SWEETNAM & SCHWARTZ, LLC

EDWIN S. SCHWARTZ
ATTORNEY AT LAW

Office Address:
Suite 1700
Three Ravinia Drive
Atlanta, Georgia 30346
Phone (770) 594-8272 (direct)
Fax (770) 234-6779
Email edschwartz@msn.com

September 16, 2011

Honorable Barbara A. Gunning
EPA Office of Administrative law Judges
US Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, DC 20460

Re: Respondents' Supplemental Prehearing Exchange
In the Matter of Jeffrey H. Duvall, Duvall Development Company Inc., Louis Steven Duvall, Sr., and Duvall & Son Livestock, Inc.
Docket No. CWA-04-2010-5505

Dear Judge Gunning:

This transmits a copy of the Respondents' Suppplemental Prehearing Exchange, the original and copy of which were filed this day with the Regional Hearing Clerk, as required by the Prehearing Order dated July 20, 2011 in the above-referenced matter.

Sincerely,

Edwin Schwartz
Attorney for Respondents

Enclosure

Cc: Mr. Robert W. Caplan

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Jeffrey H. Duvall, Duvall	)	
Development Co., Inc., Louis	)	
Steve Duvall, Sr. and Duvall	)	
& Son Livestock, Inc.	)	ADMINISTRATIVE COMPLAINT
and Jeffrey H. Duvall,	)	FOR CLASS II PENALTY UNDER
	)	SECTION 309(g) OF THE CLEAN
	)	WATER ACT, 33 U.S.C. § 1319(g)
	)	
RESPONDENTS.	)	Docket No.: CWA-04-2010-5505

RESPONDENTS' SUPPLEMENTAL PREHEARING EXCHANGE

COME NOW, Duvall Development Co., Inc. and Jeffrey H. Duvall (collectively referred to hereinafter as "Respondents"), through the undersigned counsel, and file this Prehearing Exchange in accordance with Section 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and Revocation, Termination or Suspension of Permits," ("Rules of Practice") and as required by the Prehearing Order issued by Administrative Law Judge Barbara A. Gunning dated July 20, 2011 in the above-referenced matter. This Supplemental Prehearing Exchange (i) revises the list of witnesses and exhibits and (ii) addresses new information included in Complainant's Supplemental Prehearing Exchange.

A. Respondents' List of Witnesses [40 CFR § 22.19(a)(2)(i)]

Respondents' Supplemental Prehearing Exchange identifies the same witnesses as the original Prehearing Exchange, but proposes additional testimony for several witnesses to respond to the new information included in the Complainant's Supplemental Prehearing Exchange as follows:

1. Mr. Jeffrey H. Duvall, 208 Ice Plant Road, Tiger, Georgia 30576. Mr. Jeffrey Duvall is the President of Duvall Development Company, Inc., which has been the owner of the property at which the alleged Clean Water Act ("CWA") violations occurred. He is also President in Duvall & Son Livestock Inc., which used the property under an arrangement with Duvall Development Company, Inc. Mr. Duvall has knowledge of the use of the property to Duvall & Son Livestock Inc. by Duvall Development Company, Inc. and the work performed at the pasture on the property by Duvall & Son Livestock Inc., which included the piping of 4 stream segments on the property. Mr. Duvall also has knowledge of

the work performed at a stream segment on the portion of the property near Webb Road at which piping was installed by Duvall Development Company, Inc.

Mr. Jeffrey Duvall is expected to testify to the property ownership by Duvall Development Company, Inc. and operations of Duvall & Son Livestock Inc., the original stream piping, the environmental conditions at and around the property before and after the work was performed, the work that was performed that has been alleged to constitute CWA violations, the purpose of the work and his knowledge of the regulations potentially applicable to the work prior to the work being performed. Mr. Jeffrey Duvall is also expected to testify to his knowledge of CWA permitting requirements and regulations from alleged involvement in prior regulatory and enforcement matters, as well as to his personal knowledge of the interactions of his father, Mr. Louis Steve Duvall, in these matters.

2. Mr. Steve Duvall, 547 Valley Street, Clayton, Georgia. Mr. Steve Duvall was a principal of Duvall & Son Livestock Inc., which used the property owned by Duvall Development Company, Inc. He had knowledge of the work that was performed by Duvall & Son Livestock Inc. in the pasture of the property that is alleged by EPA to constitute violations of the CWA.

   Mr. Steve Duvall passed away in July of this year. Respondents plan to use the deposition of Mr. Steve Duvall to present his testimony. This testimony is expected to include the operations of Duvall & Son Livestock Inc., the communications with governmental agencies regarding authorization of the work, environmental conditions at and around the property before and after the work was performed, the work that was performed that has been alleged to constitute CWA violations, including the purpose of the work.

3. Mrs. Frances Duvall, 547 Valley Street, Clayton, Georgia. Mrs. Frances Duvall has been the Secretary for Duvall & Son Livestock Company. She has knowledge of the operations and activities of the company, including those activities alleged to constitute CWA violations at the property.

   Mrs. Frances Duvall is expected to testify to the environmental conditions at and around the property before and after the work was performed, the work that was performed at the property that has been alleged to constitute CWA violations, including the purpose of the work.

4. Mrs. Connie Duvall, 208 Ice Plant Road, Tiger, Georgia 30576. Mrs. Connie Duvall has been the secretary for Duvall Development Company, Inc. She has knowledge of the operations and activities of the company, including those activities alleged to constitute CWA violations at the property.

   Mrs. Connie Duvall is expected to testify to the environmental conditions at and around the property before and after the work was performed, the work that was

performed at the property that has been alleged to constitute CWA violations, including the purpose of the work.

5. Mr. David Braswell, Braswell Engineering Inc., 3225 Shallowford Road, Suite 1200, Marietta, Georgia 30062. Mr. Braswell is a professional engineer, who performed a stream flow calculation for the stream 4 as identified by EPA in Complainant's Exhibit 16. He is expected to testify to the condition of that stream at and before the time that the flow calculation was prepared.

6. Mr. Butch Register, Register Nelson, Inc., 45 Parkland Drive, Stockbridge, Georgia 30281. Mr. Register is a Professional Wetlands Scientist with over 20 years of experience related to CWA permitting and wetland mitigation issues. He received his B.S. in Biology from University of West Florida. He was hired as a field biologist by the U.S. Army Corps of Engineers (USACE), and was promoted to Chief of the North Area Section. Then he moved to the U.S. Environmental Protection Agency (EPA), Region 4, where he served as Georgia Project Manager for the Wetland Section. Since entering private consulting practice, Mr. Register has furthered his expertise in determining permit applicability and requirements, and strategies to achieve proper, timely and efficient permitting for clients, including jurisdictional waters determinations, wetland and stream mitigation plans, mitigation banking and penalty assessments. Mr. Register has conducted a review of all available geographical information regarding the property, including aerial photography. He has visited the property and performed several site inspections, including reviews of the work performed at the property. He has conducted a jurisdictional analysis and quality assessment of the streams that have been piped at the property, the impacts of the work and the regulations that could have been applicable to the work.

   Mr. Register is expected to testify as a fact witness regarding his observations during his site visits, and as an expert witness opining on stream ecology, federal jurisdiction, functions and values of the streams at the property, the past conditions at the property based on aerial photography, the impacts of the work performed, the EPA allegations of violation, the application of the EPA penalty policy, and to any other issues addressed by EPA expert testimony.

   Prior to his current position at Register Nelson, Inc., Mr. Register was the Chief of the North Area Section of the US Army Corps of Engineers, Savannah District in Atlanta, Georgia. Mr. Register is expected to testify regarding the prior enforcement actions brought against Steve Duvall and Jeffrey Duvall during the time of his tenure with the Corps.

7. Mr. Marcus Rubenstein, Register Nelson, Inc., 45 Parkland Drive, Stockbridge, Georgia 30281. Mr. Rubenstein received his Bachelor of Science in Forest Resources in 2000 from the University of Georgia, where he specialized in and

gained certification as a Wildlife Biologist. After spending three years as a field research biologist concentrating on international and endangered wildlife, Mr. Rubenstein worked for three years as the Regional Representative with the Georgia Soil and Water Conservation Commission where he was responsible for overseeing local environmental programs as they related to land development. Currently a Senior Project Manager with Register-Nelson, Mr. Rubenstein is responsible for managing the Federal and State Waters permitting program, developing and managing water quality and watershed services, including jurisdictional determinations, water quality sampling and assessment, biological and habitat assessments, CWA permitting, mitigation planning and strategies, stream and bank restoration and stream geomorphology.

Mr. Rubenstein is expected to testify as an expert witness regarding the ecology, functions and values of the streams at the property, the impacts of the work, the EPA allegations of violation, the application of the EPA penalty policy, and to any other issues addressed by EPA expert testimony.

8. Mr. Spencer Trichell, Register Nelson, Inc., 45 Parkland Drive, Stockbridge, Georgia 30281. Mr. Trichell earned a B.S. degree in Biology from the University of Louisiana at Monroe in 2001. Since that time, he has been a private environmental consultant specializing in the regulation and principles of wetland, stream, and wildlife resources, including CWA permitting and jurisdictional waters determinations under federal and state requirements. Mr. Trichell is also responsible for management of projects requiring state and federal permitting and establishing viable strategies for permit resolution.

   Mr. Trichell has performed a jurisdictional evaluation of the streams impacted by the work of Duvall Development Company, Inc. and Duvall & Son Livestock Inc. He is expected to testify as an expert witness regarding jurisdictional evaluations of the impacted streams under the applicable law and guidance.

9. Mr. Sean Miller, Register Nelson, Inc., 45 Parkland Drive, Stockbridge, Georgia 30281. Mr. Miller graduated from Georgia College and State University in 2007 with a degree in Environmental Science and is currently close to completion of his Master's research in Biology, with a concentration in Astacology, Benthic Macroinvertebrates, and Fisheries Biology from that institution. He now works as a Project Manager for Register Nelson, where he is responsible for conducting stream and water quality assessments, including ecological assessments, biological sampling and benthic macroinvertebrate and fish community surveys.

   Mr. Miller has performed an analysis of the four streams at the property using the North Carolina Division of Water Quality stream identification protocol. He is expected to testify as a fact witness regarding his observations of the streams at and adjacent to the property and as an expert witness as to the conclusions and opinions regarding the overall assessment and characterization of the ecology, functions and values of the streams at the property, including a comparison of the

assessment to that of the EPA, and the overall impacts of the piping on the streams and the watershed.

10. Mr. Doug Towery, 185 Welborn Street Box 3, Blairsville, Georgia 30512. Mr. Towery is a District Conservationist with the Natural Resources Conservation Service and was involved in that capacity in the Stekoa Creek Stream Bank Restoration Project. He is expected to testify as a fact witness to the respective roles and responsibilities of Mr. Jeffrey Duvall and NRCS in the filing of a Pre-Discharge Notification for the Stekoa Creek Stream Bank Restoration Project.

11. Mr. James Leslie Neely, Rabun County Marshal's Office, 25 Courthouse Square, Suite 137, Clayton, Georgia 30525. Mr. Neely is an Officer with the Marshall's Office and was involved in the 2004 citation for piping the streams. Mr. Neeley is expected to testify as a fact witness to the circumstances involved in the issuance and resolution of the citation.

12. Mr. Anthony Dean Galloway, Rabun County Marshal's Office, 25 Courthouse Square, Suite 137, Clayton, Georgia 30525. Mr. Galloway was with the Natural Resource Conservation Service (NRCS) and was involved with the Stekoa Creek Stream Bank Restoration Project. He is now an Officer with the Marshal's Office. Mr. Galloway is expected to testify as a fact witness with regard to the involvement of NRCS and Mr. Jeffrey Duvall in the Stekoa Creek Stream Bank restoration Project.

13. Mr. Dick L. Fowler, Chatooga River Watershed Coordinator, US Forest Service, 809 Highway 441 South, Clayton Georgia 30525. Mr. Fowler was involved with the knowledge of the Stekoa Creek Stream Bank Restoration Project. Mr. Galloway is expected to testify as a fact witness with regard to the involvement of NRCS and Mr. Jeffrey Duvall in the Stekoa Creek Stream Bank restoration Project.

14. Mr. Mark Nelson, Register Nelson, Inc., 45 Parkland Drive, Stockbridge, Georgia 30281. Mr. Nelson is a principal at Register Nelson, Inc. Prior to his current position at Register Nelson, Inc., Mr. Nelson was a project manager for the North Area Section of the US Army Corps of Engineers, Savannah District in Atlanta, Georgia. Mr. Register is expected to testify as a fact witness regarding the prior enforcement actions brought against Steve Duvall during the time of his tenure with the Corps.

15. Mr. Mike Copeland, Rabun County Mapping and Planning Department, 25 Courthouse Square, Box 9, Clayton, Georgia. Mr. Copeland is currently the County tax Assessor but prior to that had been with the Rabun County office that would have been responsible for making decisions regarding authorization for work in streams during all times applicable to this matter. He is expected to testify as a fact witness to the County's communications with Mr. Steve Duvall

regarding dredging of work on Stekoa Creek and the authorization provided by the County for that work.

16. Mr. Jimmy Blekley, Rabun County Board of Commissioners, 25 Courthouse Square, Box 8, Clayton, Georgia. At all times relevant to this matter, Mr. Blekley has been the County Administrator for Rabun County. He is expected to testify as a fact witness to the County's communications with Mr. Steve Duvall regarding dredging of work on Stekoa Creek and the authorization provided by the County for that work.

17. Mr. Tony Campbell, Georgia Department of Natural Resources, Environmental Protection Division, Mountain District Office, P.O. Box 3250, 16 Center Road (30121), Cartersville, Georgia 30120. Mr. Campbell is with the Georgia Environmental Protection Division and had observed the property adjacent to Highway 441 prior to the commencement of the work. He is expected to testify as a fact witness to the condition of the stream on the property adjacent to Highway 441 prior to the commencement of the work.

18. Mr. Harold Thompson, 234 Redwood Lane, Tiger, Georgia 30576. Mr. Thompson was with the Natural Resource Conservation Service (NRCS) during the 1990's. He is expected to testify as a fact witness to the interactions of NRCS with Mr. Steve Duvall during that time.

19. Mr. James C. Wright, CPA, Tomkiewicz Wright, LLC, 6111 Peachtree-Dunwoody Rd., Atlanta, Georgia 30328. Mr. Wright is an accountant that has been identified in deposition testimony as a person who has knowledge of the financial transactions of the company Respondents. He is expected to testify as a fact witness to the manner and extent of payment by the company Respondents, if any, for the piping work including labor, equipment, fuel and any other expenses related to such work, as well as to any ownership and financial arrangements regarding heavy equipment used for the work.

20. Chris Ledford, Duvall Ford Company, 396 Highway 441 South, Clayton, Georgia. Mr. Ledford is the Comptroller of Duvall Ford Company. He has been identified in deposition testimony as a person who has knowledge of the financial transactions of Duvall Ford Company. He is expected to testify as a fact witness to the manner and extent of payment by the company Respondents, if any, by Duvall Ford Company for the piping work including labor, equipment, fuel and any other expenses related to such work, as well as to any ownership and financial arrangements by Duvall Ford Company regarding heavy equipment used for the work.

Respondents respectfully reserve the right to call or refrain from calling the aforementioned witnesses, and to expand or otherwise modify the scope, extent or areas of testimony of the witnesses, as appropriate. Respondents further reserve the

right to supplement its witness list as authorized pursuant to 40 CFR Section 22.19(f) with the Court's approval and upon adequate notice to the Complainant.

B. Respondents' List of Documents and Exhibits [40 CFR §22.19(a)(2(ii)]

Respondent intends to introduce into evidence at the hearing the following documents, copies of which are marked for identification as Respondents' Exhibit (RX) in numerical order and attached:

RX1. USGS Topographical Map of the Property and Stream Locations.

RX2. Aerial Photo of the Property with Stream Locations dated February 23, 1994.

RX3. Aerial Photo of the Property with Stream Locations dated 1999.

RX4. Aerial Photo of the Property with Stream Locations dated June 25, 2007.

RX5. Aerial Photo of the Property with Stream Locations dated June 25, 2009.

RX6. Photographs Illustrating Use of Property by Livestock

RX7. Letter from Appalachian Survey Co., Inc. dated October 27, 2005 Regarding Stream Flow Testing.

RX8. Braswell Engineering Stream Flow Calculations dated June 26, 2006.

RX9. Letter from Rabun County to Duvall Development Company, Inc. dated December 18, 2006 Stating No Need for Variance for Filling Activity.

RX10. Photographs from March 29, 2010 Showing Condition of Adjacent Property.

RX11. Stream Assessment Report, Register-Nelson Inc. dated October 25, 2010.

RX12. Jurisdictional Assessment Report, Register-Nelson Inc. dated October 26, 2010.

RX13. Respondents Final Property Title Certificate dated July 14, 1988.

RX14. Co-tenancy Agreement Between Respondents dated January 16, 1991.

RX15. Warranty Deed Transferring Property from Mr. Steve Duvall to Mr. Jeffrey Duvall dated December 10, 1991.

RX16. Warranty Deed Transferring Property from Mr. Jeffrey Duvall to Duvall Development Company, Inc. dated January 2, 1992.

RX17. Corporate Documents for Duvall Development Company, Inc. including Minutes and By-Laws, Stock Certificate, Shareholder Consent to Action, Certificate of Incorporation and Articles of Incorporation.

RX18. Corporate Documents for Duvall & Son Livestock, Inc. including Minutes and By-Laws, Stock Certificate, Shareholder Consent to Action, Certificate of Incorporation and Articles of Incorporation.

RX19. 66 Federal Register 154 (August 9, 2001) USACE Proposal to Reissue and Modify NWPs.

RX20. Pictures of ponded condition in pasture.

RX21. 61 Federal Register 65873 (December 13, 1996), USACE Notice of Issuance, Reissuance and Modification of NWPs.

RX22. Conservation Use Assessment (Easement) Duvall Development Company, Inc. Property recorded with Rabun County, April 1, 2003; and attached letter from Mr. Mike Copeland, Rabun County Tax Assessor, confirming participation in conservation program since 1993.

RX23. Any Documents Identified by Complainant's Prehearing and Supplemental Prehearing submissions. (no documents appended)

Respondents further reserve the right to supplement its exhibit list as authorized pursuant to 40 CFR Section 22.19(f) with the Court's approval and upon adequate notice to the Complainant.

C. Information Relevant to Penalty Assessment [40 CFR §22.19(a)(3-4)]

The Administrative Complaint filed by EPA proposes that Respondents pay a civil penalty "in an amount up to $177,500" for the alleged violations. Complainant's Initial Prehearing Exchange states that EPA will provide a proposed penalty and an explanation of the penalty calculation in accordance with the provisions of 40 CFR §22.19(4). Respondents object to the proposed penalty. As explained below, the assessment of any significant penalty amount would be inappropriate in this matter.

Section 309(g)(3) of the CWA sets forth the factors to be considered in determining an appropriate administrative penalty amount. Under this section, EPA must consider the nature, circumstances, extent and gravity of the violation and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and

other factors as justice may require. Respondents' evaluation of each of these factors follows:

1. Nature and Circumstances of Alleged Violation

a. Inappropriate Identification of Responsible Parties

EPA originally identified Mr. Jeffrey Duvall and Duvall Development Company, Inc. as responsible for the piping of the stream segments 1, 2.1, 2.2 and 3. The original complaint was amended in May 2011 to add Mr. Louis Steve Duvall and Duvall and Son Livestock Inc. as Respondents. Respondents continue to maintain that Mr. Jeffrey Duvall and Duvall Development Company are not properly named as Respondents.

Mr. Jeffrey Duvall and Mr. Steve Duvall originally acquired the property in July 1988, at which time each had a one-half undivided ownership interest in the property. (See Exhibit 13) These persons held the property as tenants in common (See Exhibit 14) until December 10, 1991 when, by Warranty Deed, the interest of Mr. Steve Duvall was transferred to Mr. Jeffrey Duvall. (See Exhibit 15) Mr. Jeffrey Duvall transferred the property ownership to Duvall Development Company, Inc. by Warranty Deed dated January 2, 1992. (See Exhibit 16) Duvall Development Company, Inc. is owned by Jeffrey Duvall. (See Exhibit 17) Duvall Development Company, Inc. then allowed the property to be used by Duvall & Son Livestock, Inc. for the purpose of cattle farming operations. Duvall & Son Livestock, Inc. is owned by Mr. Jeffrey Duvall and Mr. Steve Duvall. (See Exhibit 18) As the operator of the property, Duvall & Son Livestock, Inc. had the exclusive right to use of the property. The property has been and is continued to be used by Duvall & Son Livestock, Inc. to support the cattle farm.

The piping of the stream segments in the pasture of the property, identified by EPA as streams 1, 2.1, 2.2 and 3, was performed by and on behalf of Duvall & Son Livestock, Inc. Therefore, to the extent that any of this work constituted a violation of the CWA, the violator would have been Duvall & Son Livestock, Inc. However, Duvall & Son Livestock, Inc. was not named by EPA as a party to this matter. Instead, Mr. Jeffrey Duvall is named as a Respondent. Although Mr. Jeffrey Duvall is an owner of Duvall & Son Livestock, Inc., he acted for the corporation only and took no action in his individual capacity that would have been in violation of the CWA.

b. Piping of Stream 2.2 Did Not Constitute a CWA Violation

EPA incorrectly assumes jurisdiction over the area identified as stream 2.2, where replacement piping was installed by Duvall & Son Livestock, Inc. The original piping of the stream occurred shortly after 1988 when the property was purchased. After initial construction, the metal piping became obstructed. As a result, Duvall & Son Livestock, Inc. took action to maintain the piping. A metal riser was installed to

divert the water around the obstruction and to Stekoa Creek. The diversion of the water at certain times created a ponded area of up to approximately one-third of an acre (See Exhibit 20), but it effectively facilitated normal water flow to Stekoa Creek. From initial installation until 2003, there were a series of other pipe obstructions that were cleared with continued maintenance. Finally, in 2004, it became evident to Duvall & Son Livestock, Inc. that the normal life expectancy of the metal piping had been exceeded. As a result, Duvall & Son Livestock, Inc. replaced the metal pipe with higher quality concrete piping. (See Exhibits 1 – 5)

The installation of the original piping would have been authorized pursuant to permit by rule under Nationwide Permit (NWP) 26, which, at that time, authorized discharges up to 10 acres in non-tidal (headwater) streams. No Pre-Discharge Notification (PDN) would have been required for this activity as impacts of less than one acre were not subject to USACE consultation at that time. In 1984, USACE placed an upper limit of 10 acres on NWP 26. In 1996, USACE reduced that threshold to 3 acres and limited stream impacts to 500 linear feet. (See Exhibit 21) Accordingly, the original pipe placement, which occurred before 1996, was not in violation of the CWA.

Further, the replacement piping was authorized under NWP 26 as a conditional requirement for normal maintenance of previously authorized activity or, alternatively, under NWP 3 as replacement of previously authorized activity. Because this work was authorized by either of these NWPs, there was no violation by Respondents in the area of the replacement piping. Accordingly, EPA cannot assess a penalty for the activities of Respondents in this area. Further, even if there was a violation, Mr. Jeffrey Duvall and Duvall Development Company Inc. would not be properly named as violators. Although Mr. Jeffrey Duvall is an owner of Duvall Development Company, Inc., he acted for the corporation only and took no action in his individual capacity that would have been in violation of the CWA.

c. Lack of Jurisdiction with Regard to Stream 4

In the area across from Webb Road, Duvall Development Company, Inc. installed piping in an improved drainage ditch to provide access to a proposed greenway along Stekoa Creek. Duvall Development Company, Inc. planned to allow the Georgia Department of Transportation to place dirt in the area adjacent to the greenway site to create a parking area and greenway access area. When preparing the land for this work, Duvall Development Company, Inc. discovered a drainage pipe from Highway 441 that needed to be extended. Upon instruction from Rabun County, Duvall Development Company, Inc. had the flow of the water in the improved drainage ditch measured to determine whether any state stream buffer variance would be necessary for the proposed work. In October 2005, the water flow was determined by Mr. Bill Rolader of Appalachian Surveying to be fourteen gallons per minute. (See Exhibit 7) The County informed Duvall Development Company, Inc. that this flow was exempt from the variance requirement and proceeded with the work. After the work was completed, Duvall Development Company, Inc. was informed of an alleged

impropriety in the stream flow analysis of Appalachian Surveying. Duvall Development Company, Inc. engaged Mr. David Braswell of Braswell Engineering to perform a stream flow calculation. Mr. Braswell determined that the stream flow was less than 25 gallons per minute. (See Exhibit 8) Duvall Development Company, Inc. was later informed by the Georgia Environmental Protection Division (EPD) that the flow was less than the threshold necessary to require a variance. (See Exhibit 9) Duvall Development Company, Inc. was not aware of the possibility of jurisdiction under the CWA when it performed the work in this area. Although Mr. Jeffrey Duvall is an owner of Duvall Development Company, Inc., he acted for the corporation only and took no action in his individual capacity that would have been in violation of the CWA.

Respondents have obtained an expert evaluation of the hydrology of the stream segment off of Webb Road. The expert report concluded that this is an ephemeral stream of marginal/poor quality. The low quality and flow would have rendered it unlikely that this area would have been determined to be jurisdictional under the present guidelines.

Finally, to the best of its knowledge, Duvall Development Company, Inc. installed less than 100 feet of piping in this stream segment. There was a certain amount of pipe that existed in the stream before the work by Duvall Development Company, Inc. The pre-existing pipe ended at a concrete headwall. This was removed and replaced with clean pipe and junction box. Therefore, even if this stream was determined to be jurisdictional, the amount of piping was below the regulatory threshold, which at that time allowed up to 100 feet of piping of these waters.

d. Lack of Jurisdiction with Regard to First Order Streams

Respondents have obtained an expert evaluation from Register-Nelson, Inc. regarding the federal jurisdictional of the stream segments piped at the property. In performing this jurisdictional determination, Register-Nelson used the analysis adopted by the Supreme Court in Rapanos v. United States and Carabell v. US Army Corps of Engineers and the EPA/USACE guidance issued pursuant thereto, as articulated by EPA in its Prehearing Exchange. (See Complainants Exhibit 16) Register-Nelson concluded that the first order streams on the property, identified as streams 1, 2.1, 3 and 4, may not have a significant nexus by chemical, physical and biological integrity to a traditionally navigable water. Therefore, these stream segments may not be jurisdictional waters of the United States. (See Exhibit 12)

2. Extent and Gravity of the Alleged Violation

a. Improper Identification and Evaluation of Streams by EPA

EPA's penalty calculation is fatally flawed by the improper identification and assessment of the function and values of the streams at the property. First, EPA

characterizes all of the streams involved in this matter as perennial streams. However, this is incorrect, as one of the streams, identified as stream 4, is ephemeral. Second, EPA incorrectly ascribes to each stream the qualities and functions generally associated with headwaters. Third, even where EPA considers the specific conditions of the streams, EPA's assessment highly over-rates the biological value of the streams.

i. Erroneous Classification of Stream 4

EPA classifies stream 4 as perennial. Respondent, however, disputes this classification. Respondent engaged Register-Nelson to perform a study of the streams at the property. Using the North Carolina Hydrology Assessment (NCHA), which was used by EPA in its stream assessment, the study concluded that this stream is an ephemeral stream. Further, historic and present residential and commercial land uses have greatly altered and degraded the present stream. Only a moderate continuous bed and bank were noted throughout the reach. Directly upstream of the reach assessed, the stream models a man made drainage system. No in-stream geomorphic features were noted within the reach. The stream contains a level in-stream elevation with no changes to bed features throughout the reach. A thick layer of fine particles and leaves were noted within the channel as well. The presence of these attributes shows a low velocity, high degraded system. No fish were observed within the channel. A very low diversity and abundance of macroinvertebrates was sampled from this stream. The dominant taxa observed were Veliidae (broad shouldered water strider) and Tipulidae (cranefly). Members of the Veliidae family (Hemiptera order) are commonly found in stagnant ponds, lake margins, and low velocity streams. Based on this information, the study further assigns an EPA Rapid Bio-assessment Habitat Assessment (RBA) score of 62, which represents marginal/poor quality. (See Exhibit 12)

ii. Significant Over-Valuation of Stream Quality

The EPA Prehearing Exchange explains that the headwaters are important to the overall function of the aquatic ecosystem such as in transport of organic material and invertebrates, connectivity to navigable waters and groundwater recharge. However, EPA's own expert analysis concedes that all of the streams on the property do not perform the functions attributed to them. For instance, with regard to stream 1, EPA identified an absence of organic debris and weak/absent flora and fauna.

Moreover, the EPA NCHA evaluation of the streams consistently and significantly overstates the function and values of the streams at the property. The evaluation presented by Register-Nelson, on the other hand, more accurately identifies the quality of the streams at the property. The NCHA and RBA performed by the Register-Nelson indicate that the streams contain monotypic habitat and geomorphic features, very few riffle-pool complexes, little sinuosity, poor biological communities and sub-optimal habitat or in-stream structure incapable of supporting diversified and abundant biological communities. All of the biological and physical

characteristics described above correlate to highly degraded and generally low flow stream conditions within all the channels assessed. (See Exhibit 11)

iii. Exaggerated and Assumed Impacts of Piping

EPA claims that the Respondents' activities resulted in the discharge of pollutants such as soil, rock and sediment into the streams. This exaggerates the impacts of the construction since the work was conducted in such a manner as to prevent any discharge into active waterways. Respondents had the water pumped away from the area where pipe was being placed. As a result, there was no discharge to the stream during the work. After the work was completed, and the water was routed to through the piping, the piping was covered with earthen materials.

Further, EPA claims stream functional losses due to the piping. While Respondents do not dispute that some of these effects could occur from piping, others are not substantiated by EPA. For instance, EPA claims that increased erosion resulted from the piping. Respondents disagree with this claim and states affirmatively that the piping has reduced erosion as well as sedimentation at the property and adjacent waters. Prior to the use of piping the streams were exposed to cattle which trampled the areas and caused significant erosion of the stream banks and sedimentation in the streams and receiving waters. (See Exhibit 7) Therefore, the piping actually benefitted the stream systems by reducing these erosive conditions. Further, the stream systems on the property have already been impaired by piping, erosion, dredging and other fragmentation that has occurred and continues to occur upgradient from the property. (See Exhibit 10) These impairments cannot be attributed to Respondents. Finally, EPA fails to quantify these alleged functional losses due to the work at the property.

b. Lack of Culpability

EPA claims that Mr. Jeffrey Duvall had specific knowledge of the CWA permitting requirements applicable to the piping of streams when that work was performed on the property in 2004. In support of its claim, EPA cites a 2002 PCN allegedly submitted by Mr. Duvall seeking USACE approval of an NWP. However, EPA assumes a far greater comprehension of CWA jurisdiction and permitting requirements than is properly attributable to Mr. Duvall.

It is important to note the background of this matter. At that time, Mr. Duvall was participating as the representative for agriculture in a group seeking to implement a stream bank restoration project on Stekoa Creek under NWP 27. The NWP application that EPA alleges was prepared by Mr. Duvall with the assistance of the NRCS was actually prepared, not by Mr. Duvall, but entirely by the NRCS representative, Mr. Doug Towery. The application was submitted in the name of Mr. Duvall as the group representative and as the owner of the property that he was donating for the project. However, that was the extent of his involvement. Further, whether Mr. Duvall was or was not involved in completing the NWP application, it is

unreasonable for EPA to assume his broader understanding of the regulations such that he would have knowledge of such amorphous and unrelated matters as the federal jurisdiction of small streams and the permitting of piping of these streams under individual permits and/or NWPs. Accordingly, Mr. Duvall did not have knowledge of the regulations applicable to stream piping prior to commencement of the work at the property. EPA's position that Mr. Duvall ignored these regulations that it claims are applicable is mere conjecture. It is an infinitely more plausible position that Mr. Duvall simply did not know that the small improved ditches located on the property, as opposed to a larger waterway like Stekoa Creek, could be regulated by the federal government and that the placement of pipe in already piped areas and the open improved ditch areas, actions that have been commonly taken on farmland in that area of the state, could require a special authorization from the federal government.

Through its Supplemental Prehearing Exchange, EPA claims that Respondents, particularly Mr. Jeff Duvall and Mr. Steve Duvall, have been aware of the CWA permitting requirements applicable to the piping work in the streams on the Property from prior enforcement actions in the 1980's and 1990's. The actions cited by EPA involved filling and grading of land adjacent to Stekoa Creek which caused erosion and sedimentation control concerns and the rechanneling of Stekoa Creek to secure a building on the property ("prior work"). Although potentially regulated under the same provision of the CWA as the prior work, the piping work was conducted on small improved ditches of questionable jurisdiction, rather than a known navigable water such as Stekoa Creek. Further, in each case, the work was coordinated with the appropriate office of the County and with the Soil Conservation Service, both of which provided verbal authorization to move forward with the work without identifying any further governmental regulatory requirements applicable to the work. Citing the events of 20 years past fails to substantiate claims of current knowledge of applicable CWA requirements.

c. Economic Benefit

EPA claims that the Respondents gained an economic windfall from avoiding costs of permitting and future development ability achieved through the unpermitted work. Nothing could be further from the truth.

Respondents did not ignore the laws in an attempt to gain economically from property development by piping the streams. The purpose of the piping of the streams was to create additional pasture and to facilitate access for farm equipment. EPA assumes that the Respondents harbor a surreptitious intention to develop this property for residential or commercial purposes in the future. However, these assumptions are unrealistic and unfounded. The property is the home of Mr. Jeffrey Duvall and his wife and is used solely for his personal and agricultural purposes. The land was placed in the agricultural conservation use program since its establishment by the state of Georgia in 1992 and remains in the program to date. The easement burdening the property under this program precludes development of the property.

(Exhibit 22) Since the land cannot be developed, no such benefit can be realized by Respondents.

Nor have the Respondents gained economically by avoiding permitting costs. As explained above, Respondents do not believe that permit requirements were applicable to stream 2.2 (replacement of existing pipe under NWP); stream 4 (non-jurisdictional ephemeral stream); and perhaps streams 1, 2.1 and 2.2 (lack of jurisdiction under Rapanos). Therefore, Respondents maintain that they did not avoid any permit process. To the contrary, Respondents have been forced to incur significant costs on the defense of this EPA enforcement action. The costs of attorneys fees and consulting fees to address this matter with all levels of EPA including negotiation of a possible resolution and development of proposed mitigation and restoration plans (not to mention the time, aggravation and frustration) over the course of many years has been comparable to if not in excess of the costs EPA claims have been avoided. Indeed, had EPA been more reasonable and not sought such a costly resolution to this matter (approximating $300,000), this matter would likely have settled before this action was filed.

Finally, had Respondents actually known of the regulations and evaluated the available options, Respondents would likely have been informed that most if not all of the work could have been performed without the permit that EPA alleges was necessary. Even assuming that streams 1, 2.1 and 3 were jurisdictional, for instance, the objectives of the Respondents to eliminate the streams could have been performed without a permit or mitigation under an exemption or NWP. Respondents maintain that the statutory exemption [section 1344(f)(1(E)] would have allowed Respondents to construct a farm pond encompassing the area of the three streams. This exemption being self-executing, Respondents would not have had to apply for any authorization from or engage in any coordination with the USACE. A pond the size required for Duvall & Son Livestock Inc. to meet normal operational needs could easily have been in excess of one acre. It may have been advisable for Respondents to meet with NRCS to verify the allowable size of the farm pond based on water budget calculations. However, this would have been a minor expense for Respondents. Further, Respondents could have piped up to .10 acres or filled up to 25 cubic yards of waters below the plane of the ordinary high water mark under NWP 18 for minor discharges. Discharges up to .10 cubic yards below the plane of the ordinary high water mark were authorized without PDN. (See Exhibit 19)

d. Other factors as justice may require

EPA attempts to paint Mr. Jeffrey Duvall and the Respondents as bad actors i.e. having "failed to comply with that (Administrative Compliance) order", and having "refused to" restore the piped streams and seek an after-the-fact permit. Contrary to the characterization of EPA, Respondents have had legitimate legal and practical reasons for not acquiescing to the demands of EPA. Respondents have been seeking to resolve this matter with EPA for approximately three years and have spent significant resources in the process. Respondents have legitimate issues with EPA as

to the extent of streams that EPA has declared jurisdictional and the need for restoration of the piped streams. Failure of the Respondents to accept the settlement terms offered by EPA is not a valid basis to deny a penalty reduction for cooperation.

Respondents reserve the right to add other arguments as to the propriety of the penalty proposed by the Complainant pursuant to 40 CFR Section 22.19(f) with the Court's approval and upon adequate notice to the Complainant.

D. Respondents' View on the Place of Prehearing Conference/Hearing and an Estimated Amount of Time Needed to Present Their Direct Case [40 CFR §22.19(d) and §22.21(d]

Respondents prefer to have the prehearing conference by telephone and the hearing location to be in Atlanta, Georgia at the EPA Regional Office. It is estimated that Respondents will require approximately 1-2 days to present their direct cases.

Respectfully submitted,

Edwin Schwartz
Attorney for Respondents Mr. Jeffrey Duvall and Duvall Development Company Inc.

Sweetnam & Schwartz, LLC
Three Ravinia Drive, Suite 1700
Atlanta, Georgia 30346

L. Allyn Stockton, Jr. (by permission)
Attorney for Respondents Mr. Steve Duvall and Duvall & Son Livestock, Inc.

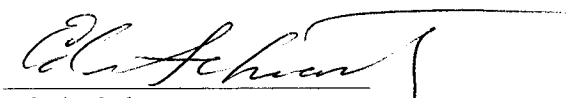
Stockton & Stockton
P.O. Box 1550
Clayton, Georgia 30525

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed with the U.S. Environmental Protection Agency, Region 4, Regional Hearing Clerk, the original and one copy of the foregoing Respondents' Supplemental Prehearing Exchange in the above-styled matter. I further certify that I have served a true and correct copy of the same on the parties listed below by United States first class mail, return receipt requested on this the 16th day of September, 2011:

Judge Barbara A. Gunning
US Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Robert W. Caplan
Senior Attorney
Sam Nunn Federal Center – 13th Floor
US Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, Georgia 30303



Edwin Schwartz
Attorney for Respondents Mr. Jeffrey Duvall and Duvall Development Company Inc.

Sweetnam & Schwartz, LLC
Three Ravinia Drive, Suite 1700
Atlanta, Georgia 30346
(p) 770.594.8272
(f) 770.234.6779
(i) edschwartz@msn.com