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

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT BRACE, ROBERT BRACE FARMS, Inc., Defendants.	)	Civil Action No. 90-229 (Erie)

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF SECOND MOTION TO ENFORCE CONSENT DECREE AND FOR STIPULATED PENALTIES

The United States of America, by its attorneys on behalf of the United States Environmental Protection Agency ("EPA"), submits this Memorandum of Law in support of its Second Motion to Enforce the Consent Decree entered in this case on September 23, 1996. As explained in detail below, Defendants have cleared, ditched, drained, plowed, and planted wetlands that the 1996 consent decree ("Consent Decree") required Defendants to restore, violating both the Consent Decree and the Clean Water Act. Unless the wetlands are restored, Defendants' activities – undertaken in defiance of the Consent Decree's permanent injunction against discharging any pollutants (including dredged or fill material) into the protected wetlands – will continue to damage the wetland hydrology, cause long-term harm to the affected wetlands, and reverse the restoration work this Court ordered under the Consent Decree. In addition, absent restoration of the wetlands, the United States will continue to be deprived of the benefit of the bargain it obtained in signing the Consent Decree in the first place.

Accordingly, the United States respectfully requests that the Court issue an Order enforcing the Consent Decree by requiring Defendants to: (1) restore the wetlands; (2) comply with the permanent injunction; (3) pay the stipulated penalties required by the Consent Decree; (4) reimburse the United States for fees and costs incurred by the United States in seeking enforcement of the Consent Decree; and (5) grant any other monetary and injunctive relief the Court deems appropriate. Further, the United States requests that the Court modify the Consent Decree to increase the stipulated penalty amount to deter Defendants from violating the Consent Decree in the future.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act ("CWA") is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant, including dredged or fill material, by any person into waters of the United States, unless authorized by a Department of the Army permit under Section 404, 33 U.S.C. § 1344. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) ("Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" (quoting S. Rep. No. 92-414, at 77 (1972))).

Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes EPA to bring suit for injunctive relief for violations of Section 301(a), including the unauthorized discharge of fill into waters of the United States. Under Section 309(d), 33 U.S.C. § 1319(d), such violations subject the responsible parties to civil penalties of up to $37,500 per day for each violation occurring

between January 12, 2009 and November 2, 2015, and up to $51,570 per day for violations occurring after November 2, 2015. 40 C.F.R. § 19.4; 81 Fed. Reg. 43,091 (July 1, 2016).

II. FACTUAL BACKGROUND

A. The Parties and the Site

Defendant Robert Brace owns approximately 137 acres on four contiguous parcels located in Waterford and McKean Townships, Erie County, Pennsylvania.[1] Mr. Brace serves as the President of Defendant Robert Brace Farms, Inc., a Pennsylvania corporation and commercial farming operation. Mr. Brace describes his contiguous Erie County property as three farms: the Homestead Farm (north of Lane Road and east of Elk Creek); the Murphy Farm (south of Lane Road, through which Elk Creek flows); and the Marsh Farm (north of Lane Road, west of Elk Creek). The Homestead Farm and the Murphy Farm were purchased by Mr. Brace from his father in 1975. Mr. Brace purchased the Marsh Farm in May 2012.[2]

The area of the Erie County property that the Consent Decree governs consists of approximately 30 acres of wetlands in a "U" shaped formation, located within the Murphy Farm south of Lane Road, bordered on the east by Greenlee Road in Waterford, Pennsylvania (the "Site"). *See* Ex. 1, Declaration of Todd Lutte ("Lutte Decl.") ¶ 6; Ex. 2, 1996 Consent Decree ("C.D.") at Exhibit A; *see also United States v. Brace*, 41 F.3d 117, 120 (3d Cir. 1994) ("*Brace I*") (referring to "the subject thirty-acre wetland site ('the site')"); *Brace v. United States*, 72 Fed.

[1] The Erie County property consists of four contiguous tax parcels, identified as parcel numbers 47-012-028.0-001.00, 47-011-004.0-002.00, 47-011-004-0-003.00, and 31-016-063.0-002.00 by the Erie County Bureau of Assessment.

[2] Independent of this action, Mr. Brace and the other Defendants unlawfully discharged pollutants within federally-regulated wetlands located on the Marsh property, in violation of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, for which the United States has brought a separate enforcement action in this court. That action, 1:17-CV-006, is pending before the Honorable Barbara J. Rothstein.

Cl. 337, 344 (Fed. Cl. 2006) ("*Brace II*") (noting that the Consent Decree was entered to conclude the original 90-229 matter and protect the approximately 30 acres of wetlands); Ex. 3, Docket No. 55, Adjudication and Findings of Fact (W.D. Pa. Dec. 16, 1993) ("1993 Adjudication"), Findings of Fact ¶ 3. The Site contains four unnamed tributaries that all flow into Elk Creek within the Site. Lutte Decl. ¶ 6; *see Brace II*, 72 Fed. Cl. at 341; 1993 Adjudication, Findings of Fact ¶ 7. From the Site, Elk Creek flows approximately 29.47 miles northwest to Lake Erie. Lutte Decl. ¶ 6; *see Brace II*, 72 Fed. Cl. at 341; 1993 Adjudication, Findings of Fact ¶ 8.

B. Litigation History

1. Defendants' Original Violations of the CWA

On October 4, 1990, the United States filed this action against Defendants Robert Brace and Robert Brace Farms, Inc., for violations of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, for the unpermitted discharge of pollutants caused by their dredging, filling, leveling, and draining waters of the United States, specifically the 30-acre wetlands Site. *See* Ex. 4, Complaint ¶¶ 7, 18-22. The United States sought injunctive relief and civil penalties. *Id.* at 5. After trial, on December 22, 1993, the Court dismissed the Complaint, finding that Defendants' activities were exempt from the permitting requirements under CWA Section 404, 33 U.S.C. § 1344. On November 22, 1994, the Third Circuit Court of Appeals reversed the district court's decision, held that Defendants were liable for CWA violations, and remanded the case to the district court to assess penalties. *Brace I*, 41 F.3d at 120. The United States Supreme Court denied Defendants' petition for certiorari. *Brace v. United States*, 515 U.S. 1158 (1995). Thereafter, on September 23, 1996, the parties entered into the Consent Decree to agree upon an

appropriate remedy to resolve Defendants' adjudicated liability. *See* C.D.; *Brace II*, 72 Fed. Cl. at 344.

2. The Consent Decree and Wetland Restoration Plan

The Court-ordered Consent Decree, which remains in place today, permanently enjoined Defendants from discharging any pollutants, including dredged and fill material, into the approximately 30-acre Site unless such a discharge complies with the CWA. C.D. ¶ 3. The Consent Decree also required that Defendants pay a civil penalty and restore the disturbed wetlands pursuant to an approved restoration plan attached to and incorporated by reference into the Consent Decree. *Id.* ¶¶ 4-5, Exhibit A to C.D. ("Wetland Restoration Plan"). The primary objective of the restoration plan was to "restore the hydrologic regime" to the Site, and the plan specified a series of required tasks to accomplish that objective. *Id.* at Wetland Restoration Plan p. 1. In particular, the restoration plan comprised three distinct obligations: (1) Defendants were obligated to remove drainage tiles they had illegally installed; (2) Defendants were obligated to fill two surface drainage ditches they had illegally excavated; and (3) Defendants were obligated to install a check dam aimed at restoring the wetland hydrology they had disturbed. *Id.* at Wetland Restoration Plan ¶¶ 1-3; *see also* Ex. 5, Dep. of Robert Brace (Jan. 9, 2018) 157:19-159:15.

If Defendants failed to comply with any of the Consent Decree's requirements, including the restoration plan, Defendants stipulated to pay a penalty of $250 per day per violation. C.D. ¶ 8; *see id.* ¶ 4. Pursuant to the Consent Decree, the United States did "not waive any rights or remedies available to it for any violations by Defendants of laws, regulations, rules, and permits other than the violations alleged in the Complaint." *Id.* ¶ 10. Additionally, the Consent Decree did "not relieve Defendants of responsibility to comply with any federal, state and local laws,

regulations, rules, and permits, except that this Consent Decree provides all necessary federal authority to implement paragraph 4 [the restoration plan]." *Id.* The Consent Decree also makes Defendants responsible for any expenses and costs the United States incurs in enforcing it. *Id.* ¶ 8. The Consent Decree remains in effect and the Court retains jurisdiction over any action to enforce it. *Id.* ¶ 12. Defendants have never sought to modify the Consent Decree.

3. Defendants' Actions After Entry of the Consent Decree

After entry of the Consent Decree, Defendants paid the civil penalty and restored the property as required. *Brace II*, 72 Fed. Cl. at 344; Dep. of Robert Brace (Jan. 9, 2018) 157:19-159:15. In 1998, Mr. Brace filed suit under the Takings Clause of the Fifth Amendment in the United States Court of Federal Claims, seeking compensation for the alleged deprivation of his property rights as a result of EPA's enforcement action. Specifically, Mr. Brace alleged that the restoration required by the Consent Decree was overreaching and caused areas outside the impacted wetlands to become inundated with water and unusable. After hearing the evidence at trial, the claims court determined that the restoration of the Site did not constitute a regulatory or physical taking and entered judgment on behalf of the United States. That ruling was then affirmed by the Court of Appeals for the Federal Circuit. *Brace II*, 72 Fed. Cl. at 358, 362, *aff'd*, 250 F. App'x 359 (Fed. Cir. 2007). In 2008, the Supreme Court denied Mr. Brace's petition for certiorari. *Brace v. United States,* 552 U.S. 1258 (2008).

In 2011, Mr. Brace contacted EPA on multiple occasions inquiring about the boundaries of the wetland area covered by the Consent Decree and expressing a desire to remove beaver dams and clean "ditches" at various locations on his property to eliminate excess water that he claimed had accumulated on the uplands. *See* Lutte Decl. ¶¶ 13-14; Ex. 6, Dep. of Randall Brace 115:13-116:1; Ex. 7, Dep. of Ronald Brace 114:1-18; Ex. 8, Letter from Robert Brace to Jeffrey

D. Lapp, EPA (Jan. 11, 2011); Ex. 9, Letter from Robert Brace to Jeffrey D. Lapp, EPA (Feb. 16, 2011); Ex. 10, E-Mail from Todd Lutte, EPA, to Robert Brace (Sept. 12, 2011). In response, EPA visited the property in 2011 and provided Mr. Brace with copies of the maps that were attached to the Consent Decree as well as an aerial photograph on which EPA regulatory staff had drawn a polygon outlining the area subject to the Consent Decree. Lutte Decl. ¶¶ 13, 15; Dep. of Robert Brace (Jan. 9, 2018) 220:7-222:16; Ex. 10; Ex. 11, Letter from Jeffrey D. Lapp, EPA, to Robert Brace (Mar. 14, 2011). In July 2012, representatives from EPA and the U.S. Army Corps of Engineers ("Corps") visited Mr. Brace's property to see the "ditches" he wished to clear. Lutte Decl. ¶ 17; *see* Ex. 12, E-Mail Thread between Robert Brace and Michael M. Fodse, Corps (Oct. 7, 2011, and May 30, 2012). Mr. Brace stated that the "ditches" he wished to clear were created by his grandfather decades ago. Lutte Decl. ¶ 17. During the Site visit, the regulators indicated to Mr. Brace that if the channels were agricultural ditches, then maintaining the channels might qualify for a CWA exemption, but that the Corps would need to make a final determination. *Id.* In addition, the EPA regulator repeatedly told Mr. Brace that he could not perform work within the 30-acre wetland area subject to the Consent Decree. *Id*. In a follow-up letter, Mr. Brace assured EPA that no work had or would be done within the 30-acre wetland area in accordance with EPA's instructions at the July 2012 Site visit. Ex. 13, Letter from Robert Brace to Todd Lutte, EPA (Jan. 17, 2013) at 1-2 (highlighting added and attachments excluded).

In December 2012, the Corps sent a letter to Mr. Brace identifying both Elk Creek and 4,750 linear feet of an unnamed tributary to Elk Creek as jurisdictional waters of the United States that are not exempt from CWA regulation, including the channels observed during the July 2012 Site visit. Ex. 14, Letter from Scott Hans, Corps, to Robert Brace (Dec. 19, 2012) at 1.

The Corps further determined that portions of those channels were located within the 30-acre Site covered by the Consent Decree. *Id.* The Corps directed Mr. Brace to cease and desist from any discharges to those waters. *Id.* at 2. By joint letter dated August 29, 2013, EPA and the Corps again notified Mr. Brace that maintenance activities in Elk Creek and its tributaries located on his property south of Lane Road were not exempt from CWA regulation and that portions of those channels are within the 30-acre Site covered by the Consent Decree. Ex. 15, Letter from Jeffery Lapp, EPA, and Scott Hans, Corps, to Robert Brace (Aug. 29, 2013) at 3-4. In that letter, EPA and the Corps also advised Mr. Brace that, although the agencies were aware that sediment had been removed from those channels, the government was exercising its discretion and foregoing an enforcement action for the sediment removal that had occurred prior to the date of the letter. *Id.* at 3. However, EPA and the Corps advised Mr. Brace that any additional work on the 30-acre Site would require a CWA Section 404 permit. *Id.* They also advised Mr. Brace that portions of the 30-acre wetland Site appeared to have been converted to agricultural use without a permit, which was a violation of the CWA and the Consent Decree, and required further investigation. *Id.* at 4.

4. Defendants' Violations of the Consent Decree

In November 2013, Mike Fodse of the Corps participated in a flyover of the Site, which revealed that Defendants had re-installed the tile drains that the Consent Decree required them to remove, re-excavated several surface ditches that the Consent Decree required them to fill, and "sidecasted" the excavated material in the area protected under the Consent Decree. Ex. 16, Dep. of Michael Fodse 173:7-175:11; Lutte Decl. ¶ 22. The aerial photographs taken during the flyover showed that a large portion of the Site had been cleared of vegetative cover and plowed for planting. Lutte Decl. ¶ 22. During a May 20, 2015 Site visit, EPA confirmed the discharge

of dredged and/or fill material into approximately 18 acres of wetlands within the 30-acre Site covered by the Consent Decree. *Id.* ¶ 29. These wetlands had been cleared, drained, plowed, and planted. *Id.* The inspectors observed ten drain outlets in and along the channel of Elk Creek and its associated tributaries, all within the limits of the 30-acre Site, in contravention of the Consent Decree's requirement that the drainage tile in the wetlands be disabled. *Id.*; Ex. 22, E-Mail from Neal Devlin, Esq., to Robert Brace (Apr. 26, 2016) at 1 (Defendants' counsel encouraging Defendants to "remove reinstalled tile line" from the Site); C.D. at Wetland Restoration Plan ¶ 1. In addition, two surface ditches had been re-excavated in the wetlands, in contravention of the Consent Decree's requirement regarding the filling of surface ditches. Lutte Decl. ¶ 30; C.D. at Wetland Restoration Plan ¶ 2. Furthermore, Defendants had removed the Consent Decree-required check dam (*see* C.D. at Wetland Restoration Plan ¶ 3) from Elk Creek. Lutte Decl. ¶ 31; Ex. 22 at 1 (Defendants' counsel encouraging Defendants to "reposition the check dam").

During their recent depositions, Defendants themselves confirmed most of the federal inspectors' observations described in the previous paragraph. In particular, Defendants testified that, during and/or after the summer of 2012:

(1) they cleared vegetation from the Site. Dep. of Randall Brace 67:1-68:13; Dep. of Ronald Brace 60:12-23; 63:13-64:11;

(2) they re-installed drainage tile within the Site. Dep. of Robert Brace (Jan. 8, 2018) 165:1-22 (stating that he directed the installation of tile train in "the same places I tore them out of."); *id.* at 172:1-16; Dep. of Randall Brace 37:6-39:9, 40:3-6, 54:14-55:1; Ex. 17, Ex. RA1 to Dep. of Randall Brace (yellow highlights indicating where Defendants installed drainage tile between the summer and fall of 2012); Dep. of Ronald Brace 40:7-10, 45:14-46:19, 47:13-18,

58:1-10, 78:21-79:2; Ex. 18, Ex. RO1 to Dep. of Ronald Brace (yellow Xs indicating where Defendants installed drainage tile between the summer and fall of 2012);

(3) they excavated a ditch within the Site. Dep. of Robert Brace (Jan. 8, 2018) 185:10-186:4; Ex. 19, Ex. P1 to Dep. of Robert Brace (Jan. 8, 2018) (hand drawn line marked with a "D" where the ditch was excavated);

(4) they plowed and otherwise disturbed the Site with mechanized equipment including, but not limited to a "Tile Plow," Bulldozer, and "Track Hoe." Dep. of Randall Brace 35:22-36:7, 37:25-38:6, 55:20-57:19, 67:7-68:13; Dep. of Ronald Brace 30:9-15; 32:13-19; 40:2-10, 41:22-25, 48:5-49:2, 63:22-64:9, 99:1-5;

(5) they discharged dredged and/or fill material into the Site. Dep. of Randall Brace 36:8-15, 37:25-38:6, 56:3-17; Dep. of Ronald Brace 48:5-49:2; 63:22-64:9, 99:1-5;

(6) they planted corn within the Site. Dep. of Randall Brace 25:6-26:15, 69:20-70:1; RA1 to Dep. of Randall Brace ("Corn" written where Defendants planted corn within the Site after the summer of 2012); Dep. of Ronald Brace 21:21-23:12; RO1 to Dep. of Ronald Brace ("Corn" written where Defendants planted corn within the Site after the summer of 2012); and,

(7) they harvested and sold corn from the Site after 2012. Dep. of Randall Brace 26:25-27:2, 70:2-3; Dep. of Ronald Brace 23:17-23.

Defendants also testified that these actions were taken by Robert Brace or at his behest. Dep. of Randall Brace 54:14-20, 57:20-58:10, 67:7-15, 106:4-8; Dep. of Ronald Brace 90:20-21. Each action violates CWA Section 301(a) and the permanent injunction set forth in the Consent Decree, and those actions, both individually and collectively, have reversed the restoration required by the Consent Decree and deprived the United States of the benefit of its bargain.

On January 11, 2016, the United States provided Defendants with written notice that they were in violation of the Consent Decree. *See* Ex. 20, Letter from Laura Brown to Neal Devlin (Jan. 11, 2016). After efforts to reach a negotiated resolution were unsuccessful, the United States filed its initial Motion to Enforce on January 9, 2017. ECF No. 82. On June 15, 2017, this Court denied that Motion without prejudice to provide Defendants an opportunity for discovery, over the United States' objection, and ordered discovery completed by November 30, 2017. ECF No. 146. Defendants delayed more than two months before serving their first round of Interrogatories and Requests for Production of Documents upon the United States on August 22, 2017. On October 1, 2017, after the parties failed to resolve issues concerning those discovery requests, the United States filed a Motion for a Protective Order to limit, on relevancy and proportionality grounds, the breadth of discovery Defendants sought. ECF No. 168. On November 9, 2017, the Court denied that Motion "based upon the broad interpretation of discovery under the Federal Rules of Civil Procedure." ECF No. 191. As a result, the parties sought and obtained from the Court a 62-day deadline extension: fact and expert discovery was to be completed by January 31, 2018. ECF Nos. 192, 193.

Between early November and mid-January the parties continued to exchange documents[3] and depose witnesses (24 depositions have been conducted in this matter since October 2017), and the United States, in accordance with the parties' agreed-upon expert disclosure deadlines, proffered its expert report. Defendants, however, unable to abide by their own expert disclosure deadlines or the Court's January 31 discovery deadline, moved for another discovery extension.

[3] On November 24, 2017, the United States was forced to file a Motion to Compel Discovery Responses. ECF No. 194. After the Court granted that Motion in part, ECF No. 198, Defendants discovered thousands of pages of relevant documents despite having previously assured the United States and this Court that they had completed their document productions following a thorough search.

ECF No. 199. Over the United States' objection, ECF No. 201, the Court granted Defendants an additional month to complete discovery. ECF No. 203.

Discovery has now closed. And after all the depositions and document exchanges, the simple and undisputed facts remain the same: Defendants have violated an order of the Court. In doing so, they have not only flouted the Court's authority, but they have deprived the United States of the benefit of the bargain it secured by waiving further prosecution of the underlying enforcement case in favor of entering the Consent Decree. Thus, the United States moves this Court to exercise its rightful authority to enforce the Consent Decree by requiring Defendants to restore the wetlands, pay stipulated penalties for each violation of the Consent Decree's requirements, and reimburse the United States for costs associated with this Motion. In addition, given Defendants' brazen violations of the Consent Decree and the likelihood that they may commit future violations if undeterred, the Court should exercise its discretion and increase the stipulated penalties required by the Consent Decree.

ARGUMENT

I. DEFENDANTS HAVE VIOLATED THE REQUIREMENTS SET FORTH WITHIN THE CONSENT DECREE AND RESTORATION PLAN.

A consent decree is a form of a contract entered between the parties which, when court-approved, becomes a judgment of the court. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (citing *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235-37 (1975)); *see also Washington Hosp. v. White*, 889 F.2d 1294, 1300 (3d Cir. 1989) ("Although consent decrees are judicial acts, they have many of the attributes of contracts voluntarily undertaken . . . [and are] construed consistently with fundamental precepts of contract construction.") (internal citations omitted). "A defendant who has obtained the benefits of a consent decree – not the least of which is the termination of the litigation – cannot then be

permitted to ignore such affirmative obligations as were imposed by the decree." *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985).

In exchange for resolving this case, Defendants entered into the Consent Decree and agreed to restore the wetland hydrology at the Site by removing the tile drainage system, filling surface drainage ditches, and installing a check dam. The Consent Decree also permanently enjoined Defendants, and parties acting on their behalf, from discharging any pollutants into the Site, unless in compliance with the CWA. These obligations are clear. However, Defendants have brazenly violated them. They reversed the required restoration and violated the permanent injunction by installing new tile drains, digging ditches, and removing the check dam, all of which resulted in discharging pollutants into the 30-acre wetland. Moreover, Defendants' unlawful actions, which replicate those that caused the United States to bring the first enforcement action resulting in the Consent Decree, have defeated the Consent Decree's objective "to restore the hydrologic regime" to the Site's wetlands, requiring the wetlands to be restored yet again.

II. THE COURT SHOULD ORDER IMMEDIATE COMPLIANCE WITH THE CONSENT DECREE AND HOLD DEFENDANTS LIABLE FOR STIPULATED PENALTIES AND COSTS AND FEES.

Pursuant to Paragraph 12 of the Consent Decree, this Court retains jurisdiction to enforce Defendants' obligations under the Consent Decree. *See Frew v. Hawkins*, 540 U.S. 431, 440 (2004) (finding that "[f]ederal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced"). "In enforcing its orders, a district court may take such steps as are appropriate given the resistance of the noncompliant party." *Berger v. Heckler* 771 F.2d at 1569 (citation omitted). In taking the steps necessary to enforce a consent decree, courts should ensure that the parties receive the benefits for which they bargained. *Chisolm ex rel. CC v. Greenstein*, 876 F. Supp. 2d 709, 716 (E.D. La. 2012) (citing

Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983)); *accord Corey H. v. Chicago Bd. of Educ.*, 528 F. App'x 666, 668 n.2 (7th Cir. 2013) (citation omitted); *Twp. of S. Fayette v. Allegheny Cnty. Hous. Auth.*, 27 F. Supp. 2d 582, 598-99 (W.D. Pa. 1998) (citation omitted); *United States v. Nicolet, Inc.*, 1989 WL 95555, at *2 (E.D. Pa. Aug. 15, 1989); *see Pigford v. Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002). Thus, it is well within this Court's authority, and consonant with the Court's initial injunction, to require Defendants to once again restore the wetlands, consistent with the Consent Decree's original restoration plan. The United States requests that the Court order such restoration, to be approved by EPA and completed as soon as practicable after entry of an order on this Motion, with stipulated penalties attached to any avoidable delay.

Additionally, Defendants are liable for stipulated penalties for their multiple distinct violations of the Consent Decree. As the Third Circuit has held, "a consent decree may contain a provision for liquidated damages for breach of the decree in the same manner as a contract which sets the damages at an amount that is reasonable in light of the anticipated or actual loss caused by the breach . . . ." *Harris v. City of Philadelphia*, 47 F.3d 1311, 1323 (3d Cir. 1995). Because they are self-executing, stipulated penalties clauses "save[] the time of courts, juries, parties and witnesses and reduce[] the expense of litigation." *Id.* (citation omitted); *see also United States v. Alsol Corp.*, 2014 WL 1891352, at *5 (D.N.J. May 9, 2015) (defendant's violations of CERCLA consent decree required payments of stipulated penalties because defendant made a "counseled and deliberate choice" entering into consent decree), *aff'd*, 620 F. App'x 133 (3d Cir. 2015); *United States v. Kelley*, 145 F.R.D. 432, 436-39 (E.D. Mich. 1993) (defendant's violations of Clean Air Act consent decree required payment of stipulated penalties to which it subjected itself for the choice of polluting rather than complying).

Here, Paragraph 8 of the Consent Decree provides that "if Defendants fail to perform *any* requirement in [P]aragraph 4, 5, and 6 . . . Defendants will pay a stipulated penalty of $250 for each day of failure." C.D. ¶ 8 (emphasis added). Paragraph 4 subjects Defendants to the requirements embodied in the attached wetlands restoration plan, and specifically incorporates those requirements into the Consent Decree. *Id.* ¶ 4 ("Defendants will perform restoration in accordance with the wetlands restoration plan, which is attached hereto as Exhibit A and *made a part hereof*." (emphasis added)). Defendants have violated not one, but all three restoration plan requirements incorporated into the Consent Decree. Lutte Decl. ¶¶ 29-32. That plan specifies that "[i]n order to restore the hydrology to the area, the drainage tile system currently located in the wetlands is to be disabled, the surface ditches filled in, and a check dam constructed." C.D. at Wetland Restoration Plan p. 1. It thereafter identifies specific tasks for accomplishing each of these three requirements, which are described in separate paragraphs of the plan. *Id.* at Wetland Restoration Plan ¶ 1 ("Excavation of trenches; removal of drainage tubing"), ¶ 2 ("Fill In Two Surface Ditches"), ¶ 3 ("Install Check Dam"). Importantly, each of these three requirements had a separate and distinct purpose in effectuating the aims of the restoration plan. Lutte Decl. ¶ 12.

Despite initially complying with the Consent Decree's restoration requirements, Defendants, without any authorization, have since reversed *all* the work required by the restoration plan, and, thus, violated the Consent Decree by: (1) re-installing drainage tiles; (2) re-excavating two surface ditches; and (3) removing the check dam, thereby again disrupting the hydrologic regime of the 30-acre wetland.[4]

[4] That Defendants once complied with the Consent Decree is of no import. Paragraph 8 of the Consent Decree subjects Defendants to penalties for *any* failure to comply with Paragraph 4, which specifically incorporates the terms of the restoration plan. That plan states that its "primary objective . . . is to restore the hydrology regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek" through the three requirements it defines as necessary to

Accordingly, the United States seeks separate stipulated penalties for: (1) Defendants' violation of the requirement to disable tile drainage at the Site; (2) Defendants' violation of the requirement to fill in surface ditches at the Site; and (3) Defendants' violation of the requirement to install a check dam in the unnamed tributary adjoining the Site. The Consent Decree requires that when Defendants "fail to perform any requirement" of Paragraph 4, "then, upon written notice of such failure from [the United States], Defendants will pay a stipulated penalty of $250 for each day of failure." C.D. ¶ 8. The United States provided written notice on January 11, 2016, of Defendants' Consent Decree violations. Because "any" failure of Paragraph 4 constitutes a violation warranting stipulated penalties of $250 per day for "such violation," Defendants are therefore liable for daily stipulated penalties with respect to each of three requirements that they have violated.[5] As of the filing of our initial Motion to Enforce on January 9, 2017, stipulated penalties for these three violations totaled $273,000. Since that

---

accomplish that objective. Defendants have undone the work and knowingly flouted the intention of the restoration plan and of the Court's Decree, so they are in violation of its terms.

[5] The United States believes the Consent Decree's language provides for the application of stipulated penalties to each violation of the restoration plan requirements. However, even if the stipulated penalty provision were "facially ambiguous," it would be properly read as providing penalties on a "per violation" basis. As the Seventh Circuit explained in *United States v. Rueth Development Co.*, where a "stipulated-penalty provision is facially ambiguous . . . we must 'look at the evil which the decree was designed to rectify.'" 335 F.3d 598, 606 (7th Cir. 2003) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 686 (1971)). In *Rueth*, the consent decree required the defendant to "restore the wetlands by performing six discrete milestone tasks" and there, just as here, the defendant understood that he "had to comply with all six milestones in order to be in compliance with the CWA." *Id.* Accordingly, the court held that stipulated penalties should not be read to "accrue only by *day* of violation rather than per violation," because otherwise "there would be no incentive for [the defendant] to complete any of the other five tasks if he is in violation of one." *Id.* (emphasis in original). This would "render the number of violations irrelevant," which the court found would contravene the parties' intent to remedy alleged violations of the CWA. *Id.* Just as in *Rueth*, the Consent Decree's stipulated penalty provision is best read as applying to each violation, as the Consent Decree was intended to restore the hydrology of the 30 wetland acres damaged by Defendants and, otherwise, Defendants would face the same consequences for failing to remove a single tile drain as for forgoing wetland restoration altogether.

filing, Defendants' violations and the environmental harms resulting from those violations have continued; as a result, stipulated penalties have continued to accrue and now total $595,500 as of the date of this filing.[6] *See United States v. Alshabkhoun*, 277 F.3d 930, 934-35 (7th Cir. 2002) (holding that stipulated penalties continue to accrue where the environmental harms caused by consent decree violations continue throughout litigation); *cf. United States v. Witco Corp*, 76 F. Supp. 2d 519, 530-31 (D. Del. 1999) (stipulated penalty accrual inappropriate during litigation where consent decree violation did not result in environmental harm).[7]

The stipulated penalties sought by the United States are reasonable because they reflect the agreed-upon terms of the Consent Decree. "[A] consent decree may contain a provision for liquidated damages for breach of the decree in the same manner as a contract." *Harris v. City of Philadelphia*, 47 F.3d at 1323. Indeed, "[a]lthough a consent decree is a judicial act, it has many of the attributes of a contract voluntarily undertaken, and a party to a consent decree, having made a 'free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment,' bears a burden which 'is perhaps even more formidable than had they litigated and lost.'" *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1088 (3d Cir. 1987) (internal citations omitted).[8] Courts are responsible for enforcing the terms of consent decrees "to preserve [the parties'] 'bargained for positions.'"

[6] We calculated this stipulated penalty amount by multiplying $750 per day ($250 per day per violation, multiplied by three violations) by the number of days between the date the United States formally notified Defendants of their ongoing violations (January 11, 2016) and the date the United States is filing this motion (March 15, 2018), a total of 794 days.

[7] Notably, Defendants used the Site for monetary gain after they reversed the environmental restoration work required by the Consent Decree. *See* Dep. of Randall Brace 26:25-27:2, 70:2-3; Dep. of Ronald Brace 23:17-23; Ex. 21, Dep. of Robert Brace (Jan. 31, 2018) 99:5-15.

[8] Mr. Brace testified that one of the reasons he agreed to enter into the Consent Decree was to avoid paying a higher civil penalty if the case were to go to judgment. Dep. of Robert Brace (Jan. 8, 2018) 156:18-157:2.

Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 469 (D.N.J. 1998) (quoting *Halderman v. Pennhurst State Sch. & Hosp.*, 901 F.2d 311, 319 (3d Cir.1990); citing *Harris*, 47 F.3d at 1323). Indeed, when "'parties to a consent decree wish to cabin the district court's equitable discretion by stipulating the remedies for breach, they are free to do so.'" *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 343 (D.C. Cir. 2014) (quoting *Cook v. City of Chicago*, 192 F.3d 693, 698 (7th Cir. 1999)). The resulting stipulated penalties "'fix the measure of relief to which the victim of a breach is entitled.'" *Id*. (quoting *Cook*, 192 F.3d at 698). As a consequence, courts have held that stipulated penalties accrued under a consent decree are reasonable even where they "greatly exceed the amount originally due under a consent decree." *United States v. Alsol Corp.*, 620 F. App'x 133, 136 (3d Cir. 2015) (upholding an increase from $200,000 to nearly $900,000 in stipulated penalties), *citing Rueth*, 335 F.3d at 601-02 (upholding a judgment of over $4 million in stipulated penalties where the original penalty was $23,000).

Not only has this Court already concluded that the stipulated penalties are reasonable, *see* C.D. ¶ 2, but the penalties are also consistent with, and in many cases substantially lower than, those applied by courts in similar cases. The relief the United States seeks here accords with the agreed-upon stipulated penalty of only $250 per violation per day, which is lower than the typical stipulated penalties in consent decrees resolving CWA violations of the CWA, even in the 1990s when the parties signed the Consent Decree in this case. *See United States v. Rueth Dev. Co.*, 189 F. Supp. 2d 874, 878-81 (N.D. Ind. 2001) (enforcing stipulated penalties in a 1999 consent decree escalating from $1,500 to $2,500 per day per CWA violation on three acres of wetlands, totaling more than $4 million), *aff'd*, 335 F.3d 598 (7th Cir. 2003); *United States v. Krilich*, 948 F. Supp. 719, 726-27 (N.D. Ill. 1996) (enforcing stipulated penalties of $2,500 per day in a 1992 consent decree resolving CWA wetlands violations), *aff'd*, 126 F.3d 1035 (7th Cir.

1997). Indeed, courts enforcing consent decrees for environmental violations have routinely required defendants to pay stipulated penalties of more than $2,000 per day, often with the stipulated amount escalating as violations continue. *See Alshabkhoun*, 277 F.3d at 933, 935 (upholding over $500,000 in stipulated penalties under a CWA wetlands consent decree based upon daily per violation penalties escalating from $500 to $2,000); *Rueth Dev. Co.*, 189 F. Supp. 2d at 878-81 (stipulated penalties escalating from $1,500 to $2,500 per day under CWA consent decree); *Krilich*, 948 F. Supp. at 726-27 (stipulated penalties of $2,500 per day under CWA consent decree); *see also United States v. Nat'l Steel Corp.*, 767 F.2d 1176, 1178, 1183 (6th Cir. 1985) (upholding stipulated penalties based upon daily per violation penalties escalating from $1,000 to $7,500 under Clean Air Act consent decree); *Alsol* Corp., 2014 WL 1891352, at *1, 6 (D.N.J. May 9, 2014) (enforcing an approximately $900,000 stipulated penalty based upon daily per violation penalties escalating from $750 to $1,500 under CERLCA consent decree), *aff'd*, 620 F. App'x 133 (3d Cir. 2015); *United States v. Jupiter Aluminum Corp.*, 2009 WL 418091, at *8-9 (N.D. Ind. Feb. 18, 2009) (upholding a stipulated penalty of more than $3 million based upon daily per violation penalties ranging between $10,000 and $50,000 under Clean Air Act consent decree); *United States v. Government of Guam*, 2007 WL 4462170, at *2 (D. Guam Dec. 14, 2007) (imposing nearly $3 million in stipulated penalties under CWA consent decree, reflecting escalating daily penalties of between $250 and $5,000); *United States v. Kelley*, 145 F.R.D. 432, 436-37 (E.D. Mich. 1993) (enforcing stipulated penalties of $3,000 per day per violation under Clean Air Act consent decree); *United States v. Cnty. of Nassau*, 749 F. Supp. 458, 461 (E.D.N.Y. 1990) (Ocean Dumping Act violator will avoid contempt charge so long as it continues to pay approximately $40,000 in stipulated penalties each day based upon daily per violation penalties ranging from $1,000 to $10,000); *United States v. Moore American Graphics*,

Inc., 1989 WL 81799, at *4 (N.D. Ill. July 10, 1989) (enforcing stipulated penalties of $5,000 per day per violation under Clean Air Act consent decree).

Moreover, the stipulated penalties the United States seeks here are reasonable and enforceable because they represent a significant discount from the liability Defendants would face for new violations of the CWA. Courts considering larger stipulated penalties than those at issue here have held that where accrued stipulated penalties are a fraction of the statutory penalties that could be imposed, the stipulated penalties are reasonable and enforceable. *See Alshabkhoun*, 277 F.3d at 933, 935 (noting that $500,000 in stipulated penalties awarded were "less than 10% of the statutory authorized penalties"); *Rueth*, 189 F. Supp. 2d at 878-81 (finding more than $4 million in stipulated penalties enforceable because "the stipulated amounts represent a small fraction of the maximum penalty a court might impose under CWA"), *aff'd*, 335 F.3d 598 (7th Cir. 2003); *Krilich*, 948 F. Supp. at 726-27 (explaining that a stipulated penalty judgment in excess of $1 million was enforceable because, in part, the daily penalty was "one-tenth of the maximum [statutory] penalty"), *aff'd*, 126 F.3d 1035 (7th Cir. 1997). Under the CWA's penalty provisions, Defendants would be liable for between $37,500 and $51,570 per day per violation, depending on the exact date.[9] *See* 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; 81 Fed. Reg. at 43,095. Thus, the United States is seeking a daily stipulated per violation penalty that is at most approximately 0.7% of the statutory daily per violation maximum ($250/$37,500), far less than the 10% figure that courts have consistently found to be reasonable and enforceable.

[9] Even assuming a *single* violation per day at the $37,500 statutory penalty level, and counting only those days of violation (794 days) since EPA's January 11, 2016 Notice to Defendants (a limitation not required under the CWA, which would allow the United States to seek penalties from the date of the violations), Congress has authorized penalties here in excess of $29 million.

Pursuant to the stated terms of this Decree and consistent with the case law above, the United States requests that the Court issue an order requiring Defendants to pay stipulated penalties for each of the three restoration requirements breached by Defendants, for each day since the United States provided notice of such ongoing violations on January 11, 2016. In addition, the United States requests, consistent with the terms of Paragraph 8 of the Decree, that the Court order Defendants to pay for "any expenses and costs incurred by the United States in enforcing this Consent Decree." C.D. ¶ 8. If the Court so orders, the United States requests the opportunity to provide evidence of such costs and expenses within a reasonable time after the Court issues its order.

III. THE COURT SHOULD MODIFY THE CONSENT DECREE TO PROVIDE FOR INCREASED STIPULATED PENALTIES AS A DETERRENT TO ADDITIONAL VIOLATIONS.

As the Supreme Court held in *United States v. United Shoe Machinery Corp.*, a court may grant a plaintiff's request to modify a consent decree where "time and experience have demonstrated" that the decree "has failed to accomplish [the] result" it was "specifically designed to achieve." 391 U.S. 244, 249 (1968); *see United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 331 (3d Cir. 1992) ("The hornbook rule regarding plaintiff's requests for modification of injunctive relief is that 'modification is proper if the original purposes of the injunction are not being fulfilled in any material respect.'" (internal citation omitted)).[10] Courts have thus modified consent decrees to impose additional requirements "when a change in circumstances thwarted the basic purpose and intent of the decree, when there had been 'pervasive violations' of the decree by one party, and when one party was in substantial non-compliance with the decree." *Holland*

[10] A different standard applies to requests for modification where defendants "[seek] relief not to achieve the purposes of the provisions of the decree, but to escape their impact." *United Shoe*, 391 U.S. at 249 (referencing the modification standard under *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), which requires a showing of "changed conditions").

v. New Jersey Dep't of Corr., 246 F.3d 267, 284 (3d Cir. 2001) (internal citations omitted) (following *United Shoe* and elaborating on the findings of fact necessary for modification).

Several circuits, including the Third Circuit, have read *United Shoe* to allow for the imposition of "new and substantial burdens on a defendant party to a consent decree" where there has been "an adjudication or admission that the defendant violated the plaintiffs' legal rights reflected in the consent decree" and the alleged violations were litigated. *Fox v. U.S. Dep't of Hous. & Urban Dev.*, 680 F.2d 315, 323 (3d Cir. 1982); *David C. v. Leavitt*, 242 F.3d 1206, 1211 (10th Cir. 2001) ("It is … settled that a court has the equitable power to impose additional obligations on a defendant party to a consent decree when the decree is entered into after an adjudication of wrongdoing on the part of the defendant."); *Rajender v. Univ. of Minnesota*, 730 F.2d 1110, 1115 (8th Cir. 1984) (agreeing with the Third Circuit's interpretation of *United Shoe* in *Fox*).

Here, Defendants litigated their claims and were held in violation of the CWA for unlawful discharges of dredged or fill material without a permit on 30 acres of wetland property, after admitting that their activities were unpermitted and that the area was a "wetland at the time of the discharges." *Brace*, 41 F.3d at 120. The Consent Decree was negotiated after this "adjudication of wrongdoing"—prior to further district court proceedings regarding appropriate penalties—and was "specifically designed" to fully restore the 30-acre wetland and permanently enjoin discharges of pollutants, including dredged or fill material, into that wetland. Now, "time and experience" have shown that Defendants have controverted these aims – reversing the required restoration and undertaking the same actions already adjudged to violate the CWA – and so the Decree has failed to accomplish its purpose.

The United States therefore requests that this Court exercise its equitable power to modify the stipulated penalties provided in Paragraph 8 of the Consent Decree. The Decree's existing stipulated penalty provision has failed to compel lasting restoration of the 30-acre wetland or deter Defendants from further discharges of pollutants in violation of the CWA. Accordingly, the United States requests that the pertinent sentence of Paragraph 8 be modified as follows:

> Defendants will pay a stipulated penalty of $250 for each day of failure *for one to thirty days of noncompliance, a stipulated penalty of $500 for each day of failure for thirty-one to sixty days of noncompliance, and a stipulated penalty of $1,000 for each day of failure for sixty-one or more days of noncompliance. Such stipulated penalties will be paid by FedWire Electronic Funds Transfer in accordance with the written instructions to be provided by the United States Department of Justice, referencing EPA Region 3 and the DOJ case number 90-5-1-1-3433*.[11]

C.D. ¶ 8 (proposed modification in italics and underlined).

This modification would ensure that short-term (i.e., 30 days or fewer) compliance delays remain under the original stipulated penalty structure negotiated by the parties, but would more effectively deter persistent violations or enduring recalcitrance on Defendants' part going forward. The modification is thus consistent with this Court's authority to grant "additional injunctive relief … necessary to advance [the] purposes" of the Consent Decree. *Local 560*, 974 F.2d at 332.

[11] The Consent Decree calls for the stipulated penalties to be paid by certified or cashier's check payable to the Treasurer of the United States. *See* C.D. ¶ 8. However, since the entry of the Consent Decree, the United States has changed its payment procedures and now requires that penalties be paid by electronic funds transfer, which is reflected in the above proposed modification.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court enforce the Consent Decree by requiring that Defendants restore the wetlands and submit to the United States all stipulated penalties that have accrued as a result of Defendants' non-compliance, as well as all costs and expenses incurred by the United States in enforcing the Consent Decree. In addition, the United States respectfully requests that the Court modify the Consent Decree to increase stipulated penalties for future violations.

Respectfully submitted,

SCOTT W. BRADY
United States Attorney
Western District of Pennsylvania

/s/ Paul E. Skirtich
PAUL E. SKIRTICH (PA Bar # 30440)
Assistant United States Attorney
Joseph F. Weis, Jr. U.S. Courthouse
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
(412) 894-7418
Paul.Skirtich@usdoj.gov

JEFFREY H. WOOD
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

/s/ Brian S. Uholik
LAURA J. BROWN (PA Bar # 208171)
CHLOE KOLMAN (IL Bar # 6306360)
BRIAN UHOLIK (PA Bar # 209518)
SARAH BUCKLEY (VA Bar # 87350)
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
601 D Street, N.W., Suite 8000
Washington, DC 20004
Phone: (202) 514-3376 (Brown)

Phone: (202) 514-9277 (Kolman)
Phone: (202) 305-0733 (Uholik)
Phone: (202) 616-7554 (Buckley)
Laura.J.S.Brown@usdoj.gov
Chloe.Kolman@usdoj.gov
Brian.Uholik@usdoj.gov
Sarah.Buckley@usdoj.gov

OF COUNSEL:

Melissa Schefski, Esq.
United States Environmental Protection Agency
Office of Compliance and Enforcement Assurance
1595 Wynkoop Street
Denver, Colorado 80202

Pamela J. Lazos, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

Dated: March 15, 2018

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2018, I served the foregoing Memorandum of Law in Support of the United States' Second Motion to Enforce Consent Decree and for Stipulated Penalties and associated exhibits on the following counsel for Defendants via e-mail:

Neal R. Devlin, Esq.
Knox McLaughlin Gornall & Sennett, P.C.
120 West Tenth Street
Erie, PA 16501-1461
(814) 459-2800
Ndevlin@kmgslaw.com

Lawrence A. Kogan, Esq.
100 United Nations Plaza
Suite #14F
New York, New York, 10017
(212) 644-9240
lkogan@koganlawgroup.com

/s/ Brian S. Uholik