

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

FILED
2015 JAN 30 PM 2:11

In the Matter of

Paco Swain Realty, L.L.C.,
a Louisiana Corporation,

Respondent

§ Docket No. CWA-06-2012-2710
§
§
§ CONSENT AGREEMENT
§ AND FINAL ORDER
§
§ Pursuant to 40 C.F.R. § 22.13(b)

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. This Consent Agreement and Final Order ("CAFO") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act (herein "the Act"), 33 U.S.C. § 1319(g). This CAFO is issued in accordance with 40 C.F.R. § 22.18, as described in the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits."

2. On May 15, 2012, EPA Region 6 issued to Paco Swain Realty, L.L.C. ("Respondent") an Administrative Complaint ("Complaint") under Section 309(g) of the Act, 33 U.S.C. § 1319(g), which proposed to assess an administrative civil penalty against Respondent, and gave notice of Respondent's opportunity to request a hearing on the proposed administrative civil penalty assessment. The Complaint is hereby incorporated by reference.

3. EPA and Respondent ("the Parties") agree that settlement of this matter without litigation will save time and resources, that it is in the public's interest, and that the entry of this CAFO is the most appropriate means of resolving such matters. Compliance with all the terms and conditions of this CAFO resolves only the penalty action related to the violations alleged in the Complaint.

4. Respondent admits the jurisdictional allegations of the Complaint, including jurisdictional allegations that the wetlands referenced in the Complaint are “waters of the United States” under the “significant nexus” standard. Respondent admits factual allegations and conclusions of law necessary to maintain jurisdiction over the subject wetlands; however, Respondent neither admits nor denies the remaining specific factual allegations and conclusions of law contained in the Complaint or the Findings of Fact and Conclusions of Law contained in this CAFO.

5. Respondent expressly waives the right to contest the factual allegations or conclusions of law contained in the Complaint and this CAFO and waives its right to appeal the Final Order set forth herein.

6. Before the taking of any testimony, and without adjudication of any issue of law or fact, the Parties agree to the terms of this CAFO and to its issuance. Respondent consents to the assessment and payment of a civil penalty, in the amount and by the method stated below.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

7. Respondent is a limited liability company incorporated under the laws of the State of Louisiana and as such, Respondent is a “person,” as that term is defined at Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 232.2.

8. At all times relevant to the violations at issue herein (“relevant time period,”), Respondent owned real property located at the end of Nancy Drive, south of Highway 1024 (Cane Market Road) in Sections 6 and 7, Township 6 South, Range 4 East, in Walker, Livingston Parish, Louisiana (“subject property”). The subject property is known as the Megan’s Way Subdivision and is the subject of the Complaint.

9. The Complaint alleged, among other things, that Respondent violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging and/or contracting with other parties to discharge dredged and/or fill material into waters of the United States, within the meaning of Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 232.2 without authorization by a permit issued by the United States Army Corps of Engineers ("Corps") pursuant to Section 404(a) of the Act, 33 U.S.C. § 1344(a).

10. With the issuance of the Complaint, the State of Louisiana was notified and given an opportunity to consult with the EPA regarding the assessment of an administrative penalty against Respondent.

11. EPA notified the public of the Complaint and afforded the public reasonable opportunity to comment on the proposed penalty. At the expiration of the notice period, EPA had received no comments from the public.

III. TERMS OF SETTLEMENT

A. ABILITY TO PAY

12. Section 1319(g)(3) of the Act, 33 U.S.C. § 309(g)(3), requires that EPA take into consideration certain factors, including the violator's ability to pay, when determining the amount of penalty assessed.

13. Respondent, in its filings related to this action, asserted an inability to pay a penalty based solely upon its financial status and the personal financial status of its owner.¹ EPA, through its contractor, conducted a thorough financial analysis, including review of sworn financial statements and financial data request forms, tax returns and other available information,

¹ Income earned through Paco Swain Realty, L.L.C. passes through to its owner, Mr. Gordon Swain, and is claimed as individual income on Mr. Swain's personal returns; therefore, the ability to pay analysis focused on the personal income of and assets available to Mr. Swain.

and determined that Respondent does not have the ability to pay any penalty above a *de minimis* amount.

14. Based solely upon inability to pay documented through a thorough analysis, EPA reduced the penalty amount from a Class II civil penalty (up to a maximum of \$177,500) to a *de minimis* amount for settlement.

B. PENALTY PROVISIONS

15. Based on the foregoing Findings of Fact and Conclusions of Law, EPA, considering the relevant criteria pursuant to Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), and under the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), hereby ORDERS that Respondent shall pay to the United States a civil penalty in the amount of five hundred dollars (\$500.00) to settle the violations as alleged in the Complaint, in accordance with 40 C.F.R. § 22.18(c).

16. Payment shall be made by one of the following methods within thirty (30) days of the effective date of this CAFO:

- a. By mailing a bank check, a cashier's check, or certified check, payable to "Treasurer of the United States," to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

b. By wire transfer to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

c. By overnight mail (Express, FedEx, DHL, etc.) to:

U.S. Bank
1005 Convention Plaza
SL-MO-C2GL
St. Louis, MO 63101
Phone: 314-418-4087

d. By credit card payments to: <https://www.pay.gov/paygov>
(enter sfo 1.1 in the search field)

"In the Matter of Paco Swain Realty, L.L.C., Docket No. CWA-06-2012-2710" should be clearly marked on the check to ensure credit for payment.

17. Respondent shall send simultaneous notice of payment, including a copy of the check, to each of the following:

- (a) Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
- (b) Chief, Marine & Wetlands Section (6WQ-EM)
Water Quality Protection Division
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
- (c) Chief, Water Enforcement Legal Branch (6RC-EW)
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Respondent's adherence to these procedures will ensure proper credit when payment is received.

18. Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

19. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b).

20. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty-day period after the payment is due and an additional \$15.00 for each subsequent thirty-day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent (6%) per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

21. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States' enforcement expenses, including but not limited to, attorney's fees and costs incurred by the United States for

collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be twenty percent (20%) of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter.

22. Failure by Respondent to pay the penalty assessed according to the terms of this CAFO, in full, by its due date, may subject Respondent to a civil action to collect the assessed penalty and any accrued interest or penalties.

23. In the event a collection action is necessary, Respondent shall pay—in addition to any applicable penalty, fees, and interest described herein—all reasonable costs and expenses, including legal expenses and court costs, incurred by the United States for enforcement and collection proceedings for nonpayment of the amounts agreed hereunder, pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9). In any such collection action, the validity, amount, and appropriateness of the penalty, and the terms of this CAFO shall not be subject to review.

C. REOPENING THIS ACTION / ADDITIONAL ACTION

24. Notwithstanding any other provision of this CAFO, EPA reserves, and this CAFO is without prejudice to, the right to reinstitute or reopen this action, or to commence a new administrative action seeking relief other than as provided in this CAFO, including an additional or larger penalty than agreed to in this CAFO, if the financial information provided by Respondent, through tax returns and a Financial Data Request Form supplied by Industrial Economics, Inc. on behalf of EPA, is false or, in any material respect, inaccurate.

25. Respondent certifies that, to the best of its knowledge and belief, after thorough inquiry, it has submitted EPA financial information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed

between the time the financial information was submitted to EPA and the time Respondent executes this CAFO.

26. Respondent agrees that the time period from the filing of the Complaint in this matter through five years following the effective date of this CAFO ("Tolling Period") shall not be included in computing the running of any statute of limitations potentially applicable to any action brought or reopened in accordance with Paragraph 24. Any defenses of laches, estoppel, waiver, or other similar equitable defenses based upon the running or expiration of the running or expiration of any time period shall not include the Tolling Period, and Respondent agrees not to assert, plead or raise against EPA any defenses of laches, estoppel, waiver, or other similar equitable defenses based on either the running any statute of limitations or the passage of time during the Tolling Period.

D. GENERAL PROVISIONS

27. To execute this Agreement, Respondent shall forward two (2) copies of this CAFO, with original signature, to:

Tucker Henson,
Water Enforcement Legal Branch (6RC-EW)
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

28. Issuance of this CAFO does not relieve Respondent from its responsibility to comply with all requirements of the Act and the requirements of any permits issued thereunder, as described in Section 309(g)(7) of the Act, 33 U.S.C. § 1319(g)(7), nor does it constitute a waiver by EPA of its right to enforce compliance with the requirements of Respondent's permits or other requirements of the Act by actions pursuant to Section 309 of the Act, 33 U.S.C. § 1319.

29. The provisions of this CAFO shall be binding upon Respondent, its officers, or officials, managers, employees, and their successors or assigns, in their capacity on behalf of Respondent.

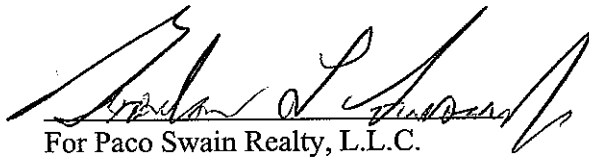
30. Each party agrees to bear its own costs and attorney's fees in this matter, except to the extent that Respondent may be responsible for reasonable costs and expenses of enforcement and collection proceedings for failure to comply with the terms of this CAFO. Furthermore, Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 *et seq.*, and any regulations promulgated pursuant to those Acts.

31. Neither EPA nor the United States Government shall be liable for any injuries or damages to persons or property resulting from the acts or omissions of Respondent, its officers, directors, employees, agents, receivers, trustees, successors, assigns, or contractors in carrying out the activities required by this CAFO, nor shall EPA or the United States Government be held out as a party to any contract entered into by Respondent in carrying out the activities required by this CAFO.

32. Respondent shall preserve, during the pendency of this CAFO, all records and documents in its possession or in the possession of its divisions, employees, agents, contractors, or successors which in any way relate to this CAFO, regardless of any document retention policy to the contrary.

33. Each undersigned representative of the Parties to this agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this agreement and to execute and legally bind that party to it.

In recognition and acceptance of the foregoing:

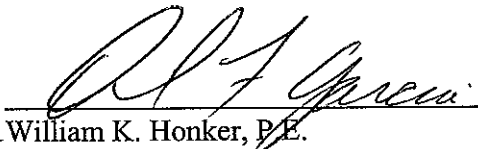


For Paco Swain Realty, L.L.C.

Gordon L. Swain, Jr.

Date:

1/27/2015



William K. Honker, P.E.

Director

Water Quality Protection Division

U.S. EPA, Region 6

Date:

1/30/2015

FINAL ORDER

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the Complaint. Nothing in this Final Order shall be construed to waive, extinguish, or otherwise affect Respondent's (or its officers', agents', servants', employees', successors', or assigns') obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. This CAFO shall become effective upon filing with the Regional Hearing Clerk, pursuant to 40 C.F.R. § 22.31(b).

Issuance Date: _____

Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2015, the original of the foregoing Consent Agreement and Final Order was hand delivered to the Regional Hearing Clerk, U.S. EPA, Region 6 (6RC-D), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and that a true and correct copy was sent via electronic mail to:

Robert W. Morgan
Attorney at Law
212 North Range Avenue
Denham Springs, LA 70726
morganlaw@bellsouth.net

with a copy, first class postage prepaid, to

Elizabeth Johnson
Louisiana Department of Environmental Quality
Office of Environmental Services
Water Permits Division
P.O. Box 4313
Baton Rouge, Louisiana 70821

