

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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IN THE MATTER OF:)
) Proceeding to Assess Class II Civil)
) Penalty Under Section 309 of the)
) Clean Water Act)
Duvall Development Co., Inc., and)
Jeffrey H. Duvall,) Docket No. CWA-04-2010-5505)
)
Respondents.)
_____)

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Comes now Complainant, by and through its counsel, and in response to the Prehearing Order issued in this matter by Administrative Law Judge Barbara A. Gunning, dated August 10, 2010, respectfully submits its Prehearing Exchange pursuant to Section 22.19(a) of 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 (Rules of Practice).

a. Complainant's List of Witnesses

1. Joel Strange
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Mr. Strange has been employed as a Life Scientist with U.S. EPA, Region 4, in its Water Protection Division, Clean Water Enforcement Branch, since February 2006. His duties include investigating alleged Clean Water Act (CWA) violations, developing appropriate resolutions to enforcement actions, determining waters of the United States and preparing administrative penalty calculations. Mr. Strange has been EPA's enforcement officer on approximately 21 CWA cases involving violations of CWA Section 404. Prior to joining EPA, Mr. Strange worked for the U.S. Army Corps of Engineers, Savannah District, Regulatory Division, Piedmont Branch, as a Regulatory Specialist. In that capacity, Mr. Strange reviewed Section 404 permit applications and determined the appropriate permit for the proposed activity, conducted site investigations, determined waters of the U.S., ensured that proposed activities complied with the Section 404(b)(1) guidelines, determined appropriate mitigation for wetland and stream impacts, investigated violations of Section 404 of the CWA, and developed and resolved attendant enforcement cases.

Mr. Strange will testify about his investigation in this case including his site inspections, development and issuance of a CWA Section 308 information request letter and a CWA Section 309 site restoration order, preparation of a stream assessment, his determination that the Respondents violated the CWA as alleged in the Complaint, and the factors EPA considered in developing a proposed penalty in this case. Mr. Strange has a BS in Biological Science from Northern Illinois University.

2. Mara Lindsley
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Ms Lindsley has been employed as a Life Scientist with EPA in the Clean Water Enforcement Branch since July 2008. Her duties include investigating and resolving alleged CWA section 404 violations. Ms Lindsley has worked on approximately 20 enforcement cases. She is expected to testify about her review of the Site files, her Site inspection and stream assessment work, and her research, review, and determination that the four tributaries on the Site property impacted by the violation are waters of the United States and have a significant physical, chemical, and biological nexus to Stekoa Creek and the Chattooga River, traditional navigable waterways of the United States. Ms. Lindsley will also testify about the factors EPA considered in developing a proposed penalty in this case. Ms. Lindsley holds a Bachelors of Science in Natural Resource Management and Applied Ecology from Rutgers University, and a Masters of Science in Biology from Murray State University.

3. Mike Wylie
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Mr. Wylie is an EPA National Wetlands Enforcement Expert with expertise in wetlands and stream jurisdiction and CWA interpretation and enforcement. He has been in this position since 2009. Mr. Wylie will testify as a fact witness about his participation in EPA's site visits and inspections, his observations of conditions at the site, his determination that Respondents violated the CWA as alleged in the Complaint, and about the factors EPA considered in developing a proposed penalty. Mr. Wylie will also testify as an expert witness on stream ecology, the functions and values of the streams impacted by the violations at issue, and the harm to the streams resulting from the violations. Mr. Wylie has a B.S. degree from the University of West Florida in Interdisciplinary Sciences, and a M.S. degree from the same university in Coastal Zone Studies.

4. Lonnie Dorn
U.S. EPA Region 4 – Science and Ecosystem Support Division (SESD)
Athens, Georgia

Mr. Dorn has been employed since July 1999 as a Life Scientist with EPA Region 4's SESD. His duties include conducting stream bioassessments, providing support for jurisdictional waters determinations, and technical assistance with wetlands enforcement matters. Mr. Dorn has participated in nine wetlands/stream identification projects and three water quality studies for EPA, including the Chattooga River Watershed Bioassessment conducted in August 2009, for which Mr. Dorn was the Project Leader. He has also co-authored a number of reports including watershed stream and bioassessment reports and water quality reports. (see Exhibit 27).

Mr. Dorn will testify as a fact witness and possibly as an expert witness regarding the Chattooga River Water Bioassessment conducted by EPA in 2009, as well as the results of an earlier assessment conducted by EPA in 1997 on the same watershed, and the conditions of Stekoa Creek and the Chattooga River, the two waters that receive discharge from the creek system that runs across the site property that is the subject of this case. Mr. Dorn will also testify about the results of an additional study that is currently underway to determine up-to-date conditions in the streams that are the subject of this case, and the Stekoa River around the discharge points of the streams. Mr. Dorn has a BS in Biology from Berry College, Rome, Georgia.

5. David Melgaard
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Mr. Melgaard has been employed since 1987 as a Life Scientist in EPA's Water Protection Division. His duties include coordinating Region 4 monitoring activities required to implement CWA programs such as 303(d) lists of impaired waters, 305(b) reports, and 106 State workplans. He is responsible for analyzing and interpreting chemical, biological and physical data to characterize water quality of streams, lakes, coastal waters, and wetlands. Since 2008, Mr. Melgaard has served as the Regional Monitoring Coordinator serving as a liaison between State Monitoring Coordinators and EPA Headquarters on monitoring issues of national significance.

Mr. Melgaard will testify as a fact witness and possibly as an expert witness about the conditions of the Stekoa Creek and Chattooga River watershed. Mr. Melgaard is well qualified in this area as he served on the Board of Directors of the U.S. Forest Service Large Scale Watershed Restoration Project of the Chattooga River. Mr. Melgaard participated in the SESD bioassessment studies of the Chattooga River watershed and was responsible for providing technical expertise on the water quality and biological data collected during this study. Mr.

Melgaard holds a Bachelor of Science in Zoology and a Masters of Science in Wildlife and Fisheries Sciences, both from the University of Tennessee, Knoxville, TN.

6. Bob Lord
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Mr. Lord has been employed since 1988 as an environmental scientist in EPA's Water Protection Division. Since 1991, Mr. Lord's duties have included the review of proposed Section 404 permit actions, proposed stream and wetland mitigation banks, NEPA documents for projects with stream and wetland impacts, and, until 2007, Section 404 enforcement actions.

Mr. Lord may be called as an expert witness regarding Section 404 permits and the permitting process. Mr. Lord has been involved in hundreds of projects involving the discharge of dredged or fill material to waters of the U.S. in all Region 4 states, and currently focuses on Georgia and South Carolina. This includes the identification of waters of the U.S., assessing the direct, indirect, and cumulative impacts of the projects, evaluating the permitting process employed by the U.S. Army Corps of Engineers, compliance with Section 404 permit conditions, and compensatory mitigation. Mr. Lord has been certified as an expert witness for previous Section 404 enforcement cases.

Mr. Lord received a Bachelor of Science Degree from the University of Illinois in Biology in 1974 and a Masters of Science Degree from the University of Michigan in Water Resources Science in 1975. Mr. Lord also completed all course work for a PhD from the School of Public Health at the University of Michigan but left the program in 1976 to work for the State of Georgia.

7. Mark LaRue
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Mr. LaRue was employed as an Environmental Scientist in EPA Region 4's Water Protection Division from 1991 to 1997, reviewing CWA 404 Permits and as the enforcement officer for Alabama. From 1998 to 2010, Mr. LaRue owned and operated a private consulting firm specializing in Section 404 of the CWA, including mitigation design, build, and monitoring. He appeared at numerous state and federal trials as an expert witness in the area of CWA Section 404. Further, Mr. LaRue assessed wetland and stream functions to determine appropriate mitigation requirements and the costs of such mitigation. Mr. LaRue is now employed as a Physical Scientist in the Surface Mining Section in EPA Region 4.

Mr. LaRue will testify as an expert witness regarding section 404 permits and mitigation requirements, procedures, and costs. He has a Bachelor of Science degree in Biology from the University of Texas at Dallas, 1989.

8. Zach Dean
Anderson, South Carolina

Mr. Dean is an outdoorsman and kayaker, and is currently employed as a whitewater rafting guide for Wildwater Ltd., one of the three companies commercially licensed to operate on the Chattooga River. Mr. Dean resides in South Carolina. He coordinates trips to various boating destinations for himself, friends, and others. He will testify about his trips to Clayton, Georgia to kayak on Stekoa Creek, and monies spent in and around the Clayton area in connection with his kayak excursions on the Stekoa.

9. Scott Magley
177 Kinney Drive
Long Creek, South Carolina

Mr. Magley is an outdoorsman, kayaker, and former whitewater rafting guide for Southeastern Expeditions, one of the three companies commercially licensed to operate on the Chattooga River. Mr. Magley resides in Long Creek, South Carolina. He has been involved with whitewater paddling for 18 years and has extensive knowledge of recreational boating within the vicinity of the Chattooga River watershed. Mr. Magley has navigated both the upper and lower portions of Stekoa Creek and received an unprecedented number of responses to a Facebook posting of the Stekoa trip report by other boaters interested in paddling Stekoa Creek. Mr. Magley will testify about his trip(s) to Clayton, Georgia to kayak on Stekoa Creek, and monies spent in and around the Clayton area in connection with his kayak excursions on the Stekoa.

Complainant respectfully reserves the right to call or not call the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent, or areas of the testimony of the above mentioned witnesses, where appropriate. Complainant also respectfully reserves the right to supplement its witness list as authorized pursuant to 40 C.F.R. Section 22.19(f) with the Court's approval and upon adequate notice to Respondents. Complainant also reserves the right to call any or all of Respondents' witnesses at the hearing.

b. Complainant's View on the Place of Hearing and an Estimated Amount of Time Needed to Present its Direct Case.

Pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondents reside or conduct the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in

Washington, D.C. Complainant prefers to have the hearing either in Clayton, Georgia (where Respondents conduct business and reside) or in Atlanta, Georgia (the relevant EPA Regional Office). Complainant estimates that it will need approximately 1-2 days to put on its case.

c. Factual Information Relevant to the Assessment of a Penalty.

The Complaint proposes that the Respondents pay a penalty up to \$177,500, which is the current allowable statutory maximum for a Class II penalty pursuant to section 309(g)(2)(B) of the CWA, 33 U.S.C. 1319(g)(2)(B), pursuant to the most recent update to the Civil Monetary Penalty Inflation Adjustment Act Rule, 40 C.F.R Part 19,¹ which increased the upper limit of such penalties to \$11,000 per violation per day, not to exceed a total of \$177,500 for violations occurring after January 12, 2009.² 73 Fed. Reg. 239 (December 11, 2008) Pursuant to the Court's Prehearing Order, Complainant hereby sets forth the factual information that it believes is relevant to the assessment of a penalty. Within 15 days after receipt of Respondents' prehearing exchange, Complainant will follow up with its specific proposed penalty and detailed analysis of how the penalty was determined, and how any penalty or enforcement policies and/or guidelines were applied in calculating the penalty.

1. Description of the Violations, Elements of Liability, and Impacts to Streams

The Complaint alleges that Respondents violated sections 301 and 404 of the CWA by clearing and leveling the Site and causing fill materials to be discharged into four streams on the Site and by installing 48-inch cement pipes into approximately 1,500 linear feet of five sections of the four streams and re-routing the streams through the pipes, without the required permit. EPA discovered the violation in March 2006 during a Site visit after having received several complaints about possible violations of the CWA at the Site. To establish Respondents' liability, it must be shown that Respondents' activities involved: (1) a discharge; (2) of a pollutant; (3) from a point source; (4) into waters of the United States; (5) without a permit under section 404.

The CWA defines "pollutant" broadly and case law has held that dirt, rock, vegetation, sediment, debris, and pipes placed into waters of the U.S. all constitute pollutants. See 33 U.S.C. § 1362(g). Discharge of a pollutant means "any addition of any pollutant to navigable waters from any point source." A point source can be a bulldozer, dump truck, or other heavy machinery, from which pollutants are discharged. See, e.g., U.S. v. Banks, 873 F. Supp. 650 (S.D. Fla. 1995).

¹ Issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701), which mandates that EPA adjust its civil monetary penalties for inflation every four years.

² As described below, the violation continues to the present day as a result of Respondents' failure to remove the fill and piping material from the impacted streams.

Navigable waters is defined in 33 U.S.C. 1362(7) as “the waters of the United States.” Pursuant to 40 C.F.R. § 232.2, “waters of the United States” includes, but is not limited to lakes, rivers, and streams. Under 40 C.F.R. § 230.3(s) (section 404(b)(1) guidelines), the term waters of the United States means “all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide [commonly referred to as “Traditionally Navigable Waters” or “TNWs”], and “[t]ributaries” of such waters.

The definition of waters of the United States was recently further construed by the U.S. Supreme Court in U.S. v. Rapanos, 126 S.Ct. 2208 (2006). The plurality opinion (known as the “Scalia test”) held that waters of the United States are limited to relatively permanent, standing or continuously flowing bodies of water and wetlands with a continuous surface connection to other regulated waters; while the concurring opinion by Justice Kennedy (the “Kennedy test”) held that for jurisdiction to attach, waters need to have a “significant nexus” to TNWs such that they significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as “navigable.”

Each of the five required elements has been met because: Respondents discharged pollutants (rock, dirt, sediment, debris, and cement pipes), from a point source (earth moving heavy equipment), into waters of the United States (the Site streams are permanent waters that flow into TNWs, including Stekoa Creek and the Chattooga River, and have a significant nexus to those TNWs) (see EPA’s Memo on Jurisdictional Waters and Nexus, Exhibit 16), without a section 404 permit. The unpermitted fill and pipes have remained in the stream beds for approximately five years in continuing violation of section 404 of the CWA despite exhaustive efforts by EPA over several years to persuade Respondents to comply with the law by removing the pipes and restoring the streams, or by applying for an after-the-fact permit and performing mitigation for the adverse impacts and loss of stream functions. Respondents have refused to take the necessary steps to return to compliance.

Respondents’ unpermitted activity has impacted approximately 1,500 linear feet of four perennial cold-water tributaries (streams) to Stekoa Creek, including three headwater streams that combine on the Site property to flow into Stekoa Creek from the west, and an additional headwater stream on the Site property that enters Stekoa Creek directly from the east. Diagrams and aerial photographs of the Site property and streams can be viewed in Exhibits 9, 10, and 16. Headwater streams, such as the ones impacted by the Respondents, perform numerous functions that are critical to maintaining the physical, chemical, and biological integrity of downstream waters. Headwater streams are typically first and second order streams and make up the majority of stream miles in a typical watershed.

As discussed in greater detail in Exhibit 16, the impacted tributaries serve multiple, critical purposes relating to maintenance of the physical, chemical, and biological integrity of downstream waters. All of the impacted streams are designated as year-round trout streams by

the Georgia Department of Natural Resources, and are therefore afforded an increased level of state and federal regulatory protection due to the unique habitat provided by shallow cold water streams. Organic material and invertebrates exported from headwater streams can substantially subsidize downstream waters by providing a continuous supply of energy to support the downstream ecosystem. The diverse organisms in headwater systems create food and energy resources for other ecosystems that are then transported downstream. Headwater streams are also important sources of aquatic insects. These insect populations frequently drift downstream and re-populate downstream reaches. Along the way, these insects provide a food source for aquatic species such as trout.

Headwater streams are critical to the overall function of aquatic ecosystems. Headwater streams maintain hydrologic and ecological connectivity to navigable waters. The hydrological processes in headwater streams control the recharge of sub-surface water sources, which influences the timing, frequency, and intensity of the base flow and floodwaters to downstream tributaries, including navigable waters. Respondents' placement of these headwater tributaries into pipes removes these important functions from the watershed and increases the cumulative loss of headwater tributaries in the area.

Additionally, Stekoa Creek is designated by the state of Georgia as CWA section 303(d) impaired water due to increased sedimentation from land sources within the Stekoa Creek watershed, which includes the Site property. Respondents' construction activities resulted in the discharge of pollutants such as soil, sediment, rock, vegetation and debris into the streams. Pollutants discharged from Respondents' property travel through Stekoa Creek to the Chattooga River, which is federally designated as a Wild and Scenic River.

Stream functional losses can be expected as a result of Respondents' piping including loss of aquatic habitat, increased velocity of the streams from straightening and piping of the channels, and increased erosion within the tributaries as well as Stekoa Creek. Piping of headwater streams results in a reduction of biological diversity in the macro-invertebrate community, reduced oxygen transfer (the piped area is not open to the atmosphere and the natural falls and riffles have been removed), reduced flood protection, interruption of the aquatic insect cycle (insect drift – important for drift feeding fish such as trout), and reduced water quality. Increased erosion and sediment in the streams may contribute to further degradation of downstream waters including Stekoa Creek and the Chattooga River.

2. Respondents' Knowledge of Section 404 Permitting Requirements and Failure to Correct Violations

At the time the Respondents conducted the unpermitted construction project that gave rise to the violations in this case, Respondent Jeffrey Duvall was fully aware of, and understood the section 404 permitting requirements, as well as the importance of COE review of the proposed project. In 2002, several years before beginning the piping project at the Site, Mr.

Duvall and another one of his companies, Duvall Livestock, submitted a preconstruction notification seeking the COE's approval of a section 404 nationwide permit that would authorize the applicants to conduct a stream bank restoration project on a 1,700 linear foot section of Stekoa Creek, fronting property owned by Mr. Duvall and/or one of his companies, located just a short distance downstream of the Site property at issue in this case. The project involved the placement of erosion control and trout habitat structures (fill material) into Stekoa Creek, a water of the United States. In planning and preparing the preconstruction notification, Mr. Duvall obtained help from the National Resource Conservation Service, a division of the U.S. Department of Agriculture. (Exhibit 24).

The COE's October 25, 2002, permit authorization letter (Exhibit 25) stated that the project area contains waters of the U.S. which are considered to be within the jurisdiction of section 404 of the CWA, and that "the placement of dredged or fill material into any waterways and/or their adjacent wetlands including material redeposited during mechanized land clearing or excavation of wetlands would require prior authorization." By having undergone this prior permitting process, Mr. Duvall gained specific knowledge of the 404 permit requirements prior to the time he conducted the stream piping project at issue in this case, located just upstream of the prior project. However, Mr. Duvall chose to ignore the requirements of the law and to proceed with the subject activities without applying for, or obtaining a permit from the COE.

In light of Mr. Duvall's knowledge about the section 404 requirements, EPA believes that Respondents made a business decision to proceed with the project at the Site and to ignore the permitting process because of his concerns that the project, as designed, would likely not be granted a permit. Further, proceeding outside of the required permitting process allowed Respondents to save the time and the costs involved with obtaining a permit (e.g., hiring a consultant, preparing plans, conferring with the COE) and with potentially having to conduct extensive and costly mitigation measures that might have been required by the COE if a permit were to be issued. By completely ignoring the permitting process, Respondents significantly undermined the purposes and integrity of the section 404 program as set forth by Congress, and prevented the COE from carefully reviewing, evaluating, and determining whether alternatives existed that would have eliminated or minimized the potential adverse impacts to the waters of the U.S., and determining whether a permit should have been granted or denied.

Upon discovering Respondents' violations in 2006, Complainant issued an Administrative Compliance Order to Respondent Jeff Duvall requiring him to remove the piping and to restore the streams. (Exhibit 6). Mr. Duvall failed to comply with that order, and despite years of effort subsequent to the order to work with Mr. Duvall to get the violations corrected, he has refused to do so. The streams are still piped, there has been no after-the-fact permit issued by the COE, nor have the Respondents mitigated for the impacts caused to the streams by the violations.

3. Respondents Have Realized Significant Economic Gain from the Violations.

Under the CWA section 404 Guidelines (40 C.F.R. Part 230), and the COE regulations (33 C.F.R. Part 323), a permit application must include, among other things, a complete description of the proposed project, drawings, sketches and plans, the location, purpose and need for the project, and a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals or denials already made. If the project involves the discharge of fill material into waters of the U.S., the application must include the purpose of the discharge, and a description of the type, composition and quantity of the material. The applicant also must present an analysis of alternatives to the proposed work that will avoid and/or minimize any adverse impacts on waters of the U.S., and must also propose compensatory mitigation options to offset unavoidable impacts.

If the COE determines that adverse impacts will occur, but that a permit (whether nationwide or individual) can be issued, the applicant will be required to "mitigate" for the impacts to replace aquatic resource functions that will be unavoidably lost or adversely affected by the authorized activities.³ By ignoring the permitting process, Respondents undermined the purposes and integrity of the section 404 program required by Congress, and prevented the COE from carefully evaluating the project and any alternatives and potential adverse impacts. Additionally, Respondents' actions precluded the COE from determining whether a permit was appropriate, and, if so, what mitigation was required to compensate for adverse impacts.

Moreover, Respondents avoided all the costs associated with the permit application process which typically includes hiring environmental consultants to investigate the area of the proposed work, conducting all background research, corresponding with the COE during development and application for a COE permit, and responding to comments and other requirements. Additionally, Respondents have gained a huge economic benefit and competitive advantage over other developers in the area by piping and leveling the property over streams which others would likely not have been allowed or permitted to do. Even if such impacts might have been permitted by the COE, Respondents have totally avoided the significant costs that would have been required to mitigate for the adverse impacts they caused to these tributaries, and continue to cause to the present day.⁴

³ Mitigation projects can be conducted on-site, or off-site on private and public land, through several approaches including restoration, enhancement, establishment, and preservation of water resources. Alternatively, in appropriate situations, mitigation can be satisfied by purchasing "mitigation credits" from "mitigation banks" or by contracting with third parties to conduct work through the "in-lieu fee program."

⁴ As Complainant will demonstrate in its detailed penalty discussion that will be filed at a later date pursuant to the Court's Order, the cost of the mitigation that would be required to compensate for the impacts to the streams could greatly exceed the maximum Class II statutory penalty allowed under section 309(g) of the CWA.

Finally, EPA believes an additional piece of critical factual information that is relevant to the assessment of an appropriate penalty in this case is that the Respondents are major developers in the Clayton area. Located directly across the highway from the Site are two parcels of property previously owned by the Respondents or affiliated entities which were sold to big box retailers Home Depot and Wal-Mart. Based on the clearing and leveling work at the Site involved in this case, the piping of the streams, the installation of concrete "drop boxes" with manhole covers allowing easy access into the piping system, and the location of the property, EPA believes that the Respondents' ultimate plan is to sell all or portions of the property for development. In that case, if Respondents have not removed the piping or mitigated for the impacts caused by the piping, and have not been held accountable for their violations and the economic benefit they derived from the violations, they will reap significant additional profit on top of the economic benefit already gained by their non-compliance and ongoing violations.

d. Complainant's statement on the applicability of the Paperwork Reduction Act, 44 U.S.C. § 3501 *et. seq.*, to this proceeding, including whether there is a current Office of Management and Budget Control number involved and whether the provisions of Section 3512 of the PRA may apply to this case is as follows:

EPA believes that the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501 *et. seq.*, is not relevant to this case which involves allegations that the Respondents violated section 404 of the CWA by conducting dredge and fill operations without a permit from the COE. To obtain an individual permit from the COE, applicants are required to file an application with the COE pursuant to 33 C.F.R. § 325.1, and to use the form designated in 40 C.F.R. § 325.1(c). The Office of Management and Budget ("OMB") has approved such information collection requirements under the provisions of the PRA and has assigned OMB control number 0710-0003 (EPA ICR Reference 200810-0710-0010) to the application form. See 73 Fed. Reg. 44709 (7/31/2008) and 73 Fed. Reg. 64925 (10/31/2008). Thus, EPA is in compliance with applicable requirements of the PRA.

Further, section 3512 of the PRA, which provides that "no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if the collection of information does not display a valid control number . . .," is by its own terms not applicable because this case involves allegations of substantive violations of the Clean Water Act's requirements that no pollutants shall be discharged into waters of the U.S. without a permit. This case is not seeking penalties for failure to submit information.

e. Documents and Exhibits Intended to be Introduced into Evidence.

In addition to the Complaint and the Respondents' Answer (copies of which have previously been filed with the Court and which all parties presently possess), incorporated herein by reference, EPA intends to offer into evidence the following documents, copies of which are

marked for identification and attached. For the purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated as "CX_."

- CX 1. Letter of Complaint and photographs submitted to U.S. Army Corps of Engineers; received by USACOE on Feb. 10, 2006.
- CX 2. Record of Conversation between Joel Strange, EPA, and Buzz Williams, Chattooga Conservancy, March 2, 2006.
- CX.3. Field Notes and Photographs of Joel Strange's Site Visit, March 16, 2006.
- CX 4. Stop Work Order, Citation of Violation, and Summons Issued by Rabun County Marshall's Office to Jeff Duvall and Duvall Livestock Company for piping 3 creeks without proper county soil erosion permits, December 15, 2004.
- CX 5. EPA's CWA section 308 Information Request Letter to Jeffrey Duvall, March 31, 2006.
- CX 6. EPA's CWA section 309(a) Administrative Compliance Order, March 31, 2006.
- CX 7. Jeffrey Duvall's Response to EPA's Information Request Letter, undated.
- CX 8. Field Notes and Photographs of Mike Wylie's Site Visit, May 18, 2006.
- CX 9. Aerial photographs of site, dated 1994, 1999, and 2004.
- CX 10. Aerial photographs with overlays showing streams and piping impacts.
- CX 11. Stream Restoration Plan and Mitigation Plan submitted by Jeff Duvall, March 28, 2008.
- CX 12. EPA's Supplemental Information Request Letter, Oct. 30, 2009, to Jeff Duvall requesting information pertaining to ownership of the site property.
- CX 13. Jeff Duvall's November 9, 2009, Response to Supplemental Information Request Letter.
- CX 14. Rabun County property deed records showing transfers and ownership of the Site property.

- CX 15. EPA Site Inspection Report, Photographs and Stream Identification Survey Worksheet, December 10, 2009.
- CX 16. Investigation of Jurisdictional Waters and Environmental Impact Assessment, Prepared by Mara Lindsley, EPA, Region 4.
- CX 17. Biological Assessment of Streams in the Chattooga River Watershed: Data Analysis, Prepared for EPA Region 4 by Tetra Tech, Inc., April 29, 1999.
- CX 18. Assessment of Water Quality Conditions, Chattooga River Watershed, Rabun County, GA, Macon County, NC, and Oconee County, SC, EPA Region 4, May 1999.
- CX 19. Total Maximum Daily Load (TMDL) Development Report for Fecal Coliform in the Stekoa Creek Watershed, EPA Region 4, March 7, 2000.
- CX 20. TMDL Development for Sediment in the Stekoa Creek Watershed, Dec. 28, 2000.
- CX 21. *Sediment Sources to the Chattooga River*, Published as part of Ninth Biennial Southern Silvicultural Research Conference, Feb. 25-27, 1997.
- CX 22. Chattooga River Watershed Bioassessment of Benthic Macroinvertebrate Communities Provisional Report, EPA, Region 4, SESD, 8/31-9/2/09.
- CX 23. Stekoa Creek Bioassessment Quality Assurance Project Plan, September 30, 2010.
- CX 24. Jeff Duvall and Duvall Livestock's Preconstruction Notification Seeking Authorization for section 404 Nationwide Permit for dredge and fill activity to install erosion control and trout habitat structures along Stekoa Creek, May 13, 2002.
- CX 25. U.S. Army Corps of Engineers Authorization of Nationwide Permit allowing dredge and fill activity along Stekoa Creek, issued to Jeff Duvall, October 25, 2002, and related correspondence.
- CX 26. Georgia Secretary of State information on Duvall Development Co., Inc.
- CX 27. Resumes of EPA Witnesses Mike Wylie, Lonnie Dorn, Robert Lord and Mark LaRue. David Melgaard's resume will be provided when he returns from extended leave in mid-October 2010.

EPA Region 4's SEDD has recently prepared a plan to conduct additional work to further assess Stekoa Creek and the 4 streams that are the subject of this case, as part of EPA's continuing overall assessment of conditions in various parts of the Chattooga River Watershed. (See Exhibit 23). SEDD initially planned to conduct the field work during the week of September 27, 2010, but due to heavy rains in north Georgia on September 26 and 27, 2010, SEDD has postponed the work until mid-October 2010. EPA anticipates that a report documenting the results of this continuing assessment work will be available within approximately 60 days after the filing of this Prehearing Exchange. Complainant plans to seek to introduce the results of that study into evidence as to provide additional information to the Court and to the Respondents about current conditions in the streams and portions of Stekoa Creek. For this reason, Complainant has included this "placeholder" Exhibit 28.

Complainant further anticipates the possibility that Complainant may need to introduce additional evidence in response to issues or defenses which may be raised in Respondents' prehearing exchange. Complainant therefore respectfully reserves the right to supplement its exhibit list upon adequate notice to the Respondents and to this Court. In addition, Complainant may request this Court to take official notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

In the event EPA's continuing review of Respondents' documents in preparation for this case reveals additional violations, Complainant respectfully reserves the right, upon adequate notice to Respondents and this Court, to move for Amendment of the Complaint and for: (1) presentation of additional testimony substantiating such additional violations; and (2) introduction of additional documentary evidence substantiating such additional violations.

Dated: October 1, 2010

Respectfully Submitted,



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