

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

In the Matter of

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

Respondent

§ Docket No. CWA-06-2012-2710
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§ COMPLAINANT'S
§ PREHEARING EXCHANGE

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COMPLAINANT'S PREHEARING EXCHANGE

The Complainant, the Director of the Water Quality Protection Division, United States Environmental Protection Agency, Region 6 ("EPA") through its attorney, hereby files this Prehearing Exchange pursuant to the Prehearing Order ("Order"), dated April 19, 2013 and amended by Order on Motion for Extension of Dates Under Prehearing Order dated May 29, 2013, issued by the Administrative Law Judge and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22. In the Order, the Presiding Officer instructed the Parties to file a Prehearing Exchange containing specific information. This document contains Complainant's responses to the Order.

A. WITNESSES:

The Complainant may call the following witnesses at the hearing:

1. William R. Nethery (expert witness) – Mr. Nethery is a Senior Botanist in the Surveillance and Enforcement Section of the Regulatory Branch of the United States Army Corps of Engineers ("Corps"), New Orleans District. As part of his regular duties, Mr. Nethery inspected the property owned by Paco Swain Realty, L.L.C. ("Respondent") known as the

Megan's Way subdivision ("subject property"), which is the property upon which the violations alleged in this action occurred. Mr. Nethery's testimony will include observations made during his on-site visits to the subject property as well as conversations and/or correspondence with Respondent and/or persons acting on behalf of Respondent. Mr. Nethery's testimony will include his determination that certain wetlands on the subject property are waters of the United States subject to the jurisdiction of the Corps and the Clean Water Act.

2. Donna Mullins (fact witness) – Ms. Mullins is a Life Scientist and Wetlands Inspector in the Water Quality Protection Division at EPA, Region 6. As part of her regular duties, Ms. Mullins participated in the initiation of this enforcement action against Respondent, including inspection of the subject property and evaluation of the penalty component and preparation of the Penalty Calculation Worksheet. Ms. Mullin's testimony will include observations made during her on-site visit at the subject property. Ms. Mullin's testimony will also discuss the calculation of the penalty in this matter.

3. Custodians of Records – EPA personnel may be called to establish the foundation for certain exhibits and the absence or receipt of certain records.

4. Any witness named by Respondent.

5. Any rebuttal witness, as required.

Although Complainant does not anticipate the need to call any additional witness, Complainant respectfully reserves the right to amend or supplement the witness list and to expand or otherwise modify the scope and extent of testimony of any of these potential witnesses, where appropriate, and upon adequate notice to Respondent and notice and order of this Court.

Complainant's witnesses will not need an interpreter in order to testify.

Special accommodations under the Americans with Disabilities Act will not be needed for counsel or any witness or party representative.

B. EXHIBITS:

The Complainant may offer into evidence the following exhibits:

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
Complainant's Ex. 1	Administrative Complaint filed May 15, 2012
Complainant's Ex. 2	Respondent's Answer to Administrative Complaint dated February 27, 2013
Complainant's Ex. 3	Cease and Desist Order issued to Eagle Land Construction, LLC on August 22, 2007
Complainant's Ex. 4	Cease and Desist Order issued to Respondent on August 22, 2007
Complainant's Ex. 5	Cease and Desist Order issued to Respondent on May 20, 2008
Complainant's Ex. 6	Jurisdictional Determination issued December 2, 2009
Complainant's Ex. 7	Administrative Order issued September 30, 2010
Complainant's Ex. 8	Violation Report Form prepared by William Nethery
Complainant's Ex. 9	Wetland Inspection Report prepared by Donna Mullins dated May 8, 2008 including 15 photographs taken during inspection
Complainant's Ex. 10	Photographs taken by William Nethery during June 15, 2007 inspection
Complainant's Ex. 11	Approved Jurisdictional Determination Form prepared by William Nethery (including supporting data)

Complainant's Ex. 12	Field notes from April 8, 2008 on-site inspection by William Nethery
Complainant's Ex. 13	Penalty Calculation Worksheet prepared by Donna Mullins
Complainant's Ex. 14	Wetland Delineation prepared by GRSC at request of Paco Swain Realty, LLC
Complainant's Ex. 15	Map and data sheets from GRSC Wetland Delineation
Complainant's Ex. 16	Notification Letter to Louisiana Department of Environmental Quality
Complainant's Ex. 17	Public Notice of Proposed Assessment of Clean Water Act Section 309(g) Class II Administrative Penalty and Opportunity to Comment
Complainant's Ex. 18	Resume of William Nethery
Complainant's Ex. 19	Resume of Donna Mullins

The Complainant respectfully reserves the right to amend its prehearing exchange to add or subtract exhibits and/or documents.

C. PLACE FOR HEARING AND ESTIMATED TIME NEEDED:

Pursuant to 40 C.F.R. §§ 22.19(d) and 22.21(d), the Complainant requests that the hearing be held in Dallas, Texas. Complainant estimates one (1) day at most will be needed to present its direct case. Translation services will not be needed.

D. ASSESSMENT OF CIVIL PENALTY:

STATUTORY FACTORS

Pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), as amended by 40 C.F.R. § 19.4, for the period from March 15, 2004 through January 12, 2009, EPA has the authority to assess against Respondent an administrative civil penalty not to exceed

\$11,000.00 per day for each day during which a violation continues, up to a maximum of \$157,500.00. For the period after January 12, 2009, EPA has the authority to assess against Respondent an administrative civil penalty not to exceed \$16,000.00 per day for each day during which a violation continues, up to a maximum of \$177,500. Based upon the facts alleged in the Complaint, and in accordance with the statutory penalty factors enumerated under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), Complainant is seeking a penalty of one hundred fifty-three thousand dollars (\$153,000.00) against Respondent for discharging pollutants into waters of the United States.

PENALTY CALCULATION

The penalty assessed is to promote the goals of fair and equitable treatment among the regulated community and to deter further noncompliance and follows EPA enforcement guidance for penalty assessment. In calculating the proposed penalty, Complainant considered the *Clean Water Act Section 404 Settlement Penalty Policy* ("Penalty Policy"), available at www.epa.gov/enforcement/water/documents/policies/404pen.pdf.

Under Section 309(g)(3), 33 U.S.C. § 1319(g)(3), Complainant must consider the **nature, circumstances, extent, and gravity** of the violation. In the case at hand, Respondent discharged, caused the discharge, directed the discharge, and/or agreed with other persons or business entities to discharge dredged and/or fill material from point sources into waters of the United States without permit authorization under the CWA.

Under Section 301 of the CWA, 33 U.S.C. § 1311, it is unlawful for a person to discharge a pollutant, including dredged or fill material, from a point source into a water of the United States except with the authorization of, and in compliance with, a permit issued under the CWA.

Under Section 404 of the CWA, 33 U.S.C. § 1344, the Secretary of the Army, acting through the Chief of Engineers for the Corps, is authorized to issue permits for discharge of dredged or fill material into waters of the United States. During the time period during which dredged or fill material was deposited into jurisdictional wetlands on the subject property, Respondent did not have a permit issued by the Corps authorizing the discharges.

On June 15, 2007, the Corps conducted an on-site inspection of the subject property and discovered the filling of wetlands without a permit, including the construction of a series of ditches designed to drain wetlands. The Corps issued a verbal Cease and Desist Order ("C&D Order") to a representative of Respondent at the site and later to Respondent. On August 22, 2007, the Corps issued a written C&D Order to Respondent. On April 8, 2008, the Corps conducted another on-site inspection of the subject property and discovered further filling of wetlands without a permit. The Corps issued a second verbal C&D Order on April 8, 2008 and a third verbal C&D Order on April 18, 2008. On May 8, 2008, Complainant and the Corps conducted an on-site inspection of the subject property and discovered further filling of wetlands since the April 8, 2008 inspection. On May 20, 2008, the Corps issued a second written C&D Order to Respondent. On September 30, 2010, Complainant issued an Administrative Order ("AO"), Docket No. CWA-06-2010-2736, ordering Respondent to cease further discharges, stabilize the property and either obtain an after-the-fact permit for the discharges or restore the jurisdictional wetlands on the subject property. Respondent has not complied with the AO.

In calculating the penalty, Complainant followed the Penalty Policy. As a threshold matter, for the reasons discussed below, Complainant determined that the violations involve a high degree of compliance significance and assigned the highest level of multiplier, albeit at the

lowest value (\$3,000.00) due to the more moderate environmental significance of the violations.

Complainant assigned a low value (1 of 20) for both the environmental impact and impacts to the aquatic environment based upon Respondent's filling of eight acres of wetlands. Complainant assigned a low-to-moderate value (5 of 20) for the uniqueness factor due to the high quality wetlands impacted by Respondent's activities. Complainant assigned a low value (2 of 20) for off-site impacts due to downstream sedimentation caused by Respondent's activities. Complainant assigned a slightly higher value (5 of 20) to the duration factor because Respondent continued to discharge in violation of the CWA for an extended period (including after receiving multiple C&D Orders), and Respondent has allowed the discharge to remain in place and continues to utilize multiple ditches to drain wetlands on the subject property.

Under Section 309(g)(3) of the CWA, 33 U.S.C. 1319(g)(3), EPA must also consider the violator's **history of violations** and the **degree of culpability**. To assign a value for degree of culpability, the Penalty Policy states the principle criteria for assessing culpability are Respondent's prior experience or knowledge of CWA requirements, degree of control over the actions causing the violation, and motivation.

Prior experience and knowledge looks as to whether Respondent knew or should have known of the need to obtain a Section 404 permit or the environmental consequences of the action. Respondent had actual knowledge of the need to obtain a Section 404 permit as evidenced by Respondent's receipt of multiple C&D Orders indicating that a Section 404 permit is required, yet Respondent continued to fill wetlands at the subject property. Respondent also had knowledge of the environmental consequences (destruction of wetlands) as evidenced by Respondent's construction of multiple ditches, the sole purpose of which is to drain wetlands.

Respondent directed the land development activities at the subject property, thus Respondent had a high degree of control over the actions. Respondent's motivation for undertaking the actions resulting in violations of the CWA was to maximize the monetary value of the property by destroying wetlands that rendered portions of the property inappropriate for residential construction. Complainant considered these factors in light of the Penalty Policy and assigned a high value (15 of 20) to Respondent's degree of culpability.

Complainant considered Respondent's compliance history and assigned a low value (2 of 20) for Respondent's failure to comply with the C&D Orders.

Complainant assigned a moderate value (10 of 20) to the need for deterrence factor. Respondent's violation of C&D Orders indicates a proclivity to ignore regulatory structures and, when considered alongside Respondent's multiple violations at similar properties, Respondent is likely to repeat the violations.

Under Section 309(g)(3) of the CWA, 33 U.S.C. 1319(g)(3), Complainant must consider the violator's **ability to pay** the civil penalty. Respondent has not provided Complainant with any evidence to substantiate an assertion of inability to pay.

Under Section 309(g)(3) of the CWA, 33 U.S.C. 1319(g)(3), EPA must consider the **economic benefit**, if any, resulting from the violation. Based upon the information currently in its possession, Complainant is not alleging Respondent gained a significant economic benefit.

Finally, under Section 309(g)(3) of the CWA, 33 U.S.C. 1319(g)(3), EPA will consider **such other matters as justice may require**. This catch-all provision can be used to increase or mitigate the penalty. The Penalty Policy looks to recalcitrance as an adjustment factor.

Recalcitrance relates to Respondent's delay or refusal to comply with the law, to cease violating

the law, to correct past violations or to cooperate with regulators once notice has been given that a violation occurred. The Penalty Policy specifically cites failure to comply with a C&D from the Corps as justifying an upwards adjustment of the penalty. Respondent continued to violate the CWA after multiple verbal and written C&D Orders and failed to comply with an Administrative Order issued by EPA requiring Respondent to seek an after-the-fact permit or restore the subject property. Due to Respondent's violation of C&D Orders and failure to comply with the Administrative Order, Complainant adjusted the penalty upwards (25%) due to recalcitrance.

By applying the Penalty Policy in the manner discussed above, Complainant arrived at a penalty value of 41 (out of 180) with a multiplier of three thousand dollars (\$3,000.00) for a preliminary gravity-based penalty of one hundred twenty-three thousand dollars (\$123,000). Complainant then adjusted the penalty upwards by 25% (\$30,750.00) for a final penalty of one hundred fifty-three thousand, seven hundred and fifty dollars (\$153,750.00).

E. PAPERWORK REDUCTION ACT APPLICABILITY

The Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501–3549, as amended, does not apply in this case. There is not an Office of Management and Budget Control Number herein, and the Provisions of Section 3512 of the PRA are not applicable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the original of the foregoing COMPLAINANT'S PREHEARING EXCHANGE 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 27th day of June, 2013, in the following manner:

VIA FIRST CLASS U.S. MAIL:

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