

# Exhibit D

**From:** [Brown, Laura J.S. \(ENRD\)](#)  
**To:** [Devlin, Neal](#); [Uholik, Brian \(ENRD\)](#); [Kolman, Chloe \(ENRD\)](#); [Buckley, Sarah \(ENRD\)](#)  
**Cc:** ["lkogan@koganlawgroup.com"](#); [Cox, Alexander K.](#); [Lamary, Christina](#)  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions  
**Date:** Wednesday, September 20, 2017 11:58:49 AM

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Hi Neal:

I am following up on my request for dates for the Brace's depositions and for the Site Inspection. If I don't hear back, I will have to notice the depositions and site inspection with dates I select. Also, we plan take 30(b)(6) depositions of Robert Brace Farms, Inc. and Robert Brace and Sons, In. I will draw up a notice with subjects. If the designees will be someone other than Robert or his sons, please let me know dates that would work for the designee.

Also, what are your thoughts on breaking out expert discovery as I suggested?

Laura

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**From:** Devlin, Neal [mailto:[ndevlin@kmgslaw.com](mailto:ndevlin@kmgslaw.com)]  
**Sent:** Wednesday, September 13, 2017 3:57 PM  
**To:** Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Uholik, Brian (ENRD) <[BUholik@ENRD.USDOJ.GOV](mailto:BUholik@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>; Buckley, Sarah (ENRD) <[SBuckley@ENRD.USDOJ.GOV](mailto:SBuckley@ENRD.USDOJ.GOV)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>; Lamary, Christina <[clamary@kmgslaw.com](mailto:clamary@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Laura:

I am heading out of the office this afternoon for a few days, but my assistant will work with Larry to figure out what days will work for the depositions and continue to work to find days for the Braces. Larry and/or I can then get back to you on the other issues you raised when I'm back next week.

Neal

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**From:** Brown, Laura J.S. (ENRD) [mailto:[Laura.J.S.Brown@usdoj.gov](mailto:Laura.J.S.Brown@usdoj.gov)]  
**Sent:** Wednesday, September 13, 2017 3:43 PM  
**To:** Devlin, Neal <[ndevlin@kmgslaw.com](mailto:ndevlin@kmgslaw.com)>; Uholik, Brian (ENRD) <[Brian.Uholik@usdoj.gov](mailto:Brian.Uholik@usdoj.gov)>; Kolman, Chloe (ENRD) <[Chloe.Kolman@usdoj.gov](mailto:Chloe.Kolman@usdoj.gov)>; Buckley, Sarah (ENRD) <[Sarah.Buckley@usdoj.gov](mailto:Sarah.Buckley@usdoj.gov)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>; Lamary, Christina <[clamary@kmgslaw.com](mailto:clamary@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Hi Neal:

We can have members of our team available for depositions on October 18-20, 23-27, 30-31, 2017. However, we will likely need to have the Braces' depositions in those windows. Additionally, we request to inspect the Brace property on 10/16-17 (and perhaps we could schedule depositions in Erie that week). I will send a formal Rule 34 request once we agree on a date.

While I am providing our availability - and because I do not know not sure whose depositions you plan on noticing - I will restate our objection (which we have discussed at length) to the depositions of many of the individuals you identified in your August 10, 2017 email.

Also, as you may have noticed, neither Judge Baxter nor Judge Rothstein's discovery orders break out expert

disclosures within their schedules. Just for practical purposes (i.e., deposing any disclosed experts), I think it would be helpful if we could agree to break that out. To the extent either party plans on using an expert I suggest the following:

90-229 Action: Initial Expert disclosures due on October 26, 2017, Rebuttal Expert disclosures due on November 9, 2017.

17-06 Action: Initial Expert disclosures due on November 22, 2017, Rebuttal Expert disclosures due on December 6, 2017.

Laura

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**From:** Devlin, Neal [<mailto:ndevlin@kmgslaw.com>]  
**Sent:** Tuesday, September 12, 2017 10:05 AM  
**To:** Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Uholik, Brian (ENRD) <[BUholik@ENRD.USDOJ.GOV](mailto:BUholik@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>; Buckley, Sarah (ENRD) <[SBuckley@ENRD.USDOJ.GOV](mailto:SBuckley@ENRD.USDOJ.GOV)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>; Lamary, Christina <[clamary@kmgslaw.com](mailto:clamary@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Laura:

Can you get me your groups availability in October for third party depositions? We are working on figuring out who we can locate and who we will need to depose. Once we get that information, we will issue subpoenas and I'd like to make sure that the dates we select work for both sides, understanding that we may need to make adjustments if the Witness has an issue.

We are also working on getting dates for Bob, Randy, Ronnie and Rhonda.

Neal

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**From:** Brown, Laura J.S. (ENRD) [<mailto:Laura.J.S.Brown@usdoj.gov>]  
**Sent:** Tuesday, September 5, 2017 4:15 PM  
**To:** Devlin, Neal <[ndevlin@kmgslaw.com](mailto:ndevlin@kmgslaw.com)>; Uholik, Brian (ENRD) <[Brian.Uholik@usdoj.gov](mailto:Brian.Uholik@usdoj.gov)>; Kolman, Chloe (ENRD) <[Chloe.Kolman@usdoj.gov](mailto:Chloe.Kolman@usdoj.gov)>; Buckley, Sarah (ENRD) <[Sarah.Buckley@usdoj.gov](mailto:Sarah.Buckley@usdoj.gov)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>; Lamary, Christina <[clamary@kmgslaw.com](mailto:clamary@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

1:30 works

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**From:** Devlin, Neal [<mailto:ndevlin@kmgslaw.com>]  
**Sent:** Tuesday, September 05, 2017 3:14 PM  
**To:** Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Uholik, Brian (ENRD) <[BUholik@ENRD.USDOJ.GOV](mailto:BUholik@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>; Buckley, Sarah (ENRD) <[SBuckley@ENRD.USDOJ.GOV](mailto:SBuckley@ENRD.USDOJ.GOV)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>; Lamary, Christina <[clamary@kmgslaw.com](mailto:clamary@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Laura:

10/10 works for Almeter and Stokely. I'll get notices out tomorrow.

Could we do 1:30 on Friday for the call. I have a 2:30 meeting and I want to make sure I give enough time for the meet and confer.

Thanks,  
Neal

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**From:** Brown, Laura J.S. (ENRD) [<mailto:Laura.J.S.Brown@usdoj.gov>]  
**Sent:** Tuesday, September 05, 2017 1:30 PM  
**To:** Devlin, Neal; Uholik, Brian (ENRD); Kolman, Chloe (ENRD); Buckley, Sarah (ENRD)  
**Cc:** 'lkogan@koganlawgroup.com'; Cox, Alexander K.  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Hi Neal:

Thanks for working with us on the dates and locations. We just realized that 10/9 is Columbus Day (a federal holiday). Could we switch Stokely and Almeter to 10/10? Sorry about that oversight.

Also, please let us know what dates would work for the Braces and we will draw up notices.

Friday would be best for the meet and confer on our end. Would 2:00 pm work?

Thanks,  
Laura

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**From:** Devlin, Neal [<mailto:ndevlin@kmgslaw.com>]  
**Sent:** Tuesday, September 05, 2017 1:10 PM  
**To:** Uholik, Brian (ENRD) <[BUholik@ENRD.USDOJ.GOV](mailto:BUholik@ENRD.USDOJ.GOV)>; Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>; Buckley, Sarah (ENRD) <[SBuckley@ENRD.USDOJ.GOV](mailto:SBuckley@ENRD.USDOJ.GOV)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Brian:

Larry and I have spoken and, based on the schedule you have provided, we will be issuing notices for the following dates and witnesses:

10/2-10/3 – In Philadelphia

Lapp starting at 9 am on 10/2 followed by Lutte.

10/6 in Pittsburgh

Fodse followed by Hans

10/9 – In Philadelphia

Stokely and Almeter

With regard to the written discovery objections, we fundamentally disagree with those objections. Per the local rules, we should meet and confer to see if we can resolve some or all of these disagreements. Can you provide me with your availability on Thursday and Friday to see if we can find a time to do that?

Neal

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**From:** Uholik, Brian (ENRD) [<mailto:Brian.Uholik@usdoj.gov>]  
**Sent:** Thursday, August 31, 2017 9:01 PM  
**To:** Devlin, Neal; Brown, Laura J.S. (ENRD); Kolman, Chloe (ENRD); Buckley, Sarah (ENRD)  
**Cc:** 'lkogan@koganlawgroup.com'; Cox, Alexander K.  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Neal:

Having not heard back from you about this, I have listed below the dates DOJ attorneys and EPA and Corps witnesses are available. As far as the Braces are concerned, DOJ's schedule is flexible in October for coming to Erie to depose the Braces. Please let us know what dates work for you guys.

The EPA dates pertain to depositions held in Philadelphia and the Corps dates pertain to Pittsburgh. We can provide the space.

1. Jeffrey Lapp, EPA – September 19th-22nd; October 2nd-6th; October 9th-13th; October 16th-20th
2. Todd Lutte, EPA - September 19th-22nd; October 2nd-6th; October 9th-13th; October 16th-20th; October 23rd-27th
3. E. Peter Stokely, EPA – September 19th-22nd; October 2nd-6th; October 9th-13th; October 16th-20th; October 23rd-27th
4. Katelyn Almeter, EPA – September 19th-21st; September 26th-28th; October 2nd; October 6th; October 9th-13th; October 16th-20th; October 23rd-27
5. Scott Hans, Corps – September 19th, September 21st, September 26th-27th, October 3rd, October 6th, and October 13th
6. Michael Fodse, Corps – September 27th, September 29th, and October 6th

You will need to subpoena Charlie Rhodes, who is retired as of August 31st, and may do so at 107 Stony Creek Ave., Lansdale, PA 19446-5259. Please be advised that, after October 13th, he is completely unavailable throughout the remainder of 2017. Since you'll have to depose Charlie around the Philadelphia area under FRCP 45, perhaps you can do so when you do the rest of the EPA people.

I'm still trying to tracking down the last known addresses for most of the USDA people. However, we have spoken with Rebecca Hyde and Brian Wolff, the only two USDA individuals you listed who remain employed with the federal government. Could you please explain why you believe they have testimony relevant to either the '90 or the '17 matter? Our conversation with them revealed that they have absolutely no knowledge about this case or Mr. Brace apart from what Mr. Brace himself has told them during visits he made to their offices and calls/e-mails Mr. Brace has initiated (e.g., Mr. Brace visited Ms. Hyde's office on five consecutive days in July 2017, he has placed Mr. Wolff on an email list, etc.). Neither Ms. Hyde, nor Mr. Wolff, have worked on anything Brace-related, nor were they even in the Waterford offices when USDA did any work on the relevant Brace properties (Wolff joined in 2005/6 and Hyde came on board in 2014).

Additionally, you may have misunderstood our position re: deposition limits. We are fine with you questioning a witness on both matters at the same time, but doing so will count as a deposition in both cases. For example, you are, of course, permitted to depose Jeff Lapp in both the '90 and the '17 matter. However, if you ask questions about both cases, it will count against your deposition limits in both. If you only ask him questions about one matter, than his deposition would only count against the one matter about which you questioned him. Of course, for witnesses who may have knowledge relevant to both cases, we encourage you to reduce the burden on the witnesses by taking depositions on the same or, if necessary, consecutive days. I hope that clears up any confusion.

As to the remainder of the discovery position you articulated in your email of August 16th, the parties have had diametrically opposing views re: discovery for months, and we have beaten this horse well beyond its life, so there is very little point in discussing this further. The meet-and-confer requirement has been undoubtedly met. We will file our motion, you will file your response, and the Court will decide what's what.

We would also like to take this opportunity to notify you about objections we have to your interrogatories and requests for production of documents, as we technically have not conferred on this specific topic until now. We object as follows:

1. The following seek information irrelevant to demonstrating or defending against allegations that Defendants violated the Consent Decree:

- a. Interrogatories Nos. 5-7 and Request for Production Nos. 1, 3, 6-7 – seek discovery regarding “The ‘Homestead Farm’” and “The ‘Marsh Farm’”
  - b. Interrogatories No. 5-6 and Request for Production Nos. 1-7 - seek discovery that pre-dates the Consent Decree’s entry
  - c. Interrogatory No. 5 and Request for Production No. 1 - seek discovery about contact between employees of the United States and Defendants that is unrelated to the Consent Decree and/or Consent Decree area wetlands
  - d. Interrogatory No. 6 and Request for Production No. 1 - seek discovery about contact between employees of state and local governments and Defendants that is unrelated to the Consent Decree and/or Consent Decree area wetlands
  - e. Request for Production No. 2 - seeks discovery, pre-trial evidentiary motions, and trial documents that the parties, the United States District Court for the Western District of Pennsylvania, and the United States Court of Appeals for the Third Circuit considered and reviewed, and upon which these courts rendered legal and factual determination in the original CWA Section 404 action and appeal.
  - f. Request for Production No. 6 - seeks discovery unrelated to the Consent Decree and/or Consent Decree area wetlands
2. The following seek information that is not within the knowledge and/or ambit of control of the United States:
    - a. Interrogatory No. 6 and Request for Production No. 1 - seek discovery related to visits employees of the Commonwealth of Pennsylvania and/or local governments have made to Defendants’ properties in the last 27 years
  3. The following, even if assumed, *arguendo*, relevant, are overbroad, unduly burdensome, and disproportional to the needs of the case as they are bereft of appropriate target agency, subject matter, and/or temporal constraints:
    - a. Interrogatories Nos. 5-6 and Request for Production Nos. 1-7 - seek discovery preceding the date on which the Court of Federal Claim’s trial concluded (January 14, 2005)
    - b. Interrogatories Nos. 5-6 and Request for Production No. 1 - seek discovery about *every* visit *any* federal, state, and/or local government employee has made to Defendants’ property in the last 27 years
    - c. Request for Production No. 6 - lacks any temporal, agency, or subject matter limitation
    - d. Request for Production No. 7 – lacks any temporal limitation

Kindest Regards,

Brian

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**From:** Uholik, Brian (ENRD)

**Sent:** Friday, August 25, 2017 8:45 AM

**To:** 'Devlin, Neal' <[ndevlin@kmgslaw.com](mailto:ndevlin@kmgslaw.com)>; Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>; Buckley, Sarah (ENRD) <[SBuckley@ENRD.USDOJ.GOV](mailto:SBuckley@ENRD.USDOJ.GOV)>

**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>

**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Neal:

Thanks for your response. As I said in my last email, we will forward you the dates that work for both witnesses and attorneys as soon as we can.

If you are hesitant to accommodate the witnesses, that will obviously impact their availability. I would imagine the Braces’ availability would be adversely impacted if, under FRCP 45, we compelled them to travel to Philly for their depositions. Frankly, we anticipated your coming to our witnesses for your depositions and us coming to your witnesses for ours, in an effort to make things easy on the witnesses—it has always been DOJ’s practice to try to limit the impact on witnesses.

I am not aware of the case law that you believe necessitates shepherding the witnesses to Erie and look forward to your sharing it with us. I would also note that “Erie” is not a judicial district, it is a division within the Western District of Pennsylvania—I am certainly not aware of any jurisprudence requiring depositions to be held within a particular division’s geographical footprint.

As far as the DOI witnesses are concerned, a discovery request will not be necessary. I am happy to share whatever information I have...

Edward Perry – retired 9/9/2002 – Last known address: 440 Brush Valley Rd., Boalsberg, PA 16827

David Putnam – retired 1/3/2007 – Last known address: 168 Kenwalke Lane, Centre Hall, PA 16828

Charles Kulp – I don’t have any information on Mr. Kulp. Personnel information is not retained in perpetuity and he retired outside of the retention period.

Kindest Regards,

Brian

BRIAN S. UHOLIK  
UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
ENVIRONMENTAL DEFENSE SECTION  
[BRIAN.UHOLIK@USDOJ.GOV](mailto:BRIAN.UHOLIK@USDOJ.GOV)  
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---

**From:** Devlin, Neal [<mailto:ndevlin@kmgslaw.com>]  
**Sent:** Thursday, August 24, 2017 2:22 PM  
**To:** Uholik, Brian (ENRD) <[BUholik@ENRD.USDOJ.GOV](mailto:BUholik@ENRD.USDOJ.GOV)>; Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>; Buckley, Sarah (ENRD) <[SBuckley@ENRD.USDOJ.GOV](mailto:SBuckley@ENRD.USDOJ.GOV)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Brian:

Thank you for the response. I can assure you that Larry and I fully understand being stretched thin in both time and resources – especially since our client is a farmer and this discovery is occurring during the heart of the growing and harvesting seasons. That said, the Court made it clear that we must complete all discovery within the time period she allotted and we believe that key depositions need to be conducted in September to accomplish that.

For that reason, please provide me dates as soon as you can for when the witnesses can be available. As I

indicated in my last email, I am fine scheduling this on a serial manner so that, for instance, if you know that Mr. Lutte is available on a given set of days, then we can get him scheduled.

Also, we disagree that the depositions will take place anywhere other than Erie. For third party witnesses, I certainly understand going to them. However, the United States is the party bringing this action, and it chose to bring it in the Erie Division of the Western District of Pennsylvania. I believe that law is clear that, in such a circumstance, depositions of party witnesses are properly conducted within the relevant judicial district – that is Erie for this case. If you are going to insist on depositions occurring outside of the district can you please provide me whatever legal support you have for that position.

Regarding the folks from the Department of Interior, can you please provide me their last known addresses so that we can endeavor to contact them directly. If you require a formal discovery request for that information please let me know and I will serve one.

Thank you,  
Neal

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**From:** Uholik, Brian (ENRD) [<mailto:Brian.Uholik@usdoj.gov>]  
**Sent:** Wednesday, August 23, 2017 5:11 PM  
**To:** Devlin, Neal; Brown, Laura J.S. (ENRD); Kolman, Chloe (ENRD); Buckley, Sarah (ENRD)  
**Cc:** 'lkogan@koganlawgroup.com'; Cox, Alexander K.  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Neal:

Thank you for your email.

We're working on ascertaining when the EPA and Corps people can be made available in Philadelphia and Pittsburgh, respectively, while tracking down the rest of the individuals on your list (I can tell you that we've determined that all of the individuals you identified from DOI are retired and no longer under our control.). Additionally, we're stretched thin at the moment as a result of ongoing trials and vacations, as well as those scheduled over August, September, and October.

We'll get back to you as soon as we can re: dates..

Kindest Regards,

Brian

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**From:** Devlin, Neal [<mailto:ndevlin@kmgslaw.com>]  
**Sent:** Wednesday, August 23, 2017 1:44 PM  
**To:** Uholik, Brian (ENRD) <[BUholik@ENRD.USDOJ.GOV](mailto:BUholik@ENRD.USDOJ.GOV)>; Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Brian:

I am following up on our previous (8/10) request for dates for depositions. Unfortunately, as we move closer to September our calendars are filling up with other Court commitments. The week of September 11<sup>th</sup> is now no longer available for our side. Therefore, could you please provide availability for the balance of September.

Also, while I understand from your previous emails that you are trying to locate some of the folks we have identified, I expect that some of them are easier to obtain availability from (e.g. Mr. Lutte and Mr. Lapp). While I'd like to try to schedule as many depositions on consecutive days as possible, my primary goal is to get these



depositions scheduled within the month of September. Therefore, please provide dates as soon as possible, even if they are just for one or two of the witnesses, so we can lock in that time and make sure we can get the necessary discovery done within the period set by the Court.

Thanks,  
Neal

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**From:** Devlin, Neal  
**Sent:** Wednesday, August 16, 2017 1:47 PM  
**To:** 'Uholik, Brian (ENRD)'; Brown, Laura J.S. (ENRD); Kolman, Chloe (ENRD)  
**Cc:** 'lkogan@koganlawgroup.com'; Cox, Alexander K.  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Brian:

Thank you for your response and for the information about Mr. Burawa.

However, we believe you are incorrect about claiming that our deposition list is excessive.

As the Government has acknowledged, the meaning of the Consent Decree is the central issue in the '90 and '17 cases.

As the Government is aware, Mr. Lapp's testimony taken under oath in the Claims Court case states that the Government's intent had been for the Consent Decree to return the Brace Farms' Murphy property tract back to its state/condition in 1984.

And, as the Government is also aware, and as we shall justify to the Court, if necessary, it is our client's position that the USDA's designation of the Brace Farm's Murphy and Marsh property tract by December 23, 1985 as "prior converted cropland" ("PCC") which EPA and the Corps subsequently determined, retroactively, via agency guidance and joint agency regulation, qualified such property as being "excluded" from the definition of "Waters of the United States" and as falling outside Clean Water Act Section 404 jurisdiction. Clearly, you must acknowledge that such agency determination(s) was/were made before and during the 1990 litigation and prior to the Court's December 1993 ruling.

Consequently, the USDA's PCC designation should have controlled the disposition of the Brace Farms' Murphy property tract, and by virtue thereof, EPA should have withdrawn its 1990 action against our clients at that point. Had the Parties litigated this issue, the Court would not have likely ruled as it did, and the Consent Decree would not likely have been necessary.

Additionally, as we set forth in the Federal Tort Claims Act administrative claim our clients filed against the Government this past July, it is quite clear that EPA's negligence in implementing/enforcing the Consent Decree covering the Brace Farm's Murphy property tract in the 1990 case, and the Government's authorization of certain activities on the Brace Farm's Murphy and Marsh property tracts following the 2011 site visit, directly impacted the condition of the Brace Farm's contiguous and adjacent Marsh property tract and gave rise to the alleged violations of CWA Section 404 on and/or adjacent to the Brace Farm's Marsh property tract in the 2017 case.

Given the indisputably deeply intertwined and inextricably linked facts and legal issues engendered in these two cases, the discovery in the two (1990 and 2017) cases is so close as to be coterminous, which justifies the need for the deposition list we provided.

Furthermore, it appears to us quite obvious that it would be a huge waste of judicial time and judicial resources, not to mention, of the time and resources of both of our clients, to take separate depositions in these cases. For instance, to subject Mr. Lutte, Mr. Lapp and others to sitting for two different depositions in these related cases is something we are not interested in doing for cost, timing and related reasons. We believe we can complete each deposition in under the 7 hour time constraints, covering issues related to both cases. Further, as you know, many of the in person meetings at my clients' property covered all three farm properties. Thus, our plan is to depose each witness one time, covering areas discoverable in both cases, and then have those depositions available for use in both cases. If you disagree with this plan can you please let us know why, so we can determine if we have to involve the Court.

Regarding the number of witnesses, we are entitled to take 10 depositions, without agreement or leave, in each case. Thus, a total of 20 depositions between the two cases would be permitted. Further, in your Rule 26(a) disclosures in the '17 action, you identified about 13 individuals (other than the Brace family). In my experience in this district, I have never had to seek leave to depose the individuals listed on another party's Rule 26(a)

disclosures. We also expected that some of the witnesses we identified would be retired or otherwise unavailable; therefore, we expected that fewer than the 24 witnesses we identified would ultimately be available for deposition. My suggestion on this point is that we should first see which witnesses you can produce and those whom we can secure via subpoena or cooperation (that you are unable to produce). If, in the end, there are more than 20 witnesses, we can meet and confer to determine if Court intervention is necessary.

Finally, we certainly plan on asking questions about the history of this property and the facts and circumstances that led to the Consent Decree. As we have noted in our pleadings, we believe the Consent Decree is woefully ambiguous and unenforceable. Therefore, evidence related to the facts that lead to it, including facts that lead to the filing of the '90 action and facts surrounding the intent underlying that decree, are highly relevant. Further, given the scope of discovery, I do not understand the basis for a protective order limiting our ability to develop a factual records around the facts and circumstances that lead to the entry of the document that the Government views as central to this case. If you seek a protective order, it is our intention to vigorously oppose that request so that we can be entitled to full discovery, consistent with the Court's order.

I look forward to hearing from you as soon as possible regarding witnesses availability in September.

Neal

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**From:** Uholik, Brian (ENRD) [<mailto:Brian.Uholik@usdoj.gov>]  
**Sent:** Tuesday, August 15, 2017 3:22 PM  
**To:** Devlin, Neal; Brown, Laura J.S. (ENRD); Kolman, Chloe (ENRD)  
**Cc:** 'lkogan@koganlawgroup.com'; Cox, Alexander K.  
**Subject:** RE: USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Neal:

Thanks for your email.

Chloe and I are working with Agriculture and Interior to identify the individuals that you listed and ascertain whether they remain in federal service. You should be aware that at least Joseph Burawa retired from the USDA in 1989 and [died in 2007](#).

Can you please identify in which case you desire to take each individual's deposition (90 or 17)? Given that FRCP 30 limits you to ten depositions per case without seeking leave from and demonstrating good cause to the Court, and that you have already represented to Judge Baxter that you only needed to depose the eight individuals that you believe attended the 2012 site visit (See Tr. of Apr. 7, 2017 Status Conference 6:20-7:14), your list of 24 proposed deponents appears to be excessive.

Additionally, to the extent you intend to seek discovery and/or elicit testimony about matters that pre-date the Consent Decree in the '90 matter, we plan to seek a protective order from the Court barring such discovery.

Kindest Regards,

Brian

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**From:** Devlin, Neal [<mailto:ndevlin@kmgslaw.com>]  
**Sent:** Thursday, August 10, 2017 10:09 AM  
**To:** Brown, Laura J.S. (ENRD) <[LBrown@ENRD.USDOJ.GOV](mailto:LBrown@ENRD.USDOJ.GOV)>; Uholik, Brian (ENRD) <[BUholik@ENRD.USDOJ.GOV](mailto:BUholik@ENRD.USDOJ.GOV)>; Kolman, Chloe (ENRD) <[CKolman@ENRD.USDOJ.GOV](mailto:CKolman@ENRD.USDOJ.GOV)>  
**Cc:** 'lkogan@koganlawgroup.com' <[lkogan@koganlawgroup.com](mailto:lkogan@koganlawgroup.com)>; Cox, Alexander K. <[acox@kmgslaw.com](mailto:acox@kmgslaw.com)>  
**Subject:** USA v. Brace, Docket Nos. 90-229 and 17-06 -- Depositions

Laura: I attempted to send the below email earlier this week, but just learned that it may have gotten held up due to a computer issue. Regardless, I wanted to re send it in case it did not get to you.

Neal

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Laura:  
 Below is an initial list of witnesses who we plan on deposing. I would like to know which of these individuals you “control” to the point where you can make them available for a deposition in Erie, at on mutually convenient date. For those witnesses whom you do not control, we will then proceed with discovery and subpoenas to attempt to secure their testimony.

Also, it is local practice in Erie County to not send out notices of deposition until you confer with other counsel to see about availability on specific dates. We are targeting the week of September 11<sup>th</sup> for a first round of depositions in this case. Larry and I believe we can likely do two witnesses a day (with a limited number of exceptions for the folks with the most involvement in this matter). Please also let me know if you and the witnesses you control are available that week. If not, please provide me with some alternative dates. Given the need for travel for both you and Larry, we would like to try to schedule as close to a full week of depositions for consecutive days, but are also interested in getting the depositions started as early in September as possible.

Thank you,  
 Neal

Witness List

Witness Name	Employer at Relevant Time
Todd Lutte	EPA
Jeffrey Lapp	EPA
Michael Fodse	USACE
Scott Hans	USACE
Charles Rhodes, Jr.	EPA

D. Katelyn Almeter	EPA
E. Peter Stokely	EPA
Lewis Steckler	USDA/NRCS
Edward Lewandowski	USDA/NRCS
Carroll Lesik	USDA/ASCS
Joesph Burawa	USDA/ASCS
Rebecca Hyde	USDA/ASCS
Brian Wolff	USDA/ASCS
Edward Perry	DOI
Charles Kulp	DOI
David Putman	DOI
James Carter	Pa Fish and Boat Commission
James Smolko	Pa Fish and Boat Commission
Andrew Martin	Pa Game Commission
Wayne Lugalía	Pa Game Commission
Thomas Delfonso	Pa DEP
Scott Dudzic	Pa DEP
Kimberly Yeakle	Pa DEP
Richard Nelville	Pa DEP

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