



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

September 6, 2013

SENT VIA OVERNIGHT MAIL (UPS) TO:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, Office of Administrative Law Judges
1300 Pennsylvania Avenue, NW
M-1200
Washington, DC 20004

Re: Motions for Accelerated Decision (2)
In the matter of Paco Swain Realty, L.L.C.
Docket Nos. CWA-06-2012-2710 and CWA-06-2012-2712

Dear Ms. Anderson,

Please find enclosed the original and one copy of two Motions for Accelerated Decision in the above referenced matters. A courtesy copy was sent via email to oaljfilng@epa.gov on September 6, 2013.

Regards,

A handwritten signature in blue ink, appearing to be "Tucker Henson".

Tucker Henson
Assistant Regional Counsel

RECEIVED BY OALJ
2013 SEP -6 PM 3:11

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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2013 SEP -6 PM 3: 11

In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Motion for
Respondent	§	Accelerated Decision

MOTION FOR ACCELERATED DECISION

COMES NOW COMPLAINANT, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6, by and through its attorney, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1–22.52, hereby moves the Presiding Officer to enter into an accelerated decision pursuant to 40 C.F.R. § 22.20, granting judgment in favor of Complainant as to (1) Respondent's liability for violations of the Clean Water Act, 33 U.S.C. §§ 1251–1387, arising from the discharge of pollutants to waters of the United States, and (2) assessing a Class II penalty in the amount of one hundred fifty three thousand seven hundred and fifty dollars (\$153,750.00) pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B). In support of its Motion for Accelerated Decision, Complainant submits the attached Memorandum in Support of Complainant's Motion for Accelerated Decision including the Declaration of Donna Mullins.

DATED this 6th day of September, 2013.

RESPECTFULLY SUBMITTED,



Tucker Henson
Assistant Regional Counsel (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Tel.: (214) 665-8148
Fax: (214) 665-3177

CERTIFICATE OF SERVICE

I certify that on the 6th day of September, 2013, the original of the foregoing MOTION FOR ACCELERATED DECISION, including Complainant's Memorandum in Support of Complainant's Motion for Accelerated Decision and Declarations of Donna Mullins and William Nethery, sent via UPS (next business day) to and 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 6th day of September, 2013, in the following manner:

VIA FIRST CLASS U.S. MAIL:

M. Lisa Buschmann, Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
1300 Pennsylvania Avenue, NW
Mail Code 1900R
Washington, DC 20460

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

Date: _____

9/6/13



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of § Docket No. CWA-06-2012-2710
Paco Swain Realty, L.L.C., §
a Louisiana Corporation, §
Respondent § Complainant's Memorandum in Support
of Motion for Accelerated Decision §

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**COMPLAINANT'S MEMORANDUM IN SUPPORT OF
MOTION FOR ACCELERATED DECISION**

JURISDICTION

This is a proceeding to assess a Class II Civil Penalty under Section 309(g) of the Clean Water Act (the "Act"), 33 U.S.C. § 1319(g) and is governed by the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits" ("Part 22 Rules"), 40 C.F.R. Part 22.

STANDARD OF REVIEW

An accelerated decision may be rendered as to "any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [the Presiding Officer] may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Although the Federal Rules of Civil Procedure do not apply, the summary judgment standard in Rule 56(c) provides guidance for accelerated decisions. *In Re: Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *P.R. Aqueduct and Sewer Auth. v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994).

Under Rule 56(c), the moving party bears the initial responsibility of identifying those parts of materials in the record which it believes demonstrate the absence of a genuine issue of

material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); FED. R. CIV. P. 56(c)(1). A party must demonstrate that an issue is both “material” and “genuine” to defeat an adversary’s motion for summary judgment. *In Re: Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004) (citing *Anderson v. Liberty Lobby, Inc.* (“*Anderson*”), 477 U.S. 242, 248 (1985)). An issue of fact is “material” if it “might affect the outcome of the suit under governing law.” *Anderson*, 477 U.S. at 248. An issue of fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Id.* Evidence that is “merely colorable” or not “significantly probative” is incapable of overcoming this standard. *Id.* at 249-50. Once the moving party meets its burden, the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party must come forward with “specific facts showing that there is a genuine issue for trial.” *Id.* at 587. If the nonmoving party is unable to meet its burden, the moving party is entitled to a judgment of an accelerated decision as a matter of law.

PROCEDURAL HISTORY

Prohibition on Discharge into Waters of the United States

Section 301(a) of the Act prohibits the discharge of a pollutant, including dredged material or fill material, from a point source to waters of the United States, except with the authorization of, and in compliance with, a permit issued under the Act. 33 U.S.C. §§ 1311(a), 1362; 40 C.F.R. § 232.2. Under Section 404 of the Act, the Secretary of the Army, acting through the Chief of Engineers for the United State Army Corps of Engineers (“Corps”), is authorized to issue permits for the discharge of dredged or fill material into waters of the United States.

Description of Property

Respondent owns a 58 acre tract in the State of Louisiana known as the Megan's Way Subdivision ("subject property"). Administrative Complaint ("Complaint") ¶ 2; Respondent's Answer to Administrative Complaint ("Answer") ¶ 2. The subject property contains wetlands and tributaries of navigable waters, including wetlands considered waters of the United States ("jurisdictional wetlands"). Complainant's Prehearing Exchange ("CPE") Exs. 6, 8, 11. On multiple dates on or about April 2007 through May 2008, Respondent or other persons acting on Respondent's behalf discharged dredged material and discharged fill material to jurisdictional wetlands and waters of the United States on the subject property through mechanized land clearing activities and redistribution of fill material to prepare a portion of the subject property for development as a residential subdivision. CPE Exs. 3-5, 9. In addition, Respondent or other persons acting on Respondent's behalf constructed cross channels to drain jurisdictional wetlands on the subject property. CDE Ex. 9.

Administrative Enforcement History

On June 15, 2007, the Corps conducted an on-site inspection at the subject property, discovered the filling of wetlands and tributaries without a permit and issued a verbal Cease and Desist Order ("C&D Order") to Respondent ordering cessation of work in the areas of the subject property containing waters of the United States. Complainant's Prehearing Exchange ("CPE") Exs. 4, 8, 10. On August 22, 2007, the Corps issued written C&D Orders to Respondent and Respondent's representative who was observed performing work on the subject property. CPE Exs. 3, 4. On April 8, 2008, the Corps conducted a second on-site inspection of the subject property and discovered additional filling of waters of the United States without a

permit. CPE Ex. 5, 12. The Corps issued a second verbal C&D Order on April 8, 2008 and a third verbal C&D Order on April 18, 2008. CPE Ex. 5.

On May 8, 2008, the Corps and the United States Environmental Protection Agency, Region 6 ("EPA") conducted an on-site inspection at the subject property and discovered additional filling of waters of the United States without a permit, including mechanized land clearing activities, and construction of cross channels to actively drain jurisdictional wetlands. CPE Ex. 5, 9. On May 20, the Corps issued a second written C&D Order to Respondent. CPE Ex. 5. On September 30, 2010, at the request of Respondent, the Corps issued a jurisdictional determination for the subject property identifying jurisdictional wetlands and other waters of the United States on the subject property. CPE Ex. 6. On September 30, 2010, EPA issued to Respondent an Administrative Order ordering Respondent to cease additional discharges to waters of the United States, stabilize the subject property and apply for a permit from the Corps. CPE Ex. 7. To date, Respondent has not complied with the Administrative Order.

On May 15, 2012, EPA filed an Administrative Complaint to initiate this action. CPE Ex. 1. On February 27, 2013, Respondent filed an Answer to the Complaint and requested a hearing. CPE Ex. 2.

ARGUMENT

I. RESPONDENT DISCHARGED A POLLUTANT FROM A POINT SOURCE WITHOUT A PERMIT IN VIOLATION OF SECTION 301 OF THE CLEAN WATER ACT.

Section 301 of the Act provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is authorized by permit. 33 U.S.C. § 1311(a). "Discharge of a pollutant" includes the "addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). As demonstrated below, Respondent is a "person" who caused the

discharge a pollutant from a point source without a permit in violation of Section 301(a) of the Act.

A. Respondent is a "person."

The Act defines "person" to include "an individual, corporation [or] partnership[.]" 33 U.S.C. § 1362(5). "Person" is further defined by regulation to be "an individual, association, partnership, corporation [...] or an agent or employee thereof[.]" 40 C.F.R. § 232.2. Respondent admits that it is a "limited liability company incorporated under the laws of the State of Louisiana[;]" therefore, Respondent is a "person." CPE Ex. 2.

B. Respondent's discharges were from a "point source."

A "point source" is "any discernible, confined and discrete conveyance [...] from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts have routinely determined that mechanized land clearing equipment, such as bulldozers and backhoes, constitutes a "point source." *Avoyelles Sportsmen's League, Inc. v. Marsh* ("Avoyelles Sportsmen's League"), 715 F.2d 897, 922 (5th Cir. 1983); *Borden Ranch P'ship v. United States Army Corps of Eng'rs* ("Borden Ranch"), 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002). Respondent utilized mechanized equipment to clear wetlands of vegetation, place fill materials in wetlands and construct cross channels to drain wetlands at the subject property, as exhibited by the presence of such equipment on the subject property and extensive heavy equipment tracks at the sites of the violations. CPE Exs. 3-5, 8-10. As such, the discharges were from a "point source" within the meaning of the Act.

C. Respondent "discharged a pollutant."

"Discharge of a pollutant" means "any addition of a pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). "Addition" is understood to include "redeposit,"

meaning that soil that is disturbed or removed from a wetland and placed back onto the wetland is a "discharge." *Avoyelles Sportsmen's League*, 715 F.2d at 923; *accord. United States v. Deaton* ("Deaton"), 209 F.3d 331, 335 (4th Cir. 2000).

A "pollutant" includes "dredged spoil, solid waste, [...] biological material, [...] rock, sand, [and] cellar dirt[.]" 33 U.S.C. § 1362(6). For wetlands matters, the pollutant is typically "dredged material" or "fill material." "Dredged material" refers to "material excavated or dredged from waters of the United States." 40 C.F.R. § 232.2. "Fill material" means "material placed in waters of the United States where the material has the effect of [...] [r]eplacing any portion of a water of the United States with dry land" and includes "rock, sand, soil, clay, [...] construction debris, [...] overburden from [...] excavation activities, and material used to create any structure or infrastructure in the waters of the United States." 40 C.F.R. § 232.2. Dirt or soil becomes a "pollutant" when it is "wrenched up, moved around and redeposited somewhere else." *Borden Ranch*, 261 F.3d at 815; *accord. Deaton*, 209 F.3d at 335; *Avoyelles Sportsmen's League*, 715 F.2d at 924.

Respondent filled wetlands and tributaries to construct roads and ready parcels for residential development, engaged in mechanized land clearing and constructed cross channels to drain wetlands. CPE Exs. 3–5, 8–10. Road construction and other filling activities seen in the photographs taken during site investigations involved the deposit of dirt, rock and gravel into jurisdictional wetlands and other waters of the United States that had the effect of replacing the wetland or tributary with dry land. CPE Exs. 9–10. Construction of the cross channels required the soil and rock in place to be disturbed and redeposited in a different location within the jurisdictional wetlands, and sidestepping of dredged material is clearly seen in the photos. *Id.* Mechanized land clearing activities also causes the redeposition of dredged material, and

Respondent deposited the cleared vegetation (a solid waste) into jurisdictional wetlands. *Id.*

Each of these activities is a "discharge of a pollutant" within the meaning of the Act.

D. Respondent did not have a permit.

Section 404 of the Act authorizes the Corps to issue permits for the discharge of dredged or fill material into waters of the United States. Respondent admits it did not possess a permit for any of the discharges alleged in this action. CPE Ex. 2.

II. THE WETLANDS AND TRIBUTARIES TO WHICH RESPONDENT DISCHARGED POLLUTANTS ARE WATERS OF THE UNITED STATES.

A. The waters of the United States on the subject property are subject to the significant nexus standard.

The subject property contains (1) tributaries that are classified as non-relatively permanent waters ("non-RPWs") that flow directly or indirectly into traditionally navigable waters ("TNW") and (2) wetlands adjacent to these non-RPWs. CPE Exs. 11, 22¹. Therefore, the Corps' jurisdiction over these waters is dependent upon the existence of a "significant nexus" between the wetlands and non-RPWs and the TNW. *Rapanos v. United States Army Corps of Eng'rs* ("*Rapanos*"), 547 U.S. 715, 779 (2006). A "significant nexus" is present "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other [TNWs]." *Id.* at 780.

B. Wetlands and tributaries on the subject property that were impacted by Respondent's activities have a significant nexus to navigable waters.

To determine whether a significant nexus exists, the Corps developed an analytical process reflected in the Approved Jurisdictional Determination Form. CPE Exs. 11, 22. After a careful analysis of the property using appropriate guidance, data and onsite observations, the

¹ On September 4, 2013, EPA filed a Motion to Supplement Complainant's Prehearing Exchange (Attachment B) including a corrected Approved Jurisdictional Determination Form.

Corps determined that the significant nexus standard was met for non-RPWs and adjacent wetlands affected by Respondent's activities. *Id.* Specifically, the Corps noted that:

Wetland on the property is adjacent to a non-RPW onsite; the non-RPW is an RPW in its lower reaches. Floodwater storage and sediment and pollution retention functions accrue in wetlands here; remaining pollutants enter the non-RPW and the RPW downstream. Carbon and organisms are also carried to the RPW from the wetland. [...] Physical characteristics on the site, including sediment deposits, rack lines (including organic material and organisms), scoured areas, water marks, etc. are evidence of both retention in the wetland and suspension of pollutants in the water column at the point where the water exists the wetland. Given the number and intensity of rain and flow events in this region (greater than 60 days annually, with more than 0.1 inches rainfall), sediments, pollutants, carbon, and organisms in excess of the assimilative capacity of the RPWs will remain suspended in the water column long enough to reach the TNW. Thus the tributary, in combination with adjacent wetlands and other similarly situated wetlands, provide a direct and acute contribution to the chemical, physical, and biological makeup of the TNW.

Id. After determining the significant nexus standard was met, the Corps prepared a map indicating which wetlands and non-RPWs on the subject property are waters of the United States. CPE Ex. 6. The map indicates several areas where unauthorized activities impacted jurisdictional wetlands and non-RPWs in violation of the Act. *Id.*

C. The wetland delineation submitted by Respondent is insufficient and grossly inaccurate, and Respondent's "good faith" reliance on the delineation is unconvincing.

In its Prehearing Exchange, Respondent submitted a wetland delineation dated October 2007 ("2007 Delineation") performed by Gulf South Research Corporation ("GRSC"). Respondent's Prehearing Exchange ("RPE") Ex. 1. The 2007 Delineation collected data from three points within the property, only one of which was located in a wetland, and determined that 0.54 acres of wetlands and 856 linear feet of tributaries were potential waters of the United States. *Id.* The 2007 Delineation noted, however, that

"GSRC's opinion may not necessarily reflect that of the [Corps], nor does it relieve the client of any legal obligations to verify the wetland findings, consult

with the [Corps], and possibly obtain a Department of the Army permit prior to performing any dredging, filling, and/or construction operations in Waters of the U.S., including wetlands. GSRC's findings should be verified by the [Corps]."

Id. Despite this admonishment, Respondent proceeded with disregard, destroying wetlands and tributaries throughout the subject property, including areas of the property not investigated in the 2007 Delineation.

In February of 2009, Respondent (through its prior attorney Andrew Harrison) provided the Corps with certain requested information, including a map prepared in February of 2009 by GRSC. CPE Ex. 15. GRSC's map included a several new data points and, most significantly, notes **6,199 feet** of potential waters of the United States and **15.0 acres** of wetlands, many of which are adjacent to potential waters of the United States. *Id.* After making an adequate examination of the property, GRSC's estimate for potential waters of the United States increased exponentially, lending credence to the statement "GRSC's findings should be verified[.]"

In its Prehearing Exchange, Respondent asserts that it "acted in good faith" and presumed to destroy only non-jurisdictional wetlands, and its "alteration of wetlands was minimal and resulted in no net loss of wetlands on the property." RPE at 3. This argument is unconvincing, and the "no net loss statement" is clearly false. CPE Ex. 6. Respondent cannot commission a wetland delineation that is insufficient in scope (and potentially underfunded) and strongly recommends consultation with the Corps, then cite that study as sufficient justification to proceed with large scale destruction of wetlands and tributaries.

III. RESPONDENT VIOLATED SECTION 301(A) OF THE CLEAN WATER ACT AND SHOULD BE ASSESSED AN ADMINISTRATIVE PENALTY.

Under Section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA has the authority to assess administrative penalties to any person who, without authorization, discharges a pollutant to a

water of the United States in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). The Act enumerates the factors that must be considered in the assessment of any civil penalty. 33 U.S.C. § 1319(g)(3). The Act itself does not provide a methodology for calculating a penalty. *In re Britton Construction Co.*, 8 E.A.D. 261, 278 (EAB 1999). Therefore, "highly discretionary calculations that take into account multiple factors are necessary" to assess penalties under the Act. *Tull v. United States*, 481 U.S. 412, 426-27 (1987).

The "appropriateness" of a penalty for purposes of 40 C.F.R. § 22.24 is measured in accordance with the penalty factors in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). When determining an appropriate penalty, each of the statutory penalty factors must be considered, and the recommended penalty must be supported by analyses of those factors. *In re Donald Cutler*, 11 E.A.D. 622, 631 (EAB 2004). Therefore, for purposes of making a record of the agency action for judicial review, EPA must establish that, in assessing a civil penalty for Respondent, EPA used the statutory factors and applied these factors to the facts of the case. These statutory penalty factors include the following: "the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3).

In making her decision on the appropriateness of a penalty, the Presiding Officer must also use the statutory factors and apply them to the case. The Presiding Officer may accept either EPA's or Respondent's interpretation of the statutory factors or she may develop her own interpretation of the statutory factors. Nevertheless, the Part 22 Rules require that "the Presiding Officer shall set forth the specific reasons for the increase or decrease" from the penalty

proposed in the Complaint. 40 C.F.R. § 22.27(b). The Presiding Officer must also consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). It is a well-established principle that, although the Presiding Officer must consider EPA penalty policies issued under the Act, she has the discretion to not apply or even follow the policies. *In re Cutler*, 11 E.A.D. at 645; *In re Robert Wallin*, 10 E.A.D. 18, 25 n.9 (EAB 2001); *In re Britton*, 8 E.A.D. at 282 n.9.

Some Presiding Officers have calculated penalties following the framework of EPA's general civil penalty policies, known as *Policy on Civil Penalties* (#GM-21) and *A Framework for Statute-Specific Approaches to Penalty Assessments* (#GM-22), both issued on February 16, 1984. *In re Wallin*, 10 E.A.D. at 25 n.9. A more statute-specific policy that implements those general policies is the revised *Clean Water Act Section 404 Settlement Penalty Policy* issued December 21, 2001, which guides EPA when establishing appropriate penalties in the settlement of civil judicial and administrative actions. "Although settlement policies as a general rule should not be used outside the settlement context, [...] there is nothing to prevent our looking to relevant portions thereof when logic and common sense so indicate." *In re Britton*, 8 E.A.D. at 287 n.16. Although the Presiding Officer may find the Settlement Policy helpful, the primary focus must be on the statutory factors and she must make a "good faith effort to evaluate" these factors when assessing the penalty. *Id.*; *Atlantic States Legal Found. v. Tyson Food Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990).

A. Complainant seeks a penalty of \$153,750.00 for violations of the Act.

Complainant hereby incorporates by reference the declaration of Donna Mullins (Attachment A). This declaration sets for the rationale for EPA's determination of the proposed penalty amount of one hundred fifty three thousand seven hundred and fifty dollars (\$153,750.00) for the violations, based upon EPA's analysis of the evidentiary facts of the case

in consideration with the statutory factors. The factors EPA primarily considered were the nature, circumstances, extent and gravity of the violations, prior history, the degree of culpability and other matters as justice may require.

EPA reasonably evaluated Respondent's actions in light of the requisite statutory factors and assessed a penalty against Respondent that is justified in light of Respondent's harm to the environment and Respondent's disregard for the authority of the Corps and the rules and regulations of the United States. EPA respectfully requests that the Presiding Officer assess a penalty of one hundred fifty three thousand, seven hundred and fifty dollars (\$153,750.00) against Respondent for the violations outlined in the Complaint and herein.

B. The proposed penalty is within the confines of the maximum penalty provisions of the Act.

For violations occurring between March 15, 2004 and January 12, 2009, a Class II civil penalty may not exceed \$11,000.00 for "each day during which the violation continues" up to a maximum of \$157,500.00. 33 U.S.C. § 1319(g)(2)(B); 40 C.F.R. § 19.4. Courts have determined that similar language does not impose a maximum for each day of activity at the site, but rather, a per day maximum for each violation at the site. *Borden*, 261 F.3d at 817-818; *See also Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1138 (11th Cir. 1990); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528 (4th Cir. 1999). In *Borden*, the Ninth Circuit directly addressed similar activity when a landowner drained wetlands through "deep ripping," a process whereby an implement is pulled behind a tractor or bulldozer to gouge through a subsurface layer that restricts drainage from a wetland. *Borden*, 261 F.3d at 812. The Court rejected the landowner's argument that the maximum daily penalty under Section 309(d) of the Act applies site-wide and found that "each pass of the ripper [is] a separate violation." *Id.*

at 818. In other words, each discrete action constitutes a separate violation with a separate maximum daily penalty even where the actions occurred in the same wetland on the same day.

Respondent discharged dredged or fill material to approximately eight acres of jurisdictional wetland and 5000 linear feet of waters of the United States. CPE Ex. 11, 22. Inspections of the site revealed discharges to at least four separate jurisdictional wetlands (including one wetland greater than six acres in size) and three separate segments of waters of the United States on multiple days. CPE Exs. 5, 6, 9–11. Photographs taken during inspections demonstrate extensive construction activities utilizing heavy equipment occurring in jurisdictional wetlands and other waters of the United States. CPE Exs. 9–10. Under the *Borden* standard stating “each pass” is a separate violation, there is ample evidence for to infer that a sufficient number of separate violations occurred to support the proposed penalty under the limitations imposed by the Act.²

VII. CONCLUSION

For the reasons set forth, EPA requests that an initial decision be issued in this matter on an accelerated basis, as provided for in 40 C.F.R. § 22.20, finding that there are no genuine issues of fact material to Respondent's liability for each of the violations alleged in the Complaint, specifically discharges of pollutants into waters of the United States from April 2007 through May 2008, and that there are no genuine issues of fact material to a determination of an appropriate penalty for the violations perpetrated by Respondent. EPA further requests that a finding be made in the initial decision that Respondent is liable for the violations alleged, and that based on an analysis of the evidence in this case and in consideration of the statutory factors,

² Further, some Courts have determined that “[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.” *Sasser v. The Adm'r, United States Env'tl. Prot. Agency*, 990 F.2d 127, 129 (4th Cir. 1993). Respondent has never attempted to remove any fill from the subject property.

the appropriate civil penalty to be assessed is one hundred fifty three thousand, seven hundred and fifty dollars (\$153,750.00). 40 C.F.R. § 22.27(b).

ATTACHMENT A
Declaration of Donna Mullins

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Declaration of
Respondent	§	Donna Mullins

DECLARATION OF DONNA MULLINS

In support of its Motion for Accelerated Decision, the Complainant, the United States Environmental Protection Agency, Region 6 ("EPA"), hereby submits the following declaration of Donna Mullins, EPA Wetland Enforcement Team Member.

I, Donna Mullins, made the following statement truthfully from personal knowledge and review of EPA documents in accordance with 28 U.S.C. § 1746:

1. I make this statement in my capacity as a Wetlands Enforcement Team Member employed in the Wetlands Section of the Water Quality Protection Division of EPA, Region 6 in Dallas, Texas.

2. I have been employed with EPA since 1985 as a Wetland Enforcement Team Member (1997-present), PCB Coordinator (1988-1993), PCB Program Staff (1993-1997) and Federal On-Scene Coordinator (1985-1988). As a member of the Wetland Enforcement Team, my duties include determining biological and ecological impacts to wetlands, delineating wetlands, developing enforcement cases (including penalty calculation) and developing and monitoring mitigation and restoration plans.

3. I am the EPA representative assigned to the current enforcement action against Paco Swain Realty, L.L.C. ("Respondent"). In my capacity as an member of the Wetland

Enforcement Team, I am familiar with the Clean Water Act (the "Act") and its implementing regulations.

4. Section 301 of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into any water of the United States without a permit issued under Section 404 ("404 permit") of the Act, 33 U.S.C. § 1344.

5. At the times relevant to the violations alleged in the Complaint, Respondent owned real property in Walker, Louisiana known as the proposed Megan's Way subdivision ("subject property"). Respondent's activities on the subject property form the basis for this action.

6. Based upon my personal observations and review of information collected and produced by EPA and the United States Army Corps of Engineers ("Corps"), I concluded that Respondent discharged dredged material and fill material to waters of the United States on several occasions from April 2007 to May 2008. Respondent did not have a 404 permit for these discharges.

7. Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), provides the factors that EPA must consider in the assessment of an administrative penalty. The first group of factors speaks to the violation and considers the "nature, circumstances, extent and gravity" of the violation. The next group includes "ability to pay, any prior history of [Clean Water Act] violations, [and] the degree of culpability," and, depending on the circumstances surrounding the violator's actions, the penalty may increase or decrease when considering these factors. "Economic benefit" is an additional factor that seeks to capture any economic advantage the violator gains through noncompliance. The final factor is "such other matters as justice may

require.” Deterrence is a goal of penalty assessment. Penalties deter noncompliance and help protect the environment and public health by deterring future violations.

8. As the EPA representative assigned to this enforcement matter, I calculated the penalty based on consideration of the required statutory factors set forth in Section 309(g) of the Act, 33 U.S.C. § 1319(g)(3), and considered the revised *Clean Water Act Section 404 Settlement Penalty Policy* (“Penalty Policy”) (December 21, 2001). For this matter, the statutory maximum penalty is \$11,000 per day per violation up to a maximum of \$157,500. 33 U.S.C. § 1319(g)(2)(B), 40 C.F.R. § 19.4. The proposed Class II penalty in this matter is \$153,750.00.

9. The gravity component accounts for nature, circumstances, extent and gravity of the violation, economic impact, good-faith efforts to comply and such other matters as justice may require. It is the punitive component of the penalty. When determining the gravity of the violation, it is proper to examine the severity of the violation. This includes considering the presence or absence of actual or possible environmental harm associated with the violation and the importance of the violation to the regulatory scheme.

10. I considered the circumstances surrounding the violation. 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, I, in conjunction with 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, EPA 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.

11. I looked to the seriousness of the violations and the actual or potential harm resulting from the violations, including environmental harm. As a threshold matter, for the reasons discussed herein including, but not limited to, Respondent's persistent disregard for C&D Orders, I 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.

12. I 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. I assigned a low-to-moderate value (5 of 20) for the uniqueness factor due to the high quality wetlands impacted by Respondent's activities. I assigned a low value (2 of 20) for secondary or off-site impacts due to downstream sedimentation caused by Respondent's activities. I assigned a slightly higher value (5 of 20) to the duration of violation factor because Respondent continued to discharge in violation of the Act 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 cross channels to drain wetlands on the subject property.

13. I looked in to Respondent's degree of culpability and compliance history of the violator and considered Respondent's prior experience or knowledge of the requirements of the Act, degree of control over the actions causing the violation, and motivation.

14. 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. I considered these factors in light of the Penalty Policy and assigned a high value (15 of 20) to Respondent's degree of culpability.

15. Compliance history of the violator is largely based on the number of past violations. I considered Respondent's compliance history and assigned a low value (2 of 20) for Respondent's receipt of C&D Orders on the subject property and receipt of a C&D Order at another nearby property prior to cessation of violations at the subject property.

16. I 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.


17. Under Section 309(g)(3) of the Act, 33 U.S.C. 1319(g)(3), a violator's ability to pay should be considered in calculating the penalty. Despite requests to provide such information, including an Order from the Presiding Officer to include such information in its Prehearing Exchange, Respondent has not provided any evidence to substantiate an assertion of inability to pay.

18. Finally, under Section 309(g)(3) of the Act, 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 Act 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.

19. By applying the Penalty Policy in the manner discussed above, I 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). I

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).

Dated: 9/15/2013



Donna Mullins
U.S. EPA, Region 6

ATTACHMENT B

Motion to Supplement Complainant's Prehearing Exchange

Filed September 4, 2013



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

September 4, 2013

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900R
Washington, DC 20460

Re: Motion to Supplement Complainant's Prehearing Exchange
In the matter of Paco Swain Realty, L.L.C.
Docket No. CWA-06-2012-2710

Dear Ms. Anderson,

Please find enclosed the original and one copy of a Motion to Supplement Complainant's Prehearing Exchange in the above referenced matter. A courtesy copy was sent via email to oaljifiling@epa.gov on September 4, 2013.

Regards,

A handwritten signature in black ink, appearing to be "Tucker Henson", written over a circular stamp or mark.

Tucker Henson
Assistant Regional Counsel

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Motion to Supplement
Respondent	§	Complainant's Prehearing Exchange

MOTION TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE

COMES NOW COMPLAINANT, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6, by and through its attorney, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1–22.52, hereby moves the Administrative Law Judge to supplement Complainant's Prehearing Exchange filed on June 28, 2013. In support thereof, Complainant states the following:

A. Jurisdiction and Legal Authority

1. This is a proceeding to assess a Class II Civil Penalty under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). In accordance with 40 C.F.R. § 22.16, any party may seek relief from the Administrative Law Judge by motion.

2. By Prehearing Order dated April 19, 2013, the Administrative Law Judge ordered submission of Complainant's Prehearing Exchange. The Prehearing Order provided that any supplement to the Prehearing Exchange shall be accompanied by a motion to supplement the Prehearing Exchange explaining why the exhibit was not provided in the Prehearing Exchange.

B. Factual Background

3. On October 19, 2009, William Nethery, as part of his duties as a Senior Botanist with the United States Army Corps of Engineers ("Corps"), completed an "Approved Jurisdictional Determination Form" ("JD Form") for the property owned by Paco Swain Realty, L.L.C. ("Respondent") known as the Megan's Way subdivision ("subject property"). The JD Form was submitted as part of Complainant's Prehearing Exchange as Exhibit 11.

4. On September 3, 2013, Mr. Nethery discovered a clerical error on the JD Form regarding the acreage of the jurisdictional wetlands on the subject property. Specifically, Sections II.B.1.b. and III.D.6 provide an incorrect estimate of two acres of jurisdictional wetlands on the subject property. Both sections should include an estimate of eight acres of jurisdictional wetlands on the subject property. Additionally, Section III.B.3 incorrectly states that three wetlands are considered in the cumulative analysis and provides a chart listing the acreage of each wetland. Section III.B.3 should state that four wetlands were considered in the cumulative analysis and an additional wetland greater than six acres in size should be included on the chart.

5. As stated in the declaration of William Nethery (Attachment A), which is incorporated herein by reference, the incorrect acreage was the result of a clerical error. Initially, Mr. Nethery prepared two JD Forms, the second of which considered only the additional six acres of wetlands. Mr. Nethery later decided to combine the all wetlands on the subject property onto one JD Form. The data and analysis contained in Exhibit 11 is correct and accounts for all of the wetlands on the subject property; however, Mr. Nethery failed to add the additional acreage onto the three sections listed in Paragraph 4. This error does not affect the conclusions

of the JD Form, the Jurisdictional Determination (Exhibit 6 to Complainant's Prehearing Exchange) or the penalty calculation.

6. On September 3, 2013, Mr. Nethery prepared a corrected JD Form (Attachment B) addressing the errors in the three sections noted in Paragraph 4. The corrected JD Form is marked as "Complainant's Ex. 22, CWA-06-2012-2710" for inclusion into the record.

7. As the clerical error was not discovered and the revised JD Form was not prepared until September 3, 2013, Complainant could not provide the document in its original Prehearing Exchange.

8. Complainant contacted Respondent's counsel prior to filing this motion; however, as of the time of filing, Respondent's counsel had not responded to indicate whether Respondent objects to the relief requested in this motion.

C. Request for Relief

Pursuant to 40 C.F.R. § 22.16, Complainant hereby moves the Administrative Law Judge to enter an Order allowing Complainant to supplement its Prehearing Exchange with the revised JD Form referenced in Paragraph 6.

DATED this 4th day of September, 2013.

RESPECTFULLY SUBMITTED,



Tucker Henson
Assistant Regional Counsel (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Tel.: (214) 665-8148
Fax: (214) 665-3177

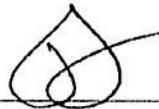
CERTIFICATE OF SERVICE

I certify that on the 4th day of September, 2013, the original of the foregoing MOTION TO SUPPLEMENT 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, Mail Code 1900R, Washington, DC 20460, and a true and correct copy was sent to the following on this 4th day of September, 2013, in the following manner:

VIA FIRST CLASS U.S. MAIL:

M. Lisa Buschmann, Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
1300 Pennsylvania Avenue, NW
Mail Code 1900R
Washington, DC 20460

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



Tucker Henson

ATTACHMENT A
Declaration of William Nethery

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	
Respondent	§	Declaration of
	§	William Nethery

DECLARATION OF WILLIAM NETHERY

In support of its Motion to Supplement Complainant's Prehearing Exchange, the Complainant, the United States Environmental Protection Agency, Region 6 ("EPA"), hereby submits the following declaration of William Nethery, Senior Botanist, United States Army Corps of Engineers ("Corps").

I, William Nethery, make the following statement truthfully from personal knowledge and review of Corps documents in accordance with 28 U.S.C. § 1746:

1. I make this statement in my capacity as Senior Botanist employed in the Regulatory Branch, Surveillance and Enforcement Section of the Corps, New Orleans District.
2. I have been employed with the Corps from 2001 to the present. In my capacity as Senior Botanist, I regularly conduct jurisdictional determinations, which includes preparing Approved Jurisdictional Determination Forms ("JD Forms"). I prepared the JD Form included as Exhibit 11 in Complainant's Prehearing Exchange ("Exhibit 11") filed in the current enforcement action against Paco Swain Realty, L.L.C. ("Respondent").
3. The statements included herein are based upon a review of my notes, Corps' files and my recollection from inspections of the property owned by Respondent known as the

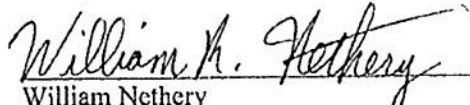
Megan's Way Subdivision in Walker, Louisiana, the activities upon which form the basis for this action

4. On September 3, 2013, I discovered a clerical error on Exhibit 11 regarding the acreage of the jurisdictional wetlands on the subject property. Specifically, Sections II.B.1.b. and III.D.6 provide an incorrect estimate of two acres of jurisdictional wetlands on the subject property. Both sections should include an estimate of eight acres of jurisdictional wetlands on the subject property. Additionally, Section III.B.3 incorrectly states that three wetlands are considered in the cumulative analysis and provides a chart listing the acreage of each wetland. Section III.B.3 should state that four wetlands were considered in the cumulative analysis and an additional wetland greater than six acres in size should be included on the chart.

5. The incorrect acreage was the result of a clerical error. Initially, I prepared two JD Forms, the second of which considered only the additional wetland greater approximately six acres in size. I later decided to combine the all wetlands on the subject property onto one JD Form. The data and analysis contained in Exhibit 11 is correct and accounts for the eight acres of wetlands on the subject property; however, I did not add the additional acreage onto the three sections listed in Paragraph 4. This error does not affect the conclusions of Exhibit 11 or the Jurisdictional Determination (Exhibit 6 to Complainant's Prehearing Exchange).

6. On September 3, 2013, I prepared a revised JD Form correcting the three sections noted in Paragraph 4. The revised JD form is included with this declaration and marked as "Complainant's Ex. 22, CWA-06-2012-2710."

Dated: 9-3-2013


William Nethery
U.S. Army Corps of Engineers

ATTACHMENT B

Complainant's Exhibit No. 22, CWA-06-2012-2710

Approved Jurisdictional Determination Form (corrected)

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): October 19, 2009

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: MVN 2007-04022-SQ Harrison-Swain

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: LA County/parish/borough: Livingston City:
Center coordinates of site (lat/long in degree decimal format): Lat. 30.54423° N, Long. 90.84398° W.
Universal Transverse Mercator:

Name of nearest waterbody: tributary of Dick Hill Branch/Middle Colyell Creek

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Colyell Bay/Amite River

Name of watershed or Hydrologic Unit Code (HUC): 8070202

Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date:

Field Determination. Date(s): 01/29/2009

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There ~~are~~ no "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There ~~are~~ "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

TNWs, including territorial seas

Wetlands adjacent to TNWs

Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs

Non-RPWs that flow directly or indirectly into TNWs

Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Impoundments of jurisdictional waters

Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: 5000 linear feet: 5-8 width (ft) and/or acres.

Wetlands: 8 acres.

c. Limits (boundaries) of jurisdiction based on: 1987 Delineation Manual

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.

Explain:

Complainant's Ex. 22
CWA-06-2012-2710

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW:

Summarize rationale supporting determination:

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size: 1890 square miles

Drainage area: 77 acres

Average annual rainfall: 65+ inches

Average annual snowfall: inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

Tributary flows directly into TNW.

Tributary flows through 3 tributaries before entering TNW.

Project waters are 10-15 river miles from TNW.

Project waters are 1-2 river miles from RPW.

Project waters are 10-15 aerial (straight) miles from TNW.

Project waters are 1 (or less) aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain: no.

Identify flow route to TNW⁵: Wetland to unnamed tributary (non-RPW) to Dick Hill Branch (seasonal RPW) to Middle Colyell Creek to Colyell Creek to Colyell Bay/Amite River.

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

Tributary stream order, if known:

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain: partly channelized during silviculture activities.

Tributary properties with respect to top of bank (estimate):

Average width: 5-8 feet
Average depth: 2-3 feet
Average side slopes: 2:1

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover:
 Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: relatively stable.

Presence of run/riffle/pool complexes. Explain: no.

Tributary geometry: Meandering

Tributary gradient (approximate average slope): 1-2 %

(c) Flow:

Tributary provides for: Intermittent but not seasonal flow

Estimate average number of flow events in review area/year: 20 (or greater)

Describe flow regime: flow during and after rain events after soil saturation, trickling between rain events, overbank flooding and inundation during high water periods in Middle Colyell Creek.

Other information on duration and volume: development in area increased volume and decreased duration, channelized areas have increased volume downstream.

Surface flow is: Discrete. Characteristics: overbank flooding during high water.

Subsurface flow: Unknown. Explain findings: not determined at this time.

Dye (or other) test performed:

Tributary has (check all that apply):

Bed and banks
 OHWM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community
 other (list):
 Discontinuous OHWM.⁷ Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

High Tide Line indicated by: Mean High Water Mark indicated by:
 oil or seum line along shore objects survey to available datum;
 fine shell or debris deposits (foreshore) physical markings;
 physical markings/characteristics vegetation lines/changes in vegetation types.
 tidal gauges
 other (list):

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: slightly cloudy.

Identify specific pollutants, if known: silt and clay sediments, oil & grease from roads, fertilizer and pesticides, organics.

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷Ibid.

(iv) **Biological Characteristics. Channel supports (check all that apply):**

- Riparian corridor. Characteristics (type, average width): Forested 50 ft wide.
- Wetland fringe. Characteristics:
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings: observed by neighbors- mosquitofish, amphibians, reptiles, birds,

mammals.

2. **Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW**

(i) **Physical Characteristics:**

(a) **General Wetland Characteristics:**

Properties:

Wetland size: 8 acres

Wetland type. Explain: Forested.

Wetland quality. Explain: disturbed by historical silviculture.

Project wetlands cross or serve as state boundaries. Explain: no.

(b) **General Flow Relationship with Non-TNW:**

Flow is: Intermittent flow. Explain: Flow in both directions between wetlands and non-RPW during saturated periods and high water table. Otherwise, flow during and after rain events, trickling to no flow between events.

Surface flow is: Overland sheetflow

Characteristics:

Subsurface flow: Unknown. Explain findings: not determined at this time.

Dye (or other) test performed:

(c) **Wetland Adjacency Determination with Non-TNW:**

Directly abutting

Not directly abutting

Discrete wetland hydrologic connection. Explain:

Ecological connection. Explain:

Separated by berm/barrier. Explain:

(d) **Proximity (Relationship) to TNW**

Project wetlands are 10-15 river miles from TNW.

Project waters are 10-15 aerial (straight) miles from TNW.

Flow is from: Wetland to navigable waters.

Estimate approximate location of wetland as within the 50-100 year floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: slightly cloudy, Watershed moderately developed, still partly forested. Identify specific pollutants, if known: silt and clay sediments, organic matter.

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

Riparian buffer. Characteristics (type, average width):

Vegetation type/percent cover. Explain: Hardwood flat 100% cover.

Habitat for:

Federally Listed species. Explain findings:

Fish/spawn areas. Explain findings:

Other environmentally-sensitive species. Explain findings:

Aquatic/wildlife diversity. Explain findings: amphibians, crustaceans, birds, reptiles, mammals-sign or observed.

3. **Characteristics of all wetlands adjacent to the tributary (if any)**

All wetland(s) being considered in the cumulative analysis: 4

Approximately (8+) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
y	0.7	y	1.0
y	0.3	y	6+

Summarize overall biological, chemical and physical functions being performed: Functions include flood storage, sediment retention, pollutant retention, carbon retention and contribution, nutrient recycling, wildlife habitat.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: Wetland on property is adjacent to a non-RPW onsite; the non-RPW is an RPW in its lower reaches. Floodwater storage and sediment and pollution retention functions accrue in wetlands here; remaining pollutants enter the non-RPW and the RPW downstream. Carbon and organisms are also carried to the RPW from the wetland. Contributions of wetlands to the biological, chemical, and physical makeup of TNWs is well-documented in the literature (see references below). Physical characteristics on the site, including sediment deposits, rack lines (including organic material and organisms), scoured areas, water marks, etc., are evidence of both retention in the wetland and suspension of pollutants in the water column at the point where water exits the wetland. Given the number and intensity of rain and flow events in this region (greater than 60 days annually, with more than 0.1 inch rainfall), sediments, pollutants, carbon, and organisms in excess of the assimilative capacity of the RPWs will remain suspended in the water column long enough to reach the TNW. Thus the tributary, in combination with adjacent wetlands and other similarly situated wetlands, provide a direct and acute contribution to the chemical, physical, and biological makeup of the TNW.
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 TNWs: linear feet width (ft), Or, acres.

Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**

- Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:
- Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: Offsite tributary is backed up and floods forested wetlands every few years, repeated observations of flow by residents.

Provide estimates for jurisdictional waters in the review area (check all that apply):

Tributary waters: linear feet width (ft).

Other non-wetland waters: acres.

Identify type(s) of waters: .

3. **Non-RPWs⁸ that flow directly or indirectly into TNWs.**

- Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

Tributary waters: 5000 linear feet 5-8 width (ft).

Other non-wetland waters: acres.

Identify type(s) of waters: .

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

- Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
 - Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .
 - Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

- Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

- Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: 8 acres.

7. **Impoundments of jurisdictional waters.⁹**

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- Demonstrate that impoundment was created from "waters of the U.S.," or
- Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
- Demonstrate that water is isolated with a nexus to commerce (see E below).

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
- from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- which are or could be used for industrial purposes by industries in interstate commerce.
- Interstate isolated waters. Explain:
- Other factors. Explain:

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: linear feet width (ft).
- Other non-wetland waters: acres.
Identify type(s) of waters:
- Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:
- Other: (explain, if not covered above):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource:
- Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource:
- Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps:
- Corps navigable waters' study:
- U.S. Geological Survey Hydrologic Atlas:
 - USGS NHD data.
 - USGS 8 and 12 digit 11UC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: Satsuma, LA.
- USDA Natural Resources Conservation Service Soil Survey. Citation: Soil Survey of Livingston Parish.
- National wetlands inventory map(s). Cite name:
- State/Local wetland inventory map(s):

¹⁰ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

- FEMA/FIRM maps:
- 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): 1998 IR, 2004 IR.
or Other (Name & Date):
- Previous determination(s). File no. and date of response letter:
- Applicable/supporting case law:
- Applicable/supporting scientific literature:
- Other information (please specify): USDA NRCS National Water and Climate Center Web Page.

Zimmerman, R.J. and J.M. Nance, 2001. Effects of Hypoxia on the Shrimp Fishery of Louisiana and Texas. *Coastal and Estuarine Sciences* 58:293-310

Wipfli, M.S., J.S. Richardson, and R.J. Naiman, 2007. Ecological Linkages Between Headwaters and Downstream Ecosystems: Transport of Organic Matter, Invertebrates, and Wood Down Headwater Channels. *Journal of the American Water Resources Association* 43, DOI: 10.1111/j.1752-1688.2007.00007.x.

Alexander, R.B., E.W. Boyer, R.A. Smith, G.E. Schwartz, and R.B. Moore, 2007. The Role of Headwater Streams in Downstream Water Quality. *Journal of the American Water Resources Association* 43. DOI: 10.1111/j.1752-1688.2007.00005.x.

Mitsch, W.J., J.W. Day Jr, J.W. Gilliam, P.M. Groffman, D.L. Hey, G.W. Randall, and N. Wang, 2001. Reducing Nitrogen Loading to the Gulf of Mexico From the Mississippi River Basin: Strategies to Counter a Persistent Ecological Problem. *Bioscience* 51:373-388.

Tracie-Lynn Nadreau & Mark Cable Rains, Hydrological Connectivity Between Headwater Streams and Downstream Waters: How Science Can Inform Policy, 43(1) *J. AM. WATER RESOURCES ASS'N* 118-133 (2007)

B. ADDITIONAL COMMENTS TO SUPPORT JD: Wetlands on property are part of a system of wetlands on non-RPW tributaries that have been altered by silviculture activities. These wetlands were likely more extensive on the property at one time.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2733

September 4, 2013

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900R
Washington, DC 20460

Re: Motion to Supplement Complainant's Prehearing Exchange
In the matter of Paco Swain Realty, L.L.C.
Docket No. CWA-06-2012-2710

Dear Ms. Anderson,

Please find enclosed the original and one copy of a Motion to Supplement Complainant's Prehearing Exchange in the above referenced matter. A courtesy copy was sent via email to oaljfilng@epa.gov on September 4, 2013.

Regards,

A handwritten signature in blue ink, appearing to be "Tucker Henson".

Tucker Henson
Assistant Regional Counsel

RECEIVED BY OALJ
2013 SEP -5 PM 1:32

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

RECEIVED BY DALJ
2013 SEP -5 PM 1:32

In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Motion to Supplement
Respondent	§	Complainant's Prehearing Exchange

MOTION TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE

COMES NOW COMPLAINANT, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6, by and through its attorney, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1–22.52, hereby moves the Administrative Law Judge to supplement Complainant's Prehearing Exchange filed on June 28, 2013. In support thereof, Complainant states the following:

A. Jurisdiction and Legal Authority

1. This is a proceeding to assess a Class II Civil Penalty under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). In accordance with 40 C.F.R. § 22.16, any party may seek relief from the Administrative Law Judge by motion.

2. By Prehearing Order dated April 19, 2013, the Administrative Law Judge ordered submission of Complainant's Prehearing Exchange. The Prehearing Order provided that any supplement to the Prehearing Exchange shall be accompanied by a motion to supplement the Prehearing Exchange explaining why the exhibit was not provided in the Prehearing Exchange.

of the JD Form, the Jurisdictional Determination (Exhibit 6 to Complainant's Prehearing Exchange) or the penalty calculation.

6. On September 3, 2013, Mr. Nethery prepared a corrected JD Form (Attachment B) addressing the errors in the three sections noted in Paragraph 4. The corrected JD Form is marked as "Complainant's Ex. 22, CWA-06-2012-2710" for inclusion into the record.

7. As the clerical error was not discovered and the revised JD Form was not prepared until September 3, 2013, Complainant could not provide the document in its original Prehearing Exchange.

8. Complainant contacted Respondent's counsel prior to filing this motion; however, as of the time of filing, Respondent's counsel had not responded to indicate whether Respondent objects to the relief requested in this motion.

C. Request for Relief

Pursuant to 40 C.F.R. § 22.16, Complainant hereby moves the Administrative Law Judge to enter an Order allowing Complainant to supplement its Prehearing Exchange with the revised JD Form referenced in Paragraph 6.

DATED this 4th day of September, 2013.

RESPECTFULLY SUBMITTED,



Tucker Henson
Assistant Regional Counsel (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Tel.: (214) 665-8148
Fax: (214) 665-3177

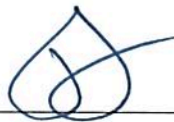
CERTIFICATE OF SERVICE

I certify that on the 4th day of September, 2013, the original of the foregoing MOTION TO SUPPLEMENT 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, Mail Code 1900R, Washington, DC 20460, and a true and correct copy was sent to the following on this 4th day of September, 2013, in the following manner:

VIA FIRST CLASS U.S. MAIL:

M. Lisa Buschmann, Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
1300 Pennsylvania Avenue, NW
Mail Code 1900R
Washington, DC 20460

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



Tucker Henson

ATTACHMENT A
Declaration of William Nethery

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Declaration of
Respondent	§	William Nethery

DECLARATION OF WILLIAM NETHERY

In support of its Motion to Supplement Complainant’s Prehearing Exchange, the Complainant, the United States Environmental Protection Agency, Region 6 (“EPA”), hereby submits the following declaration of William Nethery, Senior Botanist, United States Army Corps of Engineers (“Corps”).

I, William Nethery, make the following statement truthfully from personal knowledge and review of Corps documents in accordance with 28 U.S.C. § 1746:

1. I make this statement in my capacity as Senior Botanist employed in the Regulatory Branch, Surveillance and Enforcement Section of the Corps, New Orleans District.
2. I have been employed with the Corps from 2001 to the present. In my capacity as Senior Botanist, I regularly conduct jurisdictional determinations, which includes preparing Approved Jurisdictional Determination Forms (“JD Forms”). I prepared the JD Form included as Exhibit 11 in Complainant’s Prehearing Exchange (“Exhibit 11”) filed in the current enforcement action against Paco Swain Realty, L.L.C. (“Respondent”).
3. The statements included herein are based upon a review of my notes, Corps’ files and my recollection from inspections of the property owned by Respondent known as the

ATTACHMENT B

Complainant's Exhibit No. 22, CWA-06-2012-2710

Approved Jurisdictional Determination Form (corrected)

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): October 19, 2009

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: MVN 2007-04022-SQ Harrison-Swain

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: LA County/parish/borough: Livingston City:
Center coordinates of site (lat/long in degree decimal format): Lat. 30.54423° N, Long. 90.84398° W.
Universal Transverse Mercator:

Name of nearest waterbody: tributary of Dick Hill Branch/Middle Colyell Creek

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Colyell Bay/Amite River

Name of watershed or Hydrologic Unit Code (HUC): 8070202

Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date:

Field Determination. Date(s): 01/29/2009

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **are no** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **are** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

TNWs, including territorial seas

Wetlands adjacent to TNWs

Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs

Non-RPWs that flow directly or indirectly into TNWs

Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Impoundments of jurisdictional waters

Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: 5000 linear feet: 5-8 width (ft) and/or acres.

Wetlands: 8 acres.

c. Limits (boundaries) of jurisdiction based on: 1987 Delineation Manual

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.

Explain:

Complainant's Ex. 22
CWA-06-2012-2710

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

Tributary stream order, if known:

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain: partly channelized during silviculture activities.

Tributary properties with respect to top of bank (estimate):

Average width: 5-8 feet
Average depth: 2-3 feet
Average side slopes: **2:1**.

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover:
 Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: relatively stable.

Presence of run/riffle/pool complexes. Explain: no.

Tributary geometry: **Meandering**

Tributary gradient (approximate average slope): 1-2 %

(c) Flow:

Tributary provides for: **Intermittent but not seasonal flow**

Estimate average number of flow events in review area/year: **20 (or greater)**

Describe flow regime: flow during and after rain events after soil saturation, trickling between rain events, overbank flooding and inundation during high water periods in Middle Colyell Creek.

Other information on duration and volume: development in area increased volume and decreased duration, channelized areas have increased volume downstream.

Surface flow is: **Discrete**. Characteristics: overbank flooding during high water.

Subsurface flow: **Unknown**. Explain findings: not determined at this time.

Dye (or other) test performed:

Tributary has (check all that apply):

Bed and banks
 OHWM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community
 other (list):
 Discontinuous OHWM.⁷ Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

High Tide Line indicated by: Mean High Water Mark indicated by:
 oil or scum line along shore objects survey to available datum;
 fine shell or debris deposits (foreshore) physical markings;
 physical markings/characteristics vegetation lines/changes in vegetation types.
 tidal gauges
 other (list):

(iii) **Chemical Characteristics:**

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: slightly cloudy.

Identify specific pollutants, if known: silt and clay sediments, oil & grease from roads, fertilizer and pesticides, organics.

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷Ibid.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
y	0.7	y	1.0
y	0.3	y	6+

Summarize overall biological, chemical and physical functions being performed: Functions include flood storage, sediment retention, pollutant retention, carbon retention and contribution, nutrient recycling, wildlife habitat.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: Wetland on property is adjacent to a non-RPW onsite; the non-RPW is an RPW in its lower reaches. Floodwater storage and sediment and pollution retention functions accrue in wetlands here; remaining pollutants enter the non-RPW and the RPW downstream. Carbon and organisms are also carried to the RPW from the wetland. Contributions of wetlands to the biological, chemical, and physical makeup of TNWs is well-documented in the literature (see references below). Physical characteristics on the site, including sediment deposits, rack lines (including organic material and organisms), scoured areas, water marks, etc., are evidence of both retention in the wetland and suspension of pollutants in the water column at the point where water exits the wetland. Given the number and intensity of rain and flow events in this region (greater than 60 days annually, with more than 0.1 inch rainfall), sediments, pollutants, carbon, and organisms in excess of the assimilative capacity of the RPWs will remain suspended in the water column long enough to reach the TNW. Thus the tributary, in combination with adjacent wetlands and other similarly situated wetlands, provide a direct and acute contribution to the chemical, physical, and biological makeup of the TNW.
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 TNWs: linear feet width (ft), Or, acres.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
- from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- which are or could be used for industrial purposes by industries in interstate commerce.
- Interstate isolated waters. Explain: .
- Other factors. Explain: .

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: linear feet width (ft).
- Other non-wetland waters: acres.
Identify type(s) of waters: .
- Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: .
- Other: (explain, if not covered above): .

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource: .
- Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource: .
- Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: .
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps: .
- Corps navigable waters' study: .
- U.S. Geological Survey Hydrologic Atlas: .
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: Satsuma, LA.
- USDA Natural Resources Conservation Service Soil Survey. Citation: Soil Survey of Livingston Parish.
- National wetlands inventory map(s). Cite name: .
- State/Local wetland inventory map(s): .

¹⁰ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Motion to Supplement
Respondent	§	Complainant's Prehearing Exchange

MOTION TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE

COMES NOW COMPLAINANT, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6, by and through its attorney, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1–22.52, hereby moves the Administrative Law Judge to supplement Complainant's Prehearing Exchange filed on June 28, 2013. In support thereof, Complainant states the following:

A. Jurisdiction and Legal Authority

1. This is a proceeding to assess a Class II Civil Penalty under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). In accordance with 40 C.F.R. § 22.16, any party may seek relief from the Administrative Law Judge by motion.

2. By Prehearing Order dated April 19, 2013, the Administrative Law Judge ordered submission of Complainant's Prehearing Exchange. The Prehearing Order provided that any supplement to the Prehearing Exchange shall be accompanied by a motion to supplement the Prehearing Exchange explaining why the exhibit was not provided in the Prehearing Exchange.

of the JD Form, the Jurisdictional Determination (Exhibit 6 to Complainant's Prehearing Exchange) or the penalty calculation.

6. On September 3, 2013, Mr. Nethery prepared a corrected JD Form (Attachment B) addressing the errors in the three sections noted in Paragraph 4. The corrected JD Form is marked as "Complainant's Ex. 22, CWA-06-2012-2710" for inclusion into the record.

7. As the clerical error was not discovered and the revised JD Form was not prepared until September 3, 2013, Complainant could not provide the document in its original Prehearing Exchange.

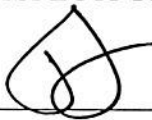
8. Complainant contacted Respondent's counsel prior to filing this motion; however, as of the time of filing, Respondent's counsel had not responded to indicate whether Respondent objects to the relief requested in this motion.

C. Request for Relief

Pursuant to 40 C.F.R. § 22.16, Complainant hereby moves the Administrative Law Judge to enter an Order allowing Complainant to supplement its Prehearing Exchange with the revised JD Form referenced in Paragraph 6.

DATED this 4th day of September, 2013.

RESPECTFULLY SUBMITTED,



Tucker Henson
Assistant Regional Counsel (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Tel.: (214) 665-8148
Fax: (214) 665-3177

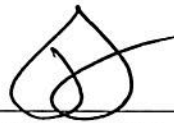
CERTIFICATE OF SERVICE

I certify that on the 4th day of September, 2013, the original of the foregoing MOTION TO SUPPLEMENT 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, Mail Code 1900R, Washington, DC 20460, and a true and correct copy was sent to the following on this 4th day of September, 2013, in the following manner:

VIA FIRST CLASS U.S. MAIL:

M. Lisa Buschmann, Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
1300 Pennsylvania Avenue, NW
Mail Code 1900R
Washington, DC 20460

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



Tucker Henson

ATTACHMENT A
Declaration of William Nethery

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of	§	Docket No. CWA-06-2012-2710
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Declaration of
Respondent	§	William Nethery

DECLARATION OF WILLIAM NETHERY

In support of its Motion to Supplement Complainant's Prehearing Exchange, the Complainant, the United States Environmental Protection Agency, Region 6 ("EPA"), hereby submits the following declaration of William Nethery, Senior Botanist, United States Army Corps of Engineers ("Corps").

I, William Nethery, make the following statement truthfully from personal knowledge and review of Corps documents in accordance with 28 U.S.C. § 1746:

1. I make this statement in my capacity as Senior Botanist employed in the Regulatory Branch, Surveillance and Enforcement Section of the Corps, New Orleans District.
2. I have been employed with the Corps from 2001 to the present. In my capacity as Senior Botanist, I regularly conduct jurisdictional determinations, which includes preparing Approved Jurisdictional Determination Forms ("JD Forms"). I prepared the JD Form included as Exhibit 11 in Complainant's Prehearing Exchange ("Exhibit 11") filed in the current enforcement action against Paco Swain Realty, L.L.C. ("Respondent").
3. The statements included herein are based upon a review of my notes, Corps' files and my recollection from inspections of the property owned by Respondent known as the

ATTACHMENT B

Complainant's Exhibit No. 22, CWA-06-2012-2710

Approved Jurisdictional Determination Form (corrected)

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): October 19, 2009

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: MVN 2007-04022-SQ Harrison-Swain

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: LA County/parish/borough: Livingston City:
Center coordinates of site (lat/long in degree decimal format): Lat. 30.54423° N, Long. 90.84398° W.
Universal Transverse Mercator:

Name of nearest waterbody: tributary of Dick Hill Branch/Middle Colyell Creek

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Colyell Bay/Amite River

Name of watershed or Hydrologic Unit Code (HUC): 8070202

Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date:

Field Determination. Date(s): 01/29/2009

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There Are no "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There Are "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

TNWs, including territorial seas

Wetlands adjacent to TNWs

Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs

Non-RPWs that flow directly or indirectly into TNWs

Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Impoundments of jurisdictional waters

Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: 5000 linear feet: 5-8 width (ft) and/or acres.

Wetlands: 8 acres.

c. Limits (boundaries) of jurisdiction based on: 1987 Delineation Manual

Elevation of established OHWM (if known):

2. Non-regulated waters/wetlands (check if applicable):³

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.

Explain:

Complainant's Ex. 22
CWA-06-2012-2710

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

Tributary stream order, if known:

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain: partly channelized during silviculture activities.

Tributary properties with respect to top of bank (estimate):

Average width: 5-8 feet
Average depth: 2-3 feet
Average side slopes: 2:1.

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover:
 Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: relatively stable.

Presence of run/riffle/pool complexes. Explain: no.

Tributary geometry: Meandering

Tributary gradient (approximate average slope): 1-2 %

(c) Flow:

Tributary provides for: Intermittent but not seasonal flow

Estimate average number of flow events in review area/year: 20 (or greater)

Describe flow regime: flow during and after rain events after soil saturation, trickling between rain events, overbank flooding and inundation during high water periods in Middle Colyell Creek.

Other information on duration and volume: development in area increased volume and decreased duration, channelized areas have increased volume downstream.

Surface flow is: Discrete. Characteristics: overbank flooding during high water.

Subsurface flow: Unknown. Explain findings: not determined at this time.

Dye (or other) test performed:

Tributary has (check all that apply):

Bed and banks
 OHWM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community
 other (list):
 Discontinuous OHWM.⁷ Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

High Tide Line indicated by: Mean High Water Mark indicated by:
 oil or scum line along shore objects survey to available datum;
 fine shell or debris deposits (foreshore) physical markings;
 physical markings/characteristics vegetation lines/changes in vegetation types.
 tidal gauges
 other (list):

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: slightly cloudy.

Identify specific pollutants, if known: silt and clay sediments, oil & grease from roads, fertilizer and pesticides, organics.

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷Ibid.

For each wetland, specify the following:

<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>	<u>Directly abuts? (Y/N)</u>	<u>Size (in acres)</u>
y	0.7	y	1.0
y	0.3	y	6+

Summarize overall biological, chemical and physical functions being performed: Functions include flood storage, sediment retention, pollutant retention, carbon retention and contribution, nutrient recycling, wildlife habitat.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: Wetland on property is adjacent to a non-RPW onsite; the non-RPW is an RPW in its lower reaches. Floodwater storage and sediment and pollution retention functions accrue in wetlands here; remaining pollutants enter the non-RPW and the RPW downstream. Carbon and organisms are also carried to the RPW from the wetland. Contributions of wetlands to the biological, chemical, and physical makeup of TNWs is well-documented in the literature (see references below). Physical characteristics on the site, including sediment deposits, rack lines (including organic material and organisms), scoured areas, water marks, etc., are evidence of both retention in the wetland and suspension of pollutants in the water column at the point where water exits the wetland. Given the number and intensity of rain and flow events in this region (greater than 60 days annually, with more than 0.1 inch rainfall), sediments, pollutants, carbon, and organisms in excess of the assimilative capacity of the RPWs will remain suspended in the water column long enough to reach the TNW. Thus the tributary, in combination with adjacent wetlands and other similarly situated wetlands, provide a direct and acute contribution to the chemical, physical, and biological makeup of the TNW.
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 TNWs: linear feet width (ft), Or, acres.

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
- from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- which are or could be used for industrial purposes by industries in interstate commerce.
- Interstate isolated waters. Explain:
- Other factors. Explain:

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: linear feet width (ft).
- Other non-wetland waters: acres.
Identify type(s) of waters:
- Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:
- Other: (explain, if not covered above):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource:
- Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource:
- Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

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