



**Knox McLaughlin Gornall & Sennett, P.C.**  
120 West Tenth Street | Erie, Pennsylvania 16501-1461  
814-459-2800 | 814-453-4530 fax | www.kmgslaw.com

**Neal R. Devlin**  
ndevlin@kmgslaw.com

July 3, 2017

U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, N.W. (2310A)  
Washington, DC 20460

RE: Robert Brace, Robert Brace Farms, Inc., and Robert Brace  
and Sons, Inc. - FTCA Claims

To Whom It May Concern:

Enclosed please find a Federal Tort Claims Act claim submitted on behalf of Robert Brace, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc. The claim consists of two subparts: (a) a real property claim, submitted by Robert Brace, and (b) personal property claims, submitted by Robert Brace Farms, Inc. and Robert Brace and Sons, Inc. These claims are being filed with the Environmental Protection Agency; the Department of Defense, Army Corps of Engineers; and the Department of Interior, Fish and Wildlife Service. Copies of the forms—along with attachments and exhibits—submitted to each agency are enclosed.

Please contact me if you have any questions. We look forward to hearing from you.

Very truly yours,

KNOX McLAUGHLIN GORNALL &  
SENNETT, P.C.

By: 

Neal R. Devlin

Enclosures  
# 1819872.v1

NRD/cl

**CLAIM FOR DAMAGE,  
INJURY, OR DEATH**

**INSTRUCTIONS:** Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED  
OMB NO. 1105-0008

1. Submit to Appropriate Federal Agency:

U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, N.W. (2310A)  
Washington, DC 20460

2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.

Robert Brace (owner of three properties at issue)  
10632 Greenlee Road, Waterford, PA 16441  
Represented by Lawrence Kogan, Esq., and Neal Devlin, Esq.

3. TYPE OF EMPLOYMENT

MILITARY  CIVILIAN

4. DATE OF BIRTH

05/03/1939

5. MARITAL STATUS

Married

6. DATE AND DAY OF ACCIDENT

Peridic ongoing

7. TIME (A.M. OR P.M.)

8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).

See attachment.

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

See attachment.

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).

See attachment.

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.

N/A

11. **WITNESSES**

NAME

ADDRESS (Number, Street, City, State, and Zip Code)

See attachment.

12. (See instructions on reverse).

**AMOUNT OF CLAIM** (in dollars)

12a. PROPERTY DAMAGE

12b. PERSONAL INJURY

12c. WRONGFUL DEATH

12d. TOTAL (Failure to specify may cause forfeiture of your rights).

8,071,232.75

8,071,232.75

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side).

*Robert Brace*

13b. PHONE NUMBER OF PERSON SIGNING FORM

(814) 459-2800

14. DATE OF SIGNATURE

07/03/2017

**CIVIL PENALTY FOR PRESENTING  
FRAUDULENT CLAIM**

The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).

**CRIMINAL PENALTY FOR PRESENTING FRAUDULENT  
CLAIM OR MAKING FALSE STATEMENTS**

Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

**INSURANCE COVERAGE**

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

15. Do you carry accident Insurance?  Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number.  No

16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible?  Yes  No 17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).

19. Do you carry public liability and property damage insurance?  Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code).  No

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**Complete all items - Insert the word NONE where applicable.**

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY

**Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.**

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The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

The amount claimed should be substantiated by competent evidence as follows:

- (a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.
- (b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.
- (c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.
- (d) **Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

**PRIVACY ACT NOTICE**

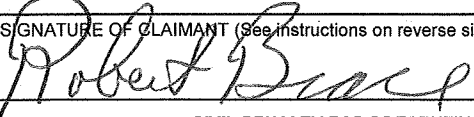
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- B. **Principal Purpose:** The information requested is to be used in evaluating claims.
- C. **Routine Use:** See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.
- D. **Effect of Failure to Respond:** Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

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<b>CLAIM FOR DAMAGE, INJURY, OR DEATH</b>		<b>INSTRUCTIONS:</b> Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.		FORM APPROVED OMB NO. 1105-0008	
1. Submit to Appropriate Federal Agency:  U.S. Environmental Protection Agency Office of General Counsel 1200 Pennsylvania Avenue, N.W. (2310A) Washington, DC 20460			2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.  Robert Brace and Sons, Inc. (owned by Robert Brace, Randall Brace, and Ronald Brace), 1131 Route 97, P.O. Box 338, Waterford, PA 16441; Represented by Lawrence Kogan, Esq., and Neal Devlin, Esq.		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN	4. DATE OF BIRTH 05/03/1939	5. MARITAL STATUS Married	6. DATE AND DAY OF ACCIDENT Peridic ongoing	7. TIME (A.M. OR P.M.)	
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<b>9. PROPERTY DAMAGE</b>					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).  See attachment.					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).  See attachment.					
<b>10. PERSONAL INJURY/WRONGFUL DEATH</b>					
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.  N/A					
<b>11. WITNESSES</b>					
NAME			ADDRESS (Number, Street, City, State, and Zip Code)		
See attachment.					
12. (See instructions on reverse). <b>AMOUNT OF CLAIM</b> (in dollars)					
12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).		
8,071,232.75			8,071,232.75		
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 			13b. PHONE NUMBER OF PERSON SIGNING FORM (814) 459-2800	14. DATE OF SIGNATURE 07/03/2017	
<b>CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM</b>  The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).			<b>CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS</b>  Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)		

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*Robert Brace*

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Neal R. Devlin  
ndeulin@kmgslaw.com

July 3, 2017

Department of Interior, Fish and Wildlife Service  
Office of the Solicitor, Division of General Law  
1849 C Street NW  
Washington, DC 20240

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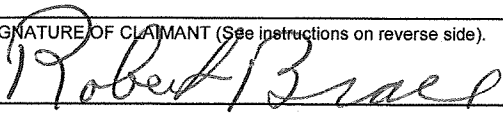
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3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN		4. DATE OF BIRTH 05/03/1939	5. MARITAL STATUS Married	6. DATE AND DAY OF ACCIDENT Peridic ongoing	
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8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).  See attachment.					
<b>9. PROPERTY DAMAGE</b>					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).  See attachment.					
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<b>10. PERSONAL INJURY/WRONGFUL DEATH</b>					
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.  N/A					
<b>11. WITNESSES</b>					
NAME			ADDRESS (Number, Street, City, State, and Zip Code)		
See attachment.					
12. (See instructions on reverse). <b>AMOUNT OF CLAIM</b> (in dollars)					
12a. PROPERTY DAMAGE  8,071,232.75		12b. PERSONAL INJURY		12c. WRONGFUL DEATH	
				12d. TOTAL (Failure to specify may cause forfeiture of your rights).  8,071,232.75	
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 			13b. PHONE NUMBER OF PERSON SIGNING FORM (814) 459-2800		14. DATE OF SIGNATURE 07/03/2017
<b>CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM</b>			<b>CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS</b>		
The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).			Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)		

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In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

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18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).

19. Do you carry public liability and property damage insurance?  Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code).  No

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If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

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The amount claimed should be substantiated by competent evidence as follows:

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- (c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.
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**CLAIM FOR DAMAGE,  
INJURY, OR DEATH**

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FORM APPROVED  
OMB NO. 1105-0008

1. Submit to Appropriate Federal Agency:

Department of Interior, Fish and Wildlife Service  
Office of the Solicitor, Division of General Law  
1849 C Street NW  
Washington, DC 20240

2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.

Robert Brace and Sons, Inc. (owned by Robert Brace, Randall Brace, and Ronald Brace), 1131 Route 97, P.O. Box 338, Waterford, PA 16441; Represented by Lawrence Kogan, Esq., and Neal Devlin, Esq.

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N/A

11. **WITNESSES**

NAME

ADDRESS (Number, Street, City, State, and Zip Code)

See attachment.

12. (See instructions on reverse).

**AMOUNT OF CLAIM** (in dollars)

12a. PROPERTY DAMAGE

12b. PERSONAL INJURY

12c. WRONGFUL DEATH

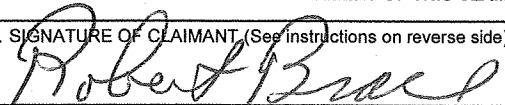
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13a. SIGNATURE OF CLAIMANT. (See instructions on reverse side).



13b. PHONE NUMBER OF PERSON SIGNING FORM

(814) 459-2800

14. DATE OF SIGNATURE

07/03/2017

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The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).

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Robert Brace Farms, Inc. (owned by Robert Brace)  
1131 Route 97, P.O. Box 338, Waterford, PA 16441  
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N/A

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NAME

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See attachment.

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**AMOUNT OF CLAIM** (in dollars)

12a. PROPERTY DAMAGE

12b. PERSONAL INJURY

12c. WRONGFUL DEATH

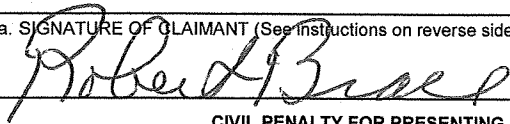
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14. DATE OF SIGNATURE

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**Knox McLaughlin Gornall & Sennett, P.C.**  
120 West Tenth Street | Erie, Pennsylvania 16501-1461  
814-459-2800 | 814-453-4530 fax | www.kmgslaw.com

**Neal R. Devlin**  
ndevlin@kmgslaw.com

July 3, 2017

U.S. Army Corps of Engineers  
Office of Chief Counsel  
441 G Street NW  
Washington, DC 20314-1000

RE: Robert Brace, Robert Brace Farms, Inc., and Robert Brace  
and Sons, Inc. - FTCA Claims

To Whom It May Concern:

Enclosed please find a Federal Tort Claims Act claim submitted on behalf of Robert Brace, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc. The claim consists of two subparts: (a) a real property claim, submitted by Robert Brace, and (b) personal property claims, submitted by Robert Brace Farms, Inc. and Robert Brace and Sons, Inc. These claims are being filed with the Environmental Protection Agency; the Department of Defense, Army Corps of Engineers; and the Department of Interior, Fish and Wildlife Service. Copies of the forms—along with attachments and exhibits—submitted to each agency are enclosed.

Please contact me if you have any questions. We look forward to hearing from you.

Very truly yours,

KNOX McLAUGHLIN GORNALL &  
SENNETT, P.C.

By: 

Neal R. Devlin

Enclosures  
# 1819871.v1

NRD/cl

**CLAIM FOR DAMAGE,  
INJURY, OR DEATH**

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15. Do you carry accident insurance?  Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number.  No

16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible?  Yes  No 17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).

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**Complete all items - Insert the word NONE where applicable.**

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- (a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.
- (b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.
- (c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.
- (d) **Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

**PRIVACY ACT NOTICE**

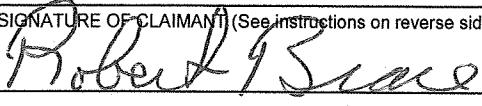
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<b>CLAIM FOR DAMAGE, INJURY, OR DEATH</b>		<b>INSTRUCTIONS:</b> Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.		FORM APPROVED OMB NO. 1105-0008	
1. Submit to Appropriate Federal Agency:  U.S. Army Corps of Engineers Office of Chief Counsel 441 G Street NW Washington, DC 20314-1000			2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.  Robert Brace (owner of three properties at issue) 10632 Greenlee Road, Waterford, PA 16441 Represented by Lawrence Kogan, Esq., and Neal Devlin, Esq.		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN		4. DATE OF BIRTH 05/03/1939	5. MARITAL STATUS Married	6. DATE AND DAY OF ACCIDENT Peridic ongoing	7. TIME (A.M. OR P.M.)
8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).  See attachment.					
<b>9. PROPERTY DAMAGE</b>					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).  See attachment.					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).  See attachment.					
<b>10. PERSONAL INJURY/WRONGFUL DEATH</b>					
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.  N/A					
<b>11. WITNESSES</b>					
NAME			ADDRESS (Number, Street, City, State, and Zip Code)		
See attachment.					
12. (See instructions on reverse). <span style="float: right;"><b>AMOUNT OF CLAIM</b> (in dollars)</span>					
12a. PROPERTY DAMAGE		12b. PERSONAL INJURY		12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).
8,071,232.75					8,071,232.75
<b>I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.</b>					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 				13b. PHONE NUMBER OF PERSON SIGNING FORM (814) 459-2800	
				14. DATE OF SIGNATURE 07/03/2017	
<b>CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM</b>				<b>CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS</b>	
The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).				Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)	

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In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

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INSTRUCTIONS

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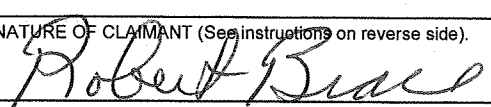
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3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN		4. DATE OF BIRTH 05/03/1939	5. MARITAL STATUS Married	6. DATE AND DAY OF ACCIDENT Peridic ongoing		7. TIME (A.M. OR P.M.)
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**UNITED STATE OF AMERICA  
ENVIRONMENTAL PROTECTION AGENCY  
DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY, CORPS OF  
ENGINEERS  
DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE**

Claimants, Robert Brace, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc., (“Claimants” or “Braces”) by and through their undersigned counsels, file this Federal Tort Claims Act (“FTCA”) administrative claim, including subparts, with a) the Environmental Protection Agency, b) the Department of Defense, Department of the Army, Army Corps of Engineers, and c) the Department of the Interior Fish and Wildlife Service, alleging as follows:

1. This is a claim commenced under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b), to obtain monetary damages for the costs incurred by Claimants for continuing and ongoing real and personal property damage caused by the flooding and/or eroding of Claimants’ three contiguous and adjacent farm tracts arising from the improper, wrongful and/or negligent acts and omissions of the United States Environmental Protection Agency (“EPA”) and its employees (collectively, “Defendants”) in connection with their enforcement of a court-approved Consent Decree covering only one of those three properties. The claim consists of the following three subparts:

- (a) A claim commenced by claimant Robert Brace under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b), to obtain monetary compensation for damages to claimant’s three contiguous and adjacent real properties owned and operated as a single integrated farm, proximately caused by the periodic ongoing surface flooding and/or subsurface eroding of those farm tracts, which has rendered claimant’s entire property(ies) or portions thereof non-farmable, which damages claimant suffered from 1996 to the present, resulting from the improper, wrongful

and/or negligent acts and omissions of the United States Environmental Protection Agency (“EPA”), the Army Corps of Engineers (“Corps”), the Fish and Wildlife Service (“FWS”) and those agencies’ employees in connection with their negligent and/or wrongful enforcement of a 1996 court-approved Consent Decree covering only a portion of one of claimant’s three contiguous and adjacent properties.

(b) A claim commenced by Claimant Robert Brace Farms, Inc. under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(B), to obtain monetary compensation for personal property damages to claimant’s farming business which has suffered substantial revenue losses and the equity holders of which have suffered a substantial loss of personal income from 1996 to the present, arising from damages to three contiguous and adjacent real property(ies) farmed exclusively and operated as a single integrated farm by claimant, proximately caused by the periodic ongoing surface flooding and/or subsurface eroding of those farm tracts, that has rendered such entire properties or portions thereof non-farmable from 1996 to the present, resulting proximately from the improper, wrongful and/or negligent acts and omissions of the United States Environmental Protection Agency (“EPA”), the Army Corps of Engineers (“Corps”), the Fish and Wildlife Service (“FWS”) and those agencies’ employees in connection with their negligent and/or wrongful enforcement of a 1996 Court-approved consent decree covering only a portion of one of claimant’s three contiguous and adjacent properties.

(c) A claim commenced by Claimant Robert Brace and Sons, Inc.. under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(B), to obtain monetary compensation for personal property damages to claimant’s farming business which has suffered substantial revenue losses and the equity holders of which have suffered a substantial loss of personal income from 1996 to the present, arising from damages to three contiguous and adjacent real property(ies) farmed exclusively and operated as a single integrated farm by claimant, proximately caused by the periodic ongoing surface flooding and/or subsurface eroding of those farm tracts, that has rendered such entire properties or portions thereof non-farmable from 1996 to the present, resulting proximately from the improper, wrongful and/or negligent acts and omissions of the United States Environmental Protection Agency (“EPA”), the Army Corps of Engineers (“Corps”), the Fish and Wildlife Service (“FWS”) and those agencies’ employees in connection with their negligent and/or wrongful enforcement of a 1996 Court-approved consent decree covering only a portion of one of claimant’s three contiguous and adjacent properties.

2. Defendants’ tortious enforcement of the 1996 court-approved Consent Decree covering only one of the three contiguous and adjacent farm tracts referred to as “the Murphy tract” has resulted in the periodic ongoing surface flooding and/or subsurface eroding of approximately 45.6 percent (%) overall of Claimant’s farm properties (66.5 acres of 146 total acres) from 1996-2016 (and of an additional 18 percent (%) of Plaintiff’s farm properties (an additional 25.5 acres of 146 total acres) from 2007-2012), which breaks down as follows: 32.5 of 58 acres (56%) of the Murphy tract (and for seven years, an additional 25.5 of 58 acres



(44%)); all 20 of 20 acres (100%) of the contiguous and adjacent “Marsh tract;” and 14 of 68 acres (21%) of the contiguous and adjacent “Homestead tract.” Such periodic ongoing surface flooding and/or subsurface erosion has occurred during prime planting season and has rendered approximately sixty-six and one-half (66.5) of one hundred forty-six (146) total acres of Claimants’ contiguous and adjacent properties no longer useable as farmlands (croplands), resulting in Claimants’ incurrence of significant damages to said real properties and to Claimants’ personal property, namely, their farming businesses from 1996 to the present.

### **THE PARTIES**

3. Claimant Robert Brace is a private individual who resides at 1131 Route 97, Waterford, Erie County, Pennsylvania. He is the principal owner of the three contiguous and adjacent farm tracts operated as a single integrated farm that are the subject of the claims filed in this matter.

4. Claimant Robert Brace Farms, Inc., is a corporation organized under the laws of the Commonwealth of Pennsylvania with a business address of 1131 Route 97, P.O. Box 338, Waterford, PA 16441.

5. Claimant Robert Brace and Sons, Inc., is a corporation organized under the laws of the Commonwealth of Pennsylvania with a business address of 1131 Route 97, P.O. Box 338, Waterford, PA 16441.

6. Undersigned counsel is authorized to act on behalf of Claimants as to this Claim. *See Exhibit 5, attached hereto.*

7. This Claim is being submitted to the Environmental Protection Agency (“EPA”), U.S. Army Corps of Engineers (“Corps”), and the U.S. Interior Department Fish and Wildlife

Service (“FWS”), based on the improper, negligent and/or wrongful actions and/or omissions of these agencies’ employees.

### **PROPERTY AT ISSUE**

8. The damaged real property at issue consists of the following: (a) the Marsh tract, Erie County tax parcel numbers 41-011-004.0-003.00 (Waterford Township) and 31-016-063.0-002.00 (McKean Township); (b) the Murphy tract, Erie County tax parcel number 47-011-004.0-002.00 (Waterford Township) and (c) the Homestead tract, Erie County tax parcel number # 47-012-028.0-001.00 (Waterford Township).

9. The real properties at issue are owned by Claimants and available to be inspected.

10. The damaged personal property at issue consists of the lost revenues denied Claimants from the harvest of profitable crops that Claimant businesses would and could have planted and harvested on the three contiguous and adjacent properties, or portions thereof, from 1996 through 2016 and the present, but for the Environmental Protection Agency’s and its employees’ improper, negligent and/or wrongful actions and/or omissions in over-enforcing the Court approved Consent Decree which proximately resulted in the periodic ongoing surface flooding and/or subsurface erosion of said real properties.

### **INSURANCE COVERAGE**

11. Claimants do not carry accident, public liability, or property damage insurance applicable to this claim.

12. Claimants have not submitted a claim for this damage to their insurance carrier for any property or business losses suffered.

## DETAILED FACTUAL BASIS OF CLAIM, AND SUPPORTING LEGAL THEORIES

### FACTUAL BASIS

13. On July 17, 1987, informed by the Pennsylvania Game and Fish Commissions about Claimants' unauthorized wetland drainage and farming activities, and following a May 5, 1987 onsite visit to Defendants' farm, the U.S. Department of Interior's Fish and Wildlife Service ("FWS") notified Claimants in writing that their ditching and filling activities in about *130 acres of wetlands* on their property on several occasions since May 1987 had allegedly violated the Clean Water Act Section 404 permitting requirements. The FWS letter's alleged purpose was to advise Claimants that the Food Security Act of 1985 ("FSA") had denied farmers federal agricultural subsidies, crop insurance and other financial assistance if their filling and draining of wetlands took place after December 23, 1985, and to advise the USDA that Claimants' draining and filling activities met the FSA definition of "converted wetlands."

14. On July 23, 1987, the U.S. Army Corps of Engineers issued a Violation Notice and Cease-and-Desist Order to Claimants citing allegedly unauthorized placement of fill material into wetlands contiguous with Elk Creek on Claimants' property without the required CWA Section 404 permit.

15. On May 3, 1988, the EPA issued a Notice of Violation and Order of Compliance to Defendants alleging violations of the CWA Section 404 permitting requirements and directing Claimants to:

"2. a) Restore, in accordance with the attached plan, all wetlands disturbed since October 5, 1984 by plugging with concrete all main drainage tiles at an excavated break in the pipe. The break shall be aluminum distance of 15 feet from Elk Creek and at a maximum distance of 50 feet from Elk Creek. [...] 3. Refrain from any further disturbance of the areas that were naturally vegetated/federally regulated wetlands on or subsequent to October 5, 1984 in

order to enable wetlands to naturally revegetate with the indigenous wetland plant species.”

That restoration plan reflected that the EPA had relied substantially upon the FWS for its details and objectives, as the FWS had previously outlined in its March 1, 1988 correspondence directed to the EPA, which contained a draft restoration plan for the Brace Farm properties, the goal of which was “to restore all wetlands disturbed since October 1984.” This plan had apparently been based upon the FWS’ May 6, 1987 delineation *by mostly aerial photography* of “over 130 acres” of wetland area on Claimants’ properties, and FWS findings which allegedly “indicate[d] that the soils of the area [were] flooded by surface or ground water for a portion of most growing seasons,” and that Claimants’ “considerable” ditching and filling activities had adversely impacted that area. Although neither the EPA nor the FWS restoration plans expressly referred to the 130 acres of wetlands mentioned in prior FWS correspondences, the EPA, FWS and Corps’ behavior toward Claimants during the past thirty (30) years strongly suggests that they continued to treat their properties as falling within said characterization.

16. The October 5, 1984 date contained in both the EPA and FWS restoration plans was apparently significant because it served as the “effective date” of then final U.S. Army Corps of Engineers (“Corps”) regulations promulgated in response to a February 10, 1984 court settlement the Corps had reached with environmental groups. The regulation *inter alia* exempted under 404(f)(1)(C) only the maintenance (but not the construction) of *drainage* ditches from CWA permitting.

17. On October 4, 1990, six (6) years from the effective date of these revised U.S. Army Corps regulations, but only eight (8) calendar days *following* U.S. Army of Engineer’s issuance of interpretative Regulatory Guidance Letter (“RGL”) 90-07, EPA Region III filed suit in the United States District Court for the Western District of Pennsylvania alleging that

Claimants' drainage and farming activities on the Murphy tract violated CWA Sections 301 and 404. The EPA action did not mention or otherwise take into account the application of RGL 90-07, which treated the "normal circumstances" of "prior converted cropland" (defined by Section 512.15 of the August 1988 National Food Security Act Manual ("NFSAM") "as wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values") as generally not supporting a 'prevalence of hydro-phytic vegetation'" and, consequently, as "not subject to regulation under [CWA] section 404."

18. On August 25, 1993, the EPA and the Corps issued a joint regulation codifying the Corps then current policy set forth in RGL 90-07, "that prior converted croplands are not "Waters of the United States" for purposes of the CWA or the FSA, and accordingly revising Corps regulation 33 C.F.R. 328.3 and EPA regulation 40 C.F.R. 230.3 to exclude prior converted cropland from CWA Section 404 regulation (provided, consistent with the NFSAM, conversion of the wetlands to croplands had "commenced" before December 23, 1985 and could continue until January 1, 1995), subject to the proviso that, "for the purposes of the [CWA], the final authority regarding [CWA] jurisdiction remains with EPA." This regulation looked back in time to U.S. Department of Agriculture ("USDA") Soil Conservation Service prior converted cropland determinations made no later than December 23, 1985, for purposes of validating those determinations based on properly certified farmlands as retroactively exempt from CWA Section 404 coverage. Although these regulatory changes remain valid today, and Claimants' past activities on the Murphy tract satisfied the conditions set forth in these retroactive regulations, EPA and the Corps have failed to recognize that Claimants' prior converted croplands were not covered by CWA Section 404 permitting requirements.

19. On December 16, 1993, this court entered judgment in favor of Claimants, finding that their activities on the Murphy tract did not require a CWA permit “because they constitute[d]: (a) normal farming activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches,” and consequently qualified for the CWA Section 404(f)(1) exemption. On June 8, 1994, the United States appealed this decision to the Third Circuit Court of Appeals.

20. On November 22, 1994, the Third Circuit reversed and remanded this court’s 1993 ruling, finding that Claimants’ activities on the Murphy tract did not qualify under the “normal farming activities” exemption under CWA Section 404(f)(1)(A) or under the “maintenance of drainage ditches” exemption under CWA Section 404(f)(1)(C). On January 9, 1995, the Third Circuit denied Claimants’ petition for rehearing, and on June 26, 1995, the U.S. Supreme Court denied Claimants’ petition for certiorari.

21. On June 25, 1996, this Court, on remand, approved an 8-page Consent Decree entered into by Claimants and Defendants, which included a Wetland Restoration Plan (Ex. 1). Paragraph 3 of the 1996 Consent decree enjoined Claimants from “discharging any pollutants (including dredged or fill material) into the approximately *30-acre wetland site*” portion of the approximately 58-acre Murphy tract. Paragraph 4 of the Consent Decree required Defendants to “perform restoration in accordance with the restoration plan” attached to the decree.

22. The “primary objective” of the Consent Decree Wetlands Restoration Plan allegedly covering only the Murphy tract was “to restore the hydrologic regime to the U-shaped, approximately *30-acre wetlands* adjacent to Elk Creek” located within the Murphy tract. It directed the Defendants to undertake three steps to achieve this result. Paragraph 1 of the Restoration Plan had required the Defendants to remove/excavate the drainage tubes referred to

as “the drainage tile system” [then] currently located in the wetlands” at three locations “marked as ‘Set 1,’” “‘Set 2,’” and “‘Set 3 on Attachment A.’” “[A] total of six trenches” were to have been “excavated at a length necessary to intercept the drainage tubes located in the wetlands,” and to be removed in twenty-five (25) foot length[s],” and then “filled in with the soil that was excavated from them.”

23. Paragraph 2 of the Consent Decree Wetlands Restoration Plan had required the Defendants to “fill in two surface ditches [...] into an unnamed tributary B.” Paragraph 3 of the Restoration Plan required the Defendants to install a “check dam [...] in [an] unnamed tributary A” that is “one and one-half (1 1/2) feet high, four (4) feet long, and as wide as the tributary bottom [...and] constructed of concrete, gabions, or compacted rock.” Paragraph 3 of the Restoration Plan also required the Defendants to complete all work to restore the Murphy tract “if feasible, within ninety (90) days after entry of this Consent Decree and, in any event, no later than one year after entry of this Consent Decree.”

24. EPA inspections and U.S. Department of Agriculture Agricultural Stabilization and Conservation Service (“ASCS”) officials subsequently confirmed that Claimants had complied with the Consent Decree and its accompanying Restoration Plan for the Murphy tract after three days’ worth of work with the assistance of several hired help at considerable expense – well, within the prescribed deadlines.

25. On November 25, 1998, Claimants filed suit in the Federal Court of Claims for the Government “taking” of his property without payment of just compensation in violation of the Fifth Amendment to the United States Constitution. Among Claimants’ claims was that the Government’s enforcement of the Consent Decree as written proximately caused the flooding of

not only the 30-acre Murphy tract, but also portions of the contiguous and adjacent 69-acre Homestead and tract and 20-acre Marsh tract.

26. On August 4, 2006, the Federal Court of Claims dismissed Claimants' suit, in part, citing insufficient evidence showing that "the flooding [was] the result *solely* of the restoration," and "that the area flooded exceed[ed] that which previously was wetlands." The Claims Court reached this conclusion even though it also had found, that by the time Claimants had completed all three drainage systems installed on the contiguous and adjacent Murphy and Homestead tracts from 1977 through 1979, the tracts had become mostly dry; i.e., "by the end of 1979, the site was dry, with the exception of times of excessive rainfall."

27. Although the Murphy, Homestead and Marsh tracts had remained dry from 1979 through, at least, 1987, when the United States ordered Claimants to cease-and-desist their activities on the Murphy tract, the Federal Claims Court found during the subsequent Takings litigation, based on the trial and appellate court record and the January 11, 2005 expert testimony of EPA employee, Jeff Lapp, that the wetlands restoration plan he had been tasked with designing was intended "to reintroduce the hydrology as it existed [in] 1984," i.e., "to restore the hydrologic drive back to this wetland system, [...] [us[ing] a target date of 1984," and that "the extent of impact of this restoration was solely on the 30-acre wetland tract." Curiously, the Court's findings did not address or otherwise raise as an issue the clear inconsistency between the stated purpose of the restoration plan and the actual physical dry condition of the site since 1979, which continued during the 1985-1987 period in question. This inconsistency has since remained a critically important genuine issue of material fact in the Government's recently filed 2017 actions, one seeking further enforcement of the 1996 Consent Decree (Case No. 90-cv-0029), and the other seeking restoration of fourteen (14) acres of the twenty (20) acres of the



Marsh tract the Corps delineated as wetlands and which the EPA deems as constituting “Waters of the United States” Case No. 1:17-cv-00006-BR).

28. Between 1998 and 2006, Claimants made periodic efforts to have the Government to confirm the precise boundaries of the 30-acre Murphy tract restoration area and to verify whether EPA authorization was required to adjust or remove the check-dam constructed on the Murphy tract at EPA’s direction per the Court Order, to clean out drainage ditches clogged with vegetation on and beyond the Murphy tract, to remove beaver dams located on the Murphy tract and the contiguous and adjoining Marsh tract, and to clear two clogged culverts – one half-filled with concrete placed by the State of Pennsylvania Department of Transportation (“Penndot”) during the 1980’s at the north end of the contiguous and adjoining Marsh tract under Sharp Road near the intersection of Sharp and Greenlee Roads, and the other located under South Hill/Lane Road on the north end of the Murphy tract. The United States had long known, or should have reasonably known, about the presence of these natural and man-made phenomena on said tracts, and had known or should have reasonably known that these phenomena had contributed significantly to the periodic ongoing surface flooding and subsurface erosion of all three tracts.

29. Claimants made numerous outreach efforts to the United States, which increased following the August 4, 2006 Federal Court of Claims’ adverse ruling in Claimants’ takings action. Nevertheless, even after eventually agreeing to undertake a site visit several years later, the EPA and the Corps procrastinated and delayed their decision regarding whether to clarify and confirm the physical boundaries of the poorly-delineated 30-acre Murphy tract wetland area, and also refused to modify or otherwise interpret the Consent Decree more reasonably to allow for removal or adjustment of the check dam, and the cleaning out of drainage ditches located on the Murphy tract, and to allow for removal of the beaver dams located on and upland from the

Murphy tract, and to allow for the cleaning and replacement of culverts, especially considering how the clogged PennDOT-placed culvert half-filled with concrete located at the north end of the contiguous and adjacent Marsh tract, together with the clogged culvert located under South Hill/Lane Road on the north end of the Murphy tract, had collectively contributed to the periodic ongoing surface flooding and subsurface erosion on all three properties. And, when these federal agency representatives endeavored to construe the Consent Decree more reasonably to allow Claimants to undertake one or more such activities without a permit, more senior Government officials subsequently retracted that interpretation and the permission that agency employees had granted to Claimants to move forward with those activities, resulting in Claimants being accused of committing further CWA Section 404 violations which are the subject of the two recently filed (2017) legal actions. As the result of the EPA's the Corps' and the FWS', and their respective employees' ongoing improper, wrongful and/or negligent (over)enforcement of the Consent Decree, portions of the Murphy tract and of the contiguous and adjacent Homestead and Marsh tracts have continued, to the present day, to experience periodic ongoing surface flooding and/or subsurface erosion beyond the roughly delineated 30-acres of wetland areas of the Murphy tract, thereby damaging these properties so as to prevent their historic and longstanding use as croplands, as well as, damaging the farming businesses dependent entirely upon them.

30. While the EPA has long contended that the purpose of the Consent Decree Wetland Restoration Plan was "to restore the wetlands portion of the Murphy Farm to its [wet] state in 1985, prior to Mr. Brace's filling activities [...which] had occurred in 1985 forward," authentic historical aerial photography and an expert analysis of the onsite hydrology and topography of then-existing drainage ditches at that time unequivocally showed, to the contrary, that the Murphy tract had already been historically drained and maintained by Claimants as "dry

land capable of supporting the ongoing farming operation.” Based on this historical evidence, the Consent Decree’s purpose of restoring the Murphy tract 30-acre wetlands area in question to its actual physical state in 1984 would have necessarily meant restoring it to its proven “dry” state at such time. The only possible way to restore the Murphy tract to its original “wet” state would have been for the Consent Decree to have ordered restoration back to its physical condition in 1977, prior to Claimants’ original clearing of brush and drainage ditch construction activities undertaken as part of an overall Conservation Plan approved by the U.S. Department of Agriculture. The United States, however, in its original filing of this lawsuit, was legally precluded from going back to that earlier period because of the application of the Clean Water Act’s 6-year statute of limitations.

#### **WITNESSES**

31. The following individuals are witnesses to the property damage:
  - (a) Robert Brace, 1131 Route 97, Waterford, PA 16441;
  - (b) Randall Brace, 1131 Route 97, Waterford, PA 16441;
  - (c) Ronald Brace, 1131 Route 97, Waterford, PA 16441;
  - (d) Beverly Brace, 1131 Route 97, Waterford, PA 16441;
  - (e) Jeffrey Lapp, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103;
  - (f) Todd Lutte, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103;
  - (g) Pamela Lazos, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103h
  - (h) Andrew Johnson, Ecostrategies Civil Engineering;
  - (i) Bruce Coffin, Former Waterford Township Supervisor;
  - (j) Gary Taylor, Former Waterford Township Employee;
  - (k) Jerry Hanas, Former Waterford Township Employee;

(l) Michael Fodse, U.S. Army Corps of Engineers, Pittsburgh District, 1000 Liberty Avenue, Pittsburgh, PA 15222; and

(m) Other unknown individuals who participated in meetings between Brace and officials from the United States government.

## **LEGAL THEORIES SUPPORTING BASIS FOR CLAIM**

### **(FEDERAL TORTS CLAIM ACT)**

32. The Federal Tort Claims Act (“FTCA”) waives the sovereign immunity of the United States to permit suits for money damages “for injury or loss of property, or personal injury or death caused by the improper, wrongful or negligent act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. Sec. 1346(b).

33. The FTCA “authorizes private tort actions against the United States ‘under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.’ 28 U.S.C. Sec. 1346(b)(1); 2674. “The government’s tort liability under the FTCA is predicated on the law of the state where the event giving rise to liability occurred,” including Pennsylvania’s tort law. A claim must be stated under Pennsylvania tort law or a state law analogue.

34. The U.S. Supreme Court has held that the 2-year statute of limitations which applies to claims filed against the United States via the presentation of an administrative claim to the appropriate federal agency under the Federal Tort Claims Act, is not jurisdictional, and is subject to a rebuttable presumption in favor of equitable tolling.

35. The Third Circuit similarly has held that, absent explicit statutory language to the contrary, namely, an explicit link between expiration of a statute of limitations and the expiration

of jurisdiction, equitable tolling will be read into a statute. Equitable tolling stops “the statute of limitations from running when the date on which the claim accrued has already passed,” and allows a court to “extend a statute of limitations on a case-by-case basis to prevent inequity.” “Equitable tolling is appropriate in three situations: (1) when the defendant has actively misled the Claimant respecting the facts which comprise the Claimants cause of action; (2) when the Claimant in some extraordinary way has been prevented from asserting his rights; and (3) when the Claimant has timely asserted his rights in the wrong forum.”

36. Fewer than two years have elapsed since Claimants first learned of the Government’s ongoing active and/or fraudulent concealment of its tortious acts and/or omissions, namely, EPA’s improper, wrongful and/or negligent enforcement of the 1996 Consent Decree through its refusal to reasonably modify or interpret the Consent Decree to allow for mitigation or prevention of the resultant periodic ongoing real property and personal property (business harvest loss) damages Claimants have suffered.

37. The Environmental Protection Agency has jurisdiction to review and respond to this administrative claim.

**FIRST THEORY OF LIABILITY**  
**(FEDERAL TORT CLAIMS ACT - NEGLIGENCE)**

38. “Under Pennsylvania law, a Claimant bringing a cause of action for negligence must allege ‘the four basic elements of duty, breach, causation, and damages.’” It must establish: ““(1) a duty recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure of the actor to conform to that standard; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage to the interests of another.”

39. Under Pennsylvania law, “a consent decree is an agreement into which parties enter rather than a judicial determination of matters in controversy, and its terms bind the parties to the decree.” “As a contract binding the parties thereto, a consent decree cannot be modified in the absence of fraud, accident, or mistake, and its terms ‘must be construed the same as any other contract.’”

40. Under Pennsylvania law, the determination of whether a duty of care exists requires consideration of the following five relevant factors. “Those factors are: 1. the relationship between the parties; 2. the social utility of the actor’s conduct; 3. the nature of the risk imposed and foreseeability of the harm incurred; 4. the consequences of imposing a duty upon the actor; and, 5. the overall public interest in the proposed solution.” “None of the five factors is dispositive.” “We will find a duty ‘where the balance of these factors weighs in favor of placing such a burden on a defendant.’”

41. Under Pennsylvania law, “[a] fiduciary duty arises from a “special relationship” between the parties involving “confidentiality, the repose of special trust, or fiduciary responsibilities,” and a breach of a fiduciary duty is grounded in tort. A special relationship will be deemed to exist where “one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.”

42. Although Claimants voluntarily agreed to execute the 1996 Consent Decree with the United States, they clearly did not do so on equal terms, and still do not have the ability to deal with the Government on equal terms because of the overmastering dominance of the U.S. Environmental Protection Agency (“EPA”), the U.S. Army Corps of Engineers (“Corps”), and

the Interior Department Fish and Wildlife Service (“FWS”) with respect to legal authority/enforcement power and access to information.

43. Claimants have long entirely relied upon and trusted, and continue to entirely rely upon and trust the CWA-related consultation, advice, instructions and directions the United States and their employees have provided to Claimants in facilitating Claimants’ initial fulfillment of the Consent Decree Wetland Restoration Plan’s three mandates and their ongoing compliance with the Consent Decree’s other provisions.

44. As the result of the Consent Decree, Claimants have long been and remain entirely dependent on the United States and its employees for securing authorization to adjust the check dam, clean the drainage ditches and remove the beaver dams located on or along the 30-acre Murphy tract wetland to reduce the likelihood of surface water flooding and subsurface erosion of the upland portion of the Murphy tract, and portions of the contiguous and adjacent Marsh and Homestead tracts. As the result of the Consent Decree, Claimants also have long been and remain entirely dependent on the United States and its employees to coordinate with Pennsylvania Commonwealth and Erie County authorities for purposes of ensuring the clearing and/or replacing of the clogged culverts at the north and southern ends of the properties to reduce the likelihood of surface water flooding and subsurface erosion of such properties or portions thereof.

45. In addition, Claimants have long been and remain entirely dependent on the United States and its employees for exercising their constitutional right to farm these same tracts to the extent they do not impact the 30-acre wetland which is the subject of the Consent Decree, and more recently, as the result of a second legal action having been filed by the United States

focused on the Marsh tract, those portions of the three contiguous tracts located beyond the 30-acre Murphy tract wetland area that lie adjacent to Elk Creek.

46. Consent Decree Section 10 states that the “Consent Decree provides all necessary federal authority to implement paragraph 4,” namely the Consent Decree’s Wetlands Restoration Plan.

47. Defendants directed Claimants, pursuant to Consent Decree Wetlands Restoration Plan Section 3, to construct and install a check dam on Claimants’ Murphy tract at unnamed tributary “A.”

48. Consent Decree Section 9 vested the United States with the right to enter the Murphy tract to monitor and measure Claimant’s compliance with the Consent Decree for a period of 18 months from its effective date.

49. Consent Decree Paragraph 12 recognizes that “[t]he United States reserves all legal equitable remedies available to enforce the provisions of this Consent Decree.”

50. While the United States and its employees initially confirmed that Claimants had fulfilled their obligations under Consent Decree Paragraphs 4, 5, and 6, including Sections 2 and 3 of the Consent Decree Wetlands Restoration Plan, the United States failed to ensure that Claimants’ construction and installation of the check dam and refilling of the drainage ditches had been performed properly so as not to cause significant surface flooding and/or subsurface erosion that would extend beyond the roughly designated 30-acre Murphy tract wetland area to the uplands of the Murphy tract, and across the roadway (Lane Road) in between them to portions of the contiguous and adjacent Homestead and Marsh tracts.

51. In addition, since its initial confirmation of Claimants’ satisfactory completion of all requirements in Consent Decree Paragraphs 4, 5, and 6, including the check dam’s



construction and installation and the filling in of drainage ditches soon after the Consent Decree's effective date, the United States has since improperly and/or negligently monitored and/or failed to monitor Claimant's ongoing operation and maintenance of the check dam and drainage ditches, so that they alone, and/or in combination with other natural and/or manmade phenomena located on or upland from the Murphy tract (e.g., beaver dams and clogged culverts) would not cause significant surface flooding and/or subsurface erosion that would extend physically beyond the 30-acre wetlands area subject to the Consent Decree to the uplands of the Murphy tract, portions of the contiguous and adjacent Homestead and Marsh tracts, and across the roadway in between them. As the Federal Court of Claims had found, "After 1996, no EPA official has ever visited the property to determine whether the restoration plan had broader impacts than were intended." (72 Fed. Cl. at 345; slip op. at 7). This ongoing oversight failure, coupled with the compound substantial effects of varying rainfall amounts and water blockages arising from preexisting beaver dams over-vegetated draining ditches located on and upstream from the Murphy tract, and from two clogged culverts – one, a Penndot-placed culvert half-filled with concrete located at the north end of the contiguous and adjoining Marsh tract under Sharp Road near the intersection of Sharp and Greenlee Roads, and the other, located under South Hill/Lane Road on the north end of the Murphy tract, about which the Government had previously known or should have known, has caused foreseeable surface flooding and/or subsurface erosion beyond the 30-acres of Murphy tract wetlands areas that encroached upon the upland portions of Claimants' Murphy tract and upon portions of Claimants' contiguous and adjacent Homestead and Marsh tracts which had been operated as a single integrated farm.

52. Given Claimants' and the Federal Government's unequal special relationship, the EPA, the Corps and the FWS, and their respective employees, owed Claimants a

nondiscretionary fiduciary duty of care. Said nondiscretionary fiduciary duty of care has long been incorporated within the Consent Decree and its accompanying Wetlands Restoration Plan, by virtue of: 1) Preambular Paragraph 1 of both the Consent Decree and the Wetlands Restoration Plan, which identify a wetlands of approximately 30 acres in size located adjacent to Elk Creek as the subject matter of the Consent Decree; 2) Consent Decree Paragraph 4 which mandates that Claimants “will perform restoration in accordance with the wetlands restoration plan;” 3) Wetlands Restoration Plan Sections 2 and 3 which direct Claimants to fill in two surface ditches running into unnamed tributary “B” and to install a check dam in unnamed tributary “A;” and 4) Consent Decree Paragraph 12’s mandate to ensure that any stipulated Consent Decree modification is in writing, signed by the Parties and approved by the Court, thereby requiring the United States and its employees to consider modifications to the Consent Decree to remedy unintended consequences. These Consent Decree provisions imposed upon these federal agencies and their employees the nondiscretionary fiduciary duty to ensure Claimants’ proper execution of those initial tasks and to ensure the Governments’ continuous monitoring of the operation of the 30-acre Murphy tract wetland area so that it functioned properly and as intended.

53. The nondiscretionary fiduciary duty that the EPA, the Corps and the FWS and their respective employees have long owed and continue to owe to Claimants obligated them to prevent or reduce the likelihood that the Consent Decree’s implementation would adversely impact more than the 30-acres of designated Murphy tract wetlands areas, as originally intended, from surface flooding and/or subsurface erosion, and thus, from causing resultant damages to Claimant’s real property and personal property/farming businesses, taking into account the foreseeable substantial contributory impact(s) of preexisting natural and manmade phenomena

then present on/at the Murphy and contiguous and adjacent Homestead and Marsh tracts, such as the well-known installed check-dam on the Murphy tract, beaver dams on the Murphy and Marsh tracts, ditches on the Murphy, Marsh and Homestead tracts, and two clogged culverts – one half-concrete-filled culvert located at the north end of the Marsh tract under Sharp Road near the intersection of Sharp and Greenlee Roads, and the other located under South Hill/Lane Road on the north end of the Murphy tract, would collectively have upon the possibility, or even, likelihood of surface flooding and subsurface erosion of these tract lands.

54. At least one EPA employee, Jeffrey Lapp of the EPA's Region III offices, previously testified under oath (penalty of perjury) during the Federal Court of Claims takings proceedings that, "in [his] opinion the extent of impact of this restoration was solely on the 30-acre [Murphy] wetland tract," that it would "be possible for Mr. Brace to approach the agency concerning modifying this restoration plan [...] if maybe there were need for relief in other areas of the parcel or something like that outside this 30 acres," and that "we [EPA] would work with Mr. Brace [...] to try to correct" such impacts, leading to a finding by the Court of Claims that EPA officials were "prepared to work with Mr. Brace to remedy any unintended consequences of the restoration plan." Mr. Lapp also testified that there were "no wetlands outside of that 30 acres" on the 58-acre Murphy tract, and that "those [remaining] 28 acres are upland areas and would not be subject to Section 404."

55. However, Mr. Lapp's testimony further indicated that EPA would not likely be open to any alteration of the restoration work Claimants had performed within the Murphy tract 30-acre wetland areas pursuant to the Consent Decree, including an adjustment of the check dam if it operated improperly, or the clearing of culverts if clogged, even if it consequently flooded and/or eroded areas outside the 30-acres of designated Murphy tract wetland areas that required

drainage for crop production, because such alteration would be deemed to involve a modification of the Consent Decree. Mr. Lapp made this statement although, as he subsequently indicated, EPA was fully aware of the “fall on the property” and of the potential availability of “possibl[e] upstream solutions or other ways to control that water.”

56. Federal interagency correspondences from 1987 show that the United States had evidently been well aware of how the presence of beaver dams on and upstream from the Murphy tract had long likely contributed to the Murphy tract’s periodic ongoing surface flooding and subsurface erosion. Nevertheless, these federal agencies and their employees failed to take this fact into account in designing the check dam that they directed Claimants to construct and install within the 30-acre wetland portion of the Murphy tract as part of the Consent Decree’s Wetland Restoration Plan.

57. At least one EPA employee, Jeffrey Lapp, previously testified under oath at Claimants’ prior Takings suit at the Federal Court of Claims that the Consent Decree Wetlands Restoration Plan had been intended to impact solely the 30-acre Murphy tract wetland area, and was not intended to directly or indirectly trigger surface flooding and/or subsurface erosion that would encroach upon Claimants’ contiguous and adjacent farmlands.

58. EPA employee, Jeffrey Lapp, also previously testified that, to the best of his knowledge, no EPA employees had gone back, between 1996 and January 2005, to see whether the Consent Decree Wetland Restoration Plan had been functioning as intended. He also testified that, if EPA were to go back for such purposes they would look only to examine the root cause of a problem, would not examine an otherwise known factor(s), together with an element of the Wetland Restoration plan, e.g., the check dam, that could be exacerbating or substantially contributing to the problem, and would not actually assist Claimants in making physical

modifications to the Consent Decree's Wetlands Restoration Plan that would eliminate its unintended consequences. He testified, moreover, that if Claimants had informed EPA that the Consent Decree Wetlands Restoration Plan had caused water, soil and plants to migrate into areas beyond the Murphy tract's 30-acre wetland area to uplands that were not previously wetlands, EPA, together with the other federal agencies involved would need to consider that extraordinary circumstance and decide whether to restore or to re-delineate those uplands as wetlands.

59. On multiple occasions since 1998, but especially since 2006, Claimants repeatedly requested permission from the United States to remove or adjust features of the check dam constructed and installed on the Murphy tract per direction of the EPA and the Court's Order and/or to clean the drainage ditches clogged with vegetation on the Murphy and contiguous and adjoining Homestead tracts and/or to remove beaver dams located on the Murphy and contiguous and adjoining Marsh tracts and/or to clear two clogged culverts – one Penndot-placed culvert located at the north end of the Marsh tract under Sharp Road near the intersection of Sharp and Greenlee Roads, and another culvert located under South Hill/Lane Road on the north end of the Murphy tract which had been half-filled with concrete, and, in effect, to modify the Consent Decree in order to stem the significant surface flooding and subsurface erosion extending well beyond the Murphy tract's 30-acres of designated wetland areas, to the Murphy tract uplands, and to the Homestead and Marsh tracts. The United States denied and/or failed to respond to most, if not all such requests over the years, and when it finally granted Claimants' permission to adjust the check dam and/or to clear/clean drainage ditches, in 2013 following Claimants' request for an onsite visit, the United States subsequently retracted their authorization for Claimants to undertake such activity.

60. The United States has failed, from year-to-year, to ensure that the EPA, the Corps, the FWS and their respective employees fulfilled the fiduciary duty of care they have long owed to Claimants. The Government should have ensured Claimants' proper execution of those initial tasks, and should have properly conducted regular ongoing monitoring of the Consent Decree's operation/implementation. These United States agencies also should have ensured that their employees would work with Claimants to modify the Consent Decree and/or its Wetlands Restoration Plan if necessary to prevent its implementation from adversely impacting other than the 30-acre wetland portion of the Murphy tract – its intended subject matter – i.e., from surface flooding and/or subsurface erosion that would result in damages to Claimants' upland croplands badly in need of drainage, taking into account the foreseeable contributory impact(s) of preexisting conditions, such as from well-known beaver dams, would have upon the possibility of surface flooding and subsurface erosion.

61. The United States' failure to fulfill the fiduciary duty of care owed to Claimants has proximately caused and will continue to proximately cause substantial periodic ongoing surface flooding and/or subsurface erosion of Claimants' upland croplands badly in need of drainage, rendering those farm tracts or portions thereof largely, if not entirely unusable. Claimants have long suffered and continue to suffer substantial damages, which include: a) Real property damages to approximately 66.5 of their 146 acres of contiguous and adjacent farmlands, 130 acres of which, including parts of the Homestead and Marsh tracts, the Government long ago alleged had qualified as wetlands; b) Loss of enjoyment of life as the result of substantial lost personal income attributable to lost crop harvest business revenues for each planting/harvesting season from 1996 to 2016 and the present, which could and would have been derived by their established four-generations-old family farming business dedicated exclusively to farming the

three contiguous and adjacent farms tracts operated as a single integrated farm; c) Severe and significant emotional distress and mental pain and suffering; d) Humiliation, embarrassment and fear; e) Annoyance and inconvenience; and f) Other damages, which, under the law and circumstances, Claimants are entitled to recover, including attorney fees and costs associated with the prosecution of this action.

**SECOND THEORY OF LIABILITY**  
**(FEDERAL TORT CLAIMS ACT - CONTINUING NUISANCE)**

62. Claimant re-alleges paragraphs 1 through 61 of this Claim by reference.

63. Pennsylvania courts recognize § 822 of the Restatement (Second) of Torts as defining the law of private nuisance. “Private nuisances are ‘nontrespassory invasion[s] of another's interest in the private use and enjoyment of land.’”

64. Under Pennsylvania law, one is subject to liability for a private nuisance “if: 1) his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land; *and* 2) the invasion is either: a) intentional and unreasonable; *or* b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.” Thus, a defendant may be liable for the invasion of such use and enjoyment when the interference is the result of negligent conduct.

65. Under Pennsylvania law, a Claimant is eligible to obtain damages for the perpetration of a private nuisance only if there is a real and appreciable (“significant”) interference with its use or enjoyment of his land. “The standard for the determination of significant character is the standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant.”

66. Under Pennsylvania law, as interpreted by other courts in the Third Circuit, there is a cause of action for continuing nuisance which “implicitly holds that the defendant is committing a new tort, including a new breach of duty, each day, triggering a new statute of limitations. That new tort is an ‘alleged present failure’ to remove the nuisance, and ‘[s]ince this failure occurs each day that [defendant] does not act, the [defendant’s] alleged tortious inaction constitutes a continuous nuisance for which a cause of action accrues anew each day.’”

67. Under Pennsylvania law, as interpreted by other courts in the Third Circuit, courts “imposed a duty on the defendant to remove the nuisance, and because the defendant’s failure to remove the nuisance is a breach of that duty, each injury is a new tort. The Claimant is therefore able to collect damages for each injury suffered with the limitations period.”

68. Claimants executed the 1996 Consent Decree with the United States, but did not do so on equal terms, and still do not have the ability to deal with the Government on equal terms because the EPA, the Corps and the FWS and their employees exercise overmastering dominance over Claimants with respect to legal authority/enforcement power and access to information.

69. Claimants have long had no choice but to trust and rely upon the United States and its federal agency employees’ CWA-related consultation, advice, instructions and directions to fulfill their legal obligations under the Consent Decree and its Wetland Restoration Plan.

70. Claimants have long had to trust and remain entirely dependent on the United States, including its EPA, Corps and FWS and their respective employees in order to secure authorization to adjust the check dam constructed and installed and clean the drainage ditches filled in accordance with the Consent Decree’s terms, and remove beaver dams located within and upstream from the 30-acre Murphy tract wetland area to reduce the likelihood of surface



flooding and/or subsurface erosion of the Murphy tract uplands and portions of the contiguous and adjacent Marsh and Homestead tracts. Claimants also have long been and remain entirely dependent on the United States and its employees to coordinate with Pennsylvania Commonwealth and Erie County authorities for purposes of ensuring the clearing and/or replacing of the clogged culverts at the north and southern ends of the properties to reduce the likelihood of surface water flooding and subsurface erosion of such properties or portions thereof.

71. Claimants, furthermore, have long had to trust and remain entirely dependent on these same federal agencies and employees to protect their private property rights, including their constitutionally protected right to use and enjoy their contiguous and adjacent Murphy, Homestead and Marsh tracts as productive farmlands, to the extent they do not impact the 30-acre Murphy tract wetland area that is the subject of the Consent Decree without first obtaining a CWA Section 404 permit.

72. The EPA, the Corps and the FWS and their respective employees have long owed and continue to owe Claimants a nondiscretionary fiduciary duty of care. That nondiscretionary fiduciary duty obligated these federal agencies and their employees directly, and/or indirectly with Claimants' assistance (pursuant to Consent Decree Paragraph 12), to remove the continuing nuisance(s) within the 30-acre Murphy tract wetland area – i.e., the periodic ongoing surface flooding and subsurface erosion that arose and continues to arise from the unintended operation of the check dam the United States had designed and directed Claimants to construct and install, and from the drainage ditches the United States had directed Claimants to fill pursuant to Consent Decree Section 4 and Wetland Restoration Plan Sections 2 and 3, that impacted and continues to impact Claimants' farmlands located beyond the Consent Decree 30-acre wetlands

area, taking into consideration the likely contributory impacts of varying rainfall amounts, water blockages from beaver dams long known to be located on and upstream from the Murphy tract, and the Murphy tract wetland area's over-vegetated filled drainage ditches.

73. At least one EPA employee, Jeffrey Lapp, previously testified during Claimants' prior Takings litigation that the United States was willing to work with Claimants to correct any unintended consequences of the Consent Decrees' Wetlands Restoration Plan. More specifically, he testified that if Claimants had informed EPA the Consent Decree Wetlands Restoration Plan had caused water, soil and plants to migrate into areas beyond the Murphy tract's 30-acre wetland area to uplands that were not previously wetlands, EPA, together with the other federal agencies involved would need to consider that extraordinary circumstance and decide whether to restore or to re-delineate those uplands as wetlands. This same EPA employee also previously testified, however, that, to the best of his knowledge, no EPA employees had gone back, between 1996 and January 2005, to see whether the Consent Decree Wetland Restoration Plan had been functioning as intended, and/or to remove these continuing nuisances.

74. On multiple occasions since 1998, but especially since 2006, Claimants repeatedly requested permission from the United States to remove or adjust features of the check dam installed on the Murphy tract per EPA's direction and this Court's Order and/or to clean the drainage ditches clogged with vegetation located on the Murphy and contiguous and adjoining Homestead tracts and/or to remove beaver dams located on and upstream from the Murphy tract (especially the beaver dam located at the north end of the contiguous and adjoining Marsh tract), and/or to clean the clogged culverts (especially the one half-concrete-filled culvert located at the north end of the Marsh tract under Sharp Road near the intersection of Sharp and Greenlee Roads, and the other located under South Hill/Lane Road on the north end of the Murphy tract).

The United States had long known or should have known that these natural and manmade phenomena were present on and around the properties, and had known or should have known that such phenomena had contributed significantly to the periodic ongoing surface flooding and/or subsurface erosion (i.e., the continuing nuisance) extending well beyond the Murphy tract's 30-acre designated wetland. The United States denied and/or failed to respond to most, if not all such requests over the years, and when it finally granted Claimants' permission to adjust the check dam and/or to clear/clean drainage ditches, in 2013 following Claimants' request for an onsite visit, the United States subsequently retracted their authorization for Claimants to undertake such activity.

75. The EPA, the Corps and the FWS and their respective employees have improperly, negligently or wrongfully failed to fulfill, and have in fact breached, their nondiscretionary fiduciary duty to remove these continuing nuisances (periodic ongoing surface flooding and subsurface erosion) proximately caused by the flawed operation of the check dam and the clogged filled-in drainage ditches within the 30-acre Murphy tract wetland area, as well as, by the natural and manmade phenomena on and around the property noted above, which impacted and continue to impact in a periodic ongoing manner Claimants' farmlands located beyond that Consent Decree wetlands area.

76. The EPA's, the Corps' and the FWS' and their respective employees' improper, negligent or wrongful failure to fulfill their nondiscretionary fiduciary duty to directly and/or indirectly remove these continuing nuisances has rendered Claimants' Murphy tract uplands and portions of the contiguous and adjacent Homestead and Marsh tracts located beyond the Consent Decree's 30-acre wetlands area largely, if not entirely unusable as productive croplands. The United States' and their employees' improper, negligent or wrongful failure to remove such

continuing nuisances has significantly curtailed and interfered with, and consequently, significantly harmed Claimants' ability to exercise their private property ownership and lease rights on such tracts, and thus, to use and enjoy their constitutionally protected private property as productive farmlands.

77. The United States' and their employees' improper, negligent or wrongful failure to fulfill their fiduciary duty to directly and/or indirectly remove these continuing nuisances necessitated Claimants' multiple requests to the United States to undertake maintenance actions on the Murphy and Marsh tracts that EPA and the Corps first authorized but then retracted, which proximately caused the Government to subsequently file two new lawsuits alleging CWA Section 404 permitting violations. These two new lawsuits seek to impose more strict enforcement of the Consent Decree and to restrict 14 acres of the 20-acre Marsh tract located along "Elk Creek" by designating them as wetlands adjacent to "Waters of the United States" subject to CWA Section 404 permitting, which is likely to further restrict Claimants' use of the properties as productive farmlands, especially if the United States and their employees fail to remove similar future periodic ongoing nuisances on that Claimant property. These two new lawsuits, therefore, further threaten to significantly curtail and interfere with Claimant's constitutionally protected right to use and enjoy their private lands as productive farmlands.

78. The United States' and their employee's breach of their nondiscretionary fiduciary duty to remove these continuing nuisances has proximately caused and continues to proximately cause substantial damages to Claimants, which include the loss of their ability to exercise their constitutionally protected right to use and enjoy their currently owned and/or previously leased private lands as productive farmlands as part of their four-generations-old

family farming business, as well as the loss of their constitutional right to earn a living in their chosen profession.

**THIRD THEORY OF LIABILITY**  
**(FEDERAL TORT CLAIMS ACT - CONTINUING TRESPASS)**

79. Claimant re-alleges paragraphs 1 through 78 of this Claim by reference.

80. The Federal Tort Claims Act authorizes and Pennsylvania state courts have recognized claims brought on the basis of continuing trespass, and have cited favorably to Restatement (Second) of Torts § 161 cmt. b which defines it.

81. Under Pennsylvania law, a claim for continuing trespass requires a showing that: 1) an actor failed to remove from land in the possession of another; 2) a structure, chattel or other thing he has tortiously (improperly or wrongfully or negligently) erected, placed or installed, on the land with consent of landowner; and 3) such failure results in damages to Claimants' property.

82. Under Pennsylvania law, courts have considered several factors to determine whether a continuing trespass has occurred. These include: 1) "the ascertainability or predictability of the injury involved (i.e., whether it is possible for Claimants to calculate all future damages in one action); and 2) the regularity of the incidents of trespass (i.e., whether the incidents [of surface flooding and/or subsurface erosion] happen frequently and predictably or only intermittently)," or if it "concerns separate and recurrent injuries which cannot be ascertained or estimate so as to be brought in a single action."

83. Under Pennsylvania law, if it is known merely that damage is probable or that, even though some damage is certain, the nature and extent of that damage cannot reasonably be known and fairly estimated, but is only speculative and conjectural, then the [2-year] statute of

limitations does not begin to run until the injury occurs, and there may be as many successive recoveries as there are injuries.” “[T]he structure or thing producing the injury may be as permanent and enduring as the hand of man can make it; yet if the resulting injury be temporary or intermittent, depending on future conditions which may or may not arise, the damages are continuing, and successive actions will lie for successive injuries.” Thus, if it is not possible to know how many incidents of flooding would occur, or what the severity of those incidents would be, a claim may lie for continuing trespass.

84. Claimants executed the 1996 Consent Decree with the United States, but did not do so on equal terms, and still do not have the ability to deal with the Government on equal terms because the EPA, the Corps and the FWS and their employees exercise overmastering dominance over Claimants with respect to legal authority/enforcement power and access to information.

85. Claimants have long had no choice but to trust and rely upon the United States and its federal agency employees’ CWA-related consultation, advice, instructions and directions to fulfill their legal obligations under the Consent Decree and its Wetland Restoration Plan.

86. Claimants have long had to trust and remain entirely dependent on the United States, including its EPA, Corps and FWS and their respective employees in order to secure authorization to adjust the check dam constructed and installed and clean the drainage ditches filled in accordance with the Consent Decree’s terms, and remove beaver dams located within and upstream from the 30-acre Murphy tract wetland area to reduce the likelihood of continuing trespasses (e.g., surface flooding and/or subsurface erosion) impacting Claimants’ other farmlands including the Murphy tract uplands and portions of the contiguous and adjacent Marsh and Homestead tracts. Claimants also have long been and remain entirely dependent on the

United States and its employees to coordinate with Pennsylvania Commonwealth and Erie County authorities for purposes of ensuring the clearing and/or replacing of the clogged culverts at the north and southern ends of the properties to reduce the likelihood of surface water flooding and subsurface erosion of such properties or portions thereof.

87. The EPA, the Corps and the FWS and their respective employees have long owed and continue to owe Claimants a nondiscretionary fiduciary duty of care. That nondiscretionary fiduciary duty obligated these federal agencies and their employees directly, and/or indirectly with Claimants' assistance (pursuant to Consent Decree Paragraph 12), to remove the continuing trespasses within the 30-acre Murphy tract wetland area – i.e., the periodic ongoing surface flooding and subsurface erosion that arose and continues to arise from the unintended operation of the check dam the United States had designed and directed Claimants to construct and install, and from the drainage ditches the United States had directed Claimants to fill pursuant to Consent Decree Section 4 and Wetland Restoration Plan Sections 2 and 3, that impacted and continues to impact Claimants' farmlands located beyond the Consent Decree 30-acre wetlands area, taking into consideration the likely contributory impacts of varying rainfall amounts, water blockages from beaver dams long known to be located on and upstream from the Murphy tract, and the Murphy tract wetland area's over-vegetated filled drainage ditches.

88. At least one EPA employee, Jeffrey Lapp, previously testified during Claimants' prior Takings litigation that the United States was willing to work with Claimants to correct any unintended consequences of the Consent Decrees' Wetlands Restoration Plan. More specifically, he testified that if Claimants had informed EPA the Consent Decree Wetlands Restoration Plan had caused water, soil and plants to migrate into areas beyond the Murphy tract's 30-acre wetland area to uplands that were not previously wetlands, EPA, together with the other federal

agencies involved would need to consider that extraordinary circumstance and decide whether to restore or to re-delineate those uplands as wetlands. This same EPA employee also previously testified, however, that, to the best of his knowledge, no EPA employees had gone back, between 1996 and January 2005, to see whether the Consent Decree Wetland Restoration Plan had been functioning as intended, and/or to remove these continuing nuisances.

89. On multiple occasions since 1998, but especially since 2006, Claimants repeatedly requested permission from the United States to remove or adjust features of the check dam installed on the Murphy tract per EPA direction and this Court's Order and/or to clean the drainage ditches clogged with vegetation on the Murphy and contiguous and adjoining Homestead tracts and/or to remove beaver dams located on and upstream from the Murphy tract (especially the beaver dam located at the north end of the contiguous and adjoining Marsh tract) and/or to clean the clogged culverts (especially the one half-concrete-filled culvert located at the north end of the Marsh tract under Sharp Road near the intersection of Sharp and Greenlee Roads, and the other located under South Hill/Lane Road on the north end of the Murphy tract). The United States had long known or should have known that these natural and manmade phenomena were present on and around the properties, and had known or should have known that such phenomena had contributed significantly to the periodic ongoing surface flooding and/or subsurface erosion (i.e., the continuing trespass) extending well beyond the Murphy tract's 30-acre designated wetland. The United States denied and/or failed to respond to most, if not all such requests over the years, and when it finally granted Claimants' permission to adjust the check dam and/or to clear/clean drainage ditches, in 2013 following Claimants' request for an onsite visit, the United States subsequently retracted their authorization for Claimants to undertake such activity.



90. The EPA, the Corps and the FWS and their respective employees have negligently or wrongfully failed to fulfill, and have, in fact, breached their nondiscretionary fiduciary duty to directly and/or indirectly remove these continuing trespasses (periodic ongoing surface flooding and subsurface erosion) proximately caused by the check dam and clogged filled-in drainage ditches within the 30-acre Murphy tract wetland area, and the natural and manmade phenomena on and around the properties, which collectively impacted and continue to impact Claimants' farmlands located beyond that Consent Decree wetlands area.

91. The EPA's, the Corps' and the FWS' and their respective employees' improper, negligent or wrongful failure to fulfill their nondiscretionary fiduciary duty to directly and/or indirectly remove these continuing trespasses has rendered Claimants' Murphy tract uplands and portions of the contiguous and adjacent Homestead and Marsh tracts located beyond the Consent Decree's 30-acre wetlands area largely, if not entirely unusable as productive croplands.

92. The United States' and their employees' improper, negligent or wrongful failure to fulfill their fiduciary duty to directly and/or indirectly remove these continuing trespasses necessitated Claimants' multiple requests to the United States to undertake maintenance actions on the Murphy and Marsh tracts that EPA and the Corps first authorized but then retracted, which proximately caused the Government to subsequently file two new lawsuits alleging CWA Section 404 permitting violations that seek to impose more strict enforcement of the Consent Decree and to restrict 14 acres of the 20-acre Marsh tract located along "Elk Creek" by designating them as wetlands adjacent to "Waters of the United States" subject to CWA Section 404 permitting. These two new lawsuits only further threaten to render additional property owned by Claimant virtually, if not entirely unusable as productive farmlands, especially if the

United States and their employees fail to remove future periodic ongoing trespasses on that Claimant property.

93. The United States' and their employee's improper, negligent and/or wrongful acts or omissions and consequent breach of their nondiscretionary fiduciary duty to remove these continuing trespasses has proximately caused and continues to proximately cause periodic ongoing damages to Claimants, which include the loss of their ability to use their property as productive farmlands, and also the loss of opportunity to earn substantial farm business revenues and personal income from the operation of the Claimants' multi-generational farming businesses.

94. While Claimants have known or should have known that these continuing trespasses (surface flooding and/or subsurface erosion) were and remain a likely outcome of these Government agency and employee improper, negligent and/or wrongful acts and omissions, Claimants have been unable to reasonably ascertain or fairly estimate the nature and extent of seasonal surface flooding and/or subsurface erosion, and consequently, the amount of damages to their croplands arising therefrom until the flooding and/or erosion occurs and damages accrue each agricultural season. Thus, it was and is not possible for Claimants to foresee how many trespasses would occur, or what the severity of those trespasses would be until the current year's agricultural season was/is upon them.

95. The United States' and their employees' failure to fulfill their nondiscretionary fiduciary duty to remove these trespasses has proximately caused and will continue to proximately cause the periodic ongoing damages Claimants continue to suffer, which include: a) Real property damages each year to an increasing portion of their 146 acres of contiguous and adjacent farmlands, including parts of the Homestead and Marsh tracts which the Government had long ago characterized as wetlands; b) Loss of enjoyment of each successive year of their

remaining lives as the result of lost personal income attributable to lost crop harvest business revenues for each planting/harvesting season from 1996 to 2016 and the present, which could and would have been derived by their established four-generations-old family farming business dedicated exclusively to farming the three contiguous and adjacent farms tracts operated as a single integrated farm; c) Increasing and ongoing severe and significant emotional distress and mental pain and suffering; d) Increasing and ongoing humiliation, embarrassment and fear; e) Increasing and ongoing annoyance and inconvenience; and f) Other increasing and ongoing damages, which, under the law and circumstances, Claimants are entitled to recover, including attorney fees and costs associated with the prosecution of this action.

#### **STATEMENT OF DAMAGES**

96. Claimants seek reimbursement of real and personal property damages in the total amount of \$8,071,232.75.

97. Of the total amount of damages sought by claimants, \$217,003.00 is for real property damage and repair, and \$7,854,229.75 is for personal property damage in the form of lost crop revenue. A detailed spreadsheet demonstrating the basis for these calculations is attached as Exhibit 4.

98. In support of this claim for real and personal property damage, which properties can be economically repaired, Claimants submit itemized statements prepared by Cory Stuchal, Stuchal Custom Ag Service, LLC, and Mary Torrey, Torrey Farms, Inc. These statements are attached hereto as Exhibits 2 and 3, respectively.

Respectfully submitted,

KNOX McLAUGHLIN GORNALL &  
SENNETT, P.C.

By: /s/ Neal R. Devlin

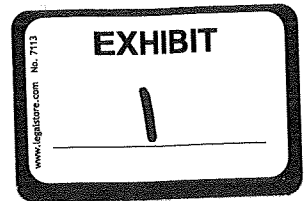
Neal R. Devlin, Esq. (PA ID No. 89223)  
Alexander K. Cox, Esq. (PA ID No. 322065)  
120 West Tenth Street  
Erie, PA 16501-1461  
Telephone: (814) 459-2800  
Fax: (814) 453-4530  
Email: [ndevlin@kmgslaw.com](mailto:ndevlin@kmgslaw.com)

THE KOGAN LAW GROUP, P.C.

By: /s/ Lawrence A. Kogan

Lawrence A. Kogan, Esq. (*Pro Hac Vice  
Pending*) (NY # 2172955)  
100 United Nations Plaza, Suite 14F  
New York, NY 10017  
Telephone: (212) 644-9240  
Email: [lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)

Attorneys for Claimants,  
Robert Brace,  
Robert Brace Farms, Inc., and  
Robert Brace and Sons, Inc.



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

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
V. )  
)  
ROBERT BRACE and ROBERT BRACE )  
FARMS, INC., a Pennsylvania )  
Corporation, )  
)  
Defendants. )

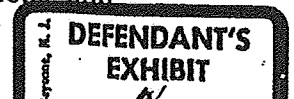
Civil Action No. 90-229  
Erie

CONSENT DECREE

WHEREAS Plaintiff United States of America, in its Complaint, alleged that Defendants committed violations of the Clean Water Act ("CWA"), including the unpermitted discharge of pollutants by dredging, filling, leveling, and draining of waters of the United States, specifically a wetlands of approximately 30 acres that is adjacent to Elk Creek, and Plaintiff sought injunctive relief and civil penalties;

WHEREAS the United States District Court for the Western District of Pennsylvania after trial dismissed the Complaint on December 22, 1993, holding that Defendants' activities were exempt from permitting requirements under Section 404 of the CWA;

WHEREAS the Third Circuit Court of Appeals, on November 22, 1994, reversed the District Court and ruled that Defendants are liable for the asserted violations, and



remanded the matter to the District Court for remedial measures, and the United States Supreme Court denied Defendants' petition for writ of certiorari; and

WHEREAS the parties have agreed to this Consent Decree;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that:

#### FINDINGS

1. This Court has jurisdiction over this action pursuant to CWA Section 309, 33 U.S.C. §1319, and 28 U.S.C. §§1331, 1345, and 1355.

2. This Consent Decree is fair, reasonable, in the public interest, and in accordance with the CWA.

#### INJUNCTION

3. Defendants, their officers, directors, agents, servants, employees, successors, assigns, and those in active concert or participation with them are enjoined permanently from discharging any pollutants (including dredged or fill material) into the approximately 30 acre wetland site depicted on Attachment A, unless such discharge is in compliance with the CWA.

RESTORATION

4. Defendants will perform restoration in accordance with the wetlands restoration plan, which is attached hereto as Exhibit A and made a part hereof.

CIVIL PENALTY

5. Within thirty days after the entry of this Consent Decree, Defendants will pay a civil penalty of \$10,000 by cashier's or certified check payable to the Treasurer of the United States and delivered to David M. Thompson of the U. S. Department of Justice. If said payment is not made within said period, then interest will be charged in accordance with the statutory judgment interest rate, as provided in 28 U.S.C. § 1961, from the time payment is due until the time payment is made.

OTHER PROVISIONS

6. Within thirty days after the entry of this Consent Decree, Defendants will record this Consent Decree in the applicable land records office.

7. Until all requirements in paragraphs 4, 5, and 6 have been performed and at least thirty days prior to any proposed transfer of any interest in any part of the property affected by this Consent Decree, Defendants will provide a true copy of this Consent Decree to any proposed transferee and simultaneously will notify the United States of any proposed transfer. A transfer of interest in the said property will not relieve Defendants of any responsibility in this Consent Decree, unless the United States, Defendants, and the transferee agree to allow the transferee to assume such responsibility.

8. Each party will bear its own expenses and costs to the time of the entry of this Consent Decree. Thereafter, if Defendants fail to perform any requirement in paragraph 4, 5, and 6, then, upon receipt of written notice of such failure from Plaintiff, Defendants will pay a stipulated penalty of \$250 for each day of failure, by cashier's or certified check payable to the Treasurer of the United States and delivered to David M. Thompson of the U. S. Department of Justice. Additionally, Defendants will be responsible for any expenses and costs incurred by the United States in enforcing this Consent Decree.

9. In addition to any other legal authority, representatives of the United States will have the authority for a period of eighteen (18) months after the entry of this Consent Decree, at reasonable times and with proper identification, to enter upon the property affected by this Consent Decree for the purposes of monitoring and measuring compliance with this Consent Decree.

10. This Consent Decree constitutes a complete settlement of any and all claims by any of the parties that arise from the Complaint through the date of the entry of this Consent Decree. The United States does not waive any rights or remedies available to it for any violations by Defendants of laws, regulations, rules, and permits other than the violations alleged in the Complaint, and this Consent Decree does not relieve Defendants of responsibility to comply with any federal, state, and local laws, regulations, rules, and permits, except that this Consent Decree provides all necessary federal authority to implement paragraph 4. Defendants do not waive any rights or remedies available to



them under any applicable law against the Plaintiff which may arise after the date of the entry of this Consent Decree.

11. Defendants consent to the entry of this Consent Decree without further notice. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. §50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree based upon such public comment.

12. Upon approval and entry by this Court, this Consent Decree will have the effect and force of a final judgment. This Court will retain jurisdiction over this action for the purposes of enforcing, interpreting, and modifying this Consent Decree. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. Any stipulated modification of this Consent Decree must be in writing, signed by the parties, and approved by this Court.

BK 0679PG2349

DATED: September 23, 1996

David M. Thompson  
UNITED STATES DISTRICT JUDGE

DATED: July 23, 1996

DMT for  
LOIS J. SCHIFFER  
Assistant Attorney General  
Environment & Natural Resources Division

By: David M. Thompson  
DAVID M. THOMPSON, Trial Attorney  
U. S. Department of Justice  
Environment & Natural Resources Division  
Environmental Defense Section  
Room 7120  
Washington, D. C. 20530  
Telephone: (202) 514-2617

Attorneys for the United States

DATED: June 25, 1996

Henry Ingram  
HENRY INGRAM  
Buchanan Ingersoll Professional Corporation  
One Oxford Centre  
301 Grant Street, 20th Floor  
Pittsburgh, PA 15219-1410  
Telephone: (412) 562-1695

Attorneys for Defendants

### Wetlands Restoration Plan

The primary objective of this plan is to restore the hydrologic regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek. In order to restore the hydrology to the area, the drainage tile system currently located in the wetlands is to be disabled, surface ditches filled in, and a check dam constructed. The series of tasks to be performed to sufficiently disable the drainage system are as follows:

1. Excavation of trenches; removal of drainage tubing

(a) Excavate a set of two parallel trenches to a depth of five (5) feet at each of the three following locations, as depicted on the map attached as Attachment A:

(1) the first set shall be located parallel to the western side of Elk Creek (marked as "Set 1" on Attachment A);

(2) the second set shall be located parallel to the southern side of the waterway referenced as "unnamed tributary A" (marked as "Set 2" on Attachment A); and

(3) the third set shall be located parallel to the northern side of the waterway referenced as "unnamed tributary B" (marked as "Set 3" on Attachment A),

for a total of six trenches.

(b) The first trench in each set shall be located at a distance of twenty five (25) feet from the bank of the referenced waterway; the second trench in each set shall be located at a distance of fifty (50) feet from the first trench (a total of seventy five (75) feet from the bank of the waterway).

(c) The trenches shall be excavated at a length necessary to intercept the drainage tubes located in the wetlands. During the course of excavation of the trenches, each time a drainage tube is intercepted, a twenty five (25) foot length of the drainage tube shall be removed. Upon removal of all intercepted drain tile, the area shall be inspected by EPA (or its representative). Following the inspection and approval of the work by EPA (or its representative), the trenches shall be filled in with the soil that was excavated from them and the tile disposed of properly.

2. Fill In Two Surface Ditches

The two surface ditches that run in a southwesterly

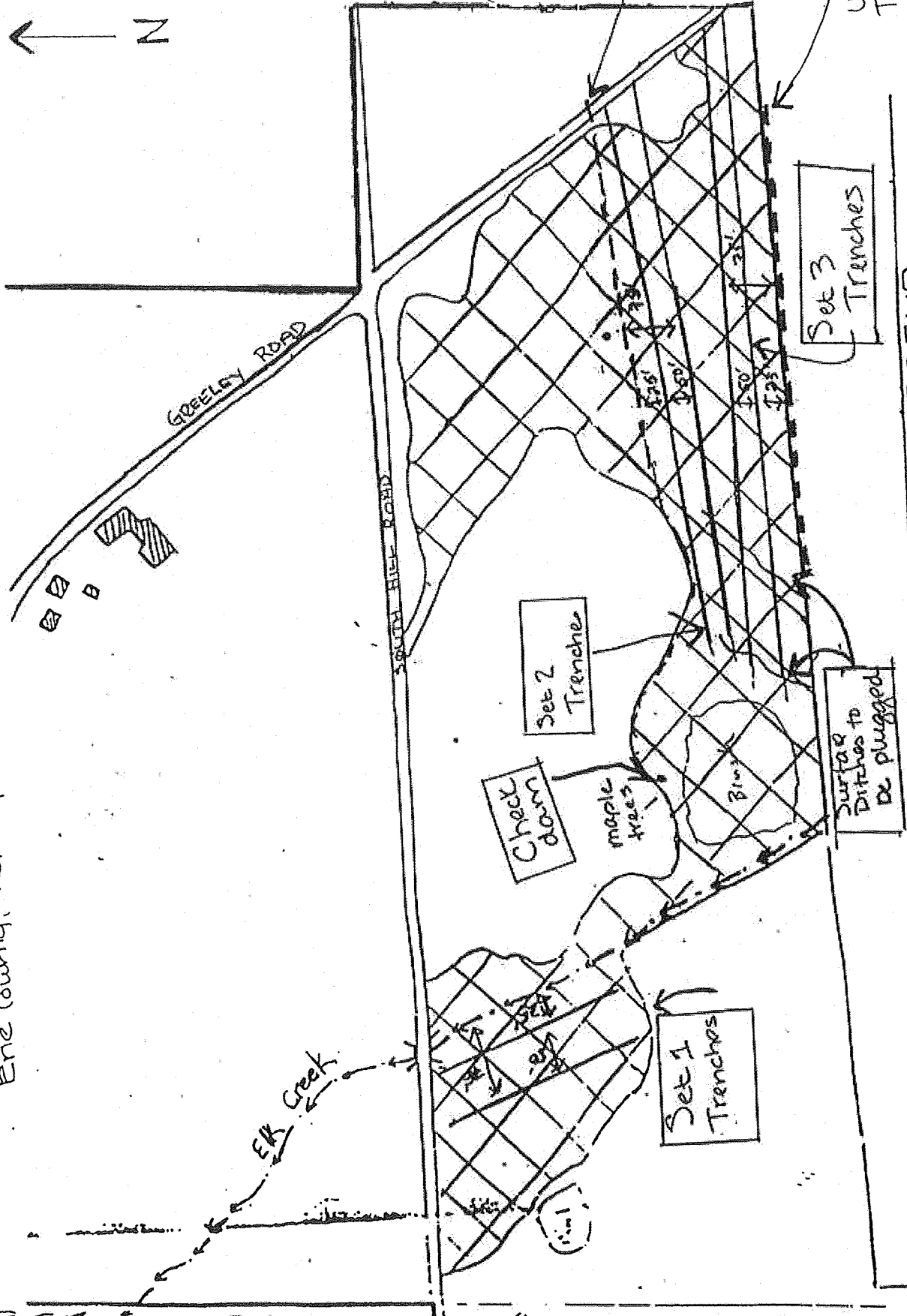
direction into unnamed tributary B, as indicated on Attachment A, shall be filled in beginning at the mouth for a distance of at least twenty five (25) feet.

3. Install Check Dam

A check dam shall be installed in unnamed tributary A at the location indicated on Attachment A. This dam shall be one and one-half (1 1/2) feet high, four (4) feet long, and as wide as the tributary bottom. The dam shall be constructed of concrete, gabions, or compacted rock.

All work shall be completed, if feasible, within ninety (90) days after entry of this Consent Decree and, in any event, no later than one year after entry of this Consent Decree. All required State and local permits must be received prior to performing any of the above work. The site will be inspected at the completion of the trench work and again at the completion of the restoration work.

Wetlands Restoration Plan  
Erie County, Pennsylvania



LEGEND

- All locations are approximate
- Map not to scale

ATTACHMENT "A"

# Stuchal Custom Ag Service, LLC

## Farm Drainage

969 Harmony Road, Slippery Rock, PA 16057

724-301-0844

Ron,

It was a pleasure talking to you and thank you for the chance to quote you for this tile project.

The prices are all tile per foot and include all the required fittings and digging the connections.

4", 6", and 8" tile will all be white co-extruded Hancor tile.

4" - \$.80 per foot

6" - \$1.45 per foot

8" - \$2.40 per foot

4" x 10' sdr 35 outlet pipe with animal guard is \$20

6" x 10' sdr 35 outlet pipe with animal guard is \$35

8" x 14' sdr 35 outlet pipe with animal guard is \$80

To tile 60 acres it would require an estimated;

261,360' of 4" tile = \$209,088

3200' of 6" tile = \$4,640

850' of 8" tile = \$2040

4 - 4" outlets = \$80

7 - 6" outlets = \$245

2 - 8" outlets = \$160

6 hours of excavator time @\$125 to establish outlets = \$750

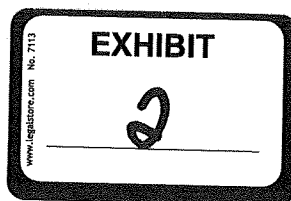
Total = \$217,003

Thank you,

Cory Stuchal

Stuchal Custom Ag Service, LLC

724-301-0844





GROWN WITH PRIDE . . .

## TORREY FARMS, INC.

BOX 187, MALTBY ROAD  
ELBA, NEW YORK 14058  
torreyny@iinc.com  
585-757-9941  
FAX 585-757-2528  
~~www.torreyfarms.com~~

June 30, 2017

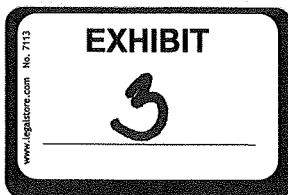
To Whom It May Concern,

I'm part of a family farm located in Western New York State. We have similar type soil to Brace Farms. We also for over twenty five years have grown and marketed potatoes, onions and cabbage.

I feel that the computed lost harvest revenues identified on the accompanying spread sheet, based on publicly available USDA-ERS data, accurately represent the harvest revenues for onion crops that Mr. Brace could and would have grown on his flooded farm tracts had they not been flooded and rendered virtually useless and valueless by the Government's over-enforcement of the court-approved consent decree.

Sincerely,

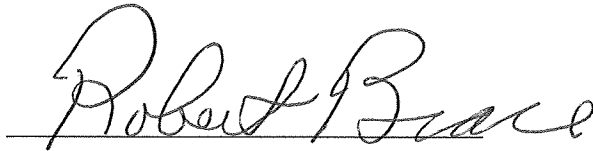
Maureen J. Torrey



**AUTHORIZATION FOR LEGAL REPRESENTATION**

I, Robert Brace, authorize Lawrence Kogan, Esq., and Neal Devlin, Esq., to serve as the legal representatives for myself, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc., with respect to FTCA claims filed against the United States government.

Date: July 3, 2017

A handwritten signature in cursive script that reads "Robert Brace". The signature is written in black ink and is positioned above a horizontal line.

Robert Brace, on behalf of Robert Brace, Robert  
Brace Farms, Inc., and Robert Brace and Sons, Inc.

