

1 when "the site" is not clearly defined, or if you say it's
2 just the 30 acres, then the opinion is incorrect in parts.
3 And Plaintiffs aren't going to -- I mean, I don't think
4 there's any dispute on the underlying fact.

5 It's just that some of -- if you take some of the
6 statements of the Third Circuit literally, they're not
7 correct, but I don't believe Plaintiffs are going to argue
8 that they're correct either.

9 THE COURT: All right. Well, let's go to Mr.
10 Marzulla and Mrs. Marzulla. Who is going to argue this?

11 MS. MARZULLA: Mr. Marzulla is, Your Honor.

12 THE COURT: Okay. Mr. Marzulla, let's take these
13 -- let me pause for a second, one more second.

14 Is that it? Those three? Is that basically it?

15 MS. FLORENTINE: I think those would be the three
16 big examples that led to me rejecting specific offered
17 stipulations, Your Honor.

18 THE COURT: All right. Now let's go back to those
19 three. Let's start with the first one.

20 What's your view, Mr. Marzulla, in terms about the
21 agency names? Is that something that --

22 MR. MARZULLA: I think Ms. Florentine -- and I'm
23 going to have some difficulty remembering to say that -- is
24 quite right, Your Honor, and that's why we had suggested
25 that you put a bracket that says SCS rather than ASCS. That

1 out of the wetland area and discharge that into
2 unnamed tributary B.

3 And so what we had was you could put in a
4 plug in it. Basically they are no longer taking the
5 surface water out of that wetland system.

6 Q Now, what was the goal of this restoration
7 plan?

8 A The goal of this restoration plan was to
9 restore the hydrologic drive back to this wetland
10 system, and we used a target date of 1984. So it was
11 to remedy those activities which had occurred from
12 1984 onward.

13 Q And why back to 1984?

14 A The information, if I recall at the time
15 that the enforcement coordinator had was that the
16 activities had occurred in 1985 forward, and also
17 usually what we do is when we look for remedies is
18 like we use a five-year limit that we go back to and
19 try to get remedy for.

20 Q And in terms of the goal of the restoration
21 plan, what area of the property was intended to be
22 impacted, or in your opinion, would be impacted by the
23 restoration?

24 A The intent and in my opinion the extent of
25 impact of this restoration was solely on the 30-acre

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1 wetland tract.

2 Q Would it be possible for Mr. Brace to
3 approach the agency concerning modifying this
4 restoration plan?

5 A Certainly.

6 Q And under what circumstances or how would
7 that be likely to occur?

8 A If maybe there was need for relief in other
9 areas of the parcel or something like that outside
10 this 30 acres, you know, that would have been
11 something that we would work with Mr. Brace, you know,
12 to try to correct.

13 Q And does that remain true to this day?

14 In other words, if Mr. Brace felt that the
15 restoration was impacting more than the 30 acres,
16 could he approach the agency about modifying the
17 restoration plan?

18 A Certainly.

19 Q Now I want to talk for a moment about some
20 of the exemptions to the Clean Water Act, and in a
21 slightly different context than we have before.

22 But looking again at the Attachment A
23 restoration plan attached to the consent decree, I
24 notice a amoebic-like blank area in the center of the
25 Murphy farm parcel that does not contain hatch marks.

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1 moving downhill. And so you may look at other ways to
2 correct the issue if there in fact is one.

3 Q Okay. But you don't see any of those
4 involving alternation of the work that was done under
5 the restoration plan?

6 A No, because I don't see how the work that
7 was done in the restoration plan would have had
8 significant upstream effects.

9 Q Okay. And that modification would have to
10 be approved both by EPA and the Justice Department,
11 wouldn't it?

12 A Yes, I believe so.

13 Q It would involve a modification of the
14 consent decree?

15 A Yes, I assume it would.

16 Q And under Justice Department regulations, to
17 your knowledge, are consent decrees such as the ones
18 in your cases also put out for public notice and
19 comment?

20 A I honestly don't know the process --

21 Q You don't. Okay.

22 A -- of that.

23 Q Fine enough.

24 Would it be fair to say Mr. Brace would
25 probably need to hire a lawyer to get this done?

1 A Well, I don't know the answer to that,
2 because if let's say these -- let's say we had this
3 discussion.

4 Q Right.

5 A And we came up with a resolution. Certainly
6 that discussion could take place without lawyers. It
7 could be amongst the technical people. There could be
8 resolutions that would be done outside of the
9 restoration plan itself that would assist Mr. Brace.

10 As I believe I testified to earlier, there
11 was nothing in the consent decree that precluded
12 activity within the 30 acres; just that it had to be
13 authorized through the Clean Water Act.

14 Q Right.

15 A So if there were activities that could be
16 undertaken which would either meet one of the
17 exemptions or meet one of the nationwide permits, or
18 you know, perhaps it might be a permit application if
19 had to be significant. Those would be things that I
20 believe you could do and wouldn't undermine again the
21 consent decree or the restoration plan.

22 Q Right.

23 A So I can't answer whether you would need to
24 get a lawyer for that or not. I mean, you know, I
25 would say many or most instances we resolve both

1 permitting, regulatory issues, and enforcement issues
2 without the involvement of counsel.

3 Q Okay. But that's not generally true after
4 trial and the entry of a court judgment, is it?

5 A I don't know what -- Justice would be able
6 to answer that.

7 Q But I mean, in your experience what you were
8 just talking about is not cases that have gone to
9 trial, but cases before trial. You resolve most
10 crises --

11 Q Correct.

12 Q -- before trial?

13 A That's correct.

14 Q Okay. But after trial, it's more
15 complicated, isn't it?

16 A Yes, it is.

17 Q And you talk about the technical people.
18 Mr. Brace or whoever owns this property will also have
19 to hire a wetlands consultant probably, right?

20 A Again, is that a possibility? Yes. Without
21 having the discussions, it's difficult for me to
22 answer whether that's a probability or not.

23 Q Really. You think Mr. Brace would be able
24 to design and to respond to the wetland concerns of
25 EPA himself?

1 A I think that if let's say, and again I'm
2 giving you a scenario because we're talking about
3 hypotheticals at this point, but if there was an issue
4 with facilitative drainage off of one of his upland
5 agricultural crops, that would be something that we
6 could sit down, see what the issues are. Perhaps get
7 other folks who are, you know, versed in this, you
8 know, from either the federal or state entities, and
9 possibly come up with a plan that would help him.

10 And so whether he would need a consultant
11 for that, it depends on the magnitude. Whether he
12 could perform that work himself, again it would depend
13 on the magnitude.

14 It could be a simple dip-out of an upland
15 drainage ditch. I don't know. So without really
16 knowing the context of what we are trying to do, it's
17 tough for me to say how many folks would need to be
18 there to be part of that cure.

19 Q Well, how about if what we are trying to
20 cure is water backing up across South Hill Road onto
21 the Homestead property?

22 A Okay. Then again we would have to look at
23 what the root causes for that would be. It could be
24 that perhaps the ditches that are moving water off of
25 those agricultural fields are not sufficient in size.

1 It could be that maybe the culvert underneath the
2 road is blocked.

3 Again, without having, you know, these
4 conversations in a real world context, and being able
5 to look at what the root causes were, it's very
6 difficult for me to give you a real answer.

7 Q Okay. EPA is not in the business of helping
8 Mr. Brace unblock or design ditches for the Homestead
9 property, is it? I thought we were talking about
10 modification of restoration plan.

11 A I think that EPA is in a position to assist
12 an help citizens who have issues. And although we may
13 not be the answer if there was an issue, we would
14 certainly try to find someone who could answer that
15 issue.

16 Q Okay, who at EPA would Mr. Brace go to to
17 talk about the failure to operate his drainage system
18 on the Homestead property?

19 A That would be myself.

20 Q That would be you? And that's part of your
21 job description, to help with drainage that's not on
22 wetlands, that doesn't effect wetlands?

23 A It would be because of the past history that
24 we have had that that would be something that he could
25 talk to me, and then I would try to figure out who the

1 best folks were, whether they were internally,
2 probably one of my staff would assist in the day-to-
3 day things.

4 But certainly to start that conversation, it
5 would be -- you know, I would -- it would probably be
6 referred to me even if it wasn't because of the past
7 history.

8 Q So he would be dealing with the enforcement
9 arm of EPA in trying to get help in solving his
10 drainage problem?

11 A No, he would be dealing with the wetlands
12 program and ocean manager. I do both regulatory,
13 permit side and enforcement side, and ocean program
14 side.

15 Q Okay. Is it fair to say that as you sit
16 here today you don't see EPA agreeing to any
17 modification of the restoration plan work that was
18 done on the 30 acres?

19 A I would think that's fair to say, yes.

20 Q Now, Ms. Cook asked you about a
21 hypothetical, and I want to make sure that you
22 understood at least the hypothetical that I would wish
23 to ask you about, and that is, suppose that Mr. Brace
24 were to plow furrows on the 28 acres of upland; that a
25 major rainstorm were to come, and to wash soils,

1 fertilizer, pesticides down those furrows into the
2 wetland.

3 A Okay.

4 Q Would that be the discharge of a pollutant
5 from point source in the navigable waters?

6 A In my opinion, no.

7 Q Furrows are not point sources in your
8 opinion?

9 A They can be, yes.

10 Q Yes, they can be, can't they?

11 A Right. But if I could qualify the answer
12 yes. What you are describing is a situation under
13 Section 402, not under 404, where furrows or rivulets,
14 those types of things can be discrete conveyances or a
15 point source.

16 And agricultural activities are one of those
17 activities that is exempt from the storm water
18 control, you know, those types of things.

19 So from the -- as you described it, from
20 plowing things, that would not be something that would
21 be a violation in my opinion.

22 Q Are you sure, though, a rivulet or a furrow
23 is not a point source, is that your testimony, under
24 301?

25 A That's not what I said.

1 Q Okay, I'm sorry.

2 A I said that you have to go back to the
3 activity which caused it, okay. I mean, it's a dual
4 test. Just as in wetlands there is a discharge of a
5 pollutant, but it has to be from a point source.

6 Q Right.

7 A And that test has been interpreted being,
8 you know, shovels, backhoes, those types of things,
9 the blade of a plow.

10 Q Right.

11 A The other programs have done the same thing,
12 and there are exemptions as well as activities that
13 are not -- that come under that. And it is my
14 understanding that farming, agricultural practices do
15 not come under the sedimentation and erosion control.
16 That may be something that's handled by other folks.
17 It may be something that's handled locally, but that
18 is my understanding.

19 Q So just to make sure I understand what you
20 are saying as the man who has charge, among other
21 things, that the enforcement program for Region III of
22 EPA --

23 A For Section 404.

24 Q For Section 404.

25 If a farmer let's say dumps pesticide into a

1 furrow, and that pesticide is conducted by the furrow
2 into the wetland, that is not a violation of the Clean
3 Water Act, is that your testimony?

4 A I do not feel that I have the expertise to
5 answer that question.

6 Q Okay, good. So your testimony is you don't
7 know if that would be.

8 If he --

9 A I mean, there is FIFRA, there is -- again,
10 you know.

11 Q My question was as to the Clean Water Act.

12 MS. FLORENTINE: Objection, Your Honor.

13 Could the witness please complete his answer before
14 counsel interrupts?

15 THE COURT: I think that -- I don't think
16 that was too serious here, so let's just go back and
17 make sure we got your answer, although I'm not sure
18 that you necessarily were cut off, but go ahead.

19 THE WITNESS: Okay. I was just going to add
20 that, you know, it would be dependent on application
21 rights, things like that; that, you know, that would
22 be my understanding that -- you know, if it was in the
23 normal course of farming, that may or may not fall
24 under a Clean Water Act discharge.

25 So as I stated before, I'm not an expert in