

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

RECEIVED
MAY 25 2011
EPA REGION 4
ATLANTA, GA

COMPLAINANT'S SUPPLEMENTAL PREHEARING EXCHANGE

Comes now Complainant, by and through its counsel, and in response to the Amended Prehearing Order issued in this matter by Administrative Law Judge Barbara A. Gunning, dated June 27, 2011, respectfully submits its Supplemental Prehearing Exchange (PHE) pursuant to 40 C.F.R. § 22.19(a). This Supplemental Amended PHE: (1) identifies additional witnesses; (2) provides additional and revised factual information and discussion of elements of liability based on deposition testimony; and (3) add exhibits to Complainant's Initial Prehearing Exchange. A copy of this Supplemental PHE will be served on the new Respondents and the original Respondents. Additionally, a copy of Complainant's Initial PHE and "Complainant's Proposed Penalty and Analysis of Statutory Penalty Factors" (filed November 12, 2010) will be provided to the new Respondents.

In May 2011, Complainant's counsel deposed six individuals pursuant to the Court's April 20, 2011, Order granting Complainant's Motion for Leave to Amend Complaint and for a Discovery Order. Based on the deposition testimony of Jeffrey Duvall, Steve Duvall, Louie Duvall, Connie Duvall, Francis Duvall, and Steve Williamson, Complainant determined that Steve Duvall and Duvall & Son Livestock, Inc., had participated jointly with the original Respondents in planning, directing, controlling, funding, supervising and conducting the piping work on the streams that resulted in violations of the Clean Water Act. As such, on May 25, 2011, Complainant filed an Amended Complaint adding Steve Duvall and Duvall & Son Livestock, Inc., as Respondents.

a. Complainant's List of Witnesses

Complainant's Initial PHE identified nine (9) witnesses, and Complainant's "Proposed Penalty and Analysis of Statutory Penalty Factors," dated November 12, 2010, amended the witness list by identifying an additional five (5) witnesses. In this Supplemental PHE, Complainant has identified thirteen (13) additional witnesses that it might call at the hearing. For purposes of convenience, Complainant lists below all 27 witnesses.

1. Joel Strange

U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Mr. Strange has been employed as a Life Scientist with U.S. EPA, Region 4, in its Water Protection Division, Clean Water Enforcement Branch, since February 2006. His duties include investigating alleged Clean Water Act (CWA) violations, developing appropriate resolutions to enforcement actions, determining waters of the United States and preparing administrative penalty calculations. Mr. Strange has been EPA's enforcement officer on approximately 21 CWA cases involving violations of CWA Section 404. Prior to joining EPA, Mr. Strange worked for the U.S. Army Corps of Engineers, Savannah District, Regulatory Division, Piedmont Branch, as a Regulatory Specialist. In that capacity, Mr. Strange reviewed Section 404 permit applications and determined the appropriate permit for the proposed activity, conducted site investigations, determined waters of the U.S., ensured that proposed activities complied with the Section 404(b)(1) guidelines, determined appropriate mitigation for wetland and stream impacts, investigated violations of Section 404 of the CWA, and developed and resolved attendant enforcement cases.

Mr. Strange will testify about his investigation in this case including his site inspections, development and issuance of a CWA Section 308 information request letter and a CWA Section 309 site restoration order, preparation of a stream assessment, his determination that the Respondents violated the CWA as alleged in the Complaint, and the factors EPA considered in developing a proposed penalty in this case. Mr. Strange has a BS in Biological Science from Northern Illinois University.

2. Mara Lindsley

U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Ms Lindsley has been employed as a Life Scientist with EPA in the Clean Water Enforcement Branch since July 2008. Her duties include investigating and resolving alleged CWA section 404 violations. Ms Lindsley has worked on approximately 20 enforcement cases. She is expected to testify about her review of the Site files, her Site inspection and stream assessment work, and her research, review, and determination that the four tributaries on the Site property impacted by the violation are waters of the United States and have a significant physical, chemical, and biological nexus to Stekoa Creek and the Chattooga River, traditional navigable waterways of the United States. Ms. Lindsley will also testify about the factors EPA considered in developing a proposed penalty in this case. Ms. Lindsley holds a Bachelors of Science in Natural Resource Management and Applied Ecology from Rutgers University, and a Masters of Science in Biology from Murray State University.

3. Mike Wylie
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Mr. Wylie is an EPA National Wetlands Enforcement Expert with expertise in wetlands and stream jurisdiction and CWA interpretation and enforcement. He has been in this position since 2009. Mr. Wylie will testify as a fact witness about his participation in EPA's site visits and inspections, his observations of conditions at the site, his determination that Respondents violated the CWA as alleged in the Complaint, and about the factors EPA considered in developing a proposed penalty. Mr. Wylie will also testify as an expert witness on stream ecology, the functions and values of the streams impacted by the violations at issue, and the harm to the streams resulting from the violations. Mr. Wylie has a B.S. degree from the University of West Florida in Interdisciplinary Sciences, and a M.S. degree from the same university in Coastal Zone Studies.

4. Lonnie Dorn
U.S. EPA Region 4 – Science and Ecosystem Support Division (SESD)
Athens, Georgia

Mr. Dorn has been employed since July 1999 as a Life Scientist with EPA Region 4's SESD. His duties include conducting stream bioassessments, providing support for jurisdictional waters determinations, and technical assistance with wetlands enforcement matters. Mr. Dorn has participated in nine wetlands/stream identification projects and three water quality studies for EPA, including the Chattooga River Watershed Bioassessment conducted in August 2009, for which Mr. Dorn was the Project Leader. He has also co-authored a number of reports including watershed stream and bioassessment reports and water quality reports. (see Exhibit 27).

Mr. Dorn will testify as a fact witness and possibly as an expert witness regarding the Chattooga River Water Bioassessment conducted by EPA in 2009, as well as the results of an earlier assessment conducted by EPA in 1997 on the same watershed, and the conditions of Stekoa Creek and the Chattooga River, the two waters that receive discharge from the creek system that runs across the site property that is the subject of this case. Mr. Dorn will also testify about the results of an additional study that is currently underway to determine up-to-date conditions in the streams that are the subject of this case, and the Stekoa River around the discharge points of the streams. Mr. Dorn has a BS in Biology from Berry College, Rome, Georgia.

5. David Melgaard
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Mr. Melgaard has been employed since 1987 as a Life Scientist in EPA's Water Protection Division. His duties include coordinating Region 4 monitoring activities required to implement CWA programs such as 303(d) lists of impaired waters, 305(b) reports, and 106 State workplans. He is responsible for analyzing and interpreting chemical, biological and physical data to characterize water quality of streams, lakes, coastal waters, and wetlands. Since 2008, Mr. Melgaard has served as the Regional Monitoring Coordinator serving as a liaison between State Monitoring Coordinators and EPA Headquarters on monitoring issues of national significance.

Mr. Melgaard will testify as a fact witness and possibly as an expert witness about the conditions of the Stekoa Creek and Chattooga River watershed. Mr. Melgaard is well qualified in this area as he served on the Board of Directors of the U.S. Forest Service Large Scale Watershed Restoration Project of the Chattooga River. Mr. Melgaard participated in the SESD bioassessment studies of the Chattooga River watershed and was responsible for providing technical expertise on the water quality and biological data collected during this study. Mr. Melgaard holds a Bachelor of Science in Zoology and a Masters of Science in Wildlife and Fisheries Sciences, both from the University of Tennessee, Knoxville, TN.

6. Bob Lord
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Mr. Lord has been employed since 1988 as an environmental scientist in EPA's Water Protection Division. Since 1991, Mr. Lord's duties have included the review of proposed Section 404 permit actions, proposed stream and wetland mitigation banks, NEPA documents for projects with stream and wetland impacts, and, until 2007, Section 404 enforcement actions. Mr. Lord may be called as an expert witness regarding Section 404 permits and the permitting process. Mr. Lord has been involved in hundreds of projects involving the discharge of dredged or fill material to waters of the U.S. in all Region 4 states, and currently focuses on Georgia and South Carolina. This includes the identification of waters of the U.S., assessing the direct, indirect, and cumulative impacts of the projects, evaluating the permitting process employed by the U.S. Army Corps of Engineers, compliance with Section 404 permit conditions, and compensatory mitigation. Mr. Lord has been certified as an expert witness for previous Section 404 enforcement cases.

Mr. Lord received a Bachelor of Science Degree from the University of Illinois in Biology in 1974 and a Masters of Science Degree from the University of Michigan in Water Resources Science in 1975. Mr. Lord also completed all course work for a PhD from the School of Public Health at the University of Michigan but left the program in 1976 to work for the State of Georgia.

7. Mark LaRue
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Mr. LaRue was employed as an Environmental Scientist in EPA Region 4's Water Protection Division from 1991 to 1997, reviewing CWA 404 Permits and as the enforcement officer for Alabama. From 1998 to 2010, Mr. LaRue owned and operated a private consulting firm specializing in Section 404 of the CWA, including mitigation design, build, and monitoring. He appeared at numerous state and federal trials as an expert witness in the area of CWA Section 404. Further, Mr. LaRue assessed wetland and stream functions to determine appropriate mitigation requirements and the costs of such mitigation. Mr. LaRue is now employed as a Physical Scientist in the Surface Mining Section in EPA Region 4.

Mr. LaRue will testify as an expert witness regarding section 404 permits and mitigation requirements, procedures, and costs. He has a Bachelor of Science degree in Biology from the University of Texas at Dallas, 1989.

8. Zach Dean
Anderson, South Carolina

Mr. Dean is an outdoorsman and kayaker, and is currently employed as a whitewater rafting guide for Wildwater Ltd., one of the three companies commercially licensed to operate on the Chattooga River. Mr. Dean resides in South Carolina. He coordinates trips to various boating destinations for himself, friends, and others. He will testify about his trips to Clayton, Georgia to kayak on Stekoa Creek, and monies spent in and around the Clayton area in connection with his kayak excursions on the Stekoa.

9. Scott Magley
177 Kinney Drive
Long Creek, South Carolina

Mr. Magley is an outdoorsman, kayaker, and former whitewater rafting guide for Southeastern Expeditions, one of the three companies commercially licensed to operate on the Chattooga River. Mr. Magley resides in Long Creek, South Carolina. He has been involved with whitewater paddling for 18 years and has extensive knowledge of recreational boating within the vicinity of the Chattooga River watershed. Mr. Magley has navigated both the upper and lower portions of Stekoa Creek and received an unprecedented number of responses to a Facebook posting of the Stekoa trip report by other boaters interested in paddling Stekoa Creek. Mr. Magley will testify about his trip(s) to Clayton, Georgia to kayak on Stekoa Creek, and monies spent in and around the Clayton area in connection with his kayak excursions on the Stekoa.

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 his knowledge of the flow conditions 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 his knowledge of the flow conditions in Streams 2.1 and 3.

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

Ms. Perteet will testify as a fact witness about her knowledge of the flow conditions 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.

15. Gary Davis
Watershed Coordinator
U.S. EPA, Region 4

Mr. Davis has been employed by EPA Region 4's Water Protection Division since 1992. Prior to his work with EPA, Mr. Davis worked as a hydrologist with the U.S. Geological Survey's Water Management Division. Currently, Mr. Davis is the Watershed Coordinator for Alabama which entails coordination and oversight of all Clean Water Act program activities in Alabama. Mr. Davis received his Bachelors degree in civil engineering from Georgia Tech in 1982, and received his Masters degree in civil engineering from Georgia Tech in 1990. Mr. Davis will testify as a fact and expert witness about how the installation of the concrete piping, including actions to widen and deepen the stream beds, to excavate soils along the sides of the streams, and to level the ground over and around the piping affected the streams. Mr. Davis' resume will be attached in CX 27.

16. Jeffrey Duvall

Mr. Duvall is the Chief Executive Officer, President, Shareholder, agent, and owner of Duvall Development Company and the CEO, President, and owner of Duvall & Son Livestock, Inc. He will be called as an adverse witness to testify about his role and his companies' roles in piping the four streams on the property owned by Duvall Development.

17. Louis "Steve" Duvall

Steve Duvall is the Treasurer and co-owner of Duvall & Son Livestock. He will be called as an adverse witness to testify about his role and his companies' roles in piping the four streams on the property owned by Duvall Development.

18. Connie Duvall

Ms. Duvall is the secretary of Duvall Development Company. She may be called as an adverse witness to testify about the structure and operation of the Respondent companies and other Duvall family businesses, the authority exercised by Jeffrey and Steve Duvall over the companies, the roles each played in the piping work and the funding of that work, the workers who helped conduct the work and the equipment used in the work.

19. Francis Duvall

Ms. Duvall is the secretary of Duvall & Son Livestock. She may be called as an adverse witness to testify about the structure and operation of the Respondent companies and other closely related Duvall family businesses, the authority exercised by Jeffrey and Steve Duvall over the companies, the roles each played in the piping work and the funding of that work, the workers who helped conduct the work and the equipment used in the work.

20. Louie Duvall

Mr. Duvall is the son of Jeffrey Duvall. He may be called as an adverse witness to testify about his role, and the roles of Jeffrey and Steve Duvall in the piping work, and also about the conditions of the site property.

21. Steve Williamson

Mr. Williamson works for Georgia Power, but occasionally works for Jeffrey and Steve Duvall on side jobs. Mr. Williamson will be called as EPA's fact witness concerning the work he did at the Duvall Development property in connection with the piping project.

22. Doug Towery
Natural Resources Conservation Service
U.S. Department of Agriculture
185 Welborn Street, Box 3
Blairsville, Georgia 30512

Mr. Towery may be called to testify as a fact witness about the assistance he provided to Jeffrey Duvall in completing and submitting a Pre-Construction Notification application to the U.S. Army Corps of Engineers for a Clean Water Act Nationwide permit for a project Mr. Duvall had proposed to construct on land owned by Duvall Development Company located along Stekoa Creek downstream from the property where the four streams were piped.

23. Antony Dean Galloway
Rabun County Marshall's Office
25 Courthouse Square, Suite 137
Clayton, Georgia 30525

Mr. Galloway may be called to testify about meeting with Jeffrey or Steve Duvall and discussing the proposed piping project.

24. James C. Wright, CPA
Tomkiewicz Wright, LLC
6111 Peachtree-Dunwoody Rd,
Atlanta, Georgia 30328,
770-351-0411

Mr. Wright was identified in the depositions of several of the Duvall family members as a person who handles Duvall company financial matters. Mr. Wright may be called to testify as a fact witness about payments made by the Respondents or agents, officers and employees of the Respondents to individuals who worked on the piping project, and payments for the piping, equipment, fuel and other expenses incurred in the project, and about ownership and depreciation of heavy equipment used in the project.

25. Chris Ledford
Comptroller/Financial Officer
Duvall Ford Company
Clayton, Georgia

Mr. Ledford was identified in the depositions of several of the Duvall family members as a person who handles Duvall Ford Company financial matters. Deposition testimony also indicated that some of the heavy equipment used in the piping project may have been acquired or leased from Duvall Ford Company, and that some of the costs of the piping project may have been paid from Duvall Ford accounts. Mr. Ledford may be called to testify as a fact witness about the sale/leasing/payment arrangements and about depreciating the equipment on tax returns.

26. Butch Register
Register Nelson, Inc.

Mr. Register has been identified by Respondents Jeffrey Duvall and Duvall Development as a witness. Mr. Nelson and his consulting firm have provided consulting services to Mr. Duvall since approximately 2007 or 2008. Prior to forming his consulting firm, Register Nelson, Inc., with Mark Nelson, Mr. Register was employed by the U.S. Army Corps of Engineers in Georgia. Mr. Register was the Branch Chief in the Corps Morrow, Georgia, office. In that capacity, he was in charge of enforcement actions initiated by the Corps against Steve Duvall and Jeffrey Duvall for violations of the Clean Water Act. Complainant intends to call Mr. Register as a fact and expert witness to testify about these prior enforcement actions brought by the Corps against the Duvalls.

27. Mark Nelson
Register Nelson, Inc.

Prior to forming Register Nelson, Inc. with Butch Register, Mr. Nelson was employed by the Corps. Mr. Nelson was the Project Manager in an enforcement action initiated by the Corps against Steve Duvall and/or Jeffrey Duvall for violations of the Clean Water Act. Complainant intends to call Mr. Nelson to testify about these prior enforcement actions brought by the Corps against the Duvalls.

Complainant respectfully reserves the right to call or not call the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent, or areas of the testimony of the above mentioned witnesses, where appropriate. Complainant also respectfully reserves the right to supplement its witness list as authorized pursuant to 40 C.F.R. Section 22.19(f) with the Court's approval and upon adequate notice to Respondents. Complainant also reserves the right to call any or all of Respondents' witnesses at the hearing.

b. Complainant's View on the Place of Hearing and an Estimated Amount of Time Needed to Present its Direct Case.

Pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondents reside or conduct the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, D.C. Complainant prefers to have the hearing either in Clayton, Georgia (where Respondents conduct business and reside) or in Atlanta, Georgia (the relevant EPA Regional Office). Complainant notes that in accordance with the parties' initial PHEs, the Court decided that the hearing would be held in Atlanta. The Regional Hearing Clerk has reserved a court room in the Richard Russell Federal Courthouse from August 23 – August 30, 2011. Complainant estimates that it will need approximately 2-3 days to put on its case.

c. Factual Information Relevant to the Assessment of a Penalty.

The Complaint proposes that the Respondents pay a penalty up to \$177,500, which is the current allowable statutory maximum for a Class II penalty pursuant to section 309(g)(2)(B) of the CWA, 33 U.S.C. 1319(g)(2)(B), pursuant to the most recent update to the Civil Monetary Penalty Inflation Adjustment Act Rule, 40 C.F.R Part 19,¹ which increased the upper limit of such penalties to \$11,000 per violation per day, not to exceed a total of \$177,500 for violations occurring after January 12, 2009.² 73 Fed. Reg. 239 (December 11, 2008) Pursuant to the Court's Amended Prehearing Order, Complainant hereby sets forth the factual information that it believes is relevant to the assessment of a penalty. Complainant has included herein an updated and slightly revised version of the basic factual information included in Complainant's Initial PHE.

¹ Issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701), which mandates that EPA adjust its civil monetary penalties for inflation every four years.

² As described below, the violation continues to the present day as a result of Respondents' failure to remove the fill and piping material from the impacted streams.

1. Description of the Violations, Elements of Liability, and Impacts to Streams

The Complaint alleges that Respondents violated sections 301 and 404 of the CWA by clearing and leveling the Site and causing fill materials to be discharged into four streams on the Site and by installing 48-inch cement pipes into approximately 1,500 linear feet of five sections of the four streams and re-routing the streams through the pipes, without the required permit. EPA discovered the violation in March 2006 during a Site visit after having received several complaints about possible violations of the CWA at the Site.

The CWA governs the "discharge of pollutants" into "navigable waters," which are defined as "waters of the United States." Section 301 of the CWA generally prohibits the discharge of pollutants into waters of the U.S. except in accordance with the requirements of one of the two permitting programs established under the CWA: Section 404 which regulates the discharge of dredged or fill material, or Section 402, which regulates all other pollutants under the National Pollutant Discharge Elimination System (NPDES) program. To establish Respondents' liability under Section 301 of the CWA, it must be shown that Respondents are "persons" whose activities involved: (1) a discharge; (2) of a pollutant; (3) from a point source; (4) into waters of the United States; (5) without a permit under section 404.

The CWA defines "pollutant" broadly and case law has held that dirt, rock, vegetation, sediment, and debris placed into waters of the U.S. all constitute pollutants. See 33 U.S.C. § 1362(g). Discharge of a pollutant means "any addition of any pollutant to navigable waters from any point source." A point source can be a bulldozer, dump truck, or other heavy machinery, from which pollutants are discharged. See, e.g., U.S. v. Banks, 873 F. Supp. 650 (S.D. Fla. 1995).

The term pollutant includes fill material. See In re Phoenix Constr. Servs., Inc., 11 E.A.D. 379, 383, n.5 (EAB 2005) (and cases cited therein); see also United States v. Pozsgai, 999 F.2d 719, 725 (3rd Cir. 1993) (identifying fill material as a pollutant); U.S. v. Banks, id. at 657 (identifying fill material and dredged soil as pollutants). EPA and U.S. Army Corps of Engineers (COE) regulations define fill material as material that has replaced any portion of the water with dry land or that has changed the bottom elevation of a water of the U.S., and further state that examples of fill material include "rock, sand, soil, construction debris, . . . and materials used to create any structure or infrastructure in the waters of the U.S." See 40 C.F.R. § 232.2 33 (EPA regulations); 33 C.F.R. § 323.2(e) (COE regulations). The regulations also define the term "discharge of fill material" to mean the addition of fill material into waters of the U.S. and to generally include placement of fill that is necessary to the construction of any structure of infrastructure in a water of the U.S., the building of any structure, infrastructure, or impoundment requiring rock, sand, direct or other materials for its construction; site-development fills for recreational, industrial, commercial, residential and other uses; . . ."

In piping the streams, Respondents constructed a structure or infrastructure in the streams. Additionally, Respondents dumped rocks and soil materials into the stream beds to raise them in order to allow for the pipes to connect up to the culverts under the bridges where the streams flow onto the site property. The rocks and soil that were placed into the streams raised and changed the bottom elevation of the streams and are clearly fill material in addition to being pollutants. Placing concrete pipes into the streams and re-routing the streams through the pipes changed the bottom elevation of the streams so that the pipes are fill material. Additionally, as a result of laying the pipes and backfilling and covering over portions of the stream beds where water used to flow, portions of the waters were replaced with dry land.

Additionally, by placing the streams into pipes, and covering the pipes and stream beds with soil to create level pasture area, Respondents brought the streams into a use to which they were not previously subject, thereby impairing the flow or circulation of the water and possibly reducing the reach of such waters. As such, the activity required a permit under section 404(f)(2) of the CWA.

Navigable waters is defined in 33 U.S.C. 1362(7) as "the waters of the United States." Pursuant to 40 C.F.R. § 232.2, "waters of the United States" includes, but is not limited to lakes, rivers, and streams. Under 40 C.F.R. § 230.3(s) (section 404(b)(1) guidelines), the term waters of the United States means "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide [commonly referred to as "Traditionally Navigable Waters" or "TNWs"], and "[t]ributaries" of such waters.

The definition of waters of the United States was recently further construed by the U.S. Supreme Court in U.S. v. Rapanos, 126 S.Ct. 2208 (2006). The plurality opinion (known as the "Scalia test") held that waters of the United States are limited to relatively permanent, standing or continuously flowing bodies of water and wetlands with a continuous surface connection to other regulated waters; while the concurring opinion by Justice Kennedy (the "Kennedy test") held that for jurisdiction to attach, waters need to have a "significant nexus" to TNWs such that they significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as "navigable."

District Court and Circuit Courts of Appeal that have considered how to interpret the Rapanos ruling have reached different conclusions on which test controls when trying to determine whether a body of water is a water of the U.S. The First, Fifth and Eighth Circuits have said that either test may be used, while the Seventh and Eleventh Circuits have said that the Kennedy test controls. The Environmental Appeals Board has ruled that EPA may apply either test. In Re Smith Farm Enterprises LLC (2011 EPA App Lexis 10, CWA Appeal No. 08-02; Docket No. 03-2001-0022, March 16, 2011). As set forth in EPA's Jurisdictional Waters analysis in this case (CX 16 to Initial PHE), EPA has applied both tests and determined that the streams in this case are jurisdictional waters under either test.

Each of the five required elements of liability has been met in this case because: Respondents are persons³ who discharged pollutants (rock, dirt, sediment, debris, and fill materials including cement pipes), from a point source (earth moving heavy equipment), into waters of the United States (the Site streams are permanent waters that flow into TNWs, including Stekoa Creek and the Chattooga River, and have a significant nexus to those TNWs) (see EPA's Memo on Jurisdictional Waters Exhibit 16), without a section 404 permit. The unpermitted fill and pipes have remained in the stream beds for more than five years in continuing violation of section 404 of the CWA despite exhaustive efforts by EPA over several years to persuade Respondents to comply with the law by removing the pipes and restoring the streams, or by applying for an after-the-fact permit and performing mitigation for the adverse impacts and loss of stream functions. Respondents have refused to take the necessary steps to return to compliance.

Respondents' unpermitted activity has impacted approximately 1,500 linear feet of four perennial cold-water tributaries (streams) to Stekoa Creek, including three headwater streams that combine on the Site property to flow into Stekoa Creek from the west, and an additional headwater stream on the Site property that enters Stekoa Creek directly from the east. Diagrams and aerial photographs of the Site property and streams can be viewed in Exhibits 9, 10, and 16. Headwater streams, such as the ones impacted by the Respondents, perform numerous functions that are critical to maintaining the physical, chemical, and biological integrity of downstream waters. Headwater streams are typically first and second order streams and make up the majority of stream miles in a typical watershed.

As discussed in greater detail in Exhibit 16, the impacted tributaries serve multiple, critical purposes relating to maintenance of the physical, chemical, and biological integrity of downstream waters. All of the impacted streams are designated as year-round trout streams by the Georgia Department of Natural Resources, and are therefore afforded an increased level of state and federal regulatory protection due to the unique habitat provided by shallow cold water streams. Organic material and invertebrates exported from headwater streams can substantially subsidize downstream waters by providing a continuous supply of energy to support the downstream ecosystem. The diverse organisms in headwater systems create food and energy

³ The deposition testimony of Jeffrey Duvall, Steve Duvall, Steve Williamson, Louie Duvall, Connie Duvall, and Francis Duvall establish that Jeffrey Duvall and Steve Duvall individually and jointly planned, directed, controlled, supervised, and paid for the piping project work both in their individual capacity and as corporate officers. The evidence also shows that Jeffrey Duvall participated directly in the work by operating the heavy machinery on the project and conducting other work. Jeffrey Duvall is personally liable because he is a person, and because he is a corporate officer of both Duvall Development, the owner of the site property, and Duvall & Son Livestock, the operator of the site, and he personally participated in the work in that capacity. Steve Duvall also acted in his individual capacity and as a corporate officer and co-owner of Duvall & Son Livestock. Both men are clearly "persons" under the CWA and are individually liable.

resources for other ecosystems that are then transported downstream. Headwater streams are also important sources of aquatic insects. These insect populations frequently drift downstream and re-populate downstream reaches. Along the way, these insects provide a food source for aquatic species such as trout.

Headwater streams are critical to the overall function of aquatic ecosystems. Headwater streams maintain hydrologic and ecological connectivity to navigable waters. The hydrological processes in headwater streams control the recharge of sub-surface water sources, which influences the timing, frequency, and intensity of the base flow and floodwaters to downstream tributaries, including navigable waters. Respondents' placement of these headwater tributaries into pipes removes these important functions from the watershed and increases the cumulative loss of headwater tributaries in the area.

Additionally, Stekoa Creek is designated by the state of Georgia as CWA section 303(d) impaired water due to increased sedimentation from land sources within the Stekoa Creek watershed, which includes the Site property. Respondents' construction activities resulted in the discharge of pollutants such as soil, sediment, rock, vegetation and debris into the streams. Pollutants discharged from Respondents' property travel through Stekoa Creek to the Chattooga River, which is federally designated as a Wild and Scenic River.

Stream functional losses can be expected as a result of Respondents' piping including loss of aquatic habitat, increased velocity of the streams from straightening and piping of the channels, and increased erosion within the tributaries as well as Stekoa Creek. Piping of headwater streams results in a reduction of biological diversity in the macro-invertebrate 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.

2. Respondents' Prior Section 404 Violations, Knowledge of Section 404 Permitting Requirements and Failure to Correct Violations

At the time the Respondents conducted the unpermitted piping project that gave rise to the violations in this case, Respondents were fully aware of, and understood that section 404 permitting requirements might apply to the piping project, and that the Corps of Engineers (COE) might need to review the proposed project. This knowledge stretches back into the mid-1980's and 1990's and stems from prior enforcement actions initiated by the COE against one or more of the Respondents for activities involving discharges of fill materials into Stekoa Creek, a water of the U.S. Documents from COE case files (set forth in CX 39) describe this long involvement of the Duvalls with Section 404 matters and enforcement actions by the COE regarding the Duvalls' property along Stekoa Creek for illegal discharges without permits, including cease and desist orders, applications and withdrawal of applications for after the fact

permits, and warnings from the COE that the Duvalls must consult with the COE prior to initiating any future construction activities in waters of the U.S. located at or near Stekoa Creek. Based on the COE documents, it is clear that both Jeffrey Duvall and Steve Duvall have had dealings with the COE regarding permit issues for several decades.

On December 11, 1995, the COE issued a cease and desist order to Steve Duvall for unpermitted, unauthorized dredging activity involving the placing of fill material into Stekoa Creek adjacent to, or just below the site property. The order directed Steve Duvall to remove the fill material that had discharged into Stekoa Creek. The Order also states that "the COE has been charged by Congress under the auspices of section 404 of the CWA with the responsibility of regulating all fill activities performed in waters of the U.S. including adjacent wetland areas. Any activity that results in the discharge of dredged or fill materials into waters or wetlands of the U.S. without prior Corps approval constitutes a violation of section 404."

The COE's case closure letter to Steve Duvall, dated June 19, 1996, states that "Our review of the information that you have provided has resulted in resolving the unauthorized activity since you have complied with our request to remove the dredged material from the Stekoa Creek floodplain. Please be advised this Stekoa Creek area and its adjacent wetlands throughout your property still remain jurisdictional areas of the United States, and coordination would be required for any future activities proposed in this area. If any additional work is planned in the future in or near any waters of the United States please contact my office for a jurisdictional determination prior to conducting any work."

The COE has advised EPA that there are additional enforcement files relating to violations by the Duvalls. As of Monday, July 11, 2011, EPA had not received copies but upon receipt, EPA will add them to this Supplemental PHE and serve them upon the parties. The Duvalls have had extensive and long-standing knowledge about section 404 requirements and the COE's enforcement authorities. Also, the knowledge of Jeffrey Duvall and Steve Duvall can be imputed to each other and to the Respondent companies in this case since both men are owners and officers of the companies.

It should also be noted that the COE personnel involved in the 1995 issuance of the cease and desist order to Steve Duvall included Butch Register, who was the Branch Chief of the COE's Morrow, Georgia office, and Mark Nelson, who was the CEO Project Manager. Mr. Register and Mr. Nelson subsequently left the COE and started a private consulting business which has acted as a consultant to Jeffrey Duvall in connection with this case. Additionally, Respondents Jeffrey Duvall and Duvall Development have listed Butch Register as a witness in their initial PHE.

In 2002, several years before beginning the piping project at the Site, a Preconstruction Notification application was submitted to the COE on behalf of Mr. Duvall and Duvall & Son Livestock to the COE seeking the COE's approval of a section 404 nationwide permit that would authorize the applicants to conduct a stream bank restoration project on a 1,700 linear foot

section of Stekoa Creek along property fronting Stekoa Creek age owned by Duvall Development Company. This property is located just a short distance downstream of the Site property at issue in this case. The project proposed to construct erosion control and trout habitat structures (fill material) in Stekoa Creek, a water of the United States. In planning and preparing the Preconstruction Notification, Mr. Duvall obtained assistance from the National Resource Conservation Service, a division of the U.S. Department of Agriculture. (Exhibit 24). Mr. Duvall was advised by the NRCS that the proposed project would need to be reviewed by the COE for a determination as to whether it could be authorized to proceed under a Nationwide permit.

The COE's October 25, 2002, permit authorization letter (Exhibit 25) approving the project under a Nationwide permit stated that the project area contained 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 redeposited during mechanized land clearing or excavation of wetlands would require prior authorization." The permit additionally provided that "[t]his 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."

By having undergone this prior permitting process, Jeffrey Duvall, and by extension, his companies Duvall Development and Duvall & Son Livestock, gained specific knowledge of the potential applicability of CWA 404 permit requirements to the piping project at issue in this case, which was conducted just upstream of the earlier project along Stekoa Creek. However, Mr. Duvall and his companies chose to ignore the requirements of the law and to proceed with the subject activities without applying for, or obtaining a permit from the COE, and without even consulting with the COE prior to beginning work on the project.

In light of Jeffrey Duvall's knowledge about the section 404 requirements, EPA believes that Respondents made a business decision to proceed with the project at the Site and to ignore the permitting process because of his concerns that the project, as designed, may not have been granted a permit. Further, proceeding outside of the required permitting process allowed Respondents to save the time and potentially considerable costs involved with obtaining a permit (e.g., hiring a consultant, preparing plans, conferring with the COE) and with potentially having to conduct extensive and costly mitigation measures that might have been required by the COE if a permit were to be issued. By completely ignoring the permitting process, Respondents significantly undermined the purposes and integrity of the section 404 program as set forth by Congress, and prevented the COE from carefully reviewing, evaluating, and determining whether alternatives existed that would have eliminated or minimized the potential adverse impacts to the waters of the U.S., and determining whether a permit should have been granted or denied.

Upon discovering Respondents' violations in 2006, and based on available information at that time, Complainant issued an Administrative Compliance Order to Respondent Jeff Duvall requiring him to remove the piping and to restore the streams. (Exhibit 6). Mr. Duvall failed to comply with the Order, and despite years of effort subsequent to issuance of the Order to work with Mr. Duvall, and more recently with the newly added Respondents to get the violations corrected, they have refused to do so. The streams are still piped, there has been no after-the-fact permit issued by the COE, nor have the Respondents mitigated for the impacts caused to the streams by the violations.

3. Respondents Have Realized Significant Economic Gain from the Violations.

Under the CWA section 404 Guidelines (40 C.F.R. Part 230), and the COE regulations (33 C.F.R. Part 323), a permit application must include, among other things, a complete description of the proposed project, drawings, sketches and plans, the location, purpose and need for the project, and a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals or denials already made. If the project involves the discharge of fill material into waters of the U.S., the application must include the purpose of the discharge, and a description of the type, composition and quantity of the material. The applicant also must present 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 adverse impacts will occur, but that a permit (whether nationwide or individual) 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.⁴ By ignoring the permitting process, Respondents undermined the purposes and integrity of the section 404 program required by Congress, and prevented the COE from carefully evaluating the project and any 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.

Moreover, Respondents avoided all the costs associated with the permit application process which typically includes hiring environmental consultants to investigate the area of the proposed work, conducting all background research, corresponding with the COE during development and application for a COE permit, and responding to comments and other requirements. Additionally, Respondents have gained a huge economic benefit and competitive advantage over other developers in the area by piping and leveling the property over streams which others would likely not have been allowed or permitted to do. Even if such impacts might

⁴ 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, in appropriate situations, mitigation can be satisfied by purchasing "mitigation credits" from "mitigation banks" or by contracting with third parties to conduct work through the "in-lieu fee program."

have been permitted by the COE, Respondents have totally avoided the significant costs that would have been required to mitigate for the adverse impacts they caused to these tributaries, and continue to cause to the present day.⁵

Finally, EPA believes an additional piece of critical factual information that is relevant to the assessment of an appropriate penalty in this case is that the Respondents are prominent, well-known major developers and sophisticated landowners in the Clayton area. Located directly across the highway from the Site are two parcels of property previously owned by Duvall Development Company that were sold to Home Depot and Wal-Mart. Based on the clearing and leveling work at the Site involved in this case, the piping of the streams, the installation of concrete "drop boxes" with manhole covers allowing easy access into the piping system, and the location of the property, EPA believes that the Respondents' ultimate plan is to sell all or portions of the property for development. In that case, if Respondents have not removed the piping or mitigated for the impacts caused by the piping, and have not been held accountable for their violations and the economic benefit they derived from the violations, they will reap significant additional profit on top of the economic benefit already gained by their non-compliance and ongoing violations.

Moreover, even if Respondents do not presently intend to sell the property for development, their continuing noncompliance significantly impacts the integrity of the CWA section 404 permitting program and sends a message to the community at large that compliance is not necessary for those who hold positions of prominence in the community. Such disregard for the law will only encourage others to commit violations when they see that prominent business people have gotten away with violating the law with no repercussions.

d. Additional Documents and Exhibits Intended to be Introduced into Evidence.

Complainant's Initial PHE included 28 exhibits, and its "Proposed Penalty and Analysis of Statutory Penalty Factors" filed on November 12, 2011, listed four (4) additional exhibits for a total of 32 exhibits. This Supplemental PHE includes X additional exhibits. For the convenience of the parties, Complainant will include the entire list herein, but will only include copies of the newly added exhibits. In addition to the Amended Complaint and the Respondents' Answers (copies of which have previously been filed with the Court and which all parties presently possess), incorporated herein by reference, EPA intends to offer into evidence the following documents, copies of which are marked for identification and attached. For the purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated as "CX _."

⁵ As Complainant will demonstrate in its detailed penalty discussion that will be filed at a later date pursuant to the Court's Order, the cost of the mitigation that would be required to compensate for the impacts to the streams could greatly exceed the maximum Class II statutory penalty allowed under section 309(g) of the CWA.

- CX 1. Letter of Complaint and photographs submitted to U.S. Army Corps of Engineers; received by USACOE on Feb. 10, 2006.
- CX 2. Record of Conversation between Joel Strange, EPA, and Buzz Williams, Chattooga Conservancy, March 2, 2006.
- CX.3. Field Notes and Photographs of Joel Strange's Site Visit, March 16, 2006.
- CX 4. Stop Work Order, Citation of Violation, and Summons Issued by Rabun County Marshall's Office to Jeff Duvall and Duvall Livestock Company for piping 3 creeks without proper county soil erosion permits, December 15, 2004.
- CX 5. EPA's CWA section 308 Information Request Letter to Jeffrey Duvall, March 31, 2006.
- CX 6. EPA's CWA section 309(a) Administrative Compliance Order, March 31, 2006.
- CX 7. Jeffrey Duvall's Response to EPA's Information Request Letter, undated.
- CX 8. Field Notes and Photographs of Mike Wylie's Site Visit, May 18, 2006.
- CX 9. Aerial photographs of site, dated 1994, 1999, and 2004.
- CX 10. Aerial photographs with overlays showing streams and piping impacts.
- CX 11. Stream Restoration Plan and Mitigation Plan submitted by Jeff Duvall, March 28, 2008.
- CX 12. EPA's Supplemental Information Request Letter, Oct. 30, 2009, to Jeff Duvall requesting information pertaining to ownership of the site property.
- CX 13. Jeff Duvall's November 9, 2009, Response to Supplemental Information Request Letter.
- CX 14. Rabun County property deed records showing transfers and ownership of the Site property.
- CX 15. EPA Site Inspection Report, Photographs and Stream Identification Survey Worksheet, December 10, 2009.
- CX 16. Investigation of Jurisdictional Waters and Environmental Impact Assessment,

Prepared by Mara Lindsley, EPA, Region 4.

- CX 17. Biological Assessment of Streams in the Chattooga River Watershed: Data Analysis, Prepared for EPA Region 4 by Tetra Tech, Inc., April 29, 1999.
- CX 18. Assessment of Water Quality Conditions, Chattooga River Watershed, Rabun County, GA, Macon County, NC, and Oconee County, SC, EPA Region 4, May 1999.
- CX 19. Total Maximum Daily Load (TMDL) Development Report for Fecal Coliform in the Stekoa Creek Watershed, EPA Region 4, March 7, 2000.
- CX 20. TMDL Development for Sediment in the Stekoa Creek Watershed, Dec. 28, 2000.
- CX 21. *Sediment Sources to the Chattooga River*, Published as part of Ninth Biennial Southern Silvicultural Research Conference, Feb. 25-27, 1997.
- CX 22. Chattooga River Watershed Bioassessment of Benthic Macoinvertebrate Communities Provisional Report, EPA, Region 4, SESD, 8/31-9/2/09.
- CX 23. Stekoa Creek Bioassessment Quality Assurance Project Plan, September 30, 2010.
- CX 24. Jeff Duvall and Duvall Livestock's Preconstruction Notification Seeking Authorization for section 404 Nationwide Permit for dredge and fill activity to install erosion control and trout habitat structures along Stekoa Creek, May 13, 2002.
- CX 25. U.S. Army Corps of Engineers Authorization of Nationwide Permit allowing dredge and fill activity along Stekoa Creek, issued to Jeff Duvall, October 25, 2002, and related correspondence.
- CX 26. Georgia Secretary of State information on Duvall Development Co., Inc.
- CX 27. Resumes of EPA Witnesses Mike Wylie, Lonnie Dorn, Robert Lord and Mark LaRue. David Melgaard's resume will be provided when he returns from extended leave in mid-October 2010.
- CX 28. Updated EPA Assessment of Streams and Stekoa Creek
- 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
- CX 33. Deposition of Jeffrey Duvall
- CX 34. Deposition of Louis Steve Duvall
- CX 35. Deposition of Connie Duvall
- CX 36. Deposition of Francis Duvall
- CX 37. Deposition of Louie Duvall
- CX 38. Deposition of Steve Williamson
- CX 39: Army Corps of Engineers Files Pertaining to Respondents' Prior Violations of the CWA
- CX 40. Study: "Considerations in Prescribing Riparian Buffer Widths With Emphasis on Georgia Warmwater Streams", C. Rhett Jackson, Associate Professor of Hydrology, Warnell School of Forest Resources, University of Georgia, May 3, 2006
- CX 41; Article: "Where Rivers Are Born – The Scientific Imperative for Defending Small Streams and Wetlands," Judy L. Meyer, Ph.D, et al., Sept. 2003

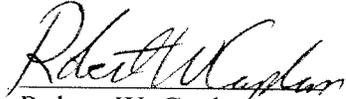
Complainant further anticipates the possibility that Complainant may need to introduce additional evidence in response to issues or defenses which may be raised in the new Respondents PHE and in the original Respondents' response to this Supplemental PHE. Complainant therefore respectfully reserves the right to supplement its exhibit list upon adequate notice to the Respondents and to this Court. In addition, Complainant may request this Court to take official notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

In the event EPA's continuing review of Respondents' documents in preparation for this case reveals additional violations, Complainant respectfully reserves the right, upon adequate notice to Respondents and this Court, to move for further Amendment of the Complaint and for: (1) presentation of additional testimony substantiating such additional violations; and (2) introduction of additional documentary evidence substantiating such additional violations.

Complainant's Supplemental
Prehearing Exchange, July 11, 2001
Page 22

Dated: July 11, 2011

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert W. Caplan". The signature is written in a cursive style with a horizontal line underneath it.

Robert W. Caplan
Attorney for Complainant
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
404-562-9520
caplan.robert@epa.gov