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Laura J. Brown, Esq.
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U.S. Department of Justice
P.O. Box 7611
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RE: Brace/EPA and DOJ

Dear Attorney Brown:

I am writing in follow-up to our most recent telephone conversation. Since that conversation, I have had a number of discussions with my client regarding his attempts to resolve the pending disputes with the EPA and DOJ. As I have previously expressed, my client was prepared, due to the regulatory structure that is in place, to comply with whatever "remediation" requirements the EPA had for the property at issue. Unfortunately, despite this willingness, we now understand that the DOJ and EPA will also require a significant (i.e. approaching or in excess of $100,000) penalty payment from Mr. Brace. Stated simply, this is not acceptable and, based on that requirement, my client does not believe a compromise resolution can be reached in this matter. The facts remain that Mr. Brace has done nothing more than comply with the law, the regulatory requirements that have existed, and the instructions he has been given by the EPA.

As you know, prior to any involvement by the EPA, my client received a determination that the property was issued a converted wetland ("CW") designation. After the 1985 farm bill, Congress gave the conservation district the authority to determine if a conversion was started prior to December 23, 1985. The property at issue received a CW and prior conversion ("PC") determination from the conservation district and was thereafter subject to a conservation plan -- a plan with which my client fully complied. This should have provided my client with the right to complete his conversion and make full farming use of this property. Also, for any property drained prior to 1977, the EPA and Army Corps have no jurisdiction. My client's property was drained prior to 1977.

Consistent with the conservation plan that controlled this property, my client proceeded to take significant efforts to bring the Murphy and Homestead farms back into production. These facts entitled my client to an agricultural exemption under the Clean Water Act. However, despite this, the EPA chose to make an example of my client and file an enforcement proceeding against him. At the District Court level, the trial judge, Judge Mencer, noted that Mr. Brace's activities in commencing conversion

pursuant to a conservation plan prior to December 23, 1985, and in obtaining status as "commenced conversion" from the ASCS are evidence that Brace and Brace Farms had established an ongoing farming operation on this property.

Unfortunately, the Third Circuit Court of appeals refused to engage with the rule of law and unrebutted facts, and issued a decision that is fundamentally contrary to the purposes of the agricultural exemption under the Clean Water Act. This resulted in Mr. Brace having no choice but to enter a consent decree in which he was required to make fundamental changes to his property and pay a sizeable penalty.

That first chapter of enforcement was, unfortunately, only the beginning. In an effort to receive just compensation for the property that the EPA took from him, Mr. Brace filed a Tucker Act claim seeking $3,200,000. This claim went to trial before Judge Allegra. At the beginning of the trial, all parties agreed that the Third Circuit decision was incorrect on many issues. (Trial Testimony, pp. 12-15) Further, testimony from the EPA witness, Jeff Lapp, indicated that the 30-acre consent decree area or the surrounding farms could be used for productive purposes, if such use was in compliance with the Food Security Act of 1985. (Trial Testimony, pp. 659-667) The clear import of Mr. Lapp's testimony was that there were a number of activities that could be undertaken on the Murphy farm without the need for permitting. Mr. Lapp went on to note that activities that might be more comprehensive or aggressive may require a permit, such as the nationwide permits that are provided for the Clean Water Act. Further, Mr. Lapp made it clear that he, as the primary representative of the EPA on this issue, would work with the Braces to ensure that the restrictions on Mr. Brace's activities would not go beyond maintaining the condition of the property that existed in 1984.

The EPA was clear during the takings claims that the purpose of the consent decree was simply to return the area at issue to the condition that existed in 1984. That condition, as established by the EcoStrategies report that my client has previously provided to you, was a dry and harvestable property. At that time, the property had oats, rye and hay.

Mr. Lapp's testimony on this regarding the goals of the EPA and it willingness to work with Mr. Brace was specifically noted by Judge Allegra, "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."

Ultimately, Judge Allegra found that there was no taking based, in part, of the EPA's promise that its goal was to simply return the property back to the condition that existed in 1984 and that it would work with Mr. Brace to allow this to happen. In fact, if the EPA would allow Mr. Brace to return the property back to what existed in 1984, there would not be a taking. Unfortunately, the next steps of this controversy show that the EPA remains committed to keeping the Murphy Farm unusable.

After exhausting his appeals regarding the takings decision, Mr. Brace then spent years trying to have the EPA come to his property to see that the consent order resulted in a significant over enforcement of the EPA's expressed objectives. By 2013, all agencies agreed that the EPA would take

the lead in this matter – which was consistent with the manner in which the EPA conducted itself during the takings claim. Finally, in 2014, representatives of the EPA (and other Federal and State agencies) met at the Murphy and Homestead farms to discuss what work Mr. Brace could perform to ameliorate the over enforcement that existed. That meeting ended with a clear direction from the EPA that Mr. Brace was allowed to do work and return a significant portion of the Murphy Farm to farmable property, he was allowed to maintain the ditches that service the Murphy and Homestead Farms, and he was allowed to do other work to bring the property closer to the condition that existed in 1984. Representatives of the EPA, including Mr. Lapp, gave Mr. Brace clear permission to perform this work. There are several emails from Mr. Brace and his family confirming these instructions and indicating their expectation that a confirming letter from the EPA would be forthcoming.

Unfortunately, the letter that Mr. Brace received was precisely opposite what Mr. Lapp indicated. The EPA took the position that the permission Mr. Brace received was incorrectly given, and that he would now have to "remediate" the property. This is completely contrary to what Mr. Lapp told Mr. Brace when he was at the Murphy property, and directly contrary to Mr. Lapp's previous testimony. However, the EPA and DOJ have stood by this position and, now, have threatened a contempt proceeding against Mr. Brace in which they will seek significant remediation and penalties.

Because Mr. Brace recognizes that, in the end, the EPA will take the position that it can require him to do whatever it believes appropriate on the property, he attempted to resolve this matter amicably – up to agreeing to engage in remediation efforts. However, the EPA has now taken the position that, in addition to these efforts, it wants Mr. Brace to pay more than $100,000 in penalties. Mr. Brace is not going to pay such an excessive amount when it is the Government that is taking his property.

Ultimately, the Third Circuit made a decision pursuant to which, no matter what Mr. Brace did prior to 1985, regardless of his compliance with the regulations, his securing of the proper CW and PC designations, this compliance with an approved conservation plan and his work to bring the property at issue back into production, the Government could recapture that property and prevent Mr. Brace from making any use of it. This is what has occurred with regard to the Murphy farm, and, in fact, has occurred at another of Mr. Brace's properties located in Garland, Pennsylvania.

However, when the EPA was confronted with a takings claim aimed at doing nothing more than compensating Mr. Brace for the recaptured property on the Murphy Farm, it claimed that it was not seeking to prevent him from using it. In fact, the EPA went so far as to make it clear it would work with Mr. Brace to help him return the property to the condition that existed in 1984. That has not happened and, instead, Mr. Brace is now, once again, threatened with civil penalties and a long court battle.

The long history of this matter leads to the unavoidable conclusion that my client he has done nothing wrong, he is in precise compliance with the law, and he should be allowed to use the entirety of the Murphy, Homestead and Marsh farms for agricultural purposes. Further, the EPA's position that remediation of the present condition is necessary, and penalties are required, is directly contrary to the EPA' s previous testimony and its earlier statements to Mr. Brace. Rather than threatening contempt against Mr. Brace, an internal investigation should be commenced to determine how it is possible that Mr. Brace could be given so many conflicting directions and promises by the EPA.

My client has concluded that he will not pay the sort of excessive penalties the EPA is demanding and will defend his property rights and his rights to hold the EPA to its sworn testimony. If the EPA is ultimately successful in forcing "remediation" on the Murphy farm, then such action will be directly contrary to its previous testimony in the takings claim, and Mr. Brace will once again seek just compensation for the property that is taken from him.

Very truly yours,

KNOX McLAUGHLIN GORNALL & SENNETT, P.C.

By: _____
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