UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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

MOTION FOR ACCELERATED DECISION

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

DATED this 6th day of September, 2013.

RESPECTFULLY SUBMITTED,

Tucker Henson
Assistant Regional Counsel (6RC-EW)
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CERTIFICATE OF SERVICE

I certify that on the 6th day of September, 2013, the original of the foregoing MOTION FOR ACCELERATED DECISION, including Complainant's Memorandum in Support of Complainant's Motion for Accelerated Decision and Declarations of Donna Mullins and William Nethery, sent via UPS (next business day) to and filed with the **Headquarters Hearing Clerk**, U.S. Environmental Protection Agency, Office of Administrative Law Judges, 1300 Pennsylvania Avenue, NW, M-1200, Washington, DC 20004, and a true and correct copy was sent to the following on this 6th day of September, 2013, in the following manner:

VIA FIRST CLASS U.S. MAIL:

M. Lisa Buschmann, Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
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Date: 9/6/13 _____

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

COMPLAINANT'S MEMORANDUM IN SUPPORT OF MOTION FOR ACCELERATED DECISION

JURISDICTION

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

STANDARD OF REVIEW

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

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

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

PROCEDURAL HISTORY

Prohibition on Discharge into Waters of the United States

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

Description of Property

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

Administrative Enforcement History

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

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

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

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

ARGUMENT

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

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

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

A. Respondent is a "person."

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

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

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

C. Respondent "discharged a pollutant."

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

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

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

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

Respondent deposited the cleared vegetation (a solid waste) into jurisdictional wetlands. *Id.* Each of these activities is a "discharge of a pollutant" within the meaning of the Act.

D. Respondent did not have a permit.

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

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

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

The subject property contains (1) tributaries that are classified as non-relatively permanent waters ("non-RPWs") that flow directly or indirectly into traditionally navigable waters ("TNW") and (2) wetlands adjacent to these non-RPWs. CPE Exs. 11, 22[1]. Therefore, the Corps' jurisdiction over these waters is dependent upon the existence of a "significant nexus" between the wetlands and non-RPWs and the TNW. *Rapanos v. United States Army Corps of Eng'rs* ("*Rapanos*"), 547 U.S. 715, 779 (2006). A "significant nexus" is present "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other [TNWs]." *Id.* at 780.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

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

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

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

ATTACHMENT A

Declaration of Donna Mullins

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
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Paco Swain Realty, L.L.C.,	§	
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	§	Declaration of
Respondent	§	Donna Mullins

DECLARATION OF DONNA MULLINS

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

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

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

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

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

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

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

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

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

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

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

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

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

10. I considered the circumstances surrounding the violation. On June 15, 2007, the Corps conducted an on-site inspection of the subject property and discovered the filling of wetlands without a permit, including the construction of a series of ditches designed to drain wetlands. The Corps issued a verbal Cease and Desist Order ("C&D Order") to a representative of Respondent at the site and later to Respondent. On August 22, 2007, the Corps issued a written C&D Order to Respondent. On April 8, 2008, the Corps conducted another on-site inspection of the subject property and discovered further filling of wetlands without a permit. The Corps issued a second verbal C&D Order on April 8, 2008 and a third verbal C&D Order on April 18, 2008. On May 8, 2008, I, in conjunction with the Corps, conducted an on-site

inspection of the subject property and discovered further filling of wetlands since the April 8, 2008 inspection. On May 20, 2008, the Corps issued a second written C&D Order to Respondent. On September 30, 2010, EPA issued an Administrative Order ("AO"), Docket No. CWA-06-2010-2736, ordering Respondent to cease further discharges, stabilize the property and either obtain an after-the-fact permit for the discharges or restore the jurisdictional wetlands on the subject property. Respondent has not complied with the AO.

11. I looked to the seriousness of the violations and the actual or potential harm resulting from the violations, including environmental harm. As a threshold matter, for the reasons discussed herein including, but not limited to, Respondent's persistent disregard for C&D Orders, I determined that the violations involve a high degree of compliance significance and assigned the highest level of multiplier, albeit at the lowest value ($3,000.00), due to the more moderate environmental significance of the violations.

12. I assigned a low value (1 of 20) for both the environmental impact and impacts to the aquatic environment based upon Respondent's filling of eight acres of wetlands. I assigned a low-to-moderate value (5 of 20) for the uniqueness factor due to the high quality wetlands impacted by Respondent's activities. I assigned a low value (2 of 20) for secondary or off-site impacts due to downstream sedimentation caused by Respondent's activities. I assigned a slightly higher value (5 of 20) to the duration of violation factor because Respondent continued to discharge in violation of the Act for an extended period (including after receiving multiple C&D Orders), and Respondent has allowed the discharge to remain in place and continues to utilize multiple cross channels to drain wetlands on the subject property.

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

14. Prior experience and knowledge looks as to whether Respondent knew or should have known of the need to obtain a Section 404 permit or the environmental consequences of the action. Respondent had actual knowledge of the need to obtain a Section 404 permit as evidenced by Respondent's receipt of multiple C&D Orders indicating that a Section 404 permit is required, yet Respondent continued to fill wetlands at the subject property. Respondent also had knowledge of the environmental consequences (destruction of wetlands) as evidenced by Respondent's construction of multiple ditches, the sole purpose of which is to drain wetlands. Respondent directed the land development activities at the subject property, thus Respondent had a high degree of control over the actions. Respondent's motivation for undertaking the actions resulting in violations of the CWA was to maximize the monetary value of the property by destroying wetlands that rendered portions of the property inappropriate for residential construction. I considered these factors in light of the Penalty Policy and assigned a high value (15 of 20) to Respondent's degree of culpability.

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

16. I assigned a moderate value (10 of 20) to the need for deterrence factor. Respondent's violation of C&D Orders indicates a proclivity to ignore regulatory structures and,

when considered alongside Respondent's multiple violations at similar properties, Respondent is likely to repeat the violations.

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

18. Finally, under Section 309(g)(3) of the Act, 33 U.S.C. 1319(g)(3), EPA will consider such other matters as justice may require. This catch-all provision can be used to increase or mitigate the penalty. The Penalty Policy looks to recalcitrance as an adjustment factor. Recalcitrance relates to Respondent's delay or refusal to comply with the law, to cease violating the law, to correct past violations or to cooperate with regulators once notice has been given that a violation occurred. The Penalty Policy specifically cites failure to comply with a C&D from the Corps as justifying an upwards adjustment of the penalty. Respondent continued to violate the Act after multiple verbal and written C&D Orders and failed to comply with an Administrative Order issued by EPA requiring Respondent to seek an after-the-fact permit or restore the subject property. Due to Respondent's violation of C&D Orders and failure to comply with the Administrative Order, Complainant adjusted the penalty upwards (25%) due to recalcitrance.

19. By applying the Penalty Policy in the manner discussed above, I arrived at a penalty value of 41 (out of 180) with a multiplier of three thousand dollars ($3,000.00) for a preliminary gravity-based penalty of one hundred twenty-three thousand dollars ($123,000). I

then adjusted the penalty upwards by 25% ($30,750.00) for a final penalty of one hundred fifty-three thousand, seven hundred and fifty dollars ($153,750.00).

Dated: 9/5/2013

Donna Mullins
U.S. EPA, Region 6

ATTACHMENT B

Motion to Supplement Complainant's Prehearing Exchange

Filed September 4, 2013