



UNITED STATES  
 ENVIRONMENTAL PROTECTION AGENCY  
 BEFORE THE ADMINISTRATOR

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 ENVIRONMENTAL PROTECTION AGENCY  
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IN THE MATTER OF )  
 )  
 DUVALL DEVELOPMENT CO., INC., )  
 and JEFFREY H. DUVALL, ) DOCKET NO. CWA-04-2010-5505  
 )  
 RESPONDENTS )

PREHEARING ORDER

As you previously have been notified, I have been designated by the August 9, 2010, Order of the Chief Administrative Law Judge to preside in the above captioned matter.<sup>1/</sup> This proceeding arises under the authority of Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.<sup>2/</sup> The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(b), 40 C.F.R. § 22.18(b), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding.

The file before me reflects that the parties have engaged in settlement discussions before a third party neutral for three months but have not reached a settlement in this case. Thus, the

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<sup>1/</sup> The Chief Administrative Law Judge issued this Order after Judge Nissen terminated the ADR process and returned the matter to the Chief Judge.

<sup>2/</sup> The Complaint in this matter was filed March 12, 2010. The record indicates that the Answer was filed April 9, 2010.

parties shall strictly comply with the requirements of this Prehearing Order and prepare for a hearing. The parties are encouraged to continue to engage in settlement negotiations during and after preparation of their prehearing exchange. However, the parties are advised that extensions of time will not be granted absent a showing of good cause. The pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failing to comply with the requirements or to meet the schedule set forth in this Order.

The following requirements of this Order concerning prehearing exchange information are authorized by Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). As such, it is directed that the following prehearing exchange takes place:

1. Each party<sup>3/</sup> shall submit:
  - (a) the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness's expected testimony, or a statement that no witnesses will be called; and
  - (b) copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondents'" exhibits,<sup>4/</sup> as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1"); and

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<sup>3/</sup> Respondents Duvall Development Co., Inc. ("Duvall Development") and Jeffrey H. Duvall ("Jeffrey Duvall") filed a joint Answer to Complaint and Request for Hearing ("Answer") and are represented by the same counsel. Respondents may choose to file a joint prehearing exchange, or each Respondent may file separately.

<sup>4/</sup> If Respondents Duvall Development and Jeffrey Duvall choose to file separate prehearing exchanges, the proposed exhibits should be identified as "Respondent Duvall Development's" or "Respondent Jeffrey Duvall's" exhibits.

- (c) a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.

See Sections 22.19(a), (b), and (d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), (b), and (d). See also Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

2. This proceeding is for the assessment of a penalty and Complainant has not specified a proposed penalty.<sup>5/</sup> Accordingly, the parties shall include in their prehearing information exchange all factual information they consider relevant to the assessment of a penalty.
3. Within fifteen (15) days after Respondent files his prehearing information exchange, Complainant shall file a document specifying a proposed penalty and explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.
4. If either Respondent intends to take the position that he/it is unable to pay the proposed penalty or that payment will have an adverse effect on his ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.
5. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501 et seq., applies to this proceeding; whether there is a current Office of Management and Budget control number involved herein; and whether the provisions of Section 3512 of the PRA are applicable in this case.

See Section 22.19(a)(3) of the Rules of Practice, 40 C.F.R. § 22.19(a)(3).

The prehearing exchange delineated above shall be filed *in seriatim* manner, according to the following schedule:

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<sup>5/</sup> The Complaint states that Complainant proposes the assessment of a civil penalty of up to \$177,500 against Respondents for the violations alleged in the Complaint. Complaint at ¶ 19.

- October 1, 2010 - Complainant's Initial Prehearing Exchange
- October 29, 2010 - Respondents' Prehearing Exchange(s), including any direct and/or rebuttal evidence
- November 12, 2010 - Complainant's Rebuttal Prehearing Exchange

In their Answer, Respondents exercised their right under Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, to request a hearing in this matter. If the parties cannot settle with a Consent Agreement and Final Order, a hearing will be held in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondents have the right to defend themselves against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Each Respondent is entitled to elect any or all three means to pursue its defense.

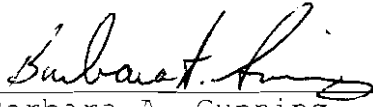
If a Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a Respondent's statement of election only to conduct cross-examination of the Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

The original and one copy of all pleadings, statements, and documents (with any attachments) required or permitted to be filed by this Order (including a ratified Consent Agreement and Final Order) shall be filed with the Regional Hearing Clerk, and copies (with any attachments) shall be sent to the undersigned and all other parties. The parties are advised that e-mail correspondence with the Administrative Law Judge is not authorized. See Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a).

Mail Code 1900L  
Washington, DC 20460

If sending by non-USPS couriers:  
EPA Office of Administrative Law Judges  
1099 14th St. NW  
Suite 350, Franklin Court  
Washington, DC 20005

Telephone contact may be made with my legal staff assistant,  
Mary Angeles, at (202) 564-6281. The facsimile number is (202)  
565-0044.

  
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Barbara A. Gunning  
Administrative Law Judge

Dated: August 10, 2010  
Washington, D.C.

In the Matter of Duvall Development Co., Inc. & Jeffrey H. Duvall  
Docket No. CWA-04-2010-5505

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Prehearing Order**, dated August 10, 2010, was sent this day in the following manner to the addressees listed below.

  
\_\_\_\_\_  
Knolyn R. Jones  
Legal Staff Assistant

Original and One Copy by Mail to:

Patricia Bullock  
Regional Hearing Clerk  
U.S. EPA / Region 4  
61 Forsyth Street  
Atlanta, GA 30303

One Copy by Mail to:

Robert Caplan, Esq.  
Assistant Regional Counsel  
U.S. EPA, Region 4  
61 Forsyth Street  
Atlanta, GA 30303

One Copy by Mail to:

Edwin Schwartz, Esq.  
Sweetnam & Schwartz, LLC  
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