

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

RECEIVED BY OALJ
2013 JUN 28 PM 3:01

In the Matter of § Docket No. CWA-06-2012-2712
§
Paco Swain Realty, L.L.C. §
a Louisiana Corporation, §
Respondent § COMPLAINANT'S
§ PREHEARING EXCHANGE

COMPLAINANT'S PREHEARING EXCHANGE

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

A. WITNESSES:

The Complainant may call the following witnesses at the hearing:

1. Brian W. Tutterow (expert witness) – Mr. Tutterow is a Project Manager / Environmental Scientist for Science Applications International Corporation ("SAIC"). SAIC was hired by EPA as a contractor to prepare a Wetland Determination Report for the property owned by Paco Swain Realty, L.L.C. ("Respondent") known as Louisiana Purchase Equestrian Estates ("subject property"), which is the property upon which the violations alleged in this

action occurred. Mr. Tutterow's testimony will include observations made during his on-site visit to the subject property and conclusions outlined in the Wetland Determination Report.

2. William R. Nethery (expert witness) – Mr. Nethery is a Senior Botanist in the Surveillance and Enforcement Section of the Regulatory Branch of the United States Army Corps of Engineers ("Corps"), New Orleans District. As part of his regular duties, Mr. Nethery inspected the subject property and analyzed reports and data relating to the subject property. Mr. Nethery's testimony will include observations made during his on-site visits to the subject property as well as conversations and/or correspondence with Respondent and/or persons acting on behalf of Respondent. Mr. Nethery's testimony may also include the rendering of an opinion upon the data and analysis provided through the Wetland Determination Report prepared by Mr. Tuttlorow of SAIC. Mr. Nethery's testimony will include his determination that certain wetlands on the subject property are waters of the United States subject to the jurisdiction of the Corps and the Clean Water Act.

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

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

5. Any witness named by Respondent.
6. Any rebuttal witness, as required.

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

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

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

B. EXHIBITS:

The Complainant may offer into evidence the following exhibits:

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
Complainant's Ex. 1	Administrative Complaint filed May 15, 2012
Complainant's Ex. 2	Respondent's Answer to Administrative Complaint dated February 27, 2013
Complainant's Ex. 3	Cease and Desist Order issued to Respondent on August 20, 2008
Complainant's Ex. 4	Wetland Delineation Report prepared by SAIC dated October 2010
Complainant's Ex. 5	Photographs taken by William Nethery during June 12, 2008 inspection
Complainant's Ex. 6	Email from B. Tutterow to D. Mullins dated October 6, 2010

Complainant's Ex. 7	Internal Tacking Sheet for Jurisdictional Determination prepared by William Nethery
Complainant's Ex. 8	Penalty Calculation Worksheet prepared by Donna Mullins
Complainant's Ex. 9	Letter from P. Swain to B. Nethery dated September 9, 2008
Complainant's Ex. 10	Notification Letter to Louisiana Department of Environmental Quality
Complainant's Ex. 11	Public Notice of Proposed Assessment of Clean Water Act Section 309(g) Class II Administrative Penalty and Opportunity to Comment
Complainant's Ex. 12	Resume of Brian Tutterow
Complainant's Ex. 13	Resume of William Nethery
Complainant's Ex. 14	Resume of Donna Mullins

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

C. PLACE FOR HEARING AND ESTIMATED TIME NEEDED:

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

D. ASSESSMENT OF CIVIL PENALTY:

STATUTORY FACTORS

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

\$11,000.00 per day for each day during which a violation continues, up to a maximum of \$157,500.00. For the period after January 12, 2009, EPA has the authority to assess against Respondent an administrative civil penalty not to exceed \$16,000.00 per day for each day during which a violation continues, up to a maximum of \$177,500. Based upon the facts alleged in the Complaint, and in accordance with the statutory penalty factors enumerated under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), Complainant is seeking a penalty of forty-five thousand dollars (\$45,000.00) against Respondent for discharging pollutants into waters of the United States.

PENALTY CALCULATION

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

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

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

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

On June 12, 2008, the Corps conducted an on-site inspection of the subject property and discovered the filling of wetlands without a permit, including the construction of a series of ditches designed to drain wetlands. On August 20, 2008, the Corps issued a written C&D Order to Respondent. On September 23 and 24, 2010, a contractor working for EPA performed a field evaluation of the subject property. The contractor's report, entitled *Louisiana Purchase Equestrian Estates Wetland Determination Report* ("Report"), noted that wetlands and tributaries were impacted by Respondent's activities at the site. The Report also noted that construction of ditches to drain on-site wetlands led to the destruction of an unknown acreage of wetlands.

In calculating the penalty, Complainant followed the Penalty Policy. As a threshold matter, for the reasons discussed below, Complainant determined that the violations involve a medium degree of environmental and compliance significance and assigned the mid-level multiplier (\$1,500.00) under the Penalty Policy.

Complainant assigned a low value (2 of 20) for both the environmental impact and impacts to the aquatic environment based upon Respondent's impact to 1.35 acres of wetlands and 2,730 linear feet of stream and reduction in the overall wetlands acreage from construction of drainage ditches. Complainant assigned a low value (2 of 20) for the uniqueness factor due to the medium quality wetlands impacted by Respondent's activities. Complainant assigned a low

value (2 of 20) for off-site impacts due to downstream sedimentation caused by Respondent's activities. Complainant assigned a low-to-moderate value (5 of 20) to the duration factor because Respondent discharged on multiple days, and Respondent has allowed the discharge to remain in place and continues to utilize the ditches to drain wetlands on the subject property.

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

Prior experience and knowledge looks as to whether Respondent knew or should have known of the need to obtain a Section 404 permit or of the environmental consequences of the action. Respondent had knowledge of the environmental consequences (destruction of wetlands) as evidenced by Respondent's construction of multiple ditches, the sole purpose of which is to drain wetlands. Respondent directed the land development activities at the subject property, thus Respondent had a high degree of control over the actions. Respondent's motivation for undertaking the actions resulting in violations of the CWA was to maximize the monetary value of the property by destroying wetlands that rendered portions of the property inappropriate for residential construction. Complainant considered these factors in light of the Penalty Policy and assigned a low value (5 of 20) to Respondent's degree of culpability.

Complainant considered Respondent's compliance history and assigned a low value (2 of 20) for Respondent's failure to comply with C&D Orders at a similar site owned and operated by Respondent.

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

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

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

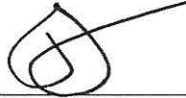
Finally, under Section 309(g)(3) of the CWA, 33 U.S.C. 1319(g)(3), EPA will consider **such other matters as justice may require**. This catch-all provision can be used to increase or mitigate the penalty. Complainant did not adjust the penalty under this provision.

By applying the Penalty Policy in the manner discussed above, Complainant arrived at a penalty value of 30 (out of 180) with a multiplier of fifteen hundred dollars (\$1,500.00) for a gravity-based penalty of forty-five thousand dollars (\$45,000).

E. PAPERWORK REDUCTION ACT APPLICABILITY

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

Respectfully submitted,



Tucker Henson
Assistant Regional Counsel (6RC-EW)
Office of Regional Counsel
U.S. EPA, Region 6
1445 Ross Ave., Ste. 1200
Dallas, TX 75202-2733
henson.tucker@epa.gov
Tel.: (214) 665-8148
Fax.: (214) 665-2182

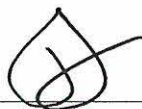
CERTIFICATE OF SERVICE

I certify that the original of the foregoing COMPLAINANT'S PREHEARING EXCHANGE was filed with the **Headquarters Hearing Clerk**, U.S. Environmental Protection Agency, Office of Administrative Law Judges, 1300 Pennsylvania Avenue, NW, M-1200, Washington, DC 20004, and a true and correct copy was sent to the following on this 27th day of June, 2013, in the following manner:

VIA FIRST CLASS U.S. MAIL:

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