



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:

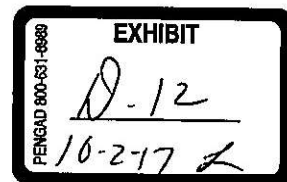
This letter is a joint response from the US Environmental Protection Agency, Region 3 (EPA), and the US Army Corps of Engineers, Pittsburgh District (Corps), to your January 17, 2013 submittal and the subsequent June 27, 2013 site visit to your property in Waterford and McKean Townships, Erie County, 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

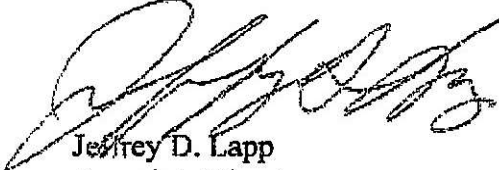
**At this time, you are in violation of the Clean Water Act. No further work in waters should be conducted without the written approval of the Corps and/or the EPA. We recommend that you hire a qualified wetlands consultant to identify the specific boundaries of all waters located on your properties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

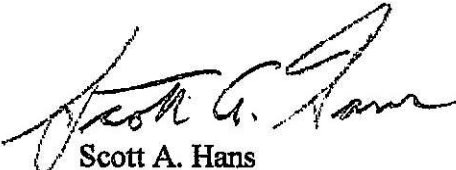


We trust that this letter clarifies any outstanding issues with regard to activities taken as of June 27, 2013 on the Brace Farm properties. If you have any additional questions, please contact Mr. Lutte at the EPA or Mr. Michael Fodse, Corps Regulatory Specialist, at (412) 395-7575 or Michael.M.Fodse@usace.army.mil.

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

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