

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

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

**INITIAL RESPONSE TO UNITED STATES MOTION TO ENFORCE CONSENT
DECREE AND FOR STIPULATED PENALTIES**

Pursuant to the Court’s February 8, 2017 Order (Doc. 97) relating, in part, to the current action, Robert Brace and Robert Brace Farms, Inc. (collectively, “Brace”) file this initial response to the United States Motion to Enforce Consent Decree. Consistent with the Court’s February 8, 2017 Order, this response presents a summary of Brace’s response to this motion. In the event this matter does not resolve through the Court’s ADR process, Brace intends to file a more complete and comprehensive response, amending this initial response, and including requests for appropriate case management deadlines to allow for the creation of a complete, comprehensive and accurate record related to the United States (U.S. Environmental Protection Agency’s (hereinafter, “EPA’s”) claims and allegations.

INTRODUCTION

This case involves the United States’ (EPA’s) incessant efforts to make Brace a national example for political, policy and media purposes by imposing and enforcing unreasonable, improper, and ultimately undefined directives and restrictions on Brace’s normal farming operations and private land use and ownership. These directives and restrictions were contained within a deliberately ambiguous and nondescript consent decree the United States had drafted and compelled Brace to execute under duress and threat of a substantial penalty in the millions

of dollars, notwithstanding the conflicts and inconsistencies then existing within and between then relevant and applicable multi-agency federal regulations covering prior converted and farmed wetlands, which conflicts and inconsistencies the federal government had apparently resolved in Brace's favor in 1993 during the course of the prior litigation but before settlement.

The Consent Decree (Doc. 79), on which the United States bases all of its relief, is ambiguous and nondescript in four fundamental ways. First, it fails to identify the precise physical area it covers. Second, it fails to identify the precise physical condition it seeks to achieve (i.e., the *status quo ante* condition to which the subject property must be restored) taking into account official United States government historical documentation Brace had included in the court record. Third, it fails to provide for any periodic EPA compliance inspections and/or certifications of ongoing Brace compliance or noncompliance with the terms thereof. Fourth, it fails to provide for any procedural mechanism allowing the Parties to modify or adjust any one or more of its terms to account for changed physical circumstances, or for relevant and applicable statutory and/or regulatory updates and changes, especially those validating the legality of Brace's normal farming operations and land use.

In addition to the facial and latent ambiguity of the Consent Decree, the United States has compounded the impropriety of its relief by making statements, both under oath and privately to Brace, his family and others, that are directly contrary to and inconsistent with the relief the United States now seeks. Despite these legal infirmities contradictions and inconsistencies, the United States has brandished the Consent Decree against Brace for approximately thirty (30) years, rendering his farming operations on and near the subject property(ies) ("the Murphy Tract" and adjoining "Homestead Tract") essentially inoperable and valueless.

Now, the United States, in demonstration of its arrogance and cognizance, has measurably increased its aggression by filing this enforcement action as well as a new action

(Case # 1:17-cv-00006-BR) with no fewer than eleven (11) days remaining prior to the inauguration of the forty-fifth (45th) President of the United States of America. The United States did so to ensure that the court's resolution of these matters is not influenced by the anticipated return of the United States federal agencies to a prior era of more balanced environmental policymaking, regulation and enforcement that recognizes and respects exclusive constitutionally protected private property rights. Simply stated, the United States now seeks to render the majority, if not the entirety, of these (and other) Brace farming operations and properties (especially those contiguous to the subject property) economically useless to Brace without compensating Brace for such loss. EPA, through the United States, does so by requesting from this Court the unfettered ability to implement and "enforce" the undefined and open-ended terms of an intentionally ambiguous and ill-described Consent Decree it, alone, drafted, for purposes of exercising ever-expansive legal jurisdiction over Brace's private lands on the putative grounds they contain "waters of the United States" which must be preserved for "public use."

Moreover, the EPA, through the United States, has long deceptively portrayed this case as a simple black-and-white Clean Water Act Section 404 violation case. Much to the contrary, this case involves significant regulatory complications and policy confusions, revisions and contradictions within and between multiple federal agencies, including EPA, US Army Corps of Engineers ("USACE"), and US Department of Agriculture ("USDA"), the regulations, guidance documents and publications of which had been updated and modified repeatedly from 1979 through 1996 (i.e., the period during which Brace had engaged in the contested activities (alleged CWA Section 404 violations) and had subsequently litigated the matter with the Government in the federal courts). Much to the contrary, these competing regulations, guidance documents and publications applicable to farming operations on wetlands had, to EPA's and the environmental

community's consternation, exempted Brace's lands and farming operations from the definition of "waters of the United States", and consequently, from EPA and/or U.S. Army Corps of Engineers CWA Section 404 jurisdiction. EPA and the United States, in conjunction with the environmental community, worked in a nefarious and calculated manner to ensure Brace's CWA compliance through overzealous enforcement of CWA Section 404, notwithstanding these then existing overwhelming regulatory complications, confusions and contradictions, Such behavior, unbecoming of a federal agency charged with upholding the "public trust," was intended to sow, and had actually sowed, extreme confusion and fear in the regulated farm community all throughout this Nation, particularly, during the 1980's and early 1990's, was wrongheaded, manifestly unfair, ethically unjust and improper, and plainly un-American; it also was not permitted under applicable law or the terms of the Consent Decree. Given their lack of good faith and unclean hands, and their overzealous enforcement and exploitation of the regulatory crisis they, themselves, created, neither EPA nor the United States is entitled to any of the relief they are seeking against Brace in this motion.

BACKGROUND

The Brace Farms and Properties At Issue

Robert Brace has spent his entire life as a third-generation farmer. He learned farming from his father and grandfather has been involved in it for the past 70 years. Despite the financial and regulatory challenges that have plagued agriculture for the past 40 years, Brace is one of the few remaining commercial farmers in Northwestern Pennsylvania. The properties at issue in this case were among the first the Brace acquired in the 1970's as part of his farming business.

Prior to 1948, the Murphy Farm was owned by individuals unrelated to Brace's family. In 1948, Brace's father purchased the Murphy farm and began using it as pastureland for his

dairy cattle. The Brace family had been farmers in Erie County, Pennsylvania since at least the 1930s. Prior to his purchase of the Murphy Farm, Brace's father owned what is referred to as the Homestead Farm. The Homestead Farm is the farm on which Brace was raised and was used by Brace's father for crop farming since the Great Depression.. The Homestead Farm is approximately a 69-acre parcel bounded by Waterford Township Route 523, the McKean Township border and Waterford Township Route 519. The Murphy Farm is also bounded by routes 519 and 523, the McKean Township line, and abuts other property to the south/southeast. Prior to Brace's father purchasing the Murphy Farm, it had been an operating farm that utilized an older drainage system. In 1975, Brace's parents concluded that they could no longer operate their dairy farming operation on the Murphy Farm in a sufficiently profitable manner. Consequently, they decided to sell both the Homestead and Murphy Farms. While dairy farming on the Murphy Farm and crop farming on the Homestead Farm was not profitable, Brace believed he could make the Murphy Farm profitable if he used it for row crops. With these as his personal and business goals, Brace purchased the Murphy and Homestead Farms from his parents for a total price of \$170,000. This was the value at which Brace's parents had the two farms appraised.

Brace's Work to Improve Farming on the Subject Property and to Secure USDA Designation of it as Prior Converted Farmland.

Shortly after purchasing the Murphy Farm, Brace began the process of improving the farmland so that it could be used for multiple purposes, including as pastureland and for growing row crops, as the land been traditionally/historically used. Like most farmers in Erie County, Brace had to construct a drainage system on the Murphy Farm in order to use it for row crop farming. At the time Brace purchased the farm, he was aware that a more substantial drainage system would be required to make the farm productive.

Brace was also aware that his father had begun the process of utilizing government assistance in constructing a drainage system on the Murphy Farm. On December 14, 1961, Brace's father, Charles T. Brace, entered into a Conservation Agreement (contract) with Erie County Soil Conservation District ("CSCD"), the local arm of the U.S. Department of Agriculture ("USDA")'s Soil Conservation Service ("SCS"). (A copy of the Conservation Agreement is attached hereto as Exhibit A) Pursuant to that Agreement, the SCS and CSCD agreed to assist Brace's father "in developing a basic conservation plan for [his] farm," which required him to "cooperate in bringing about the land use adjustments and the establishment of the conservation practices which *I* decide to develop in my conservation farm plan" (Exhibit A, p. 10) (emphasis added). That conservation plan had involved the construction and placement of underground tile (i.e., tile drains) on the Murphy Farm, the Homestead Farm, and surrounding properties, the construction and placement of open field drains and dikes, seeding, liming, land clearing (i.e., the removal of trees, brush and existing vegetation) and pasture mowing. (Exhibit A). The Conservation Plan had provided for the simultaneous and/or rotational use of the land to grow row crops, for pasturing and for livestock – i.e., for mixed farming.¹

Brace's father had continued to implement the conservation plan until the time Brace had purchased it from him upon acquiring the Murphy Farm in 1975. Assisted and overseen by the CSCD and the SCS, Brace continued the construction of the drainage system the plan had

¹ The Federal Court of Claims, in a subsequent "takings" action Brace had filed in 2002, had made the following findings of fact: "In 1961, the Soil Conservation Service (SCS), part of the USDA and now known as the Natural Resources Conservation Service (NRCS), developed a 'Soil and Water Conservation Plan' for plaintiff's father. This plan covered both farms, and identified which crops were appropriate for particular fields therein, as well as which fields could be improved by the installation of drainage. Like the drainage plans for many farms in Erie County, the SCS plan proposed using tiles and ditches to drain the fields in order to make them more suitable for farming, particularly for row crops. Specifically, as illustrated by the accompanying diagram, the SCS's plan was designed to drain fields on the Homestead Farm labeled 3, 4, 6, 7, 8, 9, 10, and 11 in a southeasterly direction under South Hill Road and into an unnamed tributary located on the Murphy Farm in what was labeled field 14. From there, the unnamed tributary channeled the water drained from the Homestead Farm and the water from the Murphy Farm in a westerly direction across the Murphy Farm and into Elk Creek, located in what was labeled field 13. Elk Creek then flows in a northwesterly direction, under South Hill Road and onto the Homestead Farm before proceeding on to Lake Erie. As designed, the flow of water across the Murphy Farm was an integral part of the SCS's plan because the Murphy Farm acts as the conduit through which the Homestead Farm drains." *See Brace v. United States*, No. 98-897L (Aug. 4, 2006), Op. at 3.

authorized in order to transform the Murphy Farm into an effective and productive farming business. Between 1977 and 1985, Brace engaged in four separate projects to provide drainage to the Murphy Farm. Each of these projects was undertaken in coordination with the CSCD and SCS. All told, prior to 1985 Brace laid over 11,000 feet of pipe, tile and waterways.² By 1979, Brace's work on the drainage system resulted in the Murphy Farm being dry, except for times of excessive rainfall. By 1985, Brace's drainage work was complete and he resumed growing row crops on the Murphy Farm.

Once installed, the drainage system allowed Brace to, once again, raise row crops on the Murphy Farm. Like any successful row crop farmer, Brace had multiple fields on the Murphy Farm on which he rotated crops. The crops were rotated in order to maximize the utility of the soil. Thus, while cabbage may have been a profitable crop to grow in a given season, Brace would rotate it with other crops, on a seasonal basis, to preserve the soil's ability to nourish all crops. Brace engaged in this type of farming for many years, and effectively used the Murphy Farm as an income generating piece of property.

In sum, from 1979 through 1985, the Murphy Farm was dry and Brace was raising row crops on it and using it as pastureland, consistent with a USDA-developed conservation plan.

On August 31, 1988, Brace filed Form AD-1026 ("Highly Erodible Land and Wetland

² The Federal Court of Claims also made the following additional findings of fact: "In the spring of 1977, plaintiff decided to discontinue the grazing that had occurred on the Murphy Farm. From 1977 through 1979, he obtained technical and financial assistance from agencies within the USDA, including surveying and funding for installing an underground drain system. In particular, on March 7, 1977, Willie L. Ruffin, a District Conservationist with the ASCS, provided technical assistance in mapping out a drainage system entailing portions of both the Homestead and Murphy Farms. When completed on July 14, 1977, that plan entailed the installation of 4,920 feet of 4-inch underground drain tile, 50 feet of 6-inch steel pipe and 880 feet of 6-inch underground drain tile. On April 13, 1978, Mr. Ruffin provided technical assistance on a second drainage system. When completed on May 2, 1978, that system entailed the installation of 5,050 feet of 4-inch underground drain tile and 30 feet of 4-inch steel pipe outlets. On March 20, 1979, Lewis Steckler, another ASCS technician, provided technical assistance mapping out a third drainage system. When completed in July 1979, that system entailed the installation of 350 feet of 4-inch underground drain tile and 650 feet of six-inch underground drain tile. In addition, an 825-foot of sod waterway was constructed. As a result of these efforts, by the end of 1979, the site was dry, with the exception of times of excessive rainfall. Further maintenance on this drainage system was conducted in 1984, to repair damage from a flood. Sometime between July and October of 1984, the USDA provided funding for this maintenance, with officials in the local office of the ASCS operating on the view that farmers were exempt from the CWA." *See Brace v. United States*, No. 98-897L (Aug. 4, 2006), Op. at 5).

Conservation Certification”) and an accompanying form setting forth “Data Needed for Swampbuster Commenced and Third Party Determinations” with the USDA Agricultural Stabilization and Conservation Service (“ASCS”) to secure a determination that the Murphy and Homestead Farms had "gained the status of 'commenced conversion from wetlands' prior to December 23, 1985." (True and correct copies of 1988 documents are attached hereto as Exhibit B) This status would establish that Brace had begun converting wetlands on his property into more usable farmland prior to December 23, 1985, and thereby, allow him to complete that conversion and "produce an agricultural commodity without losing USDA benefits” for a ten-year period – i.e., until 1995. On September 7, 1988, the ASCS referred this application to the SCS. On September 15, 1988, the SCS District Conservationist made his determination, and on September 20, 1988, delivered that determination to Brace. ((Exhibit B). The determination was subsequently updated and confirmed on September 21, 1988, by Joseph Burawa, County Executive Director for the Erie County ASC Committee. (Exhibit B).³

The SCS Conservationist’s September 15, 1988 determination had been made with respect to “Farm 826, Tract 1356.” The SCS Map (Attached hereto as Exhibit C) and the USDA Farm Service Agency Map (Attached hereto as Exhibit D) each show Farm 826, Tract 1356 as encompassing both the Murphy and Homestead Farms. The SCS Conservationist’s September 15, 1988 determination indicates on Line 13 that Fields 1, 4, 6, 8, 10 and 13 of Farm 826, Tract 1356 had initially qualified as “prior converted wetlands” (‘PC’). (Exhibit B) Line 13, which falls under the category of “exempted wetlands,” states that “[t]he use, management,

³ The Federal Court of Claims had specifically noted the testimony Mr. Burawa had provided during the course of the proceedings: “At trial, Mr. Joseph Burawa, former County Executive Director for the USDA’s Agricultural Stabilization and Conservation Service (ASCS) in Erie County, testified that, from the 1960s to the 1980s, it was common for the USDA to assist farmers in installing drainage or ‘tile underdrain’ systems on farms in Erie County, noting that this was the ‘most popular practice.’ ‘During that era,’ he further testified, ‘I was aware of the fact that the government, through entitlements for tiling and diversions and conservation plans, there was money available for farmers to tile, to enhance their property, lower the water table if you will so they could actively farm that. Production agriculture.’” See *Brace v. United States*, No. 98-897L (Aug. 4, 2006), Op. at 3, fn 5.

drainage, and alteration of prior converted wetlands (PC) are not subject to FSA [Farm Security Act] unless the area reverts to wetland as a result of abandonment.” (*Id.*) The SCS Conservationists’ September 15, 1988 determination also indicates on Line 16 that Fields 14 and 15 of Farm 826, Tract 1356, which includes the site that is covered by the Consent Decree in dispute in this action, initially qualified as “converted wetlands” (‘CW’). Line 16, which falls under the category of “non-exempted wetlands, rendered “an agricultural commodity” planted on them ineligible under the FSA to receive USDA benefits. The SCS Map accompanying these initial determinations contained the respective “PC” and “CW” designations for the fields identified. (*Id.*)

Line 16, however, also directed applicants who “believe[d] that the [wetlands] conversion was commenced before December 23, 1985, [...to] contact the ASCS office to request a commenced [...] determination.” The SCS Conservationist’s September 15, 1988 determination documented at the bottom of Line 16 (“Commenced filed with ASCS”) that Brace had already filed (on August 31, 1988) a ‘commenced determination’ request with the ASCS to assess the status of Fields 14 and 15. (*Id.*)

On September 21, 1988, the County Executive Director for the Erie County ASC Committee confirmed the Soil Conservationist’s September 15, 1988 determination delivered to Brace on September 20, 1988, with respect to the status of Fields 1, 4, 6, 8, 10 and 13 as “prior converted wetlands.” In addition, the County Executive Director for the Erie County ASC Committee updated the Soil Conservationist’s determination with respect to Fields 14 and 15, which he determined also qualified as “prior converted wetlands.” (“After reviewing invoices that you submitted and concurrence with Lew Steckler, District Conservationist, SCS, the County Committee determined that conversion of the wetlands began before December 23, 1985, and will enable you to complete the conversion and produce an agricultural commodity on the

converted wetlands without losing USDA benefits. The County Committee determination is based on the following criteria (1) construction activities were actively started prior to December 23, 1985 as supported by invoices; (2) substantial funds have been expended in the wetlands for the direct purpose of converting the wetlands prior to December 23, 1985, as supported by invoices.”) The Erie County ASCS Office determination, in other words, confirmed that the entire Farm 826, Tract 1356, encompassing both the Murphy and Homestead Farms, qualified as prior converted farmlands within the meaning of the Farm Security Act of 1985. (*Id.*)

In sum, by September 21, 1988, Brace secured from USDA a positive “Swampbuster” determination confirming that all of the identified fields on the adjacent Murphy and Homestead Farms designated as comprising, in part, Farm 826, Tract 1356, qualified as “prior converted wetlands,” that were grandfathered under, and consequently, exempt from the provisions of the Farm Security Act of 1985.

The EPA’s Enforcement Actions and the Consent Decree

The Consent Decree which is the subject of the present enforcement action first became effective on September 23, 1996. Brace executed the Consent Decree with the United States under duress, fearing that that the ruling the U.S. Court of Appeals for the Third Circuit had issued against him on November 22, 1994 would require him to engage in significant remedial measures regarding the Murphy Farm. Said ruling had reversed the favorable December 17, 1993 decision of the U.S. District Court for the Western District of Pennsylvania that, after a trial on the merits, had previously dismissed the United States’ October 4, 1990 action against Brace alleging various violations of CWA Section 404. The District Court had dismissed the United States action based on its conclusion that Brace's activities on “farmed wetlands” were exempt under CWA Section 404(f)(1) and (2) from the permitting requirements of the CWA.

The Third Circuit had found Brace liable under CWA Section 404 for “the unpermitted discharge of pollutants by dredging, filling, leveling, and draining of waters of the United States,” which violations had arisen as the result of his construction and use of the drainage system installed on the Murphy Farm under USDA SCS, ASCS and CSCD auspices and authorization, and despite the ASCS’ and SCS’ determination that Brace’s construction and operation of the drainage system did not violate the CWA. In fact, in 1984, the ASCS requested that Brace conduct maintenance on a portion of the drainage system located on the Murphy Farm. The Third Circuit Court’s ruling was based on its conclusion that Brace had failed to show that “he qualified under Section 404(f)(1) for the normal farming activities exemption, and that the permit requirement was not ‘recaptured’ under Section 404(f)(2) of the CWA.” Neither the District Court nor the Third Circuit Court rulings, however, adequately addressed the fundamental threshold matter of whether Brace’s activities on the property in question qualified not as “farmed converted wetlands” requiring CWA permitting, but rather, as “prior converted wetlands” not included within the definition of “Waters of the United States,” and consequently, not subject to the CWA at all, because they were grandfathered by the Farm Security Act of 1985.

As a result of the Consent Decree, and actions mandated by the United States, Brace proceeded to remove miles of tile and disassemble the drainage system that he, in coordination with the ASCS and SCS, had previously constructed during the prior twenty-year period. Removal of this drainage system resulted in the Murphy Farm becoming unsuitable for farming. The actions that the EPA required Brace to undertake included the construction of a "check dam" on the Murphy Farm. The check dam, together with the excavation of trenches, the removal of literally miles of drainage tile and the filling in of surface ditches, resulted in regular flooding of the Murphy Farm. With the Consent Decree, EPA effectively sought to recreate a wetlands

condition that had not existed on the Murphy Farm since, at least, 1979 when the property had first been converted to dry cropland under USDA auspices and authorization, in direct contravention of USDA policy and ASCS/SCS determinations.

The increased saturation of the Murphy Farm, furthermore, caused the growth of vegetation and the migration of animals (e.g., beaver) that compounded the lack of utility of the land for any productive farming. Further, the "upland" portions of the Murphy Farm and the adjacent Homestead Farm that were not part of the 30-acre site referred to in the Consent Decree were flooded and rendered unusable by the EPA's expansive interpretation of the decree. Brace is not permitted to engage in any action that would cause the discharge of any pollutant, including fill, into the wetlands on the Murphy Farm. Once the drainage system was removed, the upland portions of the farm became highly erodible. As a result, the Consent Decree has rendered Brace unable to farm these areas.

In addition to what the Consent Decree mandated, what it did not contain is also highly relevant to the current motion. The Consent Decree does not precisely mark or otherwise define the "approximately 30-Acre" area to which it purports to apply. It does not contain any information about the condition to which the property is to be restored Consent Decree directs is designed to accomplish. For instance, it does not indicate a previous year to which the property condition was to be returned, or any other measurable or objective state by which Brace, or this Court, can adjudge whether the Consent Decree was resulting in over-enforcement. Furthermore, the Consent Decree does not provide for any periodic EPA compliance inspections and/or certifications of ongoing Brace compliance or noncompliance with the terms thereof. Moreover, it fails to provide for any procedural mechanism allowing the Parties to modify or adjust any one or more of its terms to account for changed physical circumstances, or for

relevant and applicable statutory and/or regulatory updates and changes, especially those validating the legality of Brace's normal farming operations and land use.

The Takings Case

As the result of the Consent Decree's over-enforcement, Brace was unable to use most of the Murphy Farm for farming. In order to address this issue, he filed a takings case in the Federal Court of Claims. The United States advanced a variety of arguments in its effort to avoid payment to Brace of "just compensation" under the Fifth Amendment of the U.S. Constitution for having required Brace to surrender his private property for a "public" use as a "wetlands." In particular, the Government argued that the Consent Decree imposed, in fact, a "fairly modest" restriction on the use of his property! Specifically, and because the Consent Decree failed to indicate the condition of the property to which the Murphy Farm was to be restored, the EPA provided expert testimony about that issue. Specifically, Jeffry Lapp of the EPA testified that the Consent Decree was only intended to return the Murphy Farm to the condition that existed in 1984.

Q: Now, what was the goal of this restoration plan

LAPP: The goal of this restoration plan was to restore the hydrologic drive back to this wetland system, and we used a target date of 1984. So it was to remedy those activities that occurred from 1884 onward.

Q: And why back to 1984

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

(Excerpts of Trial Testimony from Jeffrey Lapp, attached hereto as Exhibit E)

This point cannot be over-emphasized. In testimony before the Federal Court of Claims, addressing whether or not the Consent Decree was intended to render the entire Murphy Farm

unusable, the EPA's expert witness unequivocally stated that the Consent Decree was intended to return the Murphy Farm *to the condition that existed in 1984*. Additionally, Mr. Lapp testified that, if the Consent Decree was resulting in conditions that were not consistent with the 1984 condition (e.g. flooding, erosion of upland portions), then Brace had every ability to contact the EPA, and it would work with him to ensure that the Consent Decree was appropriately implemented so as to achieve only its desired condition – i.e. *the condition that existed in 1984*. (*Id.*)

Ultimately, the Federal Court of Claims denied Brace any compensation. In its opinion, the Court made express mention of the fact that the EPA had identified the condition to which the property was supposed to be returned (by year), and that if the EPA did not work with Brace to accomplish this the Court indicated that it “would not speculate as to what legal action would be appropriate if these [government] officials did not respond positively to an actual request [from Brace to remedy any unintended consequences of the restoration plan]” “” Indeed, Counsel Florentine of the U.S. Department of Justice had acknowledged during the Federal Court of Claims proceeding that, due to the Consent Decree's failure to properly define the portion of the Murphy Farm to be restored, the Third Circuit Court of Appeals opinion had been riddled with errors. “Now, in the Third Circuit opinion, the Court begins discussing ‘the site’ and ‘the property’ without defining it. About two-thirds of the way through, it says, ‘The site of 30 acres of wetland,’ but if that's defined as the site, then a number of the Court's statements are demonstratively incorrect.” (Excerpt of Takings Case record, attached hereto as Exhibit I)

Brace's Efforts to Work with the EPA

After the Court of Claims decision became final, and after exhausting his appellate rights, Brace began a multi-year effort to hold the EPA to its sworn Federal Claims Court testimony. He repeatedly contacted the EPA endeavoring to work with them to address the drastic results

the Consent Decree had caused (achieved). The EPA's enforcement of the Consent Decree had resulted in the Murphy Farm becoming a veritable swamp, with significant portions of it covered by water year-round. It took more than four years, for Brace to convince the EPA to honor its testimony and engage him on the issue of the Consent Decree causing conditions on the property that were entirely inconsistent with the condition that existed in 1984.

On July 24, 2012, several representatives of the EPA, and other agencies, along with other unrelated individuals, met with the Braces at the Murphy Farm. The EPA toured the Murphy Farm and the surrounding parcels to both observe the condition and discuss with Brace what steps he could take to address the condition that the Consent Order had caused. The EPA gave specific permission to Brace to perform activities that would result in draining portions of the Murphy Farm. These activities were permitted both on the Murphy Farm, and on the surrounding parcels. The EPA representative specifically told Brace that he could begin the work immediately, and that a formal letter memorializing this discussion would be forthcoming.

The EPA's Retraction of its Permission

After Brace had completed the work that the EPA specifically allowed, its counsel wrote to Brace advising him "Upon further consideration and review, the Government's field determination [made during the July 24, 2012 site meeting] was made in error." (August 29, 2013 Letter from EPA to Brace, attached hereto as Exhibit F). After issuing this letter, the EPA began a multi-year process of attempting to force Brace to recreate the flooding and related conditions that were inconsistent with the EPA's own testimony regarding the intent of the Consent Order. These efforts have now culminated in the present motion.

ARGUMENT⁴

Summary of Relevant Regulatory Scheme

In the District Court and Third Circuit Court actions that gave rise, in part, to the Consent Decree at issue in this case, the United States had argued that, “*Between 1985 and 1987,*” Brace had “discharge[d], dredge[d] and fill[ed] material into the site in three different ways [...] without a Clean Water Act permit. [...] First, Brace discharged fill material at the site by clearing, mulching, churning and levelling the formerly wooded and vegetated site. [...] Second, Brace discharged dredged material at the site by taking material dredged with a backhoe from Elk Creek and Elk Creek channels, which border the site, and spreading the dredged material with a bulldozer onto the site. [...] Third, Brace discharged dredged material at the site by causing excavation and the burying of approximately four miles of plastic tubing (known as ‘drainage tile’) at the site, in an effort to drain the site.” (United States Government’s Third Circuit Brief, attached hereto as Exhibit G, p. 11)

The United States, however, failed to adequately address the legal significance of the Swampbuster determination the U.S. Department of Agriculture’s Soil Conservation Service had made in 1988 with respect to the USDA-authorized activities Brace had engaged in between 1976 and 1985 on the property(ies) that is (are) the subject of this dispute, or of the USDA Agriculture Stabilization and Conservation Service (“ASCS”)’s subsequent confirmation and update of that determination.

The United States, furthermore, failed to address, at all, the legal significance of three federal agencies’ worth of continually changing regulations, guidance documents, publications, and Interagency Memoranda of Agreement (“MOAs”) addressing CWA compliance, especially with respect to the threshold issue of whether Section 404 applied as a matter of federal agency

⁴ This Argument Section is intended to be a summary of the arguments Brace will raise and, if the case is not resolved through ADR, Brace fully intends to amend and supplement his section.

jurisdiction for purposes of determining whether Brace was required to secure a CWA Section 404 permit for his ongoing farming operations and maintenance activities during the years for which EPA has/had alleged CWA violations (1985-1987). Indeed, numerous regulations had been issued in proposed, interim final and final forms (including some with retroactive interpretations) by: 1) USACE alone (*See, e.g.,* U.S. Department of Defense Corps of Engineers, Department of the Army, *Proposal To Amend Permit Regulations for Controlling Certain Activities in Waters of the United States*, 45 FR 62732 (Sept. 19, 1980); U.S. Department of Defense Corps of Engineers, Department of the Army, *Interim Final Rule for Regulatory Programs of the Corps of Engineers*, 47 FR 31794 (July 22, 1982); U.S. Department of Defense Corps of Engineers, Department of the Army, *Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States – Proposed Rule*, 48 FR 21466 (May 12, 1983); U.S. Department of Defense Corps of Engineers, Department of the Army, *Proposal to Amend Permit Regulations for Controlling Certain Activities in the Waters of the United States – Proposed Rule*, 49 FR 12660 (March 29, 1984); U.S. Department of Defense Corps of Engineers, Department of the Army, *Final Regulations for Controlling Certain Activities in the Waters of the United States – Final Rule*, 49 FR 39478 (Oct. 5, 1984); U.S. Department of Defense Corps of Engineers, Department of the Army, *Final Rule for Regulatory Programs of the Corps of Engineers – Final Rule*, 51 FR 41206 (Nov. 13, 1986);); 2) USACE together with EPA (**See, e.g.,* U.S. Department of Defense Corps of Engineers, Department of the Army and Environmental Protection Agency, *Proposed Rule for the Clean Water Act Regulatory Programs of the Army Corps of Engineers and the Environmental Protection Agency – Proposed Rule*, 57 FR 26894 (June 16, 1992); U.S. Department of Defense Corps of Engineers, Department of the Army and Environmental Protection Agency, *Clean Water Act Regulatory Programs – Final Rule*, 58 FR 45008 (Aug. 25, 1993)); 3) USACE, together with USDA and/or

EPA (See, e.g., *Memorandum of Agreement Between the Administrator of the Environmental Protection Agency and the Secretary of the Army* (March 24, 1980); *Memorandum of Agreement Between the Secretary of Agriculture and the Secretary of the Army on Permit Processing* (March 24, 1980); *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act* (Jan. 19, 1989); *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army, Clean Water Act Section 404(q):Memorandum of Agreement* (Aug. 11, 1992); U.S. Environmental Protection Agency, U.S. Department of Agriculture Soil Conservation Service and U.S. Department of Defense Corps of Engineers, Department of the Army, *Interagency Memorandum of Agreement Concerning Wetlands Determinations for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act – Notice*, 59 FR 2920 (Jan. 19, 1994)); and 4) by USDA (See, e.g., U.S. Department of Agriculture Soil Conservation Service, *Support Activities; Compliance With NEPA – Final Rule*, 44 FR 44464 (July 30, 1979); U.S. Department of Agriculture Soil Conservation Service, *Support Activities; Compliance With NEPA – Proposed Rule*, 46 FR 52119 (Oct. 26, 1981); U.S. Department of Agriculture Soil and Conservation Service, *Support Activities: Compliance With NEPA – Final Rule*, 47 FR 34111 (Aug. 6, 1982); U.S. Department of Agriculture, Office of the Secretary and Farmers Home Administration, *Highly Erodible Land and Wetland Conservation – Interim Rule*, 51 FR 23496 (June 27, 1986); U.S. Department of Agriculture Soil Conservation Service, *Conservation Operations; Reconsideration and Appeal Procedures*, 51 FR 26535 (July 24, 1986); U.S. Department of Agriculture, Office of the Secretary and Farmers Home Administration, *Highly Erodible Land and Wetland Conservation – Interim Rule; Correction*, 51 FR 29901 (Aug. 21, 1986); U.S. Department of Agriculture, Office of the Secretary, *Highly*

Erodible Land and Wetland Conservation; Request for Comments – Interim Rule, 52 FR 24132 (June 29, 1987); U.S. Department of Agriculture, Office of the Secretary, *Highly Erodible Land and Wetland Conservation – Final Rule and Notice of Finding of No Significant Impact*, 52 FR 35194 (Sept. 17, 1987); U.S. Department of Agriculture Soil Conservation Service, *Revisions in the Conservation Operations Reconsideration and Appeal Procedures – Final Rule*, 53 FR 1605 (Jan. 21, 1988); U.S. Department of Agriculture Office of the Secretary, *Highly Erodible Land and Wetland Conservation; Correction – Final Rule; Correction*, 53 FR 3997 (Feb. 11, 1988); U.S. Department of Agriculture, Farmers Home Administration, *Highly Erodible Land and Wetland Conservation*, 53 FR 7330 (March 8, 1988); U.S. Department of Agriculture, Office of the Secretary, *Highly Erodible Land and Wetland Conservation – Interim Final Rule With Request for Comments*, 61 FR 47019 (Sept. 6, 1996); U.S. Department of Agriculture Natural Resources Conservation Service, *Protection of Wetlands – Final Rule*, 62 FR 61215 (Nov. 17, 1997)), before, during and after the period of alleged violations and subsequent litigation. In addition to these regulations and MOAs, multiple federal agencies’ guidance documents (*See, e.g.,* U.S. Army Corps of Engineers, *Regulatory Guidance Letter 90-07, Subject: Clarification of the Phrase “Normal Circumstances” as it Pertains to Cropped Wetlands* (Sept. 26, 1990)) and explanatory publications (*See, e.g.,* U.S. Environmental Protection Agency Office of Water, *Agriculture and Wetlands: Finding Common Ground*, EPA 503/9-92/003A (June 1992); U.S. Environmental Protection Agency Office of Water, *Agriculture and Wetlands: Section 404 and Swampbuster*, EPA 503/9-92/003D (June 1992); U.S. Environmental Protection Agency Office of Water, *Agriculture and Wetlands: Section 404(f) Exemptions and Nationwide General Permits*, EPA 503/9-92/003F (July 1992); USDA Natural Resources Conservation Service, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency and U.S. Fish and Wildlife Service, *Wetlands and Agriculture: Section 404 of the Clean Water Act; Swampbuster in the*

Food Security Act, Program Aid 1546 (May 1995)) publications were, in various ways, inconsistent and conflicting with each other, creating confusion for Brace and the national, regional and local farming communities.

The Conduct at Issue in the EPA's Motion was Expressly Permitted by the EPA

By the time Brace filed his claim with the Federal Court of Claims, and throughout that case, the property at issue was experiencing hydrologic conditions that were not present in 1984. These conditions were directly caused by the EPA's enforcement of its interpretation of the Consent Decree, and rendered the property entirely unusable. To avoid having to pay just compensation to Brace for the consequences of the Decree, the EPA offered testimony that clearly indicated two key points:

1. The Consent Decree was intended to return the Murphy Farm to the condition that existed in 1984; and
2. If the Consent Decree was causing the property to be in a different condition (e.g. flooding and upland erosion), then the EPA would work collaboratively with Brace to remedy that issue.

As noted above, the Court specifically called out this testimony in its ultimate opinion, noting that, if the EPA did not work with Brace to address any unintended consequences from the Consent Decree, then the Court would not speculate as to what legal actions may be appropriate.

After the Takings Claim was completed, Brace spent years attempting to get the EPA to meet with him to discuss the possibility of modifying the Consent Decree to address this over-enforcement. Ultimately, it took more than four (4) years to have the EPA to visit the site of the Murphy Farm to directly assess the flooding and other conditions triggered by the Consent Decree.

In July, 2012, that meeting occurred. The purpose of that meeting was to specifically identify the work that Brace could perform to comply with the EPA's testimony that the Murphy

Farm was intended to be in the condition that was present in 1984. That meeting resulted in the EPA representatives permitting very specific work. It was not all that was needed, but, at the time, it represented a good start in trying to get the Murphy Farm (and by this point, the adjacent properties, including the Homestead Farm) back to the condition that existed in 1984. The EPA representatives also told Brace that he could begin the work right away, and that a letter confirming that instruction would be forthcoming. Following that 2012 meeting, Brace proceeded to comply with those EPA instructions and performed the precise work that he discussed with the EPA during that 2013 meeting. More than a year later, counsel for the EPA wrote to Brace advising him that, essentially, the EPA representatives had been mistaken and that he now needed to undo all of the work that he had performed. (Exhibit F)

Essentially, the EPA testified that the Consent Decree was designed to do nothing more than obtain the condition that existed in 1984. The EPA also assured the Court that it would work with Brace to accomplish this intent. Then, when the EPA finally found the time to meet with Brace and discuss this, they provided him with specific permission to take certain actions – only to expressly revoke that permission after he had taken those actions.

The EPA now seeks to force Brace to engage in “remediation” and pay exorbitant penalties for doing nothing more than taking actions that were consistent with the EPA’s testimony and in detrimental reliance upon EPA’s express authorization conveyed by EPA personnel during an on-site visit.. Such behavior by the United States not only reflects bad faith on behalf of the government, but also gives rise to equitable estoppel against the government. The facts related to this issue must be obtained and developed through discovery, but the inconsistent positions taken by the government raise this issue. See, e.g., *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009) (“To apply equitable estoppel against the government, a party must show that (1) there was a definite representation to the party claiming

estoppel, (2) the party relied on its adversary's conduct in such a manner as to change his position for the worse, (3) the party's reliance was reasonable and (4) the government engaged in affirmative misconduct."); *see also GAO v. Gen. Accounting Office Pers. Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983) ("Estoppel generally requires that government agents engage—by commission or omission—in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result.")

The Consent Decree is both Patently and Inherently Ambiguous

The United State's motion is entirely premised on a Consent Decree that does not contain any of the following necessary elements:

1. An identification of the actual location and precise size of the area covered by the Consent Decree
2. An indication of the property status that was sought through the Consent Decree
3. A system for monitoring the impact of the Consent Decree to ensure that its specific requirements did not exceed its permissible scope; and
4. A time frame in which the Consent Decree restrictions would be lifted and the property at issue could be managed in accordance with applicable statutes and regulations

The absence of these provisions renders the Consent Decree ambiguous and, unenforceable without modification. "A consent judgment is to be interpreted as a contract, to which the governing rules of contract interpretation apply." *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 148 (3d Cir. 1994). The court is therefore required to interpret the consent decree "to give effect to the parties' 'objective manifestations of their intent' rather than attempt to ascertain their subjective intent." *Griesmann v. Chemical Leaman Tank Lines, Inc.*, 776 F.2d 66, 72 (3d Cir. 1985) (citing *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1009 (3d Cir. 1980)). "A consent decree must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Harris v. City of Philadelphia*, 47 F.3d at 1350 (citing *United States v. Armour & Co.*, 402 U.S. 673, 682,

29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)). Any ambiguities must be interpreted in favor of the party against whom the consent decree is sought to be enforced. *Harris v. City of Philadelphia*, 47 F.3d at 1350.

The ambiguity of the Consent Decree is evidenced by the fact that, in the Takings Claim, the EPA needed to offer testimony regarding what condition the Consent Decree was intended to accomplish. The Decree itself does not provide any objective information by which Brace, a Court, or any other third party, can identify where the “approximately 30 acre” portion of property is located, and what condition that property needs to be in to meet the Decree’s requirements.

In the Takings Claim, the EPA clarified this order by stating that it was intended to create the condition that existed on the property in 1984. That condition was dry and harvestable. By 1984, the Murphy Farm was farmable. Further evidence of the ambiguity of the Decree comes from the fact that the EPA itself cannot decide what Brace can and cannot do to meet its requirements. In 2013, the EPA expressly allowed Brace to conduct activities that were intended to bring the property closer to the dry condition that existed in 1984. Months after that, and continuing through today, the EPA is now taking the position that Brace needs to undo the work that it previously allowed, and potentially take other steps that will now recreate the flooding and other conditions that the EPA testified were not intended under the Consent Decree.

The EPA is not Entitled to the Relief it Seeks Based on the Inconsistencies that Encompass this Matter

As detailed above, from the factual history, to the Consent Decree to the varied positions the EPA has taken since this matter began, the regulatory inconsistencies that existed during the relevant period of time, Brace has been subjected to inconsistent requirements and expectations. As described above, Brace had the USDA, through the SCS and ASCS, providing Brace with determinations that the farms at issue had been converted prior to December 23, 1985 and,

therefore, were not subject to the acts and regulations upon which the EPA was relying. Further, and as is summarily described above the regulations, guidance, and other directives from agencies with authority over the issues in this case were relevantly inconsistent. Brace intends to further identify and uncover these regulatory inconsistencies through discovery.

The pervasive inconsistencies caused by the government preclude it from obtaining the relief it now seeks from Brace. When federal regulations and guidance are changed or otherwise inconsistent, an individual should be entitled to fair notice of the relevant agency's interpretation before he or she can be forced to act in conformity with that interpretation. *United States v. Chrysler Corp.*, 158 F.3d 1350, 1357 (D.C. Cir., 1998); *see also Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987); *Rollins Envtl. Serv. Inc. v. EPA*, 937 F.2d 649, 654 (reversing the imposition of penalties on a party where the regulation at issue was susceptible to two different interpretations); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995)..

Further, the inconsistencies between the various agencies interpretations of the rules and requirements applicable to the circumstances present in this case, require that the Court engage in a *de novo* review of those rules and regulations to determine, without deference to the any agency interpretation, the proper interpretation of the regulations. "The mere fact that there could be conflicting regulations and interpretations thereof from multiple federal agencies should preclude *Chevron* deference." *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 85 (3d Cir. 2007).

CONCLUSION

For the foregoing reasons, the government's Motion to Enforce Consent Decree should be denied. Further, Brace expressly reserves the right to amend and supplement this response in the event this matter proceeds beyond mandatory ADR.

Respectfully submitted,

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, New York, 10017

(t)212 644-9240

Email: lkogan@koganlawgroup.com

Attorneys for Defendants,
Robert Brace and Robert Brace Farms,
Inc.

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
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Email: ndevlin@kmgslaw.com

Attorneys for Defendants,
Robert Brace and Robert Brace Farms,
Inc.

1991 Depo Ex. 11

SCS-40
(1-56)

SOIL AND WATER CONSERVATION PLAN

SOLD TO ROBERT BRACE

Charles T. Brace # 1406

Cooperator

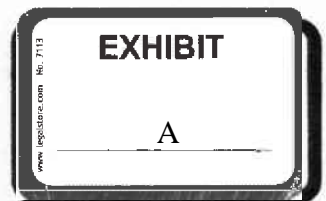
Erie County

SOIL CONSERVATION DISTRICT

Assisted by

UNITED STATES DEPARTMENT OF AGRICULTURE

SOIL CONSERVATION SERVICE



B 0130

Chas Brass 60-40

141,


B0131


Pa-5
(11-15-54)


LAND USE CAPABILITY CLASSES SHOWN IN COLOR


CHECK THE COLORED MAP OF YOUR FARM WITH THE COLOR DESCRIPTION BELOW.


The capability class shown by color is normally the most intensive use that should be made of the land if it is to remain productive.


 Land that is suitable for intensive cultivation with no special conservation hazards. Nearly level, deep well-drained soils which need only ordinary farming practices to maintain soil structure and organic matter.


 Land that is suitable for fairly intensive cultivation but needs some simple conservation treatment or has some natural limitation on its use. One example is gently sloping land that needs strip-cropping and simple water management practices. Another is land with fairly good drainage but not good enough for best yields of crops which require good drainage. Good rotations, proper fertilization and maintenance of organic matter are essential.

 Land that is suitable for cultivation but needs intensive conservation practices. For example, moderately sloping land that needs strip-cropping supplemented by diversions and with a fairly long rotation; or wet land which requires intensive drainage systems for good crop production; or shallow land which limits crop production due to low moisture capacity.

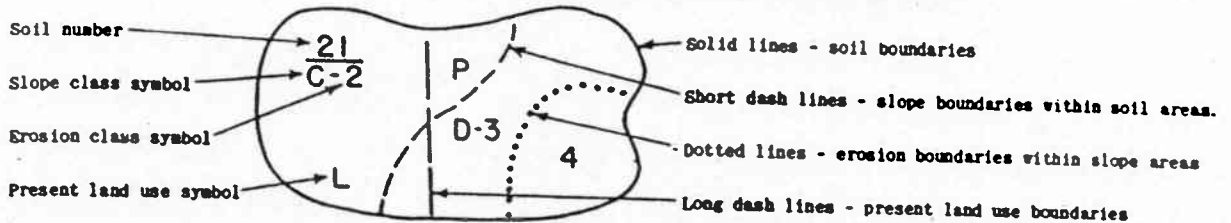
 Land that is suitable for hay or pasture and for limited cultivation. An example is steep eroded land which needs thorough protection from erosion. Other land in this class includes wet land that can be drained sufficiently for some hay crops but not for cultivation in most years. It may have enough stones to make plowing difficult.

 Land that, because of its severe natural limitations such as steepness, stoniness, wetness or erosion, is not suitable for cultivation, but can be best used for pasture or woodland with moderate use of conservation practices.

 Land that is suitable for woodland or wildlife but usually not suitable or easy to use as pasture. It includes very steep land, very badly eroded land, and very stony land.

 Land that is suitable in some cases for wildlife production or recreational uses. It is not suitable for cropland, pasture land or commercial woodland production. Some examples are rocky upper slopes of mountains, coal mining wastes which do not support vegetation, large quarries, and gravel bars along rivers and creeks.

MEANING OF BLACK SYMBOLS AND LINES ON YOUR COLORED MAP



SOIL - Number above line or first part of three part symbol.
*See soils description below.

SLOPE - Letter below line or letter in two part symbol.

EROSION - Number below line or number alone.

- A - Level or nearly level
- B - Gently sloping
- C - Moderately sloping
- D - Strongly sloping
- E - Steep
- P - Very steep

- 1 - Slight erosion
- 2 - Moderate erosion
- 3 - Severe erosion
- 4 - Very severe erosion

THE PRESENT USE OF THE LAND ON YOUR FARM IS INDICATED BY THE FOLLOWING LETTERS:
























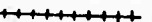










- L - Cultivated land.
- P - Pasture land.
- P - Woodland.
- X - Idle land.
- H - Homestead.

*DESCRIPTION OF THE SOILS FOUND ON YOUR FARM.

B0133

- 74. RED HOOK LOAM - Deep, poorly drained soil over sand and gravel. High water table limits root growth. Usually possible to drain.
- 207. PAPAATING SILTY CLAY LOAM - Deep soil found along streams; poorly drained and frequently flooded. Moderate natural fertility but poor drainage limits the root zone.
- 277. HOWARD GRAVELLY SILT LOAM - Deep well drained gravelly soil over sand and gravel with lime at six feet. High natural fertility.
- 278. PHELPS GRAVELLY SILT LOAM - Deep, moderately well drained gravelly soil over sand and gravel with lime at six feet; high natural fertility.

LEGEND FOR CONSERVATION PLAN MAP

	Terrace		Public highway - Hard surface
	Diversion terrace		Public highways - Dirt
	Open field drain		Private roads
	Header ditch		House
	Tax ditch		Farm buildings
	Covered drain		Watershed boundary
	Structure (temporary or permanent)		Farm boundary
	Channel clearing		Crop boundary (no fence)
	Constructed outlets - paved		Present permanent fence
	Constructed outlets - vegetative		New fence to be built
	Wind breaks		Fence row to be removed
	Streambank protection (Hatching indicates streamside requiring protection)		Railroad
	Hedges		Marsh or swamp
	Wildlife borders		Farm pond
	Connected areas		Field number
	Intermittent streams		Field acreage
	Streams		Spring

B0134

PLAN OF CONSERVATION OPERATIONS

Field No.	Amount Unit	Year	Cooperator Decisions
2,5	Acres 14	1962 1964	<p>HAYLAND</p> <p><u>Hayland Planting</u></p> <p>Line and fertilize according to soil test.</p> <p>Seed mixture per acre:</p> <p>6 lb. Birdsfoot trefoil 4 lb. Timothy</p> <p>When preparing the seed bed, plow down 500 lbs. of 0-20-20 per acre. At time of seeding use 300 lbs. of 5-10-10 per acre.</p> <p>Apply after first or succeeding harvest or grazing 400 lbs. of 0-15-30 fertilizer per acre.</p>
2,3,4,5, 6,9,10, 11,12	65	1962	<p><u>Hayland Management</u></p> <p>Continue using present management.</p> <p>Apply after first or succeeding harvest or grazing 400 lbs. of 0-15-30 per acre.</p> <p>When necessary to reseed plant to a rotation of corn, small grain</p>
7	2	1963	<p>PASTURE</p> <p><u>Land Clearing</u></p> <p>Remove trees and brush.</p>
7	5	1963	<p><u>Pasture Renovation</u></p> <p>Disc to kill existing vegetation. Lime and fertilize according to soil test.</p> <p>Seed mixture per acre:</p> <p>6 lb. Birdsfoot trefoil 4 lb. Timothy</p>
7	5	1968	<p>Liming - Check lime requirement every 5 years and lime according to test.</p>

U. S. Department of Agriculture
Soil Conservation Service
Harrisburg, Pennsylvania

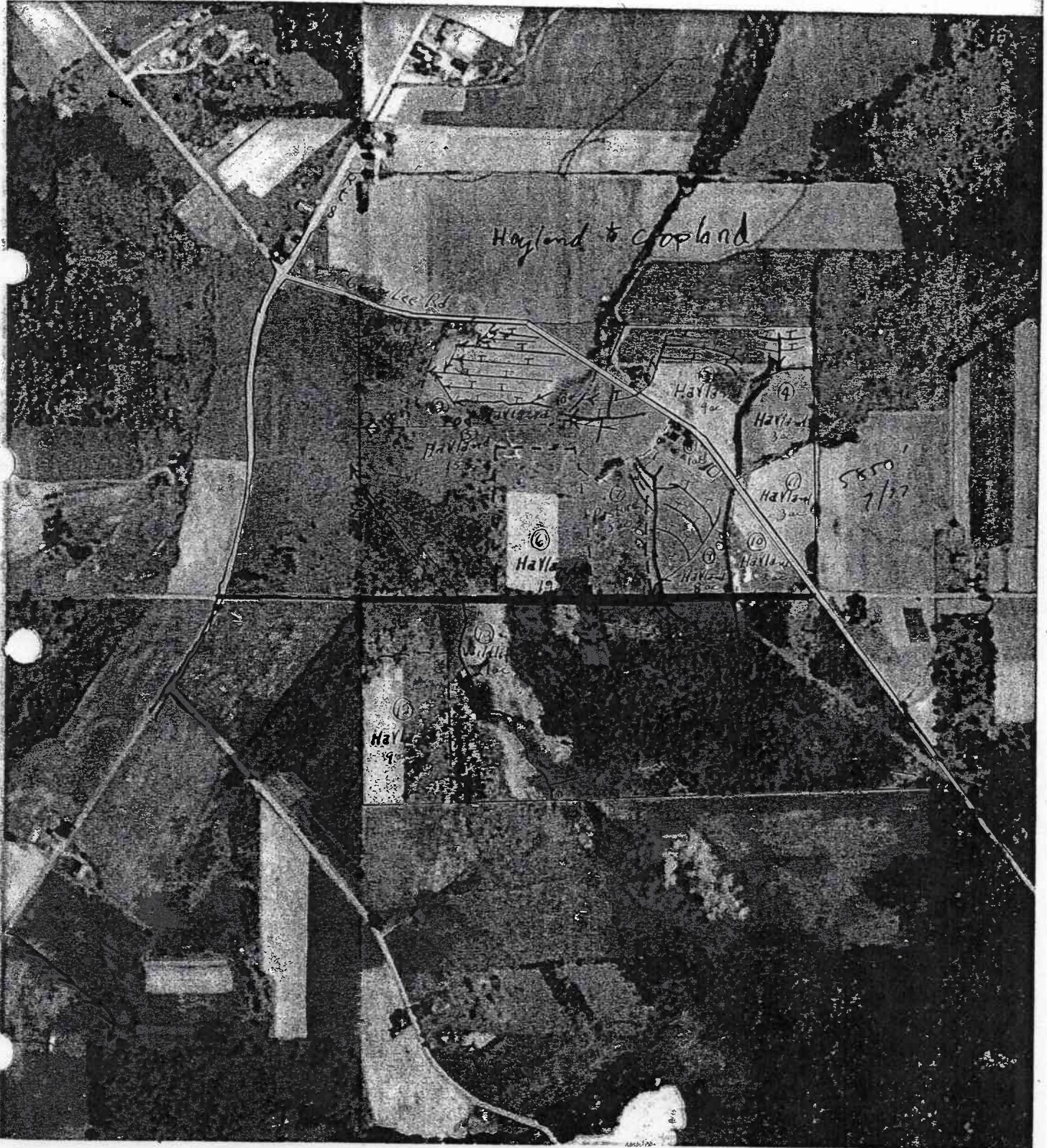
B0135

CONSERVATION PLAN MAP

Prepared by U. S. Department of Agriculture, Soil Conservation Service, cooperating with

Owner Robert T. Brace	Address RD#4 Waterford, Pa.	Erie	Soil Conservation District
Operator same	Address		Phone SW 4-5491
Township Waterford	County Erie	State Pa.	Phone
Photo No. 3 G-137	Acres 134	Planner LV. Johnson	Plan No. 1406
			Date Prepared 12/19/61

Scale: 1" = 660', App.



PLAN OF CONSERVATION OPERATIONS

Field No.	Amount Unit	Year	Cooperator Decisions
7	Acres 5	1963	<p>PASTURE Continued</p> <p>Fertilizing - Top dress annually with 400 lbs. of 0-15-30 per acre.</p> <p><u>Pasture Mowing</u></p> <p>Clip at least twice annually - mid-May and August, to remove rank growth and keep down weeds.</p>
1,13	24	1962	<p>WILDLIFE</p> <p><u>Wildlife Area</u></p> <p>Leave field # 1 as is in field # 13. There is a possibility of constructing a dike and providing a pond or area for wild ducks. Consult the Pennsylvania Game Commission for more information.</p>
2,5	L.Feet 900	1962	<p>STRUCTURAL</p> <p><u>Field Drains</u></p> <p>Construct open drain where shown on conservation plan map. Line according to soil test. Apply 1000 lbs. of 0-20-20 per acre and work into soil before seeding. Apply 600 lbs. of 10-10-10 and 10 tons of manure per acre, and work into soil before seeding.</p> <p>Seed mixture per acre:</p> <ul style="list-style-type: none"> 25 lb. Reed Canary grass 5 lb. Red top 7 lb. Birdsfoot trefoil <p>Check lime requirements every 5 years. Top dress annually with 400 lbs. of 10-10-10.</p>
3,5,9	4270	1962 1964	<p><u>Tile Drains</u></p> <p>Install tile drain where indicated on conservation pl. map.</p> <p>When necessary the U. S. Soil Conservation Service will be contacted for designs, plans, and other engineering assistance in establishing the planned conservation practices.</p>

U. S. Department of Agriculture
Soil Conservation Service
Harrisburg, Pennsylvania

B013

PA-4 (Revised)
2/19/60

FARM ORGANIZATION SUMMARY

GRAIN, HAY & SILAGE

Crop	Acres	Yield	Amount
Corn Silage	13.2	11 T	145.2 T
Sm. Grain	13.2	55 bu	726 bu
Grass silage	30	8.5 T	255
Alfalfa Hay (1st cutting)	12.8	3 T	38.4 T
Alfalfa Hay (2nd cutting)	42.8	1.5 T	64.2 T
Birdsfoot trefoil Hay	10.	2.5	25.0 T

PASTURE

Kind of Pasture	Acres	Yield-A.U. Ac.	Animal Units
Birdsfoot trefoil	5	.85	4.3

FEED REQUIREMENTS

Livestock	No.	Grain (Bu. C.E.)	Hay (tons)	Silage (tons)	Pasture (A.U.)
Dairy cows	36	1,260	155	463	
Dairy replacements	33	230	23	34.5	11.5
Ponies	9	135	10		4.5
Total Feed Requirements		1,625	188	497.5	16.
Total Feed Available		726	127.6	400.2	4.3
Difference (+ or -)		- 899	-60.4	-97.3	-11.7

Remarks: Pasture for young stock rented. Cows fed in lot, not put on pasture. Silage & hay requirements doubled. Extra land is rented.

U. S. Department of Agriculture
Soil Conservation Service
Harrisburg, Pennsylvania

B 0138

1406

CONSERVATION AGREEMENT

Between

Erie COUNTY SOIL CONSERVATION DISTRICT

and

Charles T. Brace

I am interested in conserving the soil of my farm. I, therefore, desire assistance in developing a basic conservation plan for my farm. I will cooperate with the Board of Directors of my soil conservation district in the development of such a plan, which I understand will be based on the capabilities of the land and the needs of my farm enterprise. I will also cooperate in bringing about the land use adjustments and the establishment of the conservation practices which I decide to develop in my conservation farm plan.

We the Directors of our soil conservation district will furnish assistance in helping to develop a farm conservation plan and in helping to establish the conservation measures called for in the plan in accordance with our resources and operating policies at the time the work is to be done.

The plan will remain in effect until terminated in writing by either party.

12/14/61
(Date)

Charles T. Brace
(Farmer)

Waterford
(Township)

RD #4 Waterford
(Address)

134
(Acres)

Erie County Soil Conservation District

1-25-62
(Date)

Harry E. Rye
(Director)

(Over)

B 0139

Erie County ASCS Office
R.D.#5 Route 19
Waterford, PA 16441
Telephone 796-6760

September 21, 1988

Robert H. Brace
Box 338
Waterford, PA 16441

Dear Mr. Brace:

The Erie County ASC Committee, at their regular meeting on September 14, 1988, reviewed your request for Swampbuster Commenced for your farm, serial number 826, tract 1356.

After reviewing invoices that you submitted and concurrence with Lew Steckler, District Conservationist, SCS, the County Committee determined that conversion of the wetlands began before December 23, 1985, and will enable you to complete the conversion and produce an agricultural commodity on the converted wetlands without losing USDA benefits.

The County Committee determination is based on the following criteria (1) construction activities were actively started prior to December 23, 1985 as supported by invoices; (2) substantial funds have been expended in the wetlands for the direct purpose of converting the wetlands prior to December 23, 1985, as supported by invoices.

Please contact this office if you have further questions.

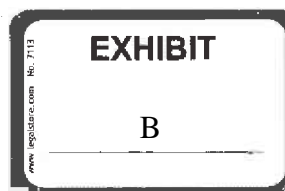
Sincerely,



Joseph Burawa, County Executive Director
For: Erie County ASC Committee

Enclosure

CC: Lew Steckler, D.C., SCS



U.S. DEPARTMENT OF AGRICULTURE
Agricultural Stabilization and Conservation Service

1. STATE NAME PA	2. COUNTY NAME Erie
3. FARM NUMBER 826	

DATA NEEDED FOR SWAMPBUSTER COMMENCED AND THIRD-PARTY DETERMINATIONS

4. NAME AND ADDRESS OF PRODUCER
Robert H. Brace
Box 338
Waterford, PA 16441

5. TELEPHONE NUMBER (Area Code)
814-796-2529

6. GIVE LEGAL DESCRIPTION OF AREAS
(Attach a photo copy and identify areas)
Erie County, Waterford Township
on South Hill Rd., east of
Sharp Rd. ASCS tract 1356

	YES	NO
7. Has a wetland determination been completed by SCS? (If no, a wetland determination is needed to consider a commencement request.) (If yes, are the areas in question determined to be wetlands.)	X	
8. Has any action (dirt moved) been taken to convert the wetland(s)? (If yes, what date <u>4-28-77</u> and what action was taken to convert the wetland(s) <u>ditching, tile, dozing</u>)	X	
9. What information is available to document the action to convert the wetland and the date? (For example, ASCS photos, canceled checks, contracts, who completed the work, etc.)	X	
10. Have you spent or legally committed substantial funds for "supplies or materials for the primary and direct purpose of converting the wetland" prior to December 23, 1985? Equipment purchases, such as tractors or scrapers, do not apply. Expenses for planning, such as attorney's fees, mileage, telephone calls, or surveying, do not apply. Data materials were purchased <u>4-28-77</u> through <u>5-8-87</u> and the amount <u>28524.00</u>	X	

11. Provide copies of documentation; such as canceled checks, invoices, etc. Date a contract to move dirt was entered into _____
Provide a copy of the contract. Breakdown, by amount to whom the funds were committed and the purpose of each.

NAME OF INDIVIDUAL(S) FUNDS COMMITTED TO AND PURPOSE OF EACH	AMOUNT	TOTAL PROJECT COSTS	FUNDS COMMITTED TO DATE
A	B	C	D
Statements attached	28524.00		28524.00

12. Explain what has been done to establish the fact that you have actively pursued the completion of the project.
Purchased home farm in 1976. Work is continuous, substantiated by invoices

13. Has a crop been planted in the wetland in the current year? (If yes, what date May 1987)

14. Is the request within the boundary of a drainage district? (If yes, a detailed plan must be submitted.)
No

15. Is this a request for an exemption because of a third-party drainage? (If yes, provide full details of why and how you were not involved, in any way, with the drainage of the wetland.)
YES NO

16. SIGNATURE OF PRODUCER Robert H. Brace DATE Aug. 31, 1988

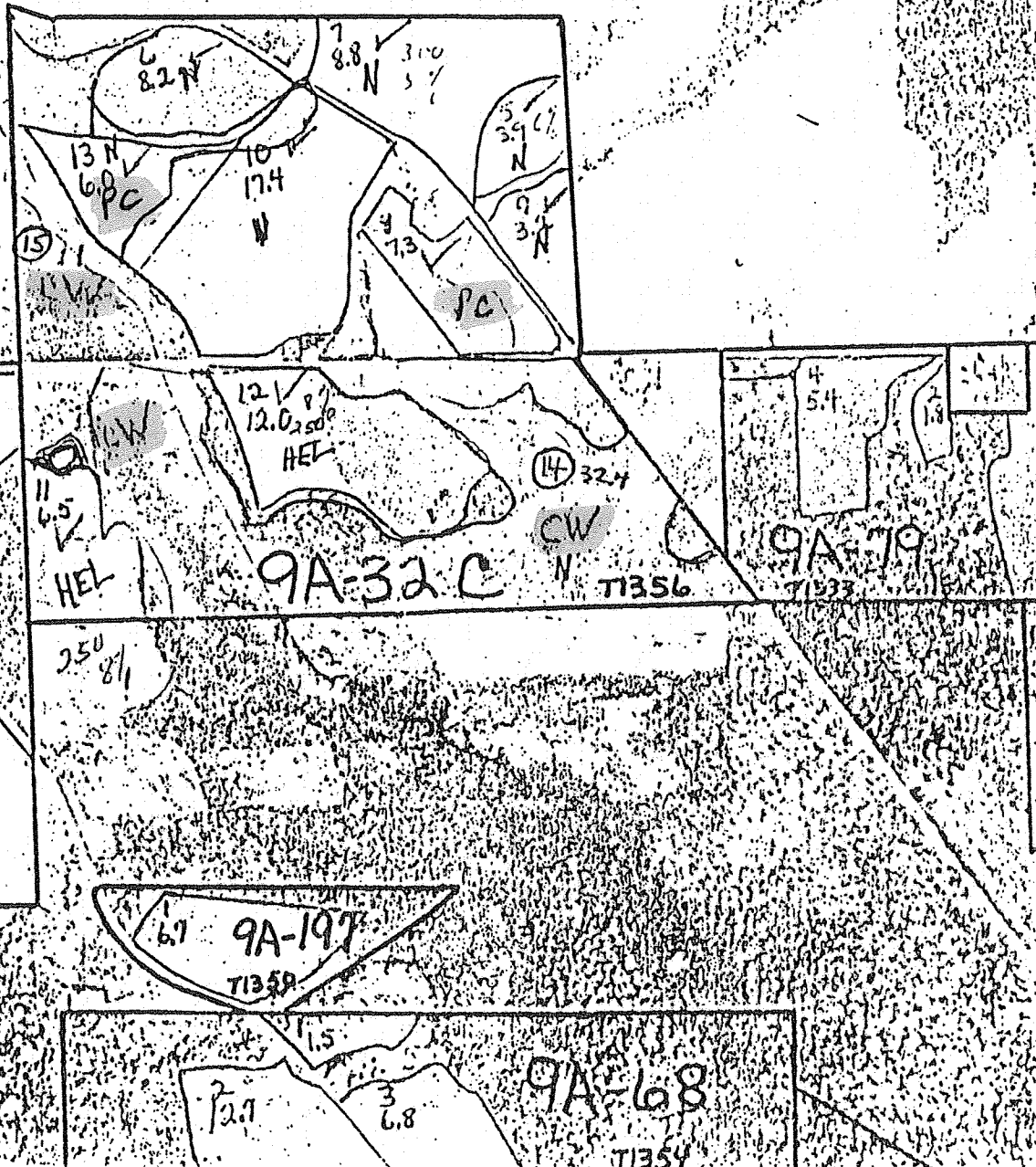
NOTE: The granting of a commencement or third-party request does not remove other legal requirements that may be required under State or Federal water laws.

This form must be filed no later than September 19, 1988. No commencement requests will be considered after this date.
Appraisal com meeting 7-14-88

This program or activity will be conducted on a nondiscriminatory basis without regard to race, color, religion, national origin, age, sex, marital status, or handicap.

32 Robert H. Brace
9A (c) M-11
(826) A

NOT TO SCALE



S.D.A. Soil Conservation Service HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION	SCS-CPA-026 (1-88)	1. Name and Address of Person <i>Robert H. Brose</i> <i>Box 33B</i> <i>Waterford, Pa 16441</i>	2. Date of Request <i>9-7-88</i>
3. County <i>Eric</i>		5. Farm No. and Tract No. <i>826 T 1356</i>	
4. Name of USDA Agency or Person Requesting Determination <i>ASCS</i>			

SECTION I - HIGHLY ERODIBLE LAND

Is soil survey now available for making a highly erodible land determination?	Yes	No	Field No.(s)	Total Acres
	<input checked="" type="checkbox"/>			
Are there highly erodible soil map units on this farm?	<input checked="" type="checkbox"/>			
List highly erodible fields that, according to ASCS records, were used to produce an agricultural commodity in any crop year during 1981-1985.			<i>11, 12</i>	<i>18.5</i>
List highly erodible fields that have been or will be converted for the production of agricultural commodities and, according to ASCS records, were not used for this purpose in any crop year during 1981-1985; and were not enrolled in a USDA set-aside or diversion program.				

6. This Highly Erodible Land determination was completed in the: Office Field

NOTE: If you have highly erodible cropland fields, you may need to have a conservation plan developed for these fields. For further information, contact the local office of the Soil Conservation Service.

SECTION II - WETLAND

11. Are there hydric soils on this farm?	Yes	No	Field No.(s)	Total Wetland Acres
	<input checked="" type="checkbox"/>			
List field numbers and acres, where appropriate, for the following EXEMPTED WETLANDS:				
12. Wetlands (W), including abandoned wetlands, or Farmed Wetlands (FW). Wetlands may be farmed under natural conditions. Farmed Wetlands may be farmed and maintained in the same manner as they were prior to December 23, 1985, as long as they are not abandoned.				
13. Prior Converted Wetlands (PC) - The use, management, drainage, and alteration of prior converted wetlands (PC) are not subject to FSA unless the area reverts to wetland as a result of abandonment. You should inform SCS of any area used to produce an agricultural commodity that has not been cropped, mowed, or maintained for 5 years or more.			<i>1, 4, 6, 8, 10, 13</i>	
14. Artificial Wetlands (AW) - Artificial Wetlands includes irrigation induced wetlands. These Wetlands are not subject to FSA.				
15. Minimal Effect Wetlands (MW) - These wetlands are to be farmed according to the minimal effect agreement signed at the time the minimal effect determination was made.				

NON-EXEMPTED WETLANDS:

16. Converted Wetlands (CW) - In any year that an agricultural commodity is planted on these Converted Wetlands, you will be ineligible for USDA benefits. If you believe that the conversion was commenced before December 23, 1985, or that the conversion was caused by a third party, contact the ASCS office to request a commenced or third party determination.			<i>14, 15</i>	<i>43.4</i>
--	--	--	---------------	-------------

Commenced filed with ASCS

17. The planned alteration measures on wetlands in fields _____ are considered maintenance and are in compliance with FSA.

18. The planned alteration measures on wetlands in fields _____ are not considered to be maintenance and if installed will cause the area to become a Converted Wetland (CW). See Item 16 for information on CW.

19. This wetland determination was completed in the: Office Field

20. This determination was: Delivered Mailed To the Person on Date: *9-30-88*

NOTE: If you do not agree with this determination, you may request a reconsideration from the person that signed this form in Block 22 below. The reconsideration is a prerequisite for any further appeal. The request for the reconsideration must be in writing and must state your reasons for the request. The request must be mailed or delivered within 15 days after this determination is mailed to or otherwise made available to you. Please see reverse side of the producer's copy of this form for more information on appeals procedure.

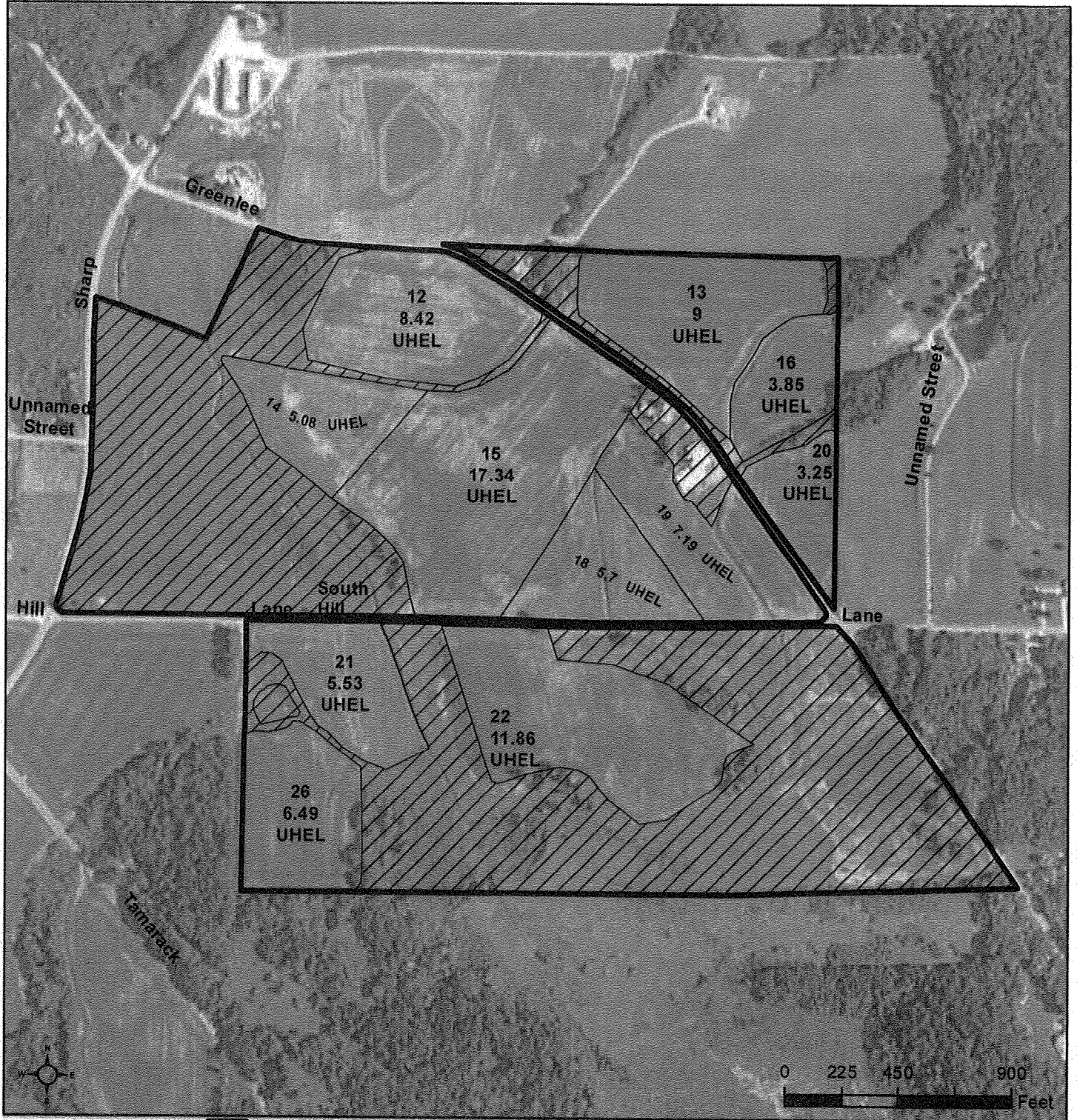
NOTE: If you intend to convert additional land to cropland or alter any wetlands, you must initiate another Form AD-1026 at the local office of ASCS. Abandonment is where land has not been cropped, managed, or maintained for 5 years or more. You should inform SCS if you plan to produce an agricultural commodity on abandoned wetlands.

21. _____

22. Signature of SCS District Conservationist *Lorrie L. Stecker* 23. Date *9-15-88*



Erie County, Pennsylvania



Common Land Unit Tract Boundary
 Non-Cropland
 Cropland
Wetland Determination Identifiers
 Restricted Use
 Limited Restrictions
 Exempt from Conservation Compliance Provisions

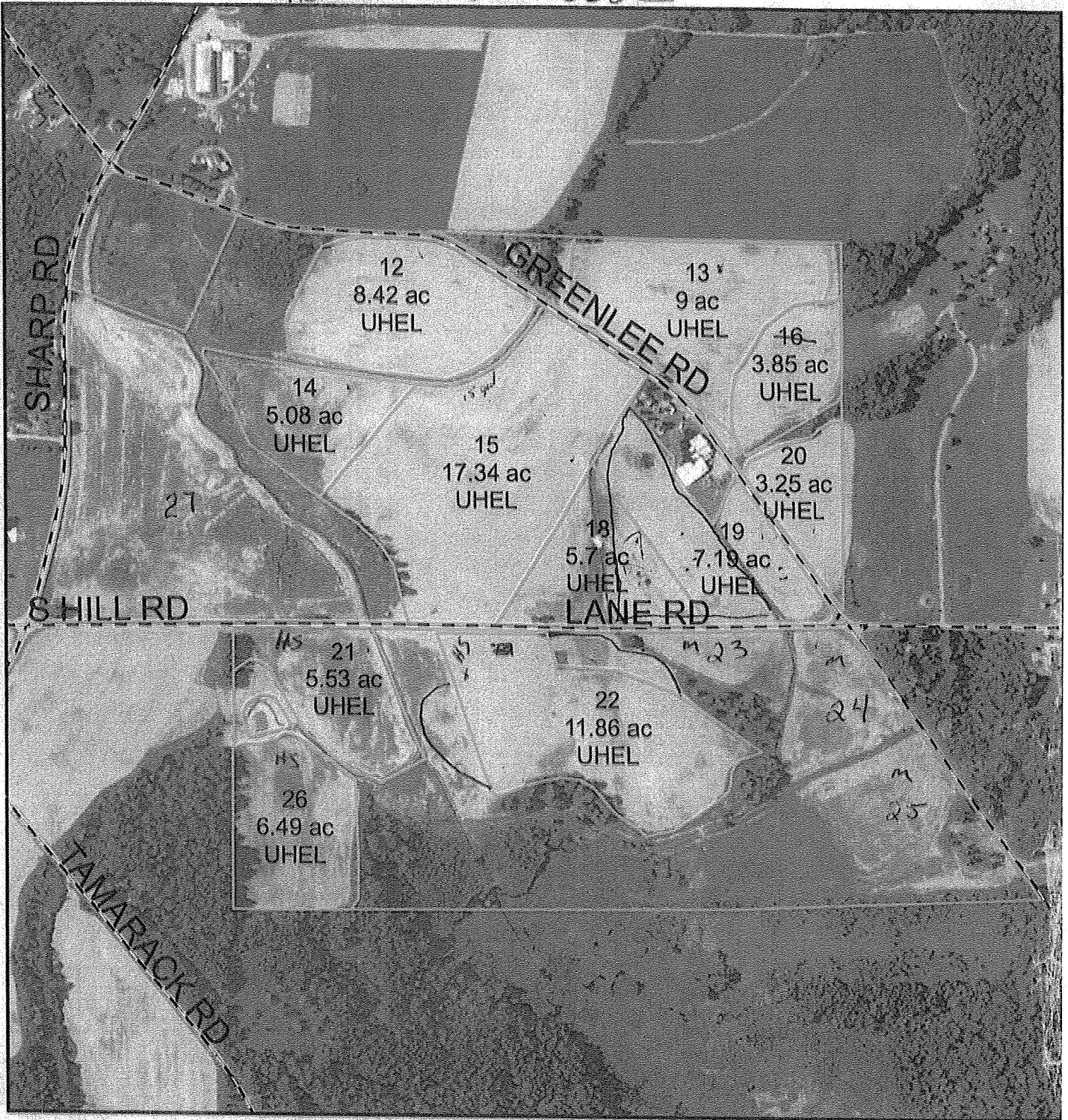
All fields are NI, unless otherwise noted.
Operator Shares:
Owner Shares:
Tract Cropland Total: 83.71 acres

2017 Program Year
 Map Created October 03, 2016
 2015 NAIP Imagery
Farm 826
Tract 1356

United States Department of Agriculture (USDA) Farm Service Agency (FSA) maps are for FSA Program administration only. This map does not represent a legal survey or reflect actual ownership; rather it depicts the information provided directly from the producer and/or National Agricultural Imagery Program (NAIP) imagery. The producer accepts the data 'as is' and assumes all risks associated with its use. USDA-FSA assumes no responsibility for actual or consequential damage incurred as a result of any user's reliance on this data outside FSA Programs. Wetland Identifiers do not represent the size, shape, or specific determination of the area. Refer to your original determination (CPA-028 and attached maps) for exact boundaries and determinations or contact USDA Natural Resources Conservation Service (NRCS).

EXHIBIT

HS 0001-0002



United States Department of Agriculture
Farm Service Agency

October 30, 2013
Erie County

Farm: 826
Tract: 1356



Farm/Tract Boundary

Wetland Determination Identifiers

- Restricted Use
- Limited Restrictions
- Exempt from Conservation Compliance Provisions

Wetland identifiers do not represent the size, shape or specific determination of the area. Refer to your original determination (CPA-026 and attached maps) for exact wetland boundaries and determinations, or contact NRC

Digital Photography Year: 2013



Roads Layer Provided by Dvnamap/2000 Tele At

P R O C E E D I N G S

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(9:06 a.m.)

THE CLERK: All rise. The United States Court of Federal Claims is now in session. The Honorable Francis M. Allegra, presiding.

THE COURT: Please be seated. Good morning.

ALL: Good morning, Your Honor.

THE COURT: Anything we need to take up, Mr. Marzulla, Mrs. Marzulla, before we get started.

MS. MARZULLA: No, Your Honor.

THE COURT: Anything from you, Ms. Florentine?

MS. FLORENTINE: No, Your Honor.

THE COURT: Why don't we resume with the witness.

Mr. Lapp, I'll just remind you that you are still under oath.

Whereupon,

JEFFREY D. LAPP

having previously duly sworn, was recalled as a witness and was examined and testified further as follows:

//
//
//



LAPP - DIRECT

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1 DIRECT EXAMINATION (Resumes)

2 BY MS. FLORENTINE:

3 Q Mr. Lapp, yesterday we were talking about
4 wetlands are defined and what characteristics you look
5 for to determine whether something is a wetland, and I
6 would like to continue that discussion a bit.

7 Are there terms known as adjacent wetlands
8 and isolated wetlands? What are they and what does
9 that mean?

10 A Yes, there are those terms. An adjacent
11 wetland would be that wetland which is adjacent,
12 neighboring or contiguous with other waters of the
13 United States.

14 An isolated wetland would be a wetland which
15 would have no connection to other waters. There would
16 be no hydrologic connection, in other words, to the
17 tributary system.

18 Q And the wetlands on Mr. Brace's property,
19 are those adjacent or isolated?

20 A Those would be adjacent wetlands.

21 Q And why would they be adjacent wetlands?

22 A Because they are adjacent to tributaries and
23 other waters of the U.S.

24 Q And the tributary, some folks referred to as
25 an unnamed tributary. Others have called it Elk

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00468

LAPP - DIRECT

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1 Creek. But the stream that is located on the Murphy
2 farm tract, what is that a tributary to?

3 A Elk Creek is -- there is both unnamed
4 tributaries and the named tributary, Elk Creek, and
5 those flow towards Lake Erie.

6 Q And flow into Lake Erie?

7 A That's correct.

8 Q Now, are there regulations under the Clean
9 Water Act that discuss what is an adjacent wetland?
10 Strike that. Let me rephrase that.

11 The Clean Water Act uses the phrase "waters
12 of the United States," correct?

13 A That's correct.

14 Q And at some point in time did the Corps of
15 Engineers promulgate regulations which defined waters
16 of the United States to include adjacent wetlands?

17 A Yes.

18 Q And when did that occur?

19 A That would have been my understanding it was
20 in 1975.

21 Q And do you know when in 1975?

22 A I believe the public notice was sometime
23 during the summer. It might have been July of 1975.

24 Q Now I would like to turn for a moment to
25 discussing the restoration plan that you indicated for

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1 us yesterday you designed.

2 Could I ask you to turn to Defendant's
3 Exhibit 7, which is the consent decree to the last
4 page, which contains an illustration and is labeled
5 Attachment A?

6 A Okay, I have that.

7 Q Could you tell me what we're looking at
8 here?

9 A What we are looking at is the major area,
10 which would be to the right of the page is the Murphy
11 tract, and encompasses both Elk Creek and the two
12 unnamed tributaries which flow into Elk Creek. Where
13 the cross-hatching is indicated on the map, that is
14 the wetlands areas, the 30-acre wetlands are that
15 we're discussing.

16 Q And the 30-acre wetlands is located all on
17 the Murphy farm tract?

18 A That is my understanding, yes.

19 Q Now, what does this tell us about how the
20 restoration plan was designed?

21 A What this shows is the steps and the
22 location of those steps that are needed to be done in
23 conjunction with the narrative which precedes this on
24 those or in those wetlands I should say, in order to
25 restore the hydrologic drive back to this 30-acre

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00470

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1 wetlands system.

2 Q And what does this restoration plan require
3 be done?

4 A It requires primarily that two parallel
5 trenches be dug at three different locations; one to
6 the west side or the bottom of the page of Elk Creek;
7 one to the north side of the unnamed tributary which
8 is labeled as unnamed tributary; the other to the
9 south side of unnamed tributary A, and they were to be
10 done at 25 feet from the creek, and then 50 feet from
11 that.

12 The intent of that was to go through, and we
13 had information on the drainage tunnel had been placed
14 in these areas, but we didn't know the exact location
15 of where that was. And so the intent was to go
16 through. When you would hit one of the drain tunnels
17 that had been installed, you would pull out 25 feet of
18 it, and then continue down through that, you know,
19 transects in order to catch all the drain tunnels that
20 had ben installed.

21 Q And I notice on this diagram set 1 trenches,
22 set 2 trenches and set 3 trenches, are those the three
23 transects that you just discussed?

24 A Yes.

25 Q And what was the purpose of removing 25 feet

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00471

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1 of the drainage tile?

2 A The purpose was to ensure that the tile was
3 no longer functioning to take water out of the
4 leveling system, but it was less of an impact on the
5 ground than going through and tearing up every foot of
6 tile that had been installed.

7 Q Now, I also see a square labeled "check
8 dam." What is that feature?

9 A Yes. That was a low rise check dam that was
10 placed in unnamed tributary A, and the purpose of that
11 was when site investigations had been conducted
12 dredging had occurred within tributary A, and there
13 was a point where that dredging ceased, and at that
14 point there was approximately a foot and a half fall
15 from the original bottom to the dredged bottom.

16 The purpose of the check dam was to correct
17 and basically bring the bottom of unnamed tributary A
18 back to its original location without taking all the
19 fill material, placing it back into unnamed tributary
20 A, which would cause additional sedimentation, and
21 those sorts of things downstream.

22 Q And I see a block that's labeled "surface
23 ditches to be plugged." What does that refer to?

24 A These were two surface ditches that had been
25 installed in order to facilitate the surface drainage

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00472

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

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

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

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

13 Q And why back to 1984?

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

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

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

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1 wetland tract.

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

5 A Certainly.

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

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

13 Q And does that remain true to this day?

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

18 A Certainly.

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

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

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00474

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

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

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

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

12 A Yes, I believe so.

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

15 A Yes, I assume it would.

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

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

21 Q You don't. Okay.

22 A -- of that.

23 Q Fine enough.

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

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

4 Q Right.

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

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

14 Q Right.

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

22 Q Right.

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

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

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

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

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

11 Q Correct.

12 Q -- before trial?

13 A That's correct.

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

16 A Yes, it is.

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

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

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

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

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

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

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

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

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

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

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

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

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

19 A That would be myself.

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

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

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

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

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

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

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

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

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

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

3 A Okay.

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

6 A In my opinion, no.

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

9 A They can be, yes.

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

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

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

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

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

25 A That's not what I said.

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1 Q Okay, I'm sorry.

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

6 Q Right.

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

10 Q Right.

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

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

23 A For Section 404.

24 Q For Section 404.

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

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

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

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

8 If he --

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

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

12 MS. FLORENTINE: Objection, Your Honor.

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

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

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

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



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

August 29, 2013

Robert Brace
Robert Brace & Sons, Inc.
1131 Route 97
P.O. Box 338
Waterford, PA 16441

RE: Applicability of Clean Water Act, Section 404(f) Exemptions at Brace Farms

Dear Mr. Brace:

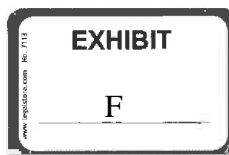
This letter is a joint response from the US Environmental Protection Agency, Region 3 (EPA), and the US Army Corps of Engineers, Pittsburgh District (Corps), to your January 17, 2013 submittal and the subsequent June 27, 2013 site visit to your property in Waterford and McKean Townships, Erie County, Pennsylvania. The joint EPA-Corps site visit was conducted in response to your request for review of the applicability of the Section 404(f) "agricultural exemption" to the Clean Water Act, 33 U.S.C. §§ 1251, 1344(f), to activities you performed in aquatic resources located on your properties depicted on Enclosure 1.

The EPA has determined, and the Corps concurs, that the majority of work you or Robert Brace & Sons, Inc. (RB&S) performed in waters of the United States was performed without the required Department of the Army permits, and that those activities are not exempt from regulation under Section 404(f) of the Clean Water Act. A site-specific analysis of the work performed and the waters affected is described more specifically herein. In summary, your unauthorized activities as of June 27, 2013 are:

- discharge of dredged and/or fill material by dredging of Elk Creek and its tributaries;
- conversion of wetlands on the former Marsh property through draining, ditching, and side-casting; installation of tile drains; and
- channel alterations and wetland conversion within the 30-acre wetland site subject to the 1996 Consent Decree.

Subject Properties

The properties subject to this letter which were impacted by you and/or RB&S are located in Waterford and McKean Townships, Erie County, Pennsylvania and include tax parcel IDs 31-



016-063.0-001.00, 31-016-063.0-002.00, 47-011-004.0-002.00, 47-012-028.0-001.00, and 47-011-004.0-003.00, and are located within the Elk Creek Watershed.

Enclosure 1 identifies the approximate location of property boundaries, Elk Creek and its tributaries, and the approximate location of the boundaries of the 1996 Consent Decree's 30-acre wetland site described below. Enclosure 1 was compiled using multiple wetland and mapping resources, is intended for illustrative purposes only, and does not represent survey-level accuracy.

Federal Jurisdiction and Statutory Background

The EPA and the Corps have concurrent jurisdiction under the Clean Water Act to regulate waters of the United States. The term "waters of the United States" is based on the definitions and limits of jurisdiction contained in 33 CFR 328 and pertinent case law. Navigable waters, their tributaries, and surrounding wetlands are waters of the United States.

The EPA has the ultimate authority for determining federal jurisdiction and interpreting the scope of exemptions under Section 404(f) of the Clean Water Act, 33 U.S.C. § 1341(f). Section 404(f)(1)(C) provides in pertinent part, that "*...the discharge of dredged or fill material...for the purpose of...the maintenance of drainage ditches... is not prohibited by or otherwise subject to regulation under this section...*" However, in order for an activity qualifying for the exemption to retain the exemption, it must avoid recapture under Section 404(f)(2). If an otherwise exempt activity "*bring[s] an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced,*" it is recaptured, subject to regulation under the Clean Water Act, and a Department of the Army Permit is required. It is important to point out that, both historically and presently, the conversion of jurisdictional waters to agriculture is not exempt from the Act.

Litigation

In 1996, a Consent Decree was entered in the matter of *US v. Robert Brace and Robert Brace Farms* (Civil Action No. 90-229) (Consent Decree), concluding *US v. Brace*, 41 F.3d 117 (3d. Cir. 1994) cert. denied, 515 US 1158 (1995) following remand. The Consent Decree memorialized the Court of Appeals for the Third Circuit's holding that your activities at Parcel No. 47-012-028.0-001.11, including the dredging, filling, leveling, and draining of waters of the United States, in approximately 30-acres of wetlands adjacent to Elk Creek, were violations of the Clean Water Act, and required a Department of Army permit. The Consent Decree permanently enjoins you from discharging pollutants by dredging, filling, leveling and draining of waters, within the approximately 30-acre wetland site, which includes portions of Elk Creek, unless such discharge is in compliance with the Clean Water Act. The Consent Decree is provided as Enclosure 2.

The Third Circuit noted that your activities did not constitute "normal farming activity" exempt from the Clean Water Act under Section 404(f)(1)(A). The court's determination that portions of Parcel No. 47-012-028.0-001.00 were not part of an on-going farming operation for purposes of

Section 404(f)(1)(A), is illustrative to whether an activity on the same site is subject to recapture under Section 404(f)(2) for purposes of applying the Section 404(f)(1)(C) exemption.

In 2006, you filed a lawsuit against the United States alleging that application of the Consent Decree was a taking of your property without just compensation under the Fifth Amendment of the Constitution of the United States. The Court of Federal Claims held that application of wetlands regulations through the Consent Decree did not constitute a regulatory or a physical taking, and that flooding following wetlands restoration required by the Consent Decree did not constitute a physical taking (Brace v. US, 72 Fed. Cl. 337 (2006)). The Consent Decree remains in effect for Parcel No. 47-012-028.0-001.00.

Description of Activities

In September 2011, you contacted the Corps and the EPA regarding your proposal to remove beaver dams, which you believed were impacting agricultural drainage systems, in areas adjacent to your active agricultural lands. You were informed that the Corps and the EPA do not regulate beaver dam removal provided there is no discharge of fill material, and were directed to contact the Pennsylvania Game Commission for more information.

Also in September 2011, the EPA conducted a site visit and informed you that the reach of Agricultural Ditch A (identified on Enclosure 1), previously excavated within uplands, north of Lane Road on Parcel No. 47-011-004.0-002, could be maintained under the Section 404(f)(1)(c) exemption from the Clean Water Act. However, the EPA emphasized that all activities in waters of the United States south of Lane Road would require a Clean Water Act permit prior to the initiating activities.

On May 30, 2012 you notified us by e-mail that the beaver dams were removed and requested a site visit to review site conditions. On July 24, 2012 a joint site visit was conducted by EPA and the Corps. During the site visit, staff represented that the removal of sediment from Elk Creek and its tributaries south of Lane Road was exempt from regulation under the Clean Water Act. At this site visit, the channels were laden with sediment, from adjacent agricultural activities, and the boundaries of the Consent Decree were not clearly identified. Subsequent to the site visit, Ms. Rhonda McAtee requested by email dated July 31, 2012 that approximately 0.9 miles of channel from Sharp Road, under Lane Road, and extending to Greenlee Road be labeled as operating under the farming exemptions. No map, drawing, delineation or permit application was ever submitted.

Upon further consideration and review, the Government's field determination was made in error; the reaches of Elk Creek and its tributaries on your property are not agricultural ditches. Additionally, portions of these channels are within the 30-acre wetland site covered by the 1996 Consent Decree. Because your performance of the sediment removal relied on information erroneously provided by the Government, we will exercise our enforcement discretion and forego any further action regarding the sediment removal activities already completed in Elk Creek at this location. Please note that any future work involving a discharge of dredge or fill material within this area requires a Department of the Army Permit. While we recognize that historically modifications have been made to Elk Creek and its tributaries, those modifications

do not convert that watercourse into an agricultural ditch and thus, maintenance activities performed in the reaches of Elk Creek and its tributaries within the subject properties are not exempt from regulation under Section 404(f) of the Clean Water Act.

It also appears that portions of the area subject to the Consent Decree may have been converted to agricultural use, and a tributary to Elk Creek may have been filled and rerouted. A Department of the Army permit was not issued for these activities, and they are not exempt from regulation under Section 404(f). These activities were not discussed nor authorized during the July 24, 2012 site visit. Because the extent of these activities was not investigated during the June 27, 2013 site visit, they will require further review and investigation to determine if a violation of the Clean Water Act or the Consent Decree has occurred.

The dredging of Elk Creek and its tributaries and the side-casting of material on Parcels Nos. 47-011-004.0-003.00, 31-016-063.0-002.00, and 31-016-063.0-001.00, north of Lane Road to Sharp Road, were performed without the required Department of the Army permit, and are not exempt from regulation under Section 404(f). These activities were not discussed or authorized during the July 24, 2012 site visit, however they were included in the 0.9 miles of channel referenced in the July 31, 2012 email. While this reach may have been previously impacted by some agricultural activities, it remains a jurisdictional water and not an agricultural ditch eligible for the Section 404(f) exemption. Therefore, the work performed constitutes a violation of the Clean Water Act.

Activities including clearing, grubbing, side-casting, and installing drain tiles within wetlands adjacent to Elk Creek, on Parcel Nos. 31-016-063.0-001.00, 31-016-063.0-002.00, and 47-011-004.0-003.00, occurred in an area constituting approximately 14-acres of wetlands. These activities were performed without the required Department of the Army permit, are not exempt from regulation under Section 404(f), and constitute a violation of the Clean Water Act. These activities were not discussed or authorized during the July 24, 2012 site visit and the work performed constitutes a violation of the Clean Water Act.

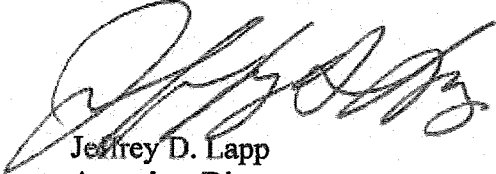
Summary

At this time, you are in violation of the Clean Water Act. **No further work in waters should be conducted without the written approval of the Corps and/or the EPA.** We recommend that you hire a qualified wetlands consultant to identify the specific boundaries of all waters located on your properties and submit that information to the Corps and the EPA for approval.

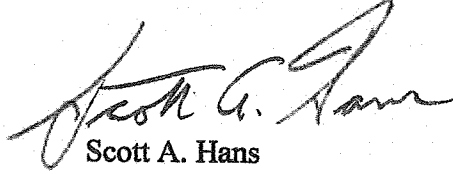
The EPA has the lead on this enforcement action and is reviewing its enforcement options to address your unauthorized activities. We recommend that you contact Mr. Todd Lutte, EPA Wetlands Team Leader, at (215) 814-2099 or lutte.todd@epa.gov within 45 days of receipt of this letter to discuss possible options to restore and remediate the Section 404 violations. While we are coordinating our actions with the Pennsylvania Department of Environmental Protection and the Pennsylvania Fish and Boat Commission, these agencies may pursue actions pursuant to state regulations and authorities.

We trust that this letter clarifies any outstanding issues with regard to activities taken as of June 27, 2013 on the Brace Farm properties. If you have any additional questions, please contact Mr. Lutte at the EPA or Mr. Michael Fodse, Corps Regulatory Specialist, at (412) 395-7575 or Michael.M.Fodse@usace.army.mil.

Sincerely,



Jeffrey D. Lapp
Associate Director
Office of Environmental Programs
US EPA, Region 3



Scott A. Hans
Chief, Regulatory Branch
Pittsburgh District
US Army Corps of Engineers

Enclosures

CF:

Mr. Karl Gross
Pennsylvania Department of Environmental Protection
Northwest Regional Office
230 Chestnut Street
Meadville, PA 16335

Mr. Robert Nestor, Northwest Region Manager
Pennsylvania Fish and Boat Commission
11528 State Highway 98
Meadville, PA 16335

ERIE COUNTY PA



RECORDED & INDEXED

RECORDER OF DEEDS

99 DEC 22 AM 10:34

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

UCCD

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT BRACE and ROBERT BRACE
FARMS, INC., a Pennsylvania
Corporation,

Defendants.

Civil Action No. 90-229
Erie

CERTIFIED FROM THE RECORD	
Date:	7-13-98
JAMES A. DRACH, CLERK	
By:	<i>Nicole Kuziel</i> Deputy Clerk

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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

Exhibit 12 00893

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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.

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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.

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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

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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.

BK06/9P8284

DATED: September 23, 1996

David M. Thompson
UNITED STATES DISTRICT JUDGE

DATED: July 23, 1996

DMT
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Assistant Attorney General
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Attorneys for Defendants

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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

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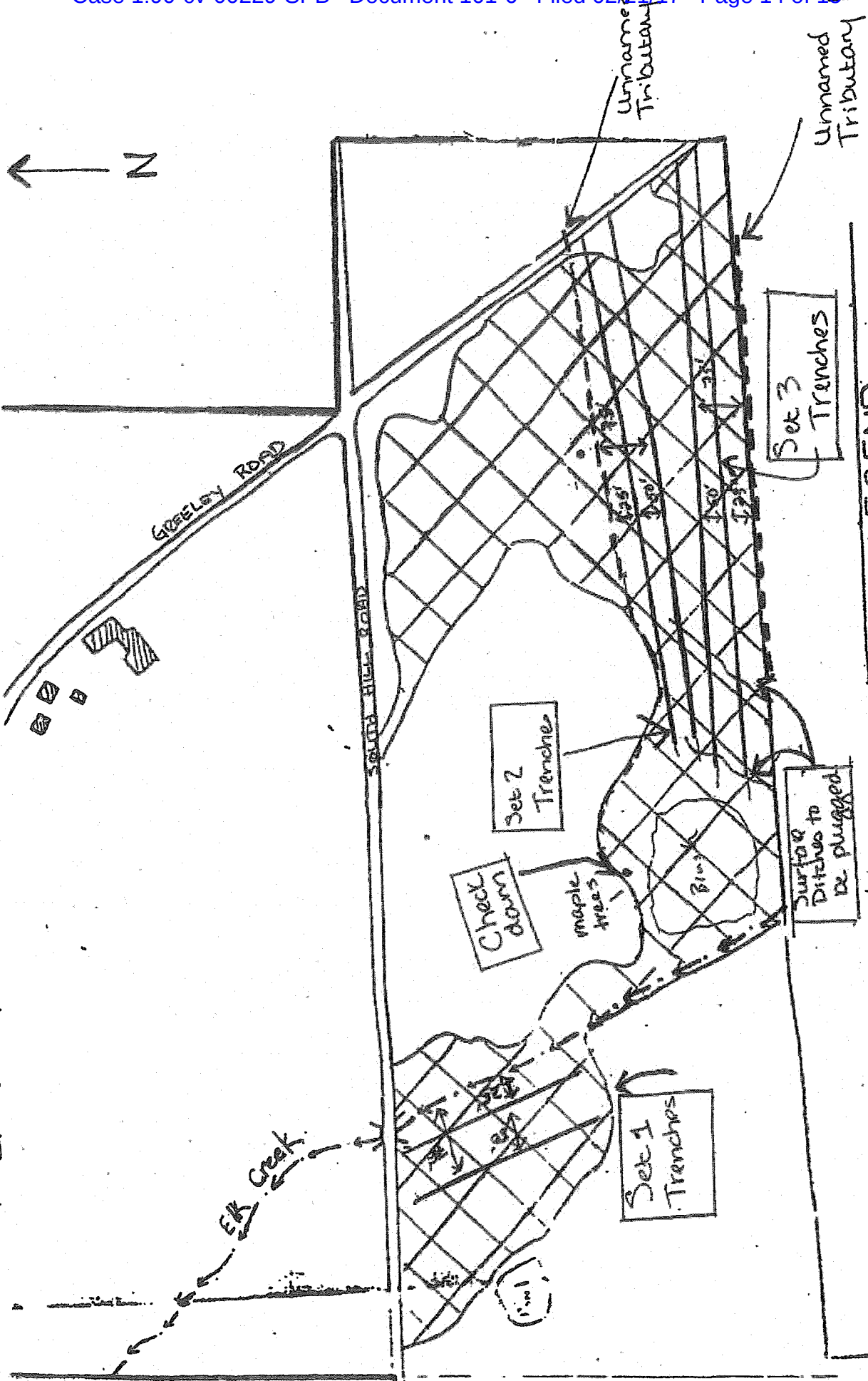
direction into unnamed tributary B, as indicated on Attachment A, shall be filled in beginning at the mouth for a distance of at least twenty five (25) feet.

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.

Erie County, Pennsylvania



LEGEND

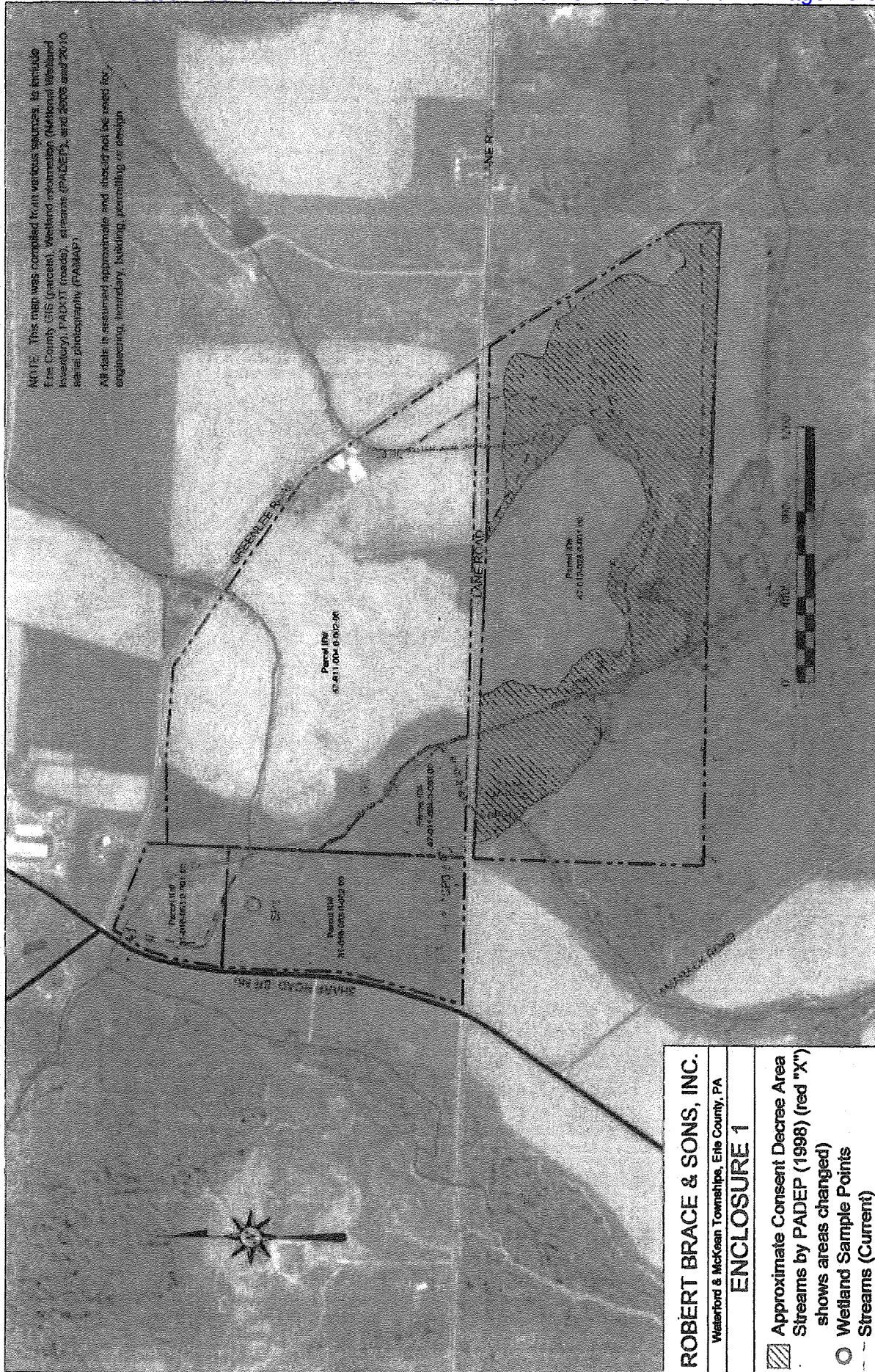
All locations are approximate

Map not to scale

ATTACHMENT "A"

NOTE: This map was compiled from various sources, to include Erie County GIS (parcels), Wetland Information (National Wetland Inventory, PADAT roads), streams (PADEP), and ADOCS and 2010 aerial photography (PAADAP).

All data is assumed approximate and should not be used for engineering, boundary, building, permitting, or design.



ROBERT BRACE & SONS, INC.	
Waterford & McKean Townships, Erie County, PA	
ENCLOSURE 1	
	Approximate Consent Decree Area
	Streams by PADEP (1998) (red "X") shows areas changed)
	Wetland Sample Points
	Streams (Current)

No. 94-3076

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

ROBERT BRACE and ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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EXHIBIT

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	-----	1

MISCELLANEOUS:

3 <u>Legislative History of the Water</u>	
<u>Pollution Control Act Amendments</u>	
<u>of 1972 (Leg. Hist.) (1973)</u>	----- 36

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3076

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

ROBERT BRACE and ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

STATEMENT OF JURISDICTION

A. **Subject Matter Jurisdiction.** -- The district court's subject matter jurisdiction rested on 33 U.S.C. 1319(b), 28 U.S.C. 1331, 1345, and 1355.

B. **Appellate Jurisdiction.** -- The district court (Honorable Glenn E. Mencer) entered judgment on December 17, 1993 (Add.24).^{1/} The United States filed a notice of appeal on February 14, 1994, within the 60 days provided by Fed. R. App. P. 4(a) (A2). This Court's jurisdiction rests on 28 U.S.C. 1291.

^{1/} Citations to the district court's order entering judgment, and the court's findings of fact and conclusions of law, which are reproduced in an addendum at the end of this brief pursuant to 3rd Cir. LAR 28.1(a)(iii) (1993), will appear as "Add. ___." Findings of fact will be referred to as "FF __," and conclusions of law will be referred to as "CL ___." Citations to the Appellant's Appendix will appear as "A___." Citations to portions of the district court record not reproduced in the appendix or addendum will be to "Doc. ___."

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STATEMENT OF ISSUES AND STANDARD OR SCOPE OF REVIEW

1. Whether the district court erred in determining that defendants' discharges of dredged and fill material into wetlands were exempt from the permit requirement in Section 404 of the Clean Water Act, 33 U.S.C. 1344.

A. The issue of whether defendants' activities were exempt from the Section 404 permit requirement was raised in (1) defendants' answer to the government's complaint (A25); (2) defendants' motion for summary judgment (Doc. 29); (3) defendants' pretrial statement (Doc. 28); (4) defendants' supplemental pretrial statement (Doc. 50); (5) defendants' trial presentation (A183-A738 (trial transcript)); and (6) defendants' proposed findings of fact and conclusions of law (Doc. 51). The United States raised objections to defendants' exemption claim in (1) the government's motion for partial summary judgment (Docs. 23, 25); (2) the government's pretrial statement (Doc. 24); (3) the government's reply memorandum in support of motion for partial summary judgment and in opposition to defendants' motion for summary judgment (Doc. 30); (4) the government's trial brief (Doc. 44); (5) the government's trial presentation (A183-A738); and (6) the government's proposed findings of fact and conclusions of law (Doc. 54). The district court ruled on the exemption question in (1) its memorandum opinion and order granting in part and denying in part the government's motion for partial summary judgment

and denying defendants' motion for summary judgment (A28); and (2) its findings of fact and conclusions of law entered on December 17, 1993 (Add.).

B. The district court erroneously formulated and applied legal precepts in holding that defendants' activities were exempt from the Section 404 permit requirement. Review by this Court is plenary. 3rd Cir. LAR 28.1(a)(i)(2) (1993). To the extent that the court's ruling on this issue also was premised on findings of fact, this Court reviews any such findings under the clearly erroneous standard. Id.

2. Whether the district court erred in determining that defendants' discharges were not "recaptured" by the permit requirement under Section 404(f)(2) of the Clean Water Act, 33 U.S.C. 1344(f)(2).

A. The issue of whether defendants' discharges were "recaptured" by the permit requirement under Section 404(f)(2) was raised in (1) the government's motion for partial summary judgment (Doc. 23, 25); (2) the government's pretrial statement (Doc. 24); (3) the government's reply memorandum in support of motion for partial summary judgment and in opposition to defendants' motion for summary judgment (Doc. 30); (4) the government's trial brief (Doc. 44); (5) the government's trial presentation (A183-A738); and (6) the government's proposed findings of fact and conclusions of law (Doc. 54). Defendants raised objections to the

government's recapture contention in (1) defendants' motion for summary judgment (Doc. 29); (2) defendants' pretrial statement (Doc. 28); (3) defendants' supplemental pretrial statement (Doc. 50); (4) defendants' trial presentation (A183-A738); and (5) defendants' proposed findings of fact and conclusions of law (Doc. 51). The district court ruled on the recapture question in (1) its memorandum opinion and order granting in part and denying in part the government's motion for partial summary judgment and denying defendants' motion for summary judgment (A28); and (2) its findings of fact and conclusions of law entered on December 17, 1993 (Add.).

B. The district court erroneously formulated and applied legal precepts in ruling that defendants' discharges were not recaptured by the permit requirement under Section 404(f)(2), even if their discharges otherwise were exempt under Section 404(f)(1) from the permit requirement. Review by this Court is plenary. 3rd Cir. LAR 28.1(a)(i)(2) (1993). To the extent that the court's ruling on this issue also was premised on findings of fact, this Court reviews any such findings under the clearly erroneous standard. Id.

3. Whether the district court erred in determining that defendants were not subject to liability for violations of administrative orders.

A. The issue of whether defendants were liable for violating administrative orders was raised in (1) the

government's complaint (A13); (2) the government's pretrial statement (Doc. 24); (3) the government's trial brief (Doc. 44); (4) the government's trial presentation (A183-A738); and (5) the government's proposed findings of fact and conclusions of law (Doc. 54). Defendants' raised objections to the government's argument in (1) defendants' answer (A18); (2) defendants' pretrial statement (Doc. 28); (3) defendants' supplemental pretrial statement (Doc. 50); (4) defendants' trial presentation (A183-A738); and (5) defendants' proposed findings of fact and conclusions of law (Doc. 51). The district court ruled on the administrative order violation question in its findings of fact and conclusions of law entered on December 17, 1993 (Add.).

B. The district court erroneously formulated and applied legal precepts in ruling that defendants were not liable for violating the administrative orders. Review by this Court is plenary. 3rd Cir. LAR 28.1(a)(i)(2) (1993).

STATEMENT OF THE CASE

In October 1990, the United States filed suit in the United States District Court for the Western District of Pennsylvania against defendants Robert Brace and Robert Brace Farms, Inc., alleging violations of the requirement in Section 404 of the Clean Water Act, 33 U.S.C. 1344, that a permit be obtained for the discharge of dredged or fill material into waters of the United States (A13). The permit requirement protects certain wetlands from unpermitted discharges of dredged

or fill. See United States v. Pozsgai, 999 F.2d 719, 722 (3rd Cir. 1993), cert. denied, 114 S. Ct. 1052 (1994). The requirement thereby allows the wetlands to perform the natural functions of filtering and purifying water draining into adjacent bodies of water, preventing flooding and erosion by slowing the flow of surface runoff into lakes, rivers, and streams, as well as significant natural biological functions including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species. See 33 C.F.R. 320.4(b).

Despite Brace's admission that he and his company had excavated and discharged materials into a 30-acre wetland site without a permit between 1985 and 1987 to make the site suitable for growing crops, the district court determined, following a four-day non-jury trial, that the discharges constituted exempt activities under Section 404(f) of the Act (Add. 23). On December 17, 1993, the court entered judgment against the United States, and in favor of the defendants (Add. 24).

STATEMENT OF FACTS

1. Statutory and regulatory background. -- The Clean Water Act (CWA) was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters * * *." 33 U.S.C. 1251(a). Section 301(a) of the Act prohibits the discharge of any pollutant into navigable waters of the United States, unless the discharge is authorized by a permit. 33 U.S.C. 1311(a), 1362(12). As this Court recognized in United States v. Pozsgai,

The Act defines the operative terms of this prohibition broadly. The term "pollutants" includes fill material such as "dredged spoil, ... rock, sand [and] cellar dirt," 33 U.S.C. § 1362(6), and "navigable waters" means "the waters of the United States," *id.* § 1362(7). In so defining the term "navigable waters," Congress expressed a clear intent "to repudiate limits that had been placed on federal regulations by earlier water pollution control statutes and to exercise its control under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." [United States v.] Riverside Bayview Homes[, Inc.], 474 U.S. [121,] at 133 [1985] * * * (citing S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell)).

999 F.2d at 724.

Section 404 of the Act authorizes the Secretary of the Army, through the Army Corps of Engineers (Corps), to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (d); 33 C.F.R. 323.1. The permit program, as this Court recognized in United States v. Pozsgai, 999 F.2d at 724-725, "is the central enforcement tool of the Clean Water Act. * * * Unpermitted discharge is the archetypical Clean Water Act violation, and subjects the discharger to strict liability."

The Corps, in C.F.R. Title 33, and EPA, in C.F.R. Title 40, have issued regulations defining the term "waters of the United States" to include "wetlands." 33 C.F.R. 328.3(b); 40 C.F.R. 230.3(t). The Corps and EPA have defined "waters of the United States" to include:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

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* * *

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), * * * wetlands, * * * the use, degradation or destruction of which could affect interstate or foreign commerce;

* * *

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

* * *

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a); 40 C.F.R. 230.3(s).

The term "wetlands" is defined as:

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b); 40 C.F.R. 230.3(t). See United States v. Riverside Bayview Homes, Inc., 474 U.S. at 134 (upholding Corps' assertion of regulatory authority over adjacent wetlands as a reasonable interpretation of the jurisdictional scope of the CWA).

Exemptions to the general requirement for a Section 404 permit are contained in Section 404(f) of the Act. Under Section 404(f)(1), a permit is not required (unless an otherwise exempt discharge is "recaptured" by Section 404(f)(2), see p. 10, infra) for (1) the discharge of dredged or fill material "from normal farming, silviculture and ranching activities such as plowing,

seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices," 33 U.S.C. 1344(f)(1)(A); and (2) the discharge of dredged or fill material "for the purpose of * * * the maintenance of drainage ditches," 33 U.S.C. 1344(f)(1)(C).

The Corps and EPA have promulgated regulations which provide that activities subject to the exemption for "normal farming" both "must be part of an established (i.e., on-going) farming * * * operation and must be in accordance with the definitions in § 323.4(a)(1)(iii)." 33 C.F.R. 323.4(a)(1)(ii) (emphasis added); see also 40 C.F.R. 232.3(c)(1)(ii)(A) & (B). The definitions in 33 C.F.R. 323.4(a)(1)(iii) further (1) provide that "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing," 33 C.F.R. 323.4(a)(1)(iii)(D); 40 C.F.R. 232.3(d)(4); and (2) define "minor drainage" as meaning "[t]he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands," 33 C.F.R. 323.4(a)(1)(iii)(C)(1)(i); see also 40 C.F.R. 232.3(d)(3)(ii). This latter definition is modified by 33 C.F.R. 323.4(a)(1)(iii)(C)(2), which further provides that the term "minor drainage" "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland * * *, or conversion from one wetland use to another (for example,

silviculture to farming)." The regulation defining "maintenance" of drainage ditches provides that the exemption from the permit requirement applies to "maintenance (but not construction) of drainage ditches." 33 C.F.R. 323.4(a)(3).

Even where Section 404(f)(1) exempts a discharge from the permit requirement, the discharge may be "recaptured" by the permit requirement under Section 404(f)(2):

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f)(2). The regulation governing the "recapture" provision stipulates in part that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States," 33 C.F.R. 323.4(c), and states, as an example, that "a permit will be required for the conversion of a cypress swamp to some other use * * * when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of * * * structures used to effect such conversion," *id.*

2. Case background. -- Defendants Robert Brace and Robert Brace Farms, Inc., own approximately 600 acres of real property in Erie County, Pennsylvania (A59 (Brace deposition)), including the subject thirty-acre wetland site that Robert Brace purchased in 1975 from his father (A78 (Brace deposition); A564 (Brace testimony)). For the fifteen years prior to 1975, Robert

Brace's father used the site for pasturing of cows and horses (A91-A92 (Brace deposition); A637 (Brace testimony)), and Robert Brace's brother used the site for pasturing some cows until 1976 (A94 (Brace deposition)).

In 1977, Brace removed the pasture fencing from the site (A91-A92 (Brace deposition); A637 (Brace testimony)). For the next nine years, the site was used neither for pasturing nor for growing crops (A95-A99, A118 (Brace deposition); A637-A638 (Brace testimony)). During that period, Brace periodically engaged in some clearing of scrub brush at some areas near the roads at the site, and did some ditching at the site by blasting open a ditch in 1977 (A95, A103 (Brace deposition); A597 (Brace testimony)).

Between 1985 and 1987, Brace -- without a Clean Water Act permit -- used a bulldozer, backhoe, brush hog, and other machinery to discharge dredged and fill material into the site, in three different ways. First, Brace discharged fill material at the site by clearing, mulching, churning and levelling the formerly wooded and vegetated site (A97-A99, A110-A113 (Brace deposition); A644 (Brace testimony)). Second, Brace discharged dredged material at the site by taking material dredged with a backhoe from Elk Creek and Elk Creek channels, which border the site, and spreading the dredged material with a bulldozer onto the site (A103-A108 (Brace deposition); A644 (Brace testimony)). Third, Brace discharged dredged material at the site by causing excavation and the burying of approximately four miles of plastic

tubing (known as "drainage tile") at the site, in an effort to drain the site (A114-A115, A118, A133-A136, A152-A153 (Brace deposition); A644-A646 (Brace testimony); A160, A161 (invoices showing excavation and burying activities)). As a result of the levelling, spreading, and tiling activities, Brace was able to begin growing crops at the thirty-acre site in 1986 and 1987 (A96 (Brace deposition); A638, A646 (Brace testimony)).

The U.S Fish and Wildlife Service (FWS) learned of Brace's discharge activities in May 1987 from the Pennsylvania Game Commission (A293 (trial testimony of David Putnam, Biologist at U.S. Fish & Wildlife Service, Department of the Interior); A179 (Chronology of Events - Robert Brace illegal fill, by David Putnam)). FWS stated that Brace's activities were "the most serious wetland violation that we have seen in Pennsylvania in recent years" (A179), but, because it does not have enforcement authority under the Clean Water Act (A296 (Putnam testimony)), referred the matter to EPA and the Army Corps of Engineers (A295-A296 (Putnam testimony), A373 (testimony of James R. Butch, EPA environmental scientist); A179 (Putnam chronology)). EPA similarly "viewed this as one of the more significant violations we had seen in Pennsylvania" (A376 (Butch testimony)).

During the next year, the Corps and EPA issued three "cease and desist" orders to Brace, and the Commonwealth of Pennsylvania issued a notice of violation. On July 15, 1987, EPA issued a "Findings of Violation and Order for Compliance" which both (1) found that Brace had "violated Section 301(a) of the

Clean Water Act * * * by discharging fill material without authorization" (A163); and (2) ordered Brace both to "[c]ease and desist immediately all filling activities in the wetlands adjacent to Elk Creek" and to submit "a plan for restoration of the wetland area and for mitigation of the environmental harm caused to the wetland" (A163). On July 23, 1987, the Corps similarly (1) notified Brace that its investigation showed that Brace had, without obtaining the required Section 404 permit, placed a considerable amount of fill into a wetland (A165); and (2) ordered Brace "to cease all activities associated with this project until further notice" (A165).

On August 31, 1987, the Pennsylvania Department of Environmental Resources issued Brace a "Notice of Violation" advising of the need for a permit to work in wetlands and requesting a plan for restoring the site (A180 (Putnam chronology)). And, on May 3, 1988, EPA issued a second "Findings of Violation and Order of Compliance" (A167), which included more specific findings of violation and orders for compliance, including a requirement that Brace refrain from further disturbances of the site so it could naturally revegetate with indigenous plant species. Brace chose not to comply with these orders, and continued to prevent revegetation of indigenous plants by mowing the site on a regular basis (A147 (Brace deposition); A624 (Brace testimony)).

On August 31, 1988, Brace requested a determination that he had "commenced conversion" of the wetlands prior December 23, 1985, from the Erie County Office of the Agriculture Stabilization and Conservation Service (ASCS) (A172). The ASCS is "an agency of the United States Department of Agriculture which is generally responsible for administering commodity production adjustment and certain conservation programs of the Department." 7 C.F.R. 12.2(a)(2). The ASCS was authorized to make such determinations under the Food Security Act of 1985, 16 U.S.C. 3801 et seq.. This Act contains a provision, referred to as the "Swampbuster," which denies certain Department of Agriculture benefits to farmers who produce an "agricultural commodity on converted wetland," 16 U.S.C. 3821, unless such conversion commenced before December 23, 1985 (the effective date of the Act), 16 U.S.C. 3822.

By letter dated September 21, 1988, the ASCS stated that it had "determined that conversion of the wetlands began before December 23, 1985" (A172), and explained that the determination "will enable you to complete conversion and produce an agricultural commodity without losing USDA benefits" (A172). Brace's application expressly noted that "[t]he granting of a commencement * * * request does not remove other legal requirements that may be required under State or Federal water laws" (A173).

3. District court litigation. -- On October 4, 1990, the United States filed suit on behalf of EPA, alleging that Robert Brace and Brace Farms had violated the permit requirement in Section 404 of the Clean Water Act, and seeking restoration of the site, a permanent injunction, and a civil penalty pursuant to 33 U.S.C. 1319(d) (A13). Defendants answered by asserting, inter alia, that the government was estopped from bringing the action and, in any event, that their activities were exempt from the permit requirement under Section 404(f)(1) as "normal farming activities" (A25).

The district court agreed to bifurcate the action into two separate trials: (1) a jury trial on liability issues; and (2) a bench trial on remedy issues (Doc. 11). After the bifurcation determination, the government filed a motion for partial summary judgment on Brace's estoppel claim and agricultural defense (Docs. 23, 25, 30), and Brace sought summary judgment on those claims (Doc. 29). By memorandum opinion and order dated July 6, 1992, the district court granted the government's motion with respect to the estoppel claim, and otherwise denied both motions (A28).

Shortly before the liability trial, Brace and his company waived the jury request. Brace and his company also stipulated immediately prior to the trial that, at the time of the discharges, "the approximately thirty-acre site that is the subject of this lawsuit was wetlands as defined at 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r)" (A40).

Either by stipulation or at trial, the five elements of a prima facie case for violations of Section 404 of the Clean Water Act were established: (1) Brace and his company admitted that they are "persons" within the meaning of the Act (A42, A47 (Responses of Robert Brace and Robert Brace Farms to Pl.'s Requests for Admission, no. 3)); (2) Brace and his company admitted that the activities at the site were conducted without a permit (A43 (Brace Responses no. 15), A48 (Brace Farms Responses no. 9)); (3) Brace stipulated that the site was wetlands at the time of the discharges (A40); (4) the district court held that "the site constituted waters of the United States at the time of Defendants' activities" (Add. 17, CL 7); and (5) at trial, the United States demonstrated three distinct types of discharges, by Brace and his company, of pollutants into waters of the United States. In this latter regard, (a) the district court held that Brace's clearing, mulching, churning, and levelling of the formerly wooded and vegetated site (Add. 8, FF 33) constituted a discharge of pollutants into the waters of the United States (Add. 18, CL 11); (b) the district court held that Brace paid for excavation and installation of drainage tubing in the site in 1986 and 1987 (Add. 8, FF 34), which necessitated a discharge in the form of a redeposit of excavated materials from the wetland;^{2/} and (c) Brace's testimony, as well as other

^{2/} See Avoyelles sportsmen's League v. Marsh, 715 F.2d 897, 923-924 (5th Cir. 1983) ("[W]e have concluded that the term 'discharge' covers the redepositing of materials taken from the wetlands * * *."); United States v. Sinclair Oil Co., 767 F. (continued...)

uncontradicted evidence, demonstrated that, between 1985 and 1987, Brace took side cast material dredged from Elk Creek and Elk Creek channels -- which border the site -- and spread the dredged material on the site (A103-A108 (Brace deposition); A644, AA647-A648 (Brace testimony)), thereby constituting a discharge of pollutants into waters of the United States. See Add. 8, FF 33; Add. 18, CL 11; see also 33 C.F.R. 323.2(c) (defining dredged material as "material that is excavated or dredged from waters of the United States"); 33 C.F.R. 323.2(d) (defining discharge of dredged material as "any addition of dredged material into the waters of the United States"); 40 C.F.R. 232.2(e) & (g) (*ibid*); United States v. Huebner, 752 F.2d 1235, 1242 (7th Cir.) (affirming determination that "the sidecasting and spreading activity" was a discharge of a pollutant under the Act), cert. denied, 474 U.S. 817 (1985).

Notwithstanding that all elements of a Section 404 violation had been established, Brace asserted, and the court held, that the discharges were exempt from the permit requirement under Section 404(f)(1). The court concluded both (1) that Brace's activities on the wetland constituted "normal farming

2/ (...continued)

Supp. 200, 204 (D. Mont. 1990) ("[T]here is an emerging consensus in the Circuit Courts that a redeposit of indigenous materials into the waters of the United States qualifies as an 'addition' of pollutants to these waters, for the purposes of enforcing the Clean Water Act."); cf. 33 C.F.R. 323.2(d)(1)(iii) (as amended August 19, 1993) (defining "discharge of dredged material" to include "any addition, including any redeposit, of dredged material, including excavated material, which is incidental to any activity * * *.")

activities" under Section 404(f)(1)(A), based on the ASCS's determination that Robert Brace had "commenced conversion" of a wetland to an upland prior to December 23, 1985 (Add. 22, CL 31); and (2) that Brace's activities also constituted "upland soil and water conservation practices" under that same provision of the Act, based on Robert Brace's testimony that "his farming activities on the site enhanced productivity in the upland areas due to improvements in water flow * * * and the corresponding improvements to the soil" (Add. 22-23, CL 33). In addition, the court found that Brace's conduct in "preserving and regularly cleaning the existing drainage system on the site" was exempt from the permit requirement as "maintenance of the drainage system" under Section 404(f)(1)(C) (Add. 23, CL 34).

The court also effectively recognized that Brace had converted at least 75 percent of the site from wetlands, by holding that "the site constituted wetlands at the time of Defendants' activities" (Add. 12, CL 5), but that "not more than 25% of the site" constituted wetlands at the time of trial (Add. 2, FF 4). Nonetheless, the court held that "the recapture provision does not apply to this case" because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven" (Add. 22, CL 30).

The district court entered judgment in Brace's favor on December 17, 1993 (A24). The United States timely filed a notice of appeal on February 14, 1994 (A2).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously, and the United States is not aware of any related cases.

ARGUMENT

I

THE DISTRICT COURT ERRED IN DETERMINING THAT BRACE'S DISCHARGES WERE EXEMPT UNDER SECTION 404(f)(1) FROM THE CLEAN WATER ACT'S PERMIT REQUIREMENT

The district court held that Brace's activities on the 30-acre wetland site were exempt from Section 404's permit requirement "because they constitute (a) normal farming activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches" (Add. 22, CL 32). That determination, which tracks the language of Section 404(f)(1), is erroneous as a matter of law. Application of the law to the facts in this case simply does not permit the district court's conclusion that Brace's activities were exempt from the permit requirement as "normal farming activities," "upland soil and water conservation practices," or "maintenance of drainage ditches."

A. Brace's discharges on the site did not meet the criteria for the "normal farming activities" exemption from Section 404's permit requirement. -- The district court's appraisal of Brace's discharges on the 30-acre wetland site as "normal farming activities" that were exempt from Section 404's permit requirement cannot be squared with the statute, the applicable regulations, or the case law governing the "normal

farming activities" exemption. As described above, Section 404(f) of the Act provides exemptions to the general requirement for a Section 404 permit, including (1) the discharge of dredged or fill material without a permit "from normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." 33 U.S.C. 1344(f)(1)(A). The district court's determination that Brace's activities fell within the terms of this provision appears to be based upon a casual observation that what Brace did was "normal" activity for a farmer in Erie County, but the court's determination cannot be reconciled with the regulatory construction accorded the statutory term "normal farming activities" by the agencies charged with implementation of the statute, or with the substantial deference to be accorded that construction.^{3/}

The applicable regulation provides that, to constitute "normal farming activities" within the meaning of the statute, the activity

must be part of an established (i.e., ongoing) farming * * * operation and must be in accordance with the definitions in § 323.4(a)(1)(iii). Activities which bring an area into farming * * * use are not part of an

^{3/} Moreover, the courts have repeatedly held that the Section 404(f) exemptions should be construed narrowly. See, e.g., United States v. Akers, 785 F.2d 814, 819 (9th Cir.), cert. denied, 479 U.S. 828 (1986); United States v. Huebner, 752 F.2d at 1240-41; Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d at 925 n.44; United States v. Cumberland Farms, 647 F. Supp. 1166, 1175-76 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. 323.4(a)(1)(ii). Brace's activities between 1985 and 1987 met neither prong of this provision: they were neither part of an "established (i.e., ongoing) farming operation," nor were they conducted "in accordance with the definitions in § 323.4(a)(1)(iii)."

1. Brace's discharges at the site were not "normal farming activities" because they brought an area into farming use. -- First, the admitted and established facts in this case show that Brace's discharges brought the site from a wetland "into farming use," and thus "are not part of an established operation." Brace himself testified both (1) that, for the nine-year period prior to the discharges onto the site at issue here -- from 1977 through 1986 -- his activities at the site included no pasturing or growing of any crops, but consisted entirely of efforts to drain the wetlands (A598-A599 (Brace testimony)); (2) that the site was fully covered in 1983 with indigenous plants, but that all plants had been stripped from the site in 1987, subsequent to the discharge activities (A647-A648 (Brace testimony)); and (3) that the purpose of his 1985-1987 discharges was to drain the wetland and make it suitable for row cropping (A118 (Brace deposition); A645-A646, A649 (Brace testimony)). Aerial photographs of the site during the 1980s showed that the vast majority of land-clearing and drainage activities at the

site occurred in 1986 and early 1987 (A226, A238-A242 (trial testimony of Peter Stokely, EPA environmental scientist, expert in photographic interpretation)). Moreover, the court found that, "[a]s a result of Defendants' levelling, spreading and tiling, Defendants began to grow crops on the site in 1986 and 1987" (Add. 9, FF 37 (emphasis added)).^{4/}

These facts simply do not permit the district court's determination that Brace's activities at the 30-acre wetland site were exempt from the permit requirement as "normal farming activities." Under the applicable regulation, that exemption is available only to activities that are part of an "established farming operation" at the site, and expressly is not available for "activities which bring an area into farming * * * use." 33 C.F.R. 323.4(a)(1)(ii). Here, Brace made a 30-acre site that was not suitable for farming into a site that is suitable for farming, by levelling the site, depositing and spreading dredged material on the site, and excavating and burying drainage tile at the site. Brace's activities at the site brought the site "into farming use," and thus could not qualify for the exemption as "normal farming activities" because they were "not part of an established farming operation." Id.

^{4/} Despite the district court's finding that "[d]efendants began to grow crops on the site in 1986 and 1987" (Add. 9, FF 37), the court also found that "[f]rom 1985 through 1987, the site was not used for either pasturing or growing of crops" (Add. 4, FF 18). The record evidence shows that the site was used in 1986 and 1987 for growing crops (A96 (Brace deposition); A638, A646 (Brace testimony)).

Even if Brace's father's pre-1975 use of the site for pasturing could be considered to have been a prior, "established farming operation" on the site, Brace's undisputed drainage activities again show that the court erred as a matter of law in finding the exemption from the permit requirement available for his subsequent activities. Under the regulation, a farming operation is not "ongoing" where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. 323.4(a)(1)(ii). Here, Brace admitted at trial that "modifications to the hydrological regime" -- i.e., drainage of the site through excavation and the burying of four miles of plastic tubing for drainage -- were necessary to grow crops on the site (see A645-A646 (Brace testimony)).

Brace's activities are simply indistinguishable from circumstances in numerous other cases found not to have met the "normal farming" exemption from the permit requirement because modifications were required to begin farming. See, e.g., United States v. Akers, 785 F.2d at 819-20 ("[Defendant] argued below that unless he were allowed to complete the work he had started, the effect of which is to drain the wetlands, he would be unable to engage in the farming activities he had planned. By his own admission, his activities require substantial hydrological alteration to [the site], and run afoul of the regulations"); Bayou Marcus Livestock & Agric. Co. v. EPA, No. 88-30275 WEA, 20 Env'tl. L. Rev. (Env'tl. L. Inst.) 20445, 20446 (N.D. Fla. Nov. 3, 1989) ("Before plaintiffs could have effectively harvested the

timber and begun farming, it was necessary to dredge, fill, construct roads and dig ditches. * * * [I]f an ongoing operation had been previously functioning, such changes in the landscape would have been unnecessary."); United States v. Larkins, 657 F. Supp. 76, 85-86 n.23 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir. 1988), cert. denied, 489 U.S. 1016 (1989) ("Activities cease to be established when the property on which they were once conducted 'has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations * * *.' [emphasis by court]. Reducing the reach of the [site] required modifications of the site's hydrological regime.") (quoting 33 C.F.R. 323.4(a)(1)(ii)).

The district court's contrary conclusion was based improperly on (1) the court's finding that Brace's installation of a drainage system at the site "is a normal farming activity in order to make land suitable for farming," because "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County" (Add. 3, FF 13); and (2) the ASCS determination that Brace had "commenced conversion" of the site from wetland to cropland prior to December 23, 1985 (Add. 9, FF 43; Add. 22, CL 31). Neither of these assertions justifies the court's result.

First, the district court clearly erred in couching as a factual finding the assertion that Brace's installation of a drainage system at the site "is a normal farming activity in order to make land suitable for farming," because "[e]xtensive

1 conference, I take the statutory mandate that we follow the
2 Federal Rules of Evidence seriously, and I will do my best
3 to apply those rules as the need should arise.

4 I think that, beyond sort of those basic things,
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9 their impact on factfinding here.

10 Let me I guess start with you, Ms. Florentine.
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12 in terms of -- you can stay seated for this part of this.

13 MS. FLORENTINE: Okay.

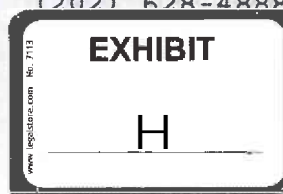
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16 related matters.

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18 the United States, and they involve the same Plaintiffs
19 here, or at least some of the same Plaintiffs here.

20 Is there a particular reason why facts found in
21 that litigation would not be collateral estoppel for
22 purposes of this litigation?

23 MS. FLORENTINE: Your Honor, I don't think I've
24 ever argued that they would not be collateral estoppel. In
25 fact, the United States offered this opinion as an exhibit,

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2 There are one or two -- I mean, I think, if
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5 We received it at four o'clock yesterday afternoon, and it
6 does not set forth with any specificity exactly what factual
7 statements in the opinion I have supposedly refused to
8 stipulate to.

9 There are a few occasions in the opinion where the
10 Court of Appeals has made small technical errors. I can't
11 stipulate to those because I know, for example, Agency X
12 didn't do a drainage plan. It was Agency Y.

13 So why should I confuse the record by stipulating
14 to something that, in fact, I know Plaintiffs cannot prove,
15 I know I can prove to the contrary and the Court of Appeals
16 simply made -- somehow made an error?

17 THE COURT: Well --

18 MS. FLORENTINE: True, technically, you could say
19 it's collateral estoppel, but how do we further our search
20 for the truth or make trial efficient in terms of
21 factfinding by stipulating to something that isn't true?

22 THE COURT: So you're suggesting that the opinions
23 didn't form part of the discussions that you had when you
24 were putting together the stipulation?

25 MS. FLORENTINE: They did, Your Honor. They did,

1 Your Honor, and there were a very few statements in the
2 opinion that were technically incorrect, and I refused to
3 stipulate to those, despite the fact that they were in the
4 opinions.

5 For example, the --

6 THE COURT: Yes. Getting specific I think would
7 be helpful here, and I'll be coming to you, Mr. Marzulla or
8 Mrs. Marzulla, in a second. Go ahead.

9 MS. FLORENTINE: For example, one of the places
10 where the Court of Appeals was incorrect was when it talked
11 about which agency developed what the Court of Appeals
12 referred to as the "drainage plan."

13 Now the technical work, as we'll find out, is done
14 by the Soil Conservation Service, the SCS, and the ASCS
15 makes payments. They do agricultural subsidies and make the
16 payments.

17 So, when somebody wants to do drainage work on
18 that farm, as we'll find out in the testimony at trial,
19 they're basically dealing with two agencies, and those
20 initials are so similar I can understand how the Court
21 became confused, SCS and ASCS, but they're two different
22 agencies within, if we can make it even more confusing, the
23 Department of Agriculture.

24 THE COURT: Did the District Court make the same
25 mistakes?

1 MS. FLORENTINE: I don't think so. I'm not sure
2 exactly, but I think some of the factual findings from the
3 District Court might have inaccurately characterized the
4 role of the ASCS, and, in fact, I don't think Plaintiffs are
5 going to argue that it was the ASCS. I think we're in
6 agreement on who did what.

7 THE COURT: Is there an example of something else
8 like that you think that would be demonstrably wrong that --

9 MS. FLORENTINE: The other example --

10 THE COURT: -- that involves --

11 MS. FLORENTINE: The other example --

12 THE COURT: -- a technicality?

13 MS. FLORENTINE: I'm sorry, Your Honor. I didn't
14 mean to --

15 THE COURT: Go ahead.

16 MS. FLORENTINE: The other example would be the
17 reference to "drainage plan." There was, in fact, no
18 drainage plan. There was a soil -- there was a conservation
19 plan, and that's what the parties will all be talking about,
20 but it was never referred to as a draining plan because it
21 encompassed some more items other than just drainage.

22 So the characterization of the drainage --

23 THE COURT: Does the opinion refer to that in sort
24 of proper noun form or just as in the descriptive term?

25 MS. FLORENTINE: They didn't -- they didn't

1 capitalize it, Your Honor, but they also didn't define what
2 they were referring to, and that leads to the third problem
3 that made it difficult for me to accept some of the offered
4 stipulations, which were basically sentences taken directly
5 from the opinion, and that was reference to "the site."

6 Now, in the Third Circuit opinion, the Court
7 begins discussing "the site" and "the property" without
8 defining it. About two-thirds of the way through, it says,
9 "The site of 30 acres of wetland," but if that's defined as
10 the site, then a number of the Court's statements are
11 demonstratively incorrect.

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14 in that opinion that, when they were defining "site," that
15 they were defining the property of the whole, for example,
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17 MS. FLORENTINE: They were --

18 THE COURT: -- a regulatory taking mode?

19 MS. FLORENTINE: Absolutely. Right.

20 THE COURT: All right.

21 MS. FLORENTINE: They were absolutely not looking
22 at that, and when they used the word "site," they didn't
23 capitalize it, and they seemed to be referring to different
24 amounts of property in different areas in the opinion.

25 And so, to just blindly stipulate to "the site"

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

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

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

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

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

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

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

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

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

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

1 solves the problem.

2 THE COURT: All right. So there's no dispute then
3 that you're not asking, by virtue of your motion then, that
4 I would continue to refer to the agency erroneously,
5 operating on the assumption that --

6 MR. MARZULLA: Correct, Your Honor.

7 THE COURT: -- everybody is in agreement as to who
8 is involved here and what roles that they had.

9 MR. MARZULLA: Exactly.

10 THE COURT: All right. Now what about this
11 drainage plan one?

12 MR. MARZULLA: Well, I suppose that's a semantic
13 difference that is of no particular moment. The
14 conservation plan, soil conservation plan, involved
15 drainage. It's commonly referred to as a drainage plan. I
16 think you'll hear witnesses refer to it as a drainage plan.
17 But we can call it a conservation plan if that makes her
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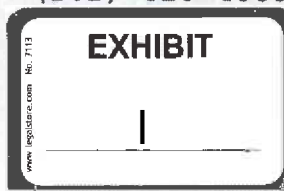
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