

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	Civil Action No. 1:90-cv-00229
)	Civil Action No. 1:17-17-cv-0006-BR
Plaintiff)	
)	
v.)	
)	
ROBERT BRACE, and ROBERT BRACE)	
FARMS, INC.,)	
)	
Defendants)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ADDITIONAL TIME FOR
SCIENTIFIC DISCOVERY TO ALLOW DEFENDANTS AN ADEQUATE, FAIR AND
JUST DEFENSE**

Defendants, Robert Brace and Robert Brace Farms, Inc., (collectively, “Defendants” or “Brace”) file this Memorandum of Law in Support of Motion for Additional Time for Scientific Discovery to Allow Defendants an Adequate, Fair and Just Defense in the related actions at bar:

1. Defendants require additional time to perform and report the results of three proposed additional scientific analyses because the United States violated the terms of the joint stipulation the parties executed and filed with this Court on October 3, 2017 (ECF No. 175), by improperly utilizing information and data obtained from the October 16-17, 2017 on-site inspections of Defendants’ Waterford Township, PA properties in two of its scientific expert reports.

2. Defendants entered into this joint stipulation in good faith after Defendants’ counsels had filed a Motion to Quash Plaintiff’s Request for Entry onto Land (ECF No. 164) and an accompanying Protective Order Regarding Use of Information Obtained from United States’ Entry on Defendants’ Lands (ECF No. 164-1). Defendants’ pre-stipulation filings had been intended to prevent “the *United States*, through its In-House Counsel, Outside Counsel, or any Federal

Employee or non-Party Contractor or Expert” from using any “information derived from any of the activities identified above [including, but “not limited to, the monitoring, measuring, sampling, examining, surveying, inspecting, testing, collecting, photographing, and analyzing of all the physical characteristics of two of Defendants’ integrated farm tracts known as the ‘Murphy’ and ‘Marsh’ Sites currently identified as the subject of these litigations, as well as, of all the physical characteristics of those portions of Defendants’ third integrated farm tract known as the ‘Homestead Site,’ [...] “for purposes of reaffirming or reestablishing a jurisdictional determination (“JD”) *and/or wetlands delineation* (“WD”) of Defendants’ three Sites, as those terms are defined by applicable Corps and EPA regulations, guidance, practices, standards, processes and/or procedures implementing Clean Water Act Section 404 (33 U.S.C. § 1344(a))” (emphasis added).

3. Defendants had filed the Motion to Quash and Protective Order because “The United States allegedly last performed a [jurisdictional determination] JD and [wetland delineation] WD of Defendants’ Marsh and Murphy Sites on or about July 24, 2012, more than five years from the date of this filing. Corps guidance has long recognized JDs and WDs as legally valid for a period not exceeding five years, and the prior alleged July 24, 2012 JD and WD covering these Sites has since expired. Consequently, the United States would find it necessary to secure an updated or an entirely new JD and WD to ensure that the EPA and Corps reaffirm or reestablish their shared legal jurisdiction over such lands on the grounds they putatively contain “Waters of the United States,” within the meaning of CWA Section 404.” (ECF No. 164, para. 4). “The evidence indicates that the DOJ has endeavored to mislead Defendants and this Court, by intentionally disguising the United States’ effort to reaffirm or reestablish EPA/Corps federal jurisdiction over Defendants’ Marsh and Murphy Sites by securing an updated or an entirely new JD/WD of them

as a run-of-the mill Rule 34(a)(2) discovery-related inspection, monitoring and measurement request.” (*Id.*, at para. 5).

The material terms of the October 3, 2017 joint stipulation (ECF No. 175) conditioned the United States’ entry onto Defendants’ lands upon Plaintiff’s abidance by the following proviso: “Plaintiff agree[d] that it w[ould] not, absent a request by Defendants, use any information or data gathered or obtained during the Inspections for purposes of an “Approved Jurisdictional Determination” or a “Jurisdictional Determination” by the U.S. Army Corps of Engineers.” Plaintiff, however, added to this joint stipulation the following language: “provided, however, that nothing in this Stipulation shall in any way affect the United States’ ability to use information or data gathered or obtained during the Inspections to support the United States’ claims or defenses in the two above-cited cases.” This added language was not intended to eliminate the previous restriction and in no way permitted the United States and/or its scientific experts to directly or indirectly use information or data gained during the October 16-17, 2017 inspection(s) for purposes of establishing, confirming or reaffirming United States regulatory jurisdiction over Defendants’ properties.

4. Two of Plaintiff’s scientific expert reports (the “Brooks Report” prepared by Dr. Robert Brooks (Ex. 1) and the “Stokely Report” prepared by Mr. Peter Stokely (Ex. 2)) directly and indirectly collectively set forth what is effectively a *wetlands delineation* developed in the Brooks Report that serves as a ground-truthing mechanism/tool to verify the existence and scope of wetlands, the wetlands boundaries, and the wetlands location (relative to) and connectivity with “Elk Creek, a tributary to Lake Erie,” for United States Clean Water Act Section 404 (“CWA 404”) *jurisdictional* purposes, as identified through the aerial photographic interpretation discussed in

the Stokely Report, in clear contravention of both the letter and spirit of the October 3, 2017 stipulation of the parties.

5. The Brooks report is entitled “Ecological Functions and Connections of Wetlands and Waters at the Marsh Site, Waterford, Erie County, Pennsylvania”; however, it is much broader and more ambitious than a mere assessment of the functions and values of wetlands. According to the 1995 National Academy of Sciences report entitled, “Wetlands: Characteristics and Boundaries” (“NAS Report”),¹ an assessment of wetlands functions “has been used to rank or categorize wetlands, which might ensure that wetlands with highly valued functions receive greater protection than wetlands in general. [...] Wetland functions are the physical, chemical, and biological processes that characterize wetland ecosystems, such as flooding, denitrification, provision of habitat for organisms, and support of aquatic life.” (Ex. 3 at 215). The NAS Report states, furthermore, that

“Assessment of wetland functions is required for a CWA Section 404 permit application,² but not as part of the identification and delineation of a wetland. The first decision in the review of a permit application is whether a site that would be affected by the applicant contains wetlands or other waters of the United States subject to regulatory jurisdiction. If jurisdictional wetlands will be affected, the next step is to determine the location of the wetland boundary. Assessing wetland function is not necessary for either of these steps. [...] Assessments of functions also are used in determining mitigation requirements.” (*Id.*, at 223).

Clearly, the Brooks Report’s assessment of wetlands functions was not intended to be used “in conjunction with a Clean Water Act (CWA) Section 404 permit [which] requires quick, simple,

¹ “The committee was asked to review and evaluate the consequences of alternative methods for wetland delineation and to summarize the scientific understanding of wetland functions. [...] The committee’s task has been to analyze present regulatory practice in relation to wetland delineation and to recommend changes that might bolster the objectivity and scientific validity of wetland delineation and identification.” *Id.*, at xiii-xiv.

² “Wetland evaluation is relevant to the issuance of a permit, however, because review of a permit application involves evaluation of probable effects and of reasonable (‘practicable’) alternatives for the proposed project.” *Id.*

repeatable, and objective methods that are applicable or adaptable to a wide range of wetlands. *Regulatory functional assessment should particularly facilitate analysis of wetland functions directly relevant to CWA's objectives*" (emphasis added) (*Id.*, at 217), because no CWA 404 permit was herein involved. The United States, nevertheless, also did not intend for the Brooks Report to be used in clinical isolation from its previously performed wetland delineations and jurisdictional determinations as the United States had led Defendants' to believe in order to secure the October 3, 2017 joint stipulation granting the United States entry onto Defendants' lands. The United States' and/or its scientific experts' improper use of this information and data violates that joint stipulation, validates Defendants' prior concerns, and now requires Defendants to more vigorously rebut those expert opinions with additional scientific studies at substantial cost.

6. If the Brooks Report were simply limited to an evaluation of the functions and values of alleged wetlands on the Marsh Site, it would not discuss and refer, as it expressly does, to the United States' prior and recent wetland delineation(s) of the Marsh Site which clearly relate to Plaintiff's assertion of regulatory jurisdiction over the alleged Marsh site wetlands adjacent to and directly abutting Elk Creek. For example, the Brooks Report states that, "Based on the *wetland delineation data sheets* from three samples points [taken during the 27 June 2013 onsite visit], all located on the Marsh Site, there was clear evidence of hydrophytic plants, soils with hydric characteristics, and surface hydrology" (emphasis added) (Brooks Report at 11). The Brooks Report also states in Section 3.0 "Methods Used for Review of the Marsh Site" that,

"Technical guidance, provided originally by the 1987 Corps of Engineers Wetlands *Delineation* Manual (Corps & USEPA 198[9], and modified by subsequent Regulatory Guidance Letters (RGLs), and the Regional Supplement to the Corps of Engineers Wetland *Delineation* Manual: Northcentral and Northeast Region (U.S. Army Corps 2012), and other relevant information, was used to identify the presence of wetlands, *and to delineate the boundaries of wetlands*" (emphasis added). (*Id.*, at 15).

In addition, the Brooks Report states that, “During the June 2013 inspection, new growth of hydrophytic vegetation was observed in portions of the site previously disturbed [...] Based on *the wetland delineation data sheets* from three sample points all located on the Marsh Site, hydrophytic plants were dominant, and soils showed hydric characteristics...” (emphasis added) (*Id.*, at 21). The Brooks Report, furthermore, states that, “At each sample point for my 2017 inspection, I used routine methods, and followed guidance regarding atypical circumstances [...] from the Corps of Engineers’ 1987 Wetlands *Delineation* Manual and the Regional Supplement to the Corps of Engineers Wetland *Delineation* Manual: Northcentral and Northeast Region (2012)” (emphasis added). (*Id.*) Moreover, the Brooks Report states with respect to the six sample points taken in October 2017, that “Based [on] my observations of soils *in standard wetland delineation soil pits* (18-20 inches deep, 8 inches diameter), soils at all of the six sample points examined in 2017 at the Marsh Site showed characteristics of hydric soils” (emphasis added). (*Id.*, at 26.)

7. Contrary to the parties’ October 3, 2017 stipulation and what the United States would have this Court believe, the Brooks Report was actually intended to directly and indirectly confirm the United States’ wetland delineation(s) of the Marsh site, and consequently, the United States’ determination of CWA 404 regulatory jurisdiction over the Marsh site wetlands and Elk Creek, consistent with the standards set forth in the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006), as subsequently and more liberally interpreted by the Third Circuit Court of Appeals in *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011). In *Donovan*, the Third Circuit embraced the Stevens dissenting opinion’s “broader view of the CWA’s scope” in *Rapanos*, with the Court holding that the United States need merely satisfy *either* the plurality/Scalia direct “continuous surface connection” test *or* the concurring/Kennedy

“significant nexus” regional ecosystem test to establish federal jurisdiction over wetlands. *Id.*, at 180.³

8. The Brooks Report expressly addresses, if not, alludes to, the direct “continuous surface connection” test of the *Rapanos* plurality opinion in its “Introduction” section. It states that, “DOJ also requested that I assess and provide my expert opinion on the *connectivity of the Marsh Site wetlands and tributaries* in the vicinity of the Marsh Site *to Traditional Navigable Waters (TNWs)*... In formulating my opinion and preparing this report, I also have evaluated the *hydrological and ecological connections* between wetlands on the Marsh Site with Elk Creek and Lake Erie, *the TNW into which Elk Creek directly flows* about 30 miles downstream of the Marsh Site” (emphasis added). (*Id.*, at 9). It also states that, “Finally, I have suggested a strategy and approach for restoring the *wetlands* and their associated functions and services *on the Marsh Site that abut Elk Creek*” (emphasis added). (*Id.*, at 9). The “Summary of Findings and Opinions” section of the Brooks Report states that, “[2016...] Elk Creek continues to display a well-defined, channelized course through the [Marsh] site *with limited to no substantial connectivity with the adjacent floodplain and wetlands*” (emphasis added). (*Id.*, at 10). The Brooks Report refers to the “continuous surface connections” test, thereafter, as follows: “Based on my desktop review of aerial photographs, NWI mapping, and reports about previous site visits, *it is evident that wetlands*

³ For example, the determination of whether “wetlands are adjacent to and abut” a water body is important for purposes of satisfying the “continuous surface connection” test, which indisputably can validate the United States’ assertion of regulatory jurisdiction over Defendants’ Marsh Site. See U.S. Army Corps of Engineer’ *Jurisdictional Determination Form Instructional Guidebook* (May 12, 2007), at p. 6, available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf (“The [*Rapanos*] decision provides two new analytical standards for determining whether water bodies that are not traditional navigable waters (TNWs), including wetlands adjacent to those non-TNWs, *are subject to CWA jurisdiction*: (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, a dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs”) (emphasis added). See also *Id.*, at 52 (“*The agencies will assert jurisdiction* over any non-navigable tributary of TNWs where the tributary is a “relatively permanent water” (RPW). *A wetland that directly abuts an RPW is also jurisdictional*”) (emphasis added).

with continuous surface connections existed on the Marsh Site prior the disturbance in 2012” (emphasis added). (*Id.*, at 13). In addition, the Brooks Report states that, “The Marsh Site has *surface and likely subsurface hydrologic connections* to Elk Creek, a perennial stream *with direct connections to Lake Erie, a TNW*, as it flows through a series of stream channels, road culverts, wetlands, and other waterbodies” (emphasis added). (*Id.*, at p. 14). The Brooks Report, furthermore, states that, “For the purpose of preparing this report, I examined the landscape setting and hydrological and ecological conditions at the Marsh Site, *and connectivity with Elk Creek*” (emphasis added). (*Id.*, at 15). Moreover, the Brooks Report states that “On 16 October 2017, I chose and sampled the ecological characteristics of six points on the Marsh Site [...] The objective was to collect sufficient data to reach an independent opinion about the occurrence of wetlands on the Marsh Site *and their connectivity to Elk Creek* at the current time (October 2017)...” (emphasis added) (*Id.*, at 16). Section 5.0 of the Brooks Report which is entitled, “Hydrologic *Connectivity* of Marsh Site Wetlands and Elk Creek to Lake Erie,” states that “The wetlands occurring and previously occurring on the Marsh Site *are connected to* Elk Creek in several ways” (emphasis added). (*Id.*, at 32). “My conclusion is that Elk Creek flows continuously beginning in a headwater system upstream of the culvert at Lane Road all the way to Lake Erie, *a Traditional Navigable Water (TNW)*” (emphasis added). (*Id.*, at 34).

9. The Brooks Report also expressly addresses, if not, alludes to, the “significant nexus” regional ecosystem test⁴ of the *Rapanos* concurring opinion within its “Introduction:”

“I also evaluated whether wetlands on the Marsh site, either alone or in combination with similar wetlands in the region, *significantly affect the chemical, physical and biological integrity* of Elk Creek and Lake Erie. I

⁴ See *Rapanos v. United States*, 547 U.S. 715 (2006), at Kennedy concurring opinion, slip op at 23 (“Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters’ if the wetlands, either alone or in combination with *similarly situated* lands in the region, *significantly affect the chemical, physical, and biological integrity* of other covered waters more readily understood as ‘navigable’”) (emphasis added).

concluded that the headwater wetlands of the Marsh Site *and similarly situated wetlands* within the watershed make important contributions to the ecological health, condition, and integrity of Elk Creek and Lake Erie” (emphasis added) (*Id.*, at 9).

Section 2.3 of the Brooks Report entitled, in part, “Assessment of [...] *Similarly Situated Wetlands* in the Watershed,” furthermore, states that “The Marsh Site wetlands and *other similarly situated wetlands* in Elk Creek watershed, perform important ecological functions and ecosystem services for adjacent and downstream habitats and structures” (emphasis added). (*Id.*, at 11). In addition, the Brooks Report states that, “The trapping and transformation of sediments, pollutants, and excess nutrients in wetlands on the Marsh Site *and similarly situated wetlands* near the Marsh Site [...] improve water quality for the receiving downstream waters, including Elk Creek and Lake Erie” (emphasis added) (*Id.*, at 11-12). Moreover, the Brooks Report states that,

“Because of th[e] direct hydrologic connections between the Marsh Site and Elk Creek, the wetlands at the Marsh Site, along *with the similarly situated wetlands* in the watershed, provide *significant physical, chemical, and biological benefits* to the water that flows from the Marsh Site downslope and downstream of Elk Creek and Lake Erie [...] The wetlands at the Marsh Site, *and other similarly situated wetlands* in the cluster of wetlands around the Marsh Site [...] had, and still have, *hydrologic and biologic connectivity to the floodplain and channel of Elk Creek* where it forms the eastern boundary of the Marsh Site” (emphasis added). (*Id.*, at 14).

Section 6.0 of the Brooks Report is entitled, “Assessment of Physical, Chemical and Biological Functions that the Marsh Site Wetlands, and *Similarly Situated Wetlands* Provide to Elk Creek and Lake Erie” (emphasis added). (*Id.*, at 34). It states that, “The trapping and transformation of sediments, pollutants, and excess nutrients (material transport and transformation) in wetlands on

the Marsh Site *and similarly situated wetlands* in the vicinity, improve water quality for the receiving downstream waters, including Elk Creek and Lake Erie” (emphasis added). (*Id.*, at 37).⁵

10. The Stokely Report is entitled, “Aerial Photography Interpretation and Geographic Information System Analysis of the Marsh Site Erie County, PA;” however, it, like the Brooks Report, is much broader and more ambitious than its title indicates. The Stokely Report expressly addresses, if not, alludes to, the United States’ prior and recent wetland delineation(s) of the Marsh Site and to the wetland boundaries of the Marsh Site which clearly relate to Plaintiff’s assertion of regulatory jurisdiction over the alleged Marsh site wetlands adjacent to and directly abutting Elk Creek. For example, the Stokely Report, in its section entitled, “Digitizing and map production,” states that “Features of interest such as *wetland boundaries*, stream courses, and areas of disturbance were identified and digitized using the tools found in the GIS software [...] Thematic maps were created [...] These maps show *wetland boundaries*, drainage patterns, sample locations...” (emphasis added). (*Id.*, at 3). In addition, the Stokely Report, in its section entitled, “Wetlands Extent,” states that, “I reviewed the historical and recent aerial photography for signature of wetlands and *wetland boundaries*” (emphasis added). (*Id.*, at 4).

11. The Stokely Report also expressly addresses, if not, alludes to, the direct “continuous surface connection” test of the *Rapanos* plurality opinion in its “Background” section. It states that, “I was asked to analyze and interpret aerial photographs of the Marsh Site taken over time to

⁵ See U.S. Army Corps of Engineers, *Jurisdictional Determination Form Instructional Guidebook* (May 12, 2007), *supra* at p. 54 (“A significant nexus analysis will assess the flow characteristics and functions of the relevant reach of the tributary, *in combination with functions collectively performed by all wetlands adjacent to the tributary*, to determine if they have more than an *insubstantial or speculative effect on the chemical, physical, or biological integrity* of TNWs”). (emphasis added). See also U.S. Army Corps of Engineers, *Appendix B – Approved Jurisdictional Determination Form*, to *Jurisdictional Determination Form Instructional Guidebook* (2007), at p. 1, available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_b_approved_jd_form.pdf (“This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.”) See also *Id.*, at p. 6 (“Significant Nexus Test Determination”).

determine the existence and locations of *wetlands*, tributaries, and *connections to downstream waters*, and to describe any impacts or disturbances to the wetlands” (emphasis added). (*Id.*, at 1). In its section entitled “Wetlands Extent,” the Stokely Report states that, “I confirmed that the Marsh Site *wetlands continue to abut Elk Creek [...which] flows approximately 27 meandering miles to Lake Erie* (17 miles in a straight line from the Marsh Site to the confluence of Elk Creek and Lake Erie” (emphasis added). *Id.*, at 6). The Stokely Report, furthermore, states in such section that “The Marsh Site *wetlands are adjacent to, and directly abut, Elk Creek, a tributary to Lake Erie,*” and that “I confirmed that the Marsh Site *wetlands continue to abut Elk Creek* when I visited the site on October 16 and 17, 2017” (emphasis added). (*Id.*, at 6). The Stokely Report, once again, states in its “Conclusions” section, that “These *wetlands are adjacent, and directly about Elk Creek, a direct tributary to Lake Erie*” (emphasis added). (*Id.*, at 7).

12. The Stokely Report, moreover, expressly addresses, if not, alludes to, the “significant nexus” regional ecosystem test of the *Rapanos* concurring opinion in its “Conclusions” section. It refers to the Marsh Site wetlands as directly abutting Elk Creek, “a direct tributary to Lake Erie,” and as comprising “*part of the system of wetlands in the Elk Creek valley*” (emphasis added). (*Id.*, at 7).

13. The Stokely Report sets forth critically important information of which this Court should take judicial notice, namely, that the United States has utilized Dr. Peter Stokely’s aerial photographic interpretation services repeatedly for the specific purpose of identifying and delineating wetlands over which the United States can establish regulatory jurisdiction.⁶

⁶ See Stokely Report at 42, “Awards/Recognition Medals” (Awarded EPA Region 3 Bronze Metal for efforts associated with the testing of the proposed 1991 revisions to the Federal Manual for Identifying and *Delineating Jurisdictional Wetlands* (April 1992)”) (emphasis added). See also *Id.*, at 47 “Expert Witness Testimony Provided” (17) Smith Farms Hearing, Post Rapanos Remand Administrative Proceeding, Norfolk, VA, May 14, 2007. Issue: CWA Jurisdiction after Supreme Court ruling in *Rapanos*. Subject of Testimony: the results of the analysis of historical aerial photography and maps showing relatively permanent hydrologic connections. Analysis and discussion of comparable wetlands in the area, as well as testimony regarding the presence of wetlands on site and the hydrological

14. Defendants' designated experts on wetlands delineations, jurisdictional determinations and aerial photographic interpretation, Mr. Ray Kagel, Jr. and Dr. Susan Kagel, each of whom has prepared an expert report on Defendants' behalf to rebut the Brooks and Stokely reports, respectively (Ex. 4) (Ex. 5, 5A), agree with the above assessment and have set forth their reasoning in separate signed and notarized affidavits accompanying this memorandum. (Ex. 6), (Ex. 7).

15. The Third Circuit Court of Appeals has held that a fraudulent or false representation "may be effected by deceitful statements of half-truths or the concealment of material facts." *United States v. Ferriero*, No. 15-4064 (3d Cir. 2017), slip op. at 25-26, quoting *United States v. Bryant*, 655 F.3d 232, 249 (3d Cir. 2011) (quoting *United States v. Olatunji*, 872 F.2d 1161, 1167 (3d Cir. 1989)). The Third Circuit Court of Appeals also has held that a claim of misrepresentation or fraud in the inducement of a contractual clause covering an issue which goes to the 'making' of the agreement is a matter susceptible to adjudication by this Court which, if proven, would be

connection of the site to other waters and tidal waters" (emphasis added); 18) Lewis Farms Hearing, Post Rapanos Remand Administrative Proceeding, Norfolk, VA, May 25, 2007. Issue: *CWA Jurisdiction* after Supreme Court ruling in Rapanos. Subject of Testimony: the results of the analysis of historical aerial photography and maps showing relatively permanent hydrologic connections. Analysis and discussion of comparable wetlands in the area, as well as testimony regarding the presence of wetlands on site and the hydrological connection of the site to other waters and tidal waters" (emphasis added); "19) Cody Bedford Evidentiary Hearing, Federal District Court, Norfolk, VA, October 22, 2008. Issue: *CWA Jurisdiction* after Supreme Court ruling in Rapanos. Subject of Testimony: testimony regarding the presence of wetlands on site and the hydrological connection of the site to other waters and tidal waters, and the chronology of filling in the wetlands" (emphasis added); "20) U.S.A. v Johnson, Civil Action No. 99-12465-EFH, Federal District Court, Boston, MA, April 11-12, 2011. Issue: *CWA Jurisdiction* after Supreme Court ruling in Rapanos. Subject of Testimony: the results of the analysis of historical aerial photography and maps showing tributary connections, adjacent and abutting wetlands and flow paths to traditional navigable waters" (emphasis added); "21) U.S.A. v Nicastro, June 2, 2011, Syracuse, NY-Grand Jury. Issue: *CWA Jurisdiction* after Supreme Court ruling in Rapanos. Subject of Testimony: the results of the analysis of historical aerial photography and maps showing wetlands and tributary connections and flow paths to traditional navigable waters" (emphasis added). *See also Id.*, at 48 "Expert Witness Testimony Provided" "22) U.S.A. v Richard Roberts, November 8, 2013, Federal District Court, Nashville, TN. Issue: *Establishing CWA Jurisdiction* over a tributary to the Duck River in west-central Tennessee. Subject of Testimony: the methods and results of historical aerial photography interpretation of the tributary of the Duck River known as Snake Creek" (emphasis added); "24) Ron Foster, et al. v United States Environmental Protection Agency, Trial testimony, August 16, 2017. Southern District of West Virginia. Issue: *Factors related to CWA Jurisdiction* over a tributary to Neil Run and the Little Kanawha River in west central West Virginia. Subject of Testimony: the methods and results of aerial photography interpretation of the tributary (known as RR4) to Neil Run. The historical presence of a channel and bed and bank features across "the hayfield") (emphasis added).

grounds to invalidate the agreement. *See Corchado v. Foulke Management Corp.*, No. 17-1433 (3d Cir. 2017), slip op. at 3.

16. “Litigation stipulations can be understood as the analogue of terms binding parties to a contract,” except “where it becomes evident that the agreement was made under a clear mistake.” *See TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir. 1995). “[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court. Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well.” *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988), (quoting *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 551 (6th Cir. 1986). “Unlike stipulations on matters of law, “stipulations by the parties regarding questions of fact are conclusive. Trial courts are bound by the facts established by the stipulation. Valid stipulations are controlling and conclusive, and courts must enforce them.” *Gander v. Livoti*, 250 F.3d 606, 609 (8th Cir. 2001). *See also United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 889 (D.C. Cir. 2010) (“Stipulations of fact bind the court and parties.”; ‘one party’ to a stipulation “need offer no evidence to prove it and the other is not allowed to disprove it”).

Respectfully submitted,

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