

4. I was assigned to this matter in approximately 2011 and have extensive knowledge of the facts and background.

5. The property that includes the area subject to the Consent Decree is identified as parcel number 47-012-028.0-001.00 by the Erie County Bureau of Assessment and is comprised of approximately 65.3 acres south of Lane Road (also known as South Hill Road) and bordered on the east by Greenlee Road in Erie County, Waterford, Pennsylvania, 41.977961, -80.043413. *See* Ex. 8 (12/30/1975 Indenture).¹ The property is located in Waterford Township and owned by Robert Brace. *Id.*

6. The area of the property that is the subject of the Consent Decree consists of 30 acres of wetland in a “U” shaped formation south of Lane Road and bordered on the east by Greenlee Road in Erie County, Waterford, Pennsylvania (the “Site”). *See* Ex. 2 (Consent Decree) at Exhibit A. The Site contains four unnamed tributaries (current locations identified as UT-1, UT-2, UT-2a, and UT-2b) which all flow into Elk Creek within the Site. *See* Ex. 9 (Map of Site). From the Site, Elk Creek flows approximately 29.47 miles northwest to Lake Erie, which has been formally identified by the U.S. Army Corps of Engineers (“Corps”) as a Section 10 water under the Rivers and Harbors Act of 1899.

7. I have visited the Site on several separate occasions and have reviewed documentation regarding Site conditions, soil and stream mapping, and topography, among other things.

¹ All of the exhibits I cite in this Declaration refer to exhibits attached to the United States’ Memorandum of Law in Support of the Motion to Enforce and for Stipulated Penalties.

8. According to EPA records, which include Mr. Brace's answers to information requests, notes of conversations, and deposition testimony, Mr. Brace originally cleared and grubbed the Site in the late 1970s and early 1980s. *See* Ex. 10 (Excerpted Transcript of Deposition Testimony of Robert Brace, dated Nov. 12-13, 1991) at 69:23-70:21, 72:20-73:4; 98:18-100:16. Grubbing is the mechanized land-clearing of vegetative cover and the ripping of the top layer of soil typically in preparation for agricultural activities. After conducting mechanized land-clearing to grade the Site, Mr. Brace installed "tile drains" with the expected result of draining the property to prepare it for planting. *Id.* at 105:23-106:11. Tile drains, which historically were made of terra cotta and are now made of PVC and other materials and come in various types and sizes, including perforated, flexible and straight pipe, were installed within the Site's wetlands several inches and up to several feet below the surface as a means of dewatering the area. While installing the tile drain, Mr. Brace side-casted the excavated material into wetlands. *Id.* at 190:4-191:13. He also configured a series of interconnected tile drains that discharged into Elk Creek. *Id.* at 106:20-107:5.

9. On October 4, 1990, the United States filed a complaint against Defendants Robert Brace and Robert Brace Farms, Inc., for violations of the CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, for the unpermitted discharge of pollutants into waters of the United States at the Site. Ex. 3 (Complaint).

10. The lawsuit was resolved when the parties entered into the Consent Decree on September 23, 1996. The Consent Decree required that Defendants restore the Site to pre-disturbance conditions in accordance with the wetlands restoration plan attached to the Consent Decree, and it permanently enjoined Defendants from discharging any pollutants into the approximately 30-acre Site without a permit from the Corps. Ex. 2 (Consent Decree).

11. The primary objective of the restoration plan was to “restore the hydrologic regime” to the Site. *See* Ex. 2 (Consent Decree) at Exhibit A. To achieve that objective, the restoration plan required: (1) disabling the drainage tile system; (2) backfilling two surface ditches; and (3) installing a check dam. *Id.*

12. The restoration plan set forth instructions on how the three requirements were to be completed. Each of the three requirements had a separate and distinct purpose in effectuating the aims of the restoration plan. First, Defendants were required to “[e]xcavate a set of two parallel trenches to a depth of five (5) feet” at three specific locations parallel to Elk Creek, “intercept the drainage tubes located in the wetlands,” and remove specific lengths of the tubes as they were intercepted. *Id.* at 1. Removal of the drainage tubes, also known as tile drains, prevents water from collecting in the tubes and discharging into Elk Creek and allows the water table to rise closer to the surface. Second, Defendants were required to fill in the two surface drainage ditches that they had dug that ran in a southwesterly direction in the Site. *Id.* at 1-2. Filling the surface ditches prevents the accumulation of water into the ditches, allowing the hydrology to evenly disperse and returning the water table to its previous level. Third, Defendants were required to install, at a specifically identified location, a check dam measuring 1.5 feet high, 4 feet long, and as wide as the tributary bottom, constructed from concrete, gabion (a wire cage filled with rock), or compacted rock. *Id.* at 2. The installation of the check dam provides an in-stream structure designed to back up water within the channel in an effort to raise hydrology closer to the surface in the area adjacent to the channel. Defendants completed the restoration work in or about the summer of 1996.

13. In early 2011, Mr. Brace wrote to EPA requesting assistance in identifying the boundaries of the Site. By letter dated March 14, 2011, EPA provided Mr. Brace with copies of

maps of the Site, including those that were attached to the Consent Decree, to assist him in identifying the boundary lines of the Site. Ex. 11 (March 14, 2011 letter).

14. In or around April 2011, Mr. Brace contacted me on several occasions by phone inquiring about the boundaries of the Site. He expressed a desire to remove beaver dams that were backing water up onto the property and to clean the ditches at various locations on the property in order to stop the water accumulation on the upland portions of the property.

15. In May 2011, I visited the Site to look at beaver dams and the clogged culvert east of Elk Creek traversing under Lane Road. I did not observe any beaver dams, but I did observe the clogged culvert. During that visit I provided Mr. Brace with an aerial photograph depicting a polygon outlining the approximate area that is subject to the Consent Decree.

16. After the May visit, I learned that Mr. Brace had contacted the Pennsylvania Game Commission about removing the beaver dams he claimed were backing up water on his property. *See* Ex. 12 (May 30, 2012 email from Brace to Corps). Mr. Brace also contacted the Corps about removing sediment from the clogged culvert and clearing “ditches,” and about providing a jurisdictional determination. *Id.*

17. Mr. Brace’s outreach resulted in a July 24, 2012 meeting with me, Mike Fodse of the Corps, and others to see the “ditches” that Mr. Brace had asked to clear. Prior to this visit, I was under the impression that Mr. Brace wanted to clear the channel east of Elk Creek where Mr. Brace had showed me the clogged culvert during the May 2011 Site visit. However, at the July 2012 meeting, Mr. Brace showed us the channels that he wished to clear in a different area of the property, which included an unnamed tributary to Elk Creek and Elk Creek itself, and asked if those channels could be maintained pursuant to a CWA exemption. Mr. Brace indicated

that the channels he wished to clear were not tributaries of Elk Creek but had been created by his grandfather decades ago. Mike Fodse informed Mr. Brace that if the channel was an agricultural ditch, maintenance activities might qualify for an exemption. It was determined at that meeting that the Corps would need to make a final determination as to whether channels could be maintained pursuant to a CWA exemption. During the Site visit, I repeatedly told Mr. Brace and his son, Randy Brace, that under no circumstances should work be done within that 30-acre wetland area subject to the Consent Decree.

18. On December 19, 2012, the Corps issued a jurisdictional determination that Elk Creek and 4,750 linear feet of the unnamed tributary to Elk Creek “located south of the active agricultural field and Lane Road [that] empties into Elk Creek” were jurisdictional waters of the United States and not eligible for a CWA exemption. Ex. 5 (Dec. 19, 2012 Jurisdictional Determination) at 1. At that time, the Corps also determined that portions of channels that EPA and the Corps had observed during the July 2012 Site visit were located in the area covered by the Consent Decree. *Id.* The letter explicitly advised Mr. Brace to cease and desist from any discharges to those waters. *Id.* at 2.

19. In a letter to me, dated January 17, 2013, and enclosing the Corps’ jurisdictional determination letter, Mr. Brace stated that he had engaged in some ditch clearing and maintenance but “assured” me that no work had been done in the Site covered by the Consent Decree, in accordance with EPA’s instructions in the field. Ex. 4 (Jan. 17, 2013 letter from Brace to Lutte at 2 (highlighting added)). In that letter, Mr. Brace also explained that he had done work in an area north of the Site, which he had recently purchased (“the Marsh property”) that had been the subject of recent inquiry by the Pennsylvania Fish and Boat Commission. *Id.*

20. On June 27, 2013, I visited the Marsh property with representatives from the Corps, Pennsylvania Fish and Boat Commission (“PFBC”), Pennsylvania Department of Environmental Protection (“PADEP”), and several representatives from legislative offices.

21. On August 29, 2013, EPA and the Corps issued a joint letter detailing our conclusions regarding the applicability of CWA exemptions at the Marsh property and again notifying Mr. Brace that Elk Creek and its tributaries located on Defendants’ property south of Lane Road were not exempt from regulation under the CWA and that portions of those channels were within the Site covered by the Consent Decree. Ex. 6 (Aug. 29, 2013 letter to Brace) at 3-4. In that same letter, the agencies advised Mr. Brace that the government was exercising its enforcement discretion and would forgo an action for the removal of sediment from the channels on the Site that Mr. Brace had undertaken prior to the date of the letter. *Id.* at 3. However, the letter notified Mr. Brace that any additional work involving a discharge of dredged or fill material at the Site would require a CWA Section 404 permit. *Id.* The agencies also informed Mr. Brace that portions of the wetlands subject to the Consent Decree appeared to have been converted to agricultural use without a permit and required further investigation. *Id.* at 4

22. In November 2013, the Corps participated in an aerial flyover, which revealed that Mr. Brace had re-installed the tile drains he had been required to remove from the Site; re-excavated several surface ditches that he had been required to fill in under the terms of the Consent Decree’s restoration plan; and side-casted the dredged material produced in digging the surface ditches in the area protected under the Consent Decree. The aerial photographs showed that a large portion of the Site had been cleared of vegetative cover and plowed for planting. Ex. 13 (aerial photos taken in Nov. 2013)

23. On March 18, 2015, EPA requested an additional Site visit that was arranged for May 20, 2015. Ex. 14 (March 18, 2015 letter from Lazos to Devlin).

24. On May 20, 2015, representatives of EPA met with state and local representatives as well as Mr. Brace and family members on the Site to conduct an inspection. We met at the intersection along Lane Road and Hill Road, where Hill Road crosses Elk Creek. In attendance were Mr. Brace and his sons, Randy and Ronnie Brace; Neal Devlin, Mr. Brace's attorney; myself, Jeff Lapp, Katelyn Almeter, and Pam Lazos from U.S. EPA Region III; Officer Bob Smolko, and Officer Robert Nestor from the PFBC Mike Fodse and Nancy Mullen from the Corps; Laura Brown from the U.S. Department of Justice; Angela Erde and Scott Dudzic from PADEP; and Andrew Johnson from Ecostrategies, Mr. Brace's consultant.

25. After introductions, I began the Site visit on May 20, 2015, by asking Mr. Brace if he could point out the area south of Lane Road that is covered under the 1996 Consent Decree. Mr. Brace indicated that it was bordered by Lane Road and extended from the west at the tree line along the south side of Lane Road, to the southeast toward the beaver dams (which could not be seen by attendees), and straight across towards the east to a point along Greenlee Road, and back up to Lane Road along the north.

26. Mr. Brace advised me that he had placed tile drains in the "ditches" to the west of Elk Creek on the Site, along the "ditches" within the eastern part of the Site, and along the "ditches" that were cleaned to facilitate drainage of the Site. He also stated that he had plowed the areas surrounding the "ditches" at the Site so he could plant crops. Mr. Brace stated that I, along with Mike Fodse of the Corps, had told him that he could do this the last time we were at the Site. Mr. Brace then left and we walked the Site, accompanied by Mr. Brace's sons, Randy and Ronnie.

27. I asked Randy Brace to describe the activities that had occurred on the Site. He indicated that they had cleaned the “ditches” and placed drains in most of them so they could plant crops.

28. I took Photos 1 through 33 of the Site showing the condition of the channels and unnamed tributaries, UT-1, UT-2, UT-2a, and UT-2b, outfalls of tile drains, and an abandoned check dam at the time of that Site visit. Ex. 15 (Photo log of May 2015 Site visit).

29. Based on visual observations at the Site during the May 20, 2015 Site visit, EPA confirmed the discharge of dredged and/or fill material into approximately 18 acres of wetlands within the 30-acre wetland Site covered by the Consent Decree. The wetlands had been cleared, drained, plowed, and planted. *See* Ex. 15, photos 1-3, 19 and 20. Ten drainpipe outlets were observed in and along the channel of Elk Creek and its associated unnamed tributaries all within the limits of the 30-acre wetland Site covered by the Consent Decree. All of the unnamed tributaries drain directly to Elk Creek.

30. In addition, I observed two surface ditches that were cut into the south side of Elk Creek that discharged to the southern border of the Brace property within the Consent Decree area which traverses the southern border of the Brace property. *See* Ex. 15, photos 15-18.

31. Finally, the check dam, originally ordered and installed as part of the restoration under the Consent Decree, had been removed from Elk Creek, and an unauthorized earthen crossing was observed in Elk Creek. *See* Ex. 15, photo 12.

32. I have reviewed the original wetland restoration plan that was attached to and incorporated into the 1996 Consent Decree. Ex. 2 (Consent Decree) at Exhibit A. The purpose of that restoration plan was to “restore the hydrologic regime” of the Site. By clearing, ditching,

draining, plowing, and planting at least 18 acres of the Site, and by removing the check dam (which was designed to back up water and rehydrate the surrounding land), Defendants have again disrupted the hydrologic regime of the Site and reversed the restoration required by the Consent Decree.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Executed this 9th day of January, 2017.

A handwritten signature in black ink, appearing to read "Todd Lutte", is written over a horizontal line.

Todd M. Lutte
Wetlands Enforcement Team Leader
U.S. Environmental Protection Agency
Region III