

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

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

MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY

Defendants, Robert Brace and Robert Brace Farms, Inc., (collectively, “Defendants” or “Brace”) file this Motion for an Extension of Time to Complete Discovery:

1. The current deadline for the parties to complete all discovery (including both factual and expert discovery, as well as all depositions) is January 31, 2018. *See* ECF No. 193.

2. Defendants request a four-week extension of the discovery deadline—to February 28, 2018—to both allow Defendants to complete and submit rebuttal expert reports and to allow each party sufficient time to take the depositions of the other party’s experts. Defendants request a February 21st deadline for the disclosure of their rebuttal expert reports, and then an additional one-week period for each party to conduct depositions of the other party’s expert witnesses. Defendants expect to work cooperatively with the government to schedule depositions of each party’s expert witnesses (three government experts and three Defendant experts) within the following five business days. Defendants would not be opposed to an additional week or two to conduct these six expert depositions, if the government finds it necessary.

3. On December 18, 2017—the government served Defendants with the expert report of Dwayne R. Edwards, Ph.D., P.E. (the “Edwards Report”). Attached as Exhibit A is a true and correct copy of that report.

4. The Edwards Report is a substantial, highly technical report that claims to constitute an analysis of potential flood magnitude and severity of land surrounding the Consent Decree area. It contains 66 pages, 42 separate lengthy numbered paragraphs, 32 figures, 20 tables, plus an additional 46 pages of supporting appendices. Although the Edwards Report (*See Exhibit A*), ostensibly concerns itself with the government’s position in the 1990 action, it also arguably sets forth the government’s position in the ’2017 action, as well as, its response to a separate administrative action Defendants previously filed on July 1, 2017, against the government under the Federal Tort Claims Act.

5. Also on December 18th, the government served two expert reports in the related 2017 action (*United States v. Brace, et al.*, Civ. No. 17-06), one belonging to Robert Brooks, Ph. D. (the “Brooks Report”), and the other belonging to Peter Stokely (the “Stokely Report”). The Brooks Report and Stokely Report are attached hereto as Exhibits B and C, respectively.

6. The Brooks Report, also a highly technical report, claims to consist of an analysis of the ecological functions and connections of Marsh Site wetlands. It consists of over 42 pages of opinion and analysis, 69 figures, and 10 tables. It also claims to rely on at least 32 different documents and other materials cited, but not provided with the report. *See Exhibit B*.

7. The Stokely Report, again, a highly technical expert report, claims to consist of aerial photograph interpretation and geographic information system analysis of the Marsh Site. It is a seven-page report, plus an additional 42 pages of supporting documentation, which includes 23 figures. It also claims to rely on 20 different aerial images, five different sets of government GIS data, four maps, and 13 different documents (all of which was cited in, but not served with, the report). *See* Exhibit C.

8. All three government experts visited the relevant properties over two days, on October 16 and 17, 2017. As a result, the government's experts had over two months to complete these reports before serving them on Defendants.

9. Defendants initially agreed to the government's requested deadline of January 12th for rebuttal expert reports. However, Defendants did not anticipate the substantial size and scope of the government's expert reports and assumed—in hindsight, wrongly—that, if Defendants required additional time to complete rebuttal expert requests, the government would agree to a scheduled that allowed them sufficient additional time.

10. On January 4, 2018, Defendants initially contacted the government via email to request an extension of the discovery deadline until February 28, 2018, to secure experts capable of rebutting three lengthy, highly technical and complex expert reports the government first produced on December 18, 2017, and to allow for each party to depose the other party's experts once rebuttal expert reports had been secured. Although the Defendants had previously agreed upon the December 18, 2017 date as the deadline for disclosure of initial expert reports, Defendants did not anticipate that the government would disclose such substantial and broad expert reports, especially just prior to the commencement of two-weeks of successive federal holidays. Once Defendants realized that the government's experts had exceeded the scope of

opinion Defendants had anticipated, Defendants began working to secure additional experts and rebuttal expert opinions. Defendants only were first able to secure contact with their previously disclosed expert, and with its new since hired experts, on January 4, 2018.

11. Although Defendants have been working diligently to not only secure rebuttal experts, but to provide those experts with all necessary information, Defendants' newly hired rebuttal experts—Ray Kagel and Susan Kagel, along with Andy Johnson, Defendants' initial expert—have informed undersigned counsel that given the size and scope of the government reports, their pre-existing commitments, and the time necessary to prepare and submit rebuttal reports, they do not believe they can complete rebuttal reports prior to February 21, 2018.

12. Immediately upon learning that Defendants' initial and new experts would not be able to review the government's three expert reports and prepare and complete rebuttal reports by the close of discovery for the above-stated reasons, undersigned counsel for Defendants, Attorney Kogan, on January 4, 2018, contacted counsel for the government and requested an extension of the deadline for discovery in both this matter and the related 2017 case. Counsel for the government refused to agree to Attorney Kogan's initial January 4, 2017 email request for an extension of discovery and indicated that the government will oppose this motion. Counsel for the government, once again, refused to agree to Attorney Kogan's subsequent in-person request for an extension of discovery during depositions convened in Erie during the week of January 8, 2018.

13. Defendants do not oppose a corresponding extension of the deadline for the government to re-file its Motion to Enforce, and thus the government will not be prejudiced by any extension of the deadline for discovery. In the event the Court or the government does not wish to move the deadlines for the Motion to Enforce and Defendants' response, Defendants do

not oppose allowing the government to supplement their motion with additional information that arises from any additional expert discovery conducted after the filing of their motion.

14. Defendants, on the other hand, will be prejudiced if they are not allowed sufficient time to respond to the government's lengthy and complex expert reports in these cases seeking substantial financial penalties and injunctive remedies against Defendants.

15. Defendants also require an extension of the discovery deadline in order to complete the depositions of two third party witnesses—Karl Gross and Scott Dudzik, both who work for the Pennsylvania Department of Environmental Protection. After the parties reached an agreement in early December on the number and identity of additional depositions, Defendants began working to schedule these depositions. These depositions were initially scheduled for January 9th, but one witness was not able to be served (Gross) and one notified Defendants the week before his deposition that he needed to reschedule it (Dudzik). Defendants are currently working to find dates that work for the witnesses and all parties, but it appears as if the only dates that work are in February.

16. In addition, during the depositions of the Defendants conducted last week, counsel for the government raised a number of additional discovery issues that Defendants anticipate will need to be resolved, providing an additional reason for granting this brief extension of discovery.

17. Defendants met and conferred with counsel for the government. The government opposes this motion.

WHEREFORE, the Defendants, by and through their undersigned attorneys, respectfully request that Court extend the deadline for discovery to February 28, 2018.

<p>Respectfully submitted,</p> <p>THE KOGAN LAW GROUP, P.C..</p> <p>By: <u>/s/ Lawrence A Kogan</u> Lawrence A. Kogan, Esq. (<i>Pro Hac Vice</i>) (NY # 2172955) 100 United Nations Plaza Suite #14F New York, New York, 10017</p> <p>(t)212 644-9240</p> <p>Email: lkogan@koganlawgroup.com</p> <p>Attorneys for Defendants, Robert Brace and Robert Brace Farms, Inc.</p>	<p>Respectfully submitted,</p> <p>KNOX McLAUGHLIN GORNALL & SENNETT, P.C.</p> <p>By: <u>/s/ Alexander K. Cox</u> Neal R. Devlin, Esq. (PA ID No. 89223) Alexander K. Cox, Esq. (PA ID No. 322065) 120 West Tenth Street Erie, PA 16501-1461 Telephone: (814) 459-2800 Fax: (814) 453-4530 Email: ndevlin@kmgslaw.com</p> <p>Attorneys for Defendants, Robert Brace and Robert Brace Farms, Inc.</p>
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