

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

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| _____                         |  | ) |                                 |
| UNITED STATES OF AMERICA      |  | ) |                                 |
|                               |  | ) |                                 |
| Plaintiff,                    |  | ) |                                 |
|                               |  | ) |                                 |
| v.                            |  | ) | Civil Action No. 17-cv-006 (BR) |
|                               |  | ) |                                 |
| ROBERT BRACE,                 |  | ) |                                 |
| ROBERT BRACE FARMS, Inc., and |  | ) |                                 |
| ROBERT BRACE and SONS, Inc.,  |  | ) |                                 |
|                               |  | ) |                                 |
| Defendants.                   |  | ) |                                 |
| _____                         |  | ) |                                 |

**UNITED STATES’ OPPOSITION TO DEFENDANTS’ MOTION FOR EXTENSION OF  
TIME TO COMPLETE DISCOVERY**

Defendants have not shown the requisite good cause for the discovery extension they seek. On December 5, 2017, counsel for Defendants agreed to an expert disclosure schedule providing that initial disclosures would be made on December 18, 2017, and rebuttal disclosures on January 12, 2018. Defendants have known from this case’s inception on January 9, 2017, that the existence of jurisdictional wetlands on the Marsh Site is central to the United States’ Clean Water Act enforcement action, and have known since at least October 13, 2017, the identity of the two experts the United States had retained to support that element of its case. Defendants have had ample time to retain a rebuttal expert and produce a rebuttal report. Thus, for the reasons that follow, the United States opposes Defendants’ Motion for Extension of Time to Complete Discovery (ECF No. 35):

1. First, Defendants previously agreed to an expert disclosure schedule that would allow expert discovery to be completed by the close of discovery. On December 5, 2017, Defendants agreed that the parties would make initial expert disclosures on December 18, 2017,

and would make rebuttal expert disclosures on January 12, 2018. Ex. A. On January 5, 2018, the United States agreed to extend the deadline for rebuttal expert disclosures to January 19, 2018, to accommodate Defendants' need for more time. Ex. B. The parties reached this agreement after the United States sent repeated unanswered requests to establish expert disclosure dates on at least four occasions: September 13, 2017, September 20, 2017, September 21, 2017, and October 11, 2017. *See* Ex. C, D, E, F. On December 5, 2017, Defendants finally responded to yet another request dated November 30, 2017. Ex. A. When Defendants agreed to the December 18, 2017 and January 12, 2018 disclosure deadlines, they knew well that two federal holidays (December 25, 2017 and January 1, 2018) fell during that period.<sup>1</sup> Furthermore, at the time of the agreement, Defendants expressed no reservation about their ability to produce rebuttal reports according to this schedule.

2. Second, Defendants have had adequate time to retain rebuttal experts in this case. This Court provided the parties more than eight months (May 19, 2017 to January 31, 2018) to complete fact and expert discovery, *see* ECF Nos. 26 and 32, and Defendants have known from this case's inception more than a year ago that the presence of wetlands on the Marsh Site is central to the United States' claim. *See* Compl. ¶¶ 30–37 (ECF No. 1). The United States has served two expert reports on that issue in this case: Dr. Robert Brooks' report, "Ecological Functions and Connections of Wetlands and Waters at the Marsh Site," and Mr. Peter Stokely's report, "Aerial Photography Interpretation and Geographic Information System Analysis of the

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<sup>1</sup> Defendants' statement that this amounts to "two-weeks of successive federal holidays," ECF No. 199 ¶ 10, is a gross exaggeration. Nevertheless, Defendants do not explain why these two holidays prevented them from retaining an expert capable of proffering rebuttal within the generous discovery period.

Marsh Site, Erie County, PA.”<sup>2</sup> Although the United States served these reports on December 18, 2017, Defendants have known the identity of the United States’ experts since at least October 13, 2017, when the United States’ identified those experts in advance of an inspection of the Marsh Site that occurred on October 16-17, 2017. Ex. G. In fact, Defendants’ counsel and their agents observed Dr. Brooks collecting samples during that inspection. Defendants were perfectly capable of retaining a wetlands expert before the United States disclosed its expert reports. The apparent predicament Defendants find themselves in is due entirely to their own lack of foresight and preparation over the past eight months and does not constitute good cause to extend the discovery period.

3. The other expert mentioned in Defendants’ motion, Dr. Dwayne Edwards, Ph.D., P.E., is an expert designated in Civil Action 90-229, which is before Magistrate Judge Baxter and concerns a different parcel than that at issue in this case. Defendants’ professed need for more time to rebut Dr. Edwards’ report in the 90-229 action is no reason to extend the discovery period in *this* action.

4. Third, no additional time is needed to depose the parties’ experts in this matter. The United States has informed counsel for Defendants that Mr. Stokely is ready and available to be deposed on any date between now and January 31, 2018, and that Dr. Brooks is ready and available to be deposed on January 22, 24, 26, or 29, 2018. Defendants need only notice the depositions.

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<sup>2</sup> The United States has also disclosed that it has retained Vincent Leo, CPA, Insero & Co., as an expert to assess the financial condition of Defendants’ ability or inability to pay a civil penalty. The United States has not yet served a report because Defendants have failed to properly respond to the United States’ First Set of Interrogatories and Requests for Production and prepare their Rule 30(b)(6) designated deponent on topics addressing Defendants’ net worth and financial statements. Once Defendants have complied with their discovery obligations, the United States will produce Mr. Leo’s expert report.

5. Finally, no additional time is needed to depose Defendants' final two fact witnesses, Karl Gross and Scott Dudzik of the Pennsylvania Department of Environmental Protection. Although Defendants have had ample time to conduct these depositions in the more than seven months of discovery thus far, the United States nevertheless will consent to these witnesses' depositions occurring outside the discovery period so long as they will be completed by February 7, 2018.

In sum, Defendants fail to show good cause to extend the already lengthy discovery period any further. The United States respectfully requests that the Court deny Defendants' motion for extension of time to complete discovery.

Respectfully requested,

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DATED this 18th day of January, 2018.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on January 18, 2018, I sent a true and correct copy of the foregoing UNITED STATES RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY to counsel for Defendants via First Class mail and E-mail at the following address.

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