

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

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In the Matter of § Docket No. CWA-06-2012-2710
§
Paco Swain Realty, L.L.C. § COMPLAINANT'S REBUTTAL
§ PREHEARING EXCHANGE
a Louisiana Corporation, § AND
§ MOTION TO COMPEL PRODUCTION
Respondent § OF INFORMATION REQUIRED BY
§ THE RULES OF PRACTICE AND
§ THE PREHEARING ORDER

COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE
AND
MOTION TO COMPEL PRODUCTION OF INFORMATION REQUIRED BY
THE RULES OF PRACTICE AND THE PREHEARING ORDER

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

Complainant also moves the Court to order production of information by Paco Swain Realty, L.L.C. ("Respondent") in accordance with the Rules of Practice and the Order.

REBUTTAL PREHEARING EXCHANGE

In the Order, the Presiding Officer instructed the Parties to file a Prehearing Exchange containing specific information and instructed Complainant to file a Rebuttal Prehearing Exchange. This document contains Complainant's response to the Order.

A. RESPONDENT MISCHARACTERIZES THE CURRENT STATUS OF THE SUBJECT PROPERTY WITH RESPECT TO RESPONDENT'S RIGHT TO POSSESSION OF THE PROPERTY.

In its Prehearing Exchange, Respondent states that Whitney Bank foreclosed on the Megan's Way subdivision owned by Respondent ("subject property") and designates an unnamed representative from Whitney Bank as a witness. Respondent's Exhibits include a Notice of Final Judgment on behalf a Hancock Bank of Louisiana, which is not a "lawsuit of foreclosure" as asserted in Respondent's Prehearing Exchange, as well as Notice of Seizure executed on behalf of Hancock Bank of Louisiana ("Hancock Bank"). Whitney Bank and Hancock Bank are held by the same parent company, Hancock Holding Company, and operate closely together. Complainant's Ex. 20.¹

On or about 2012, Ms. Donna Mullins contacted Mr. Brandon Case of Hancock Bank via telephone. Mr. Case, Vice President of Special Assets, was responsible for pursuing matters on behalf of Hancock Bank involving the loan to Respondent related to the subject property. Mr. Case stated that Hancock Bank decided not to foreclose upon the property due to environmental concerns and instead pursued a monetary judgment for the amount of the loan. Mr. Case stated that Respondent retains possession of the title to the subject property. On August 7, 2013, Ms. Mullins contact Mr. Case and confirmed the above statements as to non-foreclosure and Respondent's right to possession of the subject property. Complainant's Ex. 20. In addition, as of August 7, 2013, Respondent's website retains a listing for the subject property stating the status is "active" with a price of \$1,950,000.00. Complainant's Ex. 21.

¹ See also, www.hancockbank.com/home/whitney-story.asp.

For the reasons stated above, Complainant objects to characterization of the actions taken by Whitney Bank and/or Hancock Bank. As Respondent has failed to name a specific representative from Whitney Bank as a witness and to the extent Respondent's possession of the property is material as to Respondent's ability to pay the proposed penalty, Complainant objects to the calling of any representative from Whitney Bank or Hancock Bank as a witness unless such witness called is Mr. Brandon Case or a similar official familiar with the current status of the bank's actions relating to the subject property.

B. RESPONDENT'S PREHEARING EXCHANGE DOES NOT PROVIDE NAMES AND SUFFICIENT SUMMARY OF THE EXPECTED TESTIMONY OF EACH WITNESS TO PERMIT COMPLAINANT TO ADEQUATELY PREPARE REBUTTAL WITNESSES.

Respondent's Prehearing Exchange lacks specificity sufficient to permit Complainant to make a determination as to whether rebuttal witnesses will be required or whether Complainant will challenge any witness prior to the hearing. Section 22.19(a) of the Rules of Practice provide that each party shall submit "the *names* of any expert or other witnesses it intends to call at the hearing, together with a brief narrative *summary of their expected testimony*." 40 C.F.R. § 22.19(a)(2)(i) (emphasis added). Further, "a witness whose *name* and *testimony summary* has not been included in the prehearing information exchange shall not be allowed to testify." 40 C.F.R. § 22.19(a)(1). Respondent's Prehearing Exchange is notable for its failure to include witness names or provide a summary of expected testimony for three of its five witnesses, including one expert witness. As discussed below, Respondent's deviation from the Rules of Procedure prejudices Complainant in that Complainant is unable to adequately prepare to rebut such unnamed witnesses and undisclosed testimony, including seeking out appropriate rebuttal witnesses, if necessary.

Respondent designated a “[r]epresentative of Whitney Bank, lender and mortgagee on the subject property, which foreclosed on the site, resulting in Respondent’s total loss of control over any work, including remediation, on the site, and drastically impariring [sic] Respondent’s financial capacity.” As noted above, Respondent provided exhibits including a judgment against Respondent and “notice of taking of possession” on behalf of Hancock Bank. Respondent’s witness designation is not clear as to whether Respondent’s witness is knowledgeable as to the proceedings between Hancock Bank and Respondent or whether Respondent’s witness is akin to a custodian of records. Complainant may seek a rebuttal witness, such as Mr. Case, who is knowledgeable of the proceedings between Hancock Bank and Respondent or seek to otherwise refute any assertion that the documents speak for themselves.

Likewise, Respondent’s designation of a “[r]epresentaive of Gulf South Research Corporation (Expert Witness), which inspected the subject site and prepared a Wetland Delineation dated October 2007” fails to provide the name of the witness or adequate notice of the expected expert testimony. While Complainant would expect this witness to be one of the two “investigators” listed on the report data form, Complainant has some concern that a “representative” may be designated solely for the purpose of attempting to lay a foundation for admissibility of the document without providing Complainant the opportunity to question the author of the report as to the assertions and assumptions made within the report, a circumstance to which Complainant would object and seek to address prior to any hearing. Similarly, without an adequate summary of expected testimony, Complainant cannot ascertain whether the unnamed expert witness will testify as to the conclusions reached in the document or simply the validity of the data collected, because it is unclear as to whether one (if either) of the

investigators composed the narrative of the wetland delineation or whether that narrative was prepared by a third party after a review of collected data.

Finally, Respondent has not, as required by the Prehearing Order, provided curriculum vita or resume for its two expert witnesses. Without such basic information, Complainant is unable to determine whether to object to the expert designation of the witness or to adequately prepare for any such objection, if appropriate. In addition, Respondent failed to provide any report or other documentation prepared by or reviewed by expert witness Mr. Tim Kimmel upon which he may rely in rendering his expert opinion nor provide any indication of the issues Mr. Kimmel may be addressing.

In short, Respondent's failure to meet the requirements to provide a name and summary of the expected testimony for several witness, as well as basic information on qualifications of expert witnesses, conflicts with the Rules of Practice and the Prehearing Order while placing Complainant at a disadvantage due to Respondent's failure to meet its obligations.

C. RESPONDENT DOES NOT PROVIDE SUFFICIENT INFORMATION REGARDING ITS INABILITY TO PAY THE PROPOSED PENALTY TO PERMIT COMPLAINANT ADEQUATELY PREPARE A REBUTTAL TO THE CLAIM.

Respondent likewise indicates an inability to pay yet provides none of the typical evidence such as tax returns, certified copies of financial statements, records of other assets, bank statements, etc. In the absence of such documentation, Complainant cannot determine whether a rebuttal witness is required to assess Respondent's documentation and provide an opinion on whether Respondent is able to pay the proposed penalty or even whether Respondent has provided sufficient documentation to prove an inability to pay the proposed penalty. Complainant may seek full resolution of this matter, including assessment of the proposed

penalty, through accelerated judgment, and it is imperative that Respondent put forward some evidence to substantiate its defense of inability to pay.

D. AMENDED WITNESS LIST

In light of Respondent's assertions in its Prehearing Exchange, Complainant amends its witness list, specifically designation number 5, to include:

5. Any rebuttal witness, as required, including, but not limited to, (a) any witness to rebut Respondent's claim of loss of possession of the subject property and (b) any witness to rebut Respondent's claim of inability and/or to speak as to the sufficiency or insufficiency of such documents provided by Respondent to reach a conclusion as to Respondent's ability to pay.

E. COMPLAINANT'S ADDITIONAL EXHIBITS:

The Complainant may offer into evidence the following exhibits in addition to those Exhibits listed in Complainant's Prehearing Exchange:

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
Complainant's Ex. 20	Record of Communication between D. Mullins, EPA, and B. Case, Hancock Bank, dated August 7, 2013
Complainant's Ex. 21	Real Estate Listing for Megan's Way subdivision located on Respondent's website printed August 7, 2013 ²

² Available at: http://www.pacoswainrealty.com/Baton_Rouge,_and,Livingston_Parish_and_surrounding_areas_listings/0117FD9F-D3B4-F1C3-8173AE19FA257399.shtml

MOTION

COMES NOW COMPLAINANT, by and through its attorney, in accordance with the Rules of Practice, hereby moves the Court to order production of information by Respondent in accordance with the Rules of Practice and the Prehearing Order. 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.

B. Factual Background

2. Complainant incorporates by reference the allegations and evidence discussed above in Complainant's Rebuttal Prehearing Exchange. Complainant also incorporated by reference herein the allegations and evidence provided in Complainant's Prehearing Exchange filed on June 27, 2013.

3. By Prehearing Order dated April 19, 2013, the Administrative Law Judge set forth requirements, in addition to the requirements of the Rules of Practice, relating to disclosure of information in the parties' Prehearing Exchanges in this matter. The requirements of the Prehearing Order are incorporated by reference herein and discussed in Complainant's Rebuttal Prehearing Exchange.

4. As discussed in Complainant's Rebuttal Prehearing Exchange, Respondent failed to provide names of witnesses and an adequate summary of the expected testimony of each witnesses. In addition, Respondent failed to provide a resume or curriculum vita for each

designated expert witness, nor did Respondent provide any report or other written opinion prepared by expert witness Mr. Tim Kimmel that would indicate the expert testimony Mr. Kimmel is prepared to render in this matter.

5. As discussed in Complainant's Rebuttal Prehearing Exchange, Respondent failed to provide documentation to support its defense of inability to pay the proposed penalty.

6. Complainant is prejudiced through non-disclosure of the above mentioned information in that Complainant is unable to sufficiently prepare to rebut witness testimony or documents yet to be produced by Respondent that may be admitted in this matter.

C. Request for Relief

Pursuant to 40 C.F.R. § 22.16, Complainant hereby moves the Administrative Law Judge to enter an Order compelling production of the following information by Respondent: (1) names of all fact and expert witnesses referenced in Respondent's Prehearing Exchange who may be called by Respondent at the hearing, (2) summaries of expected testimony by each witness sufficient to apprise Complainant of the substance of each witness' expected testimony, (3) a curriculum vita or resume for each designated expert witness, (4) and supporting documentation, if any, upon which Respondent bases its claim of inability to pay the proposed penalty.

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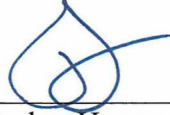
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DATED this 8th day of August, 2013.

Respectfully submitted,



Tucker Henson
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U.S. EPA, Region 6
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Fax.: (214) 665-2182

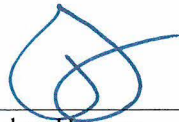
CERTIFICATE OF SERVICE

I certify that the original of the foregoing COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE AND MOTION TO COMPEL PRODUCTION was filed with the **Headquarters Hearing Clerk**, U.S. Environmental Protection Agency, Office of Administrative Law Judges, 1200 Pennsylvania Avenue, NW, Mail Code 1900R, Washington, DC 20460, and a true and correct copy was sent to the following on this 8th day of August, 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

RECORD OF COMMUNICATION

From: Donna Mullins, USEPA, Region 6, Wetlands Section (214) 665-7576)

To: Brandon Case, V.P. of Special Assets, Hancock Bank, (228-822-4351)

Date: August 7, 2013

I spoke with Brandon Case, V.P. of Special Assets at Hancock Bank, on August 7, 2013. He stated that Hancock Bank has not foreclosed on Megans Way Residential Subdivision and that Paco Swain still has legal possession of the property. He also stated that Hancock Bank and Whitney Bank are both the same banks.



www.pacoswainrealty/ Livingston Parish/ East Baton Rouge etc

Paco and Debbie Swain
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128 +/- Acres FOR SALE Walker LA



Nancy Dr
Walker, LA 70785
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Price: \$1,950,000.00
MLS: b1308024
Status: Active

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Features

Proposed Megan's Way Subdivision with all local and state approvals in place. Subdivision is approximately 30% complete. Additional access available to increase numbers from 62 lots to 400 lots. Great potential here. Call Paco today for further information. (225) 664-6777

- Neighborhood: Megan's Way
- Lot Size: 128 +/- acres
- Type: Single Family Residential for Sale
- School District: Livingston Parish Schools

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