

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

In the Matter of:

Paco Swain Realty, L.L.C.

Respondent

\* Docket No. CWA-06-2012-2710  
\*  
\*  
\* Respondent's Opposition to  
\* Motion for Accelerated Decision

**RESPONDENT'S OPPOSITION TO MOTION FOR ACCELERATED DECISION**

Respondent, Paco Swain Realty, L.L.C., opposes the Complainant's Motion for Accelerated Decision. In support of its opposition, Respondent submits the attached Memorandum in Opposition to Complainant's Motion for Accelerated Decision including the Declaration of Gordon L. "Paco" Swain, Jr.

DATED this 26<sup>th</sup> day of September, 2013.

By Attorney:



ROBERT W. MORGAN (LSBA #9713)  
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2013 SEP 30 AM 11:27

**CERTIFICATE OF SERVICE**

I certify that the foregoing Motion, dated September <sup>25</sup><sub>26</sub>, 2013, was this day sent by UPS

to:

Sybil Anderson  
Headquarters Hearing Clerk  
US EPA Office of ALJ  
1300 Pennsylvania Avenue NW  
M-1200  
Washington DC 20004  
(Original and Copy)

M. Lisa Buschmann  
Administrative Law Judge  
US EPA Office of ALJ  
1300 Pennsylvania Avenue NW  
M-1200  
Washington DC 20004  
(Copy)

In addition, a copy has been sent by regular mail and email to:

Tucker Henson (6RC-EW)  
Assistant Regional Counsel  
US EPA Region 6  
1445 Ross Av  
Dallas TX 75202-2733



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Robert W. Morgan  
212 N Range AV  
Denham Springs LA 70726

Dated: September <sup>25</sup><sub>26</sub>, 2013

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

In the Matter of:	*	Docket No. CWA-06-2012-2710
	*	
Paco Swain Realty, L.L.C.	*	
	*	Respondent's Opposition to
Respondent	*	Motion for Accelerated Decision

**RESPONDENT'S MEMORANDUM IN OPPOSITION TO  
COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

Respondent opposes Complainant's Motion for Accelerated Decision as to there exist genuine and material issues for trial, particularly as regard the facts supporting Complainant's conclusions as to the existence and application of the significant nexus standard, as to Respondent's intentions and "disregard", as to the significance of any effect on Traditionally Navigable Waters by Respondent's work on the subject property, as to the quantitative analysis of the civil penalty, and to Respondent's ability to pay a penalty.

Respondent concedes the jurisdiction of the Corps of Engineers over wetlands and its authority to issue permits, but contends that the Corps was lax in performing its duty to determine jurisdiction and expedite permits, and its unreasonable delay placed the Respondent in the untenable position of proceeding without permits, even though he had reason to believe that there were no jurisdictional wetlands on the site, or placing at risk his entire investment and indebtedness on the property.

Significant Nexus Standard. The Significant Nexus Standard is defined as stated in the last sentence of Article II.A. of Complainant's memorandum, requiring that the wetlands..."significantly affect the chemical, physical and biological integrity of other [TNW's]."

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Complainant seeks to support its conclusion of significant nexus by an excerpt from the Corps report imbedded in Article II.B, stating that the alleged wetlands provide "a direct and acute contribution to the chemical, physical, and biological makeup of the TNW."

This assertion raises an issue of fact as to the effect—including its existence, directness and acuteness--on the TNW of any operation of Respondent. Respondent has the right to question the methodology of this analysis by traversal of the report, and to retain an appropriate expert to challenge the conclusion, including the measurability of the significance by volume on the TNW's characteristics.

Respondent's Reliance on Delineation. Complainant states as a matter of fact that "the wetland delineation submitted by Respondent is insufficient and grossly inaccurate, and Respondent's 'good faith' reliance on the delineation is unconvincing."

Regardless of the sufficiency or accuracy of the report, it was provided by a reputable firm approved by the Corps, and Respondent relied upon it to his detriment. Respondent had ceased all work in July and received the draft report in September showing .54 acre of wetland, and resumed work in October. As for the disclaimer noted at the bottom of page 8 of Complainant's Memorandum, Respondent did not proceed with disregard; in fact, he had already submitted the initial report to USACE and had been awaiting a JD for some four months before resuming work.

After receiving GSRC's Final Report in October and resuming work, Respondent did not hear from the Corps again until the C&D follow-up call April 8, 2008, still having not received a Jurisdictional Determination that had been requested and disregarded for more than a year. Respondent's apparent disregard was a direct result of the Corps' dismissive attitude toward its duty to determine jurisdiction and communicate it to landowners rather than just issue C&D's

and shut down violations. These facts should be considered mitigating factors should Respondent be found to have committed violations.

The 2009 GSRC map, mentioned in the second full paragraph on page 9, is a curious matter; oddly, its only purpose seems to be to confirm the findings of Complainant's contractor, after apparently overlooking most of the "wetlands" in its 2007 survey. By the time this was issued, Respondent's work had long been terminated.

Proposed Penalty. Complainant's penalty calculations also raise some serious questions of fact. In the interest of brevity, Article D, beginning on Page 5 of 11, of Respondent's Supplemental Prehearing Exchange, is referred to and incorporated herein by reference as if included *in extenso*. The Declaration of Paco Swain, attached, presents some of his side of the story.

The gist is that, considering the nature, circumstances, extent and gravity of the alleged violations, the penalty proposed is not justified. For reasons stated in the Supplemental PHE, the multiplier should be decreased, scores should be lowered in the factors of Uniqueness, Secondary Impacts (none were shown, except conjecture), and Culpability; and the Deterrence Factor should be eliminated entirely, as should the 25% Upward Adjustment. Although comprehensively explained, the considerations for the scores are all subjective in nature, and Respondent's testimony at hearing will refute the conclusions.

The deterrence factor is altogether irrational. Complainant states, as a fact (Declaration of Donna Mullins, top of Page 6), "...Respondent is likely to repeat the violations." For the tremendous toll this experience has taken on Respondent financially, physically, emotionally, professionally and general respect, it is inconceivable that Respondent would ever repeat the mistakes or underestimate the importance of regulatory compliance.



Most important is Respondent's Ability to Pay. Respondent has now provided and entered into the record Respondent's tax returns for the years 2005-2012. The decline in taxable income is breathtaking: from a high of \$302,000 in 2006 to a Negative \$194,000 in 2012, all directly attributable to the shut down of the Megan's Way project (without regard to fault), loss of hundreds of thousands of dollars invested. \$1.8 million judgment with no way to pay, loss of borrowing power and professional stature. This is the very epitome of the lack of ability to pay.

### CONCLUSION

Undeniably, Respondent committed some violations in his work at Megan's Way. Respondent did not acquire permits before commencing work at the cite. However, Respondent did have a wetlands delineation prepared by an approved professional, and sent it to USACE for a Jurisdictional Determination.

Instead of acting on Respondent's request for a JD, the Corps delayed Respondent's work unreasonably and unexplained, putting Respondent in a no-win situation, to choose whether to proceed with its project or forfeit its investment and its future. Respondent opted to move forward with its work, but not before getting a second wetlands determination. Anticipating the impending JD visit, Respondent roped off the area identified as wetlands and went about clearing, grubbing and ditching for its subdivision. More than a year passed without USACE issuing a JD; it only issued C&D Orders. This inaction by the Corps should be considered a mitigating factor in the violations charged.

Genuine issues of material fact exist in whether there is a significant nexus sufficient for the Corps to exercise jurisdiction over the isolated wetlands near the non-relatively permanent waters or over the RPWs themselves, and whether traditionally navigable waters are at all actually affected by Respondent's work. Complainant states a complex theory on Page 14, but

all of the assumptions given there are refutable. Once Respondent has had the opportunity to traverse the declarations and seek an expert to dissect them, the ALJ will be better able to determine whether the suspension of molecules in the RPWs actually reach the TNW in measurable or even discernible volumes. If not, the whole philosophy propounded by complainant, no matter what the precedent for its acceptance, remains an improbable abstract theory.

Finally, for reasons stated above and in the Respondent's Supplemental Prehearing Exchange and the Declaration of Gordon L. "Paco" Swain, the quantification of statutory factors in calculating the proposed penalty are very questionable. Admittedly, Complainant did not have Respondent's financial information when the Declaration was confected, but the submission, together with the Swain's Declaration, clearly shows not only that Respondent is without Ability to Pay, but that there is no need for a deterrence factor to enhance the penalty.

The Motion for Accelerated Decision should be DENIED.

**ATTACHMENT A**

**Declaration of Gordon L. "Paco" Swain, Jr.**



**ATTACHMENT A**

**Declaration of Gordon L. "Paco" Swain, Jr.**

2005	\$193,520
2006	\$302,003
2007	\$274,725
2008	\$18,599
2009	(\$153,714)
2010	(\$93,144)
2011	(\$136,450)
2012	(\$194,353)

These returns, together with the owners' statement of financial condition, should suffice to demonstrate extreme financial hardship and Respondent's lack of Ability to Pay. Respondent acknowledges EPA's option of seeking a penalty that might put Respondent out of business. In this case, Respondent is already effectively out of business as a land developer, given its practically insurmountable debt, inability to borrow funds, and damaged reputation.

Without resolution of the pending Complaints, it is not likely that Respondent's financial condition can significantly improve in the foreseeable future. It is difficult to perceive any benefit to Complainant or its Mission to pursue Respondent for more than it can hope to actually recover.

Upward Adjustment. Complainant's suggested escalation of the calculated penalty is wholly inappropriate. Consistent with the reasons stated above, the upward adjustment should be deleted from the equation.

In the final analysis, Respondent sought to develop a cut-over tract of exhausted timber land that had been cleared and gouged and logged and ditched and traversed with donkey roads, as evidenced by the years of aerial photographs, into a respectable residential subdivision. In

doing so, by Complainant,s admission, there was negligible if any environmental impact outside the site, and little net change in the wetlands within it. Respondent, regardless of what Complainant has been told, has effectively lost control of the property and absorbed hundreds of thousands of dollars in financial loss in addition to immeasurable intangible loss. This should be penalty enough for the alleged transgressions, if they are proven.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'R. Morgan', with a long horizontal flourish extending to the right.

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ROBERT W. MORGAN ( #9713)  
Attorney at Law  
212 N Range Av  
Denham Springs LA 70726  
morganlaw@bellsouth.net  
Tel. 225.223.2144  
Fax 225.271.8881

**CERTIFICATE OF SERVICE**

I certify that the foregoing Respondent's Supplemental Prehearing Exchange, dated September 25, 2013, was filed with the Headquarters Hearing Clerk, U.S. Environmental Protection Agency, Office of Administrative Law Judges, 1300 Pennsylvania Avenue NW, M-1200, Washington DC 20004, and a true and correct copy was sent to the following on this 25th day of September, 2013, in the following manner:

VIA UPS:

M. Lisa Buschmann, Administrative Law Judge  
US EPA, Office of Administrative Law Judges  
1300 Pennsylvania Avenue NW  
M-1200  
Washington DC 20004

VIA Email and UPS:

Tucker Henson  
Assistant Regional Counsel (6RC-EW)  
Office of Regional Counsel  
US EPA Region 6  
1445 Ross Av  
Dallas TX 75202-2733  
Henson.tucker@epa.gov



Robert W. Morgan

Dated: September 25, 2013

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

In the Matter of:	*	Docket No. CWA-06-2012-2710
	*	
Paco Swain Realty, L.L.C.	*	
	*	Declaration of
Respondent	*	Gordon L. "Paco" Swain, Jr.

**DECLARATION OF GORDON L. "PACO" SWAIN, JR.**

In support of its Opposition to Complainant's Motion for Accelerated Decision, the Respondent, Paco Swain Realty, L.L.C., hereby submits the following declaration of Gordon L. "Paco" Swain, owner of Paco Swain Realty, L.L.C.

1. I, Gordon L. "Paco" Swain, Jr., am the principal of Paco Swain Realty, L.L.C., a Louisiana limited liability company (PSR), which is the developer of Megan's Way Subdivision in Livingston Parish, Louisiana. I am familiar with all of the material facts concerning Megan's Way, including the wetlands issues in contention in this Administrative Complaint.
2. PSR acquired the real estate for the subdivision in January 2007, and received preliminary plat approval in March. In March, 2007, I ordered a wetlands assessment from Harris Environmental Services. The results indicated approximately 1 to 2 acres of wetlands isolated to interior of property and not subject to U.S. Army Corps of Engineers (USACE) jurisdiction, according to pre-Rapanos testing. I submitted the report to USACE with a request for Jurisdictional Determination.
3. May, 2007, PSR closed on construction loan in amount of \$2,050,000 of which \$860,000 was for purchase of land and balance of \$1,190,000 for construction of subdivision.

4. June, 2007 we ordered construction plans from Alvin Fairburn & Associates. Having heard nothing from Corps and faced with substantial interest payments on the loan, we began initial clearing, grubbing and minor ditching of subdivision.
5. July, 2007, I received a telephone call from Bill Nethery from USACE informing that it was suspected we were working in a wetlands area. I informed Mr. Nethery that having waited three months for feedback from the Corps, we had marked off the wetland areas indicated by the consultant and began clearing outside these areas, and explained to Mr. Nethery that we were paying substantial interest on our loan and could not afford to wait for USACE to act on the assessment. Mr. Nethery verbally ordered C&D until he could come on site, and indicated that he would try to come within the next few weeks. He indicated that there was some uncertainty in the District because of the recent Rapanos and Carabelle decisions. I told him that our consultant had indicated that the wetlands on site were isolated by pre-Rapanos testing and not subject to USACE jurisdiction, and that the consultant had submitted the assessment to USACE for a JD. Mr. Nethery stated that only the USACE can call an area wetlands and that we should cease all work until he heard from him. I explained that if we shut down the crews for any length of time we would lose the contractor to other jobs and risk paying interest on a subdivision loan without it being completed and be unable to sell lots to recoup the investment. In July, 2007 we ceased all work on the site and contracted with Howard Nass of Gulf Coast Research Corporation for an independent post-Rapanos wetlands testing as per the new wetlands directive associated with isolated wetlands.

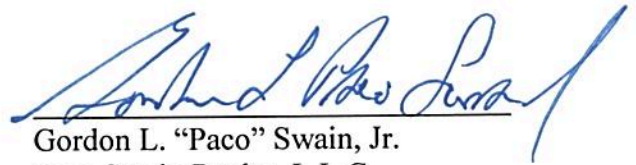
6. August 22, 2007, we received a written C&D from Mr. Nethery. September, 2007, we received a copy of written assessment from GSRC, showing about ½ acre of wetland on the 92 acre tract. October-December, 2007, we completed clearing, grubbing and minor ditching of Megans Way Subdivision.
7. March, 2008, PSR received approval from Livingston Parish on completed construction plans and began installing streets and utilities in the subdivision. April 8, 2008, I received a call from Bill Nethely indicating that continued land clearing had been observed at Megans Way after he had issued a C&D. I explained that two wetlands assessments had been completed by certified wetlands engineers and both showed isolated wetlands of 1/2 to 2 acres, not subject of USACE jurisdiction. I also stated to Mr. Nethery that the Corps had never issued a JD on the site. Mr. Nethery stated that the Corps forwarded all information on this site to EPA for prosecution. I asked how he could issue a C&D on a site that had not received a JD. Mr. Nethery stated that only the Corps can determine wetlands and not consultants. He again verbally told me to cease all work. With work shut down and PSR unable to pay its construction loan, Hancock Bank sued on the mortgage and ordered the property seized by Livingston Parish Sheriff, which seizure was effected April 27, 2010. April 16, 2012, Hancock Bank was granted a judgment against PSR in the amount of \$1,884,093.62, which continues to accrue post-judgment interest. The bank confiscated a certificate of deposit it held in my name, and availed itself of any collateral owned by me or PSR to which it had access. It is my understanding that the Bank has declined to take possession of the property because of the pending issues, but it has refused to cooperate with our efforts to conduct a short sale or compromise to any extent the amount it is owed. Bank officials have told me that I am not allowed on the property. Despite the Bank's attitude, I have



continued efforts to market the property in an attempt to minimize deficiency judgments, but the interest of prospective buyers is deterred by the pending environmental claims, as well as the general difficulties in the real estate market. We had an offer in the \$500,000 range, but the Bank would not agree to release its claims.

8. Paco Swain Realty is my primary source of income, as is shown on Income Tax Returns. All the income and debts of the LLC flow through to me and my wife, Deborah S. Swain. Because of the debacle surrounding Megan's Way and the Cease and Desist orders, we are enduring incredible financial hardship, living off credit cards and occasional commissions. PSR is not able to pay a civil penalty, and we have submitted financial documents to support the inability to pay.
9. We have learned many lessons from this extremely unpleasant experience. We are convinced that regardless of expert opinion or appearance, no work on land should ever be commenced without appropriate regulatory approval, and there is no likelihood that we or any entity with which we are affiliated will ever again procede without proper permits in hand. In addition to the extreme financial hardship, the ordeal has been detrimental to my and my wife's physical and emotional health and personal life, including our marriage, our professional reputation and our standing in the community. No further penalty is necessary to deter Paco Swain Realty, L.L.C., me, or any entity with which I am now or may become affiliated from any future violations.

Dated: 9/26/13

  
Gordon L. "Paco" Swain, Jr.  
Paco Swain Realty, L.L.C.

**ATTACHMENT B**

**Personal Financial Statement of**

**Gordon L. "Paco" Swain, Jr. and**

**Deborah S. Swain**

# PERSONAL FINANCIAL STATEMENT

NAME: Gordon L. "Paco" Swain Jr.

POSITION OR OCCUPATION: Broker / Owner

BUSINESS ADDRESS: 33916 Natures Way, Walker, La. 70785

RESIDENCE ADDRESS: - 33916 Natures Way, Walker La. 70785

PLEASE DO NOT LEAVE ANY QUESTIONS UNANSWERED. USE "NO" OR "NONE" WHERE NECESSARY

Statement of Financial Condition as of 9/25/2013			
ASSETS	IN DOLLARS	LIABILITIES	IN DOLLARS
100 not include Assets of doubtful value)	(omit Cents)		(omit Cents)
Cash on hand and in banks:	\$ 1,200	Notes payable to banks .. secured:	135,000
US Gov't & Marketable Securities .. See		Notes payable to banks .. unsecured:	
Non-Marketable Securities .. See Schedule		Due to Brokers:	
Securities held by broker in margin		Amounts payable to others .. secured:	
Restricted or control stocks:		Amounts payable to others .. unsecured:	
Partial interest in Real Estate Equities		Accounts and bills due:	
See Schedule C:		Unpaid income tax:	
Real Estate Owned .. See Schedule D: Add	\$ 1,400,000	Other unpaid taxes and interest:	
Loans Receivable:		Real Estate mortgages (LPEEC)	\$ 900,000 (LPEEC)
Automobiles and other personal property:	\$ 40,000	(MEGANS WAY )	\$ 1,884,093
Cash Value life insurance .. See Schedule		Other debts .. itemize: Credit Cards	\$ 58,200
		TOTAL LIABILITIES:	\$ 2,977,293
		NET WORTH:	(\$ -1,880,893)
TOTAL ASSETS	\$ 1,090,000	TOTAL LIABILITIES AND NET WORTH:	\$ 1,096,400

SOURCES OF INCOME YEAR	2012	PERSONAL INFORMATION	
Salary, Bonuses, & Commissions:	\$ 45,000	Do you have a will	yes If so, name of executor:
Salrv. Bonuses & Commissions	\$		
Real Estate	\$	Are you a partner or officer in any venture? If so, describe:	
Other Income (Alimony, child support, or		Yes LPEEC Equine Subdivision	
maintenance income need not be revealed		Are you obligated to pay alimony, child support or separate	
not wish to have it included as a basis for		No	
this obligation)	\$		
		Are any assets pledged: describe:	
TOTAL: - ~	\$		
CONTINGENT LIABILITIES			
Do you have any contingent liabilities? If so,	No	Income tax settled through	
		Are you a defendant in any suits or legal actions?	
As endorser, co-maker, or	\$	Personal Bank accounts carried	
On leases or	\$	Capital One Bank	
Legal Claims?	\$		
-ther special debt?	\$	Have you ever been declared Bankrupt? If so, describe:	No
Amount of contested income tax	\$		