, it might be to try to find a better way forward.")

[2] *See* Federal Rules of Civil Procedure, Rule 26(b)(1) and the Advisory Committee on Federal Rules of Civil Procedure, Committee Notes, 2015 Amendment to Rule 26, available at: https://www.law.cornell.edu/rules/frcp/rule_26.

[3] On June 15, 2017, this Court ruled that, "IT IS FURTHER ORDERED that because the motion to enforce [ECF No. 82] effectively re-opens this case and because this cannot be decided until after discovery and additional briefing, the motion will be dismissed without prejudice to be refiled following discovery. All discovery (including both factual and expert discovery, as well as depositions of both) shall be concluded by November 30, 2017." (ECF No. 146).

"the Court modify the Consent Decree to increase stipulated penalties to deter Defendants from violating the Consent Decree in the future." (ECF No. 83, p. 2).

The United States' recollection of the events leading to the present enforcement action includes *inter alia* the following: 1) "In 2011, Mr. Brace contacted EPA on multiple occasions inquiring about the boundaries of the area covered by the Consent Decree and expressing a desire to move beaver dams and clean 'ditches' at various locations on his Erie County property to eliminate excess water that he claimed had accumulated on the uplands;" 2) EPA representative Todd Lutte responded by providing "Mr. Brace with copies of the maps that were attached to the Consent Decree as well as an aerial photograph on which EPA regulatory staff had drawn a polygon outlining the area subject to the Consent Decree;" 3) "In July 2012, representatives from EPA and the Corps visited Mr. Brace's property to see the 'ditches' he wished to clear;" 4) "During the [July 2012] Site visit, the regulators indicated to Mr. Brace that if the channels were agricultural ditches then maintaining the channels might qualify for a CWA exemption, but that the Corps would need to make a final determination;" 5) "During that visit the EPA regulator repeatedly told Mr. Brace that he could not perform work within the 30-acre wetland area subject to the Consent Decree;" 6) The Corps sent to Mr. Brace a December 19, 2012 correspondence authored by Corps representative Scott Hans which the Corps apparently now characterizes as a "jurisdictional determination that both Elk Creek and 4,750 linear feet of an unnamed tributary to Elk Creek were jurisdictional waters of the United states and were not exempt from CWA regulation, including the channels observed during the July 2012 Site visit;" and 6) In a January 17, 2013 correspondence addressed to EPA representative Todd Lutte, Mr. Brace assured EPA that no work would be done within the 30-acre wetland area in accordance with EPA instructions at the July 2012 Site visit." (ECF No. 83, p. 6)

The United States conveniently fails to mention in its Memorandum of Law, however, that the agricultural ditches and channels Defendants had sought to clear and which EPA and Corps regulators stated they would analyze to determine if Defendants could clear as a matter of maintenance without a permit under the applicable CWA Section 404(f) exemption for agricultural ditch maintenance, included Elk Creek and unnamed tributaries portions of which were located well within the approximately 30-acre wetland area subject to the Consent Decree. The United States also conveniently fails to mention that, during the July 2012 onsite visit, Corps representative Michael Fodse and EPA representative Todd Lutte had "walked" the approximately 30-acre wetland Consent Decree area adjacent to Elk Creek with Mr. Brace, and that Corps representative Fodse, accompanied and overheard by EPA representative Lutte, had verbally authorized Mr. Brace to clear portions of the channel known as Elk Creek and connecting tributaries located within the approximately 30-acre wetland Consent Decree area. The United States, furthermore, conveniently fails to mention that the portions of Elk Creek and connecting tributaries located within the approximately 30-acre wetland Consent Decree area which Defendants had been so authorized to clear had measured approximately 4,750 linear feet in length. Indeed, both regulators have since acknowledged as much in their recent testimonies of October 2, 2017 and October 6, 2017, respectively.

Approximately five (5) months later, in a Cease and Desist Letter dated December 19, 2012 that the United States now conveniently characterizes as a "jurisdictional determination," (ECF No. 83, p. 7), Corps representative Scott Hans relayed to Defendants that the Corps had determined that Mr. Brace could not clear those channels as he had previously been authorized to do during the July 24, 2012 onsite visit.

> "Following the July 24, 2012 site visit, it was confirmed that approximately 4,750 linear feet of an unnamed tributary (unt) to Elk Creek and Elk Creek are

> jurisdictional waters of the United States. The unt to Elk Creek is located south of the active agricultural field and Lane Road then empties into Elk Creek. After consulting the mapping and other relevant documents, it was determined that a portion of the channel in question is located within the 30-acre wetland area subject to the September 23, 1996 Consent Decree […and were] not eligible for the [CWA] Section 404(f) exemption…" (Ex. 1, p. 1)

In effect, the 12/19/12 Hans correspondence confirmed that the prior authorization that Corps representative Fodse overheard by EPA representative Lutte had given to Mr. Brace to clean these channels had been made in error.

Approximately thirteen (13) months following the July 24, 2012 onsite visit, EPA representative Jeffrey Lapp and Corps representative Scott Hans, dispatched to Mr. Brace a correspondence dated August 29, 2013, that may best be characterized as part Violation Notice, part Order for Compliance, and part Cease and Desist Letter. (Ex. 2) The 5-page joint EPA-Corps 8/29/13 correspondence addressed many issues including the July 24, 2012 onsite visit. With respect to that visit, the correspondence acknowledged that Corps representative Fodse had authorized Mr. Brace to clean sediment (which necessarily includes sidecasting) from Elk Creek and its tributaries within the approximately 30-acre wetlands Consent Decree area under the mistaken belief that such activities qualified as agricultural ditch maintenance exempted by CWA Section 404(f) from Corps permitting. The 8/29/13 correspondence also acknowledged that the boundaries of the Consent Decree had not been clearly identified during that visit.

> "On July 24, 2012, a joint site visit was conducted by EPA and the Corps. During the site visit, *staff represented that the removal of sediment from Elk Creek and its tributaries south of Lane Road was exempt from regulation under the Clean Water Act*. At this site visit, the channels were laden with sediment, from adjacent agricultural activities, *and the boundaries of the Consent Decree were not clearly identified*. […]
>
> Upon further consideration and review, the Government's field determination was made in error; the reaches of Elk Creek and its tributaries on your property are not agricultural ditches. Additionally, portions of these channels are within the 30-acre wetland site covered by the 1996 Consent Decree. *Because your*

> *performance of the sediment removal relied on information erroneously provided by the Government*, we will exercise our enforcement discretion and forego any further action regarding the sediment removal activities already completed in Elk Creek at this location. Please note that any future work involving a discharge of dredge or fill material within this area requires a Department of the Army Permit. While we recognize that historically modifications have been made to Elk Creek and its tributaries, those modifications do not convert that watercourse into an agricultural ditch, and thus, maintenance activities performed in the reaches of Elk Creek and its tributaries within the subject properties are not exempt from regulation under Section 404(f) of the Clean Water Act" (emphasis added). (Ex. 2, pp. 3-4)

It is clear from this correspondence that the Corps considered representative Fodse' prior verbal authorization to Mr. Brace to clean Elk Creek and its tributaries as having been made in error. It also acknowledged that this error likely occurred as the result of poorly identified Consent Decree area boundaries (for which neither the Consent Decree nor accompanying Wetlands Restoration Plan provide any precise metes and bounds measurements), and because there had then been present an abundance of surface water and subsurface erosion that caused Elk Creek and its connecting tributaries located within that portion of the Consent Decree area to become laden with sediment. Granted, while the agencies *claimed* they jurisdictionally determined that the channel-clearing activities had occurred within waters of the United States located within a portion of the Consent Decree area, the agencies signaled that they would waive CWA violations attributable to those of Defendants' activities undertaken prior to 8/19/13 in reliance upon what the agencies officially recognized as Corps representative Fodse' erroneous authorization.[4]

[4] Apparently, the 12/19/17 Corps (Hans) correspondence had endeavored to limit the area of Elk Creek and connected tributaries that Corps representative Fodse had authorized Mr. Brace to clear without a permit, in error, to that portion of Elk Creek located south of Lane Road. This point is materially relevant because the 12/19/17 Corps (Hans) correspondence also alleged that Defendants had "recently cleared without a permit, including but not necessarily limited to: approximately 2,200 linear feet of Elk Creek" located along "approximately 32 acres of [Mr. Brace's] property acquired […] in May 2012. […] These unauthorized activities were conducted from Elk Creek and Lane Road north and west to the intersections of State Route 86." These additional alleged violations are, in part, the subject matter of related Civil Action No. No. 1:17-cv-00006-BR. Significantly, EPA representative Lutte testified during his recent deposition of October 3, 2017, that he believed that, during the July 24, 2012 onsite visit that Corps representative Fodse's error in verbally authorizing Mr. Brace to clear 4,750 of Elk Creek and connecting tributaries south of Lane Road within the approximately 30-acre wetland Consent Decree area was far greater than he originally

However, the 8/29/13 joint EPA-Corps correspondence addressed to Mr. Brace was not accompanied by a formal written decision document evidencing that such claimed jurisdictional determination had actually been made, as Corps regulatory guidance requires.[5] In addition, while the 8/29/13 correspondence also alleged that other portions of the Consent Decree area had been farmed and had impacted a tributary to Elk Creek, it failed to specify the precise location of such activity within the approximately 30-acre Consent Decree area or whether the impacted tributary to Elk Creek so referenced was one of the tributaries to Elk Creek that Defendants' had previously been authorized, in error, to clean and sidecast.

These omissions of information were material and gave rise to substantial uncertainty, once again, because of the lack of precise boundaries of the Consent Decree area, and because of the ongoing periodic surface flooding and subsurface erosion that the Consent Decree area, especially adjacent to Elk Creek and its tributaries, had experienced since 1996. As Defendants described in the administrative claim they filed pursuant to the Federal Tort Claims Act against the United States this past summer, (ECF No. 156) such surface flooding and subsurface erosion within and beyond the Consent Decree area was attributable in part to the likely malfunctioning of the Restoration Plan's three key features (plugged ditches, parallel trenches ensconcing remaining disassembled and perhaps partially functioning drainage tile, and an often overgrown and submerged check dam), clogged Lane Road and Sharp Road culverts directly impacting Elk Creek, and additional blockages caused by several beaver dams located within and beyond the Consent

had thought. Mr. Lutte, in fact, testified that, in addition to the portion of Elk Creek located within the Consent Decree area located south of Lane Road, he believed that Mr. Fodse also had verbally authorized Mr. Brace to clean that portion of Elk Creek north of Lane road, including the 2,200 linear feet north of Lane Road along and adjacent to Defendants' "Marsh" farm tract. In other words, EPA representative Lutte testified that Corps representative Fodse had mistakenly authorized Mr. Brace to clear the entire length of Elk Creek spanning both the Murphy farm tract's Consent Decree area and the Marsh farm tract.

[5] Various Corps regulatory guidance documents set forth prescribed rules and procedures for issuing formal jurisdictional determinations to which the claimed JD in this case was subject. These include:

Decree area, all of which have long rendered portions of Defendants' uplands located beyond the Consent Decree area nonfarmable, and created considerable sediment buildup in and around Elk Creek and its tributaries within the Consent Decree area.

These omissions also generated substantial uncertainty concerning the extent, at that time, of agency as opposed to court-determined jurisdictional waters within the Consent Decree area, and concerning the true scope and extent of Corps representative Fodse's error in previously authorizing Defendants to remove "sediment from Elk Creek *and its tributaries s*outh of Lane Road" (emphasis added). Given the 4,750 linear feet of Elk Creek and connecting tributaries the Corps had acknowledged was located south of Lane Road, a portion of which Defendants had previously cleared in reliance upon Corps representative Fodse's acknowledged erroneous authorization, how could reasonably knowledgeable persons, regulatory officials or Defendants be have been certain that the "other" Elk Creek tributary within the Consent Decree area allegedly impacted by Defendants' agricultural activities to which Mr. Hans separately refers in the second paragraph on page 4 of the 8/29/13 correspondence,[6] had not been one of the Elk Creek tributaries within the Consent Decree area from which sediment was removed pursuant to the prior erroneous authorization? And, under these conditions, how could reasonably knowledgeable persons, regulatory officials, or Defendants have been certain that what they observed was new drainage tile rather than old remaining disassembled partially functioning drainage tile ensconced in previously dug but water-inundated trenches?

[6] "It also appears that portions of the area subject to the Consent Decree may have been converted to agricultural use, and a tributary to Elk Creek may have been filled and rerouted. A Department of the Army permit was not issued for these activities, and they are not exempt from regulation under Section 404(f). These activities were not discussed nor authorized during the July 24, 2012 visit. Because the extent of these activities was not investigated during the June 27, 2013 site visit [which focused primarily on the Marsh farm tract], they will require further review and investigation to determine if a violation of the Clean Water Act or the Consent Decree has occurred."

A close scrutiny of the facts of this case reveals that EPA and Corps officials exploited the longstanding unresolved latent ambiguities within the Consent Decree, its Restoration Plan, and its Hand Drawn Map, together with the broad imprecise language they had utilized in these two correspondences to conclude that Defendants had committed unauthorized activities within the Consent Decree area in violation of the Consent Decree and CWA Section 404. A vigilant due diligence, furthermore, shows that the present enforcement action increasingly appears to have been commenced as a means to cover up significant prior 2012 EPA-Corps errors and to quietly fulfill unreasonable prior administration wetlands policy objectives anathema to farming and private property ownership. Moreover, a critical examination of the recent motion for a protective order that would bar discovery and production of pre-1996 Consent Decree development and design information and pre-January 14, 2005 expert witness Federal testimony elucidating the Restoration Plan's objective, evidence extrinsic to the Consent Decree that is highly relevant for purposes of ascertaining the true intent and meaning of the various ambiguous components of the 1996 Consent Decree, increasingly appears to have been filed as a means to cover up the Consent Decree's original infirmities that have long gone unaddressed and caused ongoing Consent Decree and CWA Section 404 compliance problems for Defendants, which have placed them in the current regulatory "killing field" within which they now find themselves.

ARGUMENT

I. The Correct Record Regarding Defendants' Requests for Discovery and the Courts' Order Regarding Discovery

In support of its baseless and premature motion, the United States misstates the record regarding Defendants' statements to the Court regarding the need for discovery. The United States then doubles-down on this misrepresentation of the record by ignoring the scope of the Court's order allowing for discovery.

In its brief, the United States falsely states that Defendants represented to the Court that they needed discovery limited only to the 2012 site visit. *See* U.S. Mot. at 2. This misstates Defendants' statements during the April 7th status conference and wholly ignores Defendants other, repeated statements to the Court regarding the scope of discovery it needed. The full and accurate record reveals that Defendants have always maintained that they needed discovery on the defenses the United States attempts to de-facto strike through this discovery motion.

First, in its initial response to the United States' Motion to Enforce, Defendants identified that one of the issues relevant to its defense of the motion was the ambiguity in the Consent Decree. *See* ECF No. 101 at 22-23. Defendants further explained in that brief why the ambiguity of the Consent Decree was relevant.

Second, in response to the United States' request for a briefing schedule—in which the United States requested that the Court resolve the Motion to Enforce without discovery—Defendants explained the several topics on which discovery was necessary. This list of discovery topics expressly included the two issues on which the United States now seeks to prevent Defendants from pursuing: (a) "The ambiguities and deficiencies in the Consent Order including, but not limited to, the inaccurate measurement and description of the location of the area it covers and its purpose," and, *inter alia*, (b) "Whether this Consent Order is still necessary given the certification by one government agency of Defendants' conservation plan-bound property as 'prior converted cropland' excludable from CWA Section 404 'waters of the United States' jurisdiction, consistent with regulation jointly issued by three Government agencies that remains on the books today." ECF No. 126 at 4.

Third, during the status conference held before Your Honor on April 7, 2017, when asked about the scope of discovery they were requesting, Defendants expressly indicated their need for

discovery on a variety of topics, including the ambiguities in the Consent Order. Tr. at 8:15-22. Nevertheless, the United States contends that during the status conference Defendants represented that they only needed discovery regarding a 2012 site visit at Defendants' property. Mot. at 2. This assertion is belied by the transcript of that status conference.

The United States furthers its skewed recitation of the record by ignoring the Court's actual order regarding discovery and the scope of the parties' requests that lead to that discovery. On April 3, 2017, the United States filed a Motion to Set a Briefing Schedule, in which it argued that Defendants were not entitled to any discovery and thus their Motion to Enforce should proceed directly to briefing, without any discovery. *See* ECF No. 118. In response to that motion, Defendants identified the nine specific topics on which they requested discovery (and further noted that this was an illustrative list and not an exhaustive one). *See* ECF No. 126 at 4. The Court then held a status conference on April 7, 2017, during which the Court stated it would address the briefing schedule and other case management issues following the parties' attempts to mediate the case. Tr. at 23:16-23:2. After mediation was unsuccessful, on June 10, 2017, the United States filed a Reply Brief in support of its Motion to Set a Briefing Schedule. In that brief, the United States argued many of the same points contained in their Motion for a Protective Order at issue here. In short, the United States argued there—like it does here—that Defendants were not entitled to discovery on certain issues as a matter of law. *See generally* ECF No. 144. In response to that brief, Defendants filed a Motion for Status Conference, or, in the Alternative, Leave to File Sur-Reply Brief. *See* ECF No. 145. In that motion, Defendants requested either a status conference (or a sur-reply brief) in order to address the scope of discovery issues raised by the United States. *Id*. On June 15, 2017, in response to these motions, the Court entered an order allowing Defendants to conduct discovery. *See* ECF No. 146. In that Order, the Court stated that "the motion to enforce

[ECF No. 82] effectively re-opens this case and . . . cannot be decided until after discovery." *Id.* The Court then set a discovery deadline of November 30, 2017. *Id.* The Court did not impose any of the limitations requested by the United States on the scope of discovery. *Id.* The parties thereafter proceeded to conduct discovery.

As part of that discovery, the Defendants issued the following requests, which are at issue in this motion:

- Interrogatory No. 5: "Identify all agents or other representatives of the United States government who have been physically present on one or more of the Properties at Issue since October 1, 1990 and, for each individual, identify the following: (a) The date(s) he or she was physically present on one or more of the Properties at Issue; (b) The reason he or she was physically present on each identified date; (c) Any reports, notes, photos, communications or other documents referring to, related to, or generated in connection with each visit to one or more of the Properties at Issue."

- RFP No. 4: "All documents, including, but not limited to reports, communications, notes, inter-agency communications and intra-agency communications, referring or relating to the September 23, 1996 Consent Decree that is Exhibit 2 to your Motion to Enforce in case 90-229."

- RFP No. 5: "All documents, including, but not limited to reports, communications, notes, inter-agency communications and intra-agency communications, referring or relating to the restoration plan that is part of the Consent Decree that is Exhibit 2 to your Motion to Enforce in case 90-229."

- RFP No. 6: "All documents in your possession, including, but not limited to, reports, communications, notes, inter-agency communications and intra-agency communications, referring or relating to the Properties at Issue."

- Defendants' stated intent to question witnesses regarding "the history of this property and the facts and circumstances that led to the Consent Decree." ECF No. 169, Ex. B.

II. The Consent Decree Must Be Construed as a Contract and the Principles of Contractual Interpretation, Including the Use of Extrinsic Evidence, Govern to Discern the True Meaning and Intent of Ambiguous Consent Decree Provisions

Third Circuit and Pennsylvania law precedents require this Court to construe the 1996 Consent Decree as a contract. "A consent judgment is to be interpreted as a contract, to which

the governing rules of contract interpretation apply." *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 148 (3d Cir. 1994). Under Pennsylvania law, "a consent decree is an agreement into which parties enter rather than a judicial determination of matters in controversy, and its terms bind the parties to the decree." *Commonwealth of Pennsylvania v. UPMC*, No. 334 M.D. 2014 (Pa. Commonwlth. 2015), slip op. at p. 24, citing *Dulles v. Dulles*, 85 A.2d 134, 137 (Pa. 1952). *See also Corman v. National Collegiate Athletic Association*, No. 1 M.D.2013 (Pa. Commonwlth. 2013), citing *Lower Frederick Twp. v. Clemmer*, 518 Pa. 313, 328, 543 A.2d 502, 510 (1988). A Consent Decree must therefore be interpreted "to give effect to the parties' 'objective manifestations of their intent' rather than [to] attempt to ascertain their subjective intent." *Griesmann v. Chemical Leaman Tank Lines, Inc.*, 776 F.2d 66, 72 (3d Cir. 1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1009 (3d Cir. 1980)). "A consent decree must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Harris v. City of Philadelphia*, 47 F.3d at 1350 (citing *United States v. Armour & Co.*, 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)). Any ambiguities must be interpreted in favor of the party against whom the consent decree is sought to be enforced. *Harris v. City of Philadelphia*, 47 F.3d at 1350.

"[T]he interpretation of a contract is ordinarily a matter of state law…" *Zuber v. Boscov's*, No. 16-3217 (3rd Cir. 2017), slip op. at 6, citing *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 468 (2015)." "In Pennsylvania, '[t]he fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties.' Where writing is 'clear and unequivocal,' the intent of the parties is found 'in the writing itself…A contract contains an ambiguity if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" *Indian Harbor Ins. Co. v. F&M Equipment, Ltd.*, No. 14-1897 (3rd Cir.

Oct. 15, 2015), citing *Murphy v. Duquesne Univ.*, 777 A.2d 418, 429 (Pa. 2001). Where the terms of a contract are ambiguous the Court as factfinder may "examine all the relevant extrinsic evidence to determine the parties' mutual intent." *Duquesne Light Co. v. Westinghouse Electric Corporation*, 66 F.3d 604, 613 (3d Cir. 1995). *See also Zuber v. Boscov's*, No. 16-3217 (3rd Cir. 2017), slip op. at 6, citing *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) ("'When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself.' […] 'When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances.'"). "Ambiguities may be either patent or latent. A patent ambiguity appears on the face of the instrument and arises from the defective, obscure, or insensible language used. *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659 (1982). Latent ambiguities arise from extraneous or collateral facts which render the meaning of a written contract uncertain although the language, on its face, appears clear and unambiguous. [fn] Id." *Metzger v. Clifford Realty Corporation*, 327 Pa. Superior Ct. 377, 378 (1984); 476 A.2d 1, 5 (Pa. Super. 1984), citing *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659 (1982).

III. Discovery Requests Calling for Production of Pre-1996 Consent Decree Development and Design Information and pre-January 14, 2005 Expert Witness Federal Testimony Relevant to Resolving Longstanding Consent Decree Ambiguities Resulting in New 2012-2015 Allegations of Consent Decree and CWA Section 404 Violations Are Relevant and Proportional to the Needs of the Case

A. Overview of Amended FRCP Rule 26(b)(1):

"The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. Mutual knowledge of all the relevant facts gathered by both parties is essential proper litigation." *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 209 F. Supp. 810, 818

(W.D. Pa 2016), citing Advisory Committee on Federal Rules of Civil Procedure, Committee Notes, 1983 Amendment to Rule 26, citing *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 S.Ct. 451 (1947). "[U]nder amended Rule 26, the scope of all discovery is limited to matter that is relevant to the claims or defenses in the case and proportional to what is at stake in a given case." *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 209 F. Supp. 810, 823 (W.D. Pa 2016). *See also* Advisory Committee on Federal Rules of Civil Procedure, Committee Notes, 2015 Amendment to Rule 26 ("Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case."). This same Advisory Committee has noted, for purposes of evaluating whether the proportionality test has been satisfied in a particular case, that Courts may consider: i) "the importance of the issues at stake in the action"; ii) "the amount in controversy"; iii) "the parties' relative access to relevant information"; iv) "the parties' resources"; v) "the importance of the discovery in resolving the issues"; and vi) "whether the burden or expense of proposed discovery out-weights its likely benefit." It also has emphasized that the proportionality rule changes are not "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional." The "burden of responding to discovery lies heavier on the party who has more information, and properly so." (*Id*.)

B. Defendants' Discovery Requests are Relevant:

The 1996 Consent Decree, including its Restoration Plan and Hand Drawn Map, have long been riddled with unaddressed latent ambiguities, as previously identified, that have enabled the EPA and Corps to allege without substantiation or fear of reprisal that Defendants committed new Consent Decree and CWA Section 404 violations at unspecified dates during the period spanning 2012-2015. The pre-1996 Consent Decree development and design information Defendants'

discovery requests seek is highly relevant for purposes of ascertaining the intended meaning and effect of those Consent Decree provisions that have historically (since 1996) lent themselves to persistently different interpretations, resulted in lost use and earned revenues from certain of Defendants farm tracts, and triggered new Government allegations that Defendants had engaged during 2012-2015 in unauthorized agricultural activities within the Consent Decree area without proper permitting in contravention of the Consent Decree and CWA Section 404.

In addition, the admission into evidence of the pre-January 14, 2005 Federal Court testimony of EPA expert Jeffrey Lapp explaining the Government's view regarding the temporal period best reflecting the physical condition to which the Consent Decree area must be restored, is highly relevant for purposes of highlighting the fundamental logical and empirical inconsistency between the Government's view and the actual use, status and physical condition of the Consent Decree area specifically, and as an integrated tract within Defendants' 146-acre Waterford Township, Pennsylvania farm, more generally, that had been recognized and authorized by the U.S. Department of Agriculture ("USDA")'s Soil Conservation Service ("SCS") during that same temporal period. Such evidence can be used to resolve the latent ambiguity contained within the Restoration Plan's primary objective which fails to identify the preferred time, place or condition to which the "hydrologic regime" must be restored, which has led to Defendants being accused of unauthorized agricultural activities within the Consent Decree area in contravention of both the Consent Decree and CWA Section 404.

The United States' assertions that Defendants' discovery requests seek information relating to the Governments' *original* allegations of CWA Section 404 violations "in the late 1980's" (ECF No. 169, pp. 5-6) are groundless and merely intended to confuse this Court. Rather, Defendants' discovery requests seek information that is relevant to resolving the Government's more recent

allegations of Consent Decree and CWA Section 404 noncompliance concerning *violations considered by the United States to have taken place at unspecified dates during the period spanning 2012 to 2015*. (Ex. 1),[7] (Ex. 2),[8] (Ex. 3),[9] (Ex. 4).[10]

i. *The Relevance of the Restoration Plan's Failure to Define the term "Hydrologic Regime"*

The Restoration Plan's "primary objective" is expressed in opaque, if not, obfuscated language which begs the question of what the true intended purpose(s) and impact(s) of the Restoration Plan is/are. The Restoration Plan's preambular paragraph states as follows: "The primary objective of this plan is to restore the hydrologic regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek." Neither the preambular paragraph, nor the Restoration Plan overall, however, defines the term "hydrologic regime" and how to distinguish the "hydrologic regime" of the 30-acre wetland area of the Murphy farm tract from the "hydrologic regime" of the remaining 28-acre upland portion of the Murphy farm tract. Defendants' discovery request for relevant pre-1996 information, in part, seeks to clarify these distinctions for purposes ensuring that Defendants' activities on the Murphy farm tract uplands that affect its hydrology do not directly or indirectly affect the hydrology of the 30-acre wetlands portion of the tract subject to the Consent Decree.

ii. *The Relevance of the Restoration Plan's Failure to Identify the Temporal Period to Which the 30-Acre Wetland's Hydrologic Regime/Physical Condition Must be Restored*

[7] *See* Letter Correspondence from Scott Hans, U.S. Army Corps of Engineers to Robert Brace (Dec. 19, 2012).
[8] *See* Letter Correspondence from Jeffrey Lapp, U.S. Environmental Protection Agency and Scott Hans, U.S. Army Corps of Engineers to Robert Brace (Aug. 29, 2013).
[9] *See* Letter Correspondence from Laura Brown, U.S. Department of Justice to Neal Devlin Esq. *Re Notice of Violation of Consent Decree, United States v. Robert Brace et al.*, Civ. Action No. 90-229 (W.D. Pa.) (Jan. 11, 2016).
[10] *See* Letter Correspondence from from Laura Brown, U.S. Department of Justice to Neal Devlin Esq. *Re Violations of Consent Decree and CWA by Robert Brace & Robert Brace Farms, Inc*. (July 13, 2016).

Neither the Restoration Plan's preambular paragraph, nor the Restoration Plan overall, defines, let alone, identifies the temporal period to which the hydrologic regime of the 30-acre wetlands portion of the Murphy farm tract (in contrast to the remaining 28-acre upland portion of the overall 58-acre Murphy farm tract) must be restored. Was the 30-acre portion of the Murphy tract, apart from the tract's remaining 28 acres, to be restored to the way it appeared in 1977 (or more specifically, to December 27, 1977, the effective date of the CWA's 1977 amendments - Clean Water Act of 1977. Pub. L. 95-217, December 27, 1977)? To the way it appeared before 1986 (or more specifically, December 23, 1985, the effective date of the Food Security Act of 1985, Pub. L. 99-198, December 23, 1985)? To the way it appeared before 1985 (or more specifically, October 5, 1984, the effective date of then final Corps regulations implementing CWA Section 404(f)(1)(C) and exempting only the maintenance but not the construction of agricultural drainage ditches, 49 FR 39478, 39482 (Oct. 5, 1984))? To the way it appeared during any other period? The four corners of the Consent Decree's Restoration Plan do not speak to these materially relevant issues, notwithstanding the United States' assertion that "Defendants' suggestion that 'the purpose of the Consent Decree is in question because it was not stated in the Consent Decree what its purpose really was' […] is […] unsupported." (ECF No. 169, p. 12).

The identification of the temporal period to which the hydrologic regime of the 30-acre wetlands portion of the Murphy farm tract (in contrast to the remaining 28-acre upland portion of the overall 58-acre Murphy farm tract) must be restored is materially relevant to Defendants' prior (2012-2015), current (2017) and ongoing future ability to comply with the Consent Decree's Restoration Plan. Evidence extrinsic to the Consent Decree's Restoration Plan overwhelmingly indicates that the temporal period to which the hydrologic regime of the 30-acre Murphy tract wetlands area must be restored is likely sometime between October 5, 1984 and December 23,

1985. The physical condition to which the 30-acre wetland area is to be restored pursuant to the Consent Decree's Restoration Plan could not have been the physical condition of the 30-acre area on or prior to October 5, 1984, since that condition would have been a relatively "dry" condition, said area having already been deemed a prior converted cropland, i.e., converted from a wetland to a "dry" land consistent with an approved and authorized USDA SCS Conservation Plan, and have received a "commenced conversion" designation from the USDA Agricultural Stabilization and Conservation Service ("ASCS").[11] In addition, the United States would have been precluded as a matter of law from filing on October 4, 1990 the present civil enforcement action seeking monetary penalties and injunctive relief for alleged violations of CWA Section 404 by the application of the general five (5)-year federal statute of limitations set forth in 28 U.S.C. § 2462.[12]

Arguably, the United States must have intended that the physical condition to which the 30-acre wetland area must be restored is/was the physical condition of the 30-acre area after October 5, 1984 and before December 23, 1985, as evidence extrinsic to the Consent Decree's Restoration Plan confirms. For example, the July 15, 1987 EPA "Findings of Violation and Order for Compliance," Docket No. III-87-026-DW discussed above contained a preliminary wetland restoration plan within its "Order for Compliance" that specifically referenced an October 5, 1984 restoration date. (Ex. 5) Paragraph 2(a) of said Order directed Defendants to

[11] This precise point will be elaborated upon later in this brief.

[12] The Third Circuit Court of Appeals has held that the five-year statute of limitations of 28 U.S.C. § 2462 applies to Clean Water Act enforcement actions brought by EPA, and that "the statute of limitation begins to run when the claim accrues" – i.e., "when all elements of the cause of action have objectively come into existence," and not pursuant to the "discovery rule," which "provides that the limitations period is tolled until 'events occur or facts surface which could cause a reasonably prudent person to become aware that she or he has been harmed.'" *See State of New Jersey v. RRI Energy and Mid-Atlantic Power Holdings, LLC et al.*, Civil Action No. 07-cv-05298 (E.D. Pa 2013), p. 34, fn 34, citing *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 75 (3d Cir. 1990); *Id*., at slip op. at 25, citing *William A. Graham Company v. Haughey*, 646 F.3d 138, 146 RRI Energy Mid(3d Cir. 2011) quoting Black's Law Dictionary (9th ed. 2009). *See also Jackson v. Jackson*, Civil Action No. 13-746, (W.D. Pa 2014), slip op. at 14, citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947) "('equity will withhold relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.')."

> "Restore in accordance with the attached plan, all wetlands disturbed *since October 5, 1984* by plugging with concrete all main drainage tiles at an excavated break in the pipe" (emphasis added).

Paragraph 3 of said Order directed Defendants to

> "Refrain from any further disturbance of the areas that were naturally vegetated/federally regulated wetlands *on or subsequent to October 5, 1984* in order to enable the wetlands to naturally revegetate with the indigenous wetland plant species" (emphasis added).

Paragraph 4 of said Order directed Defendants to

> "Incorporate a provision within the restoration plan referenced in Paragraph 2 of this ORDER FOR COMPLIANCE, specifying measures to be followed to seed or plant with indigenous wetland species, those areas that were naturally vegetated wetlands *on or subsequent to October 5, 1984*, that do not naturally revegetate by the end of the 1988 growing season" (emphasis added).

Similarly, the March 1, 1988 Correspondence from former FWS Supervisor, Charles Kulp discussed above contained a "draft restoration plan for the Robert Brace Farm" which specifically stated that, "*[t]he goal of the draft plan is to restore all wetlands disturbed since October 1984*, as discussed with you and Mr. Don Wilson of the Buffalo Corps of Engineers" (emphasis added). (Ex. 6). Mr. Kulp's correspondence also referenced an October 5, 1984 restoration date in Points 1 and 2 of its section entitled, "Specific Details for Implementing the [Restoration] Plan." There, Mr. Kulp directed Mr. Butch to ensure that Defendants

> "1. Restore *all wetlands disturbed since October 1984* by: A) Plugging all drainage tiles in the areas disturbed since October 1984 in a manner specified by the regulatory agencies. Non-perforated drainage pipe may cross wetlands to maintain drainage in adjacent fields. B) Plugging the southernmost surface ditches in the areas indicated with cross hatching.
>
> 2. Maintain[] drainage to *all fields drained prior to October 1984*" (emphasis added).

Yet, additional extrinsic evidence including authentic historical aerial photography and expert interpretational analysis of it and other maps and images revealing historical onsite hydrology and topography of then-existing drainage ditches and channels at that approximate time period unequivocally would show, to the contrary, that the Murphy tract had already been converted and maintained by Claimants as "dry land capable of supporting the ongoing farming operation," as the August 5, 2015 report from Defendants' expert has also shown.[13] (Ex. 7) Based on this evidence, the Consent Decree's purpose of restoring the Murphy tract 30-acre wetlands area in question to its actual physical state in 1984 and 1985 would have necessarily meant restoring it to its proven "dry" state at such time. To this end, further extrinsic evidence can be introduced establishing that the 30-acre wetland area of the Murphy farm tract, in 1984 and 1985, had been deemed a prior converted cropland, i.e., converted from a wetland to a "dry" land consistent with an approved and authorized USDA SCS Conservation Plan, and had received a coveted "commenced conversion" designation from the USDA Agricultural Stabilization and Conservation Service ("ASCS") prior to December 23, 1985.

These diametrically opposed bits of evidence only further exacerbate this Restoration Plan ambiguity necessitating Defendants' request for additional relevant pre-1996 information directly related to the Restoration Plan's primary objective that would enable Defendants and this Court to finally resolve the ambiguity and arrest the decades-old debate over the legal status of the approximately 30-acre wetland area for current CWA Section 404 compliance purposes.

[13] *See* EcoStrategies Civil Engineering, Wetland Evaluation Report: Homestead, Murphy, and Marsh Farms, Waterford Borough, Erie County, Pennsylvania (Aug. 5, 2015), at pp. 2-4 ("If the Consent Order allows the Owner to return the property to the pre-1984 condition, the beaver dam(s) would be removed and this area would be drained and converted back to dry farmland as shown in the May 11, 1983 photo from USDA. […] The pre-1984 condition was dry farmland that was properly drained and either producing crops or was in the process of being converted to produce crops as shown on the authentic historical aerial photos.").

iii. *The Relevance of the Consent Decree's & Restoration Plan's Failure to Provide Precise Metes & Bounds of "U-Shaped Approximately 30-Acre Wetlands Adjacent to Elk Creek*

The Consent Decree is also ambiguous to the extent it and its accompanying Restoration Plan (Exhibit A) and hand drawn map (Attachment A) containing the caveat: "All locations are approximate; Map not to Scale," fail to set forth the precise metes and bounds of the Murphy farm tract's "U-shaped approximately 30-acre wetlands adjacent to Elk Creek." United States witnesses from EPA recently verbally represented that the Consent Decree area has not, since 1990, been subject to a field survey or formal wetland delineation. Yet, federal agency officials at the EPA and Corps have indicated that an identifiable knoll exists between the wetlands and the uplands areas along the entire length of the inside of the "U" which they have utilized to discern whether Defendants had/have engaged in unauthorized agricultural activities in the wetland area, or had/have engaged in authorized activities in the Murphy tract upland area that have unauthorized impacts on the Murphy tract wetland area, in contravention of the Consent Decree. Defendants' counsels' recent inspection of this area, however, has yielded little, if any, confirmation that there is indeed such an easily definable knoll, or that Defendants can rely upon the existence of such a knoll merely from hearsay statements for purposes of ensuring that their agricultural activities do not violate the Consent Decree's terms. Nevertheless, the 1987 and 1988 EPA and FWS documents discussed above, which reference materially relevant historical aerial photographs, satellite images and topographic and other maps of the Brace farm tracts spanning a number of years, reveal that aerial survey(s) and/or delineation(s) had previously been made. And, it is this information that could potentially be useful in resolving this ambiguity and addressing the Government's allegations that Defendants violated the Consent Decree and CWA Section 404 at unspecified times between 2012 and 2015, because they had undertaken unauthorized activities on

the wrong side of the knoll. Thus, Defendants discovery requests seek, in part, production of highly relevant information that would establish the precise metes and bounds of the Consent Decree area for these purposes.

iv. *The Relevance of the Restoration Plan's Failure to Explain the Specifications, Purposes and Effects of Each of its Three Key Features*

Another ambiguity surrounding the 1996 Consent Decree concerns its failure to explain the intended purposes and effects of the Restoration Plan's three key features. For example, the Restoration Plan fails *to identify and to explain* to Defendants and this Court *why*: 1) Defendants were required to dig within the physically approximated Consent Decree area three sets of parallel trenches at three different locations of specific depths and distances from agricultural ditches and/or tributaries; 2) Defendants were required to install "plugs" within the physically approximated Consent Decree area at specific locations in specified agricultural ditches or unnamed tributaries; and 3) Defendants were required to install at a specific location within the physically approximated Consent Decree area a "check dam" of a specific height, length and width which has remained submerged in several feet of water and covered by wetland vegetation since it had been installed, which condition EPA and the Corps have precluded Defendants from remedying.

Defendants' discovery requests seeking, in part, production of pre-1996 federal and state agency information could significantly help Defendants and this Court to ascertain the true bases and rationales behind the Restoration Plan's key features, and to confirm whether they were intended individually and/or collectively, by design, and/or by effect, to impact other than the Consent Decree area within the entire Brace Waterford Township farm.

The production of such information is materially relevant to resolving this ambiguity because, ever since Defendants' satisfactory completion of the Restoration Plan in 1996, "[a]s

verified by EPA inspections and ASCS officials,"[14] the Restoration Plans' three key features have caused, if not substantially contributed to, the ongoing periodic surface flooding to and subsurface erosion of portions of Defendants' three contiguous and adjacent farm tracts physically situated beyond the Consent Decree area. Since such ongoing periodic flooding and erosion have persisted now for a period of approximately 21 years (1996-2017), Defendants and this Court are entitled to know whether these impacts were intentional or inadvertent. As the Federal Court of Claims had found, although "*[f]or reasons that are unclear*, the water table on [the Braces'] property has risen, indeed so much, as to create a large pond on the lower half of the property, […a]fter 1996, no EPA official has ever visited the property to determine whether the restoration plan had broader impacts than were intended" (emphasis added).[15] Serious questions remain, therefore, concerning the respective roles that EPA, Corps, FWS and USDA officials had played in developing, designing and monitoring the operation of the Consent Decree's ambiguous Restoration Plan that Defendants have since been charged with violating at some unspecified date during the period spanning 2012-2015.

v. *The Relevance of the Restoration Plan's Failure to Anticipate Potential Impacts of Known Natural and Manmade Phenomena Present Within and Beyond the Consent Decree Area Upon Proper Operation of Plan's Three Key Features*

The Restoration Plan, furthermore, is latently ambiguous to the extent it fails to address or reference several known natural and manmade phenomena present within and beyond the Consent Decree area of Defendants' Murphy tract that could potentially impact whether any one or more of the three features of the Restoration Plan operate properly or malfunction. For example, two key culverts lie beneath roadways (Ex. D-2) bordering these farm tracts which are used to transport

[14] *See Brace v. United States*, 72 Fed. Cl. at 345; No. 98-897L (Ct. Cl. 2006), slip op. at 7.
[15] *Id.*

water flowing through agricultural ditches and tributaries. One (the Lane Road Culvert) transports water from one farm tract (the Murphy tract) to the other two farm tracts (the Homestead and Marsh tracts). The other (the Sharp Road Culvert) transports water from one farm tract located on the Brace Farm (the Marsh tract) to an area located beyond the Brace Farm. The Lane Road Culvert has often been clogged with dirt, gravel and sediment arising from the erosion caused by large pools of several feet of standing water remaining within the Consent Decree wetland area, which when it overflows Lane Road, itself a dirt road, carries with in it additional dirt, gravel and sediment into Elk Creek located within the Brace Marsh farm tract. The Sharp Road Culvert, meanwhile, which has long been obstructed with approximately 2 feet of concrete deposited by the Pennsylvania Department of Transportation for no known reason during the late 1980's or early 1990's, has become further clogged by dirt and sediment traveling northward on Elk Creek along the Marsh farm tract.

These two culverts have been further obstructed by the presence of beaver dams built along Elk Creek and unnamed tributaries feeding Elk Creek located within the Consent Decree area of the Murphy farm tract, within the Marsh farm tract along Elk Creek and adjoining tributaries, and in waters located across Sharp Lane beyond the Marsh farm tract and the Brace farm altogether. These beaver dams cause waters in Elk Creek and the unnamed tributaries to stand still, back up and overflow their banks onto Defendants' uplands, carrying with them built-up sediment from erosion of upland agricultural ditches, from previously plugged agricultural ditches and trenches previously dug in the Consent Decree area, from the ongoing erosion of Lane Road, and from the beaver dams themselves, especially during recurrent rain events and extreme weather events. These manmade and natural phenomena also have caused the ongoing inundation and submergence of the check dam installed in the 30-acre wetland area which has resulted in further

surface flooding and subsurface erosion of areas beyond the 30-acre Consent Decree area that have prevented Defendants from farming their lands and deriving badly needed revenue from harvesting them.

Defendants' recent discovery requests, in part, seek information extrinsic to the Consent Decree's Restoration Plan that is relevant to determining whether the Plan's federal and/or state agency authors had considered the potential impacts of such natural and manmade phenomena when developing and designing said Plan, or had failed intentionally or unintentionally to undertake such due diligence. It also would help Defendants and this Court to determine whether the Restoration Plan could have been implemented in a way that compensated for or prevented the compound and exacerbated surface flooding and subsurface erosion effects triggered by such "outside" phenomena. These requests, in part, are particularly relevant given Defendants' filing this past summer of an administrative torts claim for monetary damages against the United States (EPA, Corps & FWS) for loss of the use of their farmlands. (ECF No. 156).

vi. *The Relevance of the Consent Decree's/Restoration Plan's Failure to Include Modification Provisions and a Defined Administrative Process to Address Issue of Modification with EPA and Corps*

Both the Consent Decree and its Restoration Plan are ambiguous, moreover, because they fail to include a provision for modifying one or more of the Restoration Plan's three key features, in the event one or more of them failed to operate as designed (i.e., malfunctioned), e.g., when over-vegetated and obstructed agricultural drainage ditches and an inundated and submerged check dam were found to contribute alone, or in combination with clogged culverts and existing beaver dams, to the surface flooding and subsurface erosion of Defendants' three contiguous and adjacent farm tracts located beyond the Murphy tract's "U-shaped 30-acre wetland area adjacent to Elk Creek." In addition, both the Consent Decree and its Restoration Plan fail to provide any defined

process or procedure directing Defendants how and who to contact at EPA and/or the Corps to discuss modification as one of several options available to address their concerns.

Indeed, there is only a single provision within either document that indirectly speaks about modification. Consent Decree Paragraph 12 merely states that "[t]his Court will retain jurisdiction over this action for purposes of […] modifying this Consent Decree," and that "[a]ny stipulated modification to this Consent Decree must be in writing, signed by the parties, and approved by this Court." Only a lawyer's (rather than a reasonably prudent person's) quick and plain language reading of Paragraph 12 would lead to the following tentative conclusions: 1) without EPA and/or Corps written approval, there can be no modification of the Consent Decree, including its Restoration Plan; and 2) only if such an agreement is first reached between Defendants and these agencies, can the Court take up the matter and approve it.

The lack of any modification provisions or defined process to address the issue of modification within these documents has rendered Defendants entirely dependent on EPA and Corps officials' willingness to exercise their administrative discretion in their favor. In fact, EPA and Corps officials, in their exercise of discretion, have literally left Defendants hanging for more than five (5) years without proper direction and devoid of a useful information for remedying the surface flooding and subsurface erosion of those portions of their farm tracts not technically subject to the Consent Decree. Defendants not chose not to seek modification of the Consent Decree and its Restoration Plan primarily because both EPA and the Corps discouraged it, and refrained from suggesting any formal or informal approach that could ultimately lead to a modification. Defendants were directed instead to pursue informal circular discussions with EPA and the Corps of illusory "fixes" that led nowhere and fell far short of their goals.

Defendants have questioned EPA and Corps officials, for example, regarding where outside the "U-shaped approximately 30-acre area adjacent to Elk Creek" they were allowed to farm, including what ditches they were authorized to clean. Defendants also questioned how they could remedy the loss of use of those portions of their three contiguous and adjacent farm tracts that were not subject to the Consent Decree/Restoration Plan, but which had been encroached upon by ongoing periodic surface flooding and subsurface erosion originating from the 30-acre Consent Decree area. Although Defendants and their counsel had made numerous outreach efforts to EPA and the Corps from 2008 through 2016 seeking creative solutions to such problems, EPA and Corps officials refused to consider any suggestion that would result in the modification of these documents.

After having attended onsite visits during May 2011, July 2012, June 2013 and May 2015 for the ostensible purpose of advising Defendants how much of their farm tracts they could farm, these same Federal officials proceeded to encourage Defendants to provide them measurement and other data the agencies then utilized to perform a wetland delineation and preliminary jurisdictional determination without first securing Defendants' informed written consent. On one occasion, during the onsite visit of July 24, 2012, said EPA and Corps officials strained to provide Defendants with useful assistance by endeavoring to construe the Consent Decree more reasonably to allow for permit-free ditch and channel cleaning and tiling in specified areas beyond the 30-acre wetland area subject to the Consent Decree. However, more senior EPA and Corps officials subsequently retracted that interpretation and the permission these junior agency officials had granted to Defendants to move forward with those activities, which advice Defendants wholly

relied upon in undertaking such activities.[16] Nearly eleven (11) months later, following the onsite visit of June 27, 2013, these same officials charged Defendants with committing further CWA Section 404 civil violations. It is these violations, that the United States recognizes as having occurred at an unspecified time during the period spanning 2012-2015, that are now the subject of this Consent Decree enforcement action.

Defendants' recent discovery requests, in part, seek pre-1996 information relevant to determining whether EPA and the Corps had ever directly contemplated modifying the Consent Decree and Restoration Plan, or had instead always preferred the less publicly accountable method of exercising their administrative discretion, in the event the Plan's three-key features malfunctioned and prevented Defendants from farming those portions of their contiguous and adjacent farm tracts located beyond the approximately 30-acre wetland area.

vii. *The Relevance of Jeff Lapp's Pre-January 14, 2005 Testimony is Highly Relevant to Ascertaining the Temporal Period to Which the Physical Condition of the Consent Decree Wetland Area Must Be Restored and Whether the Restoration Plan Was Ever to be Modified*

Defendants have sought to admit into evidence in the current enforcement action excerpts of Federal Court testimony provided under oath and penalties of perjury by EPA's star witness, Jeffrey Lapp, during January 12-13, 2005. Jeff Lapp is the Government's only witness who has remained involved in this case since its inception in 1990. His testimony was proffered during the Fifth Amendment Takings case that Defendants initially filed in the Federal Court of Claims on November 25, 1998.[17]

[16] *See* Letter Correspondence from Scott Hans, U.S. Army Corps of Engineers to Robert Brace (Dec. 19, 2012), *supr*a; Letter Correspondence from Jeffrey Lapp, U.S. Environmental Protection Agency and Scott Hans, U.S. Army Corps of Engineers to Robert Brace (Aug. 29, 2013), *supra*.

[17] Defendants had alleged that "the government effectively took his property without just compensation when plaintiff was ordered to cease maintenance and operation of a drainage system on his property and to restore portions of property to a prior condition which would exhibit wetland characteristics." *Brace v. United States*, No. 98-897L (Ct. Cl. 2002), slip op. at 2.

Mr. Lapp's January 12-13, 2005 Federal Claims Court testimony is highly relevant to the issues at stake in this case for the following reasons: 1) His testimony helps to establish the temporal period to which the hydrologic drive, and thus, physical condition of the approximately 30-acre wetland area must be restored, within the meaning of the Consent Decree's Restoration Plan; and 2) His testimony also helps to establish that the Restoration Plan was never intended to be modified in the event the Plan's three key features, either alone or in combination, ever malfunctioned causing damages to Defendants' farmlands and ability to earn farm revenues.

With respect to the first purpose, his extrinsic testimony referred to the years 1984 and 1985 as representing the temporal period to which the physically "wet" condition of the approximately 30-acre Consent Decree wetland area must be restored. (Ex. 8),[18] (Ex. 9),[19] (Ex. 10)[20] His testimony's references to October 1984 appear to corroborate other references to that date contained in the 1987 and 1988 federal agency documents previously discussed. And, with respect to the second purpose, his testimony reveals that the Restoration Plan's authors had never intended for the Plan to be modified, and had instead preferred for EPA and Corps officials to exercise their administrative discretion to address Defendants' inability to use his farm tracts in the event the Restoration Plans' three key features malfunctioned. (Ex. 9),[21] (Ex. 11),[22] (Ex. 12),[23] (Ex. 13).[24]

---

[18] *See* United States Court of Federal Claims, *Direct Testimony of Jeffrey Lapp* (Jan. 12, 2005), pp. 525-526.
[19] *See* United States Court of Federal Claims, *Direct Testimony of Jeffrey Lapp* (Jan. 13, 2005), p. 610.
[20] *See* United States Court of Federal Claims, *Cross Examination by the Court of Jeffrey Lapp* (Jan. 13, 2005), pp. 675-676.
[21] *See* United States Court of Federal Claims, *Direct Testimony of Jeffrey Lapp* (Jan. 13, 2005), pp. 610-611.
[22] *See* United States Court of Federal Claims, *Cross Examination by the Court of Jeffrey Lapp* (Jan. 13, 2005), pp. 657-659.
[23] *See* United States Court of Federal Claims, *Cross Examination by the Court of Jeffrey Lapp* (Jan. 13, 2005), pp. 660-662.
[24] *See* United States Court of Federal Claims, *Cross Examination by the Court of Jeffrey Lapp* (Jan. 13, 2005), pp. 663-664.

Mr. Lapp's 2005 Claims Court testimony may become less relevant once the transcript to his more recent October 2, 2017 deposition in this enforcement action becomes available, but this will depend on whether his new testimony covers the same or greater ground than his prior testimony, and by virtue thereof, is considered more highly relevant to the issues at stake in this case.

C. The United States Has Failed to Show Defendants' Discovery Requests are Disproportional to the Benefits of Discovery Production:

To determine whether a discovery request is disproportionate within the meaning of amended FRCP Rule 26(b)(1), the party resisting discovery must show that the burden or expense of responding to the discovery outweighs the likely benefit of its production, taking into account the following five factors: (1) importance of the issues at stake; (2) the amount in controversy (3) the parties' relative access to relevant information; (4) the parties' resources; and (5) the importance of the discovery to resolve the issues.

The Advisory Committee Note on the 2015 amendment to Rule 26(b)(1) states that, the opposing party cannot satisfy its burden by "simply making a boilerplate objection that the discovery request in question is not proportional." However, this is precisely what the United States Memorandum of Law in Support of its Order for Protection has done. First, the United States characterizes the enforcement action it has brought before this Court as a "limited proceeding." (ECF No. 169, p.4) Second, the United States baldly asserts, without more, that Defendants' pre-1996 Consent Decree development and design information-related discovery requests are "of course, not only irrelevant and disproportional to the needs of this limited proceeding;" it does not provide any evidence of disproportionality regarding how these requests go beyond the scope of the proceeding. (ECF No. 169, p. 4) Third, the United States claims, without more, that Defendants' pre-1996 Consent Decree development and design information-

related discovery requests "pose[] a wholly unwarranted waste of value, time and resources, including the time and resources of witnesses who have personal and professional commitments beyond this lawsuit;" it, again, does not provide evidence of the time wasted, the cost of such time, or an estimate of the resources expended by either the Government or its witnesses. (ECF No. 169, p.4).

Similarly, the United States has failed to allege, let alone, address any of the proportionality factors the 2015 Amendments restored to FRCP Rule 26(b)(1), even though "[r]estoring the proportionality calculation to Rule 26(b)(1) […] does not place on [Defendants] seeking discovery the burden of addressing all proportionality considerations."

i. *The Importance of the Issues at Stake*

The United States does not consider the significance of the issues at stake to Defendants as compared to the significance of the issues at stake to the Government. It ignores that Defendants are a 4-generation farming family whose sustenance and survival relies almost entirely on being able to farm the fields that its owns and leases from third parties. The Consent Decree area is located on an owned integrated farm consisting of three contiguous and adjacent farm tracts. It holds special and irreplaceable emotional value to the Brace family, and specifically, to Mr. Robert Brace, its patron, who was raised on the Homestead tract portion of this farm, whose grandfather and father previously farmed these tracts as pasture lands and as croplands, and whose two sons now farm these tracts with their sons and daughters. In the 1970's Mr. Brace purchased his father's USDA-approved Conservation Plan originally secured in the early 1960's and then expanded it during the 1970's through the early-to-mid-1980's to include two of this farm's owned farm tracts (the Homestead tract and the Murphy tract inclusive of the wetland area) and one farm tract leased from his neighbors – the Marsh farm tract. In addition to utilizing portions of these

lands for pasturing and cropping during this period, Mr. Brace excavated and installed drainage tiles on these lands in measured stages consistent with available financing and the USDA-SCS-approved updates he had made to his father's former Conservation Plan, with the ultimate objective of creating a single integrated farm with a single integrated farm drainage system. In December 1985, Mr. Brace applied to the USDA-SCS for purposes of both obtaining USDA financing to complete the conversion of portions of his farmlands from wetlands to dry lands through ultimate completion of its steadily expanding integrated drainage system and commercial use of his fields, and certifying his integrated farm as "prior converted cropland" ("PCC") and as a pre-12/23/85 "commenced conversion" ("CC") which enabled him to continue those farming uses without loss of USDA financing and the need to seek Clean Water Act permits. Although federal law at the time was in a state of confusion and constant evolution and EPA, the Corps and USDA were not necessarily in synch regarding farmers' obligations under CWA Section 404, Mr. Brace's due diligence and investment of time and money paid off when Corps, in August 1990, issued regulatory guidance RGL-09-07 which, consistent with the relevant provisions of the Food Security Act of 1985, incorporated the provisions of the National Food Safety Manual and retroactively recognized converted farmlands bearing a PCC designation and a CC certification by December 23, 1985, as no longer exhibiting the characteristics of wetlands, as no longer included within the definition of waters of the United States, and as no longer subject to federal jurisdiction. Unfortunately for Mr. Brace, however, EPA did not initially agree to this treatment in the law of converted wetlands, until August 1993 when both EPA and the Corps issued joint federal regulations adopting the retractive approach taken in Corps RGL-09-07, and amending which remains valid to the present day. (58 FR 45008, 45031-35, amending 33 C.F.R. 328.3(a)(8) and 40 C.F.R. 232.2)

As the result of overzealous federal-state CWA Section 404 enforcement, many millions of acres of farmed wetlands located in Great Lakes States have been taken off-line. As the result, thousands of small farming families throughout the eight Great Lakes States have lost their family livelihood. The greater Erie PA community once boasted a great many family farms that have since placed out of business by EPA's overenforcement of CWA Section 404 and the costly, burdensome and time-consuming Corps permitting process. The Brace Farm whose Murphy tract includes the Consent Decree area in dispute in this litigation, is one of the last operating family farms in all of Erie PA, and is among a small number of remaining family farms in the region spanning northwestern PA and southwestern NY.

ii. *Amount in Controversy*

The United States Memorandum of Law Supporting the Motion for a Protective Order neglects to address that the Government not only seeks stipulated penalties of $10,000 as Paragraph 5 of the Consent Decree had originally required following its execution, but also fees and costs incurred by the United States in seeking enforcement of the Consent Decree. (ECF No. 82). The United States also neglects to address how its Memorandum in Support of its Motion to Enforce Consent Decree requests, in violation of Paragraph 12 of the Consent Decree a unilaterally stipulated modification to the Consent Decree that provides for increased penalties for each act of noncompliance with respect to any provision of the Consent Decree.

iii. *The Parties' Relative Access to Information*

Furthermore, the United States has failed to address the asymmetry of information between the parties, i.e., the parties' relative access to information and how that bears upon Defendants' discovery requests. According to the Advisory Committee note to the 2015 amendment of FRCP 26(b), "the burden of responding to discovery lies heavier on the party who has more information,

and properly so." If the United States had addressed this point, it would have had to admit that it is the only party in this litigation currently possessing the full trial and appellate records, including supporting exhibits, pleadings, witness transcripts, etc. of the long running Brace case, which includes, in part, the pre-1996 Consent Decree development and design information-related discovery that Defendants now seek. This result obtains because Defendants were compelled to dispose of most of their files to due recurrent flooding on their farm over the course of years, and the U.S. District Court's and Third Circuit Court of Appeals' records retention policies permitted those institutions to dispose of their records of the Brace case after 20 years – i.e., 2003 and 2004, respectively. Therefore, save for very few documents Defendants have managed to retain, Defendants are entirely dependent on the United States for all discovery in this enforcement action, particularly, discovery relevant to resolving the Consent Decree's ambiguities in order to avoid further Consent Decree and CWA Section 404 violations.

Moreover, the United States has not put forth any argument—let alone evidence—that it would be burdened by producing this information. As to the specific written discovery requests at issue, Defendants merely seek an identification of government individuals present at the property at issue and documents in the government's possession regarding those site visits, the consent decree, and the properties in question. The United States has not established why it would be burdensome to provide this information since, presumably the requested documents are maintained alongside other documents indisputably relevant to the case. Indeed, it is likely ***more*** burdensome for the United States to parse through its files regarding the Brace properties instead of simply producing the entire files. In any event, the United States instead suggests that depositions regarding these issues would waste "the time and resources of witnesses who have personal and professional commitments beyond this lawsuit." Mot. at 4. But the witnesses are already being

deposed on other indisputably relevant topics and thus it would not be a significant additional burden to have them asked additional questions during their depositions regarding the discovery topics at issue. The United States also cannot complain about the burden and expense of this lawsuit, considering that it is the party that initiated it against a farmer with much more limited resources.

iv. *The Parties Resources*

The United States also ignores the economic burden that this litigation has placed on Defendants in terms of legal fees and costs incurred to defend the enforcement action, and the ongoing lost use of farmlands and lost harvest revenues resulting from the United States' negligent and improper enforcement of the Consent Decree's ambiguous provisions to-date, which has resulted, since 1996, in the ongoing periodic surface flooding and subsurface erosion of portions of Defendants integrated farm located beyond the approximately 30-acre Consent Decree area. In July 2017, Defendants filed an administrative claim against the United States under the Federal Torts Claim Act premised on theories of negligence, trespass and nuisance, seeking compensation of approximately $8 million for the loss of use of such farmland and lost harvest revenues. In addition, Defendants believe that the filing of this Consent Decree enforcement action has encouraged EPA, Corps and PA State regulators to deny the family's ability to exploit other farm and non-farm business properties located elsewhere in the greater Erie metro region into which the family has had to diversity to earn revenues because of their lost use of farmlands and loss of farm revenues, by delaying consideration of permits and then denying them after such delays. This has placed Defendants in a financially precarious financial position that can only last so long, for which reason Defendants seek the discovery of pre-1996 Consent Decree development and design

information for purposes of resolving the Consent Decree's latent ambiguities and the allegations contained in this enforcement action.

v. *The importance of the Discovery to Resolving the Issues*

The ability of Defendants to resolve the unaddressed latent ambiguities that continue to plague the Consent Decree and its Restoration Plan and Hand Drawn Map and to resolve ongoing allegations of Consent Decree and CWA Section 404 noncompliance of the type that have resulted in this enforcement action, and ultimately, the ability of Defendants to exercise their exclusive legal rights under the Fifth Amendment of the United States Constitution to use and enjoy their private property for the purpose of agricultural production and to exercise their other constitutionally protected rights to earn a living in their chosen profession of farming,[25] *depends entirely* on securing the pre-1996 Consent Decree development and design-related information Defendants have sought in their discovery requests, and on securing the admission into evidence of the pre-January 14, 2015 Federal court testimony of Mr. Jeffrey Lapp, especially that bearing upon the temporal period best reflecting the physical condition to which the Consent Decree area must be restored, and upon whether the Restoration Plan's authors had ever intended for the Plan to be modified to accommodate Defendants' inability to use his farm tracts if the Restoration Plans' three key features malfunctioned.

Defendants' ability to secure this information will keenly determine whether Defendants can financially continue to engage in their 4th generation family farming business and afford to retain these lands even for investment purposes considering the severe diminution in their economic value resulting from the Consent Decree's and CWA Section 404's *de facto*

[25] *See Burney v. Young*, 133 S.Ct. 1709 (2013) *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (holding that "the Privileges and Immunities Clause protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling.'").

encumbrance on their lands. If this Court has any questions concerning the veracity of these statements, Defendants invite this Court to visit with its local bankers.

D. The Extrinsic Evidence of Which Defendants Seek Discovery to Interpret the Consent Decree is Absolutely Relevant to Resolving the Consent Decree's Latent Ambiguities Leading to the United States' 2012-2015 Allegations of Consent Decree and CWA Section 404 Noncompliance:

Consistent with the United States District Court for the Middle District of Pennsylvania's holding in *Westfield Ins. Co. v. Icon Legacy Custom Modular Homes*, 2017 WL 2021514 (M.D. Pa. May 12, 2017), Defendants provided above an extensive analysis that "point[s] to specific language" in the Consent Decree "itself," including its Restoration Plan and Hand Drawn Map, "that is genuinely ambiguous," and that also "point[s] to omissions of language in said documents that extrinsic evidence is likely to render genuinely ambiguous." *Id*. at 1. In addition, Defendants have "show[n] that the requested extrinsic evidence is also likely to resolve the ambiguity without imposing unreasonable expense." *Id*. Contrary to United States assertions, Defendants' extensive analysis set forth above affirmatively shows that the Consent Decree and its Restoration Plan and Hand Drawn Map, as shown through prior written interagency communications, prior written communications between the parties discussing evidentiary resources, such as aerial photography, soil surveys, field data and reports, maps and drafts of the emerging restoration plan ultimately incorporated into the Consent Decree, prior verbal communications between the parties concerning what agricultural activities could be undertaken within the Consent Decree area along Elk Creek and its tributaries, and whatever meager evidence (maps and images of prior court documents) they have managed to obtain thus far through their discovery efforts which have been entered into evidence as Defendants' exhibits in depositions of EPA and Corps witnesses convened on October 2-3, 6 and 10, 2017, "did not reflect the parties' objective, mutual intent as shown through those written and verbal communications and other documents and information. *Id*. at 5.

Furthermore, contrary to United States assertions, the parties' conduct since 2011 overwhelmingly demonstrates that these ongoing latent Consent Decree ambiguities have generated genuine confusion among Defendants and EPA and Corps officials that has necessitated the scheduling of four onsite visits during May 2011, July 2012, June 2013 and May 2015, and resulted in the dispensing of erroneous agency advice and the inconsistent, incoherent and conflicting exercise of administrative discretion by agency officials, as the substance of the discussions in the agencies' December 19, 2012 and August 29, 2013 correspondences clearly shows. Notwithstanding Defendants' continued good faith outreach efforts to resolve these ambiguities since 2011, genuine differences of interpretation of the Consent Decree's and Restoration Plan's provisions and of the Hand Drawn Map continue to prevent Defendants from farming their lands beyond the Consent Decree area while remaining in compliance with the Consent Decree and CWA Section 404.

Moreover, Defendants' initial compliance with the terms of the Consent Decree and Restoration Plan provided no indication of how the Restoration Plan would operate once it had been completed, especially considering the natural and manmade phenomena that had been present in the immediate area prior to the Consent Decree's satisfaction that were ultimately found to contribute to the malfunctioning of the Restoration Plan's three key features. Defendants' initial compliance with the Consent and Restoration Plan also provided no indication of how EPA and the Corps would respond to Defendants' later requests to maintain and reconstruct flooded and eroded sediment-laden and overgrown agricultural ditches and channels located within adjacent Murphy tract, Homestead tract and Marsh tract uplands that also transcend the Consent Decree wetlands area which had never been precisely delineated.

Contrary to United States assertions, it was not Defendants' original violations of CWA Section 404 that gave rise to their present claims of Consent Decree ambiguity, but rather the Government's new allegations of Consent Decree and CWA Section 404 violations are understood by the United States as involving activities undertaken at unspecified dates during the period spanning 2012-2015, that gave rise to these claims. Since these allegations of Consent Decree and CWA Section 404 violations are well within the five (5)-year applicable federal statute of limitations 28 U.S.C. § 2462,[26] Defendants' claims of Consent Decree ambiguity relating to those violations, as a defense, are also well within the applicable statute of limitations.

IV. Defendants' Use of the Requested Discovery Information to Support a Defense that the Consent Decree Areas Was Previously Designated Prior Converted Cropland is Not Barred Under the Doctrines of Law of the Case, Judicial Estoppel, Collateral Estoppel or Res Judicata

As discussed extensively above, the Consent Decree Restoration Plan's failure to identify the temporal period to which the Consent Decree's approximately 30-acre wetland area's hydrologic regime/physical condition must be restored has raised serious questions of fact about whether the parties and even the EPA and the Corps as between themselves ever had reached a true meeting of the minds on this issue. At the very least, the United States must admit the logical inconsistency of the Government's star witness asserting that this period was 1984 or 1985, when apparently the Consent Decree area had been designated as prior converted cropland by the USDA

[26] The Third Circuit Court of Appeals has held that the five-year statute of limitations of 28 U.S.C. § 2462 applies to Clean Water Act enforcement actions brought by EPA, and that "the statute of limitation begins to run when the claim accrues" – i.e., "when all elements of the cause of action have objectively come into existence," and not pursuant to the "discovery rule," which "provides that the limitations period is tolled until 'events occur or facts surface which could cause a reasonably prudent person to become aware that she or he has been harmed.'" *See State of New Jersey v. RRI Energy and Mid-Atlantic Power Holdings, LLC et al.*, Civil Action No. 07-cv-05298 (E.D. Pa 2013), p. 34, fn 34, citing *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 75 (3d Cir. 1990); *Id.*, at slip op. at 25, citing *William A. Graham Company v. Haughey*, 646 F.3d 138, 146 RRI Energy Mid (3d Cir. 2011) quoting Black's Law Dictionary (9th ed. 2009). *See also Jackson v. Jackson*, Civil Action No. 13-746, (W.D. Pa 2014), slip op. at 14, citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947) "('equity will withhold relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.')."

SCS and certified as commenced conversion by the USDA ASCS at precisely the same time. There is no logical inconsistency, however, in Defendants using extrinsic evidence from its discovery requests to identify and then resolve this Restoration Plan ambiguity.

A. Defendants' Discovery Requests are Not Barred by the Law of the Case:

The United States asserts that "the findings of fact and conclusion of law of the U.S. District Court in *Brace v. United States* and by the Third Circuit Court of Appeals in *United States v. Brace* are binding on this enforcement action under the "law of the case" doctrine. Consequently, the United States argues that the "law of the case" doctrine precludes Defendants' from obtaining discovery of issues of law and fact that the District Court and Third Circuit Court of Appeals had previously decided at earlier stages in this litigation. (ECF 169, p. 16). In drawing this conclusion, however, the United States overlooks a few important points noted below.

The Government first substantiates this assertion by identifying how the U.S. District Court trial judge (Judge Glenn E. Mencer) found:

1) as a matter of fact, that the "parties stipulated that the site constitutes "wetlands" as defined in the CWA and its implementing regulations," *Brace v. United States*, Civil Action No. 90-229 (12/17/93) (Ex. 14), "Findings of Fact," para. 4, but with the following proviso: "This court accepts this stipulation for purposes of this lawsuit, but notes that our view of the site indicated that only approximately 25% of the site would fall within the aforementioned definition of wetlands." *Id*., at "Discussion, para. 1. It then referenced a copy of that Pre-Trial Stipulation, dated November 26, 1993 (Ex. 15);

2) as a matter of fact, that ACSC granted Defendants "the status of 'commenced conversion from wetlands' with respect to the site for purposes of the Federal Food Security Act" […] finding

that Brace's on-going farming activities had commenced prior to December 1985;" Civil Action No. 90-229 (12/17/93), "Findings of Fact", para. 43;

3) as a matter of law, that the "parties have stipulated and this Court concludes, that the site constituted wetlands at the time of Defendants' activities, Civil Action No. 90-229 (12/17/93), "Conclusions of Law", para. 5;

4) as a matter of law, that "the site constituted waters of the United States at the time of Defendants' activities," *Id*., at para. 7;

5) as a matter of law, that "Defendants' activities in commencing conversion of the site prior to December 23, 1985, and in obtaining status as 'commenced conversion' from the ASCS are evidence that Brace and Brace Farms have established an ongoing farming operation on the site." *Id*., at para. 31.

What the United States neglects to mention, however, is that issues raised and decided at the District Court concerned only the application of two CWA "Section 404 Program" permitting *exemptions*: i) CWA Section 404(f)(1)(C), which specifically provides that "dredge or fill discharges for the purpose of maintenance (but not construction) of drainage ditches" are exempt" from Corps permit requirements; and ii) CWA Section 404(f)(1)(A), which specifically provides that "discharge of dredge or fill material for normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for production of food, fiber, and forest products, or upland soil and water conservation practices" is exempt from Corps permit requirements.

The United States also neglects to mention that a review of the parties' pre-trial stipulation reveals that the terms "wetlands" and "waters of the United States" to which the parties stipulated, and which the District Court confirmed, are defined therein 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."

Moreover, the United States neglects to mention that the District Court's findings of fact and conclusion of law relating to Defendants' prior ability to obtain from the USDA-ASCS the designation of "commenced conversion" under the Food Security Act of 1985, was significant only for purposes of determining whether Defendants had maintained ongoing farming activities in order to qualify for the "normal farming activities" exemption of CWA Section 404(f)(1)(A).

Thus, contrary to what the United States asserts, the District Court had not made factual findings or drew legal conclusions concerning whether the Consent Decree area within Defendants' Murphy farm tract had been designated as "prior converted cropland" for purposes of qualifying for the ***exclusion*** from the CWA Section 404 Program altogether. This can be confirmed by reviewing then applicable jointly issued Corps-EPA regulations relating to this exclusion – 33 C.F.R. § 328.3(a)(8) and 40 C.F.R. § 232.2, (58 FR 45008, 45031-35, adding new 33 C.F.R. 328.3(a)(8) and amending 40 C.F.R. 232.2, Aug. 25, 1993, adopting the approach of prior Corps Regulatory Guidance Letter 90-07 (Sept. 26, 1990) (treating prior converted croplands as no longer supporting the "normal circumstances" that would otherwise indicate the existence of a "wetland" because PCCs "generally do not support a 'prevalence of hydro-phytic vegetation and as such are not subject to regulation under section 404")). These regulations are substantively distinct from the regulations applicable to the exemption from CWA Section 404 Program permitting noted above.

The Government next substantiates this assertion by identifying how the Third Circuit Court of Appeals panel found:

1) as a matter of fact and law, that "[D]efendants stipulated that the site was a wetland at the time of the discharges," *United States v. Brace*, 41 F.3d 117, 120, 123, 129 (3d. Cir. 1994);

2) as a matter of fact and law, that the District Court "found that the site constituted waters of the United States at the time of Brace's activities," *Id*., 120, 123;

3) 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." *Id*., 127;

4) as a matter of law and fact, that ASCS-designated "commenced conversion" activities are subject to CWA Section 404 permitting. *Id*., 128.

The United States neglects to mention, however, that the Third Circuit's holding that a ASCS-certified "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*., at 128. In other words, the Third Circuit held that Defendants' conversion activities, by definition, did not qualify as "normal farming activities" eligible for ***exemption*** under CWA Section 404(f)(1)(A) which already recognized that the Consent

Decree area had been stipulated as constituting "a wetland" that is included within the definition of "waters of the United States."

Consequently, neither the Third Circuit opinion in *United States v. Brace*, nor the District Court opinion in *Brace v. United States*, ever addressed the issue of whether Defendants' activities qualified under the "prior converted cropland" ("PCC") exclusion from CWA Section 404 "wetlands" and "waters of the United States jurisdiction altogether, because the parties apparently never thought to raise the issue before either court. Therefore, the "law of the case" doctrine should not operate to restrict discovery of pre-1996 information and admission into evidence of pre-January 14, 2005 Federal Court testimony of the Government's star witness concerning the true meaning and intent of the latently ambiguous Consent Decree that is the subject matter of the current enforcement action (ECF No. 82).

Contrary to United States assertions, "[t]he law of the case doctrine directs courts to refrain from re-deciding issues that were resolved earlier in the litigation. The doctrine applies 'as much to the decisions of a coordinate court in the same case as to a court's own decisions.'" *Pub. Interest Research Grp. of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 45 ERC 1001, 27 Envtl. L. Rep. 21,340, para. 14 (3d Cir. 1997), quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988). The U.S. Supreme Court, furthermore, has held that "[t]he law of the case doctrine does not limit a federal court's power; rather, it directs its exercise of discretion." 45 ERC 1001, 27 Envtl. L. Rep. 21,340, para. 15, citing *Arizona v. California*, 460 U.S. 605, 619, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983); *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). Therefore, "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of

extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" 45 ERC 1001, 27 Envtl. L. Rep. 21,340, para. 16, citing *Christianson*, 486 U.S. at 817, 108 S.Ct. at 2178.

Indeed, the Third Circuit continues to recognize that the law of the case doctrine does not apply where there are extraordinary circumstances. In the more recent case of *Roberts v. Ferman*, No. 15-2909 (3rd Cir. 2016), slip op. at 21, it ruled that, "[a]s we have consistently held, when '(1) new evidence is available; (2) a supervening new law has been announced; *or* (3) the earlier decision was clearly erroneous and would create manifest injustice,' the law of the case doctrine does not apply and the court is free to reconsider an earlier denial of summary judgment." *Id.*, quoting *Pub. Interest Research Grp. of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 27 Envtl. L. Rep. 21,340, para. 17 (3d Cir. 1997) (holding more broadly that "This Circuit has recognized several 'extraordinary circumstances' that warrant a court's *reconsideration of an issue decided earlier in the course of litigation*. They include situations in which: (1) new evidence is available; (2) a supervening new law has been announced; *or* (3) the earlier decision was clearly erroneous and would create manifest injustice," (emphasis added) citing *Bridge v. U.S. Parole Commission*, 981 F.2d 97, 103 (3d Cir.1992); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169-70 (3d Cir.1982)). In *NJ PIRG*, the Third Circuit Court of Appeals ultimately held that it could revisit the threshold issue of Article III standing because the district court's findings "undermine[d] an earlier conclusion that the plaintiffs before it ha[d] standing to sue." 27 Envtl. L. Rep. 21,340, para.19. According to the Court, this "create[d] exactly that type of 'extraordinary circumstance' that warrants reconsideration of the standing issue." *Id.*

In addition, the Third Circuit Court of Appeals has emphasized that, "'we also have held that the law of the case doctrine does not limit the power of trial judges to reconsider their prior

decisions,' but have noted that when a court does so, it must explain on the record why it is doing so and 'take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling.'" *Roberts v. Ferman*, No. 15-2909 (3rd Cir. 2016), slip op. at 21, quoting *Williams v. Runyon*, 130 F. 3d 568, 573 (3d Cir. 1997) and citing *Krueger Assocs., Inc. v. Am. Dist. Tel. Co. of Pa.*, 247 F.3d 61, 65 (3d Cir. 2001) "('Under the law of the case doctrine the district court's denial of ADT's initial summary judgment motion did not create any bar to the court's later reconsideration of the renewed motion.')".

i. *The Law of the Case Doctrine Does Not Apply in the Present Case to Prevent this Court from Reconsidering What the U.S. Justice Department, Itself, has Recognized as Compound Errors of Law and Fact Committed Previously by the District Court and the Third Circuit Court of Appeals that Would Result in Manifest Injustice to Defendants if Not Addressed.*

A review of the Attorney-Court colloquy portion of the Federal Claims Court transcript of January 12, 2005 reveals how counsels for the United States and Brace and the Court had recognized that the District Court and the Third Circuit Court of Appeals had made a series of errors of law and fact that may have indeed become compound errors. (Ex. 16).[27]

The first of these errors consisted of technical errors (pp. 11-12) committed by the Appeals Court, such as confusing two separate agencies of the USDA as a single agency by mis-designating USDA's Soil Conservation Service ("SCS") (which performs technical work on farmers' agricultural plans) as the USDA's Agricultural Stabilization and Conservation Service ("ASCS") (which provides agricultural subsidies to farmers), and vice versa. As counsel for the United States admitted, while she was uncertain whether the District Court had made the same error, she did

[27] *See* United States Court of Federal Claims, *Attorney-Court Colloquy Transcript*, (Jan. 12, 2005), pp. 10-25 (The parties and the Court had been concerned about how these errors might impact factfinding during their Fifth Amendment Takings litigation, and had sought to resolve these errors by stipulated agreement.) *Id*. at pp. 10, 20.

recall that "some of the factual findings from the District Court might have inaccurately characterized the roles of the ASCS." (p. 13).

A second error consisted of both courts mistakenly referring throughout their decisions to Defendants' USDA – approved "drainage" plan when the plan had actually been a "conservation" plan. As counsel for the United States explained, "The other example would be the reference to 'drainage plan.' There was, in fact, no drainage plan. There was a soil – there was a conservation plan, and that's what the parties will all be talking about, but it was never referred to as a draining plan because it encompassed some more items other than just drainage." (p. 13).

A third error consisted the failure of the courts to properly define the scope and extent of Defendants' "site" to which they had referred. As counsel for the United States explained, "Your Honor, […] they also didn't define what they were referring to, and that leads to the third problem that made it difficult for me to accept some of the offered stipulations, which were basically sentences taken directly from the opinion, and that was reference to the 'site'. *Now, in the Third Circuit opinion, the Court begins discussing the 'site' and 'the property' without defining it.* About two-thirds of the way through, it says, 'The site of 30 acres of wetland,' but if that's defined as the site, then a number of the Court's statements are demonstratively incorrect" (emphasis added). (p. 14)

The Claims Court, for its part, was just as uncertain as were counsels regarding what the term "site" referred to, but sought to construe the term in the context of a takings litigation. "THE COURT: I take it there would be no indication in that opinion that, when they were defining 'site,' that they were defining the property of the whole, for example, for purposes of the analysis that would be conducted in a […] regulatory taking mode?" (p. 14).

Counsel for the United States did not agree with the Court's assessment and was unwilling to stipulate to a definition without knowing what the Appellate Court had meant. "They were absolutely not looking at that, and when they used the word 'site,' they didn't capitalize it, and they seemed to be referring to different amounts of property in different areas in the opinion." (p. 14). Counsel for the United States further stressed that she believed this error had a compound effect on the Third Circuit's entire opinion. *"And, so, to just blindly stipulate to 'the site' when the 'site' is not clearly defined, or if you say it's just the 30 acres, then the opinion is incorrect in parts*." (pp. 14-15). "[I]f you take some of the statements of the Third Circuit literally, they're not correct, but I don't believe Plaintiffs are going to argue that they're correct either. […] I think those would be the three big examples that led me to reject specific offered stipulations, Your Honor." (p. 15).

In the Claims Court's estimation, the error over the mis-designation of the conservation plan as a drainage plan was curable for purposes of the Takings litigation if the parties and the Court knew what a witness was referring to when the term "drainage plan" or "conservation plan" was used. (p. 18). However, this conclusion does not diminish the extent of the error and its impact for purposes of the District Court and Appellate cases. The Claims Court, nevertheless, remained concerned about the Third Circuit Court's references to the "site". "So the third of these, though, is the one where I suspect there may be a little more of a rub, which has to do with references to 'site' that are in the Court of Appeals opinion[], and I assume descriptive terminology regarding how the Court of Appeals goes about defining what is the site, characteristics of the site, things like that." (p. 18.)

Counsel for Brace, however, did not necessarily agree. "Well, my view is I guess somewhat similar to Ms. Florentine's, Your Honor, and that is *the term 'site' is used in sort of a*

nonspecific manner. It's not entirely clear which boundaries or that the Court had specific boundaries in mind. The Court will find, I think, that it's sort of a complicated question or an unclear question here in that the original notices originally identified 200 acres of wetland, a little bit difficult because Mr. Brace, at the time, only owned 127 acres of land. Thereafter, the government identified 130 acres of wetland. That is the entire land in the name of Mr. Brace. And, it was only subsequently, actually, *at the time at least of the District Court's determination* of what he had disturbed, which, after all, is what the enforcement action is about, that is: *What is the area in which the violation of the Clean Water Act occurred? That was found ultimately to be 30 acres*. Now whether the [District] Court is talking about the 30 acres he disturbed or – and I think the Court uses the term sort nonspecifically to refer to the general place where that occurred, whether you call it the Murphy farm or the whole Homestead plus Murphy farm is sort of beside the point. So I would agree with counsel and perhaps suggest adopting the Court's suggestion that the term 'site' is not necessarily coterminous with any of those terms, and it, more specifically doesn't define a relevant parcel or a title held by Mr. or any of those things. It's considered like [an] area or location" (emphasis added). (pp. 18-19).

Just as the Claims Court requested that counsels mark up the Third Circuit opinion to show where the three sets of errors lied, counsel for the United States emphasized that "the District Court opinion is more problematic because it was reversed on appeal, and so it's not clear which of the factual findings really survived." (p. 22). Counsel for Brace, on the other hand, believed that "the Third Circuit relied entirely on the District Court's findings of fact," and *understood the Third Circuit opinion as entailing "a de novo review on the law of the determination of the meaning of the exemption for normal farming activities*. The Third said the District Court got it wrong. Based

on these facts found by the Third Circuit], the exemption does not apply, contrary to the District Court. Therefore, the District Court is reversed." (p. 23).

The difference of opinion among counsels triggered the Claims Court to state its preference that it needs to know definitively the facts from the District Court that would be subject to a collateral estoppel ruling. "So I think my preference would be that, unless you all identify something from the District Court opinion that you think is important to be the subject essentially of a collateral estoppel ruling – and then we'd have to get down to the nitty grittiness as to what to do with a reversed opinion – but unless you identify something specific that you want me to consider along those lines, I'm going to operate under the assumption that the marked up version of the Third Circuit opinion is going to get you what you need, and that I'll view the District Court opinion as having historical value, but not something that I'm going to focus upon, at least from the standpoint of collateral estoppel, unless you indicate specifically otherwise." (pp. 24-25).

ii. *The Law of the Case Doctrine Does Not Apply in the Present Case to Prevent this Court from Considering a Supervening New Regulation Announced Subsequent to the Commencement of the Original Action, But Before the District Court's Ruling Had Been Announced*

Approximately two months prior to the commencement of trial in the earlier proceeding in this litigation, final joint EPA-Corps regulations fully explaining how farmers could exploit the prior converted cropland exclusion from CWA 404 jurisdiction were issued. These regulations were lengthy, complex and reflected a newly formed consensus between EPA and the Corps that, a prior converted cropland designation granted under the Food Security Act of 1985 excluded a farm or farm tract that had undertaken an USDA-approved conversion from wetland to dry land from the definition of "wetlands" and "waters of the United States," and thus from all federal jurisdiction under Clean Water Act Section 404. These regulations were not issued and available until August 25, 1993. Defendants had entered into a stipulation with the Justice Department on

September 26, 1993, barely one month after the regulations were issued, which acknowledged that the approximately 30-acre Murphy tract wetland area was a "wetland" and "water of the United States", and thus fell under federal jurisdiction. The Court thereafter issued its decision in December 1993. It is highly likely that Defendants' counsels had not known of or fully understood the newly issued regulations at the time they agreed to the stipulation. Arguably, neither did the District Court which was evident from its valiant but failed attempt to reconcile a "commenced conversion" with the CWA Section 404(f)(1)(A) exemption for normal farming activities. It is pure speculation at this point to surmise why Defendants had chosen not to amend their pleadings to include this defense just prior to the October 1993 trial and before the Court issued its decision in December 1993.

It is more than possible that with the quickly approaching trial Defendants' former counsels who had already prepared themselves for trial based on the 404(f)(1)(A) and 404(f)(1)(C) "exemption" defenses did not have the means, capacity or time to learn a new defense. Yet, it is sufficient to note that these regulations were complex and involved input from many federal agencies, including the EPA and Corps. In addition, these agencies had granted themselves a transition period to educate their officials in order to avoid errors and confusion in administering the rules. While the joint rule adopted the approach previously taken by the Corps alone since September 1990, EPA likely required more time to accept what to them was a significant compromise in wetlands policy.

iii. *The Law of the Case Doctrine Does Not Apply in the Present Case to Prevent this Court from Considering Newly Available Evidence Produced Through Discovery*

Defendants' discovery requests for pre-1996 Consent Decree development and design-related information and efforts to secure admission of pre-January 14, 2005 Federal Court

testimony of EPA's star witness, Jeffrey Lapp are likely to produce newly available evidence not previously obtained that can be used to resolve the ongoing latent ambiguities plaguing the Consent Decree, its Restoration Plan and its Hand Drawn Map, which have served to prevent Defendants from fully farming their land without a violation of the Consent Decree and CWA Section 404. The combination of such discovery requests and disclosures from prior testimony taken under oath offers Defendants a reasonable opportunity to finally put this longstanding 30-year administrative and judicial dispute to bed. This Court should grant Defendants this opportunity and deny the United States its protective order precluding such discovery in the name of justice and fairness.

B. Defendants' Discovery Requests are Not Barred by Judicial Estoppel:

The United States claims without merit that the doctrine of judicial estoppel should operate in this case to preclude Defendants from seeking discovery of pre-1996 information and admission into evidence of pre-January 14, 2005 Federal Court testimony of the Government's star witness concerning the true meaning and intent of the Consent Decree, because it would support the assertion of what the Government intentionally mischaracterizes as "'a position inconsistent with one that [Defendants have] previously asserted in the same or in a previous proceeding.'" ECF No. 169, p. 19, quoting *Becker v. Bank of N.Y. Mellon Trust Co., N.A.*, 2016 WL 5816075, at *39 (E.D. Pa. Oct. 5, 2016) (internal quotation marks omitted) (alteration in original) (quoting *MD Mall Assoc., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d Cir. 2013)). Unfortunately, for the United States, it has not proven the two elements necessary to invoke this defense: 1) Defendants' adoption of a position clearly inconsistent with an earlier position; and 2) Defendants' success in persuading the Third Circuit Court of Appeals to accept its earlier position, such that this Court's acceptance of a newly advanced inconsistent position would create inconsistent rulings the

appearance of misrepresentation. *Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA*, 779 F.3d 214, 221-22 (3d Cir. 2015).

Granted, Defendants had previously stipulated prior to the 1990 trial that the approximately 30-acre wetland area of their Murphy tract which ultimately became subject to the Consent Decree in 1996 was a "wetland" and "water of the United States" at the time of the alleged unauthorized activity. Defendants had done so, however, for purposes of invoking the exemptions from Corps permitting under the CWA Section 404 Program potentially available for maintenance of agricultural drainage ditches and for normal farming activities under CWA Section 404(f)(1)(C) and 404(f)(1)(A). At the time immediately preceding trial in the fall of 1993, when Defendants entered into the stipulation, they had likely assumed that by stipulating to the existence of wetlands and waters of the U.S. they were rendering themselves eligible to invoke these exemptions from Corps permitting as a defense against the United States' pending action. While Defendants succeeded in persuading the District Court that they qualified for these permitting exemptions, the Third Circuit was not persuaded and overruled the District Court on these issues.

Had Defendants then been informed about how to exploit the prior converted cropland exclusion first introduced under the Swampbuster provisions of the Food Security Act of 1985, as a defense to CWA Section 404 coverage altogether, they would have done so. However, these are not inconsistent positions since they fall under different regulatory provisions. The exemption provisions already fall under the CWA Section 404 Program, whereas the prior converted cropland provisions do not. Thus, Defendants should not be barred under the doctrine of judicial estoppel from invoking the prior cropland exclusion defense from CWA Section 404 jurisdiction; nor should Defendants be banned from seeking discovery and securing into evidence information and

testimony that would support their claims for purposes of resolving the Consent Decree's longstanding latent ambiguities and the present enforcement action.

C. Defendants' Discovery Requests are Not Barred by Collateral Estoppel:

The United States misrepresents that Defendant's may be barred from pursuing a prior converted cropland exclusion from CWA 404 jurisdiction defense on the grounds of issue preclusion. Despite the Government's verbiage the bottom line is that neither the District Court nor the Third Circuit Court of Appeals in this litigation ever previously addressed whether the Consent Decree was ambiguous or whether the prior converted cropland exclusion defense was available. All that these courts addressed was whether one of two exemptions from Corps permitting required by the CWA Section 404 Program was available – the Section 404(f)(1)(A) exemption for "normal farming activities" and the Section 404(f)(1)(C) exemption for the maintenance of agricultural drainage ditches. Whatever ink was spilled to discuss the impact of the USDA-ASCS's grant of a "commenced conversion" designation to the approximately 30-acre Murphy farm tract wetland ultimately subject to the Consent Decree was focused on analyzing whether the activity of "converting" wetland to cropland constituted a "normal farming activity" such that the exemption would be available for an "established farm." Therefore, Defendants are not barred on grounds of collateral estoppel from pursuing a future prior converted cropland exclusion defense in this action, or from seeking pre-1996 Consent Decree development and design-related discovery or pre-January 14, 2005 Federal Court testimony of EPA's star witness concerning the meaning of certain Consent Decree Restoration Plan terms.

D. Defendants' Discovery Requests are Not Barred by Res Judicata

The United States finally asserts that Defendants are precluded from raising the prior converted cropland exclusion as a defense in this case for purposes of both the Food Security Act

of 1985 AND Clean Water Act Section 404, because it could have been previously invoked as a defense in the earlier 1990 EPA action. This, actually, would have been quite a remarkable feat considering that the final joint EPA-Corps regulations fully explaining how this could be done were not issued and available until August 25, 1993. It is pure speculation at this point to surmise why Defendants had chosen not to amend their pleadings to include this defense just prior to the October 1993 trial was to commence. It is more than possible that with the quickly approaching trial Defendants' former counsels who had already prepared themselves for trial based on the 404(f)(1)(A) and 404(f)(1)(C) "exemption" defenses did not have the means, capacity or time to learn a new defense.

Yet, it is sufficient to note that these regulations were complex and involved input from many federal agencies, including the EPA and Corps. In addition, these agencies had granted themselves a transition period to educate their officials in order to avoid errors and confusion in administering the rules. While the joint rule adopted the approach previously taken by the Corps alone since September 1990, EPA likely required more time to accept what to them was a significant compromise in wetlands policy. Consequently, contrary to United States assertions, Defendants could not have brought the prior converted cropland defense in the prior proceeding, and, therefore, should not be precluded on grounds of res judicata from seeking pre-1996 Consent Decree development and design-related discovery or pre-January 14, 2005 Federal Court testimony of EPA's star witness for purposes of resolving Consent Decree ambiguities and potentially this enforcement action.

CONCLUSION

Defendants respectfully request that the Court deny the United States' Motion for a Protective Order.

Respectfully submitted, THE KOGAN LAW GROUP, P.C.. By: */s/ Lawrence A Kogan* Lawrence A. Kogan, Esq. (*Pro Hac Vice*) (NY # 2172955) 100 United Nations Plaza Suite #14F New York, New York, 10017 (t)212 644-9240 Email: lkogan@koganlawgroup.com Attorneys for Defendants, Robert Brace, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc.	Respectfully submitted, KNOX McLAUGHLIN GORNALL & SENNETT, P.C. By: */s/ Neal R. Devlin* Neal R. Devlin, Esq. (PA ID No. 89223) Alexander K. Cox, Esq. (PA ID No. 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.