

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

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COMPLAINANT'S PROPOSED PENALTY AND ANALYSIS
OF STATUTORY PENALTY FACTORS

I. Introduction

Pursuant to the Court's Prehearing Order, dated August 10, 2010, Complainant (EPA) hereby files its Proposed Penalty Analysis. As discussed below, an analysis of the statutory penalty factors found in section 309(g)(3) of the CWA, considered in light of the evidence in this case, fully supports the proposed penalty of \$177,500, the statutory maximum Class II penalty allowable under section 309(g)(2)(B) of the CWA. Respondents' Prehearing Exchange (PHE) presents no facts or defenses that change Complainant's position that the Respondents violated section 404 of the CWA or that support a reduction in the proposed penalty.

The statutory penalty factors that must be considered in determining the penalty include: (1) the nature, circumstances, extent and gravity of the violation, and with respect to the violator, (2) ability to pay, (3) any prior history of such violations, (4) the degree of culpability, (5) the economic benefit or savings (if any) resulting from the violation, and (6) such other matters as justice may require. Complainant will address each of these factors, and also respond to Respondents' arguments and defenses herein as they pertain to the evaluation of the penalty factors.

II. Penalty Policy Discussion

In the absence of a specific penalty policy for CWA section 404 cases in litigation, EPA Region 4 has looked to EPA's general penalty policy documents for guidance in interpreting the statutory penalty factors in this case, including *EPA's Policy on Civil Penalties* and *A Framework for Statute Specific Approaches to Penalty Assessments*, both issued on February 16, 1984 (hereinafter collectively referred to as "the Policy"). This Policy is not

specific to the CWA, but was issued to provide guidance to EPA's program enforcement offices in their development of statute-specific penalty policies. EPA also has reviewed administrative and civil case law for guidance on how courts have interpreted and applied the statutory penalty factors.

The Policy advises first calculating a "preliminary deterrence figure" by determining the economic benefit gained and combining it with the gravity component of the penalty, followed by consideration of the additional penalty factors in section 309(g). To effectuate a key goal of assessing penalties - to deter people from violating the CWA, violators must be placed in a worse position than people who have complied with the law. If a violator is allowed to benefit from noncompliance, competitors who comply will be placed at a competitive disadvantage. For that reason, the Policy instructs that any penalties assessed should, at a minimum, remove economic benefits resulting from the noncompliance. The importance of recovering economic benefit has been recognized and emphasized by administrative and civil courts.

The Policy further provides that deterrence requires an additional amount in the penalty to ensure that the violator is economically worse off than if it had obeyed the law. This amount is based on the seriousness of the violation and is known as the "gravity" portion of the penalty, and encompasses the section 309(g) statutory factor of the "nature, circumstances, extent and gravity of the violation." The determination of gravity requires consideration of actual or potential harm (whether and to what extent the violation actually resulted or was likely to result in an unpermitted discharge or exposure) and the importance to the regulatory scheme (focusing on the importance of the requirement to achieving the goal of the statute or regulation).

The Policy also suggests that the gravity amount (but not the economic benefit) should be adjusted upward or downward based on the following additional statutory factors: (1) degree of willfulness and/or negligence (i.e., the statutory factor of "culpability"); (2) history of noncompliance; (3) ability to pay; and (4) other unique factors specific to the violator or the case, and that the degree of the violator's cooperation or noncooperation should be factored into the penalty as well. As shown below, EPA Region 4 believes that these additional factors, even when analyzed apart from the economic benefit and gravity factors warrant the assessment of the full statutory penalty.

III. Summary of Proposed Penalty

Complainant believes that the statutory maximum of \$177,500 is an appropriate penalty in this case. Respondents have refused to restore the streams to their pre-impact (un-piped and un-filled) condition. In the event that these impacts would have ever been permitted had Respondents followed the required permitting process, mitigation would have been required for all permitted impacts. Given that the streams have been impacted for a number of years, and remain impacted to this day, Respondents have gained an enormous economic benefit in this

case resulting from their failure to conduct the mitigation that a compliant party would have had to conduct for this amount of impact to the streams.

As will be shown below, the estimated cost of mitigation for this degree of stream impact (ranging between \$546,860 and \$745,718) far exceeds the Class II statutory maximum penalty of \$177,500. Therefore, based on the economic benefit factor alone, the statutory maximum penalty is fully justified. In addition, EPA believes that the gravity portion of the penalty alone could also justifiably be assessed at the statutory maximum for the violations. If the economic benefit and gravity portions are somehow determined to be less than the statutory maximum in this case, EPA believes that the additional statutory factors of culpability, noncooperation, ability to pay, and other factors as justice requires warrant increasing the penalty up to the statutory maximum.

IV. Analysis of Statutory Penalty Factors

1. Economic Benefit

a. Background on Mitigation Requirements

Respondents realized a significant economic benefit by avoiding the costs associated with obtaining a CWA section 404 permit from the U.S. Army Corps of Engineers (COE) for the piping work conducted at the Site. Though these costs typically include fees for consultants to submit an application to the COE, the primary economic benefit realized by Respondents was the avoided costs associated with mitigating for unavoidable impacts to waters of the U.S.

Under the CWA section 404 Guidelines (40 C.F.R. Part 230) and the COE regulations (33 C.F.R. Part 323), whenever a project is proposed for a discharge of a pollutant into a water of the United States for which a permit is required, and in cases in which an applicant wishes to use a nationwide permit that requires submittal of preconstruction notification (PCN) to the COE, the permit application and/or PCN must include an analysis of alternatives to the proposed work that will avoid and/or minimize any adverse impacts on waters of the U.S., and must also propose compensatory mitigation options to offset unavoidable impacts. If the COE determines that unavoidable adverse impacts will occur, but that a permit can be issued, the applicant will be required to "mitigate" for the impacts to replace aquatic resource functions that will be unavoidably lost or adversely affected by the authorized activities.

The COE must determine the compensatory mitigation that will be required as part of the permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. Mitigation projects can be conducted on-site or off-site on private and public land, through several approaches including restoration, enhancement, establishment, and preservation of water resources. Alternatively, mitigation can be satisfied by purchasing "mitigation credits" from "mitigation banks" or "in-lieu fee" programs. Mitigation banks operate on a market basis and the cost per stream credit varies depending on the location of the impacts, availability of credits, competition for the credits, and other factors.

By ignoring the permitting process, Respondents undermined the purposes of the section 404 program and prevented the COE from carefully reviewing the project, and evaluating available alternatives and potential adverse impacts. Additionally, Respondents' actions precluded the COE from determining whether a permit was appropriate, and, if so, what mitigation was required to compensate for adverse impacts. As a result of their actions, Respondents have gained a huge economic benefit and competitive advantage over other developers in the area by having totally avoided incurring any costs to mitigate for the adverse impacts they have caused, and which continue to the present day.

b. Calculation of Mitigation Costs

To calculate estimated costs of mitigation, EPA determined the quantity of stream credits required for mitigation using the COE's methodology (see below) and multiplied that amount by the cost per stream credit that would have been charged by mitigation banks. The total number of compensatory mitigation credits required for the existing impacts on the Site is 9,942.9. At the time the impacts first occurred in 2004-2005, stream mitigation credits were available for approximately \$55/credit. In 2009-10, credits were available at an average cost of \$75/credit. Multiplying the cost per credit x 9,942.9 credits required, yields a total estimated cost for mitigation in 2004-2005 of approximately \$546,860, and for 2009-2010, approximately \$745,718.

The impacted streams are located within the COE's Savannah District, which has developed a standard operating procedure (SOP) to be used to quantify appropriate compensatory mitigation for adverse impacts to waters of the U.S. (see Complainant's Exhibit, "CX" 30). The SOP is broken down into two separate methodologies, one for wetlands and open waters, and one for riverine systems and streams (stream SOP). The stream SOP, which was applied by EPA in this case, takes the following factors into consideration to develop a multiplier which is used to calculate the mitigation credits required: (1) stream type; (2) the importance of the area in which the stream is located; (3) the existing condition of the stream; (4) duration of the impact; (5) dominant type of impact; and finally, (6) a scaling factor that accounts for the cumulative number of linear feet impacted by a project. The total number of mitigation credits required is derived by applying the multiplier to the lengths of impact for each stream. Once the COE has issued a permit, applicants may satisfy their mitigation requirements by the options noted above.

In applying the SOP to quantify the number of credits required for compensatory mitigation to address the impacts to the streams in this case, EPA inputted conservative numeric values into the COE's stream SOP worksheet. A summary of EPA's analysis of each SOP factor as applied to the impacts at the Site is presented below, along with EPA's response to some of the defenses raised by Respondents as they might relate to these factors.

1. Stream Type Impacted - Perennial

During its December 2009 and November 2010 site visits, EPA conducted surveys using the North Carolina Division of Water Quality Stream Identification Form ("NCID") and determined that each of the stream reaches impacted is a perennial stream¹ with a width of less than 15 feet, (CX 15 and 31). The streams were assigned a value of 0.8 on the SOP worksheet. Complainant obtained additional evidence confirming the determination that the streams are perennial from several local residents with first-hand knowledge of the streams. One man who has lived in a home bordered by stream 4 since 1953 advised EPA that the stream flows all year and that he has never seen it dry up for any period of time during all the years he has lived there. Another, an employee at the golf course across old Highway 441 from the Site, advised EPA that in the 15 years that he has worked at the golf course, streams 2.1 and 3 have always flowed and never been dry. Another resident in the area who has lived her entire life on the property through which stream 1 crosses before entering the Site, indicated that she has never observed the stream not running or being dry.

Respondents have argued that stream 4 is an ephemeral channel that flows only in response to rain and that the remaining streams have intermittent flow based on their consultant's application of the NCID form. With regard to stream 4, Respondents consultant's stream assessment indicates that they found only limited migratory-type species that live in more stagnant water with a lower life cycle that is indicative of an ephemeral environment rather than intermittent or perennial. However, on November 9, 2010, Complainant conducted a follow up assessment of stream 4² upstream from the portion piped by Respondents, and in the first dip net sample scooped out of the stream found a great diversity of species that are not typically present in ephemeral or even intermittent streams but are found only in perennial streams. Therefore, EPA's most recent stream assessment confirms its earlier determination that stream 4 is indeed a perennial stream.

Additionally, EPA re-confirmed that the other streams were also perennial, which conclusion is further supported by the residents' observations as noted above. EPA attempted to duplicate as closely as possible the sampling locations noted in Respondents' assessment. Based on the field observations and sampling of the streams, and input of information into the NCID form, the result was the same as EPA's December 2009 assessment – streams 1, 2.1, and 3 are definitely perennial (CX 31).

2. Priority Area: Trout Streams

¹A perennial stream is defined as having a continuous flow regime and is therefore considered a permanent source of flowing water. Small perennial streams (less than 15 feet in width) are given the highest value under the mitigation SOP.

² On September 1, 2010, a revised North Carolina Stream Identification Form was issued (Version 4.1). During EPA's November 9, 2010, updated assessment, EPA completed both the old form and the new Form, and under both forms, the result was the same – the streams are perennial.

The Georgia Environmental Protection Division (EPD) classifies all tributaries to the Chattooga River as primary trout waters. These streams are tributaries to the Chattooga River and therefore are primary trout waters. The SOP provides that streams classified as primary trout waters are primary priority areas given a value of 1.5. Therefore, EPA assigned these streams a value of 1.5 for this factor.

3. Existing Conditions of the Streams

EPA acknowledges that prior to the piping impact, the streams running across Respondents' property were impaired due to several factors, including several preexisting modifications made to the streams, the periodic presence of some cattle, and construction for a highway right of way. Therefore, each of the five impacted reaches is listed on the SOP worksheet as being fully impaired and has an assigned the value of 0.25. Respondents argue that because the streams are degraded and water quality is impaired, the streams have no nexus to a Traditional Navigable Water (TNWs). Respondents have confused the issue of stream quality with the process for determining whether a stream is a jurisdictional water of the U.S. These are completely separate issues. Whether or not a stream is of high or low quality may affect the amount of required compensatory mitigation, but is not determinative of whether it has the required nexus to a TNW that would make it a jurisdictional water of the U.S. Respondents have made no showing, and cannot show that there is no biological, physical, and chemical connection between these streams and the TNWs, including Stekoa Creek and the Chattooga River, as demonstrated in Complainant's Jurisdictional memo (CX 16).

4. Duration of Impacts

Respondents have been unwilling to remove the piping from the streams despite having been ordered to do so in March 2006. The impacts have continued for well over 4 years. Under the SOP, the duration of the impact is considered to be permanent and has a corresponding value of 0.2.

5. Dominant Type of Impact

Each of the stream reaches was placed in a pipe greater than 100 feet in length, which has a corresponding value in the SOP of 3.0. Complainant's prehearing exchange lists the impact on Stream 4 as 100 feet; however, the estimated length was determined by measurement in the field and is listed in the inspector's field notes at 102 feet. (CX 8).

6. Scaling Factor

Scaling factor is a means of quantifying the cumulative impact that occurs when several smaller impacts occur within the same watershed. The scaling factor for total impacts of over 1,000 feet is 0.4 for every 1,000 feet. The total impact of 1,518 feet was calculated using GIS mapping and field measurements, and the corresponding scaling factor is 0.8. Stream 1 was 194

feet, Stream 2.1 was 178 feet, Stream 2.2 was 842 feet, Stream 3 was 202 feet, and Stream 4 was 102 feet. (CX 15).

In light of the findings above showing that the cost of compensatory mitigation that Respondents have failed to perform ranges between approximately \$546,139 and \$744,735, the economic benefit gained by Respondents warrants assessment of the full statutory maximum penalty of \$177,500.

2. Nature, Circumstances, Extent and Gravity

As noted earlier, the determination of gravity requires consideration of actual or potential harm (whether and to what extent the violation actually resulted or was likely to result in an unpermitted discharge) and the importance to the regulatory scheme (focusing on the importance of the requirement to achieving the goal of the statute or regulation). Respondents conducted, participated in, and/or authorized the discharges of pollutants from a point source into navigable waters by placing five segments of four unnamed tributaries to Stekoa Creek into concrete pipes, for a total impact of approximately 1,500 linear feet. These activities were all conducted without required permits in violation of section 404 of the CWA. Respondents' unpermitted discharges and continuing failure to remove the piping or to mitigate for the impacts, have resulted in actual and potential harm and constitute serious violations that warrant the assessment of the statutory maximum penalty of \$177,500.

The four impacted tributaries include three headwater streams that combine to flow into Stekoa Creek from the west, and an additional headwater stream that enters Stekoa Creek directly from the east. Even in instances such as this where the water quality of the headwater streams may be impaired for some parameters (i.e. sediment), these headwater streams continue to serve several important functions such as nutrient uptake and processing, cold water habitat for macroinvertebrate and other aquatic species, and watershed and groundwater recharge. Despite their small size, headwater streams are critical to the overall function of aquatic ecosystems and maintain hydrologic and ecological connectivity to navigable waters. It is estimated that first and second-order streams (headwater streams) comprise approximately 70% of the total stream length in the United States, excluding Alaska. Organic material and invertebrates exported from headwater streams can substantially subsidize downstream waters such as Stekoa Creek and the Chattooga River by providing a continuous supply of energy to support the downstream ecosystem.

Prior to being placed in pipes, the streams had been impacted by channel relocation, vegetative buffer removal, channelization, and/or cattle hoof shear on the banks and within the stream channels. Despite their degraded condition, these streams provide habitat and contribute nutrients, cold water base flow and other ecological elements to Stekoa Creek, as evidenced by the current condition of Streams 1 (upstream of Site property) and 2.2 (in the open section of the stream located between the piped segments on the property). Both Stream 1 and Stream 2.2 are channelized streams with a grass buffer that flow through land periodically used as cattle pasture,

yet they each support a diverse and abundant assemblage of macroinvertebrates and other aquatic species such as crayfish and amphibians. The presence of such species is a strong indicator that ecological functions are taking place and contributing a significant input to Stekoa Creek, the nearest TNW.

The primary objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a). "In order to achieve this objective . . . it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish." CWA § 101(a)(2). If left in place, the unpermitted pipes permanently annihilate these sections of stream, rather than restoring the water quality of this already impaired stream system as would be intended by the CWA. As Respondents recognize in their Jurisdictional Assessment Report, essentially all biological, chemical and physical functions are lost in piped portions of streams, and this is the very reason why placement of fill into waters of the United States is so carefully regulated. However, Respondents' assertion that pipes sever jurisdiction by severing any biological, chemical and physical nexus between upstream and downstream segments of a water is completely false.

Respondents' placement of these headwater tributaries into pipes has resulted in complete functional loss, including loss of aquatic habitat, within these piped stream segments. Respondents' impacts can also be expected to lead to increased velocity of the streams from straightening and piping of the channels, and increased erosion within the remaining portion of the on-Site streams as well as within Stekoa Creek. Piping of headwater streams results in a reduction of biological diversity in the macroinvertebrate community, reduced oxygen transfer (the piped area is not open to the atmosphere and the natural falls and riffles have been removed), reduced flood protection, interruption of the aquatic insect cycle (insect drift – important for drift feeding fish such as trout), and reduced water quality. Increased erosion and sediment in the streams may contribute to further degradation of downstream waters including Stekoa Creek and the Chattooga River, also a TNW.

Despite the already impacted condition of the streams on this Site, the gravity of the additional piping impacts is significant for several reasons. First, Stekoa Creek is listed on Georgia's CWA Section 303(d) list for biological and habitat impairment due to excessive sedimentation. Respondents' construction activities resulted in the discharge of pollutants into the streams that appears to have included sediment (see CX 4). Pollutants discharged from Respondents' property into Stekoa Creek serve to further impact an already impaired water body. Second, the waters within the Stekoa Creek watershed are all considered to be primary trout streams according to the Georgia EPD, and by virtue of this designation, as Outstanding Resource Waters. The Chattooga River itself is listed as a National Wild and Scenic River and is notably impacted by pollutants originating within the city of Clayton, Georgia.

Unpermitted impacts to the headwaters of these systems place stress on waters that are considered to be of particular importance to the state of Georgia and compromises the considerable efforts being made to return Stekoa Creek to a fishable and swimmable condition,

two of the key goals of Congress in enacting the CWA. The 404 program was established to authorize certain limited discharges and impacts through issuance of permits that, with review and approval by the COE, may not detract from the overall purpose of the CWA's goals of restoring the waters of the U.S.

In this case, Respondents have completely subverted the purpose of the 404 program and the CWA itself by ignoring these critical permitting requirements, by failing to correct the violations, and by failing to mitigate for the impacts to the streams. Complainant contends that the actual and potential harm of permanently piping these streams is serious, and taken together with Respondents' circumvention of the statutory permitting requirements and unwillingness to restore these streams, warrant the assessment of the statutory maximum penalty of \$177,500.

Additional Statutory Penalty Factors

3. Degree of Culpability (Willfulness and/or Negligence)

The "degree of culpability" statutory factor is expressed in the Policy as the degree of willfulness and/or negligence, and is determined based on how much control the violator had over the events constituting the violation, the foreseeability of the events constituting the violation, whether the violator took reasonable precautions, whether the violator knew or should have known of the hazards associated with the conduct, and whether the violator in fact knew of the legal requirement which was violated. Respondent Jeffrey Duvall, and by extension, his company, Duvall Development, the owner of the land, had total control over the events constituting the violation, took no reasonable precautions to find an alternative to placing the streams in the pipes, knew that piping the streams would create environmental concerns, and knew of the CWA requirements for permitting. Complainant contends that Respondents' degree of culpability is extremely high.

At the time the unpermitted work was conducted, Jeffrey Duvall was aware of, and understood the section 404 permitting requirements, as well as the importance of having COE review the proposed project to determine whether it should be allowed. His knowledge of CWA requirements generally, and section 404 permitting requirements in particular, is based on several factors. First, in 2002, Mr. Duvall submitted a preconstruction notification (PCN) to COE seeking authorization pursuant to Nationwide Permit 27 to dredge and fill a 1,700 linear foot section of the stream banks of the Stekoa River along a stretch of property owned by one of Jeffrey Duvall's companies located just a short distance downstream of the Site property at issue in this case. (CX 24).

Though Mr. Duvall, like other applicants, might have sought help from the Natural Resource Conservation Service (NRCS, part of U.S. Dept. of Agriculture) in preparing the PCN to the COE, this did not mean that he was not aware of the purpose of the project, the necessary permitting requirements, or the process by which a permit could be obtained. The PCN was submitted in Mr. Duvall's name and on his behalf, for a project that he proposed, and the permitted activity was performed by Mr. Duvall on land owned by one of Mr. Duvall's companies. All COE correspondence was directed to Mr. Duvall. On September 5, 2002, Mr.

Duvall faxed a request to the COE for a copy of the permit. The COE's October 25, 2002, permit approval letter (CX 25) stated that:

The subject property contains waters of the U.S. which are considered to be within the jurisdiction of section 404 of the CWA, and that "the placement of dredged or fill material into any waterways and/or their adjacent wetlands including material re-deposited during mechanized land clearing or excavation of wetlands would require prior authorization. . . This authorization should not be construed to mean that any future projects requiring Department of the Army authorization would necessarily be authorized. Any new proposal, whether associated with this project or not, would be evaluated on a case-by-case basis. Any prior approvals would not be a determining factor in making a decision on any future request.

Mr. Duvall's involvement with the 2002 project gave him specific knowledge of the 404 permit requirements, and this knowledge carried forward to the stream piping project several years later.

The second means by which Mr. Duvall gained knowledge about the CWA was through his involvement as a representative for the "Stekoa Creek Group," a partnership of local private and public stakeholders organized to help improve and protect Stekoa Creek. The Stekoa Creek Group is listed as a stakeholder in the Stekoa Creek TMDL implementation plan that was developed by the Georgia Mountains Regional Commission and submitted to the Georgia Department of Environmental Protection in 2002. Mr. Duvall's knowledge and prominence in the Group led to his being invited as a guest speaker on behalf of the Group at the 2005 Georgia Water Resources Conference where he spoke on the topic of "The Successes and Challenges of Implementing Sediment and Pathogen TMDL's in Stekoa Creek." Through his involvement with this Group, and his permitted stream project in 2002, Mr. Duvall had experience discussing water quality issues with both state and federal regulators regarding adverse impacts to local streams. His current claim that he had no knowledge of the CWA section 404 permitting requirements in 2004 and 2005 when he piped the streams is disingenuous at best, and a complete fabrication at worst.

Finally, it must be noted that Respondents are prominent, sophisticated land owners and developers in Clayton, Georgia. At approximately the same time that the piping work and violations first occurred, Respondents orchestrated the sale and site development for a Wal-Mart, and later a Home Depot, on land owned by Mr. Duvall and/or one of his companies, located directly across Hwy 441 from the Site in this case. Development of that scale would have required extensive coordination and permitting through local, state and federal authorities, so it cannot be reasonably postulated that Respondents had no knowledge that alteration of the Site property by placing four streams into pipes would require similar coordination and consideration of possible permits, including CWA permits.

Respondents' actions in knowingly conducting work without the required permits and prior consultation with the COE, their long-standing failure to correct the violations after being

ordered to do so, their refusal to cooperate and to negotiate in good faith, and their failure to truthfully disclose ownership information, demonstrates a high degree of willfulness and negligence, further supporting assessment of the statutory maximum penalty in this case.

4. Ability to Pay

Based on financial information previously submitted to EPA by Respondent Jeffrey Duvall, EPA's financial analyst determined that Mr. Duvall has the ability to pay the proposed penalty. Additionally, based on an internet research of publicly available information, and a search of property records showing the value of properties owned by Duvall Development Company, EPA believes that Duvall Development Company also has the ability to pay the proposed penalty. Respondents have not submitted any additional financial information to EPA or indicated recently that they are claiming inability to pay. If Respondents raise inability to pay prior to or at the hearing, EPA will seek to offer into evidence the financial information Mr. Duvall submitted previously, and may also seek discovery regarding the financial condition of both Respondents.

5. History of Noncompliance

Complainant is not aware of other prior violations.

6. Other Matters as Justice May Require

As noted above, Respondents are active developers in the Clayton, Georgia area engaged in large scale development and sales of property to nationally based retailers. Duvall Development Company buys, holds, sells, and develops land and has considerable holdings in the area. Given Respondents' blatant disregard for the permitting requirements associated with their activities, Complainant believes that a significant penalty is warranted to deter Respondents and other closely-related Duvall companies, or any other person or company from committing similar violations in the future, and to ensure a level playing field within the regulated community by preventing Respondents from gaining an unfair economic advantage over other developers who have complied with the CWA.

Also, the Stekoa Creek watershed, specifically within the area of Clayton, is the most heavily developed within the Chattooga watershed. Compliance with environmental laws is necessary to ensure that the cumulative effect of unregulated impacts to waters of the U.S. does not further impair Stekoa Creek or degrade the Wild and Scenic Chattooga River.

Degree of Cooperation/Noncooperation

In their Prehearing Exchange, Respondents assert that they have cooperated with EPA and acted reasonably and in good faith against Complainant's purportedly unreasonable demand that Respondents spend \$300,000 to resolve the case. Respondents' characterization of this

matter is a gross distortion of what has transpired over the past four years since EPA first discovered the violations in March 2006.

Without any further disclosure of the details of settlement discussions held with Mr. Duvall, it was Mr. Duvall's proposal for mitigation of the impacts that set the stage for a settlement that would have been valued in this range. Following Mr. Duvall's refusal to remove the piping and to restore the streams (which he could have accomplished at a reasonable cost using his own equipment) and to pay a penalty amount that, taken together with the cost of restoration, would have been nowhere near the amount Mr. Duvall now complains about, Mr. Duvall proposed a settlement based on mitigation. It is important to note that the costs associated with mitigating a particular amount of impacts does not correspond with the reasonableness of a penalty sought by EPA. As explained above, had these activities been properly permitted by the COE, the costs of mitigation that would have been required as part of the permit would have been significantly higher than the settlement costs that Respondents assert were unreasonable.

Mr. Duvall has engaged in years of delay, deceit, and false starts, rejected every one of EPA's highly reasonable settlement offers, and finally walked away from the settlement table at the last minute. Despite every effort by EPA to resolve the case on terms as favorable as possible to Mr. Duvall, he ultimately failed to cooperate with EPA and his actions have wasted an extensive amount of Agency time and resources. To this day, he has refused and failed to comply with EPA's March 31, 2006, Compliance Order directing him to restore the streams, and he has refused to mitigate for any of the adverse impact to the streams.

Mr. Duvall has also made misrepresentations and submitted false information to EPA concerning ownership of the site property. After having met with Mr. Duvall over a period of years during which he repeatedly represented that he conducted the work on his own behalf, that he personally owned the land and that no other owners or corporate interests were involved, Complainant issued a CWA section 308 information request to him (CX 12), asking for information about ownership of the property and whether there were any corporate ownership interests. Mr. Duvall's response (CX 13) states that the property is owned by Jeffrey Duvall and that there was no corporation ownership. However, a title search of Rabun County property records revealed that Duvall Development Company has owned the property since 1991. (CX 14).

Further, at no time during the years of settlement talks did Mr. Duvall ever claim that anyone other than he was responsible for piping the streams or that the decision to conduct the work was made by a corporation not a party to this action. In an effort to deflect responsibility away from himself now that a Complaint has been filed, Mr. Duvall claims that one of his family owned companies, Duvall Livestock, was responsible for conducting the work on several (but not all) of the streams, and that he only acted as an employee of the corporation. However, Mr. Duvall, as the owner and president of his family companies, personally directed and conducted

the work on all the streams, hired the few workers involved, made all the decisions about the work that was done, and is personally liable for the violations. That Duvall Livestock may have leased a portion of the Site property at some time does not eliminate Jeffrey Duvall's personal liability or the liability of the landowner, Duvall Development.³ As indicated below, in light of Mr. Duvall's insistence that Duvall Livestock was involved in the violations, EPA is considering filing a Motion for Leave to Amend the Complaint to add Duvall Livestock and Steve Duvall as additional respondents in this action.

In summary, Respondents have refused to cooperate, have acted in bad faith, and have engaged in a pattern of deceitful, dilatory tactics which led to Complainant having to file the Complaint in this case. Complainant contends that Respondents' lack of cooperation further demonstrates their culpability and supports the assessment of the statutory maximum penalty.

V. Complainant's Response to Defenses Raised in Respondents' Prehearing Exchange

Complainant explains below why the specific defenses raised by Respondents do not justify any reduction in the penalty proposed by EPA.

1. Respondents Argue that Streams 1, 2.2 and 3 may not be jurisdictional waters.

Respondents have suggested that these streams "may not be" jurisdictional waters based on their belief that they are similar to a stream in Blairsville, Georgia, located in another town in north Georgia, which the COE determined was not jurisdictional. Respondents argue that because the streams in this case may be similar to the one in Blairsville, they cannot be jurisdictional. The argument is nonsensical since there is nothing remotely similar between the Blairsville stream situation and the streams in this case in terms of whether or not these streams are jurisdictional. Respondents have provided no analysis of how these streams are similar and why they would be treated similarly by the COE, nor have they contested Complainant's specific jurisdictional findings that these streams have a physical, biological, and chemical nexus to TNWs. Even a cursory comparison of the two stream systems shows the illogic of Respondents' contention, as there are considerable differences rather than similarities that explain the COE's determination that the Blairsville stream was not jurisdictional.

The Blairsville stream flows under the City of Blairsville, has unknown origins, discharges from a pipe that is built into a wall, and then flows as a stream and discharges into and out of a series of ponds. (See aerial photograph, CX 29). Between two of the ponds, the stream bed channel disappears, and it is believed that water flows out the upper pond when the pond is full and runs as a sheet across the adjoining property and into a lower pond and then discharges into a stream channel and empties into Butternut Creek. The owner of the property

³ Respondents have presented no evidence such as a lease or other documentation showing that Duvall Livestock has ever formally leased any portion of the site property or had any authority or control over the property or was authorized to make major physical changes to the property as was done by Jeffrey Duvall.

where the stream flows out of the pipe sought to develop the land and asserted that the stream was not jurisdictional.

The COE reviewed the situation and determined that it could not definitively conclude that there was an unbroken connection in the flow of the stream running across the owner's property and Butternut Creek, and, since the required nexus could not be definitively proven, the stream was determined not to be jurisdictional. This determination was based on the finding of the apparent severance in the flow between the stream and the TNW. No such severance exists in this case. All of the streams that Respondents piped flow in an unbroken connection across Respondents' property and into a TNW. Therefore, using the Blairsville stream situation as a reference to the streams at issue in this case provides no help to Respondents with regard to the jurisdictional argument.

2. Respondents argue that even if streams 1, 2.1, and 3 are jurisdictional, Respondents did not violate section 404 because the piping work was authorized by Nationwide Permit (NWP) 18.

The work conducted by Respondents was not eligible for NWP 18. In order to be eligible for the use of NWP 18 ("Minor Discharges"), the quantity of discharged material and the volume of area excavated must not exceed 25 cubic yards (cy) below the plane of the ordinary high water mark (OHWM) or the high tide line. If the discharge is greater than 10 cy but less than 25 cy, or is into a "special aquatic site" (which includes waters containing "riffle/pool complexes"), the project owner must submit a "preconstruction notification" (PCN) to the COE and consult with the COE about the project.

Complainant has determined that the amount of fill (pipes and soil cover) discharged into the streams and the volume of area excavated below the OHWM exceeded 30 cy (see CX 33). Therefore, NWP 18 was not available to Respondents. Even if the amount of fill discharged and excavated area was less than 25 cy, the discharge was clearly above 10 cy, requiring the Respondents to submit a PCN. Also, even if the discharge was less than 10 cy, Respondents were required to submit a PCN because the streams contain riffle pool complexes, as demonstrated by both Complainant's stream assessment work (CX 15), and Respondents' stream assessment work (Respondents' Exhibit 11), and as admitted by Respondents in their PHE. By failing to submit a PCN, Respondents failed to comply with the requirements of NWP 18, and as a result, the project was not eligible for authorization through NWP 18, even if the amount discharged was less than 25 cy.

3. Respondents could have created a farm pond encompassing streams 1, 2.1, and 3 without a permit under the so-called "farm pond" exemption, section 404(f)(1)(C), 33 U.S.C. § 1344(f)(1)(C).

Respondents seem to argue that because CWA section 404(f) provides for a permitting exemption for "farm ponds," Respondents were thereby somehow allowed to pipe the streams

without a permit. However, the "farm pond" exemption in section 404(f)(1)(C) is totally irrelevant to the alleged violations in this case. The fact that Respondents might have been able to construct a farm pond in the area of the streams has no bearing whatsoever on whether the streams are jurisdictional waters of the U.S., or whether a permit was needed before piping those streams. Moreover, Respondents didn't construct a pond of any size in that area, but rather piped the streams and leveled the property in violation of permitting requirements, so the introduction of this exemption is puzzling and completely off point. COE regulations found at 33 C.F.R. Part 323.4 address the "farm pond" exemption and associated requirements for coverage, and Respondents' stream piping activities clearly do not fit within this exemption. Additionally, before a farm pond may be constructed, an applicant must demonstrate the size of the pond is needed to meet the requirements of the use proposed for the pond. Respondents did not meet these requirements.

4. Piping work on Stream segment 2.2 was authorized by Nationwide Permit 3.

NWP 3 allows for the repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit. Under NWP 3, only minor deviations are allowed, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. "Currently serviceable" means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. The work must begin or be under contract to begin within two years of the date of their destruction or damage.

Stream segment 2.2 is piped beginning at the outfall that discharges into Stekoa Creek and runs upstream onto the Site property a distance of approximately 1,200 feet. Complainant's position is that approximately half the length of this piping (the upper 600 feet farthest from the outfall) was installed without a permit sometime in or after 2004 in violation of the CWA. Respondents state that the entire 1,200 ft length of piping was originally installed in 1988 with metal piping and replaced in 2004 after the piping had rotted out (see CX 7) and was no longer working properly. Respondents argue that this replacement work was authorized under NWP 3 because the original piping was authorized under NWP 26. However, an aerial photograph from 1999 (see CX 9), as interpreted by EPA, clearly shows that approximately 300-400 feet of the stream that Respondents claimed to have piped in 1988, was visibly flowing into the existing pond through a clearly defined stream channel and was not piped. Further, an aerial photograph from 2004 [CX 9] shows that the stream had disappeared indicating that it was piped after 1999.

NWP 3 could be relied upon only if (1) the existing piping had been currently serviceable, which means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction, (2) if the work entailed minor deviations from the original; and (3) the work to repair the damage is done within two years after the owner determined it needed repair. NWP 3 is not available for major construction projects that go well beyond the original

project as this one did. Complainant contends that Respondents' work failed all three requirements: the existing 600 feet of piping structure was not then currently serviceable, the work performed went well beyond a minor deviation (installation of an additional 600 feet of concrete pipe that was 18 in larger in diameter than the alleged original pipe, installation of drop inlets, and leveling of entire hillside and placement of large quantities of fill over the pipe), and the work was not conducted within two years after Mr. Duvall determined that the existing piping had deteriorated.

5. Respondents argue that the Site property is bound by a conservation easement and cannot be developed.

Respondents argue that any suggestion that Respondents' intent in piping the streams was to prepare the site for development in the same manner as Respondents did with property across the highway, cannot be true because in 2003, Jeffrey Duvall placed the property into the county conservation easement program which restricts development. Respondents have conveniently left out key the fact that by placing the property into the program, the owner's property taxes are reduced for a period of ten years, but at the end of the 10 years, the easement ends and the property may be developed. Moreover, the property can be removed from the program at any time prior to the end of the easement, although the owner must pay the taxes that were forgiven during the prior years as a penalty. The easement on the Site property is due to expire in 2012. At that time, Mr. Duvall can fully develop the property, or sell it to another developer or company. Mr. Duvall also could choose to remove the property at this time from the easement program if market conditions were such that he could maximize profits from the sale of the property. He would simply need to pay the taxes he saved in past years.

6. Respondent argues that Duvall Livestock is a party in interest and that Jeffrey Duvall acted on behalf of the company when piping the streams.

In light of Respondents' revelation in its PHE that Duvall Livestock and its principle owners, Jeffrey Duvall and Steve Duvall, were also engaged in and directed the work that caused the violations while Duvall Livestock purportedly leased the property from Duvall Development, Complainant may file a Motion for Leave to Amend the Complaint to Add Duvall Livestock and Steve Duvall as additional parties in this case.

VI. Amendment to Witness List

In accordance with Complainant's reservation in its Prehearing Exchange, 40 C.F.R. § 22.19(f), and based on its review of Respondents' Prehearing Exchange, Complainant adds the following witnesses that it may call at trial:

10. Peter Stokely
US EPA - Headquarters
Washington, D.C.

Mr. Stokely is an Environmental Scientist working for EPA Office of Civil Enforcement in Washington, DC. Mr. Stokely has gained 30 years experience in aerial photography interpretation, 22 years experience in wetland science and CWA regulation and 10 years experience in Geographic Information Systems (GIS). Combining these experiences, Mr. Stokely has interpreted wetland boundaries, drainage patterns, and hydrological connections in support of CWA programs and enforcement efforts around the country. He has worked on cases in every EPA Region and has interpreted aerial photography for several Corps of Engineer Districts. Mr. Stokely has testified as an expert witness in aerial photography interpretation in federal court and EPA administrative proceedings over twenty times. Mr. Stokely graduated from West Virginia University in 1980 with a BS in Forest Resource Management. He will testify as a fact and/or expert witness regarding the interpretation of aerial photographs of stream 2.2, and the existence of piping along the length of the stream.

11. Mr. Steve Bingham
128 Webb Rd.
Clayton, Georgia

Mr. Bingham will testify as fact witness about the flow in Stream 4.

12. Fred Derrick
Rabun County Golf Course
1322 Old 441 S.
Clayton, GA 30525

Mr. Derrick will testify as a fact witness about the flow in Streams 2.1 and 3.

13. Lorene Perteet
45 Little House Lane
Tiger, GA.

Ms. Perteet will testify as a fact witness about the flow in Stream 1.

14. Justin Hammond
U.S. Army Corps of Engineers, Savannah District
Lake Lanier Field Office
Cumming, Georgia.

Mr. Hammond is a Project Manager in the COE's Piedmont Branch, Regulatory Division. He will testify as a fact and/or expert witness regarding Nationwide Permits 3 and 18, and the "farm pond" exemption under CWA section 404(f)(1), and will testify that the work conducted by Respondents to pipe streams 1, 2.1, part of 2.2, and 3 would not have been authorized by NWP 18, and that the project to replace piping at stream segment 2.2. (from old pond to Stekoa Creek) was not considered to be a minor deviation and was not authorized under NWP 3.

VII. Amendment to Exhibits List (Complainant's Exhibits – "CX")

Pursuant to the reservation in Complainant's Prehearing Exchange to supplement its Exhibits List in response to Respondents' Prehearing Exchange, and in accordance with 40 C.F.R. § 22.19(f), Complainant hereby amends its Exhibits List by adding the following documents:

CX 29. Aerial photo of Blairsville Stream

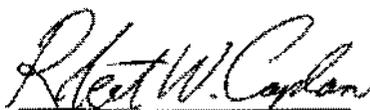
CX 30. COE Savannah SOP Worksheet for Mitigation Requirements for Piped Streams

CX 31. EPA's Revised North Carolina Stream Assessment, Nov. 9, 2010

CX 32. Joel Strange's Field Notes, 11-4-10, Site Visit; Calculation of Amount of Fill Discharged by Respondents into Streams

Finally, CX 27 is hereby supplemented with the resumes of additional expert witnesses identified above, Peter Stokely, and Justin Hammond. Also attached is the resume of David Melgaard, an EPA expert witness identified in Complainant's initial PHE, but whose resume was not available at the time the PHE was filed because Mr. Melgaard was on extended leave.

Respectfully submitted,



Dated: November 12, 2010

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CERTIFICATE OF SERVICE

I hereby certify that an original and one copy of the foregoing Complainant's Proposed Penalty and Analysis of Statutory Penalty Factors in In the Matter of Duvall Development Co., Inc., and Jeffrey H. Duvall, Docket No. CWA-04-2010-5505. was filed on November 12, 2010 with the Region 4, Regional Hearing Clerk, and that I have served a true and correct copy of the same on the parties listed below in the manner indicated:

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

(Via pouch mail)

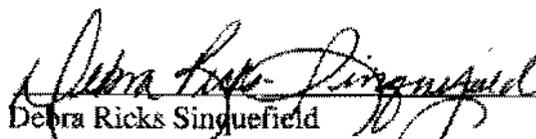
Robert W. Caplan
Senior Attorney
Sam Nunn Federal Center -13th Fl.
U.S. EPA, Region 4
61 Forsyth St., S.W.
Atlanta, GA 30303

(Via EPA's internal mail)

Edwin Schwartz, Esq.
Sweetnam and Schwartz
Suite 1700
Three Ravinia Drive
Atlanta, Georgia 30346

(Via Certified Mail, Return Receipt
Requested)

Date: November 12, 2010


Debra Ricks Singuefield
Office of Air, Pesticides, and Toxics Law