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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).