

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

Status Report Pertaining to Public Notice

In its June 27, 2011, Amended Prehearing Order, the Court directed EPA to submit as part of its Amended Prehearing Exchange (PHE) proof of proper public notice as required by 40 C.F.R. § 22.45(b). Pursuant to 40 C.F.R. § 22.45(b), Complainant is required to notify the public about a proposed assessed penalty within 30 days following Complainant's receipt of proof of service of the Amended Complaint. It is EPA Region 4's practice to serve Clean Water Act penalty complaints by certified mail, return receipt requested. Once the return receipt green card is received by the Region, it is filed with the Regional Hearing Clerk, and within 30 days after receipt of proof of service of a complaint on the respondent, Region 4 posts a public notice of the proposed assessment of a penalty on EPA's internet site where it remains posted for 30 days.

On May 25, 2011, Complainant filed an Amended Complaint and mailed it to the Respondents by certified mail. On June 6, 2011, Complainant received the green cards from the U.S. Postal Service indicating that the Amended Complaint had been received by the Respondents' attorneys on May 26, 2011. In accordance with 40 C.F.R. § 22.45(b), Complainant published the public notice on EPA's website on July 6, 2011, within 30 days after receipt of proof of service. A Certification of Posting of Public Notice is attached hereto as *Exhibit A*.

On July 5, 2011, during the process of drafting the public notice and the Supplemental PHE, counsel for EPA requested the Region 4 Clean Water program to provide a copy of the public notice that had been published on EPA's internet site in connection with the filing of the original Complaint in March 2010. Upon further investigation it was determined on July 6, 2011, that after the original Complaint was filed in March 2010, the program prepared a public notice but did not publish it at that time because it believed that it had not received the certified green card showing proof of service. The Region's best reconstruction of events is that the green card had been received but was misplaced and as a result, the public notice was not published for the original Complaint.

The Amended Complaint, which supercedes the original Complaint, is essentially identical to the original Complaint in that it includes the same facts and allegations of violation and request for relief but adds two new Respondents. The public notice published on July 6, 2011, advises the public about the filing of the Amended Complaint and the right to submit comments and to participate in the hearing. It also includes a copy of the Amended Complaint. While it has generally been Region 4's practice in CWA penalty cases to have a 30-day public notice comment period, 40 C.F.R. § 22.45(b) does not set a specific time period. In view of the upcoming hearing scheduled for August 23, 2011, EPA has set the public notice period for 21 days, to run until July 27, 2011. As shown below, EPA believes that there is sufficient time to meet the requirements of 40 C.F.R. § 22.45.

40 C.F.R. § 22.45(c)(1) provides that any person not a party to the action who wishes to participate in the proceeding/hearing must notify the Regional Hearing Clerk within the public comment period. 40 C.F.R. § 22.45(c)(1)(ii) requires the Presiding Officer to provide notice of the hearing to any person who has met the requirements of 40 C.F.R. § 22.45(c)(1)(i) at least 20 days prior to the scheduled hearing. Pursuant to 40 C.F.R. § 22.45(c)(1)(iv), any person or commenter who wishes to present evidence at the hearing must submit a notice to the Presiding Officer and the parties no later than 10 days before the hearing. The notice must include a description of the evidence, copies of documents to be introduced, and the identities of any witnesses the person or commenter would like to introduce. See 40 C.F.R. § 22.45(c)(1)(4).

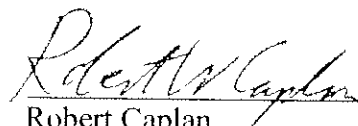
In this case, the 21-day public comment period will end on July 27, 2011, which is 27 days prior to the August 23rd hearing. EPA believes that this provides sufficient time as required by 40 C.F.R. § 22.45 for the Court to satisfy the requirement to provide notice of the hearing 20 days prior to the hearing to any person who has requested an opportunity to participate in the hearing. To meet the 20-day notice requirement, the Court would need to notify the commenter of the right to participate by no later than August 3, 2011.

EPA believes that its oversight in not publishing the public notice for the original Complaint should be considered harmless procedural error because by issuing the Amended Complaint and publishing the public notice in connection with the Amended Complaint, the public has an opportunity to comment and/or participate in the hearing, and neither the public nor the Respondents have been prejudiced. Also, under 40 C.F.R. § 22.45(c)(3), a commenter can submit comments any time prior to the close of the record.

Based on the foregoing, EPA requests that the Court allow the case to proceed to a hearing on its merits as scheduled, and further respectfully suggests that the Court issue a notice to any commenter or person seeking to participate in the hearing by no later than August 3, 2011.

Respectfully submitted,

Dated: July 11, 2011

  
Robert Caplan  
Counsel for Complainant

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Certification of Posting of Public Notice Regarding Amended Complaint

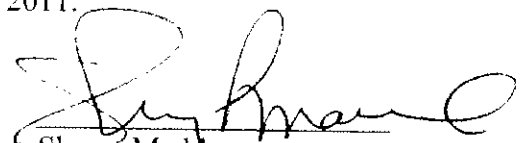
1. My name is Sherry Maddox. I work for the U.S. EPA, Region 4, as the Regional Web Master. My duties include posting documents to EPA Region 4's web site, and other administrative responsibilities including posting public notices to EPA's website.

2. I hereby certify that on July 6, 2011, I uploaded to EPA's national website [http://www.epa.gov/region4/water/wpeb/documents/pnga\\_wetlands.pdf](http://www.epa.gov/region4/water/wpeb/documents/pnga_wetlands.pdf) EPA Region 4's public notice pursuant to 40 C.F.R. § 22.45 that advised the public of the opportunity to submit comments and to participate in any hearing on the penalty proposed in the Amended Complaint in the above-styled matter. The Amended Complaint was appended to the Public Notice on the website. A copy of the webpage is attached hereto as Attachment A.

3. The public notice will remain posted until July 27, 2011.

Date:

7-8-11



Sherry Maddox  
Region 4 Web Master, EISB

EXHIBIT "A"