



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

2011 APR 20 10:01 AM RECEIVED REGION 4

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

ORDER ON MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND FOR DISCOVERY ORDER

This proceeding arises under the authority of Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), as amended, 33 U.S.C. § 1319(g), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. On February 28, 2011, the undersigned received a Motion for Leave to File Amended Complaint and For Discovery ("Motion") and Complainant's Memorandum in Support of Motion for Leave to File Amended Complainant and For Discovery ("Memo") in which Environmental Protection Agency Region 4 ("Complainant" or "EPA") seeks leave to amend the Complaint and depose certain individuals. Motion at 1.

The original Complaint in this matter was filed on March 12, 2010, and named Duvall Development Co., Inc., and Jeffrey H. Duvall as respondents. On October 29, 2010, pursuant to a Prehearing Order issued August 10, 2010, Respondent submitted its initial Prehearing Exchange ("PHE"). In its PHE, Respondents raise the issue that liability for the allegations contained in the Complaint rests with another, unnamed party. On February 2, 2011, Complainant issued a request for additional information to Respondents seeking clarification on the liability issues raised in the PHE. Memo at 3-4.

On February 11, 2011, Respondent submitted a response to the request for information simultaneously with a Motion to Amend the Answer ("Respondents' Motion"). Respondents' Motion, which was unopposed by Complainant, sought to change its response to certain allegations in the Complaint related to piping activities that occurred on the site in question to reflect that those

activities were conducted by, for and/or on behalf of Duvall & Son Livestock, Inc., not Duvall Development Co., Inc., as stated in the original Answer. By Order dated March 3, 2011, Respondents' Motion was granted.

Complainant, through its Motion, now seeks leave to amend the Complaint to add two parties: Duvall & Son Livestock, Inc. ("Duvall Livestock"), and Steve Duvall, Respondent Jeffrey Duvall's father and CFO of Duvall Livestock. Motion at 1, 8. Complainant states that it believes these parties may be jointly and severally liable for the allegations raised in the Complaint and should be added as respondents in this matter. Memo at 8. Complainant further argues that Respondents have necessitated this amendment by altering their position on the threshold issue of the responsible party after four years of negotiations. Motion at 2. Respondents have not filed a response to the Motion. By separate email to the undersigned's staff attorney and Counsel for Complainant's, Counsel for Respondents states that Respondents do not oppose the Motion.<sup>1/</sup> For good cause shown, Complainant's unopposed Motion for Leave to Amend the Complaint is **GRANTED**.

Complainant's Motion also requests leave to engage in "other discovery" pursuant to 40 C.F.R. § 22.19(e)(1). Specifically, Complainant seeks permission to depose certain individuals and, "depending on the testimony given in the depositions, EPA may seek further discovery including requests for admissions and additional documents." Motion at 12. Complainant also states that it may seek discovery on the financial condition and financial relationships of the new parties if those new parties claim an inability to pay the proposed penalty. *Id.* at 13.

Rule 22.19(e)(1) states that the Presiding Officer may order discovery, beyond the PHEs, if such discovery will not unreasonably delay the process nor unreasonably burden the non-moving party, and if such discovery has significant probative value on a disputed issue relevant to liability and is most reasonably obtained by the non-moving party. See 40 C.F.R. § 22.19(e)(1). Under 22.19(e)(3), two additional considerations apply to requests for leave to take depositions. Rule 22.19(e)(3) states:

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<sup>1/</sup> Again, I note that email correspondence with the ALJ is not authorized and any official filings must be in accordance with the Rules of Practice.

[t]he 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 hearing.

40 C.F.R. § 22.19(e) (3).


Complainant proposes to depose the following individuals: Respondent Jeffrey Duvall, newly added respondent Steve Duvall, Connie Duvall (Secretary for Duvall Development and listed as a witness in Respondents' PHE), Francis Duvall (Secretary for Duvall Livestock and also listed as a witness in Respondents' PHE), as well as three individuals alleged to have participated in the project at issue, Louis Duvall, Steve Williamson, and Daniel Vasquez. Motion at 12.

Complainant states that the purpose of these depositions is to "elicit complete, accurate, and truthful information from the proposed deponents about the actions and authorities of the individual and companies involved in the piping work that led to the violation[.]" which Complainant asserts is a significant issue relevant to liability. Memo at 7. EPA also asserts that "the depositions are necessary and would be the most efficient manner to obtain reliable and probative evidence[.]" Memo at 7, noting that previous discussions and information requests have yielded conflicting statements. The file before me also reflects that the piping activity at issue occurred over six years ago, bolstering the importance of preserving testimony as soon as possible.

Again, Respondents do not oppose this request. For good cause shown, Complainant's unopposed Motion to depose the identified individuals is **GRANTED**. The motion to order the production of unspecified documents, if deemed necessary by Complainant as a result of the information provided in the depositions, is premature and too vague and, thus, is **DENIED** at this time. Likewise, the request for financial documents from newly named parties in anticipation that they will assert an inability to pay is conjecture and is similarly **DENIED** at this time.

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The Hearing in this matter has been rescheduled to commence on Tuesday, August 23, 2011, in or around Atlanta, Georgia. Because Complainant has been granted leave to file an amended complaint adding two additional parties, Complainant must file that Amended Complaint, if at all, sufficiently in advance of the Hearing date to allow the newly added parties time to submit an answer and for the parties to file another Prehearing Exchange.

  
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Barbara A. Gunning  
Administrative Law Judge

Dated: April 20, 2011  
Washington, DC

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

**CERTIFICATE OF SERVICE**

I hereby certify that true copies of the foregoing **Order on Motion for Leave to File Amended Complaint and for Discovery Order**, dated April 20, 2011, issued by Barbara Gunning, Administrative Law Judge, were sent this 20<sup>th</sup> day of April 2011, in the following manner to the addressees listed below.



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Mary Angeles  
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

Patricia Bullock  
Regional Hearing Clerk  
U.S. EPA / Region 4  
Sam Nunn Federal Center - 13<sup>th</sup> Flr.  
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One Copy by Facsimile and Pouch Mail to:

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Dated: April 20, 2011  
Washington, DC