UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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

MOTION TO SUPPLEMENT RESPONDENT'S PREHEARING EXCHANGE

Paco Swain Realty, L.L.C., through its undersigned counsel, hereby moves the Administrative Law Judge to supplement Respondent's Prehearing Exchange filed on July 26, 2013, and as good cause therefor states as follows:

Certain necessary exhibits and information were omitted from the Prehearing Exchange, to some of which Counsel did not have access at the time of filing, and some were omitted inadvertently.

Although Counsel was of the belief that the substance of the original Prehearing Exchange was sufficient, he has been informed that more detail is necessary, and therefore has included it in the supplement.

Counsel has discussed this request with Tucker Henson, Attorney for Complainant, who did not voice objection to the supplement.

WHEREFORE, Respondent respectfully moves that it be permitted to file the attached Respondent's Supplemental Prehearing Exchange.

By Attorney:

September 25, 2013
Date

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CERTIFICATE OF SERVICE

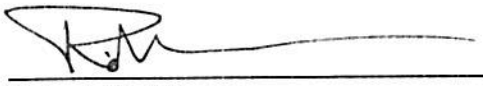
I certify that the foregoing Motion, dated September 25, 2013, was this day sent by UPS to:

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

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

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

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



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

Dated: September 25, 2013

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

In the Matter of	*	Docket No. CWA-06-2012-2710
	*	
Paco Swain Realty, L.L.C,	*	
a Louisiana Corporation,	*	
	*	RESPONDENT'S
Respondent	*	PREHEARING EXCHANGE

RESPONDENT'S SUPPLEMENTAL PREHEARING EXCHANGE

The Respondent, Paco Swain Realty, L.L.C., through its undersigned attorney, hereby files this Supplemental Prehearing Exhange, which contains Respondent's supplemented responses, pursuant to the Prehearing Order herein.

A. WITNESSES:

The Respondent may call the following witnesses at the hearing:

1. Gordon "Paco" Swain (fact witness), the respondent's principal and the developer of the property upon which it is alleged in the complaint that violations occurred. He will testify substantially as follows: The property had been heavily affected by silvaculture operations prior to his commencing work on the property. He does not believe that the condition of the wetlands on the property is significantly worse than when he started. In March, 2007 he ordered a pre-Rapanos wetlands assessment from Harris Environmental Services. Results indicated approximately 1-2 acres of wetlands isolated to interior of the prperty and not subject to USACE jurisdiction. He submitted the report to USACE for JD. June, 2007, having heard nothing from Corps, he began initial clearing, grubbing and minor ditching of subdivision. July, 2007, he received a call from Bill Netherly from USACE informing him that it was suspected he was working in a wetlands area. He informed Mr. Netherly that having waited three months for feedback from the Corps, he had marked off the weland areas indicated by the consultant and began clearing outside these areas. He explained to Mr. Netherly that he was paying substantial interest on his loan and could not afford to wait for USACE to act on the assessment. Mr. Netherly verbally ordered C&D until he could come on site, and indicated that he would try to come within the next few weeks. Swain stated that his consultant had indicated that the wetlands on site were isolated by pre-Rapanos testing and not subject to USACE jurisdiction, and that the consultant had submitted the assessment to USACE for a JD. Mr. Netherly stated that only the USACE can call an area wetlands and that he should cease all work until

he heard from Netherly. Swain explained that if he shut down his crews for any length of time he would lose the contractor to other jobs and risk paying interest on a subdivision loan without it being completed and be unable to sell lots to recoup his investment. In July, 2007 Respondent ceased all work on the site and contracted with Howard Nass of Gulf Coast Research Corporation for an independent post-Rapanos wetlands testing as per the new wetlands directive associated with isolated wetlands. August 22, 2007, Respondent sreceived a written C&D from Mr. Netherly. September, 2007, Respondetnt received a copy of written assessment from GSRC, showing about ½ acre of wetland on the 92 acre tract. October-December, 2007, Respondent completed clearing, grubbing and minor ditching of Megans Way Subdivision. March, 2008, Respondent received approval from Livingston Parish on completed construction plans and began installing streets and utilities in the subdivision. April 8, 2008, Swain received a call from Bill Nethely indicating that continued land clearing had been observed at Megans Way after he had issued a C&D. Swain explained that two wetlands assessments had been completed by certified wetlands engineers and both showed isolated wetlands of 1/2 to 2 acres, not subject ot USACE juridiction. He also steted to Mr. Netherly that the Corps had nevr issued a JD on the site. Mr. Netherly stated that the Corps forwarded all information on this site to EPA for prosecution. Swain asked how Netherly oculd issue a C&D on a site that had not received a JD. Mr. Netherly stated that only the Corps can detemine wetlands and not consultants. He again verbally told him to cease all work. With work shut down and Respondent unable to pay its construction loan, Hancock Bank sued on the mortgage and ordered the property seized by Livingston Parish Sheriff, which seizure was effected April 27, 2010. April 16, 2012, Hancock Bank was granted a judgment against Responden in the amount of $1,884,093.62, which continues to accrue post-judgment interest. The bank confiscated a certificate of deposit it held in Respondent's name, and availed itself of any collateral owned by Respondent to which it had access. The Bank has declined to take possession of the property because of the pending issues, but it has refused to cooperate with Respondent's efforts to confect a short sale or compromise to any extent the amount it is owed. Bank officials have told Respondent that he is not allowed on the property. Despite the Bank's recalcitrance, Respondent continues efforts to market the property in an attempt to minimize deficiency judgments, but the interest of prospective buyers is deterred by the pending environmental claims, as well as the general ennui in the real estate market. Respondent procured and offer in the $500,000 range, but the Bank would not agree to release its claims. He will testify as to Respondent's financial hardship, his lack of ability to pay a civil penalty, and the extreme unlikelihood of his committing future violations. In addition to the financial hardship, the ordeal has been detrimental to his health, his personal life, including his marriage, his professional reputation and his standing in the community. He is convinced that regardless of expert opinion or appearance, no work on land should ever be commenced without appropriate regulatory approval, and there is no likelihood that he will ever again procede without proper permits in hand.

2. Jason Harris (Expert Witness), engineer with Harris Environmental Services, Inc., who provided the initial Wetlands Assessment for Megan's Way, dated May 18, 2006.

3. Howard Nass, Gulf South Research Corporation, performed Wetland Delineation dated Ocotber 2007 on the 58-are property known as Megan's Way, indicating approximately 0.54 acre of potential wetlands and approximately 856 linear feet (.16 acre) of potential Waters of the United States. Respondent relied to some extent on this report in conducting its work on the site . Respondent presumes that Complainant has obtained the CV or Resume of Howard Nass and GSRC. If not, Respondent will attempt to obtain it and provide it to Complainant. It is anticipated that this testimony will be taken under cross-examination.

4. Tim Kimmel (Expert Witness), Biologist, wetlands evaluation, remediation and mitigation.

5. Jimmy Hopkins (fact witbess), Superintendent of Livingston Parish Gravity Drainage District #5. To describe the nature, function, condition and operations of the streams and tributaries mentioned in documents filed by Complainant, particularly without limitation any effect on the waters within the District's jurisdiction resulting from any of Respondent's work.

6. Corporate representative(s) of Hancock Holding Company, Hancock Bank and/or Whitney Bank, including without limitation Brandon Case, Jim Patrick, Billy Price and/or (by FRCP 30(b)(6) deposition, a designee with knowledge of all dealings with Paco Swain Realty, LLC. To testify to the substance and effect of all documents pertinent to the loan to Respondent and all communications of any nature or medium between the Bank and Respondent or Paco Swain.

7. Any witness named by Complainant.

8. Any rebuttal witness, as required.

9. Any witness the identity or necessity of testimony of whom might become known to Respondent during discovery or before the hearing of this matter.

Respondent does not anticipate the need to call any additional witness, but respectfully reserves the right to amend or supplement the witness list, particularly in regard to experts as yet unknown, with particular expertise in enforcement but who have not provided any prior advice, and to expand or otherwise modify the scope of testimony of any of these potential witnesses, where appropriate, and upon adequate notice to complainant and noticea and order of this court.

Respondent intends to seek such pre-hearing discovery as necessary to determine facts that might be relevant to the issues or that tend to lead to material facts, and reserves all rights available. It is anticipated that Respondent will traverse the declarations of Complainant's witnesses and will notice the oral deposition of Brandon Case, among others.

Respondent's witnesses will not need an interpreter to facilitate their testimony.

Special accomodations under the Americans with Disabilities Act will not be needed for counsel or any of the witnesses or party representatives of Respondent.

B. EXHIBITS:

The Respondent may offer into evidence the following exhibits:

EXHIBIT NO.	DESCRIPTION
Respondent No. 1	Wetland Delineation for Megan's Way on 58-acre tract in Sections 6 and 7, T-6-S, R-4-E, Livingston Parish, Louisiana, submitted October 2007 by Gulf South Research Corporation.
Respondent No. 2	Wetland Determination for Property Located at Cane Market Road and Cooper Allen Road, May 18, 2006 by Jason Harris.
Respondent No. 3	Individual Ability to Pay Claim, Financial Data Request Form, with supporting documents, including without limitation, IRS tax returns of Gordon L. Swain, Jr. and Deborah S. Swain for the years 2005-2012, inclusive; recent financial statement; court records showing activity in suits against Respondent by Hancock Bank or any of its affiliates. This item will be supplemented as any further relevant document are revealed through discovery or otherwise come to Respondent's attention.
Respondent No. 4	All records of Hancock Holding Company, Hancock Bank and Whitney Bank which in any way pertains to any business of any of those entities with the respondent. It is anticipated that compulsory process will be necessary to secure these documents, and copies will be provided Complainant as soon as they are obtained.
Respondent No. 5	Curriculum Vitae or resume of witnesses who may be called as experts as specified above or who are retained during the course of these procedings.

Any Exhibit the existence or probative value of which becomes known prior to hearing.

The Respondent respectfully reserves the right to further amend its supplemental prehearing exchange to add, subtract or amend exhibits and/or documents.

C. PLACE FOR HEARING AND ESTIMATED TIME NEEDED:

The Respondent requests that the hearing be held in Livingston Parish, Louisiana (in accordance with 40 CFR §§20.21(d) and 22.19(d)), the county where the respondent resides and conducts his business. Resondent estimates that one (1) day at most will be needed to present its direct case. Translation services will not be needed.

D. ASSESSMENT OF CIVIL PENALTY:

The Respondent respectfully takes exception to the Penalty Calculation sought to be assessed by the Complainant.

Respondent asserts that it acted in good faith on the informed belief that any wetlands on the property were non-jurisdictional and that no permit was required. Further, any alteration of wetlands was minimal and resulted in no net loss of wetlands on the property. To the extent that any drainage was affected, it was through a redirection of flow and very little, if any, increase in volume leaving the property.

PENALTY CALULATIONS

The penalty suggested by the Complainant is not justified, considering the nature, circumstances, extent and gravity of the alleged violation. Despite the abstract declarations of coomplainant, there is no evidence that the Respondent caused the actual discharge of any dredged or fill material into jurisdictional waters. Specific factors considered by Complainant should be assigned lower values.

Gravity Component. Respondent believes that the ($3,000) assigned by EPA to the Preliminary Gravity Amount is excessive, considering the relatively low overall environmental and compliance significance, and that a mid-level Multiplier ($1,500) should be assigned. Upon receiving the first wetlands evaluation, Respondent—before doing any work—requested of USACE a jurisdictional Determination, and waited 3 months with no response. Only after beginning initial clearing and grubbing did he hear from Mr. Nethery, and again requested an inspection and JD. The Corps representative was non-responsive and dismissive throughout, except when it came to issuing Cease and Desist Orders. After the verbal C&D in July, 2007, Respondent ceased work until October, after receiving a wetlands assessment from GCRC in September. In the meantime, a C&D was issued August 22, 2007, still with no JD. Respondent continued to attempt to deal with USACE to no avail. Because of the jeopardy of his investment, the chronological pressures of meeting construction and loan deadlines, and the futility of his attempts to get Corps attention, except for C&D orders, Respondent took the chance to rely on the assessments that he had in hand, and moved forward with the work out of frustration. In retrospect, it appears likely that some of the difficulty in getting JD's performed at that time were occasioned by some post-Rapanos turmoil in the Corps's field guidance, a notion that will be explored in discovery. Nevertheless, the extraordinary delay in having 404 applications tended to was a contributing factor in these alleged violations, and the gravity component should be adjusted to account for this.

Culpability. Complainant suggests that Respondent wantonly ignored the need to obtain a Section 404 permit. In fact, he repeatedly requested that the Corps evaluate the property and issue a JD, but his pleas were cnsistently ignored. The value of the wetlands on the property had long ago been diminished by logging operations, and it is likely that any indigenous qualities had

been destroyed before Respondent ever got there. Certainly there was a financial motive involved, but Respondent had no idea that he would have to wait months for USACE to act on his routine requests, and he only conducted ooperations after receiving advice on the wetlands. Not an engineer or a scientist, he could only rely on information that he was able to procure. As the violations were exacerbated by the Corps's recalcitrance, the Degree of Culpability should be reduced to 5/20.

Deterrence Factor. Complainant infers from Respondent's prior experience that "Respondent is likely to repeat the violations." This conclusion is wholly contrary to reality. In fact, there is no likelihood that Respondent would be in any position to repeat the violations, even if it inclined to do so. Respondent is now aware of the real prospect of severe civil liability and worse in the event of violations such as those alleged In the complaint.

Were the specter of future liability and its incumbent expenses and emotional toll not enough to deter legally or regulatorily questionable conduct, the financial burden would more than suffice. The actions of Complainant in this case have already resulted in Respondent losing hundreds of thousands of dollars invested, in addition to foreclosure on the property, acceleration of the mortgage and more than a million dollars in debt and the concomitant loss of any ability to borrow funds to finance any future developments.

Respondent acknowledges Complainant's policy to the effect that Further disincentive can be found in the fall from the high level of respect in which Respondent was held in the business community, all of which Respondent's owner will testify to at hearing.

Ability to Pay Claim. An ennumerated statutory factor to establish penalties is **Ability to Pay**. Complainant may consider adjusting a civil penalty when the assessment of a civil penalty

may result in extreme financial hardship. The Respondent is in dire financial straits, as is demonstrated by the documentation submitted herewith.

As a result of the shutdown of his work on this project, Respondent was unable to pay its contracors or meet other obligations. Hancock Bank of Louisiana, which holds the mortgage on the property, effected a seizure of the property by the Livingston Parish Sheriff on April 27, 2010, entered a final judgment in its suit on the mortgage April 16, 2012 in the amount of $1,884,093.62, which continues to accrue post-judgment interest. The bank confiscated a certificate of deposit it held in Respondent's name, and availed itself of any collateral owned by Respondent to which it had access.

The Bank has declined to take possession of the property because of the pending issues, but it has refused to cooperate with Respondent's efforts to confect a short sale or compromise to any extent the amount it is owed. As Respondent informed Complainant, the title to the property remains in Respondent's name, but it is effectively unable to do anything with it so long as Complainant's Actions remain in progress. Despite anything any of the Bank's officers might have said to the contrary, the Bank has told Respondent that Respondent does not have control of the property and is not allowed to enter or work upon it. The debt on the property, without regard to expenditure of any further funds on its development, including remediation and mitigation costs to make it marketable, exceeds its value.

The Respondent, Paco Swain Realty, LLC, is wholly owned by Gordon "Paco" Swain, whose fortunes are inextricably aligned with that entity. As shown by the income tax returns of Gordon L. Swain, Jr. and his wife Deborah S. Swain fot the years impacted by this action, the income of the company and its owners has declined dramatically, plummeting from $274,725 in 2007 to a negative $194,353 in 2012, to wit:

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

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

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

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

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

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

Respectfully submitted,

ROBERT W. MORGAN (#9713)
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Denham Springs LA 70726
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CERTIFICATE OF SERVICE

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

VIA UPS:

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

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

Robert W. Morgan

Dated: September 25, 2013