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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 9**

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| IN THE MATTER OF | ) | DOCKET NO. UIC-09-2022-0058 |
| NSHE HI Narcissus, LLC | ) | **COMPLAINANT'S MOTIONS IN LIMINE** |
| Respondent. | ) | |

Pursuant to 40 C.F.R. § 22.19(b)(7), in the Prehearing Order issued February 16, 2024, and during the Prehearing Conference on May 1, 2024, the Presiding Officer directed the parties to consider "other matters which may expedite the disposition of the hearing." In response to the Presiding Officer's direction and concerns raised by the Presiding Officer in the Prehearing Conference about the time and cost of a two-day hearing, and consistent with the

Consolidated Rules of Practice at 40 C.F.R. § 22.16(a), Complainant submits these motions in limine to expedite disposition of the hearing. Complainant moves to admit clearly relevant and reliable exhibits; moves to admit written testimony in lieu of oral testimony for Mr. David Smith-Watts; moves for official notice of the facts supporting the partial accelerated decision on liability in this matter; and moves to exclude irrelevant and unreliable exhibits and testimony. An order granting Complainant's motions in advance of the hearing will expedite disposition of the hearing.

## I. Motions to admit clearly admissible exhibits

Consistent with the Consolidated Rules of Practice at 40 C.F.R. § 22.16(a), Complainant moves to admit evidence that must be admitted. The Consolidated Rules of Practice state that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement . . . is not admissible." 40 C.F.R. § 22.22(a)(1). Presiding Officers have repeatedly found that it is appropriate to consult the Federal Rules of Evidence and federal court practice for guidance interpreting the standard of admissibility. *See In the Matter of Euclid of Virginia, Inc.*, 13 E.A.D. 616, 657 (EAB 2008); *In the Matter of City of Salisbury*, 10 E.A.D. 263, 285 n.31 (EAB 2002); *In the Matter of BP Products North America*, Docket No. CWA-05-2016-0014 (May 8, 2018). Under Federal Rule of Evidence 401, evidence is "relevant" when "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Evidence is "material" if it "might affect the outcome" of litigation under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986); *see also In the Matter of: BP Products North America*, Docket No. CWA-05-2016-0014 (May 8, 2018) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1981)).

The language of 40 C.F.R. § 22.22(a)(1) is not permissive; admission of evidence meeting the standard of admissibility is mandatory. Complainant seeks to expedite the disposition of the hearing by moving in limine to admit evidence which must be admitted. Specifically, Complainant moves to admit publicly available government records and information provided by Respondent. Respondent has not contested the admissibility of any of the evidence Complainant moves in limine to admit.

**a) Complainant moves to admit clearly relevant and reliable government records**

Complainant moves to admit government records that clearly meet the standard of admissibility. Specifically, Complainant moves to admit:

i. The Federal Register Notice for the Final Rule titled "Revisions to the Underground Injection Control Regulations for Class V Injection Wells" which was published on December 7, 1999. 64 Fed. Reg. 68546, Dec. 7, 1999, (Complainant's Exhibit 35);

ii. EPA General Enforcement Policy #GM-21, Policy on Civil Penalties, and its companion document, EPA General Enforcement Policy #GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, both of which are effective as of February 16, 1984, and are publicly available on EPA's website at https://www.epa.gov/enforcement/enforcement-policy-guidance-publications, (Complainant's Exhibit 36);

iii. EPA Office of Drinking Water Memorandum titled "UIC Program Definition of Significant Noncompliance," which was issued December 4, 1986, and is publicly available on EPA's website at https://www.epa.gov/uic/uic-program-guidance, (Complainant's Exhibit 38);

iv. EPA Office of Enforcement and Compliance Assurance Memorandum titled "Clarification of the Size of Violator/Size of Business Civil Penalty Factor," which was issued May 4, 2023, and is publicly available on EPA's website at https://www.epa.gov/enforcement/enforcement-policy-guidance-publications, (Complainant's Exhibit 49).

All of the government records are reliable. The Notice of Final Rulemaking (Complainant's Exhibit 35) contains a public record of EPA's findings leading to the final rule banning large capacity cesspools. Notices of Final Rulemaking are available to the public, as required by the Administrative Procedure Act, 5 U.S.C. §§ 552 and 553, and are subject to judicial review. The three guidance documents are public statements of EPA's policies and activities. As part of its mission to protect human health and the environment, EPA works to inform and educate the public about its policies and activities. EPA Guidance Documents, https://www.epa.gov/laws-regulations/epa-guidance-documents (last visited August 6, 2024). The reliability of agency guidance documents is well established. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency guidance "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Furthermore, Respondent has not disputed the reliability of any of the government records in this matter.

All of the government records are relevant, probative, and material to the calculation of the penalty for Respondent's ownership and operation of a large capacity cesspool in violation of the Safe Drinking Water Act. Complainant's Exhibit 35 demonstrates the importance of the violation to the Underground Injection Control (UIC) regulatory scheme and contains EPA's findings regarding the toxicity and amount of pollutants released by large capacity cesspools. The Safe Drinking Water Act requires consideration of the seriousness of the violation when assessing a penalty. 42 U.S.C. § 300h-2(c)(4)(B)(i). EPA's penalty guidelines identify importance to the regulatory scheme, toxicity, and amount of pollutants released as factors to consider to determine the seriousness of the violation. EPA General Enforcement Policy #GM-21 and #GM-22. The facts in Complainant's Exhibit 35 are therefore relevant, probative, and material to the outcome of the litigation.

Complainant's Exhibit 36 provides guidelines for statute-specific approaches to penalty assessments. Pursuant to 40 C.F.R. § 22.27(b) the Presiding Officer shall consider such penalty guidelines when applying the statutory penalty criteria. The penalty guidelines are therefore relevant to determine an appropriate penalty and are material to the outcome of the litigation.

Complainant's Exhibit 38 details EPA's standardized approach to determining the significance of a violation to the regulatory scheme. The Safe Drinking Water Act requires consideration of the seriousness of the violation when assessing a penalty. 42 U.S.C. § 300h-2(c)(4)(B)(i). EPA's penalty guidelines identify importance to the regulatory scheme as a factor to consider to determine the seriousness of the violation. EPA General Enforcement Policy #GM-21 and #GM-22. The facts in Complainant's Exhibit 38 are therefore relevant and probative to determine an appropriate penalty and material to the outcome of the litigation.

Complainant's Exhibit 49 provides guidance on evaluating the size of the violator to determine the economic impact of the penalty on the violator. The Safe Drinking Water Act requires a consideration of the economic impact of a penalty on the violator when assessing a penalty. 42 U.S.C. § 300h-2(c)(4)(B)(v). Complainant's Exhibit 49 is relevant and probative to apply the Safe Drinking Water Act penalty factors and is material to the outcome of the litigation.

Complainants Exhibits 35, 36, 38, and 49 are not unduly repetitious and do not contain evidence relating to settlement. Complainant is not seeking to admit exhibits containing facts that are duplicative of the facts in Exhibits 35, 36, 38, and 49 and therefore these exhibits are not unduly repetitious. None of these exhibits contain offers discussed to compromise a claim or facts regarding conduct or statements made during compromise negotiations and therefore these exhibits would not be excluded in federal court under Rule 408 of the Federal Rules of Evidence.

Complainants Exhibits 35, 36, 38, and 49 are not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value and do not contain evidence relating to settlement. In accordance with 40 C.F.R. § 22.22(a)(1), Complainant's Exhibits 35, 36, 38, and 49 must be admitted. Respondent has not contested the relevance, materiality, repetitiousness, reliability, or probative value of any of these exhibits. Complainant moves to admit Exhibits 35, 36, 38, and 49.

**b) Complainant moves to admit clearly relevant and reliable exhibits provided by Respondent**

Complainant moves to admit information provided by Respondent that clearly meets the standard of admissibility. Specifically, Complainant moves to admit:

i. Email from Duke Pontin to Jelani Shareem, Subject: LCC, November 23, 2021, (Complainant's Exhibit 18a);

ii. Title Guaranty Final Buyer Settlement Statement, October 4, 2017, (Complainant's Exhibit 18b);

iii. Pictures and Description of Bathroom, reported to have been taken April 28, 2021, (Complainant's Exhibit 18d);

iv. Large Capacity Cesspool Backfilling Final Completion Report, NSHE HI Narcissus, LLC, December 2, 2021, (Complainant's Exhibit 19b);

v. Invoice for cesspool pumping, ABC Plumbing LLC, November 22, 2021, (Complainant's Exhibit 19c);

vi. Invoice for "recycle concrete scalp," Aloha Trucking, December 2, 2021, (Complainant's Exhibit 19d);

vii. Respondent's Exhibit C "$$ new system fill old," Prehearing Information Exchange, Feb. 24, 2023, (Complainant's Exhibit 60).

Respondent has represented that all of the information provided is reliable. Respondent's managing member, Duke Pontin, provided the information on Respondent's behalf. Mr. Pontin made factual representations in writing (*see* Complainant's Exhibit 18a) about when Respondent's property was acquired, the non-residential uses that occurred on the

property, and use of the cesspool on the property. Mr. Pontin provided supporting documentation for his statements including the Title Guaranty Final Buyer Settlement Statement (*see* Complainant's Exhibit 18b) to verify the date the property was acquired, photo documentation (*see* Complainant's Exhibit 18d) to support his statements about use of the cesspool on the property, and the Large Capacity Cesspool Backfilling Final Completion Report (*see* Complainant's Exhibit 19b) signed by a licensed contractor as evidence that the large capacity cesspool on the property was closed on December 2, 2021. The Large Capacity Cesspool Backfilling Final Completion Report stated that ABC Pumping disposed of the sludge/sediment or liquid taken from the large capacity cesspool. Mr. Pontin provided an invoice from ABC Plumbing (*see* Complainant's Exhibit 19c) as supporting documentation. Finally, Mr. Pontin provided an invoice from Aloha Trucking (*see* Complainant's Exhibit 19d) and a list of the costs to backfill and replace the large capacity cesspool (*see* Complainant's Exhibit 60). Although Respondent was unwilling to stipulate to the admission of any exhibits, Respondent does not dispute the reliability of Complainant's Exhibits 18a, 18b, 18d, 19b, 19c, 19d, or 60.

All of the information provided by Respondent in Complainant's Exhibits 18a, 18b, 18d, 19b, 19c, 19d, and 60 is relevant, probative, and material to the calculation of the penalty for Respondent's ownership and operation of a large capacity cesspool in violation of the Safe Drinking Water Act. Respondent's managing member provided the exhibits to Complainant specifically because they contain facts that are relevant, probative, and material to the litigation.

The Safe Drinking Water Act requires consideration of the seriousness of the violation when assessing a penalty. 42 U.S.C. § 300h-2(c)(4)(B)(i). EPA General Enforcement Policy #GM-21 and #GM-22. Complainant's Exhibits 18a and 18b contains facts about when the property was acquired by Respondent. Complainant's Exhibit 19b contains facts about when the large capacity cesspool on the property was closed. These facts are necessary to determine the duration of the violation. Complainant's Exhibits 18a and 18d contain facts about the potential use of the large capacity cesspool. These facts are relevant to determine the actual or possible harm caused by the cesspool. The duration of the violation and the actual or possible harm caused by the cesspool are probative, and material to the calculation of the penalty for Respondent's violation of the Safe Drinking Water Act.

The Safe Drinking Water Act also requires consideration of the economic benefit resulting from the violation when assessing a penalty. 42 U.S.C. § 300h-2(c)(4)(B)(ii). Complainant's Exhibits 19c, 19d, and 60 contains facts about the costs of closing and replacing the large capacity cesspool and the dates those costs were incurred. These facts are relevant to calculate Respondent's economic benefit of noncompliance and are probative to the application of the Safe Drinking Water Act penalty factor U.S.C. § 300h-2(c)(4)(B)(ii) and are therefore material to the outcome of the litigation.

Complainant's Exhibits 18a, 18b, 18d, 19b, 19c, 19d, and 60 are not unduly repetitious and do not contain evidence relating to settlement. Complainant is not seeking to admit exhibits or testimony containing facts that are duplicative of the facts in Exhibits 18a, 18b, 18d, 19b, 19c, 19d, and 60 and therefore these exhibits are not unduly repetitious. None of these exhibits contain offers discussed to compromise a claim or facts regarding conduct or

statements made during compromise negotiations and therefore these exhibits would not be excluded in federal court under Rule 408 of the Federal Rules of Evidence.

Complainant's Exhibits 18a, 18b, 18d, 19b, 19c, 19d, and 60 are not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value and do not contain evidence relating to settlement. In accordance with 40 C.F.R. § 22.22(a)(1), Complainant's Exhibits 18a, 18b, 18d, 19b, 19c, 19d, and 60 must be admitted. Respondent has not contested the relevance, materiality, repetitiousness, reliability, or probative value of any of these exhibits, and has in fact represented that the exhibits are relevant, material, and reliable. Complainant moves to admit Exhibits 18a, 18b, 18d, 19b, 19c, 19d, and 60.

## II. Motion to admit written testimony in lieu of oral testimony for Mr. David Smith-Watts

Complainant moves to admit Complainant's Exhibit 48, the "Report Calculating the Economic Benefit of Noncompliance" by David Smith-Watts, in lieu of Mr. Smith-Watts' oral testimony at the hearing. Exhibit 48 is a report drafted by Mr. Smith-Watts which outlines the principles and methodology he used to calculate the economic benefit of non-compliance in this case, and explains the inputs and steps he took to complete his calculations. Admitting the report in lieu of Mr. Smith-Watts oral testimony will promote efficiency, as it would eliminate the need for multiple hours of testimony for Mr. Smith-Watts to present information that is undisputed and already in the report.

The Consolidated Rules of Practice at 40 C.F.R. § 22.22(c) allow the Presiding Officer to "admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness." *See also In the Matter of J.V. Peters & Co.,* 7 E.A.D. 77, 96 (EAB

April 14, 1997) ("With respect to witness testimony, the Consolidated Rules plainly authorize the use of written statements in lieu of live testimony."). A witness's written testimony "shall be subject to the same rules as if the testimony were produced under oral examination," and is admissible if the witness presenting the testimony "swear[s] to or affirm[s] the testimony" and is "subject to appropriate oral cross-examination." 40 C.F.R. § 22.22(c). The rules regarding testimony produced under oral examination state that evidence shall be admitted if it "is not irrelevant, immaterial, unduly repetitious or otherwise unreliable." 40. C.F.R. § 22.22(a). Therefore, written testimony in lieu of a witness's oral testimony is admissible if (1) the witness swears to or affirms the testimony, (2) the witness is available at the hearing for cross-examination, and (3) the testimony is relevant, material, reliable, and not unduly repetitious.

Admitting Complainant's Exhibit 48 in lieu of Mr. Smith-Watts' oral testimony will satisfy the requirements of 40 C.F.R. § 22.22(c). Mr. Smith-Watts will be present at the hearing, during which he will swear to and affirm the contents of Exhibit 48, and be available for cross examination regarding the written testimony. *See* 40 C.F.R. § 22.22(c). Further, information establishing the reliability of the report, including information about Mr. Smith-Watts educational and professional background, his experience calculating economic benefit for enforcement matters, and the reliability of the methodology he used to calculate economic benefit in this and other enforcement cases is already included in the report itself. *See* Complainant's Exhibit 48. Even so, Complainant intends to elicit additional testimony at the hearing on these subjects which will further establish the reliability of the report. *See* 40. C.F.R. § 22.22(a). Finally, Exhibit 48 is relevant and material to this case because the Safe Drinking Water Act requires EPA to consider economic benefit when calculating civil penalties. 42 U.S.C.

§ 300h-2(c)(4)(B)(ii). Accordingly, Exhibit 48 meets the threshold requirements for admissibility under 40 C.F.R. § 22.22(c), because Mr. Smith-Watts will swear to and affirm the testimony, will establish the reliability and relevance of the testimony, and will be available at the hearing for cross examination by the Respondent.

Notably, Respondent has not raised any specific objections to the admissibility of the report, either at the prehearing conference or in the prehearing statement. While Respondent refused to stipulate to the admission of any exhibits (including several of Respondent's own exhibits), the only explanation Respondent gave for this refusal was Mr. Pontin's strong belief that Complainant should be required to prove every element of its case.[1] With regard to Exhibit 48, specifically, Respondent has not raised any objections to the relevance or reliability of the report, nor has Respondent raised any dispute of material fact regarding the economic benefit calculations contained in the exhibit. Respondent has therefore not presented any reason why admitting Exhibit 48 in lieu of Mr. Smith-Watt's oral testimony should not be permitted under 40 C.F.R. § 22.22(c).

Indeed, admitting the report under 40 C.F.R. § 22.22(c) would be an efficient use of the tribunal and the parties' resources, as it would significantly reduce the time needed at the hearing to present Mr. Smith-Watts' testimony. Exhibit 48 is a nineteen-page, single-spaced document, which defines and explains each factor of the economic benefit calculation, identifies each input used in the calculation, and then walks through each step of the economic

[1] The "strong belief" of Respondent's managing member is irrelevant to Complainant's motion to admit written testimony in lieu of oral testimony. Complainant will provide testimony explaining the economic benefit calculation in full. The question presented to the Presiding Officer is whether to expedite the disposition of the hearing by allowing Complainant to provide the testimony in writing.

benefit calculation using narratives, equations, and charts. Requiring this information to be presented orally at the hearing would be time intensive. It would likely take several hours to explain in the hearing what ultimately accounts for approximately 3% of the Complainant's requested penalty amount.[2]

Because Mr. Smith-Watts's report satisfies the requirements of 40 C.F.R. § 22.22(c), and because admitting written testimony in lieu of oral testimony would be an efficient use of the tribunal's time and resources, Complainant respectfully requests that the Presiding Officer enter an order admitting Complainant's Exhibit 48 in lieu of Mr. Smith-Watts' oral testimony at the hearing.[3]

## III. Motion for official notice of the facts supporting the partial accelerated decision on liability and admission of the evidence containing those facts

Complainant seeks official notice of the facts supporting the partial accelerated decision on liability in this matter, issued on August 28, 2023, and moves for admission of the evidence containing those facts.[4] Official notice of the facts supporting the partial accelerated decision

[2] As explained in Exhibit 48, Mr. Smith-Watts calculated economic benefit to be $4,317.98, which is 3.24% of the total requested penalty of $133,450.

[3] In the alternative, Complainant requests an order conditionally admitting Complainant's Exhibit 48 in lieu of Mr. Smith-Watts' oral testimony on the conditions that Mr. Smith-Watts is available at the hearing for cross examination and swears to and affirms the contents of the report at the hearing.

[4] The Partial Accelerated Decision on Liability cites as its basis facts and admissions in the Complaint, filed August 2, 2022, (attached to Complainant's Motion for Accelerated Decision (MAD) as Exhibit A) and Answer, filed August 29, 2022, (attached to Complainant's MAD as Exhibit B); and on the following exhibits: EPA's Notice of Final Rulemaking 64 Fed. Reg. 68546 (Dec. 7, 1999) (identified in Complainant's April 16, 2024 Prehearing Information Exchange (PIE) as Exhibit 35), EPA's March 4, 2021 Inspection Report (attached to Complainant's MAD as Exhibit C and identified in Complainant's PIE as Exhibit 1a), November 23, 2021 email from Duke Pontin to Jelani Shareem (attached to Complainant's MAD as Exhibit E and identified in Complainant's PIE as Exhibit 18a), Large Capacity Cesspool Backfilling Completion Report and photographs (attached to Complainant's Reply to Respondent's Memorandum in Opposition to Complainant's MAD as Exhibit F; the Large Capacity Cesspool Backfilling Completion Report is also identified in Complainant's PIE as Exhibit 19b), and the January 9, 2023 Declaration of Jelani Shareem (attached to Complainant's MAD as Exhibit D and identified in Complainant's March 9, 2023 Prehearing Information Exchange as Exhibit 31a).

on liability and an order admitting the evidence containing those facts will expedite the disposition of the hearing.

The Consolidated Rules of Practice at 40 C.F.R. § 22.27(a) require the Presiding Officer to issue an initial decision which shall contain "findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and . . . a recommended civil penalty assessment." The initial decision is subject to appeal. 40 C.F.R. § 22.27(c). On appeal, the Environmental Appeals Board (EAB) reviews the initial decision based on the record. 40 C.F.R. § 22.30.

The Presiding Officer's conclusions regarding Respondent's liability for violation of the Safe Drinking Water Act are material to the imposition of a civil penalty because the Presiding Officer shall only determine the amount of the recommended civil penalty if the Presiding Officer determines that a violation has occurred. 40 C.F.R. § 22.27(a). The record must therefore include the facts and evidence supporting the Presiding Officer's conclusions regarding Respondent's liability because those conclusions may be subject to review by the EAB.

To ensure that the facts the Presiding Officer relied upon in the partial accelerated decision on liability are part of the record, Complainant seeks official notice of those facts and moves for admission of the evidence containing those facts. The Consolidated Rules of Practice at 40 C.F.R. § 22.22(f) allow official notice to be taken "of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency." In Federal courts, Federal Rule of Evidence 201(b) allows judicial notice of an adjudicative fact "that is not subject to reasonable dispute because the fact is

generally known within the trial court's territorial jurisdiction [or] can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Presiding Officer may therefore take official notice of facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

As required by 40 C.F.R. § 22.20(b)(2), the Presiding Officer identified in the partial accelerated decision those material facts which exist without substantial controversy. Partial Accelerated Decision on Liability at 5-6. The Presiding Officer previously reviewed the filings and exhibits presented and based the partial accelerated decision only on undisputed facts from evidence that was found to be admissible pursuant to 40 C.F.R. § 22.22(a). *Id.* at 6-15. In accordance with 40 C.F.R. § 22.22(a), the partial accelerated decision on liability was based only on reliable evidence from sources whose accuracy cannot reasonably be questioned. *See id.* Because the facts supporting the partial accelerated decision on liability are undisputed and because they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, the Presiding Officer may take official notice of those facts. 40 C.F.R. § 22.22(f).

The Consolidated Rules of Practice allow official notice of the facts supporting the partial accelerated decision on liability in this matter and the Presiding Officer has previously found that the evidence containing those facts is admissible pursuant to 40 C.F.R. § 22.22(a). To ensure that the facts the Presiding Officer relied upon in the partial accelerated decision on liability are part of the record for this matter, Complainant seeks official notice of those facts and moves for admission of the evidence containing those facts.

## IV. Motions to exclude irrelevant, immaterial, and unreliable exhibits and testimony

Consistent with the Consolidated Rules of Practice at 40 C.F.R. § 22.16(a), Complainant moves to exclude evidence that is irrelevant, immaterial, and unreliable. The Consolidated Rules of Practice at 40 C.F.R. § 22.22(a)(1) require the Presiding Officer to admit "evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. . ." In the Prehearing Order issued February 16, 2024, and during the Prehearing Conference on May 1, 2024, the Presiding Officer directed the parties to consider "objections to proposed exhibits" and "other matters which may expedite the disposition of the hearing." If Respondent attempts to admit evidence at hearing that is irrelevant, immaterial, or unreliable, Complainant intends to object. An order excluding such exhibits in advance of the hearing will expedite the disposition of the hearing.

Evidence that is irrelevant, immaterial, or unreliable should be excluded because such evidence cannot be used to determine the outcome of the litigation. The Consolidated Rules of Practice at 40 C.F.R. § 22.27(b) require the Presiding Officer to determine the amount of the recommended civil penalty in accordance with the penalty criteria set forth in the Safe Drinking Water Act and the penalty guidelines. Furthermore, the Presiding Officer must explain in detail how the penalty corresponds to the penalty criteria in the Safe Drinking Water Act. *Id.* Admission of evidence that is irrelevant to the statutory penalty factors or evidence that is unreliable and cannot be used to justify the penalty amount would unnecessarily prolong the hearing without providing a record that the Presiding Officer can rely upon. Therefore, Complainant seeks to exclude exhibits and testimony that are irrelevant, immaterial, and unreliable.

**a) Complainant moves to exclude exhibits regarding consent agreements and orders issued in other matters**

In the present case, Respondent seeks to admit settlement agreements and orders from other matters. Respondent's Exhibits H 1-7. The settlement agreements and orders from other matters are irrelevant and immaterial to the present matter. "What has happened in other cases can have no bearing on any factual issue in this case . . . [nor] can other [cases] be used to show that the penalty is inappropriate because it is more severe than penalties imposed in similar [cases]." *In the Matter of Chautauqua Hardware Corp.*, 3 E.A.D. 616, 627 (EAB 1991). The EAB has consistently held that "it is inappropriate to compare penalties imposed in different cases." *In the Matter of Euclid*, 13 E.A.D. at 694 n.168 (citing *In the Matter of Chem Lab Prods., Inc*., 10 E.A.D. 711, 728 (EAB 2002)) ("There is naturally substantial variability in case-specific fact patterns, making meaningful comparison between cases for penalty assessment purposes impracticable.") *and In the Matter of Hunt*, 12 E.A.D. 774, 795 (EAB 2006) ("the penalty inquiry is inherently fact-specific such that abstract comparison of dollar figures between cases without considering the unique factual record of cases does not allow for meaningful conclusions about the fairness or proportionality of penalty assessments"); *see also In the Matter of Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999) ("penalty assessments are sufficiently fact-and-circumstance-dependent that the resolution of one case cannot determine the fate of another").

The Presiding Officer must determine the amount of the penalty in accordance with the penalty factors in the Safe Drinking Water Act and the penalty guidelines and must explain how the penalty criteria were applied in the present matter. 40 C.F.R. § 22.27(b). The application of

statutory penalty factors is unique to each case based on the facts of that case. *In the Matter of Chem Lab Prods., Inc*., 10 E.A.D. at 728 . If penalties "are compared in the abstract simply as dollar figures, without any (or even with bits and pieces) of the unique record information that is so central to the penalty determinations themselves, then meaningful conclusions regarding the comparative proportionality or uniformity or "fairness" of the penalties cannot reasonably be drawn." *Id. citing In the Matter of Titan Wheel*, 10 E.A.D. 526, 533 (EAB 2002).[5] Because of the different circumstances, the EAB has found that comparison is particularly inappropriate between settled and adjudicated cases. *In the Matter of Chem Lab Prods., Inc*., 10 E.A.D. at 730 ("The inappropriateness of comparing settled versus litigated cases has also long been established"); *see also Briggs & Straton Corp.*, TSCA Appeal No. 81-1, 1 E.A.D. 653, 668 (CJO 1981).

Respondent's Exhibits H 1-4, 6, and 7 are consent agreements documenting penalties in settled cases that are not comparable to the matter at hand. EPA negotiates settlement penalties for violations of the UIC program in accordance with its 1993 UIC Settlement Penalty Policy. The UIC Settlement Penalty Policy states that it is "not to be used in pleadings or in a

[5] The EAB has also consistently declined to review the factual details of other cases alleged to be analogous, on the basis that the Consolidated Rules of Practice at 40 C.F.R. § 22.4 encourage the "efficient, fair, and impartial adjudication of issues." *In the Matter of Chem Lab Prods., Inc*., 10 E.A.D. at 729 . "[O]ne can easily imagine the increase in burdens presented to. . . decisionmakers if every respondent in a penalty case were to think it advantageous to submit comparative penalty information . . . [presiding officers] would soon be awash in a sea of minutiae pertaining to cases other than the ones immediately before them." *Id.* (citing *In the Matter of Titan Wheel*, 10 E.A.D. 526, 533 (EAB 2002)); *In the Matter of Newell Recycling Co.*, 8 E.A.D. 598, 642-43 (EAB 1999); *In the Matter of Chautauqua Hardware Corp.*, 3 E.A.D. 616, 626-27 (EAB 1991); *Briggs & Straton Corp.*, TSCA Appeal No. 81-1, 1 E.A.D. 653, 665-55 (CJO, 1981). Here, Respondent has made no argument that the cases resolved by the consent agreements are analogous to the present matter, however, even if Respondent made such an argument, Respondent's Exhibits H 1-4, 6, and 7 should be excluded on the basis of the Consolidated Rules of Practice at 40 C.F.R. § 22.4.

penalty hearing, which should base the penalty on the statutory maximum and penalty factors." 1993 UIC Settlement Penalty Policy at 2. The factual details of the violations and the terms of the resolutions identified in the consent agreements are also not analogous to the present matter. For example, Respondent's Exhibit H 3 pertains to a resolution in which the respondent agreed to implement a supplemental environmental project to close two cesspools in low-income areas and a compliance audit of approximately 100 properties. Respondent's Exhibit H 3 at 11-25. The penalty assessed in that matter was calculated in consideration of the supplemental environmental project and other factual details. The factual circumstances of each of the other enforcement actions are all so different as to make any comparison of the consent agreements and orders irrelevant and immaterial to the present litigation.

Respondent's Exhibit H 5 is a negotiated order requiring compliance with the Safe Drinking Water Act. An order requiring a non-party to comply with the Safe Drinking Water Act has no relevance for determining the appropriateness of a penalty assessed to resolve Respondent's liability and is immaterial to the outcome of the present litigation.

Contrary to the assertion in Respondent's Prehearing Statement on page 5, filed April 17, 2024, that "a review of recent consent orders is relevant in determining what penalties are appropriate for various violations," it would not be appropriate for the Presiding Officer to propose a penalty in the present matter based on comparison with penalties imposed in different cases, especially when those cases have significant factual differences, including that those cases have settled. *See, e.g., In the Matter of Chem Lab Prods., Inc*., 10 E.A.D. at 728. Because remedies imposed in other cases are not an appropriate basis for the Presiding Officer

to determine an appropriate penalty in this matter, evidence of remedies imposed in other cases should not be admitted.

But even if evidence of remedies imposed in other cases were relevant—which they are not—the small selection of cases that Respondent chose here are immaterial, unreliable, or of little probative value to this case. The cases Respondent offers represent only a small sample of settlements with smaller penalties that have been cherry-picked by Respondent, while ignoring settlements with higher penalties which are comparable to or exceed the penalty proposed here. Because this cherry-picked sample of cases are immaterial, unreliable, or of little probative value, they should be excluded.

Complainant moves to exclude consent agreements and orders issued in other matters because these documents are irrelevant and immaterial to the present litigation.

**b) Complainant moves to exclude exhibits and testimony regarding a non-party's alleged environmental stewardship**

Respondent seeks to introduce exhibits[6] and testimony[7] of Mr. Pontin's alleged environmental stewardship to demonstrate that a penalty paid by Respondent "will not deter others." Respondent's Prehearing Statement at 9. However, Mr. Pontin is not a party to this litigation and this evidence is irrelevant, immaterial, unreliable and therefore should not be admitted under 40. C.F.R. § 22.22.

As an initial matter, the evidence regarding Mr. Pontin's purported acts of environmental stewardship which he undertook in his personal capacity are irrelevant and

[6] Respondent's Exhibits I, J, K, L, M, N, O, P, Q, and R.
[7] Respondent's Prehearing Information Exchange, filed April 17, 2024, states that Respondent intends to call Mr. Duke Pontin to testify to his efforts to clean up Respondent's property and his stewardship of the land, among other topics.

immaterial, because Mr. Pontin is not a party to this matter. Mr. Pontin is the managing member of Respondent, which is a limited liability company. Respondent is a separate entity, which should legally hold distinct assets and liabilities. *Tereick v. Hawaiian Riverbend, LLC.*, No. CAAP-18-0000683, 2019 Haw. App. LEXIS 21, at *1 (Ct. App. Jan. 23, 2019) ("'A limited liability company is a legal entity distinct from its members.'") (quoting HRS § 428-201 (2004)). Accordingly, Complainant only analyzed the penalty factors with respect to the actions of the Respondent, NHSE Narcissus HI, LLC., and did not analyze the penalty factors with respect to the actions, assets, and liabilities of Mr. Pontin.[8] Because Mr. Pontin's actions are not relevant or probative of any issue in this litigation, exhibits and testimony regarding actions taken by Mr. Pontin in his personal capacity should be excluded. *See* 40. C.F.R. § 22.22(a) (allowing presiding officer to exclude testimony that is "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value").

For example, Respondent's Exhibit Q is an unsigned letter from a "close friend" of Mr. Pontin which pertains to work that was allegedly conducted in 2011—six years before Respondent came into existence.[9] Thus, even if Mr. Pontin did perform this work, it could not be imputed to Respondent because Respondent did not exist at the time the work was

[8] According to Agency guidance, the appropriate way to consider related parties in calculating a penalty is to consider their when evaluating the economic impact of the penalty on the violator, as required by 42 U.S.C. § 300h-2(c)(4)(B)(v). "Clarification of the Size of Violator/Size of Business Civil Penalty Factor," EPA Office of Enforcement and Compliance Assurance Memorandum, May 4, 2023 (Complainant's Exhibit 49) at 3. Complainant's research revealed that Respondent's managing member, Mr. Pontin, is affiliated with numerous other business and assets. *See* Complainant's Statement of Proposed Penalty, FN 6, April 16, 2024. Accordingly, if Mr. Pontin were to be considered as a related party in this litigation, the appropriate penalty would be significantly higher.

[9] According to the Hawaii Department of Commerce and Consumer Affairs, Respondent, the NHSE HI Narcissus, LLC, was registered on May 24, 2017. Complainant's Exhibit 4.

performed. Likewise, Respondent's Exhibit R is a magazine article about a ranching business that is has no relation to Respondent, other than its mutual affiliation with Mr. Pontin.

Further, the evidence Respondent seeks to present regarding Mr. Pontin's alleged environmental stewardship should be excluded because of its unreliable nature. As explained above, Respondent's Exhibit Q is an unsigned letter from a "close friend" of Mr. Pontin named Jeff Wallace. The letter is not signed, sworn to, or affirmed, and Mr. Wallace will not be present at trial for cross examination. Written testimony is only allowed in lieu of oral testimony if the witness "swear[s] to or affirm[s] the testimony" and is "subject to appropriate oral cross-examination." 40 C.F.R. § 22.22(c). The letter from Mr. Wallace does not meet the requirements for admission of written testimony in lieu of oral testimony and is therefore unreliable and should not be admitted.

Respondent's Exhibits I-P are similarly unreliable for the purposes for which they are purportedly offered. Respondent's Exhibits I-P pertain to the removal of an underground storage tank (UST) located on Respondent's property, which was a former gas station. Respondent claims that Mr. Pontin engaged in the UST removal "on his own to ensure that his new property was not polluting the environment." Respondent's Prehearing Statement at 10. But this dubious explanation is unsupported by Respondent's own exhibits. As the unsigned, unlabeled, and incomplete Exhibit N identifies, USTs are regulated in the state of Hawaii, and Respondent could have faced legal consequences for violation of the closure requirements for USTs, or if sampling indicated the existence of onsite soil contamination.[10] While Respondent's

[10] Without an order excluding these exhibits and testimony, Complainant may need to revise its Prehearing Information Exchange to add a witness from EPA Region 9's Land, Chemicals, and Redevelopment Division who can testify to the UST closure requirements under the Resource Conservation Recovery Act.

Exhibits I-P may represent work undertaken by Mr. Pontin to reduce Respondent's legal liability under the UST regulations, the exhibits are unreliable to demonstrate that Mr. Pontin performed this work "on his own to ensure that his new property was not polluting the environment," as Respondent claims.

Even if Respondent's Exhibits I-P were reliable, which they are not, they should still be excluded, along with testimony containing the same assertions, for the additional reason that they are not relevant or material to this case. Efforts by Respondent's managing member to bring Respondent's property into compliance with state UST regulations are not relevant or material to any penalty factor identified in the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(4)(B).

In conclusion, Complainant moves to exclude the exhibits and testimony related to Mr. Pontin's alleged environmental "stewardship" because they are irrelevant, immaterial, and unreliable.

**c) Complainant moves to exclude testimony regarding percolation testing**

According to Respondent's Prehearing Information Exchange, Respondent may call Mr. Finn McCall as a witness to testify about a percolation test that was performed on Respondent's property for the purpose of installing a septic system. Mr. McCall's testimony should be excluded because Respondent failed to provide a report detailing the methodology and results of the percolation test allegedly performed by Mr. McCall and because the testimony is neither reliable nor relevant.

According to Respondent's Prehearing Statement, Respondent also expects Mr. Pontin to testify that a percolation test was performed, to testify to the results, and to draw conclusions regarding the migration of pollutants through the ground. Mr. Pontin's testimony should be excluded because the testimony is neither reliable nor relevant.

**1. Respondent failed to provide a report detailing Mr. McCall's claimed percolation testing**

Mr. McCall's testimony regarding the results of a percolation test should be excluded because Respondent failed to provide a report detailing the results of the test, and Complainant is therefore unable to prepare an effective cross examination of Mr. McCall. Allowing Mr. McCall's testimony under these circumstances would unfairly prejudice Complainant.

Respondent intends to call Mr. McCall to testify regarding the findings of a "percolation test" he performed for the purpose of installing a septic system, and notes that Mr. McCall's "testimony as a professional engineer could be considered in the nature of expert testimony." *See* Letter from Charles W. Gall to Daron Ravenborg (May 10, 2024) at 1. However, Respondent has not provided a report detailing the findings of Mr. McCall's percolation test or the methodologies used to perform the test. Instead, Respondent provided a letter from Respondent's counsel purporting to summarize the findings of the "percolation tests," which attached a brief one-page email from Mr. McCall listing his credentials and providing a three-sentence explanation of the percolation test he performed while designing a septic system for Respondent. Counsel's summary of two percolation tests that Mr. McCall allegedly performed

describe the results of the first percolation test as "very slow" and the results of the second percolation test as "better percolation than the first test." *Id.* at 2

Counsel does not specify which of the two percolation tests mentioned would be the subject of Mr. McCall's testimony. Furthermore, the "results" include no objective, numeric criteria for measuring percolation that Complainant could analyze or respond to, or even an explanation of what Respondent means when using the term "percolation." There is no indication from this summary of what the percolation test was designed to measure, any of the methodologies used to conduct the percolation test, the date on which the percolation test was conducted, or even the precise location where the percolation test was conducted. *See id*. For example, Respondent's counsel claims that the percolation test was performed "in near proximity" to the cesspool, but the surface area surrounding the cesspool is paved concrete. While Complainant presumes that the percolation test was performed in soil and not on pavement, no location was provided and the letter from Respondent's counsel did not identify the media through which the percolation test was conducted. Claimant has no information on whether Mr. McCall drilled through the concrete surrounding the cesspool, or whether the "percolation test" was actually performed some distance away from the cesspool outside of the paved area.

Following the prehearing conference, the tribunal ordered Respondent to provide a "written report regarding the findings of the percolation test referenced in Respondent's prehearing brief." *See* Second Prehearing Order, In the Matter of NSHE HI Narcissus, LLC, Docket No. UIC-09-2022-0058 (May 6, 2024). But the half-page summary of the "findings" of the percolation test, written by Respondent's counsel, and the three sentences in Mr. McCall's

email to Respondent's counsel are incomplete and do not satisfy the requirement that Respondent produce a "written report" regarding Mr. McCall's findings. *See* Letter from Charles W. Gall to Daron Ravenborg at 1-2.

Allowing Mr. McCall to testify regarding the results of the percolation tests he performed without first requiring him to produce a report outlining those findings would unfairly prejudice the Complainant, because Complainant is unable to prepare an adequate cross examination. Respondent claims that Mr. McCall's testimony "could be considered in the nature of expert testimony." *See* Letter from Charles W. Gall to Daron Ravenborg at 1. While The Consolidated Rules of Procedure do not address expert witnesses or expert testimony, Presiding Officers have repeatedly found that it is appropriate to consult the Federal Rules of Evidence and federal caselaw for guidance. *See e.g. In the Matter of Lazarus, Inc.,* 7 E.A.D. 318, 330 (EAB 1997) *("*[W]e have often looked to decisions of the federal courts on issues of procedure that may bear some similarities to our own administrative rules"). Federal Rule of Civil Procedure 26(a)(2) requires parties to provide an expert report for each expert witness it expects to testify at trial, which contains, among other things "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; [and] (iii) any exhibits that will be used to summarize or support them." Fed. R. Civ. P. 26(a)(2). Federal courts have routinely found that "The principal purpose behind the written report requirement 'is to permit a reasonable opportunity to prepare for effective cross examination and . . . arrange for expert testimony from other witnesses.'" *Ellis v. Pa. Higher Educ. Assistance Agency*, 2008 U.S. Dist. LEXIS 112150, *21 (C.D. Cal. Oct. 3, 2008).

As explained above, the letter from Respondent's counsel does not contain the kind of information that an expert report should have to allow Complainant the opportunity to prepare an effective cross examination or arrange for testimony from other expert-type witnesses. The letter from Respondent's counsel and Mr. McCall's accompanying email briefly describing the percolation test he performed does not contain the "basis and reasons" for Mr. McCall's opinions or any "facts or data considered by" Mr. McCall in forming his opinions. As a result, Complainant is unable to prepare an effective cross and would be unfairly prejudiced by Mr. McCall's testimony regarding the results of the percolation test.

**2. Mr. McCall's testimony is not reliable, relevant, or material**

Under 40 C.F.R. § 22.22(a), the Presiding Officer may exclude evidence if it is unreliable, irrelevant, or immaterial. Respondent intends to call Mr. McCall to testify regarding the findings of a "percolation test" he performed, but as explained above, Respondent has not provided a description or explanation of what the percolation test was designed to measure; any information about the methodology used to conduct the test; any specific information about where the test was conducted; or any objective, numeric criteria to describe the results of the test. *See* Letter from Charles W. Gall to Daron Ravenborg at 1-2. And while Respondent has provided some information indicating that Mr. McCall is a licensed civil engineer with experience designing septic systems, Respondent has not provided any information indicating that Mr. McCall has been trained in or has experience performing percolation tests. *See id.* at 1-2. Without this kind of information or documentation supporting Mr. McCall's conclusions, Mr. McCall's testimony regarding the results of a so-called "percolation test" are unreliable and should not be admitted.

Even if Mr. McCall's testimony regarding the results of the percolation test were reliable, which it is not, the testimony should be excluded because it is irrelevant and immaterial to application of the Safe Drinking Water Act statutory factors at 42 U.S.C. § 300h-2(c)(4)(B). Respondent stated that the percolation test was performed because it was "necessary to install the septic system" that Respondent used to replace the cesspool "in accordance with applicable laws and regulations." Letter from Charles W. Gall to Daron Ravenborg at 1. But Respondent does not explain how a test that is legally required for the installation of a septic tank in any way relates to the operation or use of the cesspool on Respondent's property. Moreover, based on the information Respondent provided, it does not appear that Mr. McCall even examined the cesspool on Respondent's property, or indeed, has any experience at all related to cesspools. *Id.* While the letter from Respondent's counsel indicates that Mr. McCall has been designing septic systems for ten years, Respondent has not indicated that Mr. McCall has ever done any work or completed any education related to the operation of cesspools. *Id.* Mr. McCall's testimony regarding the test he performed for the purpose of installing a septic system is neither relevant nor material to this case, and should be excluded.

Respondent's counsel argues that the suitability of the area for a leachfield is relevant to evaluate the actual or potential harm caused by Respondent's cesspool because pollutants entering the ground in an area that is unsuitable for a leachfield are not going to cause harm. A leachfield is part of a wastewater treatment system. Even if Respondent's assertions about the percolation test were true, one could just as easily imagine that an area could be unsuitable for a leachfield because pollutants entering the ground in that area are especially likely to cause

harm to an underground source of drinking water. Because the suitability of an area to be used as a leachfield does not indicate whether the potential for harm is less or that the potential for harm is greater, the fact is not material to the application of the penalty factors or to the outcome of this litigation.

Because Mr. McCall's anticipated testimony regarding the percolation test he performed for the purpose of installing a septic system on Respondent's property is unreliable, irrelevant, and immaterial to this case, and because allowing the testimony without an accompanying report outlining the results of the test would unfairly prejudice claimant, the testimony should be excluded from evidence.

**3. Mr. Pontin's testimony is not reliable, relevant, or material**

Under 40 C.F.R. § 22.22(a), the Presiding Officer may exclude evidence if it is unreliable, irrelevant, or immaterial. Testimony from Mr. Pontin interpreting the results of a percolation test and providing his opinions regarding the migration of pollutants would be unreliable. Respondent asserts that the percolation test was conducted by Mr. McCall, not Mr. Pontin and Respondent has identified no credentials that would qualify Mr. Pontin to conduct or interpret the results of a percolation test.

Even if Mr. Pontin's testimony regarding the results of a percolation test in some unspecified area that was deemed unsuitable for a leachfield were reliable, which it is not, the testimony should be excluded because it is not material to application of the Safe Drinking Water Act statutory factors at 42 U.S.C. § 300h-2(c)(4)(B). As described above, Respondent has not explained how a test that is legally required for the installation of a septic system for wastewater treatment in any way relates to the operation or use of the cesspool on

Respondent's property. Additionally, as described above, even if Respondent's assertions that an area was unsuitable for use as a leachfield were true, suitability of an area to be used as a leachfield does not indicate whether the potential for harm is less or that the potential for harm is greater, and therefore the fact is not material to the application of the penalty factors or to the outcome of this litigation.

Because Mr. Pontin's anticipated testimony regarding the percolation test is unreliable, irrelevant, and immaterial to the outcome of this litigation, the testimony should be excluded from evidence.

Based on the foregoing reasons, having established good cause, Complainant requests that its Motions in Limine be granted.

Respectfully submitted,

KIMBERLY WELLS

Digitally signed by KIMBERLY WELLS
Date: 2024.08.16 08:32:36 -07'00'

Kimberly Wells
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Office of Regional Counsel, EPA Region 9

Certificate of Service

The undersigned certifies that on the date indicated below these Motions in Limine were served upon Respondent's attorney, who has consented in writing to electronic service pursuant to 40 C.F.R. § 22.5(b)(2).

One copy via electronic mail to:

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Dated: August 16, 2024

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