UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of	§	Docket No. CWA-06-2012-2712
	§	
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 forty-five thousand dollars ($45,000.00) 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 Declarations of Donna Mullins and William Nethery.

DATED this 6th day of September, 2013.

RESPECTFULLY SUBMITTED,

Tucker Henson
Assistant Regional Counsel (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
Tel.: (214) 665-8148
Fax: (214) 665-3177

CERTIFICATE OF SERVICE

I certify that on the 6th day of September, 2012, the original of the foregoing MOTION FOR ACCELERATED DECISION, including Complainant's Memorandum in Support of Complainant's Motion for Accelerated Decision and Declaration of Donna Mullins, was hand-delivered to and filed with the **Headquarters Hearing Clerk**, U.S. Environmental Protection Agency, Office of Administrative Law Judges, 1300 Pennsylvania Avenue, NW, Mail Code 1900R, Washington, DC 20460, and a true and correct copy was sent to the following on this 4th 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
1300 Pennsylvania Avenue, NW
Mail Code 1900R
Washington, DC 20460

Robert W. Morgan
Attorney at Law
212 North Range Avenue
Denham Springs, LA 70726

Date: 9/6/13 _____

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In the Matter of	§	Docket No. CWA-06-2012-2712
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Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	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

Paco Swain Realty, L.L.C. ("Respondent") owns a 200 acre tract in the State of Louisiana known as the Louisiana Purchase Equestrian Estates Subdivision ("subject property"). Complainant's Prehearing Exchange ("CPE") Ex. 1, 2. The subject property contains wetlands and tributaries of navigable waters, including wetlands considered waters of the United States ("jurisdictional wetlands"). CPE Exs. 4, 7. On multiple dates on or about June 2008 through September 2010, 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. 4–7. In addition, Respondent or other persons acting on Respondent's behalf constructed cross channels to drain jurisdictional wetlands on the subject property. CDE Ex. 4.

Administrative Enforcement History

On June 12, 2008, the Corps conducted an on-site inspection at the subject property and discovered the filling of wetlands and waters of the United States without a permit. CPE Exs. 3, 5. On August 20, 2008, the Corps issued a written Cease and Desist Order ("C&D Order") to Respondent. CPE Ex. 3. In September 2010, Mr. Brian Tutterow, an Environmental Scientist employed by Science Applications International Corporation ("SAIC") and working under contract for the United States Environmental Protection Agency, Region 6 ("EPA"), inspected the site and prepared a Wetland Determination Report dated October 18, 2010. CPE Ex. 4.

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 ditches to drain wetlands at the subject property, as exhibited by the road construction and mechanized land clearing on the subject property as well as heavy equipment tracks at the sites of the violations. CPE Exs. 3–5, 9. 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 drainage ditches

to drain wetlands. CPE Exs. 3–5. 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 creek with dry land. CPE Exs. 3–5. Construction of the drainage ditches required the soil and rock in place to be disturbed and redeposited in a different location within the jurisdictional wetlands and other waters of the United States. CPE Ex. 4. Sidecasting of dredged material is clearly seen in the photos (Exhibit 4, photos 44 and 45), and additional drainage ditches impacting Beaver Branch West Colyell Creek were constructed in 2009 and 2010. CPE Exs. 4, 6. Mechanized land clearing activities in wetlands also caused the redeposition of dredged material. CPE Ex. 3–5. 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 CREEK TO WHICH RESPONDENT DISCHARGED POLLUTANTS ARE WATERS OF THE UNITED STATES.

A. Beaver Branch West Colyell Creek is a water of the United States.

A "water of the United States" includes "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 subject to the ebb and flow of the tide." 40 C.F.R. §§ 122.2, 232.2. These waters are generally referred to as traditionally navigable waters ("TNWs"). "Waters of the United States" also includes tributaries of TNWs. *Id.* Colyell Bay is a TNW that is part of the Lake Pontchartrain basin. Beaver Branch West Colyell Creek ("BBWC Creek") is tributary of Colyell

Bay. Declaration of William Nethery ("Nethery Declaration") (Attachment A), 2. Thus, BBWC Creek is a "water of the United States."

B. The adjacent wetlands on the subject property are waters of the United States.

The subject property contains (1) a relatively permanent water ("RPW") (BBWC Creek) that is a water of the United States, (2) wetlands adjacent to an RPW, and (3) wetlands not adjacent to a RPW. Nethery Declaration, 2; CPE Ex. 4. Wetlands in the southern and northwestern portions of the subject property are adjacent to a RPW, thus a significant nexus determination is not required for those wetlands. *Id.*

The Supreme Court has held that "waters of the United States" includes wetlands adjacent to a TNW. *United States v. Riverside Bayview Homes, Inc.* ("*Riverside Bayview*"), 474 U.S. 121, 135 (1985). In *Rapanos v. United States Army Corps of Eng'rs* ("*Rapanos*"), a plurality of the Court determined that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. 715, 739 (2006). The plurality defined "adjacent to" as "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right[.]" *Id.* at 742. Thus "establishing that wetlands […] are covered by the Act requires two findings: first, that the adjacent channel contains a 'water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water[.]" *Id.* at 742. Justice Kennedy, concurring in part, criticized the plurality's requirement for a "continuous

surface connection" and established the "significant nexus" standard. *Id.* at 768–777, 780. Either standard is sufficient to demonstrate jurisdiction.[1]

BBWC Creek is both adjacent to and shares a surface connection with wetlands impacted by Respondent's activities. BBWC Creek is an RPW connected to a TNW (Colyell Bay) via another RPW (West Colyell Creek), and the adjacent wetlands have a continuous surface connection to BBWC Creek. Nethery Declaration 5, 6, 8. As such, the adjacent wetlands meet the more restrictive standard established by the *Rapanos* plurality and are considered waters of the United States. Since the plurality standard is met, a significant nexus need not be established for the adjacent wetlands.

C. Impacts to non-adjacent wetlands

Due to resource limitations, the Corps did not perform a significant nexus determination for non-adjacent wetlands on the subject property. Typically, a jurisdictional determination ("JD") is requested by a property owner, then the Corps provides guidance to the owner's consultant regarding what additional field data and mapping is needed to complete the JD, including the significant nexus analysis. For larger or commercial tracts, the Corps typically requests data concerning vegetation, soils and hydrology in order to complete the JD.

Respondent did not request a JD or seek to collect sufficient data to determine whether non-adjacent wetlands meet the significant nexus standard; therefore, the Corps did not complete an approved JD or significant nexus determination for non-adjacent wetlands. Complainant is not seeking an Accelerated Decision as to impacts to non-adjacent wetlands,[2] and demonstrated

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[1] *See* EPA & the Corps, Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States (June 5, 2008), available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf.

[2] Respondent should not interpret this section to mean non-adjacent wetland are not jurisdictional and can be filled without a 404 permit. Respondent should determine whether a significant nexus exists prior to conducting

impacts to waters of the United States and adjacent wetlands are sufficient to support the proposed penalty.

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)

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additional activities in non-adjacent wetlands on the subject property, and it is recommended that Respondent consult with the Corps prior to impacting non-adjacent wetlands.

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 $45,000.00 for violations of the Act.

Complainant hereby incorporates by reference the declaration of Donna Mullins (Attachment B). This declaration sets for the rationale for EPA's determination of the proposed penalty amount of forty-five thousand dollars ($45,000.00) 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 the need to deter Respondent and the regulated community from engaging in similar activities. It is also notable that, although Complainant erroneously failed include the allegation in the Complaint, evidence presented in this matter indicates that Respondent continued construction activities directly impacting waters of the United States *after* receipt of a C&D Order, specifically creating drainage cuts across BBWC Creek. CPE Exs. 4, 6. EPA respectfully requests that the Presiding Officer assess a penalty of forty-five thousand dollars ($45,000.00) 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. For violations occurring since January 13, 2013, a Class II civil penalty my not exceed $16,000.00 per day up

to a maximum of $177,500.00. *Id.* Courts have determined that language similar to "each day during which the violation continues" 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 at least 1.35 acres of wetlands wetlands and 2,730 linear feet of waters of the United States. CPE Ex. 11, 22. Inspections of the site revealed ten discrete impacts to wetlands and eleven separate ditches impacting a water of the United States, as demonstrated by the Figures/maps attached to the Wetland Delineation. CPE Exs. 4, 6. Photographs taken during inspections demonstrate construction activities utilizing heavy equipment occurring in jurisdictional wetlands and other waters of the United States. CPE Exs. 4, 5. 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.[3]

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[3] 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.

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 June 2008 through September 2010, 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, the appropriate civil penalty to be assessed is forty-five thousand dollars ($45,000.00). 40 C.F.R. § 22.27(b).

ATTACHMENT A

Declaration of William Nethery

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
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Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	Declaration of
Respondent	§	William Nethery

DECLARATION OF WILLIAM NETHERY

In support of its Motion to Supplement Complainant's Prehearing Exchange, the Complainant, the United States Environmental Protection Agency, Region 6 ("EPA"), hereby submits the following declaration of William Nethery, Senior Botanist, United States Army Corps of Engineers ("Corps").

I, William Nethery, make the following statement truthfully from personal knowledge and review of Corps documents in accordance with 28 U.S.C. § 1746:

1. I make this statement in my capacity as Senior Botanist employed in the Regulatory Branch, Surveillance and Enforcement Section of the Corps, New Orleans District.

2. I have been employed with the Corps from 2001 to the present. In my capacity as Senior Botanist, I regularly conduct on-site inspections and determine whether wetlands and other waters on the property are waters of the United States.

3. The statements included herein are based upon a review of my notes, files maintained by the Corps and the United States Environmental Protection Agency ("EPA") and my recollection from inspections of the property owned by Respondent known as the Louisiana Purchase Equestrian Estates Subdivision ("subject property") in Walker, Louisiana, the activities upon which form the basis for this action

4. On June 12, 2008, I conducted an on-site inspection of the subject property and observed evidence of mechanized land clearing and redistribution of fill material and deposition of hauled fill relative to ditching and road construction. Specifically, I observed locations where dredged and fill material was deposited into wetlands, including the construction of roads through wetlands. I also observed several locations along Beaver Branch West Colyell Creek ("BBWC Creek") where drainage ditches were constructed to and into BBWC Creek, causing the deposition of dredged and fill material into the creek.

5. During my inspection, I observed water in BBWC Creek. Based upon my knowledge and experience, I believe BBWC Creek is a relatively permanent water ("RPW"). BBWC flows into another RPW known as West Colyell Creek which flows into Colyell Bay, a traditionally navigable water. Under current Corps policy and regulations, BBWC Creek is considered a water of the United States.

6. During my inspection, I observed evidence of a surface water connection (drainage patterns and sediment deposition) between the wetlands in the southwestern portion of the subject property and BBWC Creek whereby water from the wetlands was flowing into BBWC Creek. I also observed evidence of mechanized land clearing and the deposition of dredged and fill material into areas of these wetlands. Based upon my notes, files and recollection, I observed at least 3 discrete areas where fill was placed into a wetland with a surface water connection to BBWC Creek.

7. During my inspection, I observed areas where drainage ditches were constructed to and into BBWC Creek. I observed evidence that dredged and/or fill material was deposited into BBWC Creek as a result of the construction of these drainage ditches. Based upon my

notes, files and recollection, I observed at least 6 discrete areas of BBWC Creek where dredged and/or fill material was deposited into BBWC Creek.

8. During my inspection, I observed evidence of a surface water connection (drainage patterns and sediment deposition) between the wetlands in the northwestern portion of the subject property and BBWC Creek whereby water from the wetlands was flowing into BBWC Creek. I also observed evidence of mechanized land clearing and the deposition of dredged and fill material into areas of these wetlands. Based upon my notes, files and recollection, I observed at least 2 discrete areas where fill was placed into a wetland with a surface water connection to BBWC Creek.

9. I consulted the document entitled *Louisiana Purchase Equestrian Estates Wetland Determination Report* prepared by SAIC while under contract by EPA. Although the document somewhat underestimates the wetlands at the subject property, the document reflects the same or similar violations that I recall from my on-site inspection, and Figures 4 and 7 (maps depicting ditching activities and locations of wetlands impacts) are representative of the locations where I observed wetlands impacts.

Dated: 9-5-13

William R. Nethery USACE
William Nethery
U.S. Army Corps of Engineers

ATTACHMENT B

Declaration of Donna Mullins

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of	§	Docket No. CWA-06-2012-2712
	§	
Paco Swain Realty, L.L.C.,	§	
a Louisiana Corporation,	§	
	§	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 Louisiana Purchase Equestrian Estates 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, contractors working on behalf of the 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 June 2008 to September 2010. 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 violations occurring from March 4, 2004 to January 12, 2009, the statutory maximum penalty is $11,000.00 per day per violation up to a maximum of $157,500.00. 33 U.S.C. § 1319(g)(2)(B), 40 C.F.R. § 19.4. For violations occurring after January 12, 2009, the statutory maximum penalty is $16,000.00 per day per violation up to a maximum of $177,500.00. The proposed Class II penalty in this matter is forty-five thousand dollars ($45,000.00).

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 12, 2008, the Corps conducted an on-site inspection of the subject property and discovered the filling of waters of the United States without a permit, including the construction of a series of ditches designed to drain wetlands and affecting a creek running through the property. The Corps issued a written Cease and Desist Order ("C&D Order") to Respondent on August 20, 2008. 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 Delineation Report* ("Wetland Delineation"), noted that wetlands, tributaries and creeks were impacted by Respondent's activities at the site. The Wetland Delineation also noted that construction of ditches to drain on-site wetlands led to the destruction of an unknown acreage of wetlands.

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, I determined that the violations involve a medium degree of compliance significance and assigned the mid-level level multiplier ($1,500.00) under the Penalty Policy.

12. I assigned a low value (2 of 20) for both the extent of aquatic environmental impact and severity of 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. I assigned a low value (2 of 20) for the unique/severity of affected resources factor due to the medium quality of 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 discharged on multiple days, and Respondent has allowed the fill to remain in place and continues to utilize the ditches to drain wetlands on the subject property.

13. I looked at 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 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 low value (5 of 20) to Respondent's degree of culpability

15. With respect to Respondent's culpability, it is worth noting that, based upon additional review of the Wetland Delineation and other evidence, I believe the assigned value is likely too low. Specifically, the contractor engaged to perform the Wetland Delineation noted additional work impacting Beaver Branch West Colyell Creek that was performed *after* Respondent's receipt of the C&D Order from the Corps. This demonstrates that Respondent had actual knowledge of the need for a permit prior to performing this later work, indicating a higher degree of culpability and calling for an increased value for the culpability factor; however, I did not consider this information when preparing the penalty calculation.

16. 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 and failure to comply with C&D Orders at similar sites owned and operated by Respondent (Meadow Lake and Megan's Way subdivisions).

17. I assigned a moderate value (10 of 20) to the need for deterrence factor. Respondent's violation of C&D Orders at a similar site (Megan's Way) 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.

18. 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.

19. 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. Although I did not adjust the penalty for this provision, it is again worth noting that the information discussed in paragraph 15, if I had considered it prior to penalty calculation, would likely have caused an upward adjustment for recalcitrance, as the Penalty Policy specifically cites failure to comply with a C&D Order as justifying an upwards adjustment of the penalty.

20. By applying the Penalty Policy in the manner discussed above, I 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).

Dated: 9/5/2013

Donna Mullins
U.S. EPA, Region 6