

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)	
)	

**MOTION FOR ADDITIONAL TIME FOR SCIENTIFIC DISCOVERY TO ALLOW
DEFENDANTS AN ADEQUATE, FAIR AND JUST DEFENSE**

Defendants, Robert Brace, and Robert Brace Farms, Inc., (collectively, “Defendants” or “Brace”) file this Motion for Additional Time for Scientific Discovery to Allow Defendants an Adequate, Fair and Just Defense in the related actions at bar:

1. The current deadline for the parties to complete all discovery in both civil actions (including both factual and expert discovery, as well as all depositions) was February 28, 2018, per Court orders issued in each action, respectively, on January 19, 2018 (1:90-cv-00229, ECF No. 203), and January 23, 2018 (1:17-cv-00006, ECF No. 38).

2. Defendants request additional time for scientific discovery from the date of this filing – from March 20, 2018 to June 29, 2018 – to provide sufficient time: a) For Defendants’ scientific experts to conduct essential focused analyses of Defendants’ three hydrologically integrated Waterford, PA farm fields in response to Plaintiff’s three expert reports; b) For Defendants’ scientific experts to prepare reports of the results of said studies; and 3) For Plaintiff’s scientific experts to review said reports and for Plaintiff’s counsels, if they so choose, to depose Defendants’ three scientific experts in Idaho Falls, ID and Utica, NY for purposes of both actions.

3. Defendants have not before mounted a scientific expert defense in the 30-year-old 1:90-cv-00229 action, and, since the United States' filing of both the current actions, have been hamstrung in their ability to organize such a defense as the result of the United States' improper conduct. On October 3, 2017, the United States' and Defendants' counsels executed and filed with this Court a joint stipulation (ECF No. 175) to address the concerns identified in Defendants' prior Motion to Quash Plaintiff's Request for Entry onto Land (ECF No. 164) and accompanying Protective Order Regarding Use of Information Obtained From United States' Entry on Defendants' Lands (ECF No. 164-1) i.e., limiting the use(s) by the United States and its experts of data and other information that would be gathered from the Plaintiff's then desired October 16-17, 2017 onsite examination of Defendants Waterford, PA properties. The United States then proceeded to violate the letter and spirit of that joint stipulation, through its and/or its scientific experts' carefully crafted but improper indirect use of that information, as reflected in the text and resumes of two of the three reports produced by United States' scientific experts. To add insult to injury, the United States then intentionally provided late delivery of their expert reports just prior to the onset of two back-to-back federal holidays, outside the growing season and in the dead of a harsh winter. This appears designed to ensure a significant one-sided pre-trial advantage prior to the close of discovery.

4. Defendants require additional time to have their experts perform and report the results of three focused scientific studies, including: a) a wetland assessment study of the approximately 20-acre Marsh site, including examination and analysis of soils, vegetation and hydrology, site photography, analysis of field data, completion of data forms, and preparation of a report thereof; b) a jurisdictional tracing and documentation study of Elk Creek from the Marsh site to Lake Erie; [and c) a hydrologic/hydraulic study that: i) measures and monitors groundwater elevations on all

three hydrologically integrated fields, ii) evaluates the hydraulic efficiency of the drainage system as constructed by identifying every source of change in the system that can affect the quantity and movement of water on all tracts, and (iii) analyzes the groundwater/surface water interactions to assist in the evaluation of the impact of groundwater on all streams and parcels which will require, at a minimum, 45-days of on-site in-growing season surface and groundwater data collection prior to analysis..]

5. Defendants require this additional time also to perform and report the results of the three focused scientific analyses, because the Defendants detrimentally relied on the United States complying with the joint stipulation and could not have anticipated the scope of expert analyses the United States would prepare following their examination of Defendants' properties since neither party had prepared any similar analyses previously. This joint stipulation served as the precondition for Defendants having allowed the United States entry onto Defendants' Waterford, PA properties to enable Plaintiff's scientific experts to conduct their own onsite examinations of those properties on October 16-17, 2017.

6. The October 3, 2017 stipulation conditioned Plaintiff's entry onto Defendants' lands upon Plaintiff's abidance by the following proviso: "Plaintiff agree[d] that it w[ould] not, absent a request by Defendants, use any information or data gathered or obtained during the Inspections for purposes of an "Approved Jurisdictional Determination" or a "Jurisdictional Determination" by the U.S. Army Corps of Engineers." Plaintiff, however, added to this stipulation the following language: "provided, however, that nothing in this Stipulation shall in any way affect the United States' ability to use information or data gathered or obtained during the Inspections to support the United States' claims or defenses in the two above-cited cases." This added language appears rather standard and innocuous on its face. However, when read together with the text of two of

Plaintiff's expert reports – (the “Brooks Report”, prepared by Dr. Robert Brooks (Ex. 1) and the “Stokely Report,” prepared by Mr. Peter Stokely (Ex. 2)), this language indicates that the United States did not comply with, and, in fact, violated both the letter and spirit of the parties' stipulation.

7. Defendants entered into this stipulation in good faith after Defendants' counsels had filed a Motion to Quash Plaintiff's Request for Entry onto Land (ECF No. 164) and an accompanying Protective Order Regarding Use of Information Obtained From United States' Entry on Defendants' Lands (ECF No. 164-1). Defendants' pre-stipulation filings had been intended to prevent “the *United States*, through its In-House Counsel, Outside Counsel, or any Federal Employee or non-Party Contractor or Expert” from using any “information derived from any of the activities identified above [including, but “not limited to, the monitoring, measuring, sampling, examining, surveying, inspecting, testing, collecting, photographing, and analyzing of all the physical characteristics of two of Defendants' integrated farm tracts known as the ‘Murphy’ and ‘Marsh’ Sites currently identified as the subject of these litigations, as well as, of all the physical characteristics of those portions of Defendants' third integrated farm tract known as the ‘Homestead Site,’ [...] “for purposes of reaffirming or reestablishing a jurisdictional determination (“JD”) and/or wetlands delineation (“WD”) of Defendants' three Sites, as those terms are defined by applicable Corps and EPA regulations, guidance, practices, standards, processes and/or procedures implementing Clean Water Act Section 404 (33 U.S.C. § 1344(a))” (emphasis added).

8. At the time it entered into the joint stipulation with Defendants, the United States knew full well that determinations of regulatory jurisdiction are based on and require that a wetland delineation be performed. (Ex. 3), (Ex.4), (Ex. 5), (Ex. 6). Despite the language of the joint stipulation, in which the United States expressly indicated that it would not use information it obtained during the site inspection for such purposes, the United States violated this language

through its and/or its scientific experts' improper direct and indirect use of the examination information for wetland delineation and/or regulatory jurisdictional purposes, as reflected in the text and resumes of the Brooks and Stokely Reports. The United States' improper conduct has rendered Defendants unable to ensure an adequate, fair and just defense against Plaintiff's allegations and expert reports. As the result, Defendants now seek additional time, until June 29, 2018, to have their scientific experts conduct three probative analyses of the three hydrologically integrated Brace Waterford, PA farm fields which such experts deem necessary and indispensable to providing Defendants with an adequate, fair and just defense against Plaintiff's allegations and expert reports. This Court possesses broad discretion to modify the conduct of discovery in the course of its management of these cases to provide Defendants with the type of relief requested. *See Drippe v. Tobelinski*, 604 F.3d 778, 783 (3d Cir. 2010) ("As a general matter, we accord district courts great deference with regard to matters of case management. *See, e.g., In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817-818 (3d Cir. 1982) ("[M]atters of docket control and conduct of discovery are committed to the sound discretion of the district court...")

9. Defendants also require additional time to perform and report the results of three focused scientific analyses because the 2018 growing season in western Pennsylvania does not commence until mid-April to early May 2018, (Ex. 7) and (Ex. 8), and the 2017 growing season in western Pennsylvania had already ended approximately two months prior to Plaintiff's delivery to Defendants' counsels of three lengthy, highly technical and complex expert reports - the Brooks Report, the Stokely Report, and the report of Dr. Dwayne Edwards (the "Edwards Report" (Ex. 9)). These reports were delivered to Defendants' counsels on December 18, 2017, on the eve of two back-to-back federal holidays. Defendants were thereby denied the ability to first learn of what scientific studies would be necessary to ensure their adequate, fair and just defense until after

the 2017 growing season had already ended, and until after Defendants' counsels had the opportunity during these back-to-back federal holidays to first review the three voluminous and technically complex United States expert reports to ascertain the need for Defendants to retain scientific experts to mount a credible expert defense against Plaintiff's allegations and expert reports. Defendants' counsels quickly proceeded to retain experts for Defendants during the first ten days of January 2018. Thereafter, on January 16, 2018, Defendants filed with this Court a Motion for Extension of Time to Complete Discovery (ECF No. 199) with accompanying exhibits (ECF Nos. 199-1, 199-2, 199-3).

10. The Court in each of the actions at bar, in light of Defendants' Motion for Extension of Time to Complete Discovery and the then anticipated government shutdown (which actually took place from January 20-22, 2018),¹ granted Defendants a 30-day extension, until February 28, 2018. This enabled Defendants' scientific experts to prepare *rebuttal reports* (the "Ray Kagel Rebuttal Report," (Ex. 10), the "Susan Kagel Rebuttal Report" (Ex. 11) and the "Andrew Johnson Rebuttal Report" (Ex. 12)) to each of the three reports prepared by United States experts. It also enabled each party to depose the other party's experts.

11. Notwithstanding the Court's grant of this extension for discovery, however, none of Defendants' scientific experts was able to conduct at least one onsite wetland-focused visit at the subject properties for such purposes in either January or February 2018 on account of particularly harsh Erie, PA winter weather outside of the growing season. Both the calendar and these conditions "made it impossible to obtain crucial evidence," and consequently, a "more diligent discovery was impossible." See *Reisinger v. City of Wilkes-Barre*, 520 F. App'x 77, 80 (3d Cir. 2013) quoting *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1032 (3d Cir.

¹ See Wikipedia, *United States federal government shutdowns of 2018*, available at: https://en.wikipedia.org/wiki/United_States_federal_government_shutdowns_of_2018.

1997) (quoting *In re Fine Paper*, 685 F.2d at 818). The inability of Defendants' scientific experts, thus far, to conduct onsite examinations of Defendants' properties has been extremely debilitating to their defense, effectively rendering their expert rebuttal reports both technically and holistically incomplete. This is especially so given the United States' violation of the joint stipulation through its and/or its scientific experts' improper direct and indirect use of the examination information and data gathered from the October 2017 inspection of Defendants' properties as clearly evidenced in the texts and resumes of Plaintiff's expert reports.

12. As noted above, this Court possesses broad discretion to modify the conduct of discovery incident to its management of these cases to provide Defendants' scientific experts, until May 31, 2018, to conduct three probative analyses of the Brace Waterford, PA properties which Defendants' experts deem necessary and indispensable to providing Defendants with an adequate, fair and just defense against the United States' allegations and expert reports. *See Drippe v. Tobelinski*, 604 F.3d 778, 783 (3d Cir. 2010) (precedential) ("As a general matter, we accord district courts great deference with regard to matters of case management. *See, e.g., In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817-818 (3d Cir. 1982) ("[M]atters of docket control and conduct of discovery are committed to the sound discretion of the district court...").

WHEREFORE, Defendants, by and through their undersigned attorneys, respectfully request that the Court schedule a status conference to address this Motion, and thereafter, exercise its legal and equitable discretion by granting Defendants sufficient additional time, until June 29, 2018, for their scientific experts to conduct three essential probative focused scientific studies of Defendants' three hydrologically integrated Waterford PA farm fields in response to Plaintiff's three expert reports, and to prepare reports of the results of said studies, and for Plaintiff's scientific

experts to review said reports and for Plaintiff's counsels, if they so choose, to depose Defendants' three scientific experts in Idaho Falls, ID and Utica, NY for purposes of both actions.

Respectfully submitted,

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