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

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT BRACE, ROBERT BRACE FARMS, Inc., Defendants.	)	Civil Action No. 90-229 (Erie)

UNITED STATES' RESPONSE TO DEFENDANTS' NOTICE REGARDING MOTION FOR ADDITIONAL TIME (ECF NO. 211)

The United States submits this response to Defendants' "Notice Regarding Motion for Extension of Time to Complete Expert Discovery," ECF No. 211.

1. The United States respectfully requests that the Court hold a telephonic hearing on Defendants' motion, ECF 209.

2. For the following reasons, and despite Defendants' suggestion to the contrary, Judge Rothstein's Order granting Defendants additional time to complete expert discovery in the 17-CV-006 matter is irrelevant to—and should have no bearing on—this Court's analysis of the motion pending before it, ECF No. 209.

3. First, during the March 30, 2018 telephonic hearing on Defendants' motion for additional time to conduct expert discovery, Judge Rothstein explicitly rejected Defendants' argument that the United States violated the parties' October 3, 2017 stipulation, which serves as the ***sole*** basis for Defendants' untimely motion filed with this Court.[1]

[1] The United States has not yet had the opportunity to obtain the transcript of the March 30, 2018 hearing, but will do so and provide citations to the Court as soon as is possible.

4. Second, Judge Rothstein granted the Defendants additional time for expert discovery in the 17-CV-006 matter apparently based on Defendants' argument that they had only retained their rebuttal experts (Raymond and Susan Kagel) in January 2018, and that to fully rebut the opinions of the United States' experts in in the 17-CV-006 matter (Dr. Robert Brooks and Mr. Peter Stokely), Defendants' experts must conduct a field assessment of the relevant wetlands during the spring "growing season." But that rationale is entirely inapposite to the substance and timing of expert discovery in this matter as discussed below:

a. Defendants have designated Mr. and Dr. Kagel to respond to expert opinions by Dr. Brooks and Mr. Stokely, who the United States has proffered as experts ***solely*** in the 17-CV-006 action. The United States will use Dr. Brooks' and Mr. Stokely's expert opinions in the 17-CV-006 action to establish that wetlands existed on a new property Mr. Brace purchased in 2012 (referred to as the "Marsh Site," which is ***not*** the property subject to the 1996 Consent Decree at issue in this action) and that Defendants disturbed those wetlands in violation of the Clean Water Act ("CWA"). Those expert opinions are irrelevant to the United States' motion to enforce the 1996 Consent Decree at issue here.

b. In this matter, Defendants have already ***stipulated*** that the 30-acre area protected by the Consent Decree ("Consent Decree Area") is a wetland. In addition, Judge Mencer has already held that those wetlands are "waters of the United States" under the CWA, and the Third Circuit has already held that Defendants disturbed wetlands within the 30-acre Consent Decree Area in violation of the CWA. Thus, United States has not proffered (and need not proffer) expert opinions regarding the existence of wetlands protected by the Consent Decree. Quite simply, the existence of wetlands within the 30-acre Consent Decree Area is *res judicata* and law of the case. Thus, Judge Rothstein's order, providing Defendants additional

time to have experts assess the presence of wetlands on a ***different*** property where that issue has not already been adjudicated, is completely irrelevant to the claims before this Court.

c. The only expert witness the United States has retained in this matter is Dr. Dwayne Edwards, P.E., who the United States hired to refute Defendants' assertion that the restoration work required by the Consent Decree caused flooding on their upland farms. The United States hired Dr. Edwards, in part, to respond to an ***August 2015*** report (which Defendants have now proffered as their affirmative expert report in this matter) prepared by Defendants' expert, Andrew Johnson, P.E. Defendants have not presented (and cannot present) any evidence that Mr. Johnson was unable to conduct whatever hydrological tests Defendants deem necessary to support their defense in the more than two years since they retained him.

5. Finally, in addition to the substantive differences between the expert discovery in this action as contrasted to that in the 17-CV-006 action, the two matters are in different procedural postures. Unlike the matter before Judge Rothstein, the dispositive deadline in this matter passed and the United States has already timely filed its renewed Motion to Enforce, ECF No. 207. As noted in the United States opposition brief to Defendants' motion, courts in this Circuit have consistently held that discovery should not be re-opened after the dispositive motion deadline has passed. *See* ECF No. 210 ¶ 9 & n.4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2018, I served the foregoing United States' Response to Defendants' Notice Regarding Motion for Additional Time (ECF No. 211) on the following counsel for Defendants via ECF:

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