UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of:	)	
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Paco Swain Realty, L.L.C.,	)	**Docket No. CWA-06-2012-2710**
	)	
Respondent	)	**Dated: September 9, 2014**

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION

I. Procedural Background

This proceeding was initiated on May 15, 2012, by the Director of the Water Quality Protection Division, United States Environmental Protection Agency, Region 6 ("Complainant" or "EPA") filing a Complaint under section 309(g) of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1319(g). The Complaint alleges that on multiple days from about April 2007 through May 2008 Respondent discharged, and/or agreed with other persons to discharge, dredged material and/or fill material from point sources into waters of the United States without a permit issued under Section 404 of the Act, 33 U.S.C. § 1344. The Complaint alleges further that Respondent failed to comply with an Administrative Order issued by the United States Army Corps of Engineers ("Corps") requiring Respondent to cease and desist any discharges of dredged or fill material into waters of the United States, to stabilize all disturbed areas, to apply for an after-the-fact permit with the Corps, and if the permit is denied, to restore the wetlands to the natural hydrology and allow revegetation. The Complaint charges Respondent with violations of Section 301(a) of the CWA, 33 U.S.C. § 1311 and proposes assessment of a civil penalty.

On March 1, 2013, Respondent filed an Answer to the Complaint, denying the alleged violations and asserting several affirmative defenses. A Prehearing Order was issued and thereafter each of the parties filed a prehearing exchange and supplements thereto. Complainant proposed a penalty of $153,750 for the alleged violations.

On September 6, 2013, Complainant filed a Motion for Accelerated Decision as to both liability and penalty (Motion and Memorandum in Support collectively referenced as "Motion" or "Mot."), with attachments. On September 30, 2013, Respondent submitted an Opposition to Motion for Accelerated Decision ("Opposition" or "Opp."), with an attached Declaration of Gordon L. "Paco" Swain, Jr. ("Swain Declaration" or "Swain Decl.").

II. Relevant Law under the Clean Water Act

In 1972 Congress substantially amended the Federal Water Pollution Control Act, now commonly known as the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301 of the Act provides that, except as in compliance with a permit under Section 404 of the Act, and certain other permits, limitations and standards not applicable in this case, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311.

A "discharge of a pollutant" is defined in the Act as "any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12), (16). "The term 'pollutant' means dredged spoil, solid waste, . . . biological materials, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts have ruled that bulldozers, backhoes and other heavy mechanized earthmoving equipment constitute a "point source" as "rolling stock." *E.g.*, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983)(bulldozer and backhoe are point sources); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd* 537 U.S. 99 (2002)(tractor pulling a deep ripper is a point source).

The term "navigable waters" is defined in the Act as "waters of the United States." 33 U.S.C. § 1362(7). Regulations codified pursuant to the Clean Water Act define "waters of the United States" as including:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . [or] wetlands, . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . .;
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> * * *
>
> (5) Tributaries of waters identified in paragraphs (g)(1)- (4) of this section;
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> * * *
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1) - (q)(6) of this section.
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> * * * *

40 C.F.R. § 232.2; 33 C.F.R. § 328.3(a).[1]

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1 Both the U.S. Environmental Protection Agency and the U.S Army Corps of Engineers have authority to promulgate regulations under the Act. 33 U.S.C. §§ 1344(b), 1361(a).

In turn, the term "wetlands" is defined as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

40 C.F.R. §§ 232.2; 33 C.F.R. § 328.3(b).

The U.S. Supreme Court's seminal decision *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") established two tests to determine whether wetlands are "adjacent to" waters of the United States and thus subject to jurisdiction under the Clean Water Act. Justice Scalia expressed the four-justice plurality opinion that "'waters of the United States' include only relatively permanent, standing or flowing bodies of water" that are "connected to traditional interstate navigable waters" and that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 732, 742. Waters that are merely occasional, intermittent, transitory or ephemeral are non-jurisdictional, as are waters with only a physically remote hydrologic connection to traditional navigable waters, according to the plurality opinion. *Id.*

An alternative standard, the "significant nexus" standard, was articulated by Justice Kennedy in his concurring opinion as follows: "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' 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 covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. 759, 780 (Kennedy, J., concurring). According to Justice Kennedy, wetlands with merely "speculative or insubstantial" effects on water quality are non-jurisdictional. *Id.* Wetlands adjacent to navigable-in-fact waters necessarily satisfy the significant nexus test. *Id.; see also, United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 135, 139 (1985). On the other hand, the government must "establish a significant nexus on a case-by case basis" for wetlands adjacent to non-navigable tributaries. *Rapanos*, 547 U.S. at 782 (Kennedy, J.).

Either the standard set forth in the plurality opinion or the standard set forth by Justice Kennedy in *Rapanos* may be used to determine whether wetlands are subject to federal jurisdiction under the Act. *See, e.g., United States v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011), *cert. denied,* 132 S. Ct. 2409 (2012); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *Smith Farm Enterprises, LLC*, 15 E.A.D. __ , CWA Appeal No. 08-02, 2011 EPA App. Lexis 10 (EAB 2011) ("*Smith Farm*"); *Henry Stevenson and Parkwood Land Co.*, 16 E.A.D. ___, CWA Appeal No. 13-01, 2013 EPA App. LEXIS 36 (EAB 2013) ("*Parkwood*"); "U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decisions in *Rapanos v. United States & Carabell v. United States,"* at 3 (Dec. 2, 2008) ("EPA/Corps Joint Guidance").

Section 404(a) of the Act authorizes the Secretary of the Army, through the Corps, "to issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. The regulations define "dredged material" as "material excavated or dredged from waters of the United States." 40 C.F.R. § 232.2. "Fill material" is defined as "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 materials used to create any structure or infrastructure in the waters of the United States." *Id.* "Discharge of dredged material" is defined as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States," which includes "[a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 40 C.F.R. § 232.2. "Discharge of fill material" includes "[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction; site development fills for recreational, industrial, commercial, residential, or other uses; [and] causeways or road fills . . . ." *Id.*

The Corps' District Engineers are authorized by regulation to determine the area defined by the term "waters of the United States." 33 C.F.R. § 325.9. A written determination by the Corps that a wetland or waterbody is subject to regulatory jurisdiction under Section 404 is called a jurisdictional determination. 33 C.F.R. § 331.2.

III. Standards for Accelerated Decision

The applicable procedural rules, 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"), provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he 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). The standard for accelerated decision under 40 C.F.R. § 22.20 is similar to that of summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *Puerto Rico Aqueduct and Sewer Authority v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

The role of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts University School of Medicine,* 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993). The party moving for summary judgment bears the initial burden of showing that there is no genuine

issue of material fact to be decided with respect to any essential element of the claim, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 4 (1986). The movant who bears the burden of proof at trial must show that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the . . . presence of a genuine dispute." FRCP 56(c)(1). It is inappropriate to grant the motion "'unless a reasonable juror would be compelled to find its way on the facts needed to rule in its favor on the law,'" and "'if there is a chance that a reasonable factfinder would not accept a moving party's necessary propositions of fact,' summary judgment is inappropriate." *United States v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011)(quoting *El v. Southeastern Pa. Transp. Auth.,* 479 F.3d 232, 238 (3d Cir. 2007)(footnote omitted)). Under Rule 56, the use of affidavits is not required to support a motion for summary judgment; reliance on other materials is permissible. 73 Am. Jur. 2d Summary Judgment § 23 (2d ed.); *Celotex Corp. v. Catrett*, 477 U.S. at 323.

Once the movant's burden is met, to defeat summary judgment, the nonmoving party must show that a material fact is genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence . . . of a genuine dispute." FRCP 56(c)(1). The non-movant must "set out specific facts showing a genuine issue for trial." *Nolen v. FedEx TechConnect Inc.,* 971 F.Supp. 2d 694, 700 (W.D. Tenn. 2013)(quoting *Viergutz v. Lucent Techs., Inc.,* 375 Fed. App'x 482, 485 (6th Cir. 2010)). It must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-250; *Newell Recycling Company, Inc.*, 8 E.A.D. 598, 624, 1999 EPA App. LEXIS 28, at *59 (EAB 1999)(countervailing evidence must be sufficiently probative to create a genuine issue of material fact). An issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to oppose summary judgment); *Ricker v. Zinser Corp.,* 506 F. Supp. 1, 2 (E.D. Tenn. 1978), *aff'd sub nom. Ricker v. Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980) (affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial); *see*, 73 Am. Jur. 2d Summary Judgment § 34 (A defendant's resistance to a motion for summary judgment must be supported by sworn statements of a person having knowledge of the facts sufficient to sustain a valid defense to the action.)

"In determining whether a genuine issue of material fact exists, a court must view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor." *Gentile v. Nulty*, 769 F. Supp. 2d 573, 577 (S.D.N.Y. 2011); *Liberty Lobby,* 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012). A factual dispute is

"'genuine' if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 255. In the present proceeding, the evidentiary standard is a preponderance of the evidence. 40 C.F.R. § 22.24(b).

When conflicting inferences may be drawn from the evidence and a choice among them would amount to fact finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Ultimately, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

Rule 56 of the FRCP provides that "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." FRCP 56(e)(3).

When the non-moving party has asserted an affirmative defense, the moving party must show that there is an absence of facts present in the record to support the defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (*quoting BWX Techs. Inc.*, 9 E.A.D. 61, 78 (EAB 2000)). If the moving party does show an absence of facts supporting the defense, the non-moving party must identify "specific facts" from which a reasonable fact finder could find in its favor by a preponderance of the evidence in order to preserve its defense. *Id.* However, where both parties fail to address affirmative defenses on complainant's motion for accelerated decision, the motion may be granted if respondent failed to provide factual support for them. *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9243, 2007 EPA ALJ LEXIS 37, *73-80 (ALJ, December 27, 2007).

IV. Undisputed Facts

The following facts are admitted by Respondent:

1. Respondent Paco Swain Realty L.L.C. is a corporation that was incorporated under the laws of the State of Louisiana. Complaint and Answer ¶ 1. Gordon L. "Paco" Swain, Jr. ("Mr. Swain") is the principal of Paco Swain Realty L.L.C. Swain Decl. ¶ 1.

2. Respondent is the owner and developer of a parcel of real property known as Megan's Way Subdivision ("the Property"), in Livingston Parish, Louisiana. Complaint and Answer ¶ 2; Swain Decl. ¶¶ 1, 2.

3. Wetlands existed on the Property at all times relevant to the Complaint. Swain Decl. ¶ 2; Respondent's Prehearing Exchange ("R's PHE") Exhibit 1.

4. In July 2007, Mr. William Nethery of the U.S. Army Corps of Engineers contacted Mr. Swain by telephone, informing him that the Corps suspected that Respondent was

working in a wetlands area and verbally ordering Respondent to cease and desist from such work. Swain Decl. ¶ 5.

5. In July 2007, Respondent contracted with Gulf Coast Research Corporation ("GSRC") "to identify and quantify potential wetland areas within the project site that may meet the jurisdictional criteria of Waters of the United States . . . including wetlands." R's PHE Ex. 1, at 1. GSRC issued its report in October 2007, concluding that "the site contains approximately 0.54 acre of potential jurisdictional wetlands and approximately 856 linear feet (0.16 acres) of potential Waters of the United States that would require a Section 404 permit prior to any mechanical clearing or placement of fill material." R's PHE Ex. 1, at 10.

6. In at least June 2007 and October through December 2007, Respondent engaged in land clearing, grubbing and ditching to develop the Property as a residential subdivision. Swain Decl. ¶¶ 4, 6; Opp. at 4.

7. Respondent did not have a permit under Section 404 of the Act. Complaint and Answer ¶ 9.

8. On August 22, 2007, the Corps notified Respondent of violations of Section 301(a) of the Act through a written Cease and Desist Order referencing the Corps' observation on June 15, 2007 of "mechanized landclearing and redistribution of fill material relative to preparing a portion of a 90-acre tract for development (proposed Megan's Way subdivision)" and that "a portion of the work . . . has been determined to be in a wetlands and other waters of the United States" subject to its jurisdiction and in violation of Section 301(a) of the Act. The Cease and Desist Order directed Respondent not to perform or allow any further unauthorized work at the site and to explain why it failed to obtain a permit prior to conducting the work. Complaint and Answer ¶ 12; Complainant's Prehearing Exchange ("C's PHE") Exhibit 4.

9. On May 20, 2008, the Corps issued a second written Cease and Desist Order to Respondent notifying it of violations of Section 301(a) of the Act, on the basis of observation of additional mechanized landclearing and redistribution of fill material in wetlands on the proposed Megan's Way subdivision on April 8 and May 8, 2008. Complaint and Answer ¶ 15; C's PHE Exhibit 5.

10. On December 2, 2009, at the request of Respondent, the Corps issued a Jurisdictional Determination concluding that, under a significant nexus analysis, wetlands and an estimated 5000 linear feet of tributary waters on the Property are "waters of the United States" and require a permit under Section 404 of the CWA prior to any deposition or redistribution of dredged or fill material into such waters. Complaint and Answer ¶ 16; C's PHE Ex. 6; C's PHE Ex. 11 pp. 1, 6; C's PHE Ex. 22 pp. 1, 6.

11. On September 30, 2010, EPA issued to Respondent an Administrative Order, Docket No. CWA-06-2010-2736, ordering Respondent to cease and desist any discharges of dredged or fill material into waters of the United States, to stabilize all disturbed areas, to apply

for an after-the-fact permit with the Corps, and if the permit is denied, to restore the wetlands to the natural hydrology and allow revegetation. Complaint and Answer ¶ 17; C's PHE Exhibit 7.

V. **Elements of Liability**

The Complaint alleges that on multiple dates between about April 2007 through May 2008, Respondent, without a permit from the Corps, caused the discharge of dredged and/or fill material from point sources, "in, on and to an eight acre tract on the subject property which was adjacent to, hydrologically connected to, and/or had a significant nexus to a navigable-in-fact body of water . . . and therefore, is a water of the United States . . . ." Complaint ¶ 3.

To meet its initial burden as to liability on a motion for accelerated decision, Complainant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law with respect to the following elements of liability for a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a): (1) Respondent is a "person," (2) who "discharged" a "pollutant," (3) from a "point source," (4) into "waters of the United States," (5) without a permit under Section 404 of the Act.

The first element of liability, that Respondent is a "person" under the Act is established by Undisputed Fact 1, *supra,* and the statutory and regulatory definitions of "person" which includes corporations. 33 U.S.C. § 1362(5), 40 C.F.R. § 232.2. Respondent admits that it did not have a permit under Section 404 of the Act. Undisputed Fact 7, *supra.* Therefore, the fifth element of liability is established. Respondent does not dispute that it "discharged" a "pollutant" on the Property from a "point source." The question presented is whether the Property contained "waters of the United States."

VI. "**Waters of the United States**"

A. **Complainant's Arguments**

Complainant's position is that waters on the Property meet the "significant nexus" standard under Justice Kennedy's concurring opinion in *Rapanos*, 547 U.S. at 719. Mot. at 7-8. Complainant asserts that the Property contains two types of jurisdictional waters (waters of the United States): (1) tributaries 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-RPW tributaries. Mot. at 7, citing C's PHE Exs. 11 and 22. Complainant explains that jurisdiction over these waters depends upon the existence of a "'significant nexus' between the wetlands and non-RPWs and the TNW." *Id.*, citing *Rapanos*, 547 U.S. at 779. Complainant cites to Justice Kennedy's test, that 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" the TNWs. *Id.*, quoting *Rapanos,* 547 U.S. at 780.

Complainant points out that "the Corps developed an analytical process" for determining whether a significant nexus exists, "reflected in the Approved Jurisdictional Determination Form." Mot. at 7. Complainant asserts that the Corps determined the existence of a significant nexus for wetlands and tributaries on Respondent's Property "[a]fter a careful analysis of the property using appropriate guidance, data and onsite observations." *Id.* Complainant relies on a jurisdictional determination ("JD") prepared by the Corps, as memorialized in an "Approved Jurisdictional Determination Form" ("original JD Form," C's PHE Ex. 11), and a corrected "Approved Jurisdictional Determination Form" prepared on September 3, 2013 ("JD Form," C's PHE Ex. 22) to correct an error in the original JD Form. In addition, Complainant refers to a map of the Property prepared by the Corps showing which wetlands and non-RPWs are jurisdictional waters, and areas where unauthorized activities impacted such waters ("JD map," C's PHE Ex. 6). Mot. at 8. The jurisdictional waters are described in the JD Form as eight acres of wetlands and 5,000 linear feet of non-wetland, non-RPWs that flow directly or indirectly into TNWs. C's PHE Ex. 22, at 1.

The JD Form indicates that water from the wetland and unnamed tributary on the Property flows through three other tributaries before entering the TNW, which is Colyell Bay/Amite River, and that the latter is 10 to 15 aerial or river miles away from the wetland and unnamed tributary. C's PHE Exs. 11, 22 at 1, 2, 4. The flow route to the TNW is described by the JD Form as "[w]etland to unnamed tributary (non-RPW) to Dick Hill Branch (seasonal RPW) to Middle Colyell Creek to Colyell Creek to Colyell Bay/Amite River." *Id.* at 2. The JD Form also states that a relatively permanent water ("RPW") is one aerial mile or less from the unnamed tributary. *Id.* In other words, the wetland "is adjacent to a non-RPW onsite" and "the non-RPW is an RPW in its lower reaches." *Id.* at 5. The JD Form states further:

> Floodwater storage and sedimentation and pollution retention functions ac[c]rue [sic] in wetlands here; remaining pollutants enter the non-RPW and 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.

Id. The Corps' JD Form then concludes that, in satisfaction of the significant nexus standard as articulated by Justice Kennedy in *Rapanos*, "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.*

Complainant characterizes the wetland delineation submitted by Respondent, dated October 2007 and performed by contractor Gulf South Research Corporation ("GSRC"), as

insufficient in scope and grossly inaccurate. Mot. at 8, 9. Complainant also challenges Respondent's allegations that it relied in "good faith" on GSRC's wetland delineation to avoid destroying jurisdictional wetlands. Mot. at 8, quoting R's PHE at 3. Complainant asserts that GSRC collected data from only three points on the Property, only one of which was in a wetland, to support its conclusion that 0.54 acres of wetlands and 856 linear feet of tributaries were potential waters of the United States. *Id.* In particular, Complainant quotes and emphasizes language in the GSRC delineation stating that "GSRC's opinion may not necessarily reflect that of the [Corps]," does not relieve any legal obligation to consult with the Corps and "should be verified by the [Corps]" and that a permit may be required before performing any dredging, filling, or construction. *Id.* To emphasize Respondent's need to consult the Corps, Complainant references a map prepared by GSRC in February 2009 in which "GRSC's [sic] estimate for potential waters of the United States increased exponentially" to 6,199 feet and 15 acres of wetlands. Mot. at 9; C's PHE Ex. 15 Figure 4. Complainant argues that Respondent's claim that alteration of wetlands was minimal and resulted in no net loss of wetlands is clearly false, citing to the Corps' map. Mot. at 8.

B. <u>Respondent's Arguments</u>

Respondent's Opposition is a bit unclear as to whether liability for the alleged violations is disputed, in that the "Conclusion" section begins by stating "[u]ndeniably, Respondent committed some violations in his work at Megan's Way . . . .," but later states:

> Genuine issues of material fact exist in whether there is a significant nexus sufficient for the Corps to exercise jurisdiction over the isolated wetlands near the non-relatively permanent waters or over the RPWs themselves, and whether traditionally navigable waters are at all actually affected by Respondent's work. Complainant states a complex theory . . . , but all of the assumptions given there are refutable. Once Respondent has had the opportunity to traverse the declarations and seek an expert to dissect them, the ALJ will be better able to determine whether the suspension of molecules in the RPWs actually reach the TNW in measurable or even discernable volumes.

Opp. at 4-5. The latter statements will be taken as Respondent's position.

Respondent contends that the statement in the JD Form that the alleged wetlands provide a direct and acute contribution to the chemical, physical and biological makeup of the TNW raises an issue of fact "as to the effect – including its existence, directness and acuteness – on the TNW of any operation of Respondent." Opp. at 2. Respondent argues that it has the right to question the methodology of the Corps' analysis and retain an expert witness to challenge the conclusion. *Id.*

Respondent asserts that GSRC, who prepared the wetlands delineation report, was "a reputable firm approved by the Corps." Opp. at 2. Respondent argues that it stopped work on the site in July 2007 and then relied on the report to its detriment, resuming work on the site in October after receiving the draft report in September. Opp. at 2. Respondent asserts that it

"roped off the area identified as wetlands and went about clearing, grubbing and ditching for its subdivision." Opp. at 4.

Attached to Respondent's Opposition to the motion is a Declaration of Gordon L. "Paco" Swain, Jr. He states in his Declaration that he ordered a wetlands assessment from Harris Environmental Services, which indicated the existence of approximately one to two acres of wetlands isolated to the interior of the property and not subject to Corps jurisdiction "according to pre-Rapanos testing." Swain Decl. ¶ 2. He states that he submitted that report to the Corps with a request for a Jurisdictional Determination, and when he heard nothing from the Corps, he began initial clearing, grubbing and minor ditching in June 2007. *Id.* ¶ 4. When Mr. Nethery telephoned him, he "informed Mr. Nethery that having waited three months for feedback from the Corps, "we had marked off the wetland areas indicated by the consultant and began clearing outside these areas." *Id.* ¶¶ 4, 5. Mr. Swain states that in July 2007, he contracted with GSRC for "an independent post-Rapanos wetlands testing." *Id.*¶ 5. After he received the GSRC report in September 2007, showing about a half acre of wetland on the Property, he completed clearing, grubbing and ditching of the subdivision. *Id.* ¶ 6.

C. **Discussion**

Complainant's burden is to show that there are no genuine issues of fact, and that it is entitled to judgment as a matter of law, with respect to whether wetlands on the Property meet Justice Kennedy's significant nexus test: that they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of" the TNW, namely, the Colyell Bay or Amite River. *Rapanos*, 547 U.S. 759, 780 (Kennedy, J., concurring). On the other hand, "'if there is a chance that a reasonable factfinder would not accept'" Complainant's "'necessary propositions of fact,'" then it is not appropriate to grant the motion. *Donovan*, 661 F.3d at 185 (quoting *Southeastern Pa. Transp. Auth.*, 479 F.3d at 238).

The Corp's determination that the wetlands on the Property meet this test, as shown on the JD Form, is not the end of the inquiry as to whether Complainant has met its burden. The Corp's jurisdictional determination that a significant nexus exists is a matter of statutory interpretation, a legal determination which is neither binding nor given deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984). *Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 296 and n. 10 (4th Cir. 2011) ("*Precon*") (jurisdictional determination is based on a guidance document rather than a formal rule and thus entitled "at most" to deference under *Skidmore v. Swift*, 323 U.S. 134 (1944), with level of persuasiveness dependent on factors such as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements" *Skidmore*, 323 U.S. at 140)); [2] *cf., Ocean State Asbestos Removal, Inc.*, 7

[2] Rather than issuing a formal rule to implement the terms of the *Rapanos* decision, EPA and the Corps issued a guidance document entitled U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decisions in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008). This guidance document provides the underlying rationale upon which the completion of individual JDs are based, and the general JD form was revised based upon the new guidance. *Id.* at 4, 12. On April 21, 2014, the Corps and EPA jointly published a proposed rule at 79 Fed. Reg. 22188.

E.A.D. 522 n. 22, 1998 EPA App. LEXIS 82 (EAB 1998)(principle of court giving deference under *Chevron* to the agency's interpretation of a statutory provision does not apply to the Environmental Appeals Board because it serves as final decisionmaker for the agency).

The initial inquiry is whether the materials cited by Complainant in its Motion are sufficient to show that wetlands on the Property "significantly affect the chemical, physical, and biological integrity of" Colyell Bay or the Amite River. The analysis starts with a review of case law addressing the sufficiency of evidence under Justice Kennedy's significant nexus test.

1. <u>Caselaw on sufficiency of evidence to demonstrate significant nexus</u>

In *United States v. Donovan,* 661 F.3d 174 (3d Cir. 2011), *cert. denied,* 132 S.Ct. 2409 (2012), the Third Circuit Court of Appeals upheld summary judgment in favor of the Government, holding that Justice Kennedy's significant nexus test was met where the Government had presented two expert scientific reports in support of its motion. The scientists who prepared the report used a variety of methods to map stream channels on an around the property at issue to demonstrate that they were perennial. The scientists also examined the physical, chemical and biological connections between the wetlands on the property and downstream waters. They analyzed hydrological connections to downstream waters, the wetlands' potential for filtering pollutants, and the wetlands' role in the aquatic system for fish and invertebrates. For example, they added dissolved bromide and dye to the wetlands and measured levels downstream, conducted studies demonstrating that the wetlands help sequester pollutants from downstream waters, and demonstrated that the wetlands are important sources of energy and carbon for downstream habitats. The court noted that the distance from the property at issue to the area where the waters become tidal was 2.5 miles. 661 F.3d at 187.

The Sixth Circuit in *United States v. Cundiff,* 555 F.3d 200 (6th Cir. 2009) affirmed summary judgment in favor of the Government, finding that it met the significant nexus test on the basis of qualitative, rather than quantitative, physical evidence. The Government presented expert testimony that the particular wetlands performed significant ecological functions in relation to the TNW and the tributaries flowing into it, including water storage, filtering of acid runoff and sediment from the nearby mine, and providing an important habitat for plants and wildlife. The court also considered evidence that the alterations to the wetlands increased flooding in the TNW and caused runoff to bypass wetlands and flow more directly into the tributaries, causing sediment accumulation in the TNW and significantly affecting aquatic food webs. 555 F.3d at 211. The court noted that laboratory analysis of soil and water samples was not required to establish a significant nexus. *Id.*

Summary judgment in favor of the Corps was reversed by the Fourth Circuit Court of Appeals where it found that the Corps' record for the jurisdictional determination did not include sufficient physical evidence, quantitative or qualitative, to support the Corps' conclusion that a significant nexus existed. *Precon,* 633 F.3d at 296-297. The court discussed the evidentiary requirements of Justice Kennedy's significant nexus test, described as "a flexible ecological inquiry into the relationship between the wetlands at issue and traditional navigable waters." 633 F.3d at 294 (citing *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring)). The court noted that it requires "some evidence of both a nexus and its significance," such as "documentation of 'the

significance of the tributaries to which the wetlands are connected,' a 'measure of the significance of [the hydrological connection] for downstream water quality,' and/or 'indication of the quantity and regularity of flow in the adjacent tributaries.'" *Id.* at 294 (quoting *Rapanos* at 784, 786). The Fourth Circuit held that measures of water storage capacity, indicating potential flow rates of that tributary, without any measurements of actual flow showing typical or various flow rates, were insufficient. *Id.*

Even if flow were sufficiently documented, the Fourth Circuit continued, where the wetland was about seven miles from any navigable water, information must be provided regarding the wetlands' or tributary's significance, in regard to the TNW's condition. *Id.* at 294-295. The court found that the Corps' documentation was insufficient as to whether the wetland functions were significant for the TNW; it did not address, for example, whether the TNW had high levels of nitrogen or sedimentation, or was prone to flooding. *Id.* at 295. The court emphasized the importance of fully documenting the significance of the wetlands' effects on navigable water particularly where there is significant distance between them, noting with approval the Corp's guidance stating that "[a]s the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with traditional navigable water." *Id.* at 296. Based on Justice Kennedy's opinion "drawing a critical distinction between wetlands with 'significant' effects versus only 'insubstantial' effects on navigable waters," (*Rapanos,* 547 U.S. at 786 (Kennedy, J., concurring)), the fundamental rationale of the *Precon* decision is that the significance of the nexus depends not only on the functions and flows of the upstream wetlands and tributaries, but also on their impact on the TNW.

The Environmental Appeals Board found that the significant nexus test was met where evidence showed that the wetlands perform various ecological functions and prevent flooding and erosion, reduce the quantity of nitrates in the downstream TNW, and produce food for downstream organisms. *Smith Farm Enterprises, Inc.,* CWA Appeal No. 08-02, 2011 EPA App. LEXIS 10 at *104 (EAB, March 16, 2011). The evidence showed that the wetlands filtered nitrates and that nitrates were a significant problem in the Chesapeake Bay. *Smith Farm,* at *74, n.29, and at *103. Furthermore, the Board noted, the distance of 4,200 feet between the wetlands and downstream navigable-in-fact waters "falls within Justice Kennedy's category of wetlands where the 'proximity' to navigable-in-fact waters is sufficient to presume that adjacent wetlands would perform important functions for an aquatic system incorporating the downstream navigable waters." *Smith Farm,* 2011 EPA App. LEXIS 10 at *80, citing *Rapanos* at 780-81, n.31 (emphasis added). The Board noted that the Sixth Circuit's consideration in *Cundiff* of evidence of the actual impact on the TNW *from the unauthorized activities* "does not signify that this specific type of evidence is necessary to demonstrate a significant nexus under Justice Kennedy's jurisdictional test." *Smith Farm,* 2011 EPA App. LEXIS 10, at *96.

Multiple authorities who have considered these "significant nexus" issues have opined that the farther the distance from the wetlands to the TNW, the more documentation required to support a determination that the impacts of the wetlands on the TNW are truly significant. *Rapanos,* 547 U.S. at 786 (Justice Kennedy expressed concern about establishing the significance of wetlands that might be "located many miles from any navigable-in-fact water and

carry only insubstantial flow toward it"); *Precon*, 633 F.3d at 295-96 (quoting both Justice Kennedy and the EPA/Corps Joint Guidance, and noting the wetlands in *Precon* were considerably farther away than the one mile in the *Carabell* case, where the Supreme Court held more evidence was needed in order to establish jurisdiction); *Smith Farm,* 2011 EPA App. LEXIS 10, at *102; EPA/Corps Joint Guidance, *supra*, at 11 ("As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with traditional navigable waters."). The *Precon* court hypothesized a scenario where "wetlands next to a tributary with minimal flow might be significant to a river one quarter mile away, whereas wetlands next to a tributary with much greater flow might have only insubstantial effects on a river located twenty miles away." 633 F.3d at 294-95.

2. <u>Whether Complainant has demonstrated a significant nexus</u>

According to the Corps' JD Form, the wetlands and non-RPW tributaries on the Property are approximately 10 to 15 miles upstream from the TNW. C's PHE Exs. 11, 22, p.4, ¶ B.2.(d). Therefore, the Complainant must provide information regarding the wetland's or tributary's significance, in regard to the TNW's condition. *Precon,* 633 F.3d at 294-295. Complainant must show "some evidence of both a nexus and its significance," such as "documentation of 'the significance of the tributaries to which the wetlands are connected,' a 'measure of the significance of [the hydrological connection] for downstream water quality,' and/or 'indication of the quantity and regularity of flow in the adjacent tributaries.'" *Id.* at 294 (quoting *Rapanos* at 784, 786).

The Corps' JD Form includes information on the gradient and the estimated width, depth and average side slope ratio of the tributary adjacent to the wetlands on the Property, in relation to the top of the bank. The JD Form also notes that the tributary has intermittent flow, with at least 20 flow events per year, and that there is flow "during and after rain events after soil saturation, trickling between rain events, overbank flooding . . . during high water periods in Middle Colyell Creek." C's PHE Exs. 11, 22 p. 3. It lists pollutants of the tributary as "silt and clay sediments, oil & grease from roads, fertilizer, and pesticides, organics," and states that, as "observed by neighbors" it is a habitat for "mosquitofish, amphibians, reptiles, birds, mammals." *Id.* pp. 3-4. The JD Form summarizes the overall biological, chemical and physical functions of the wetlands on the Property as "flood storage, sediment retention, pollutant retention, carbon retention and contribution, nutrient recycling, wildlife habitat." *Id.* p. 5. The specific "significant nexus findings" on the JD Form state as follows:

> 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 the 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.

Id. Data sources reviewed for the JD as indicated on the JD Form include Department of Agriculture soil survey of the local parish, U.S. Geological Survey map and hydrogeologic atlas, aerial photographs from 1998 and 2004, Department of Agriculture National Water and Climate Center webpage, and general published scientific articles concerning hydrological connectivity, nitrogen loading, hypoxia, and effect of headwaters on downstream water quality and ecosystems. *Id.* at 7, 8.

The JD Form includes only estimates of the size of the bed and banks and number of flow events per year, and thus potential flow of the tributary, but only a very vague description of actual flow -- "flow" during and after rain events, "trickling" otherwise. This is not sufficient information as to the quantity and regularity of flow in the tributaries. The JD Form is devoid of information on the characteristics of the downstream TNW, and how it is actually impacted by the wetlands and non-RPW tributaries on Respondent's Property. It does not describe the current conditions of Colyell Bay or the Amite River, its pollutant loading, or its biological status, in order to be able to assess whether the chemical, physical and biological impacts from waters on Respondent's Property are significant. The literature referenced provides general information about wetlands and does not address the wetlands on the Property. The listing of general pollutants and general functions of the wetland do not give specific information regarding the wetlands at issue to indicate the significance of their function. The evidence of suspension of pollutants where the water exits the wetland, and the number and intensity of rain events only indicates that particles from the wetland may reach the TNW but does not address characteristics, factors or effects of the RPW tributaries. There is very little information about the three tributaries leading to Colyell Bay or the Amite River. Without such factual information, even if some molecules of materials from the upstream wetlands and tributaries may eventually reach the downstream TNW, there is no indication that the nexus is significant. The aerial photographs, maps and overlays attached to the JD Form merely show outlines of the Property, roads and tributaries thereon, and types of soil. C's PHE Ex. 11. The map for the JD merely shows locations and outlines of wetland areas and tributaries on the Property. C's PHE Ex. 6. It is concluded that the information on the JD Form and its attachments do not demonstrate that wetlands on the Property significantly affect the chemical, physical, and biological integrity of" Colyell Bay or the Amite River, and do not include sufficient information to meet the significant nexus test. Assuming *arguendo* that the deference standard under *Skidmore v. Swift*, 323 U.S. 134 (1944) should be applied to the JD Form, the Form along with its attachments does not show the requisite thoroughness in consideration that would support such deference.

Even if other information provided by Complainant in its Prehearing Exchange is considered, it fails to meet the test. Mr. William Nethery states in his Declaration, dated September 3, 2013 (attached to Motion to Supplement Prehearing Exchange) that he prepared the

original JD Form and JD Form and that he performed inspections of the Property. Complainant includes in its Prehearing Exchange photographs and field notes taken during inspections and a one-page Violation Report Form prepared by Mr. Nethery. C's PHE Exs 8, 10, 12. Complainant also includes a wetland inspection report, with only five sentences of notes of the inspection, prepared by Ms. Donna Mullins and several photographs taken during the inspection. C's PHE Ex. 9. The notes and documents provide very little information. The photographs, without explanations, cannot demonstrate that wetlands on the Property significantly affect the chemical, physical, and biological integrity of" Colyell Bay or the Amite River. The GSRC's 2007 and 2009 wetland delineations, maps and data do not include any additional information on Colyell Bay, the Amite River or the tributaries leading to it, or typical flow rates. C's PHE Exs. 14, 15.

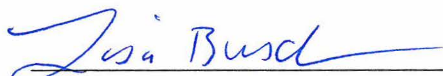
It is concluded that Complainant has not carried its burden to show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law that the wetlands on the Property are "waters of the United States" subject to jurisdiction under Section 404 of the CWA. Accordingly, Complainant's Motion for Accelerated Decision must be denied.

ORDER

1. Complainant's Motion for Accelerated Decision is **DENIED**.

2. Issues remain controverted as to liability and the appropriate penalty to assess for any violations found. Unless the parties achieve a settlement and file a Consent Agreement and Final Order resolving this matter beforehand, a hearing on the controverted issues in this matter will be scheduled.

3. The parties shall continue in good faith to attempt to settle this matter. Complainant shall file a Status Report as to the status of any settlement efforts on or before **October 10, 2014**.



M. Lisa Buschmann
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **Order Denying Complainant's Motion For Accelerated Decision,** dated September 9, 2014, was sent this day in the following manner to the addressees listed below:

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Staff Assistant

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Dated: September 10, 2014
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