

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

Kimco Realty
3333 New Hyde Park Road
New Hyde Park, NY 11042

Respondent.

Proceeding under Section 1423(c)
of the Safe Drinking Water Act,
42 U.S.C. §300h-2(c).

COMPLAINT, NOTICE OF VIOLATION,
PROPOSED ADMINISTRATIVE ORDER
FOR COMPLIANCE WITH CIVIL
PENALTY AND OPPORTUNITY TO
REQUEST A HEARING

DOCKET NO. SDWA-02-2017-8901

I. LEGAL AUTHORITY

1. This Complaint, Notice of Violation, Proposed Administrative Order with Civil Penalty and Opportunity to Request a Hearing, is hereinafter referred to as "Complaint" and is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 1423(c) of the Safe Drinking Water Act ("SDWA" or "Act"), 42 U.S.C. §300h-2(c). The EPA Administrator has delegated the authority to take these actions to the Regional Administrator for EPA, Region 2, who in turn has delegated the authority to the Director of the Division of Enforcement and Compliance Assistance, Region 2 ("Complainant").
2. Pursuant to Section 1423(c) of the Act, 42 U.S.C. §300h-2(c), and in accordance with the administrative Consolidated Rules of Practice ("CROP"), found at 40 C.F.R. Part 22, Complainant hereby requests that the Regional Administrator assess a civil penalty against a person for violations of the Act and the regulations promulgated thereunder and requires such person to take certain actions to achieve compliance with the Act and the regulations promulgated thereunder.
3. Section 1421(a) and (b) of the Act, 42 U.S.C. §300h(a) and (b), requires the EPA Administrator to promulgate regulations establishing minimum requirements for effective programs to prevent underground injection which endangers drinking water sources. *See* 40 C.F.R. Parts 124, 142, 144, 146, and 147, Subpart HH.
4. Section 1421(d) of the Act, 42 U.S.C. §300h(d), defines "underground injection" as the subsurface emplacement of fluids by well injection. Furthermore, underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such

system not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

5. Section 1422(c) of the SDWA, 42 U.S.C. §300h-1(c), requires EPA to administer the Underground Injection Control (“UIC”) program in states which do not have approved state programs. The State of New York does not have an approved state program. Pursuant to 40 C.F.R. §147.1651, EPA administration of the New York State UIC program became effective on June 25, 1984, for all injection activities except those on lands of the Seneca Indian Tribe.
6. 40 C.F.R. §144.3 includes, *inter alia*, the following relevant definitions:
 - a. “Person” is defined as, among other things, an individual, corporation, association, partnership or municipality;
 - b. “Contaminant” means any physical, chemical, biological, or radiological substance or matter in water;
 - c. “Owner or Operator” means the owner or operator of any “facility or activity” subject to regulation under the UIC program;
 - d. “Facility or Activity” means any UIC “injection well,” or another facility or activity that is subject to regulation under the UIC program;
 - e. “Injection well” means a “well” into which “fluids” are being injected;
 - f. “Well” means a bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system;
 - g. “Fluid” means any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state;
 - h. “Drywell” means a well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids;
 - i. “Cesspool” means a “drywell” that receives untreated sanitary waste containing human excreta, and which sometimes has an open bottom and/or perforated sides;
 - j. “Underground source of drinking water” means an aquifer or its portion: (a)(1) which supplies any public water system; or (2) which contains a sufficient quantity of ground water to supply a public water system; and (i) currently supplies drinking water for human consumption; or (ii) contains fewer than 10,000 mg/l total dissolved solids; and (b) which is not an exempted aquifer; and

k. "Ground water" means water below the land surface in a zone of saturation.

7. Pursuant to 40 C.F.R. §144.6, injection wells are classified as Class I, II, III, IV, V or VI. 40 C.F.R. §144.80(e) indicates that Class V wells are typically shallow wells used to place a variety of fluids directly below the land surface. 40 C.F.R. §144.81 describes the types of Class V injection wells. More specifically, 40 C.F.R. §144.81(2) clarifies that "large capacity cesspools including multiple dwelling, community or regional cesspools, or other devices that receive sanitary wastes, containing human excreta, which have an open bottom and sometimes perforated sides..." are regulated as Class V injection wells. The UIC requirements do not apply to single family residential cesspools or to non-residential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons a day.
8. Pursuant to 40 C.F.R. §§144.84(b)(2), 144.85(a) and 144.88(a), all existing large capacity cesspools or large capacity cesspools under construction were to be closed by April 5, 2005, and new or converted construction of a large capacity cesspool is prohibited as of April 5, 2000.
9. Section 1445 of the Act, 42 U.S.C. §300j-4, authorizes EPA to conduct inspections to determine whether the owner or operator of an injection well has acted or is acting in compliance with the UIC program.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Kimco Realty ("Respondent") is a "person" as defined by Section 1401(12) of the SDWA, 42 U.S.C. §300f(12) and 40 C.F.R. §144.3.
2. Respondent owns and/or operates a building which contains several large businesses located at 180 Montauk Highway, Hampton Bays, NY 11946 ("the Facility"). Two businesses, Macy's and Panera Bread, possess large-capacity cesspools. Panera Bread is a restaurant and Macy's is a department store. Respondent is either the "owner" and/or "operator" of the Facility within the meaning of 40 C.F.R. §144.3.
3. The Facility at 180 Montauk Highway, Hampton Bays, NY is a non-residential facility.
4. On July 11, 2016, EPA conducted an inspection of the Facility that found two large capacity cesspools, Class V injection wells, as defined by 40 C.F.R. §§144.6(e) and 144.80(e). Panera Bread has a combination of employees and customers using the restrooms greater than 20 people per day. The restrooms are connected to a cesspool. Macy's has 30 to 40 workers per shift and approximately 100 customers per day that use the restrooms in the store. Macy's sanitary system is connected to a cesspool; the lid on the cesspool is marked "Macy's Cesspool".

5. Based on the above, Respondent is subject to the requirements of Part C of the SDWA, 32 U.S.C. §300h et seq., and implementing regulations found at 40 C.F.R. Parts 124, 142, 144, 146 and 147 Subpart HH.
6. At the time of the inspection, Respondent had failed to close and had not ceased injection into two large capacity cesspools at the Facility by April 5, 2005, in accordance with 40 C.F.R. §§144.84(b)(2), 144.85(a) and 144.88(a).
7. Based on the above, Respondent was in violation of 40 C.F.R. §144.88(a).

III. PROPOSED ADMINISTRATIVE ORDER

1. **Penalty:** EPA proposes to issue a Final Administrative Order (“Final Order”). The Final Order will be based on the foregoing Findings of Violation and pursuant to the authority of Section 1423(c) of the Act, 42 U.S.C. §300h-2(c), and the Debt Collection Improvement Act of 1996. EPA, Region 2, hereby proposes to issue a Final Administrative Order against the Respondent, assessing a penalty of **\$20,000.00**. EPA has determined the proposed penalty in accordance with the terms of the SDWA, which takes into account statutory factors, including the seriousness of the violation(s); the economic benefit (if any) resulting from the violation(s); the history of such violation(s); the good-faith efforts to comply with the applicable requirements; the economic impact of the penalty on the violator; and such other matters as justice may require.
2. **Compliance Measures:** In addition to paying a penalty, Respondent will be ordered to:
 - a. **Remediation/Closure Plan Submittal:** Within 60 days of the Effective Date of the Final Order, Respondent shall submit a Remediation/Closure Plan (“Plan”), developed in accordance with well remediation/closure requirements incorporated into this Order as Attachment 1, detailing how the injection wells subject to this Order will be properly remediated and closed. *EPA will review the Plan and approve or provide comments within 30 days after receipt of the Plan from Respondent.*
 - b. **UIC Well Remediation/Closure:** Within 180 days of the Effective Date of the Final Order, Respondent shall complete all the work required, in accordance with the EPA approved Plan.
 - c. **UIC Well Remediation/Closure Final Report Submittal:** Within 210 days of the Effective Date of the Final Order, Respondent shall submit a Final Report to EPA, summarizing the work completed in fulfillment of the requirements of the Final Order and as required by the EPA approved Plan. EPA shall notify Respondent in writing as to whether or not the well remediation/closure and Final Report are adequate or if additional measures must be taken.

All information required in the Final Order must be sent to the following:

Nicole Foley Kraft, Chief
Groundwater Compliance Section
U.S. Environmental Protection Agency, Region 2
290 Broadway, 20th Floor
New York, New York 10007-1866
kraft.nicole@epa.gov

3. The Final Order does not constitute a waiver, suspension or modification of the requirements of 40 C.F.R. Part 147, Subpart HH, which remain in full force and effect. Issuance of the Final Order is not an election by EPA to forego any civil or criminal action otherwise authorized under the Act.
4. Violations of the terms of the Final Order after its Effective Date or date of final judgment as described in Section 1423(c)(6) of the Act, 42 U.S.C. §300h-2(c)(6), may subject Respondent to additional civil and/or criminal enforcement actions of the Final Order, pursuant to Section 1423(b) of the Act, 42 U.S.C. §300h-2(b). Failure to act in accordance with the Final Order truthfully and accurately within the time provided may subject Respondent to sanctions authorized by federal law. In addition, making a knowing submission of materially false information to the U.S. Government may be a criminal offense.

IV. OPPORTUNITY FOR A HEARING

1. Respondent may, within thirty (30) days of receipt of this Complaint, and as part of any Answer filed in this matter, request a hearing (“Hearing Request”) on the proposed civil penalty assessment and the actions proposed to achieve compliance with the Act, as detailed in Section IV, above. At the hearing, Respondent may contest the factual allegations set forth in the Findings sections above; the appropriateness of any penalty amount; and appropriateness of any compliance measures contained in Section III, above. The procedures for the hearing, if one is requested, are set out in the CROP, including Subpart I. A copy of the CROP is attached.
2. Should Respondent request a hearing on this proposed penalty assessment and/or compliance measures, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 1423(c)(3) of the Act, 42 U.S.C. §300h-2(c)(3), to be heard and to present evidence on the appropriateness of the penalty assessment and compliance measures. Should Respondent not request a hearing, EPA will issue a Final Order and only members of the public who submit timely comment on this Complaint will have an additional thirty (30) days to petition EPA to set aside the Final Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner’s evidence is material and was not considered by EPA in the issuance of the Final Order.

A. Filing an Answer

3. If Respondent wishes to avoid being found in default, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk no later than thirty (30) days from the date of receipt of this Complaint. Under authority of 40 C.F.R. §22.17, EPA may file a motion seeking a default order thirty (30) days after Respondent's receipt of the Complaint, unless Respondent files an Answer within that time. If a default order is entered, the entire proposed penalty may be assessed and the proposed compliance measures may be required, without further proceedings.
4. The Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with respect to which Respondent has knowledge, or, clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The Answer also shall state:
 - a. circumstances or arguments which are alleged to constitute grounds of any defense;
 - b. facts which the Respondent disputes;
 - c. basis for opposing the proposed relief; and
 - d. whether a hearing has been requested.
5. Failure of Respondent to admit, deny or explain any material factual allegation in the Complaint shall constitute an admission of the allegation.

B. Filing of Documents

6. In accordance with the CROP, the Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

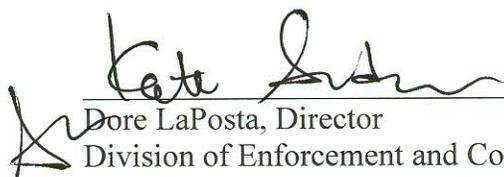
7. A copy of the Answer, any Hearing Request, and all subsequent documents filed in this action shall be sent to:

Lauren Fischer, Esq.
Assistant Regional Counsel
Water & General Law Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

V. GENERAL PROVISIONS

1. Respondent has the right to be represented by an attorney at any stage of these proceedings.
2. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated thereunder or any applicable UIC permit.
3. Complainant specifically reserves all rights to pursue criminal enforcement as well as the right to initiate an action for imminent and substantial endangerment, including the right to seek injunctive relief and/or the imposition of statutory penalties for those violations not addressed by this Complaint. This reservation of rights does not waive any other rights Complainant may have but has not stated herein.

COMPLAINT ISSUED THIS _____ DAY OF **DEC - 8**, 2016.



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

IN THE MATTER OF:

Kimco Realty
3333 New Hyde Park Road
New Hyde Park, NY 11042
Docket Number: SDWA-02-2017-8901

ATTACHMENT 1

EPA Region 2 Underground Injection Control (UIC) Program Instructions for Class V Remediation/Closure Plans

- To ensure UIC Class V well remediation/closure is conducted in accordance with regulatory requirements and in a manner protective of the environment, the United States Environmental Protection Agency Region 2 (EPA) UIC Program requires that the following information be included in a Class V Remediation/Closure Plan (“Plan”).
- UIC Class V Remediation/Closure Plans must be submitted to and approved by the EPA prior to initiation of **any** closure or remediation activities. You will be notified in writing that EPA has approved your Plan or that the Plan requires modifications to meet the regulatory requirements. *Please Note:* State and/or local regulatory agencies may have additional regulations and requirements.
- Failure to properly implement these requirements will result in EPA considering all available enforcement options.
- All Remediation/Closure Plans and Final Reports must be submitted to EPA Region 2 for review and approval. Documents can be mailed to:

Chief
Ground Water Compliance Section
U.S. Environmental Protection Agency, Region 2
290 Broadway, 20th Floor
New York, NY 10007-1866

SECTION I: GENERAL REQUIREMENTS

The following information must be included in a Remediation/Closure Plan.

A. Site Schematic and Well-System Diagram. The diagram must include all buildings; drinking water wells; drains (e.g., toilet drains, sink drains, shower drains, storm drains); piping; all storage areas for chemicals, oils, or wastes; chemical or sanitary waste processing units (e.g., oil-water separators, septic tanks, wastewater treatment systems) and final discharge points for all drainage (e.g., drywells/overflow drywells, septic tanks/leach fields, open underground pipes, retention basins, surface waters/streams, municipal sanitary/storm sewer connections).

B. Description of business. Description must include all activities conducted, or known to have been conducted, at the facility and a listing of chemicals and wastes used, generated, disposed of and/or stored

at the facility. In addition, include the Standard Industry Code (SIC) for the current use or, if vacant, the immediate prior use.

C. Description of all fluids injected. Description must include fluids which enter, may enter or may have entered the injection well(s); or are suspected or known to have been used at the facility. Include any recent analytical results for pertinent wastewater, sludge and/or soil sampling.

The Plan for a large capacity cesspool that has received only sanitary waste must include supporting information to affirm the sanitary waste only discharge (i.e. facility either does not use, generate or store chemicals or chemical wastes; or no drains of any kind are located near where chemicals/chemical wastes are delivered, used, stored or generated; prior facility uses should be considered).

D. Verification of connection between drain and UIC well. Connection between all drains and the injection wells must be verified by an independent third party and/or witnessed by an EPA inspector. A statement must be included indicating who will be performing the verification and what verification method will be used.

E. Description of permanent closure. If applicable, include a description of the plug emplacements or how the drains and/or wells will be permanently closed.

As of April 5, 2005, large capacity cesspools were banned and must be permanently closed or upgraded to septic systems by installing, at a minimum, a septic tank.

F. Pump out cesspool: For sanitary waste only cesspools, the contents must be pumped out and disposed of properly by a licensed hauler.

G. Backfill: Clean inert soil or sand must be used as backfill.

H. Final Report: A Final Remediation/Closure Report must be completed within 30 days of completion of remediation/closure and must include at a minimum: remediation/closure procedures used; the name, address and telephone number of all entities that supplied backfill material.

IN THE MATTER OF:

Kimco Realty
3333 New Hyde Park Road
New Hyde Park, NY 11042

Proceedings under Section 1423(c)
of the Safe Drinking Water Act,
42 U.S.C. §300h-2(c)

**COMPLAINT,
NOTICE OF VIOLATION,
PROPOSED ADMINISTRATIVE ORDER
WITH CIVIL PENALTY AND
OPPORTUNITY TO REQUEST A HEARING**

DOCKET NO. SDWA-02-2017-8901

CERTIFICATE OF SERVICE

I certify that on 12/9/2016, I served the above-cited Complaint, Notice of Violation, Proposed Administrative Order with Civil Penalty, bearing the above referenced docket number, on the persons listed below, in the following manner:

Original Hand Delivered:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by Certified Mail
Return Receipt Requested:

Joshua Weinkranz, President Northeastern Region
Kimco Realty
3333 New Hyde Park Road
New Hyde Park, NY 11042

Dated: Carolyn Drayton