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Laura J. Brown, Esq.
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044

RE: Brace/EPA and DOJ

Dear Attorney Brown:

I am writing in follow-up to our April 5th meeting. Since that meeting I have had a number of discussions with my client regarding the resolution concept that the DOJ and EPA raised. This letter address that concept in two parts, first is a summary of my client's adamant, and well supported belief, that the pending issue should be resolved in precise accordance with the EcoStrategies report that was previously submitted. The second portion directly address the resolution concept you raised during that meeting.

The EcoStrategies Report and its Correct Indication of the Appropriate Condition of the Property at Issue.

In essence, my client believes that the EcoStrategies report that we provided identifies the roughly thirty (30) acre parcel mentioned in the Consent Decree, and accurately identifies the proper scope of use to which my client is entitled. My client would agree that this approximately 30 acre area identified in that report would be considered the area addressed in the consent decree because the conservation district, which had the authority under the 1985 farm bill to determine what was and was not a converted wetland ("CW"), determined these acres to be a CW. The EcoStrategies report also establishes that the Murphy, Marsh & Homestead Farms are integrated in the exemption of "normal farming." Additionally, this report addresses the 2 feet of concrete and beaver dams that have backed water up on this property for well over 20 years. As identified in that report, my client has been unable to maintain these ditches and land due to the actions of the EPA and other government agencies. In summary, however, my client's position is that he should be entitled to use of entire Murphy farm in a manner that is consistent with the conclusions of this report.

In addition to the strength of that report, my client also notes the following as strong evidence and history supporting that fact that the EPA and DOJ's present position that he is in violation of the Consent Decree and law is incorrect:

- There has never been a dispute that the purpose of the Consent Decree was to cause the 30 acre portion of the Murphy farm to be placed in the condition it was in in 1984. At that time, it had oats, rye and hay within that site.

- Through 1984, farmers were allowed to legally drain or improve their properties without fear of clean water act violations

- 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 conervation district. This should have provided my client with the right to complete his conversion and make full farming use of this property.

- Additionally, the 2014 farm bill provided that farms that had received CW and PC determinations were entitled to upgrade their drainage system to make the most productive and durable use of their property for normal farming practices – practices which clearly encompass the actions taken by my client. The bill also released the EPA and Army Corps of Engineers from jurisdiction over such properties that had received CW and PC determinations. Standing alone, this new farm bill significantly undercuts the continuing validity of the Third Circuit's decision in this matter. In fact, we believe it provides a change in law that renders that decision void.

- In a 1992 memorandum of agreement, the EPA and Army Corps of Engineers agreed that they no longer had jurisdiction over properties that were converted prior to December 23, 1985.

- My client has been able to secure crop insurance for this property since 2012, which requires that the property have always been in compliance with the determinations of the conservation district.

- The 2006 decision from the Federal Court of Claims made it clear that the scope of the Consent Decree was limited to returning the property to its condition in 1984, and that any enforcement beyond that scope could constitute a taking.

- Further, in 2013 all agencies agreed that the EPA would take the lead in this matter. Based on Mr. Lapp's previous testimony, the EPA had indicated that the property should go back to its condition in 1984 and that the property could be used for normal farming practices so long as it met one of the exemptions for nationwide permits. As described above, this property should be entitled to such a permit.

- Additionally, after the EPA was acknowledged as the lead agency, it gave permission for my client to conduct the precise work that the EPA and DOJ are now claiming violate the consent decree. This not only runs contrary to the authorizations given by the EPA, but also its subsequent indications that it would not seek contempt sanctions for work performed based on those authorizations.

For all of these reasons, my client remains committed to and adamant in his position that he has done nothing wrong, he is in precise compliance with the law, and that he should be allowed to use the entirety of the Murphy, Homestead and Marsh farms in a manner consistent with the analysis provided in the EcoStrategies report.

The EPA and DOJ proposal

While my client is adamant in the correctness of his position, he is also well aware of the realities of fighting the EPA, DOJ and other governmental agencies. He has spent more than 3 decades, and a small fortune, doing so. Despite my client's cautious optimism to the contrary, the DOJ and EPA's position in our April 5th meeting did not give due regard to the validity of his positions. While my client regrets that, he also understands that continuing to fight this issue will put a financial and emotional burden on his family that he should not have to encounter.

To that end, my client has authorized me to respond to the general DOJ/EPA proposal as follows:

1. My client believes that the 30 acre parcel mentioned in the Consent Decree is properly identified in the EcoStrategies report. If the DOJ or EPA disagree with this identification, or believe it needs to be more precise, then he will agree to have the Army Corps of Engineers visit the property to make its own delineation. While he is not agreeing to the contents of such a future delineation, he is willing to allow it to occur with the understanding that, at the end of the day, it will be part of a remediation plan that, either as proposed or as consensually modified, will form the basis of the only path to resolution of this matter.

2. My client does not believe that he should have to engage in any tile removal, moving of the check dam, or other actions. However, the DOJ and EPA have previously made it clear that they will require such actions to resolve this matter. If the DOJ and EPA remain in this position, then my client will agree to provide access to the property to the DOJ, EPA and/or Army Corps of Engineers to allow those agencies to propose a specific remediation plan. My client considered your suggestion and offer that he take the first effort at proposing such a remediation. However, he would prefer to have DOJ and EPA inform him of the specifics they believe are necessary to resolve this issue. Again, my client is not agreeing to such a remediation without first seeing it, but he understands that, if the DOJ and EPA take this step, remediation will be necessary for a resolution to occur.

Finally, if the DOJ and EPA chose to present such a remediation plan, and my client agrees to that plan, it will be essential that the Consent Decree be modified to incorporate those portions of the plan that affect the 30 acre parcel. Additionally, and as you and I briefly discussed, such a plan will need to allow my client to maintain the main ditch that flows through the Murphy, Homestead and Marsh farms so that the ditch freely flows and is free of beaver dams and other obstructions or debris that adversely impacts the usability of the Murphy, Homestead and Marsh properties. Also, any resolution will need to include my client being able to make full use of the Marsh Property, which has always been part of the integrated farming operation. To the extent permits or other agreements are required to accomplish this, those will need to be part of such a resolution.

As I hope this letter makes clear, my client is adamant in his position. However, he recognizes that continuing this fight with the EPA and DOJ will, once again, place his family in a very difficult position. Therefore, he is willing to have the EPA and DOJ propose the remediation they deem appropriate and then attempt to reach terms based on that proposal that resolves all outstanding issues, and provides clear direction for him and his family going forward. He also would request that, if EPA and DOJ are going to conduct a site visit, they do this identification and creation of a plan within 30 days so he can plant the fields that are ready to be planted and as were previously planted.

Very truly yours,

KNOX McLAUGHLIN GORNALL & SENNETT, P.C.

By: _____
Neal R. Devlin

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cc: Robert Brace