



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

MEMORANDUM

FROM: Rich Campbell, Attorney-Advisor

TO: Steven Armsey, Regional Hearing Clerk

DATE: March 16, 2020

SUBJECT: *In the Matter of Hawai'i Department of Land and Natural Resources and City and County of Honolulu*, Docket No. UIC-09-2020-0005
Re: 40 C.F.R. § 22.45(b) Requirements

1. EPA published public notice of the consent agreement and proposed final order in the above-referenced matter on its website. A true and correct copy of EPA's public notice is attached.
2. EPA published the public notice on November 11, 2019 and the 30-day public comment period ended December 23, 2019 (**ATTACHMENT A**).
3. On January 8, 2020, I conferred with you, in your capacity as Region 9's Regional Hearing Clerk, and you confirmed that a single comment from Ms. Natalie Iwasa on December 23, 2019, attached to this memorandum (**ATTACHMENT B**), had been received regarding EPA's public notice in this matter.
4. Ms. Iwasa's comment met the requirements of 40 C.F.R. § 22.45(c), which applies to comments made by a person not a party to the proceeding, and specifically 40 C.F.R. § 22.45(c)(1), which provides that any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under 40 C.F.R. § 22.45(b) and provide his name, complete mailing address, and state that he wishes to participate in the proceeding.
5. 40 C.F.R. § 22.45(c)(4)(i) further provides that complainant (here, ECAD) shall provide to each commenter, by certified mail, return receipt requested, a copy of any consent agreement between the parties and the proposed final order. On January 21, 2020, EPA Region 9's ECAD mailed Ms. Iwasa a copy of the consent agreement by certified mail, return receipt request, accompanied by ECAD's response to Ms. Iwasa's comments (**ATTACHMENT C**).

6. 40 C.F.R. § 22.45(c)(4)(ii) provides that within 30 days of receipt of the CA/FO provided by EPA via certified mail, a commenter may petition the Regional Administrator to set aside the CA/FO on the basis that material evidence was not considered.
7. On January 30, 2020, Ms. Iwasa received the copy of the consent agreement provided by EPA via certified mail, as shown by the attached return receipt (**ATTACHMENT D**). Over 30 days has passed and of the date of this memorandum EPA Region 9 has not received a petition from Ms. Iwasa. Thus, we request that the RJO affirm the consent agreement in this matter.
8. In addition, Ms. Iwasa's comment did not provide any additional evidence, material or otherwise, to support her claim that the proposed penalty is inadequate or that the CA/FO should not otherwise be approved. See EPA's January 21, 2020 response to Ms. Iwasa's comments that accompanied the transmittal of the consent agreement to Ms. Iwasa. (**ATTACHMENT C**). No other significant issues were raised in the comments. In sum, the comments do not provide a basis for not issuing the proposed Final Order.
9. In conclusion, upon this showing of sufficient proof that Complainant complied with the public notice requirements of 40 C.F.R. § 22.45(b), that the comments do not raise significant issues, and that the commenters did not meet the jurisdictional requisites for filing a petition to set aside the CA/FO, and in fact did not file a petition despite the opportunity to do so, EPA Region 9 ECAD hereby respectfully requests the Presiding Officer issue the Final Order in this matter (**ATTACHMENT E**).

Enclosure

An official website of the United States government.



Public Notice: Proposed Settlement of Safe Drinking Water Act Administrative Penalty and Opportunity to Comment In the Matter of Hawai'i Department of Land and Natural Resources and City and County of Honolulu

How to Comment

Comments accepted through: 12/23/2019

Please provide the following information along with your comments and submit them in accordance with Part 22: Your full name, mailing address, telephone number, email address, the Docket Number (UIC-09-2020-0005), and a concise statement of the basis for and relevant facts supporting any comment for the case to which you are commenting. Persons wishing to comment on this case, including comments on the amount or basis of the proposed penalty, are invited to submit a statement to the EPA Regional Administrator, attention of the Regional Hearing Clerk (address below), within 30 days of the date of this public notice. All comments received within this 30-day period will be considered prior to the issuance of the final order. See 40 C.F.R. § 22.45(b). If the 30th day of the comment period falls on a Saturday, Sunday or federal holiday, the deadline shall be extended to the next business day. See 40 C.F.R. § 22.7(a).

Name, Mailing Address, Telephone Number, and Email of Regional Hearing Clerk

Steven Armsey, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street (ORC-1)
San Francisco, CA 94105
(415) 972-3919
r9hearingclerk@epa.gov

- **Consent Agreement and (Proposed) Final Order**
- **Cesspools in Hawaii**

Publish Date: 11/21/2019

Summary

In accordance with Section 1423(c)(3)(B) of the Safe Drinking Water Act (“SDWA” or “Act”), 42 U.S.C. § 300h-2(c)(3)(B), and the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits” (“Consolidated Rules”) at 40 C.F.R. Part 22, notice is hereby given of a proposed settlement, recorded in a **Consent Agreement and Proposed Final Order** (“Proposed Consent Agreement”), between the U.S. Environmental Protection Agency, Region 9 (“EPA”), and the Hawai’i Department of Land and Natural Resources and the City and County of Honolulu to resolve the following civil administrative proceeding under Sections 1423(c)(3)(B) of the Act.

In the Matter of Hawai’i Department of Land and Natural Resources and City and County of Honolulu, Docket No. UIC-09-2020-0005

Pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) - (3), Complainant and Respondents entered into a Proposed Consent Agreement to simultaneously commence and conclude this SDWA civil administrative proceeding. The Proposed Consent Agreement requires Respondents to pay to the United States a penalty of one hundred and thirty-five thousand seven hundred and thirty dollars (\$135,730), and close two (2) LCCs by December 31, 2020. Payment of this penalty and closure of the LCCs will resolve EPA’s allegations that the Respondents violated 40 C.F.R. § 144.88 by owning and/or operating two (2) large-capacity cesspools (“LCCs”) after the ban on existing LCCs took effect on April 5, 2005.

Complainant: Amy C. Miller, Director, Enforcement and Compliance Assurance Division, U.S. EPA, Region 9, 75 Hawthorne Street, San Francisco, CA 94105

Respondents: Hawai’i Department of Land and Natural Resources and City and County of Honolulu

Facility: Helemano Plantation, 64-1510 Kamehameha Hwy, Wahiawa, HI 96786.

Description of Business or Activity Conducted by the Respondent: Gift shop for community-oriented organization for the developmentally disabled.

Alleged Violations: EPA alleges that Respondents own and/or operate two (2) LCCs in violation of the ban that took effect on April 5, 2005 40 C.F.R. § 144.88.

Proposed Order and Penalty: \$135,730

Date Filed with Regional Hearing Clerk: November 21, 2019

For More Information

Persons wishing to receive a copy of the Consolidated Rules, review the documents filed by the parties in this proceeding, comment upon the **Consent Agreement and Proposed Final Order**, or participate in any hearing that may be held, may contact the Regional Hearing Clerk identified above. Please note that the federal regulations are available online at the Code of Federal Regulations (CFR) website. Unless otherwise noted, the public record for the proceeding is located at the office of the Regional Hearing Clerk (address above) and the file will be open for public inspection during normal business hours.

Applicants or Respondents

Hawai'i Department of Land and Natural Resources

City and County of Honolulu

LAST UPDATED ON MARCH 2, 2020

TO: EPA Regional Administrator
Attn: Steven Armsey
Regional Hearing Clerk
US EPA, Region 9

FROM: Natalie Iwasa
1331 Lunalilo Home Road
Honolulu, HI 96825
808-395-3233
natalieiwasa@email.com

DATE: Monday, December 23, 2019

RE: Docket UIC-09-2020-0005, Consent Agreement and Proposed Final Order
Cesspools at Helemano Plantation

Thank you for this opportunity to provide comments regarding the Consent Agreement and Proposed Final Order for two cesspools at Helemano Plantation on Oahu at TMK 1-6-4-003-002.

According to the Consent Agreement, the Hawaii Department of Land and Natural Resources and the City and County of Honolulu voluntarily entered into this agreement with the EPA. The public, however, was not privy to discussions regarding this issue.

The "Owner or operator" was required to have closed the large capacity cesspools (LCCs) by April 5, 2005. It is my understanding the operator in this case was Opportunities and Resources, Inc. (ORI). They have leased the land at Helemano Plantation for over three decades. They have also received millions of dollars in federal, state and county grants. ORI should have been a party to this settlement, and the assessed fine should be paid by them. Costs for removal should also be borne by them.

When the Honolulu City Council voted to authorize this agreement and the civil penalty of \$135,730, they went behind closed doors to discuss the issue. The public, therefore, was not provided any background information on this settlement other than what is in Committee Report EMLACR323. The CA/FO was also not provided to the public.

Since ORI occupied the subject property and benefited from its operation, it should be responsible for paying the fine as well as its removal, which according to the CA/FO is to be no later than December 31, 2020.

It appears to me the party responsible for noncompliance with the law, ORI, is not being held responsible. They have also not followed the law with respect to certain federal grants in the past. ORI should therefore not be allowed to obtain any additional federal, state or county grants.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

75 Hawthorne Street
San Francisco, California 94105

January 21, 2020

VIA Certified Mail

No.: 7018 0360 0000 6461 0808

Return Receipt Requested

Natalie Iwasa
1331 Lunalilo Home Road
Honolulu, HI 96825

Re: Response to Comment on Proposed Administrative Consent Agreement and Final Order
In re: Hawai'i Department of Land and Natural Resources and City and County of Honolulu, EPA Docket No. UIC-09-2020-0005

Dear Ms. Iwasa:

We are writing in response to your comments provided to the Regional Hearing Clerk for U.S. EPA Region 9 (EPA) by e-mail on December 23, 2019 on the above-referenced administrative Consent Agreement and Proposed Final Order (CA/FO) entered into between EPA, the City and County of Honolulu (CCH), and Hawaii's Department of Land and Natural Resources (DLNR). As a preliminary matter, however, we first wish to express our appreciation of your participation in the public notice and comment process.

Your comment (excerpted below) appears to be primarily concerned with EPA's decision not to name the non-profit entity that leases the Helemano Plantation facility as a respondent in the proposed CA/FO:

It is my understanding the operator in this case was Opportunities and Resources, Inc. (ORI). They have leased the land at Helemano Plantation for over three decades. They have also received millions of dollars in federal, state and county grants. ORI should have been a party to this settlement, and the assessed fine should be paid by them. Costs for removal should also be borne by them.

Since ORI occupied the subject property and benefited from its operation, it should be responsible for paying the fine as well as its removal, which according to the CA/FO is to be no later than December 31, 2020.

It appears to me the party responsible for noncompliance with the law, ORI, is not being held responsible.

In our consideration of your comments we first note that a decision by EPA not to bring an enforcement action against a particular party is based on many factors, including factual, policy and legal

determinations. Consequently, courts have recognized on several occasions over many years that EPA's decision not to prosecute or enforce is a decision generally committed to its absolute discretion. See Heckler v. Chaney, 470 U.S. 821, 831(1985); see also Euclid of Virginia, Inc., 13 E.A.D. 616, 2008 WL 700562, n. 69 (USEPA Environmental Appeals Board, March 11, 2008). Your comment also does not provide additional material evidence that EPA failed to consider in its issuance of the CA/FO.

Your comment also took issue with the process taken by CCH and DLNR to authorize their participation in the proposed CA/FO:

When the Honolulu City Council voted to authorize this agreement and the civil penalty of \$135,730, they went behind closed doors to discuss the issue. The public, therefore, was not provided any background information on this settlement other than what is in Committee Report EMLACR323. The CA/FO was also not provided to the public.

The adequacy of the CCH and DLNR procedural requirements related to their decision to participate in this proceeding is beyond the purview of EPA and immaterial to EPA's enforcement in this matter.

Finally, you note that:

It appears to me the party responsible for noncompliance with the law, ORI, is not being held responsible. They have also not followed the law with respect to certain federal grants in the past. ORI should therefore not be allowed to obtain any additional federal, state or county grants.

First, EPA disagrees with the notion that the parties responsible for noncompliance with the SDWA's UIC LCC closure requirements are not being held responsible. As discussed above, DLNR and CCH are being held responsible for their failure, as the owners and/or operators of the LCCs at Helemano Plantation, to have closed the LCCs by April 5, 2005. As to your comment on ORI's eligibility for future federal, state and local grants, that issue is outside the scope of this proceeding and EPA's statutory enforcement authority to address, as well as immaterial to EPA's enforcement in this matter.

EPA's Consolidated Rules of Practice at 40 C.F.R. Part 22 that govern these proceedings require we provide you a copy of the proposed CA/FO by certified mail. 40 C.F.R. § 22.45(c)(4). The enclosed CA/FO is identical to the version you commented on and which was available on-line on our website at <https://www.epa.gov/sites/production/files/2019-11/documents/uic-09-2020-0005-dlnr-cch-helemano-cafo.pdf>. Within 30 days of your receipt of the enclosed proposed CA/FO, you may petition the Regional Administrator for EPA Region 9 to have it set aside on the basis that *material evidence* was not considered. The address for the Regional Administrator is:

Michael Stoker, Regional Administrator
U.S. Environmental Protection Agency Region 9
75 Hawthorne Street
San Francisco, CA 94105

Should you decide to submit a petition, please also send a courtesy copy to our attorney Rich Campbell at the address below:

Rich Campbell, Attorney-Advisor
Office of Regional Counsel
U.S. Environmental Protection Agency Region 9
75 Hawthorne Street (ORC-2)
San Francisco, CA 94105
campbell.rich@epa.gov

Our Consolidated Rules of Practice at 40 C.F.R. § 22.45(c)(4) also require that you provide a copy of your petition to the respondents in this matter, who are listed below:

Suzanne Case, Chairperson
Department of Land and Natural Resources
Kalanimoku Building 1151 Punchbowl Street
Honolulu, HI 96813

Pamela Witty-Oakland, Director
Department of Community Services City and County of Honolulu
925 Dillingham Boulevard, Suite 200
Honolulu, HI 96817

In accordance with 40 C.F.R. § 22.45(c)(4), do not send any such petition to the Regional Hearing Clerk for EPA Region 9.

Thank you again for your comment. Regardless of whether you file a petition, please note that your comment will be considered and included in this matter's administrative record. If you have any questions, you may contact me by phone at (415) 972-3908 or by email at berg.elizabeth@epa.gov.

Sincerely,

A handwritten signature in blue ink that reads "Thanne Berg". The signature is fluid and cursive, with the first name "Thanne" and last name "Berg" clearly legible.

Thanne Berg, Acting Assistant Director
Enforcement and Compliance Assurance Division

Enclosure

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Natalie Iwasa
1331 Lunalilo Home Road
Honolulu, HI 96825



9590 9402 4737 8344 0430 45

2. Article Number (Transfer from service label)

7018 0360 0000 6461 0808

COMPLETE THIS SECTION ON DELIVERY

A. Signature

Natalie Iwasa

- Agent
- Addressee

B. Received by (Printed Name)

C. Date of Delivery

1/30

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type

- Adult Signature
- Adult Signature Restricted Delivery
- Certified Mail®
- Certified Mail Restricted Delivery
- Collect on Delivery
- Collect on Delivery Restricted Delivery
- Mail Restricted Delivery
- Priority Mail Express®
- Registered Mail™
- Registered Mail Restricted Delivery
- Return Receipt for Merchandise
- Signature Confirmation™
- Signature Confirmation Restricted Delivery