in favor of restoration here.

Furthermore, given that Defendants steadfastly refuse to acknowledge the illegality of their conduct and have been adjudicated as repeat CWA violators, the Court should require Defendants to record a deed restriction that ensures the wetlands are protected. *See United States v. Bailey*, 516 F. Supp. 2d 998, 1019 (D. Minn. 2007) (injunction against future CWA violations appropriate where United States shows likelihood of future violations); *United States v. Van Leuzen*, 816 F. Supp. 1171, 1183 (S.D. Tex. 1993) (imposing injunction against future CWA violations).

For these reasons, the Court should direct Defendants to retain a qualified wetlands consultant to perform a wetland delineation on the Site and propose a restoration plan. That plan must be consistent with the plan outlined in Dr. Brooks' expert report and declaration and result in complete restoration of the Marsh Site wetlands to their pre-disturbance condition. The Court should further order Defendants to submit the plan to EPA for comment and approval and, upon approval, implement the plan. Additionally, the Court should order Defendants to execute and record a deed restriction, the language of which shall also be approved by EPA, within 90 days of the Court's order on remedy that would permanently enjoin Defendants and their successors and/or assigns from disturbing the restored wetlands. Finally, the Court should require Defendants to complete restoration by June 30, 2020.

## II. CWA Penalty Factors Support a Civil Penalty of at least $400,000 to Appropriately Punish Defendants and Deter Potential Violators.

Where there has been a violation of the CWA, the imposition of civil penalties is mandatory. *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986)

(reversing the district court for failing to assess a penalty for proven violations of the Act); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990). The CWA mandates the imposition of civil penalties to ensure that the violator is punished, the economic gains resulting from the violation are disgorged, and other potential violators are deterred. *Tull*, 481 U.S. at 422-23 ("Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." (citing 123 CONG. REC. 39,191 (1977))); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988). Thus, the question for the Court to determine is not only the amount of penalty that will force Defendants to become concerned about their own compliance with the CWA (specific deterrence), but also the amount of penalty that will garner the attention of the others, and thereby prevent them from acting similarly (general deterrence). *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (civil penalties in CWA cases serve to "deter future violations"). To accomplish this goal, a penalty should significantly exceed what Defendants and similarly situated persons might consider, and therefore absorb, as the "cost of doing business." *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 231-32 (1975). In other words, a penalty should be "large enough to hurt; it should deter anyone in the future from showing a similar lack of concern with compliance." *United States v. Envtl. Waste Control, Inc.*, 710 F. Supp. 1172, 1244 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990).

Under CWA section 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d), Defendants are liable for a civil penalty of up to $25,000 per day for each violation of CWA section 301(a), 33 U.S.C. § 1311(a). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C.

§ 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, 69 Fed. Reg. 7121 (Feb. 13, 2004), and 74 Fed. Reg. 626 (Jan. 7, 2009), and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, EPA may seek civil penalties of up $37,500 per day for each violation occurring after January 12, 2009, and $51,570 per day for each violation occurring after November 2, 2015.

The CWA articulates six factors that must be considered in determining appropriate civil penalties: "[(1)] the seriousness of the violation or violations, [(2)] the economic benefit (if any) resulting from the violation, [(3)] any history of such violations, [(4)] any good-faith efforts to comply with the applicable requirements, [(5)] the economic impact of the penalty on the violator, and [(6)] such other matters as justice may require." 33 U.S.C. § 1319(d).

Courts have articulated two different approaches ("top-down" and "bottom-up") to considering the six penalty factors. Under the "top-down" approach, a court first ascertains the maximum civil penalty, then "determine[s] if the penalty should be reduced from the maximum by reference to the statutory factors." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir. 1996) (*citing Tyson Foods*, 897 F.2d at 1142); *see also United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528 & n.7 (4th Cir. 1999) (citing cases applying the "top-down" approach); *United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 265 (3d Cir. 1998); *Hawaii's Thousand Friends v. City & Cty. of Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw. 1993). The statutory maximum penalty amount should only be reduced after clear indications as to the weight given to each of the statutory factors and the factual findings that support the court's conclusions. *Tyson Foods*, 897 F.2d at 1142; *United States v. Gulf Park Water Co., Inc.*, 14 F. Supp. 2d 854, 858-68 (S.D. Miss. 1991); *United States v. Roll Coater*, 1991 U.S. Lexis

8790, at *9 (S.D. Ind. Mar. 22, 1991). Defendants bear the burden of establishing the facts that entitle them to such reduction. *See Roll Coater*, 1991 U.S. Lexis 8790, at 9-10 (considering seriousness of violation at the penalty phase of the litigation places the issue of environmental harm on the defense); *NRDC v. Texaco*, 800 F. Supp. 1, 26 (D. Del. 1992) (defendant did not demonstrate that a large penalty would have an adverse impact on the company), *aff'd in part, rev'd in part on other grounds*, 2 F.3d 493 (3d Cir. 1993).

Under the "bottom-up" approach, the court begins with the violator's estimated economic benefit and then adjusts the penalty amount based on the other CWA factors, as well as the goals of retribution and deterrence. *See Smithfield*, 191 F.3d at 528-29. When determining civil penalties, "it is hoped that the potential economic gain which would tempt a regulated entity to violate the Clean Water Act, when converted into a potential economic loss of the same magnitude, will inspire fidelity to the law." *United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 808 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998). But disgorging an ill-gotten gain is, by itself, insufficient to punish a violator for illegal conduct. Instead, the Court must apply the other statutory penalty factors in conjunction with the benefit factor to arrive at a penalty amount that is sufficient to punish a violator and deter other potential violators. For the reasons we explain below, the Court should impose a civil penalty of at least $400,000 in this case.[4]

**A. Seriousness of the Violation**

[4] Defendants' violations were first discovered on September 10, 2012, U.S. SOF ¶¶ 47-49, more than 2,600 days ago. Thus, if the Court were to count each day as a violation as is prescribed by law, the maximum penalty would quickly run into the millions of dollars. However, for the reasons explained *infra*, the United States believes a penalty of at least $400,000 is appropriate.

"unlikely that Defendants are confused or unaware about the regulations or prohibitions under the Act given that—for almost 30 years—Defendants have been litigating with the EPA over CWA violations on the Marsh Site's neighboring parcel, and already have a consent decree with the Government." *Id.* CW-1983-1984

Thus, even before Defendants filed their noncompliant response to the United States' motion for summary judgment, the Court has heard, considered, and found against several of Defendants' proffered defenses.

3. *"Persons" that "discharged a pollutant" from "a point source" without a CWA Section 404 permit*

Turning to the affirmative case, four of the five requirements for a prima facie showing of a CWA violation are readily established by the United States' pleadings.

First, Robert Brace, his sons Randall and Ronald Brace, and their companies which make up the Defendants in this matter, are clearly "persons" under the CWA. The CWA defines "person," for the purpose of Section 301(a), as, among others, individuals and corporations. 33 U.S.C. § 1362(5). A person, *i.e.*, individual or corporation, is then liable under the CWA if they "either perform[ed] the work or control[ed] performance of the work." *Sierra Club v. MasTec N. Am.*, No. 03-1697, 2007 WL 4387428, at *3 (D. Or. Dec. 12, 2007); *see also Brace*, 41 F.3d at 122 (stating that the CWA provides for strict liability); *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993) ("[u]npermitted discharge is the archetypal Clean Water Act violation, *and subjects the discharger to strict liability*") (emphasis added).

Here, it is uncontroverted that Robert, Randall, and Ronald themselves conducted the land clearing activities, including clearing, grubbing, ditching, sidecasting, and installing tile drains, for their own benefit and for the benefit of their companies. *See* Dkt. No. 1 at ¶ 38 (complaint stating that "one or more of the Defendants and/or persons acting on their behalf

 Always have been legal