SYLVIA QUAST
Regional Counsel
United States Environmental Protection Agency, Region 9

KIMBERLY WELLS
Attorney Advisor
United States Environmental Protection Agency, Region 9

DARON RAVENBORG
Attorney Advisor
United States Environmental Protection Agency, Region 9

Attorneys for Complainant

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF	)	DOCKET NO. UIC-09-2022-0058
NSHE HI Narcissus, LLC	)	**COMPLAINANT'S STATEMENT OF PROPOSED PENALTY**
Respondent	)	
Proceeding under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	)	

Pursuant to 40 C.F.R. § 22.19(a)(4) Complainant files the attached document specifying a proposed penalty in the Matter of NSHE HI Narcissus, LLC, and explaining how the proposed penalty was calculated in accordance with the criteria set forth at 42 U.S.C. § 300h-2(c)(4)(B).

Respectfully submitted,

KIMBERLY WELLS

Digitally signed by KIMBERLY WELLS
Date: 2023.03.23 16:28:36 -07'00'

Kimberly Wells
Assistant Regional Counsel
Office of Regional Counsel, EPA 9

Complainant's Explanation of the Proposed Penalty Assessment
***In the Matter of NSHE HI Narcissus, LLC*, Docket No. UIC-09-2022-0058**

March 23, 2023

The Safe Drinking Water Act ("SDWA") authorizes the Environmental Protection Agency ("EPA") to issue an administrative order "assessing a civil penalty . . . or requiring compliance with respect to any such regulation or other requirement, or both." 42 U.S.C. § 300h-2(c)(1). EPA has broad discretion to assess a penalty for violation of the SDWA up to a maximum of $27,018 per day during which the violation continues and $337,725 total for each violation. 42 U.S.C. § 300h-2(c)(5); *see also* § 300h-2(c)(1) modified as mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 88 Fed. Reg. 986, 989 (January 6, 2023), codified at 40 C.F.R. § 19.4. In assessing the penalty, EPA must consider

i) the seriousness of the violation;
ii) the economic benefit (if any) resulting from the violation;
iii) any history of such violations;
iv) any good-faith efforts to comply with the applicable requirements;
v) the economic impact of the penalty on the violator; and
vi) such other matters as justice may require.

42 U.S.C. § 300h-2(c)(4)(B).

In administrative litigation the Presiding Officer is granted broad discretion to assess a penalty within the range authorized by the statute. *See* 42 U.S.C. § 300h-2(c)(1); s*ee also In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 2005 WL 4905111 at *18 (EAB 2005). When evaluating whether a penalty is within the range authorized by other environmental statutes with similar penalty provisions, courts have generally determined that it is appropriate to start with the maximum penalty allowed by the statute and reduce the penalty as appropriate considering the statutory penalty factors. *See, e.g.*, *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc*., 897 F.2d 1128, 1142 (11th Cir. 1990) (holding that when assessing a

penalty under the Clean Water Act "the district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out"); *United States v. B&W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994) ("In considering fines under the [Clean Air] Act, courts generally presume that the maximum penalty should be imposed"); *United States v. HVI Cat Canyon, Inc.*, Case No. CV 11-5097 FMO (SSx), 2023 WL 2212825 slip op at *53 (C.D. Cal, Feb. 25, 2023) (summarizing caselaw on penalty calculations).

Complainant carries the burden to demonstrate that the relief sought in this matter is appropriate. *See* 40 C.F.R. § 22.24(a). Specifically, Complainant must touch upon each factor and provide analysis showing that the proposed penalty is appropriate. *In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 1994 WL 615377 at *6 (EAB 1994). Complainant does not bear a separate burden to prove each factor. *Id.*

For the reasons explained below, Complainant requests that the Presiding Officer assess a penalty of **$123,855.20** against Respondent, NSHE HI Narcissus, LLC.

Relevant Law and Facts

Complainant seeks this penalty pursuant to section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), for Respondent's ownership and operation of a large capacity cesspool ("LCC") in violation of EPA's Underground Injection Control ("UIC") regulations at 40 C.F.R. § 144.88(a)(1). The UIC regulations were promulgated pursuant to section 1421(a)(1) of the SDWA, 42 U.S.C. § 300h(a)(1).

Respondent owns at least two properties in Hawai'i in Haleiwa and Kahuku, respectively. Complainant's Exhibits 14 and 34. Respondent owned and operated the LCC on the Haleiwa

property from at least October 4, 2017, when it purchased the property, until at least April 28, 2021, when the restrooms served by the cesspool were closed.

EPA Guidance

EPA does not have a penalty policy for applying the SDWA's statutory criteria in administrative or civil adjudications. EPA has developed guidance for calculating bottom-line penalties for settlement of UIC enforcement actions, the UIC Program Judicial and Administrative Order Settlement Penalty Policy ("UIC Settlement Penalty Policy"), September 1993 (Complainant's Exhibit 20b), but with the exception of the economic benefit calculation, this policy is expressly not applicable to adjudications.[1]

Without an applicable UIC penalty policy, the EPA Region 9 UIC Enforcement Program looks to two general penalty policies for the purpose of identifying and explaining considerations that are relevant for applying the SDWA statutory factors. The Policy on Civil Penalties (GM-21), and its companion document, A Framework for Statute-Specific Approaches to Penalty Assessments (GM-22), Feb. 16, 1984, (together, Complainant's Exhibit 36), were written to help EPA develop program-specific penalty guidance by providing an approach for evaluating statutory penalty factors.

These guidance documents provide that penalties should, at a minimum, be sufficient to recover the economic benefit of violations. Complainant's Exhibit 36, GM-21 at 3-4; GM-22 at 2-4. Courts share this view. *See, e.g.*, *Atlantic States Legal Foundation,* 897 F.2d

[1] The UIC Settlement Penalty Policy provides a framework for calculating "the lowest penalty figure which the Federal Government is generally willing to accept in settlement . . .." UIC Settlement Penalty Policy at 1. "This policy only establishes how the Agency calculates the minimum penalty for which it would be willing to settle a case. The development of the penalty amount to plead in an administrative or judicial complaint is developed independent of this policy . . . Of course, the Agency will not use the settlement Penalty Policy in arguing for a penalty at trial or in an administrative penalty hearing." *Id.* at 2. However, as described further below, calculation of economic benefit remains the same for litigation and for settlement. Guidance on the Distinction Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act, January 19, 1989 at 8 (applicable to SDWA enforcement actions, *see* UIC Settlement Penalty Policy at 2).

1141 ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are to successfully deter violations"). The penalty must also include a component to account for the gravity of the violation. "The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation." Complainant's Exhibit 36, GM-21 at 3.

The gravity component of the penalty assessment addresses the violation's impact on public health and the environment, as well as its impact on the regulatory program. *See, e.g.*, Complainant's Exhibit 36, GM-22 at 9-10. The seriousness of the environmental impact is "whether (and to what extent) the activity of the [violator] actually resulted or was likely to result in an . . . exposure." Some of the common considerations here relate to the amount and toxicity of the pollutant, sensitivity of the environment, and duration of the violation. *Id.* at 10. The seriousness of the regulatory impact depends on the importance of the requirement which was violated to achieving the goal of the statute or regulation." *Id.* EPA guidance also recognizes "size of the violator" as a gravity factor, which is equivalent to the "economic impact of the penalty on the violator" under the SDWA. *See* Complainant's Exhibit 36, GM-22 at 3, *see also* 42 U.S.C. § 300h-2(c)(4)(B). EPA's guidance on considering the size of the violator recommends increasing the penalty where it is clear that the penalty would otherwise have little impact on the violator to ensure that the penalty is sufficient to promote compliance with the regulatory program and fairness within the regulated community. Complainant's Exhibit 36, GM-22 at 15.

The combination of economic benefit and gravity produce a "preliminary deterrence figure," which may be adjusted upward or downward to account for case-specific conditions. *Id.* at 3. GM-21 and GM-22 identify a number of case-specific considerations, including the violator's degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, extent of noncompliance in specific areas of the United States, and any other unique factors. Complainant's Exhibit 36, GM-21 at 4-5; GM-22 at 10-15. Respondent's ability to pay is presumed unless Respondent has raised its inability to pay as an issue. *In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8.

In applying the GM-21 and GM-22 framework EPA considers the SDWA's six penalty factors by: (1) determining economic benefit (the second SDWA factor); (2) determining the gravity based on the seriousness of the violation and economic impact of the penalty on the violator (the first and fifth SDWA factors); then (3) adjusting the gravity based on Respondent's history of violations; good-faith efforts to comply, including the level of cooperation with EPA; and such other matters as justice may require (the third, fourth, and sixth SDWA factors).

Consideration of Statutory Factors

In proposing a penalty of **$123,855.20**, consistent with EPA's guidance, Complainant has taken the six statutory factors into consideration, as follows:

I. Economic benefit resulting from the violation

In assessing a penalty, EPA shall consider the economic benefit resulting from the violation. 42 U.S.C. § 300h-2(c)(4)(B)(ii). An appropriate penalty should remove any significant economic benefit that accrued as a result of noncompliance. Complainant's Exhibit 36, GM-21 at 3; *see also Atlantic States,* 897 F.2d 1141.

EPA has a standard policy and methodology for calculating the economic benefit based on the calculation of avoided and delayed costs of noncompliance. Complainant's Exhibit 20b, UIC Settlement Penalty Policy at 4. This analysis remains the same for litigating penalties because the posture of the proceeding is irrelevant to the calculation of the economic benefit that accrued to Respondent as a result of noncompliance. *See* Complainant's Exhibit 40, Guidance on the Distinction Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases under the Clean Water Act at 8, (applicable to SDWA enforcement actions, *see* Complainant's Exhibit 20b, UIC Settlement Penalty Policy at 2).

In accordance with EPA's standard methodology, the economic benefit of noncompliance is the present value of Respondent's cost savings from: (1) delaying the costs of closing the LCC and replacing the LCC with a legal wastewater treatment system, and (2) avoiding the costs of operating and maintaining the new wastewater treatment system during the period of violation. Complainant used the BEN (2022.0.0) model[2] and calculated Respondent's economic benefit gained from noncompliance in accordance with the September 1999 BEN User's Manual (Complainant's Exhibit 28). The BEN (2022.0.0) model adjusts the delayed and avoided costs for inflation, taxation, and the time value of money.

Respondent delayed the costs of closing and replacing the LCC between October 4, 2017, when Respondent purchased the property, and at least April 28, 2021, when the restrooms served by the cesspool were closed. The precise amount of the delayed costs must be inferred from the record because Respondent has not provided invoices or receipts for the specific project costs of closing and replacing the LCC. On February 24, 2023, Complainant requested this information from Respondent in order to develop this penalty calculation, but Respondent failed to respond.

[2] BEN (2022.0.0) is available at https://www.epa.gov/enforcement/penalty-and-financial-models.

See Complainant's Request for Other Discovery, attached hereto. Respondent provided Exhibit C in its pre-hearing exchange, titled "$$ new system fill old," which is neither an invoice nor a receipt, and contains various dollar figures.[3] Complainant interprets Respondent's Exhibit C "$$ new system fill old" to assert that Respondent spent between $27,249 and $27,262.51 to install a septic system and backfill the LCC.[4] Based on interpretation of Respondent's Exhibit C, Complainant assumes that Respondent spent $27,252.51[5] to install a septic system and backfill the LCC. This figure is consistent with the cost estimates provided in the HDOH January 2021 Cesspool Conversions Finance Research Summary Report, which is a study that evaluates the funding, financing, and affordability of cesspool conversions in the State, and estimates that most conventional septic system replacements will cost an average of $23,000, however many systems cost more due to site-specific conditions. *See* Complainant's Exhibit 30, HDOH January 2021 Summary Report at 5.

Respondent also incurred, or should have incurred, one-time nondepreciable costs for design and permitting of a 1,000-gallon septic tank with chamber drain field. The precise amount of the costs must be inferred because, as described above, Respondent failed to respond to Complainant's request for information on the costs of LCC closure and replacement. *See* Complainant's Request for Other Discovery, attached. Based on past experience with similar

[3] On December 3, 2021 Respondent's managing member sent EPA a document labeled "Receipt fo backfill material and volume" from Aloha Trucking but this document did not include any costs. Complainant's Exhibit 19d.
[4] The dollar figures in Respondent's Exhibit C "$$ new system fill old" are mostly unlabeled and are subject to various interpretations. The number $25,800 is circled and labeled "NEW SYS." indicating that this was the cost of the new septic system, however adding the two nearest columns of numbers yields $25,803.51. Based on interpretation of Respondent's Exhibit C, $25,803.51 appears to be the most likely representation of the cost of installing the septic system. Based on the title of the exhibit, Complainant assumes that the other, unlabeled column of numbers represents the cost of backfilling Respondent's LCC. The total for the unlabeled column is indicated as "1459" however the sum of the numbers in the column is actually 1,449. Therefore $1,449 appears to be the most likely representation of the cost of backfilling Respondent's LCC.
[5] For purposes of the BEN (2022.0.0) Model this figure has been rounded to $27,253.

LCC closure and replacement projects in Hawai‘i, EPA Region 9's UIC Enforcement Program estimates that Respondent's costs for design and permitting should have been at least $750.00.

EPA Region 9's UIC Enforcement Program estimates that Respondent would also have incurred annual septic system operating and maintenance costs of $852 if the property had been served by a 1,000-gallon septic tank with chamber drain field between October 4, 2017, when Respondent acquired the property, and April 28, 2021, when the restrooms served by the cesspool were closed.[6] *See* Complainant's Exhibit 30, HDOH January 2021 Summary Report at 5. Due to Respondent's noncompliance, Respondent avoided these costs.

EPA Region 9's UIC Enforcement Program calculated the economic benefit Respondent realized through noncompliance by inputting the estimates for delayed and avoided costs into the BEN (2022.0.0) model. The BEN (2022.0.0) model projects that Respondent's economic benefit from noncompliance is **$8,694.**

II. Gravity

In assessing a penalty, EPA shall consider the seriousness of the violation and the economic impact of the penalty on the violator. 42 U.S.C. § 300h-2(c)(4)(B)(i) and (v). EPA's guidance refers to these factors as the gravity component of the penalty calculation. Complainant's Exhibit 36, GM-21 at 3; GM-22 at 3. An appropriate penalty achieves retribution and deterrence, in addition to restitution. *See Tull v. U.S.*, 481 U.S. 412, 422 (1987). The gravity is a necessary component of a penalty that achieves deterrence and fundamental fairness to those who have complied because it ensures that a violator is worse off than if it had obeyed the law. Complainant's Exhibit 36, GM-21 at 3; *see also Tull*, 481 U.S. 422.

[6] The annual operating and maintenance costs are based on an estimated $71 in monthly costs.

a. Seriousness of the violation

As explained above, "seriousness" refers to both the actual or potential threat the violation posed to the environment or public health, and the extent to which Respondent's actions (or inaction) violated critical requirements of the regulatory program. Complainant's Exhibit 36, GM-22 at 3. Applying these criteria to the specific facts of this case, the circumstances of Respondent's operation of an LCC in violation of 40 C.F.R. § 144.88(a)(1) constitutes a serious violation.

EPA considers the seriousness of the *risk* of harm where the risk exceeds the actual, documented harm. *See* Complainant's Exhibit 36, GM-22 at 14. To evaluate the seriousness of the risk of harm, EPA looks to the amount of the pollutant, the toxicity of the pollutant, the sensitivity of the environment, and the duration of the violation. Complainant's Exhibit 36, GM-22 at 3.

EPA found that LCCs endanger drinking water and therefore banned them nationwide. Complainant's Exhibit 35, 64 Fed. Reg. 68546, 68550 (Dec. 7, 1999). In assessing the risk of harm posed by the amount of pollutants and the toxicity of the pollutants from LCCs, EPA found that

> Large-capacity cesspools have a high potential to contaminate [underground sources of drinking water] because: they are not designed to treat sanitary waste; they frequently exceed drinking water [maximum contaminant levels] for nitrates, total suspended solids and coliform bacteria; and, they may contain other constituents of concern such as phosphates, chlorides, grease, viruses, and chemicals used to clean cesspools such as trichloroethane and methylene chloride. Pathogens in untreated sanitary waste released into large capacity cesspools could contaminate the water supply . . . and pose an ''acute'' risk if consumed (meaning there could be a serious health risk with a single exposure given the nature of contamination).

Id. at 68551.

Although LCCs are banned nationwide, EPA also found that certain hydrogeologic settings are of particular concern. *Id.* In the present matter, Respondent's cesspool was located in

a geographic area that was identified by HDOH as being Priority Level 1 for closure because of the elevated risk cesspools in this area pose to human health and the environment. Complainant's Exhibit 37, HDOH 2021 Hawai'i Cesspool Hazard Assessment & Prioritization Tool report.[7] From October 4, 2017 to April 28, 2021, Respondent owned or operated an LCC in an environmentally sensitive area, adding weight to the seriousness of the violation.

EPA has developed a consistent system for quantifying the gravity of UIC violations, including quantifying the significance of the type of violation in the context of the UIC regulatory program, in accordance with GM-22 at 13. *See* Complainant's Exhibit 39, UIC Federal Reporting System Part II: Compliance Evaluation Significant Noncompliance, EPA Form 7520-2B (Revised April 2019), Instructions and Definitions; *see also* Complainant's Exhibit 38, UIC Program Definition of Significant Noncompliance Memorandum from Michael B. Cook, Director, Office of Drinking Water, Dec. 4, 1986. The UIC Program is designed to protect all current and potential underground sources of drinking water from contamination by injection wells. Complainant's Exhibit 35, 64 Fed. Reg. 68550. The requirement that all LCCs must be closed by April 5, 2005 is a critical requirement of the UIC regulatory program. *Id.* at 68549-68550. Owning or operating an LCC is an unauthorized injection of wastewater, which is a significant violation of the UIC program's core requirements. *See* Complainant's Exhibit 39, Instructions and Definitions; *see also* Complainant's Exhibit 38, at 2. Enforcement of the LCC ban is a central component of the UIC program. Respondent's injection from October 4, 2017 to

[7] The tool analyzes fifteen risk factors to develop a single prioritization system that organizes census-based regions into categories of Priority Level 1, Priority Level 2, and Priority Level 3 for determining whether cesspools that are located in a specific census boundary area will have a higher or lower potential to cause negative social and environmental impacts. The fifteen risk factors that were analyzed to calculate the geographic prioritization score include: Distance to municipal or domestic drinking water wells; Well capture zones; Distance to streams and wetlands; Distance to coastline; Sea level rise zones; Precipitation; Depth to groundwater; Groundwater flow paths; Soil characteristics; Cesspool density; Coral cover; Fish biomass/recovery potential; Beach user-days; Proximity to lifeguarded beach; and Coastal Ocean circulation proxy.

April 28, 2021 in violation of the LCC ban constitutes a serious violation of a critical requirement of the UIC regulatory program.

The risk of harm posed by the LCC and the significance of the violation in the context of the UIC Program both demonstrate that the violation is serious. Therefore, Complainant proposes that after accounting for the economic benefit, consideration of the seriousness of the violation warrants the assessment of at least fifty percent of the remaining statutorily allowable penalty. *See* calculation in *Figure 1*, below.

b. Economic impact of the penalty on the violator

The penalty must have an economic impact on the violator to achieve deterrence. *See* Complainant's Exhibit 36, GM-22 at 15. EPA looks to the size of the violator when evaluating the economic impact of the penalty on the violator, to account for the variations in financial capabilities among different violators and ensure adequate deterrence. *Id.*

In the present matter, Respondent is a Hawai'ian domestic limited liability company that owns the real property located at 66-532 Kamehameha Highway, Haleiwa, HI 96712, Tax Map Key (TMK) 1-6-2-007-019, in addition to real property located at 56-1030 Kamehameha Highway, Kahuku, HI 96731, TMK 1-5-6-005-024. Complainant's Exhibits 14 and 34. The Haleiwa Property comprises a commercial building and a parking lot, which is leased to mobile food vendors, and has an assessed value of $2,489,900. Complainant's Exhibit 8. EPA Region 9's UIC Enforcement Program was unable to locate business size information for NSHE HI Narcissus, LLC using Dun & Bradstreet Finance Analytics or Hoovers; Westlaw Company Investigator; Reference USA Business Database; or Hawai'i Business Express. However, assessment of Respondent's known assets (including, at least, the two properties referenced above) indicates that Respondent is able to pay a penalty.

Further, Respondent has not claimed that it is unable to pay and has refused to provide any information about business size. Each party's prehearing information exchange "shall include . . . all factual information [the party] considers relevant to the assessment of a penalty." 40 C.F.R. § 22.19(a)(4). On February 24, 2023, Complainant requested that Respondent provide information on assets, liabilities, and incomes to adequately assess the economic impact of the penalty on the violator pursuant to 42 U.S.C. § 300h-2(c)(4)(B)(v). *See* Complainant's Request for Other Discovery, attached. Respondent did not reply to Complainant's request and did not provide any information about business size or ability to pay in its prehearing exchange. Through its omission Respondent has conveyed that it has no factual information that it considers relevant to determine business size or ability to pay. Therefore, it may be presumed that Respondent is able to pay. *See In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8.

Because the Complainant was unable to obtain any information that details the financial means of the Respondent, Complainant is not proposing an adjustment to the gravity component to ensure that the penalty will have an appropriate economic impact on Respondent. However, while Complainant has not done so, the Presiding Officer may infer from Respondent's omissions that an adjustment to the gravity component is warranted. *In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18.

c. Preliminary Deterrence Figure

In the terminology used in GM-22, the preliminary deterrence figure is the economic benefit plus the gravity. Considering the seriousness of the violation and the economic impact of the penalty on Respondent, Complainant proposes a gravity adjustment of at least fifty percent of the remaining statutorily allowable penalty. *See Figure 1* for Complainant's Proposed

Preliminary Deterrence Figure calculation considering Respondent's economic benefit, seriousness of the violation, and the economic impact of the penalty on Respondent.

Figure 1

Preliminary Deterrence Figure	**=**	**[Economic Benefit]** **+ [Gravity]** where Gravity = 50% of the remaining statutorily allowable penalty and where the statutorily allowable penalty = $337,725
	=	**[Economic Benefit]** **+ [(($337,725) – (Economic Benefit)) x (0.5)]** where Economic Benefit = $8,694
	=	**[$8,694]** **+ [(($337,725) – ($8,694)) x (0.5)]**
	=	**[$8,694]** **+ [$164,516]**

III. Penalty Adjustment Factors

In assessing a penalty, EPA shall consider Respondent's history of similar violations, any good faith efforts to comply with the applicable requirements, and other matters as justice may require. 42 U.S.C. § 300h-2(c)(4)(B)(iii),(iv) and (vi). Consistent with GM-22, EPA considers these factors and determines whether an adjustment to the preliminary deterrence figure of the penalty is appropriate. Complainant's Exhibit 36, GM-22 at 3.

EPA Region 9's UIC Enforcement Program is not aware of any other similar violations by Respondent. Therefore, Respondent's history of violations does not merit a greater penalty to achieve deterrence and Complainant proposes no adjustment for this factor.

On the second factor, Respondent made certain good faith efforts to comply with the LCC ban at 40 C.F.R. § 144.88(a)(1) after EPA informed it of the violation. Respondent restricted access to the restrooms served by the LCC on April 28, 2021, after EPA's March 4, 2021, inspection and closed the LCC ten days after receiving EPA's Show Cause Letter on November 22, 2021. Although the violation was fully within Respondent's control since October 4, 2017, Complainant acknowledges Respondent's efforts to come into compliance with the LCC

ban in 2021 and proposes a thirty percent downward adjustment to the preliminary gravity component of the penalty.

Complainant also considered other matters as justice may require. EPA recognizes that where there is extensive noncompliance with certain regulatory programs in specific areas of the United States, the normal penalty assessments have not been sufficient to achieve general deterrence. GM-21 at 4. In such cases, EPA guidance recommends considering an increase to the penalty to achieve general deterrence. *Id. at 4-5.*

There is extensive noncompliance with the LCC ban set forth at 40 C.F.R. § 144.88(a)(1) in the State of Hawai‘i. EPA's enforcement actions since 2005 have resulted in closure of 1,219 LCCs in Hawai‘i, including closures within 0.1 miles of Respondent's property.[8] However, the HDOH estimates that there are 88,000 cesspools remaining in Hawai‘i, a significant number of which are LCCs operating in violation of the SDWA. Complainant's Exhibit 37, HDOH 2021 Hawai‘i Cesspool Hazard Assessment & Prioritization Tool report at 7. Therefore, it is evident that Respondent's LCC was located in an area where past enforcement has not been sufficient to deter ongoing extensive noncompliance. Consistent with EPA guidance, Complainant could request a higher penalty, however, Complainant has taken a conservative approach and proposes no adjustment on the basis of this factor. If the Presiding Officer finds that an adjustment is appropriate, the Presiding Officer has discretion to adjust the penalty based on this factor. *In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18.

Finally, Complainant has considered Respondent's ability to pay. Because Respondent has not raised inability to pay as an issue and has provided no information to support such a claim, Complainant proposes no adjustment on the basis of this factor.

[8] A list of EPA's enforcement actions in Hawai‘i is available at https://www.epa.gov/uic/hawaii-cesspool-administrative-orders (last visited March 16, 2023).

In summary, Complainant Proposes no adjustment for Respondent's history of violations, a thirty percent downward adjustment to the preliminary gravity component of the penalty based on certain good faith efforts to comply with the LCC ban, and no adjustment based on other factors as justice may require. In total, Complainant proposes a thirty percent downward adjustment to the preliminary gravity component of the penalty. *See Figure 2* for Complainant's proposed penalty calculation.

Figure 2

Penalty	**=**	**[Economic Benefit]**	**+**	**[Adjusted Gravity]**
		where Economic Benefit = $8,694;		
		where Gravity = $164,516;		
		and where the adjustment is a 30% reduction or 70% remaining of the total amount		
	=	**[$8,694]**	**+**	**[$164,516 x 0.7]**
	=	**[$8,694]**	**+**	**[$115,161.20]**
Penalty	**=**	**$123,855.20**		

Conclusion

In consideration of the statutory factors at 42 U.S.C. § 300h-2(c)(4)(B) and for the reasons described above, Complainant proposes that the Presiding Officer assess a total penalty of **$123,855.20** for Respondent's violation of the UIC requirements.

Certificate of Service

The undersigned certifies that on the date indicated below this Statement of Proposed Penalty was 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:

Charles W. Gall
Kobayashi Sugita & Goda, LLP
First Hawaiian Center
999 Bishop Street, Suite 2600
Honolulu, Hawaii 96813
Telephone: (808) 535-5700
Facsimile: (808) 535-5799
Email: cwg@ksglaw.com

Dated: March 23, 2023

KIMBERLY WELLS

Digitally signed by KIMBERLY WELLS
Date: 2023.03.23 16:32:42 -07'00'

Kimberly Wells
Assistant Regional Counsel
Office of Regional Counsel, EPA 9