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February 26, 2014

Pamela Lazos, Esq.
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103-2029

RE: Robert Brace & Sons, Inc. – Waterford and McKean Townships, Erie County, Pennsylvania

Dear Ms. Lazos:

I am writing on behalf of Robert Brace in follow-up to our January 10, 2014 letter. As indicated in that previous letter, my goal is to provide you with more detail regarding Mr. Brace's position that all of the activities in which he has engaged on the property at issue have been appropriate and, particularly, in compliance with the unique legal history of these properties.

As you are well aware, these properties, which the Braces generally refer to as the "Homestead Farm" and the "Murphy Farm", have been the subject of more than twenty (20) years of litigation. It is the specifics of that litigation, and the Court Decisions it has generated, that provide a primary basis for my client's position that the activities identified in your previous letter that the EPA took exception to, were perfectly appropriate.

As you know, the legal proceedings regarding the Murphy and Homestead farms began in 1990 when the United States Government accused Mr. Brace of violating the Clean Water Act ('CWA") through the maintenance of a tile system and ditches to keep the Murphy and Homestead Farms in a condition that would allow them to be used for the growing of crops. After a multi-day trial in that case, Judge Mencer ruled in favor of Mr. Brace, finding that all of his activities were appropriate, and that the properties were subject to an agricultural exemption. ["MENCER DECISION"]

On appeal, the Third Circuit reversed Judge Mencer's Opinion and, determined that the Homestead and Murphy Farms were not one integrated farming operation but, instead, needed to be analyzed separately with regard to the application of an agricultural exemption. 41 F.3d 117, 125 (3d Cir. 1995). Based upon that conclusion, the Third Circuit found that Mr. Brace's activities on the Murphy Farm may have violated the CWA. Mr. Brace remains consistent in his position that the Third Circuit's decision was contrary to the facts, as they existed, and the law. However, he also recognized that, after the Supreme Court refused to review that decision, he was placed in a position where only damages were left to be litigated.

Subsequent to the Third Circuit's Decision, and as I recognize you are well aware, Mr. Brace entered into a Consent Order with the Government. As Mr. Brace I know has explained on multiple occasions, he did so under significant pressure. He was well aware of the fact that, after the Third Circuit's Decision, the only issues left to litigate were penalties and damages.

At the time he executed the Consent Order, Mr. Brace had a clear understanding as to what its requirements were. As discussed later in this letter, those understandings were later confirmed through testimony in the Federal Court of Claims phase of this litigation. Mr. Brace's understanding was that he would have to engage in certain specific activities within a discrete period of time. At which point, the goal of the Consent Order was to "return" the Murphy Farm to the state it was in 1985. Mr. Brace was well aware of the condition of the Murphy Farm in 1985 because he was actively working the Farm at that time. The Department of Agriculture was also well aware of the condition of the Murphy Farm in 1985. In 1988, the Murphy Farm was granted a "Swampbuster determination" by the Agricultural Stabilization and Conservation Service ("ASCS"). In making this designation, ASCS conclusively determined that ongoing farming operations within converted wetlands had commenced prior to December 23, 1985. Such "prior converted croplands" are not subject to regulation under Section 404 of the CWA and therefore were allowed for the continued conversion of that property. .. Further, there are aerial photos of the condition of that Farm around that time, which clearly identify the fact that it was dry and tillable. Mr. Brace complied with all aspects of the Consent Order, took the specific steps it required with regard to the removal of tile lines and installation of a check-dam. This was noted by the Court of Federal Claims in *Brace v. U.S.A.*, "In the case *sub-judice*, the record plainly reveals that the purpose of the remediation plan was to restore the wetlands portion of the Murphy Farm to its state in 1985." 72 Fed. Cl. 337, 344 (2006) ("As verified by EPA inspections and ASCS officials, plaintiff subsequently complied with the Consent Decree.")[1] Page 13 note Then, as a result of the Consent Order's strong prohibitions on engaging in any other activities on the Murphy Farm, Mr. Brace was forced to simply do nothing with regard to the Murphy Farm for years. To make matters worse, for reasons that are still unclear to Mr. Brace, the Commonwealth of Pennsylvania raised the elevation of the culvert at the intersection of Sharp and Greenlee Roads immediately adjacent to Mr. Brace's property. This artificial interruption in the natural course of the drainage system at the property resulted in the Brace property becoming inundated with water.

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[1] Judge Allegra also noted that the finding of the Murphy farm had been an integral part of an overall farm operation was reached by the trial court and never disturbed on appeal:

> This Court is persuaded and concludes that the subject site was during the entire period of time that ownership rested in the Brace family, an integral part of an established and on-going farm and ranching operations, and [Mr. Brace's] activities during the time frame of 1985-1987 did not bring a new area into the operation."); see also Brace, 41 F.3d at 125 (leaving this fact finding undisturbed).

Mr. Brace subsequently filed a Takings Claim in the Court of Federal Claims seeking compensation for the deprivation of the Murphy Farm. After another multi- day trial, Judge Allegra issued a 29 page Opinion denying Mr. Brace any compensation for the impacts of the Consent Order on the Murphy Farm. While that was directly contrary to the relief Mr. Brace was requesting, that Opinion and the testimony upon which it was based, provided clear evidence that all activities that Mr. Brace has engaged in since the issuance of that Opinion are in precise conformity with the legal requirements associated with the Consent Order and this Property.

Specifically, the impact of the Consent Order was clearly identified by the Government's witnesses and relied upon by the Court. In describing the impact of the Consent Order on the Murphy Farm, the Court noted that the work Brace did after the consent order was done "all in an effort to restore what one EPA official described as the "hydrologic drive of the wetlands to where it was in 1984.[2] *Id.* at 344. Judge Allegra specifically relied upon this testimony in concluding that the impact on the Murphy Farm was not sufficiently significant to entitle Mr. Brace to compensation. Addressing the quantity of property taken, Judge Allegra limited it to only 14% of a 134-acre combination of the Murphy and Homestead Farms. Further, addressing Mr. Brace's argument that the EPA's actions had caused significant flooding of his property outside of the 30 acre parcel, Judge Allegra indicated that Mr. Brace should work with government officials to avoid an over enforcement of that order.

> "In the case sub judice, the record plainly reveals that the purpose of the remediation plan was to restore the wetlands portion of the Murphy Farm to its state in 1985, prior to Mr. Brace's filling activities. Nothing in the record suggests that it was instead foreseen or foreseeable that implementation of the plan would flood that property, so as to preclude it from being used as pastureland, as it had been used before."
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> *Id.* at 363.

Judge Allegra then went on to make it clear that he was premising his Decision on his reasonable belief that the United States Government would work with Mr. Brace to allow for the use of the Murphy Farm as contemplated by the Consent Order and as clearly laid out in the testimony of Mr. Lap.

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[2] The EPA's witnesses indicated that the goal of the consent order was to return the Murphy Farm to the condition that existed in 1984, although Judge Allegra indicated that 1985 was the relevant year. It is unclear if this difference was intentional, but it is likely irrelevant to the ultimate issue.

> Q: Now, what was the goal of this restoration plan?
>
> A: The goal of this restoration plan was to restore the hydrologic drive back to this wetland system, and we used a target date of 1984. So it was to remedy those activities which had occurred from 1984 onward.
>
> (Testimony of Mr. Lapp, p. 610)

> At trial, various government officials indicated that they were prepared to work with Mr. Brace to remedy any unintended consequences of the restoration plan. The court will not speculate as to what legal action would be appropriate if these officials did not respond positively to an actual request.
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> *Id.* at 363 n. 41.

This Opinion was affirmed by the United States Court of Appeals for the Federal Circuit and the Supreme Court subsequently denied certiorari. Thus, it became final and unappealable.

After the Federal Court of Claims appeal proceedings ended, Mr. Brace began a multi-year effort to obtain cooperation from the EPA to allow him to utilize the property in the manner contemplated under Judge Allegra's Opinion. It took years for Mr. Brace to be able to obtain sufficient cooperation from the EPA to provide some guidance as to its views as to the activities that would be permissible on both the Murphy Farm and the Homestead Farm.

Finally, on June 27, 2013, as you are well aware, a group of individuals from the EPA came to the Murphy Farm and the Homestead Farms and toured them with Mr. Brace. During this tour, they authorized Mr. Brace to engage in a variety of activities that he had always believed should be appropriate. These included cleaning ditches and generally taking actions on both the Homestead Farm, Murphy Farm and neighboring property that would allow for the continued agricultural use of those properties and the maintenance of the 30-acre parcel in a condition equivalent to 1985.

Despite this positive meeting, the EPA has subsequently accused Mr. Brace of violating the Consent Order and various regulations due to the actions he has taken. However, those actions are well within the scope of the Consent Order (as they are designed to return the 30 acre parcel to its condition in 1985) and are otherwise appropriate pursuant to the agricultural exemption provisions of the CWA.

The EPA's current interpretations of the agricultural exemption and the so-called drainage ditch maintenance exemption are so narrow and restrictive as to constitute the virtual administrative repeal of the exemption. The EPA has neither the discretion nor legal authority to affect such a change.

The United States Congress enacted section 404(f) of the CWA in 1977 to make it clear that it did not intend to regulate certain activities – among them normal farming activities and the regular maintenance of agricultural drainage ditches. 33 U.S.C. §§1344(f)(1)(A)&(C). As you are aware, section 404(f) sets up a two-part test to determine whether a landowner can avoid a lengthy individual permit review process. Step one is to determine whether the activity falls within any one of the six categories referenced in the statute. It does not appear that the EPA is now or has ever contested the fact that the activities on both the Murphy Farm and the Homestead Farm constitute normal farming activities and/or drainage ditch maintenance. The Third Circuit's and Federal Claims Court's opinions support this conclusion. Step two is to make sure the (f)(1) exemption is not lost because of (f)(2), commonly known as the "recapture clause." In the case of the Brace property, the EPA has suggested, albeit it in a rather vague and unconvincing manner, that recapture is at play.

The recapture provision in section 404(f) is as follows:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters may be reduced, shall be required to have a permit under this section.

The (f)(2) recapture clause has two fundamental requirements: one is establishing a "new use" and the other requires a showing of a reduction in reach or impairment of flow or circulation. Both requirements must be met to trigger the recapture clause. It is not clear to us that there is a "new use" at either the Murphy Farm or the Homestead Farm upon which recapture can be based.

A 1997 Regulatory Guidance Letter ("RGL") issued by the EPA and the US Army Corps is instructive as to the issues relevant at the Brace property as they relate to recapture. RGL 87-7 relates specifically to the drainage ditch maintenance issue and the recapture provision. Regarding recapture, the RGL states that abandonment and new use determinations depend on case-by-case assessments that apply a "rule of reason to the facts:

> For example, if an area has been farmed following ditch construction and an effort has been made to farm the land within the originally constructed ditch drainage area on a regular but not necessarily continuous basis, the fact that wetland vegetation has temporarily reestablished does not mean that a continuation of farming after ditch maintenance will result in bringing a new area under a new use. That is, the temporary establishment of wetland vegetation within an area benefitted by original ditch construction does not automatically mean that the use to which the area was previously subject should be considered a "wetland."

Section 404(f)(2) was never intended to cut off a property owner's ability to conduct normal farming activities or to maintain or repair a ditch without a permit when wetlands have reemerged or are otherwise present in the vicinity of the farming activities. If that was case, there would be no exemption as a practical matter and that is what has happened at the Brace property due to the EPA's and other agencies' historic actions.

Moreover, the "wetlands" to be considered within a certain project area and that must be considered in the context of establishing an entitlement to an exemption are all wetlands contiguous to and having a natural surface connection with the ditch system proposed for maintenance. However, at the Brace farm, the EPA has taken the position that only certain portions or certain ditches are entitled to the exemption. Once again, this interpretation of the breadth or scope of the drainage ditch exemption nullifies the exemption entirely. Being permitted to only maintain a distinct segment of a drainage ditch does not serve the purpose of cleaning the ditches in the first place. Drainage ditches by their very nature are a series of interconnected ditches that often have a natural surface connection to wetland areas. Drawing an arbitrary line where ditch maintenance must end results in a disruption of this surface connection and a failure of the ditches to serve their essential purposes.

Above and beyond the foregoing analysis of the section 404(f) exemptions lie the perplexing guidelines that have been issued in the wake of Rapanos v. United States. Clearly even the regulators are struggling with how to proceed in the post-Rapanos world. The Brace Farm is clearly not a situation where wetlands are adjacent to actual open waters or "navigable-in-fact waters." Suffice it to say that the relationship between the agricultural drainage ditches at the Brace Farm and navigable waters is tenuous at best.

As I hope this letter makes clear, Mr. Brace has attempted to do nothing more than utilize his property in a manner that fell within the guideposts established by the complex litigation history that exists. For Mr. Brace, those guideposts are fairly clear – the thirty acre parcel must be maintained in a position that it was in 1985, and the balance of the Murphy and Homestead Farms are entitled to agricultural exemptions from general permitting requirements. Both the historic case law at the Murphy Farm and the Homestead farm and the relevant regulations support this conclusion. Mr. Brace is certainly willing to work with the EPA in an effort to address any specific issues that it has with his activities. He hopes that this letter will provide a starting point for that by explaining to you his basis for the way he has tried to maintain his property.

Very truly yours,

KNOX McLAUGHLIN GORNALL & SENNETT, P.C.

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