

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

UNITED STATES OF AMERICA,	)	Civil Action No. 1:90-cv-00229
	)	Civil Action No. 1:17-17-cv-0006-BR
Plaintiff	)	
	)	
v.	)	
	)	
ROBERT BRACE, and ROBERT BRACE	)	
FARMS, INC.,	)	
	)	
Defendants	)	
	)	

**AFFIDAVIT OF RAY L. KAGEL, JR.**

1. Ray L. Kagel, Jr., being first duly sworn upon oath, deposes and says: I am over the age of 18 and am a resident of the State of Idaho. I have personal knowledge of the facts herein, and if called upon could testify completely thereto.

2. I have been designated as an expert witness for Defendants in the case of *United States. v. Brace et. al.*, 17-cv-06, W.D. Pa., and have prepared a report in rebuttal to the expert report prepared and submitted by Richard Brooks of Brooks Consulting on behalf of the United States in this matter.

3. I am certified by the Society of Wetland Scientists as a Professional Wetland Scientist (#2234). Over the past 36 years, I have completed numerous wetland habitat evaluations, and wetland identifications. To date, I have performed approximately 3,500 wetland jurisdictional determinations since 1987 for purposes of the federal Clean Water Act (CWA) and the Food Security Act (FSA). I also have taught wetland identification and delineation courses on behalf of the U.S. Army Corps of Engineers (COE) and U.S. Environmental Protection Agency (EPA) based on the currently used 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual).



In addition, I was a training instructor, along with James Wakely and Jim Teafor, for the first course taught to federal employees of the COE, EPA, U.S. Fish and Wildlife Service (FWS), and U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), based on the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual) which was withdrawn around January 1993. As a former U.S. Army Corps of Engineers regulatory project manager and Section 404 wetlands enforcement officer, I possess a strong knowledge of wetland laws and regulations, including the study, understanding, and application of wetland identification, wetland delineations, jurisdictional determinations, permitting, and violation resolution pursuant to Section 404 of the CWA.

4. In my position as a senior regulatory project manager and wetland scientist with COE, I earned and was granted signature authority for issuing final and legally binding jurisdictional determinations of waters of the U.S., including wetlands, on behalf of the COE and the EPA. I also had responsibility for reviewing and approving, including signature authority, for executing final authorization for CWA Section 404 nationwide permit (NWP) applications. I was a federal regulatory project manager in three different COE Districts and COE Divisions spanning three major geographical areas across the United States: the east (Philadelphia, PA District), central (Omaha, NE District) and west (Walla Walla, WA District). My official duties and responsibilities included performance, review, and either approval or rejection of applications for CWA Section 404 and Rivers and Harbors Act (RHA) Section 10 NWPs, including making a determination of the limits of federal CWA and RHA jurisdiction associated with all permit applications.

5. Additionally, my duties and responsibilities required that I personally perform wetland identification and delineation field studies, plus review, analyze, and either accept or reject wetland delineation studies and reports completed and submitted by professional wetland consultants and

contractors. Wetland consultant reports submitted to the COE often required that I perform on-site (field) studies to verify that a wetland consultant employed acceptable methods, and correctly identified and interpreted wetland indicators or empirical evidence pertaining to wetland vegetation, wetland soils, and wetland hydrology. My federal authority and responsibility also included verifying that wetland delineation boundaries marked by non-governmental, as well as governmental wetland scientists, were properly and accurately established and mapped. As a federal wetlands expert, enforcement officer, and regulatory project manager, I made approximately 3,000 official wetland jurisdictional determinations on behalf of the United States, i.e. COE and EPA.

6. During my federal regulatory career, I was assigned and authorized to perform several hundred CWA Section 404 jurisdictional determinations for the location of the ordinary high-water mark (OHWM) of lakes, reservoirs, rivers, streams, creeks, including jurisdictional canals and ditches. I was also entrusted with the responsibility and authorization for making official regulatory determinations of “no jurisdiction” for waterways that I determined had an absence of an OHWM.

7. As a regulator with the COE, I served as an enforcement officer of the federal government for identifying alleged CWA Section 404 violations involving the discharge of dredged or fill material into jurisdictional waters and wetlands, including direct involvement in facilitating violation resolution on behalf of the government. In enforcement cases where the EPA was actively involved, the EPA often relied upon my in-depth knowledge, training, skill, and significant experience in wetland science for rendering the agency’s official determination, identification, delineation, and location of subject wetlands for purposes of defining the legal limit(s) of federal CWA jurisdiction.

8. During the last six (6) years of my career with the COE in the Walla Walla, Washington District, the Chief of Regulatory Division, by authority of the District Commander, appointed me as the official point-of-contact (POC), commonly known as the appeals officer, for making final wetland jurisdictional determinations throughout the Walla Walla District which included the entire state of Idaho. I was therefore called to sites that were particularly complicated, complex, atypical, subject to challenge or disagreement, and/or sites that were involved in litigation such as alleged violations and enforcement actions. During the six years that I served as the POC for making final wetland jurisdictional determinations for the Walla Walla District of the COE, the EPA's Region 10 field office located in Boise, Idaho also deferred to and relied upon me as the final authority for identifying, delineating, and determining the limits of federally regulated wetlands in the state of Idaho.

9. In the course of preparing my expert report to rebut Dr. Brook's expert report, I have had the opportunity to closely scrutinize Dr. Brook's methodology, analyses and choice of language to describe the extent, nature and scope of his assessment. It is my professional opinion that Dr. Brooks' expertise is wetland functional assessment and developing assessment models associated with HGM (Hydrogeomorphic) methodology for establishing quantitative values for wetlands. In his report (18 December 2017), Dr. Brooks did not use standard methods of wetland function assessment even though he has published extensively in this area. A significant portion of the report actually does not present any documented facts about the Marsh Site and would not have required that he even be on the site. Another significant portion of his report presents [faulty] results of his on-site sampling points of six separate areas where Dr. Brooks examined and analyzed soils, vegetation and hydrology, i.e., wetland parameters needed to determine Section 404 CWA jurisdiction. Dr. Brooks reported/recorded on each of the official field data forms that

all of his six sampling point areas on the Marsh site exhibited wetland parameters (factors) for wetland vegetation, wetland hydrology, and wetland (hydric) soils. The remaining significant portion of Dr. Brooks' report focused on his efforts to show that the wetlands he identified on the Marsh Site were subject to Section 404 CWA jurisdiction based upon his analysis and conclusions that such wetlands were directly (hydrologically) connected to Lake Erie via Elk Creek, and that such wetlands, including similarly situated wetlands, provided ecologically important services, e.g. physical, chemical, biological, to Lake Erie.

10. Typically, to do a wetlands functional assessment, models are employed that utilize formulas incorporating variables such as  $V_{BIOMASS}$ ,  $V_{EXOTIC}$ ,  $V_{REGEN}$ ,  $V_{REDOX}$ , and others, with the goal of ending up with a number between 0.0 and 1.0 that conveys a value of a wetland for performing a function compared to a "perfect" wetland (1.0 is perfect), providing the same function(s). Dr. Brooks did not do this on the Marsh Site, although he is well published in this area.

11. The Brooks report's introductory paragraph states that he was hired to provide an expert opinion on the "existence, conditions, and functions of wetlands" on the site, as well as, to determine their connectivity/significant nexus. In my professional opinion, the existence, conditions, and functions of wetlands are only relevant to the DOJ if those wetlands are jurisdictional. In my experience as a federal regulator and as a professional wetland scientist, the EPA, COE, and DOJ do not have any legal/federal interest in the functions, values, services, of any areas that meet a technical definition for wetlands, unless such wetlands are determined to be regulated waters of the U.S. according to the ruling of the U.S. Supreme Court in 2006 (*Rapanos v United States*). The EPA, COE, and DOJ might have a general interest in a scientific sense regarding non-jurisdictional wetlands. However, I do not believe these agencies have dedicated

regulatory or enforcement budgets (i.e. authorization) to spend taxpayer money in hiring a \$150 per hour private contractor [wetland scientist] such as Dr. Brooks, simply to perform an on-site field study to obtain, analyze, and determine the existence, conditions, and functions of alleged wetlands associated with a federal CWA lawsuit with regard to non-jurisdictional wetlands. Therefore, it is my professional opinion that the only plausible reason, purpose, and justification for the DOJ to hire Dr. Brooks, was their hope that his expert study would lead to his determination of the existence, location, and condition of jurisdictional wetlands on the Marsh Site, and that his determination for jurisdiction would be based on ecological functions, i.e. nexus, and connectivity of wetlands on the Marsh Site to Lake Erie, a Traditionally Navigable Waterway (TNW).

12. The field data Dr. Brooks observed, recorded, and analyzed from the actual Marsh Site was information that would be typically collected for wetland identification and delineation purposes. I believe his additional data observations, analyses, research, and study of ecological functions and connections were clearly and necessarily required for him to show that Marsh Site wetlands he identified and delineated were jurisdictional wetlands.

13. In Dr. Brooks' publications, he typically uses reference sites to calibrate variables used in employing models for evaluating wetland functions; but there is certainly no mention of calibration of any sort in his expert report of 18 December 2017.

14. The small amount of actual "data" presented by Brooks' in his report is all about determining if a jurisdictional wetland exists. I do not believe his report would be accepted by a peer-reviewed publication interested in accurately describing wetland functions, values, and services since his report lacks a reliably scientific basis.

15. The Brooks report's language of "*significantly affect chemical, physical and biological integrity*" of a TNW (Lake Erie) is the language of the definition of "*significant nexus*", which is

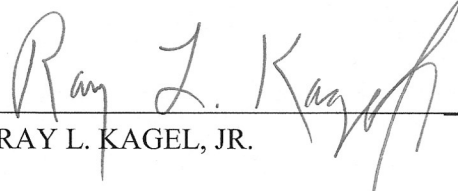
used to determine if a wetland is jurisdictional, per Justice Kennedy in *Rapanos v. United States*. It is my professional opinion that Dr. Brooks' use of Justice Kennedy's language in the *Rapanos* ruling, as well as the statement of purpose and significant components of Brooks' entire expert report prepared for the DOJ, is evidence of his direct attempt and purpose to conduct a wetland jurisdictional determination in support of the current lawsuit brought against Robert Brace and Robert Brace and Sons, Inc., Civil Action Number 17-cv-06, Pa.

16. Any mention of a wetland boundary mentioned by Dr. Brooks in his expert report intuitively relates to jurisdictional determination boundaries.

I declare that, to the best of my knowledge and belief, the information herein is true, correct and complete.

FURTHER AFFIANT SAITH NOT.

DATED this 14 day of March, 2018.

  
RAY L. KAGEL, JR.

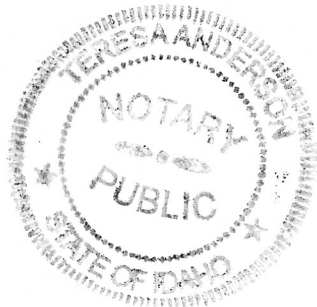
**NOTARY ACKNOWLEDGEMENT**

SUBSCRIBED AND SWORN TO before me this 14 day of March, 2018.

STATE OF Idaho COUNTY OF Jefferson .ss:

Notary Public 

(SEAL)



My Commission Expires 7-1-23