KOBAYASHI SUGITA & GODA, LLP

CHARLES W. GALL 4771
DANIEL K. JACOB 9524
TIMOTHY T. SILVESTER 11751
First Hawaiian Center
999 Bishop Street, Suite 2600
Honolulu, Hawaii 96813
Telephone: (808) 535-5700
Facsimile: (808) 535-5799
Email: cwg@ksglaw.com; dkj@ksglaw.com
tts@ksglaw.com

Attorneys for Respondent
NSHE HI Narcissus, LLC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 9

IN THE MATTER OF: NSHE HI Narcissus, LLC, Kahuku, Hawaii, Respondent. Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	DOCKET NO. UIC-09-2022-0058 **NSHE HI NARCISSUS, LLC'S MEDIATION BRIEF**

NSHE HI NARCISSUS, LLC'S MEDIATION BRIEF

I. INTRODUCTION

The Safe Drinking Water Act ("**SDWA**") required the closure of large capacity cesspools by April 5, 2005. Twelve years after the deadline, Mr. Duke Pontin, the owner of NSHE HI Narcissus, LLC ("**NSHE**"), purchased property located on the North Shore of Oahu that was serviced by cesspool (the "**NSHE Property**"). At the time of his purchase, Mr. Pontin had no

reason to know the cesspool was potentially in violation of the SDWA. It was not until March 4, 2021—the day the Environmental Protection Agency ("**EPA**" or "**Complainant**") issued its notice of inspection—that Mr. Pontin was made aware that the EPA believed the cesspool servicing portions of the property to be a large capacity cesspool.

Although liability was established in the EPA's Partial Accelerated Decision On Liability, issued August 28, 2023, Mr. Pontin respectfully submits that the system in question was, in fact, not a large capacity cesspool and that the decision identifying the cesspool as large capacity was erroneous. Nevertheless, Mr. Pontin acknowledges that liability has been found and that the purpose of this mediation is to attempt to determine an appropriate penalty amount that the parties can agree to. Mr. Pontin reserves all rights to appeal the ruling on liability and does not waive any rights or positions with respect to liability by proceeding to defend NSHE in this penalty phase. Further, to the extent NSHE refers to a cesspool on its property, it is not an admission or acknowledgement that there was an actionable large capacity cesspool on his property.

The EPA has a policy to assist the determination of what an appropriate penalty amount would be. *See* EPA General Enforcement Policy #GM-21, "Policy on Civil Penalties," dtd. Feb. 16, 1984, attached as **Exhibit A**; EPA General Enforcement Policy #GM-22, "A Framework For Statute- Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties," dtd. Feb. 16, 1984, attached as **Exhibit B**. The purpose of the penalty is two-fold. First, the penalty is intended to deter future violations by ensuring that the violator is "worse off" than if the violation had not occurred. Second, penalty amounts must be fair, equitable, and consistent with penalties for similar violations. *See id*.

Here, the EPA submits that the economic benefit received by NSHE from its noncompliance was $4,317.98, but its recommended penalty amount is $133,450.00, ***over thirty***

times the amount of the economic benefit amount. It is Complainant's burden to demonstrate that its recommended penalty is fair and equitable, and consistent with penalties for similar violations. As set forth below, however, Complainant has failed to meet its burden by neglecting to consider all of the EPA's factors to ensure a fair, equitable, and consistent penalty amount. As a consequence, the proposed penalty amount far exceeds penalties for similar violations. Accordingly, Mr. Pontin submits that the proposed penalty is patently unreasonable.

II. ARGUMENT

A. The Complainant Failed to Properly Consider All of the Factors under the Gravity Component to Ensure a Fair, Equitable, and Consistent Result.

Under the gravity component, the EPA's policy suggests consideration of various factors to determine the seriousness of a violation. *See* Ex. B at 13-16. The eight factors are: (1) the actual or possible harm; (2) the importance of the regulatory scheme; (3) the availability of data from other sources; (4) the impact of the penalty based on the violator's size; (5) the amount of the pollutant; (6) the toxicity of the pollutant; (7) the sensitivity of the environment; and (8) the length of the time a violation continues. *Id*. While the EPA recognizes that analysis of the gravity component is a "subjective process," the EPA's policy recognizes that applying the factors is a "useful way of insuring that the violations of approximately equal seriousness are treated the same way." *Id*. at 13.

In this case, Complainant has failed to properly consider the actual or potential for harm, the length of the violation, and the other unique factors relevant to the circumstances of this case, all of which are discussed below. Instead, Complainant's proposed penalty amount is based primarily on an insufficient analysis of ***only one of the eight factors***, the actual or possible harm to the environment. Specifically, Complainant alleges that the "cesspool was located in a geographic area that was identified by [the Hawaii Department of Health] as being a Priority

Level 1 for closure because of the elevated risk cesspools in this area pose to human health and the environment." Complainant's Statement of Proposed Penalty, dtd. Mar. 23, 2023, at 10-11, attached as **Exhibit C**; Complainant's Statement of Proposed Penalty, dtd. Apr. 16, 2024, at 11-12, attached as **Exhibit D**. As a result, Complainant unfairly contends that the violation "warrants the assessment of at least fifty percent of the remaining statutorily allowable penalty." *Id*.

Notably, Complainant fails to acknowledge the fact there was no harm or potential for harm. There is no showing by Complainant that there was ***any actual harm*** whatsoever caused by the alleged violation and operation of the cesspool. While the Hawaii Department of Health made an area-wide determination that the location where the NSHE Property is located has the potential for harm, the specific, unique characteristics of the NSHE Property were not taken into account. In fact, as noted in the Partial Decision on Liability, "Complainant did not physically measure the dimensions or volume of the cesspool." EPA's Partial Accelerated Decision On Liability, dtd. Aug. 28, 2023, at 13, attached as **Exhibit E**.

Had Complainant thoroughly inspected the cesspool or the ground around the cesspool, it would have learned that the ground did not allow for large amounts of water to penetrate. Mr. Pontin can testify that a percolation test had to be performed to determine whether the ground was even capable of absorbing water. The test results established that the ground would not absorb water and, therefore, could not be used as leach field. *See* Site Plan 66-532 Kam. Hwy, attached as **Exhibit F**. Accordingly, the use of cesspool could not result in any significant pollution, because the ground prevented the pollution that the Complainant alleges to have occurred. The assessment of 50% of the statutory maximum as the seriousness component of the proposed penalty is unreasonable and unjustified.

In evaluating the potential for harm from the violation, Complainant also fails to consider that the businesses on the property were never open consistently and that there was little, if any, business conducted after 2020 because of COVID. *See* Ex. D at 6-7; *see also* Region 9 Enforcement and Compliance Assurance Division, Compliance Evaluation Inspection Report, dtd. Mar. 4, 2021, at 2, attached as **Exhibit G**. Thus, the potential for harm was significantly less than it would have been had the property been operating continuously. Complainant should have considered this mitigating evidence in its analysis of the factor concerning the length of the violation and the harm or potential for harm, but it failed to do so. The alleged violation took place for only a portion of the three-and-a-half-year period, reducing the violation period.

Complainant's failure to properly account for the actual time that the alleged violation occurred runs contrary to the EPA's policy. This failure, together with Complainant's additional failure to properly evaluate the potential for actual harm, has resulted in a proposed penalty amount that, as set forth below, is facially unfair, inequitable, and inconsistent with penalties for similar violations.

B. The Proposed Penalty Is Not Fair, Equitable, or Consistent with Those Similarly Situated in the Regulated Industry.

The EPA's penalty policy is clear: "In order to achieve the above Agency policy goals, all administratively imposed penalties and ***settlements*** of civil penalty actions, should, where possible, be consistent with the guidance" with the policy. Ex. A at 1 (emphasis added). Consent orders are subject to consideration of the same factors taken into account when a ruling is made on a penalty. Thus, a review of recent consent orders is relevant in determining the appropriate penalties for respective violations.

A review of relevant consent orders regarding cesspool violations in Hawaii, as summarized below, however, demonstrates that Complainant's proposed penalty is patently

unreasonable, ***far in excess*** of the penalty for similar violations, and ***entirely inconsistent*** with the EPA's policy in this respect.

1. SKS Management, LLC

SKS Management, LLC ("**SKS**") operated a commercial storage facility that was serviced by a restroom and one cesspool for approximately 10 years from 2012 through September 30, 2022. The penalty for the 10-year continuous operation of the cesspool was $28,780,00. *See generally* UIC-09-2022-0061: SKS Management LLC, Kailua-Kona, HI; Consent Agreement and Final Order, attached as **Exhibit H-1**. In addition, SKS was given a full year to comply. When these penalties are compared with the proposed penalty of $133,450.00 sought by Complainant here for a violation period of less than three years, and a property owner who immediately closed the cesspool, it is clear that the penalties proposed by Complainant are unjustifiably excessive. *See id.*

2. Halona Pacific

Halona Pacific ("**Halona**") operated three restrooms, one additional sink, and one additional drinking water fountain on its property beginning in 2013, all of which was serviced by a cesspool. *See generally* UIC-09-2022-0015: Halona Pacific LLC, Honolulu, HI; Consent Agreement and Final Order, attached as **Exhibit H-2**. Pursuant to the consent order, as a consequence of the violation spanning almost 10 years, Halona received a penalty of $70,000.00, and it was given until January 31, 2023 to become compliant. *See id*.

3. Hawaii Conference Foundation

Hawaii Conference Foundation ("**Foundation**") operated two properties. *See generally* UIC-09-2023-0060: Hawaii Conference Foundation; Consent Agreement and Proposed Final Order, attached as **Exhibit H-3**. Foundation operated a property on Kauai from 2015 and a

property in Haleiwa from 2005. Each of the properties was serviced by a cesspool during those time periods. The penalty imposed for the operation of two cesspools on the two different properties for a combined period more than 26 years was only $50,633.00. In addition, Foundation was given almost two years to become compliant. *See id*.

4. Hawthorne Pacific Corp.

Hawthorne Pacific Corp. ("**Hawthorne**") owned and operated a property on Maui from 2014 through the present with two cesspools servicing its bathrooms. *See generally* UIC-09-2023-0074: Hawthorne Pacific Corp.; Consent Agreement and Proposed Final Order, attached as **Exhibit H-4**. Hawthorne was given almost two years to come into compliance, and for operating two cesspools for ten years, it received a penalty of only $71,422.00. *See id*.

5. Chieko Takahashi Family Limited Partnership

Chieko Takahashi Family Limited Partnership ("**Chieko**") owned property since 2005 where Café Haleiwa and Haleiwa Bottle Shop are located. *See generally* SDWA-UIC-AOC-09-2022-0002: Chieko Takahashi Family Limited Partnership, Haleiwa, HI; Administrative Order on Consent, attached as **Exhibit H-5**. The restrooms for those businesses were serviced by two cesspools for a period of 20 years. **No penalty at all was imposed whatsoever** and Chieko was given two years to come into compliance. *See id*.

6. LuckyU Enterprises

LuckyU Enterprises ("**LuckyU**") operated a property in Haleiwa since 2006 that had food trucks and a restroom that were serviced by four cesspools on the property. *See generally* UIC-09-2019-0048: LuckyU Enterprises Inc., Haleiwa, HI; Consent Agreement and Final Order, attached as **Exhibit H-6**. For its operation of four cesspools, three of which were in operation

for fourteen years, LuckyU received a penalty of $62,143.00, and it was given two years to come into compliance. *See id*.

7. Seven Eleven Hawaii

Seven Eleven Hawaii ("**Seven Eleven**") operated fifty-five (55) cesspools since 2005. For operating the 55 cesspools over 18 years, Seven Eleven's penalty was $145,000.00, and it was given almost a year to bring the properties into compliance. *See generally* UIC-09-2023-0036: Seven-Eleven Hawaii Inc.; Consent Agreement and Proposed Final Order, attached as **Exhibit H-7**.

As demonstrated by this review of the recent consent decrees summarized above, the penalty sought by Complainant in this case is ***grossly out of proportion*** with penalties imposed for significantly longer and more egregious violations in other cases, including those involving multiple cesspools by large, national entities. Complainant has no justification for the disproportionality of its proposed penalty.

C. The Complainant Failed to Consider Flexibility-Adjustment Factors.

In addition to the gravity factors, the EPA's policy suggests using "flexibility-adjustment factors" to further ensure that the penalty amount is consistent with similar violations. *See* Ex. A at 5; Ex. B at 17–24. These factors include: (1) the degree of willfulness or negligence; (2) the degree of cooperation or noncooperation of a violator; (3) any history of noncompliance; and (4) other unique factors specific to the case. *Id*. Although Complainant's proposed penalty amount includes "a twenty five percent downward adjustment" due to Mr. Pontin's good-faith efforts to become compliant, Complainant once again has applied only one of the factors to reach its proposed amount, and its downward adjustment does not sufficiently compensate for Complainant's failure to adequately consider all the factors.

For instance, the Complainant did not address whether the violation occurred as a result of intention or neglect. As previously mentioned, Mr. Pontin was unaware of the potential violation until the EPA contacted him in March 2021. This is not in dispute. Furthermore, Mr. Pontin's efforts to become compliant after he was first contacted by the EPA were immediate and exhaustive. Specifically, after the EPA's initial contact, he permanently closed the bathrooms to the public. Based on his conversations with EPA inspectors, Mr. Pontin was under the impression that the alleged violation was cured as a result of closing the bathrooms to the public, and he was surprised when he subsequently received the violation. Had the EPA initially told Mr. Pontin to close the system, he would have done so immediately. Instead, after receiving the violation, and despite his protest, Mr. Pontin immediately filled the cesspool, rendering it inoperable. Perhaps most notably, however, is the fact that this is Mr. Pontin's ***first and only*** violation.

In proposing its excessive penalty, Complainant completely disregards Mr. Pontin's immediate efforts to become compliant and appears determined to make an example of Mr. Pontin by recommending a penalty so severe that it would be consistent only with much more serious violations. There is no other explanation for the harsh and disproportionate penalty that Complainant has proposed. Ultimately, Complainant's attempt to make an example of Mr. Pontin and indifference to the Flexibly-Adjustment Factors has resulted in a proposed penalty amount that is not fair, equitable, or consistent with the penalty amounts for similar violations and, in fact, severely penalizes Mr. Pontin for raising legitimate defenses to liability despite his prompt and comprehensive compliance.

D. Mr. Duke Pontin Is a Recognized Steward of the Land in Hawaii.

As previously discussed, the first goal of the penalty is to deter violations. *See generally* Ex. A. This applies to both the individual violator and the community at large. In the case at

hand, a deterrence amount is not warranted. Mr. Pontin is a recognized steward of the land, and a larger penalty placed upon him will do nothing to deter others.

When Mr. Pontin first bought the NSHE Property, he took immediate action and spent a considerable amount of money to clean it up. Mr. Pontin first properly disposed of barrels of antifreeze and other waste products that were left on the property by the prior owner. *See* Invoice from Unitek Solvent Services, Inc., dtd. Nov. 9, 2017, attached as **Exhibit I**; *see also* Invoice from Unitek Solvent Services, Inc., dtd. Nov. 15, 2017, attached as **Exhibit J**. Next, he hired a company to inspect the property to determine whether there were any underground oil storage tanks that were unknown to him. *See* Letter from GeoTek Hawaii, Inc., dtd. May 25, 2018, attached as **Exhibit K**.

Once he determined that there were no underground storage tanks, Mr. Pontin endeavored to pump and remove a 500-gallon oil tank that was known to be on the property. *See* UST Removal and Closure Report, dtd. Jun. 17, 2018, attached as **Exhibit L**; *see also* Invoice from Unitek Solvent Services, Inc., dtd. Apr. 19, 2018, attached as **Exhibit M**; Letter to Mr. Duke Pontin, dtd. Aug. 2, 2018, attached as **Exhibit N**; Invoice from Unitek Solvent Services, Inc., dtd. Nov. 13, 2017, attached as **Exhibit O**. After the tank's removal, Mr. Pontin took further steps to test whether the soil below the removed tank had been polluted. *See* TestAmerica Honolulu, Chain of Custody Record, attached as **Exhibit P**. The test revealed that it had not. *See id*. Mr. Pontin was never told that he needed to clean up his new property. Rather, he did so on his own to ensure that his new property was not polluting the environment.

Mr. Pontin's stewardship of land extends beyond the subject property. Beginning in 2011, Mr. Pontin volunteered his time and resources to manage the Kahuku Water Association ("**KWA**"), a non-profit organization that manages a public water system in Kahuku, Hawaii. *See*

Letter to Amy Miller-Bowen, U.S. EPA, from Jeff Wallace, attached as **Exhibit Q**. Before Mr. Pontin volunteered his time and resources, KWA was paying a company up to $100,000.00 to manage the archaic water system. Over the course of two years, using his own time, money, and personnel, Mr. Pontin revamped the underground piping system, thereby saving over sixty-million gallons of drinking water each year from being drawn out of the aquafer, and designed and implemented ways to detect future leaks. Today, the Kahuku water system is one of the most efficient and cost-effective water systems in the State of Hawaii. *See id*.

The second property Mr. Pontin owns has been featured as an environmental marvel. In an article published by *Cowgirl Life* on December 23, 2021, Mr. Pontin's property, known as Big Rock Ranch, became the "first building in the nation to have a 100% solar roof." *See* "Resourceful Ranching," *Cowgirl Life*, dtd. Dec. 21, 2021, attached as **Exhibit R**. The building comprises 51,450 square feet that serve as home to a horse arena. The additional ***green energy*** produced by the property is utilized by Hawaiian Electric to provide electricity to the community. *See id*. The article notes that the "Big Rock Ranch takes their resources seriously." *Id*.

Mr. Pontin's efforts to improve the environment across the State of Hawaii cannot be overlooked or minimized. Had Mr. Pontin known at any point before the EPA contacted him that there was a potential problem with the cesspool on the subject property, he would have taken immediate action, just as he did after he was informed that there might be a problem. As a result of Mr. Pontin's recognized stewardship and unprompted attention and dedication to a cleaner environment, it is not reasonable to believe that an increased penalty will deter him or others within the community.

III. PROPOSED PENALTY

Mr. Pontin recommends that a penalty of $15,000.00 is fair, equitable, and consistent with similar violations. Again, the first goal of any penalty is to deter violations by ensuring that the violator is "worse off" than he would have been had the violation not occurred. In this case, Complainant provides that the economic benefit received by NSHE from its noncompliance was $4,317.98. *See* Ex. D at 15. Mr. Pontin's proposed penalty of $15,000.00 is more than three times that amount and sufficient punishment for the respective violations.

A penalty over thirty times greater than the calculated economic benefit to Mr. Pontin is entirely unreasonable and also unnecessary to deter future violations. Unlike the EPA's proposed penalty amount, NSHE's proposed penalty amount reflects a fulsome consideration of the EPA's factors and is supported by the substantial evidence offered in this case.

IV. CONCLUSION

Based on the above, NSHE respectfully submits that $15,000.00 is a proper penalty amount because it gives due consideration to all of the factors necessary to ensure a fair, equitable, and consistent outcome.

DATED: Honolulu, Hawaii, May 17, 2024.

/s/ Charles W. Gall_____
CHARLES W. GALL
TIMOTHY T. SILVESTER
DANIEL K. JACOB

Attorneys for Respondent
NSHE HI NARCISSUS, LLC