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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

**PREHEARING STATEMENT FOR MAY
28, 2024 PENALTY HEARING;
EXHIBITS A–R**

AMENDED PREHEARING STATEMENT FOR MAY 28, 2024 PENALTY HEARING

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 (“NSHE”), purchased property located on the North Shore of Oahu that was serviced by cesspool. 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”) 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 the hearing on May 28, 2024 is to determine an appropriate penalty amount. 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.

In this phase, the hearing officer must determine a reasonable penalty amount under the circumstances. The EPA has a policy of assisting hearing officers in determining the penalty amount, and 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. *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**. Second, penalty amounts must be fair, equitable, and consistent with penalties for similar violations. *See id.*

It is the Complainant’s burden to demonstrate that its recommended penalty of \$133,450.00 is fair and equitable. As set forth below, Complainant has failed to properly 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.* The EPA recognizes that the analysis of the gravity component is a "subjective process"; however, the 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, the 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, the 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 take into account 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, the “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 the 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. At the hearing, Mr. Pontin will testify a percolation test had to be performed to determine whether or not the ground was even capable of absorbing water. The result of the test established that the ground in an area 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, the 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 as a result 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. This mitigating evidence should have been considered by the Complainant in its analysis of the factor concerning the length of the violation and the harm or potential for harm, but it was not. The alleged violation took place for only a portion of the three-and-a-half-year period, effectively reducing the period of violation.

Complainant's failure to properly account for the actual time when the alleged violation occurred runs contrary to the EPA's policy. This failure, together with Complainant's failure to properly evaluate the potential for actual harm, has resulted in a proposed penalty amount that is not fair, equitable, or consistent 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, should, were possible, be consistent with the guidance" with the policy. Ex. A at 1. Consent orders are subject to consideration of the same factors to be taken into account when a ruling is made on a penalty. Thus, a review of recent consent orders is relevant in determining what penalties are appropriate for various violations. A review of consent orders regarding cesspool violations in Hawaii, as summarized below, however, demonstrates that the Complainant's proposed penalty is *far in excess* of the penalty for similar violations and *entirely inconsistent* with the same.

1. SKS

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

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 in excess of 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 a review of recent consent decrees, 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, even including those involving multiple cesspools. Complainant has no justification for the disproportionality.

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

In addition to the gravity factors, the EPA 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. 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 later shocked when he 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.

It is also important to take into consideration that this is Mr. Pontin's *first and only* violation.

Despite Mr. Pontin's immediate efforts to become compliant, Complainant appears to be trying to make an example of Mr. Pontin by recommending a severe penalty that would only be consistent 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, rather than properly analyzing the Flexibly-Adjustment Factors, has resulted in a proposed penalty amount that is not fair, equitable, or consistent with similar violations and, rather, penalizes him for promptly coming into 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, however, a deterrence amount is not warranted. Mr. Pontin is a recognized steward of the land, and a larger penalty placed upon him will not deter others.

When Mr. Pontin first bought the subject property, he took immediate action and spent a considerable amount of money to clean it up. Mr. Pontin first 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 was 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 unknown storage tanks, Mr. Pontin took the effort 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 its 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. *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 aquifer, 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. *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." "Resourceful Ranching," *Cowgirl Life*, dtd. Dec. 21, 2021, attached as **Exhibit R**. The building comprises 51,450 square foot that serves as a home to a horse arena. The additional *green energy* produced by the property is utilized by the Hawaiian Electric Company to provide 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 cannot be overlooked. 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 like 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 would be 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. Because a dramatically increased penalty is unnecessary to deter future violations in this case, it is only reasonable to believe that the penalty amount should be closer to the amount of economic benefit received as a result of the violation. NSHE's proposed amount also reflects a full consideration of the EPA factors and is supported by substantial evidence that will be offered in this case.

IV. CONCLUSION

Based on the above, Mr. Pontin respectfully request that Complainant’s proposed penalty amount be rejected and that an amount that considers all of the factors necessary to ensure fair, equitable, and consistent results be imposed instead. Mr. Pontin reserves his rights and anticipates offering additional, relevant testimony and evidence during the hearing in further support of his case.

DATED: Honolulu, Hawaii, April 16, 2024.

/s/ Charles W. Gall

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