

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

UNITED STATES OF AMERICA,)	
)	Civil Action No. 1:17-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 Jan. 19, 2018 (1:90-cv-00229, ECF No. 203), and Jan. 23, 2018 (1:17-cv-00006, ECF No. 38).

2. Defendants require 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 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.

4. Defendants require additional time to perform and report the results of these additional scientific analyses because the United States violated the letter and spirit of the joint stipulation the parties executed and filed with this Court on October 3, 2017 (ECF No. 175), through its scientific experts' carefully crafted but improper use of the information and data obtained from the October 16-17, 2017 on-site inspections of Defendants' Waterford Township, PA properties. Such improper indirect use is reflected in the texts and resumes of two of the three reports produced by Plaintiffs' scientific experts. 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. 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 improper conduct appears designed to provide Plaintiffs with a significant one-sided pre-trial advantage prior to the close of discovery, rendering Defendants unable to ensure an adequate, fair and just defense against Plaintiff's allegations and expert reports. Consequently, Defendants must now seek leave from this Court to more vigorously rebut Plaintiffs' allegations and expert reports with additional scientific studies their experts deem necessary and indispensable to that defense, at substantial extra cost.

5. Defendants entered into this joint 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).

6. Defendants had filed the Motion to Quash and Protective Order because “The United States allegedly last performed a [jurisdictional determination] JD and [wetland delineation] WD of Defendants’ Marsh and Murphy Sites on or about July 24, 2012, more than five years from the date of this filing. Corps guidance has long recognized JDs and WDs as legally valid for a period not exceeding five years, and the prior alleged July 24, 2012 JD and WD covering these Sites has since expired. Consequently, the United States would find it necessary to secure an updated or an entirely new JD and WD to ensure that the EPA and Corps reaffirm or reestablish their shared legal jurisdiction over such lands on the grounds they putatively contain “Waters of the United States,” within the meaning of CWA Section 404.” (ECF No. 164, para. 4). “The evidence indicates that the DOJ has endeavored to mislead Defendants and this Court, by intentionally disguising the United States’ effort to reaffirm or reestablish EPA/Corps federal jurisdiction over Defendants’ Marsh and Murphy Sites by securing an updated or an entirely new JD/WD of them as a run-of-the mill Rule 34(a)(2) discovery-related inspection, monitoring and measurement request.” (*Id.*, at para. 5).

7. 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. The material terms of the October 3, 2017 joint stipulation conditioned the United States’ 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 joint 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 was not intended to eliminate the previous restriction and in no way permitted the United States and/or its scientific experts to directly or indirectly use information or data gained during the October 16-17, 2017 inspection(s) for purposes of establishing, confirming or reaffirming United States regulatory jurisdiction over Defendants' properties.

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. 1), (Ex.2), (Ex. 3), (Ex. 4). 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.

9. Two of Plaintiff's scientific expert reports (the "Brooks Report" prepared by Dr. Robert Brooks (Ex. 5) and the "Stokely Report" prepared by Mr. Peter Stokely (Ex. 6)) directly and indirectly collectively set forth what is effectively a *wetlands delineation* developed in the Brooks Report that serves as a ground-truthing mechanism/tool to verify the existence and scope of wetlands, the wetlands boundaries, and the wetlands location (relative to) and connectivity with "Elk Creek, a tributary to Lake Erie," for United States Clean Water Act Section 404 ("CWA 404") *jurisdictional* purposes, as identified through the aerial photographic interpretation discussed in the Stokely Report, in clear contravention of both the letter and spirit of the October 3, 2017 stipulation of the parties.

10. The Brooks Report is much broader and more ambitious than a mere assessment of the functions and values of wetlands. According to the 1995 National Academy of Sciences report entitled, “Wetlands: Characteristics and Boundaries” (“NAS Report”),¹ an assessment of wetlands functions “has been used to rank or categorize wetlands, which might ensure that wetlands with highly valued functions receive greater protection than wetlands in general. [...] Wetland functions are the physical, chemical, and biological processes that characterize wetland ecosystems, such as flooding, denitrification, provision of habitat for organisms, and support of aquatic life.” (Ex. 7 at 215). The NAS Report reveals, furthermore, that an “[a]ssessment of wetlands functions is required for a CWA Section 404 permit, it is not required for but may be useful in the identification and delineation of wetlands for jurisdictional purposes. *Id.*, at 223. Clearly, the Brooks Report’s assessment of wetlands functions was not intended to be used in conjunction with a Clean Water Act (CWA) Section 404 permit, because no CWA 404 permit was herein involved. The United States, nevertheless, also did not intend for the Brooks Report to be used in clinical isolation from its previously performed wetland delineations and jurisdictional determinations,² and it and/or its scientific experts improperly used this information for such purposes in violation of the parties’ joint stipulation.

11. If the Brooks Report were simply limited to an evaluation of the functions and values of alleged wetlands on the Marsh Site, it would not discuss and refer, as it expressly does, to the United States’ prior and recent wetland delineation(s) of the Marsh Site which clearly relate to Plaintiff’s assertion of regulatory jurisdiction over the alleged Marsh site wetlands adjacent to and

¹ “The committee was asked to review and evaluate the consequences of alternative methods for wetland delineation and to summarize the scientific understanding of wetland functions. [...] The committee’s task has been to analyze present regulatory practice in relation to wetland delineation and to recommend changes that might bolster the objectivity and scientific validity of wetland delineation and identification.” *Id.*, at xiii-xiv.

² “Regulatory functional assessment should particularly facilitate analysis of wetland functions directly relevant to CWA’s objectives.” *Id.*, at 217.

directly abutting Elk Creek. *See* Brooks at 11 (“Based on the *wetland delineation data sheets...*”), at 15 (“...and other relevant information, was used to identify the presence of wetlands, *and to delineate the boundaries of wetlands*”), at 21 (“Based on *the wetland delineation data sheets* from three sample points all located on the Marsh Site,” and referring to the Corps’ wetland delineation manual , regional manual supplement and regulatory guidance letters), and at 26 (“Based [on] my observations of soils *in standard wetland delineation soil pits...*”).

12. Contrary to the parties’ October 3, 2017 stipulation and what the United States would have this Court believe, the Brooks Report was actually intended to directly and indirectly confirm the United States’ wetland delineation(s) of the Marsh site, and consequently, the United States’ determination of CWA 404 regulatory jurisdiction over the Marsh site wetlands and Elk Creek, consistent with the standards set forth in the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006), as subsequently and more liberally interpreted by the Third Circuit Court of Appeals in *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011). In *Donovan*, the Third Circuit embraced the Stevens dissenting opinion’s “broader view of the CWA’s scope” in *Rapanos*, with the Court holding that the United States need merely satisfy *either* the plurality/Scalia direct “continuous surface connection” test *or* the concurring/Kennedy “significant nexus” regional ecosystem test to establish federal jurisdiction over wetlands. *Id.*, at 180.³

³ For example, the determination of whether “wetlands are adjacent to and abut” a water body is important for purposes of satisfying the “continuous surface connection” test, which indisputably can validate the United States’ assertion of regulatory jurisdiction over Defendants’ Marsh Site. *See* U.S. Army Corps of Engineer’ *Jurisdictional Determination Form Instructional Guidebook* (May 12, 2007), at p. 6, available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf (“The [*Rapanos*] decision provides two new analytical standards for determining whether water bodies that are not traditional navigable waters (TNWs), including wetlands adjacent to those non-TNWs, *are subject to CWA jurisdiction*: (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, a dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs”) (emphasis added). *See also Id.*, at 52 (“*The agencies will assert jurisdiction over any non-navigable tributary*

13. The Brooks Report expressly addresses, if not, alludes to, the direct “continuous surface connection” test of the *Rapanos* plurality opinion in its “Introduction” section. It states that, “DOJ also requested that I assess and provide my expert opinion on the *connectivity of the Marsh Site wetlands and tributaries* in the vicinity of the Marsh Site *to Traditional Navigable Waters (TNWs)*...In formulating my opinion and preparing this report, I also have evaluated the *hydrological and ecological connections* between wetlands on the Marsh Site with Elk Creek and Lake Erie, *the TNW into which Elk Creek directly flows* about 30 miles downstream of the Marsh Site” (emphasis added). (*Id.*, at 9). The Brooks Report’s use of other textual language is equally revealing of this. See Brooks at 9 (“...on the Marsh Site *that abut* Elk Creek” (emphasis added)), at 10 (“...through the [Marsh] site *with limited to no substantial connectivity with the adjacent floodplain and wetlands*” (emphasis added)), at 13 (“Based on...*it is evident that wetlands with continuous surface connections* existed on the Marsh Site...”) (emphasis added)), at 14 (“The Marsh Site has *surface and likely subsurface hydrologic connections* to Elk Creek, a perennial stream *with direct connections to Lake Erie, a TNW,...*” (emphasis added)), at 15 (“For purposes of preparing this report...*and connectivity with Elk Creek*” (emphasis added)), at 16 (“The objective...Marsh Site *and their connectivity to Elk Creek...*” (emphasis added)), at 32 (“The wetlands occurring and previously occurring on the Marsh Site *are connected to* Elk Creek in several ways...” (emphasis added)), and at 34 (at Lane Road all the way to Lake Erie, *a Traditional Navigable Water (TNW)*.” (emphasis added)).

14. The Brooks Report also expressly addresses, if not, alludes to, the “significant nexus” regional ecosystem test⁴ of the *Rapanos* concurring opinion within its “Introduction:”

of TNWs where the tributary is a “relatively permanent water” (RPW). *A wetland that directly abuts an RPW is also jurisdictional*”) (emphasis added).

⁴ See *Rapanos v. United States*, 547 U.S. 715 (2006), at Kennedy concurring opinion, slip op at 23 (“Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters’ if the wetlands,

“I also evaluated whether wetlands on the Marsh site, either alone or in combination with similar wetlands in the region, *significantly affect the chemical, physical and biological integrity* of Elk Creek and Lake Erie. I concluded that the headwater wetlands of the Marsh Site *and similarly situated wetlands* within the watershed make important contributions to the ecological health, condition, and integrity of Elk Creek and Lake Erie” (emphasis added) (*Id.*, at 9).

The Brooks Report’s use of other textual language is equally revealing of this. *See* Brooks, Sec. 2.3, at 11-12 (“Assessment of [...] *Similarly Situated Wetlands* in the Watershed” [...] The Marsh Site wetlands and *other similarly situated wetlands* in Elk Creek watershed [...] wetlands on the Marsh Site *and similarly situated wetlands* near the Marsh Site...” (emphasis added)). Moreover, the Brooks Report states that,

“Because of th[e] direct hydrologic connections between the Marsh Site and Elk Creek, the wetlands at the Marsh Site, along *with the similarly situated wetlands* in the watershed, provide *significant physical, chemical, and biological benefits* to the water that flows from the Marsh Site downslope and downstream of Elk Creek and Lake Erie [...] The wetlands at the Marsh Site, *and other similarly situated wetlands* in the cluster of wetlands around the Marsh Site [...] had, and still have, *hydrologic and biologic connectivity to the floodplain and channel of Elk Creek* where it forms the eastern boundary of the Marsh Site” (emphasis added). (*Id.*, at 14).

The Brooks Report textualizes the phrase “similarly situated wetlands” in other locations as well. *See* Brooks at pp. 34 (“Assessment of Physical, Chemical and Biological Functions that the Marsh Site Wetlands, and *Similarly Situated Wetlands* Provide to Elk Creek and Lake Erie” (emphasis added)) and at 37⁵ (“wetlands on the Marsh Site *and similarly situated wetlands* in the vicinity...” (emphasis added)).

either alone or in combination with *similarly situated* lands in the region, *significantly affect the chemical, physical, and biological integrity* of other covered waters more readily understood as ‘navigable’” (emphasis added).

⁵ *See* U.S. Army Corps of Engineers, *Jurisdictional Determination Form Instructional Guidebook* (May 12, 2007), *supra* at p. 54 (“A significant nexus analysis will assess the flow characteristics and functions of the relevant reach of the tributary, *in combination with functions collectively performed by all wetlands adjacent to the tributary*, to determine if they have more than an *insubstantial or speculative effect on the chemical, physical, or biological integrity* of TNWs”). (emphasis added). *See also* U.S. Army Corps of Engineers, *Appendix B – Approved Jurisdictional Determination Form*, to *Jurisdictional Determination Form Instructional Guidebook* (2007), at p. 1,

15. The Stokely Report, like the Brooks Report, is much broader and more ambitious than its title indicates. The Stokely Report expressly addresses, if not, alludes to, to the United States' prior and recent wetland delineation(s) of the Marsh Site and to the wetland boundaries of the Marsh Site which clearly relate to Plaintiff's assertion of regulatory jurisdiction over the alleged Marsh site wetlands adjacent to and directly abutting Elk Creek. For example, the Stokely Report, in its section entitled, "Digitizing and map production," states that "Features of interest such as *wetland boundaries*, stream courses, and areas of disturbance were identified and digitized using the tools found in the GIS software [...] Thematic maps were created [...] These maps show *wetland boundaries*, drainage patterns, sample locations..." (emphasis added). (*Id.*, at 3). In addition, the Stokely Report, in its section entitled, "Wetlands Extent," states that, "I reviewed the historical and recent aerial photography for signature of wetlands and *wetland boundaries*" (emphasis added). (*Id.*, at 4).

16. The Stokely Report also expressly addresses, if not, alludes to, the direct "continuous surface connection" test of the *Rapanos* plurality opinion. See Stokely at 1 ("I was asked to analyze and interpret aerial photographs of the Marsh Site taken over time to determine the existence and locations of *wetlands*, tributaries, and *connections to downstream waters*..." (emphasis added)), at 6 ("I confirmed that the Marsh Site *wetlands continue to abut Elk Creek [...which] flows approximately 27 meandering miles to Lake Erie* [...] The Marsh Site *wetlands are adjacent to, and directly abut*, Elk Creek, a tributary to Lake Erie [...] I confirmed that the Marsh Site *wetlands continue to abut Elk Creek*" (emphasis added)), and at 7 ("These *wetlands are adjacent, and directly abut* Elk Creek, a direct tributary to Lake Erie." (emphasis added)). The Stokely Report,

available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_b_approved_jd_form.pdf ("This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.") See also *Id.*, at p. 6 ("Significant Nexus Test Determination").

furthermore, expressly addresses, if not, alludes to, the “significant nexus” regional ecosystem test of the *Rapanos* concurring opinion. *See* Stokely at 7 (referring to Elk as “a direct tributary to Lake Erie” [...and] as comprising “*part of the system of wetlands in the Elk Creek valley.*” (emphasis added)).

17. The Stokely Report reveals, and this Court should take judicial notice of, the fact that the United States has utilized Dr. Peter Stokely’s aerial photographic interpretation services repeatedly for the specific purpose of identifying and delineating wetlands over which the United States can establish regulatory jurisdiction. *See* Stokely Report at 42 (“Awarded EPA Region 3 Bronze Metal for efforts associated with the testing of the proposed 1991 revisions to the Federal Manual for Identifying and *Delineating Jurisdictional Wetlands* (April 1992)”) (emphasis added), and at 46-47 (reflecting Mr. Stokely’s expert testimony in various cases regarding establishment of CWA Section 404 regulatory jurisdiction over wetlands: “(17) Smith Farms Hearing, Post Rapanos Remand Administrative Proceeding, Norfolk, VA, May 14, 2007. Issue: CWA Jurisdiction”; “(18) Lewis Farms Hearing, Post Rapanos Remand Administrative Proceeding, Norfolk, VA, May 25, 2007. Issue: CWA Jurisdiction”; “(19) Cody Bedford Evidentiary Hearing, Federal District Court, Norfolk, VA, October 22, 2008. Issue: CWA Jurisdiction”; “(20) U.S.A. v Johnson, Civil Action No. 99-12465-EFH, Federal District Court, Boston, MA, April 11-12, 2011. Issue: CWA Jurisdiction”; “(21) U.S.A. v Nicastro, June 2, 2011, Syracuse, NY-Grand Jury. Issue: CWA Jurisdiction”; “(22) U.S.A. v Richard Roberts, November 8, 2013, Federal District Court, Nashville, TN. Issue: Establishing CWA Jurisdiction; 24) Ron Foster, et al. v United States Environmental Protection Agency, Trial testimony, August 16, 2017. Southern District of West Virginia. Issue: Factors related to CWA Jurisdiction”. (italicized emphasis added; underline in original)).

18. Defendants' designated experts on wetlands delineations, jurisdictional determinations and aerial photographic interpretation, Mr. Ray Kagel, Jr. and Dr. Susan Kagel, each of whom has prepared an expert report on Defendants' behalf to rebut the Brooks and Stokely reports, respectively (Ex. 8) (Exs. 9, 9A), agree with the above assessment and have set forth their reasoning in separate signed and notarized affidavits accompanying this memorandum. (Ex. 10), (Ex. 11).

19. The Third Circuit Court of Appeals has held that a fraudulent or false representation "may be effected by deceitful statements of half-truths or the concealment of material facts" (*See United States v. Ferriero*, No. 15-4064 (3d Cir. 2017), slip op. at 25-26, quoting *United States v. Bryant*, 655 F.3d 232, 249 (3d Cir. 2011) (quoting *United States v. Olatunji*, 872 F.2d 1161, 1167 (3d Cir. 1989)), and that a claim of misrepresentation or fraud in the inducement of a contractual clause covering an issue which goes to the 'making' of the agreement is a matter susceptible to adjudication by this Court which, if proven, would be grounds to invalidate the agreement. (*See Corchado v. Foulke Management Corp.*, No. 17-1433 (3d Cir. 2017), slip op. at 3.)

20. Various federal circuit courts have treated litigation stipulations of fact as legally binding contracts. *See TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir. 1995); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988), (quoting *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 551 (6th Cir. 1986); *Gander v. Livoti*, 250 F.3d 606, 609 (8th Cir. 2001). *See also United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 889 (D.C. Cir. 2010) ("Stipulations of fact bind the court and parties.'; 'one party' to a stipulation 'need offer no evidence to prove it and the other is not allowed to disprove it'").

21. Defendants also require additional time to conduct scientific discovery because the 2018 growing season in western Pennsylvania does not commence until mid-April to early May 2018,

(Ex. 12) and (Ex. 13), 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. 14)). 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).

22. 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),⁶ granted Defendants a 30-day extension, until February 28, 2018. This enabled Defendants' scientific experts to prepare *rebuttal reports* (the "Ray Kagel Rebuttal Report," (*supra*), the "Susan Kagel Rebuttal Report" (*supra*), and the "Andrew Johnson Rebuttal Report" (Ex. 15)) to each of the three reports prepared by United States experts. It also enabled each party to depose the other party's experts.

⁶ See Wikipedia, *United States federal government shutdowns of 2018*, available at: https://en.wikipedia.org/wiki/United_States_federal_government_shutdowns_of_2018.

23. 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. 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.

24. 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) (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..."). Additionally, although not requested, this Court possesses broad discretion under FRCP Rule 37 to impose sanctions upon the United States for Rule 26 violations arising from its improper misuse of discovery information obtained under false pretense in breach of Defendants' good faith execution

of the parties' joint stipulation under Rule 26(c) ostensibly intended to address Defendants' concerns with the scope of and purpose for which Plaintiff filed its Rule 34(a)(2) motion. *See e.g., Grider v. Keystone Health Plan Central, Inc.*, 580 F. 3d 119 (3d Cir. 2009).

WHEREFORE, the Defendants, by and through their undersigned attorneys, respectfully request that the Court 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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