

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

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IN THE MATTER OF: )  
 )  
 Jeffrey H. Duvall and Duvall )  
 Development Co., Inc., )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

DOCKET NO.: CWA-04-2010-5505

COMPLAINANT'S MEMORANDUM IN SUPPORT OF MOTION  
FOR LEAVE TO FILE AMENDED COMPLAINT AND FOR DISCOVERY ORDER

COMES NOW the Complainant, the United States Environmental Protection Agency, Region 4 (EPA), by and through its counsel in the above-styled action, and submits the following Memorandum in Support of its Motion for Leave to File Amended Complaint and for Issuance of a Discovery Order.

I. Basis for Filing Amended Complaint

Pursuant to 40 C.F.R. § 22.14(c), after an answer has been filed, a complainant may amend the complaint only upon motion granted by the Presiding Officer. Section 22.14(c) does not provide any guidance as to the circumstances under which a motion to amend should be granted. Section 22.14(c) is modeled after Rule 15(a) of the Federal Rules of Civil Procedure (FRCP). Rule 15(a) itself does not provide much more than Section 22.14(c) in the way of specific guidance about the circumstances supporting a motion to amend, but it does adopt a liberal stance toward amending pleadings, stating that "leave shall be freely given when justice so requires." The Supreme Court has expressed this liberality in interpreting FRCP Rule 15 and has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure

deficiencies by previous amendment, undue prejudice, or futility of amendment. See Foman v. Davis, 371 U.S. 178, 181-182.

Although the FRCP are not binding on administrative agencies, the Environmental Appeals Board (EAB) has looked to federal decisions construing Rule 15(a) for useful guidance on what factors Administrative Law Judges and the EAB should consider in analogous situations. See In the Matter of Rogers Corporation, Docket No. TSCA-I-94-1079, 1997 TSCA LEXIS 47, n.3 (November 13, 1997), citing In re Wego Chemical & Mineral Corp., TSCA Appeal No. 92-4, 4 EAD 513, 524, n. 10 (EAB, February 24, 1993). The EAB has found that a complainant should be given leave to freely amend a complaint in EPA proceedings in accordance with the liberal policy of FRCP 15(a), since it promotes accurate decisions on the merits of each case. See In the Matter of Asbestos Specialists, inc., TSCA Appeal 92-3, 4 E.A.B. 819, 830 (EAD, Oct. 3, 1993); See also In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 (EAB, Aug. 5, 1992), slip opinion at 41. The test is whether substantial prejudice will result. EPA Administrative Law Judges have adopted the approach enunciated by the EAB. See, e.g., In the Matter of JDN Intermountain Holdings, Inc., 2004 EPA ALJ LEXIS 119 (Docket No. CWA-08-2003-0073, June 10, 2004) (Order Granting Complainant's Motion to Amend the Amended Complaint).

In the present case, EPA's Motion clearly is not the result of any undue delay, bad faith, or dilatory motives or repeated failures to cure any deficiencies by previous amendment on EPA's part. EPA has acted in good faith and in a timely manner throughout the proceedings. The Complaint was filed on March 12, 2010. After the conclusion of Alternative Dispute Resolution in the summer of 2010, EPA filed its

Prehearing Exchange on October 1, 2010. On October 29, 2010, Respondents filed their Prehearing Exchange, asserting that Duvall & Son Livestock had conducted the piping work on its own behalf and that Duvall Development Company was not involved in the work. On November 12, 2010, Complainant filed its Proposed Penalty and Analysis of Statutory Penalty Factors in response to Respondents' PHE, and indicated that in light of Respondents' newly disclosed assertions about Duvall & Son Livestock having conducted the work, Complainant would be considering whether to file a Motion for Leave to File an Amended Complaint.

In late November and early December 2010, EPA reviewed Respondents' Prehearing Exchange and all the evidence in an effort to determine whether a Motion for Leave to Amend the Complaint to add Duvall & Son Livestock and Steve Duvall should be filed. During the last two and a half weeks of December 2010, counsel for EPA was on scheduled leave and returned to the office on January 3, 2011. During the week of January 10, 2011, the Region 4 office was shut down due to an ice storm, and counsel was not able to get to the office the entire week. The office was also closed on January 17, 2011, in observance of the ML King holiday. On January 18-19, 2011, EPA counsel was required to attend meetings in the state of Florida. Upon returning to the office on January 19, 2011, counsel and the EPA CWA program client decided that EPA would first seek additional information from Respondents before making a final determination on whether it was appropriate to seek to amend the Complaint to add Steve Duvall and Duvall & Son Livestock as parties.

On February 2, 2011, EPA issued its request for additional information to the Respondents, and on February 11, 2011, Respondents submitted their answers. This

Motion is being filed within seven days after EPA's receipt of the additional information. In view of the above, there is no evidence of any undue delay or dilatory motives on the part of Complainant in filing this Motion. In fact, EPA has expended significant time and resources over the past 4 years trying to get this case resolved and has no interest in delaying its resolution. Any delay in resolving this matter at this point is the responsibility of the Respondents who failed to comply with EPA's Order to restore the streams, who have refused to return to compliance, and who have provided inconsistent, conflicting stories about the piping work. These actions have led to the need for an amended complaint and an amended answer.

Nor is there any basis upon which to conclude that the current Respondents or the proposed additional Respondents will suffer any prejudice or hardship if the Motion to Amend is granted since the allegations against the new Respondents are essentially identical to those against the existing Respondents. There are no new theories of liability or different claims or complicated additional facts or any change in the proposed penalty that will require extensive investigation or expenditures by the new parties. Further, it would appear that the attorney representing the current Respondents will also represent the proposed additional parties. Since Duvall Development Company and Duvall & Son Livestock are closely held family businesses with Jeffrey Duvall as CEO and President of both companies, and Jeffrey Duvall's father, Steve Duvall, as an officer of Duvall & Son Livestock, the proposed new Respondents have been on notice of this enforcement matter since EPA issued its Compliance Order and Information Request to Jeffrey Duvall in March 2006, and on notice of the Complaint from the date it was issued.

As stated in EPA's Motion, Steve Duvall attended one of the last meetings between the parties, but did not disclose at that time his role as the person who made all the decisions about piping the streams or that it was Duvall & Son Livestock, not Duvall Development Company, that conducted, controlled and directed the work. Respondents did not clearly disclose their assertions that Duvall & Son Livestock and Steve Duvall made all the decisions about the work and conducted and directed the work until they submitted their answers to EPA's February 2, 2011, questions, and they cannot assert now that Complainant's Motion to Amend the Complaint to add these parties is somehow dilatory or in bad faith. Respondents are claiming that if there is liability for the violations, the appropriate liable parties are Duvall & Son Livestock and Steve Duvall.

The hearing in this matter is scheduled for April 26, 2011, approximately 10 weeks after the date this Motion is being filed. Respondents have ample time to respond to this Motion and both they and the new Respondents have time to answer an amended complaint. Further, on February 11, 2011, Respondents filed a Motion to Amend their Answer to correct the inaccurate, incorrect statements contained in their original Answer. EPA does not object to Respondents' Motion to Amend their Answer, but believes that the more efficient procedure under the circumstances would be for the Court to direct the Respondents to file an Answer to EPA's Amended Complaint, rather than filing an amended answer now to the original Complaint and then another amended answer after EPA issues its Amended Complaint, assuming that the Court grants EPA's Motion.

EPA acknowledges that the process to amend the Complaint and the Answer and to conduct the discovery sought by EPA might result in a delay in the hearing date, but any such delay should be of short duration. Moreover, the short delay, if necessary, will

allow the parties to complete the filing of pretrial motions and to gather all the facts to enable them to develop their Joint Stipulation. EPA also believes that the discovery requested herein can be conducted expeditiously and should not result in any significant or unreasonable delays in conducting the hearing, nor will Respondents incur significant costs responding to EPA's requested discovery. EPA will conduct the depositions in Rabun County, Georgia where the Duvalls reside.

## II. A Discovery Order is Appropriate in this Case

40 C.F.R. § 22.19(e)(1) provides that the Presiding Officer may order discovery after the parties have completed their prehearing exchanges if such discovery:

- i. Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- ii. Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- iii. Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

Pursuant to 40 C.F.R. § 22.19(e)(3), the Presiding Officer may also order depositions in accordance with paragraph (e)(1) and upon an additional finding that:

- i. The information sought cannot reasonably be obtained or discovered by alternative methods of discovery; or
- ii. There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved by a witness at the hearing.

EPA believes that its request for discovery satisfies the grounds established under section 22.19(c). Taking depositions will not unreasonably delay these proceedings nor unreasonably burden the existing or proposed new Respondents. The purpose of the depositions will be to seek to elicit complete, accurate, and truthful information from the

proposed deponents about the actions and authorities of the individuals and companies involved in the piping work that led to the violation. This information has significant probative value on a key disputed issue of fact: which of these individuals and companies are responsible for the decisions and work that gave rise to the violation and which of them are properly to be held liable for the violation.

As discussed previously, the Respondents have provided inconsistent, contradictory and untruthful information on these very critical questions in their responses to information requests, in their Answer and PHE. In light of this history of Respondents' shifting stories on key issues in this case, EPA believes that depositions are necessary and would be the most efficient manner to obtain reliable and probative evidence. EPA does not believe that this information can be reasonably obtained or discovered by alternative methods of discovery such as interrogatories or requests for production of documents; indeed, spending time issuing interrogatories may only lead to more inconsistent and inaccurate assertions and further delay rather than narrowing the issues for trial and helping the parties prepare a joint Stipulation. Depositions will enable EPA to probe the bases, veracity and credibility of the different stories presented by the Respondents.

EPA is also concerned about not being able to preserve the potentially relevant and probative evidence that would be provided at trial by Steve Duvall, who is currently 85 years old. While EPA is not aware of his current physical condition, a deposition will ensure that his testimony is properly preserved. EPA believes that under these circumstances, EPA's request satisfies 40 C.F.R. § 22.19(e)(3)(ii).

As for requesting documents on these issues, the Respondents stated in their February 11, 2011, response to EPA's questions that there are no corporate documents pertaining to the identity of which corporation or individuals made decisions to conduct the work, or which of them actually directed, controlled or conducted the work, or who owned the heavy equipment, or hired and paid workers. See Attachments 2 and 3 to this Motion and Memorandum.

However, despite claiming in their February 11, 2011, response (Attachment 3) that there were no documents regarding the purchase and ownership of the heavy equipment, Respondents included documents in their PHE Exhibits showing that Duvall Development authorized its President, Jeffrey Duvall, to acquire the equipment for Duvall Development from Jeffrey Duvall in exchange for stock in the newly formed company. In this highly confused state of facts, depositions are critical for sorting out the confusion and pinning down what happened and who did what in relation to the piping work. If, as Respondents assert, there are no documents on these questions, and it appears that the only information available is in the memories of Jeffrey Duvall and Steve Duvall, depositions are appropriate and necessary to elicit the very relevant factual information that will lead to a proper adjudication of this case.

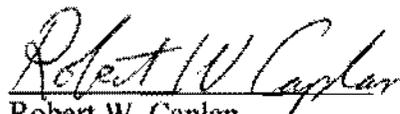
The Environmental Appeals Board has held that the central inquiry in resolving a motion for discovery is whether the requested information is relevant to the proceeding as that term is used in the Federal Rules of Evidence, and further stated that the term "significant probative value" denotes the tendency of a piece of information to prove a fact that is of consequence in the case." See In the Matter of Chautauqua Hardware Corp., EPCRA Appeal No. 91-1, 3 E.A.D. 616, Order on Interlocutory Review (June 24,

1991). See also In the Matter of E.I. Du Pont De Nemours & Co., Inc., 1997 EPA ALJ LEXIS 148, Docket No. FIFRA-95-H-02, Order Granting Motion for Discovery. EPA believes that the information as to the authorities and actions of the individual corporate owners and officers and their two closely-related family companies pertaining to the piping work is highly relevant factual information that will help the Court determine the ultimate questions of which of these parties can and should be held liable for the violation. EPA contends that both Jeffrey Duvall and Duvall Development Company are liable parties, and that it is possible, based on the assertions of the Respondents, that Steve Duvall and Duvall & Son Livestock are also jointly and severally liable. Therefore, the facts surrounding what each of these parties did should be further probed to ensure that this case is properly adjudicated.

In view of the foregoing, EPA respectfully requests that the Court uphold the principle enunciated by the EAB that leave to amend be freely granted and to grant EPA's Motion to Amend, and also to order that depositions be taken and documents be provided if determined to be necessary as a result of the information provided in the depositions.

Date: 2/18/11

Respectfully submitted,



Robert W. Caplan  
Counsel for Complainant  
U.S. EPA – Region 4  
404-562-9520  
Caplan.Robert@epa.gov

CERTIFICATE OF SERVICE

I hereby certify that I have this day served to the Region 4, Regional Hearing Clerk, the original and one copy of the foregoing Motion for Leave to File Amended Complaint and for Discovery Order and Memorandum in Support, in In the Matter of Jeffrey H. Duvall and Duvall Development Co., Inc. Docket No.: CWA-04-2010-5505.

I also certify that I have served a true and correct copy of the same on the parties listed below in the manner indicated.

Judge Barbara Gunning  
U.S. Environmental Protection  
Agency – Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

(Via EPA's internal mail)

Robert Caplan  
Senior Attorney  
Sam Nunn Federal Center -13<sup>th</sup> Fl.  
U.S. EPA, Region 4  
61 Forsyth St., S.W.  
Atlanta, GA 30303

(Via EPA's internal mail)

Edwin Schwartz, Esq.  
Sweetnam & Schwartz LLC  
Suite 1700  
Atlanta, Georgia 30346

(Via Certified Mail, Return Receipt  
Requested)

Date: 2/18/2011

  
Debra Ricks-Sinquefeld, Secretary  
Office of Air, Pesticides, and Toxics Law

CERTIFICATE OF SERVICE

I hereby certify that I have this day served to the Region 4, Regional Hearing Clerk, the original and one copy of the foregoing Motion for Leave to File Amended Complaint and for Discovery Order and Memorandum in Support, in In the Matter of Jeffrey H. Duvall and Duvall Development Co., Inc. Docket No.: CWA-04-2010-5505. I also certify that I have served a true and correct copy of the same on the parties listed below in the manner indicated.

Judge Barbara Gunning  
U.S. Environmental Protection  
Agency – Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

(Via EPA's internal mail)

Robert Caplan  
Senior Attorney  
Sam Nunn Federal Center -13<sup>th</sup> FL  
U.S. EPA, Region 4  
61 Forsyth St., S.W.  
Atlanta, GA 30303

(Via EPA's internal mail)

Edwin Schwartz, Esq.  
Sweetnam & Schwartz LLC  
Suite 1700  
Atlanta, Georgia 30346

(Via Certified Mail, Return Receipt  
Requested)

Date: 2/18/2011

  
Debra Ricks-Sinquefeld, Secretary  
Office of Air, Pesticides, and Toxics Law

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4**

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

**AMENDED ADMINISTRATIVE COMPLAINT**

**I. Statutory Authority**

1. This is an Amended Administrative Complaint ("Amended Complaint") issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA" or "Complainant") under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and 40 C.F.R. Part 22, the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits." The Administrator has delegated this authority to the Regional Administrator of EPA, Region 4, who has duly redelegated this authority to the Director of the Water Protection Division, Region 4.

2. This Amended Complaint is issued pursuant to the Court's Order granting Complainant's Motion for Leave to Amend the Complaint.

3. This Amended Complaint is issued to Duvall Development Company, Inc. ("Duvall Development"), Jeffrey H. Duvall, ("Jeffrey Duvall"), Duvall & Son Livestock, Inc. ("Duvall Livestock"), and Louis Steve Duvall ("Steve Duvall"), hereinafter also collectively referred to as Respondents.

**II. Statutory and Regulatory Background**

4. Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319(g)(1)(A), states "[w]henever, on the basis of any information available - the Administrator finds that any person has violated [Section 301 of the CWA, 33 U.S.C. § 1311], . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under [33 U.S.C. § 1319(g)(2)(B)]."

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states "[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged

or fill material] by any person shall be unlawful.” Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters.

6. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a “discharge of pollutants” as “[a]ny addition of any pollutant to navigable waters from any point source . . . .”

7. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged.”

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”

9. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “streams.”

### **III. Allegations**

10. Respondent Duvall Development, at all times relevant to this Amended Complaint, was the owner of a tract of land located adjacent to Old 441, near the city of Clayton, Rabun County, Georgia, near latitude 34°51'50.602"N, longitude 83°24'51.1183"W (the Site)(Exhibits A and B).

11. Respondent Duvall Livestock, at all times relevant to this Amended Complaint, operated a business on the Site.

12. Respondent Jeffrey Duvall, at all times relevant to this Amended Complaint, was the Chief Executive Officer, President, Sole Shareholder and Agent of Duvall Development and the Chief Executive Officer and President of Duvall Livestock.

13. Respondent Steve Duvall, at all times relevant to this Amended Complaint, was the Chief Financial Officer Duvall Livestock.

14. Respondents are persons within the definition set forth under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. Commencing on or about approximately January 2005, to the present, Respondents, or those acting on behalf of, and at the direction of Respondents, discharged dredged and/or fill material into four tributaries flowing across the Site using earth moving machinery owned by Duvall Development, during unauthorized activities associated with the clearing and leveling of the Site and the installation of 48 inch diameter cement pipes.

16. Respondents impacted approximately 1,500 linear feet of four unnamed tributaries to Stekoa Creek, a navigable water of the United States.

17. The discharged dredged and/or fill material, including earthen material deposited at the Site, are "pollutants" as defined under Section 502(6) of the CWA.

18. The earth moving machinery employed by Respondents to deposit the dredged and/or fill material at the Site are "point sources" as defined under Section 502(14) of the CWA.

19. Respondents' placement of the dredged and/or fill material at the Site constitutes a "discharge of pollutants" as defined under Section 502(12) of the CWA.

20. At no time during the discharge of dredged and/or fill material at the Site from approximately January 2005, to the present, did Respondents possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondents. Each discharge by Respondents of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

21. Each day the material discharged by Respondents remains in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

#### **IV. Notice**

22. As required by 40 C.F.R. § 22.38(b), Complainant has consulted with the State of Georgia regarding this proposed action by mailing a copy of this Amended Complaint to the Georgia Department of Environmental Protection and offering an opportunity to consult with Complainant on the proposed penalty assessment.

#### **V. Penalty**

23. Based on the above Findings of Violation and under Section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), the Administrator may assess a civil penalty of up to \$11,000 per violation per day, not to exceed a maximum of \$137,500, for violations of Sections 301(a) and 404 of the CWA, 33 U.S.C. § 1311(a) and 1344. Consistent with the 2004 Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004), based on the above Findings of Violation and under Section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), the Administrator may assess a civil penalty of up to \$11,000 per violation per day, not to exceed a maximum of \$157,500, for violations of Sections 301(a) and 404 of the CWA, 33 U.S.C. § 1311(a) and 1344, that occurred after March 15, 2004, through January 12, 2009. For violations occurring after January 12, 2009, under the 2008 Civil Monetary Penalty Adjustment Rule, 73 Fed. Reg. 75340 (Dec. 11, 2008), the penalties are \$16,000 per day up to a maximum of \$177,500. Based upon the facts alleged in this Amended Complaint, and based upon the nature,

circumstances, extent, and gravity of the violations alleged, as well as Respondents' ability to pay, prior history of such violations, and such other matters as justice may require, Complainant hereby proposes to issue a Final Order Assessing Administrative Penalties to Respondents for violations alleged in this Complaint. The Complainant proposes that Respondents pay a penalty in an amount of up to \$177,500 for the violations stated in this Complaint.

## VI. Hearing

24. Pursuant to 40 C.F.R. § 22.14(c), Respondents must file a written Answer to this Amended Complaint and a Request for Hearing within 20 days of service of this Amended Complaint with the:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-3104

25. The Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Amended Complaint with respect to which Respondents have any knowledge, or clearly state that Respondents have no knowledge as to particular factual allegations in the Amended Complaint. The Answer also must state the circumstances or arguments that are alleged to constitute grounds of defense, and the facts which Respondents intend to place at issue.

26. Failure to deny any of the factual allegations in this Amended Complaint constitutes admission of the undenied allegations.

27. A copy of the Answer and any subsequent documents that Respondents file in this action should be sent to:

Mr. Robert Caplan  
Senior Attorney  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta Federal Center  
Atlanta, Georgia 30303-3104

Mr. Caplan represents EPA in this matter and is authorized to receive service for EPA in this proceeding. He may be telephoned at (404) 562-9520.

28. Any hearing that Respondents request regarding this Amended Complaint will be held and conducted in accordance with the provisions of 40 C.F.R. Part 22. If Respondents fail to file a written Answer within 20 calendar days of receipt of this Amended Complaint, a Default

Order may be issued against Respondents by the Regional Administrator. Issuance of a Default Order will constitute a binding admission of all allegations made in the Amended Complaint and a waiver of Respondents' right in this case to a hearing under the CWA, pursuant to 40 C.F.R. § 22.17. The civil penalty proposed in this Amended Complaint will then become due and payable without further proceedings 60 days after the Default Order becomes the Final Order of the Administrator pursuant to 40 C.F.R. § 22.31. Respondents' failure to fully pay the proposed penalty, as assessed by the Final Order, by its due date will result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty under Section 309(g)(9)(B) of the CWA, 33 U.S.C. § 1319(g)(9)(B).

## **VII. Settlement Conference**

29. Whether or not Respondents request a hearing, an informal conference may be requested in order to discuss the facts of this case and to arrive at a settlement. To request a settlement conference, please contact:

Mr. Robert Caplan  
Senior Attorney  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta Federal Center  
Atlanta, Georgia 30303-3104

He may be telephoned at (404) 562-9520.

30. Respondents' request for an informal settlement conference does not extend the 20-day period during which a written Answer and Request for Hearing must be submitted. Respondents may pursue the informal conference procedure, however, simultaneously with the adjudicatory hearing procedure. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. EPA, however, will not reduce the penalty simply because such a conference is held. Any settlement that may be reached as a result of such conference will be embodied in a Final Order. Respondents' consent to a Final Order will constitute a waiver of the right to request a hearing on any matter stipulated to therein.

31. Neither assessment nor payment of an administrative civil penalty under Section 309(g)(2) of the CWA will affect Respondents' continuing obligation to comply with the CWA, or any other federal, State or local law or regulation.

32. Any settlement reached as a result of the informal conference will be finalized by the issuance of a written Consent Agreement and Final Order approved by EPA.

COMPLAINANT:



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James D. Giattina, Director  
Water Protection Division  
U.S. EPA, Region 4

Date: 2/18/11



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

FEB 02 2011

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Edwin S. Schwartz, Esq.  
Suite 1700  
Three Ravinia Drive  
Atlanta, GA 30346

Re: Request for Voluntary Submittal of Additional Information Company

Dear Mr. Schwartz:

This letter follows up on the Respondents' filing of their Prehearing Exchange (PHE) on October 29, 2010, and requests that the Respondents provide additional information for the purpose of clarifying some of the statements and information included in Respondents' PHE, as well as in their Answer to the Complaint, and in Jeff Duvall's response to EPA's first information request. This information will help narrow the issues for trial and assist the parties in preparing their joint stipulation ordered by Judge Gunning. EPA is requesting that Respondents provide this information voluntarily outside of formal discovery as contemplated under the Consolidated Rules of Practice. Should Respondents refuse to submit the information requested herein, EPA may file a motion for a discovery order pursuant to 40 C.F.R. § 22.19(e), or issue a Request for Information pursuant to Section 308 of the Clean Water Act.

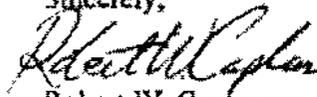
In the interest of complying with the scheduling set forth in Judge Gunning's November 19, 2010, Order Scheduling Hearing, EPA requests that Respondents provide the information in Attachment A to this letter to EPA within ten (10) days after receipt of this letter. The response should be submitted to me.

If the Respondents believe that any of the information is Confidential Business Information (CBI), they may assert a claim of confidentiality by stamping any documents they wish to protect with a suitable stamp such as "confidential," "trade secret," or "CBI." If a CBI claim is not asserted, EPA may make information submitted under this request available to the public without further notice to the Respondents, and will be under no obligation pursuant to the Consolidated Rules of Practice, 40 C.F.R. Part 22, or under the CBI rules found at 40 C.F.R. Part 2, Subpart B, to take steps to protect the information during the scheduled hearing, or as part of its inclusion in any amended PHE submitted to the Court.

I also wanted to let you know that EPA remains interested in discussing settlement of this matter. If Mr. Duvall is interested in resuming settlement talks, please

let me know as soon as possible so that you and I can set up a time to talk to see if the parties are able to find an acceptable compromise that will avoid the time and expense of trial.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert W. Caplan".

Robert W. Caplan  
Senior Attorney

Attachment.

## ATTACHMENT A

Request for Voluntary Submittal of Information  
Jeffrey Duvall and Duvall Development Company  
February 2, 2011

1. In Respondents' Answer to the Complaint, Respondents admit that at all times relevant to the Complaint, Duvall Development Company has been the owner and operator of the site property, that Jeffrey Duvall has been the CEO and President of Duvall Development Company, that the piping activity was conducted by and on behalf of Duvall Development Company for the benefit of Duvall & Son Livestock, and that Jeffrey Duvall, as President and CEO of Duvall Development Company, participated in the piping activity. State whether these assertions made by Respondents in their Answer to the Complaint are accurate and correct. If they are not, provide accurate, correct statements.

a. Identify who runs the day-to-day business operations of Duvall Development Company, and who makes decisions about company activities and how its property is used, developed, leased, sold or otherwise used.

b. Identify the officers, directors, shareholders, and employees of Duvall Development Company at the time the decision was made to conduct the piping work, and during the time the piping work was conducted.

c. Identify the person who was authorized to make the decision on behalf of Duvall Development Company to conduct the piping work, and identify the person(s) who made the decision on behalf of Duvall Development Company to conduct the piping work. Identify any persons other than the owners, officers, directors, shareholders, or employees of Duvall Development Company that were involved in the decision to conduct the piping work.

d. Provide copies of all documents that pertain to the decision to conduct the piping work, including, but not limited to, minutes of corporate meetings, reports, contracts, purchase orders, invoices, memos, and correspondence.

e. Identify all person(s) who designed and/or contributed to the design and development of the piping plan and the role they played in that process.

2. On page 7 of Respondents' Prehearing Exchange (PHE), Respondents state that the piping work was performed by and on behalf of Duvall & Son Livestock and that Jeffrey Duvall is an owner of Duvall & Son Livestock. Are these accurate and correct statements? If they are not, provide correct, accurate statements.

a. Identify who runs the day-to-day business operations of Duvall & Son Livestock, and who makes decisions about company activities.

b. Identify the officers, directors, shareholders, and employees of Duvall & Son Livestock at the time the decision was made to conduct the piping work, and during the time the piping work was conducted.

c. Identify the persons authorized to make the decision on behalf of Duvall & Son Livestock to conduct and/or participate in the piping work, and identify the person(s) who made the decision on behalf of Duvall & Son Livestock to conduct the piping work. Identify any persons other than the owners, officers, directors, shareholders, or employees of Duvall & Son Livestock that were involved in the decision to conduct the piping work.

d. Provide copies of all documents prepared by, or in the possession of Duvall & Son Livestock that pertain to the decision to conduct the piping work, including, but not limited to, minutes of corporate meetings, reports, contracts, purchase orders, invoices, memos, and correspondence.

e. Identify all person(s) for Duvall & Son Livestock who designed and/or contributed to the design and development of the piping plan and the role they played in that process.

3. Explain the statement on page 7 of Respondents' PHE that after Duvall Development Company purchased the site property, Duvall Development Company "then allowed the land to be used by Duvall & Son Livestock."

a. What were the terms and conditions of such "use" and when did such use begin?

b. State who at Duvall Development Company approved the use of the property by Duvall & Son Livestock, and who on behalf of Duvall & Son Livestock agreed to the terms and conditions of the use of the property. Provide copies of any documentation evidencing approvals by or on behalf of Duvall Development Company to allow Duvall & Son Livestock to use the property.

c. Provide copies of any and all correspondence, agreements, contracts or other documents between Duvall Development Company and Duvall & Son Livestock addressing the use of the property by Duvall & Son Livestock.

Request for Voluntary Submittal of Information  
Jeffrey Duvall and Duvall Development Corporation  
February 2, 2011  
Page 3

4. Explain the statement in paragraph 10 of Respondents' Answer to EPA's Complaint that "[t]he activities were conducted for Duvall Development Company for the benefit of the leasee (sic) of the property, Duvall and Son Livestock."

a. Is the site property where the piping work was conducted currently being leased by Duvall Development Company to Duvall & Son Livestock?

b. Is there a written lease entered into between Duvall Development Company and Duvall & Son Livestock for the rental of the property?

c. State the date the property was first leased to Duvall & Son Livestock and how long the lease arrangement has existed.

d. Provide copies of the original written lease and any amendments or renewal leases.

e. State whether negotiations or discussions were conducted between Duvall Development Company and Duvall & Son Livestock for the leasing arrangement.

f. State who was involved for each company in the lease discussions or negotiations, whether the lease arrangement was ratified by Duvall Development Company and by Duvall & Son Livestock, and if so, who ratified it for each company.

g. Provide any documents pertaining to each company's review and approval of the lease agreement(s), including, but not limited to, minutes or notes from corporate meetings of shareholders and directors, or other documentation.

h. Does Duvall & Son Livestock pay rent for the lease?

i. When did rent payments first begin, how often have they been made, and how much rent is paid monthly and annually?

j. Who makes the rent payment on behalf of Duvall & Son Livestock and to whom or to what company is the rent payment made?

k. Provide copies of documents evidencing that lease payments were made including, but not limited to, checks, receipts, ledgers, and statements of account maintained by Duvall Development Company and Duvall & Son Livestock.

5. In response to question #3 of EPA's first Request for Information (Exhibit 7 of EPA's Prehearing Exchange), Jeffrey Duvall indicated that the following equipment

was used to conduct the work: a Mitsubishi Excavator, a Cat Dozer and two dump trucks.

a. State whether the aforementioned equipment was purchased, leased, or rented by Jeffrey Duvall, Duvall Development Company or Duvall & Son Livestock or by some other company or individual, and identify such companies or individuals.

b. State the date(s) the equipment was purchased, leased or rented and from whom.

c. Provide any documentation evidencing the purchase, rental, or lease of the equipment, including, but not limited to, contracts, titles, sales receipts, invoices, bills of sale, corporate records recording the purchase, and State of Georgia and/or county vehicle registrations.

d. If Duvall Development Company or Duvall & Son Livestock or Jeffrey Duvall had owned the equipment previously, but no longer owns it, state when and to whom it was sold, and provide copies of documents showing the sales transaction(s).

6. In Respondent Jeffrey Duvall's response to question # 2 of EPA's first Request for Information (see Exhibits 5 and 7 to EPA's Prehearing Exchange) asking for the name and address of any contractor or individual participating in the work to install the piping, Mr. Duvall named himself, Steve Duvall, Louie Duvall, Steve Williamson, Daniel Vasquez, and "various Mexican day laborers."

a. State the relationship of each person named above to Jeffrey Duvall.

b. State how many "various Mexican day laborers" helped conduct the work.

c. State who hired the day laborers, from where they were hired, and who authorized their hiring.

d. State who paid the laborers and how they were paid (cash, check, otherwise).

e. Provide copies of any authorizations, directives, or approvals signed by the CEO, CFO, President, Treasurer, Secretary, or other employee of Duvall Development Company or any other company that authorized payment of the laborers.

f. Provide copies of account ledgers or other documents that record the payments having been made.

g. Identify who was considered to be: (1) the owner of the piping job site; (2) the boss of the piping work being conducted; and (3) the supervisor of the daily work at the piping job site; and (4) state how that information was communicated to the workers and by whom.

h. Identify the person(s) who made the decisions as to what work was to be conducted each day, and identify the person(s) who supervised, directed, and controlled the work each day.

i. Describe the daily work performed by Jeffrey Duvall, Steve Duvall, Louis Duvall, Steve Williamson, Daniel Vasquez, and the Mexican day laborers.

j. Provide copies of any log books, field notes, summaries, reports, descriptions, time cards, or other documents describing the work performed and the dates the work was conducted.

7. Is Jeffrey Duvall currently claiming inability to pay the penalty and will he be claiming this at the hearing? If so, EPA requests that Mr. Duvall submit his 2009 and 2010 tax returns and an up-to-date financial statement to EPA.

8. Is Duvall Development Company claiming that it is unable to pay the penalty and will it be claiming inability to pay at the hearing? If so, please provide corporate income tax returns for 2007, 2008, and 2009, plus a current financial statement and a completed Corporate Form for Debtors (included herein).

**Sweetnam & Schwartz, LLC**

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February 11, 2011

VIA ELECTRONIC MAIL

Mr. Robert Caplan  
Senior Attorney  
U.S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303-8960

Re: Response to EPA Request for Voluntary Submittal of Additional Information  
Docket No. CWA-04-2010-5505

Dear Mr. Caplan:

This is the response of Respondents, Mr. Jeffrey H. Duvall and Duvall Development Co., Inc. to the United States Environmental Protection Agency (Complainant) Request for Voluntary Submittal of Additional Information dated February 2, 2011 (copy attached). The following responses are provided in the interests of clarification of the record and cooperation with Complainant in preparation for the hearing in the above-referenced matter:

1. The statement referenced by Complainant is an incorrect statement made by the Respondents in their Answer. The piping activity was not conducted by Duvall Development Company, Inc. but by Duvall & Son Livestock Inc. To correct this, Respondents will file an Amended Answer.
  - a. Jeffrey H. Duvall runs the daily operations of Duval Development Company, Inc. in his capacity of Chief Executive Officer and President.
  - b. The other officer of Duvall Development Company, Inc. is Connie Duvall, who serves as Secretary and Treasurer.
  - c. The person authorized to make decisions on behalf of Duvall Development Company, Inc., is Jeffrey H. Duvall. The decision to conduct the piping work was not made by Duvall Development Company, Inc., but by Duvall & Son Livestock Inc.
  - d. There are no documents that reflect the decision to conduct the piping work.

- c. The only other person who designed and/or contributed to the design and development of the piping plan was Steve Duvall, as the representative of Duvall & Son Livestock Inc.
2. The referenced statements from the Respondents' Prehearing Exchange (PHE) are essentially correct. The piping work was performed by and on behalf of Duvall & Son Livestock Inc. and that Jeffrey H. Duvall is an officer of Duvall & Son Livestock Inc.
  - a. The person who runs the daily operations of Duvall & Son Livestock, Inc. and who makes decisions about corporate activities is Steve Duvall.
  - b. The officers of Duvall & Son Livestock Inc. are Jeffrey H. Duvall - Chief Executive Officer, Steve Duvall - Chief Financial Officer, and Frances Duvall - Secretary.
  - c. The person authorized to make the decision on behalf of Duvall & Son Livestock Inc. to conduct the piping work was Steve Duvall.
  - d. There were no documents prepared by or in the possession of Duvall & Son Livestock Inc. regarding the decision to conduct the piping work.
  - e. The person who designed and/or contributed to the design and development of the piping plan was Steve Duvall.
3. An explanation of the statement from the PHE that Duvall Development Company, Inc. "then allowed the land to be used by Duvall & Son Livestock Inc." is a correct statement of the facts in this matter. Duvall Development Company, Inc. purchased the property around 1988. The property contained pastureland suitable for cattle grazing. Duvall & Son Livestock Inc. owned and continues to own cattle. Duvall & Son Livestock Inc. was authorized by Duvall Development Company, Inc. to use the property of Duvall Development Company, Inc. for the purpose of maintaining the livestock.
  - a. The use of the property for cattle grazing began when the property was purchased by Duvall Development Company, Inc., around 1988.
  - b. Because Duvall Development Company, Inc. and Duvall & Son Livestock Inc. are closely-held family businesses, there were no formal agreements regarding the terms and conditions of use of the property, such as a lease. The terms were agreed upon by the respective officers of the businesses: Steve Duvall on behalf of Duvall & Son Livestock Inc.; and Jeffrey H. Duvall on behalf of Duvall Development Company, Inc.
  - c. There were no agreements or documents reflecting the arrangements for use of the property by Duvall & Son Livestock Inc.

4. The referenced statement is incorrect. As noted above, the piping activities were conducted by Duvall & Son Livestock Inc.
  - a. Since there is no formal lease, any reference to the lease of the property by Duvall & Son Livestock Inc. is a misstatement; however, it is correct to state that the property has been and is used by Duvall & Son Livestock Inc., under authorization of Duvall Development Company, Inc.
  - b. There is no written lease between Duvall Development Company, Inc. and Duvall & Son Livestock Inc.
  - c. The date the property was first used by Duvall & Son Livestock Inc. was shortly after the purchase in or around 1988.
  - d. There is no lease document.
  - e. No negotiations were conducted for any lease of the property; informal discussions were held between principals of the companies.
  - f. The persons involved in such informal discussions were the respective officers of the businesses: Steve Duvall on behalf of Duvall & Son Livestock Inc.; and Jeffrey H. Duvall on behalf of Duvall Development Company, Inc.
  - g. There were no documents reflecting the approval of a lease agreement between Duvall Development Company, Inc. and Duvall & Son Livestock Inc.
  - h. Duvall & Son Livestock Inc. has not paid and does not pay rent.
  - i. Not applicable.
  - j. Not applicable.
  - k. Not applicable.
5. The response to the referenced Request for Information correctly identifies the equipment used in conducting the piping work.
  - a. To the best of the recollection of Respondents, the equipment is owned by Duvall & Son Livestock Inc.
  - b. To the best of the recollection of Respondents, the bulldozer was purchased by Duvall Ford Company and transferred to Duvall & Son Livestock Inc. in 1988; one dump truck was purchased by Duvall & Son Livestock Inc. in 1990; another dump truck was purchased by Duvall Ford Company and transferred to Duvall & Son Livestock Inc. in 1999; the excavator was purchased by Duvall Ford Company and transferred to Duvall & Son Livestock Inc. in 1999.

- c. There is no documentation regarding evidencing the purchase of the equipment.
6. The response to the referenced Request for Information correctly identifies the individuals participating in the piping work.
  - a. Steve Duvall is the father of Jeffrey H. Duvall. Louis Duvall is the son of Jeffrey H. Duvall. None of the other identified persons are related to Jeffrey H. Duvall.
  - b. Approximately 1 or 2 Mexican laborers were involved.
  - c. Daniel Vasquez hired the laborers.
  - d. The laborers were paid in cash by Duvall & Son Livestock Inc. Respondents have no recollection of the amount paid to the workers.
  - e. There were no authorizations, directives or approvals of Duvall Development Company, Inc. or Duvall & Son Livestock Inc, for the payment of the laborers.
  - f. There are no ledgers or other documents reflecting the payments made.
  - g. (1) The owner of the piping job site was Duvall Development Company, Inc.; (2) the boss of the piping work was Steve Duvall; (3) the supervisor of the daily work was Steve Duvall; and (4) the information was communicated from Steve Duvall to Jeffrey H. Duvall for some work; from Steve Duvall to Daniel Vasquez to the laborers for other work.
  - h. The person responsible for deciding the work to be done on any given day was Steve Duvall.
  - i. Steve Duvall supervised the work; Jeffrey H. Duvall implemented some bulldozing work; Louis Duvall implemented some dump truck work; Steve Williamson implemented some excavation work; Daniel Vasquez and the day laborers provided general labor in the placement of the pipe.
  - j. There were no documentation describing the work performed and the dates the work was conducted.
7. Jeffrey H. Duvall is no claiming inability to pay.
8. Duvall Development Company, Inc. is not claiming inability to pay.

Mr. Robert Caplan  
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Respondents trust that these responses are sufficient. If you have any questions regarding these responses or if Complainant requires any further information, please contact me at the above telephone number.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edwin Schwartz". The signature is written in black ink and is positioned above the printed name.

Edwin Schwartz

Cc: Jeffrey H. Duvall