**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-

EXHIBIT
2

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 Unites 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:
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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

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

UNITED STATES OF AMERICA,

Plaintiff,

V.

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

Defendants.

Civil Action No. 90-229
Erie



## CONSENT DECREE

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

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

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

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

WHEREAS the parties have agreed to this Consent Decree;

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

## FINDINGS

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

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

## INJUNCTION

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

## RESTORATION

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

## CIVIL PENALTY

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

## OTHER PROVISIONS

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

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

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

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

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

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

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

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

DATED: September 23, 1996

UNITED STATES DISTRICT JUDGE

DATED: July 23, 1996

DMT for
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Assistant Attorney General
Environment & Natural Resources Division

By: David M. Thompson
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DATED: June 25, 1996

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Attorneys for Defendants

## Wetlands Restoration Plan

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

1. Excavation of trenches; removal of drainage tubing

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

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

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

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

for a total of six trenches.

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

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

2. Fill In Two Surface Ditches

The two surface ditches that run in a southwesterly

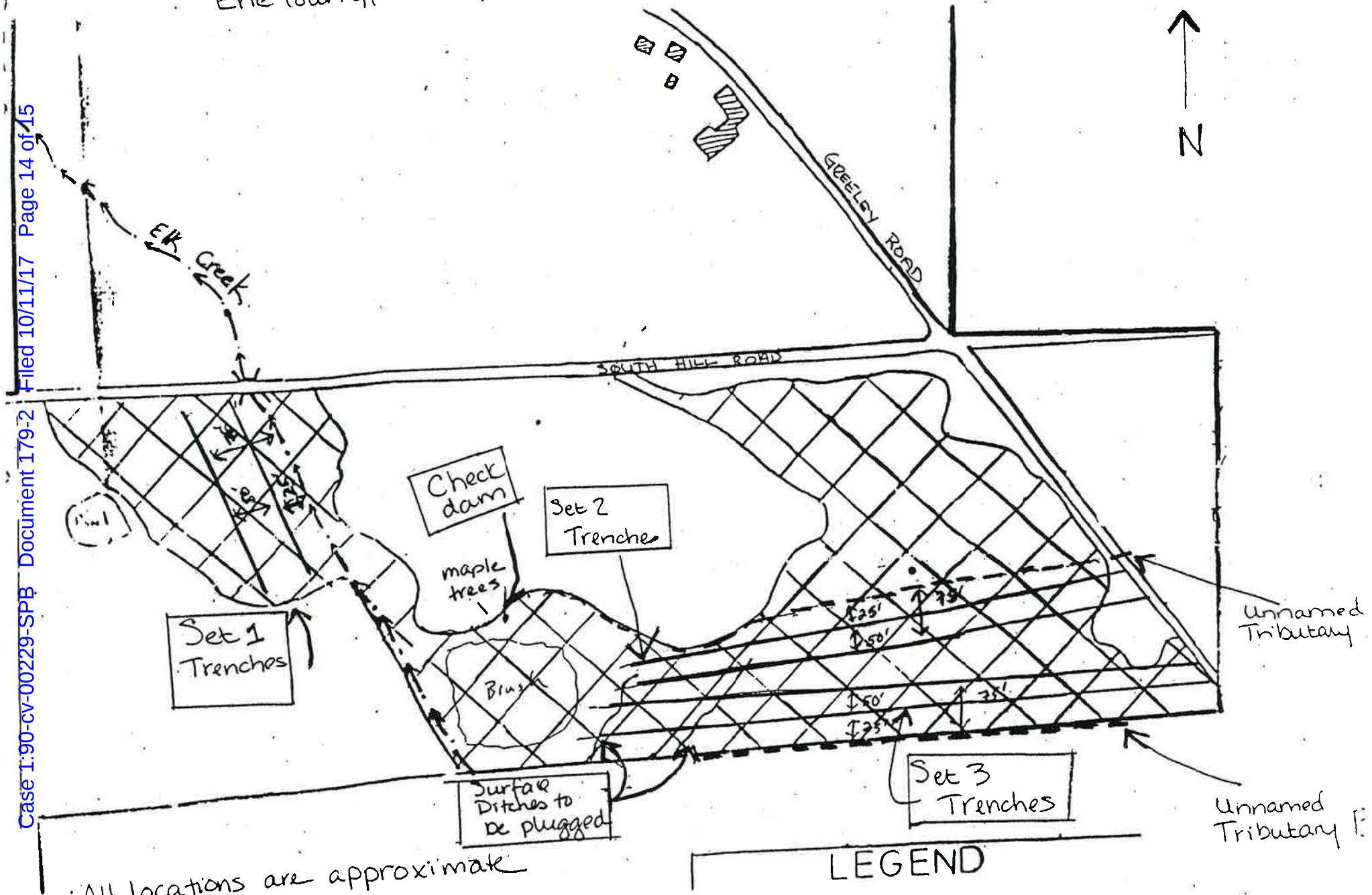
direction into unnamed tributary B, as indicated on Attachment A, shall be filled in beginning at the mouth for a distance of at least twenty five (25) feet.

3. Install Check Dam

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

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

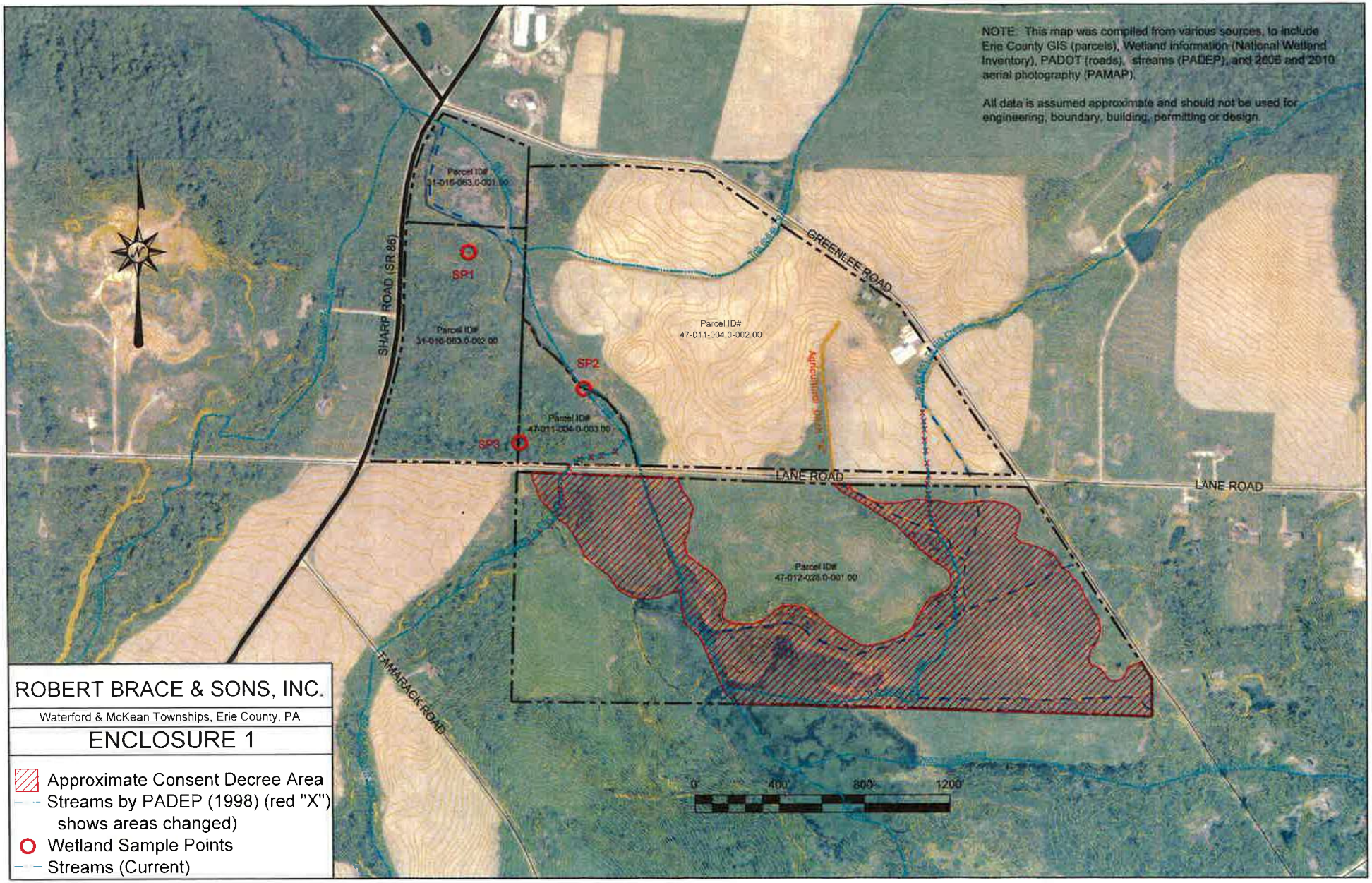
Erie County, Pennsylvania




· All locations are approximate

· Map not to scale

ATTACHMENT "A"

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