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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.

DOCKET NO. UIC-09-2022-0058

NSHE HI NARCISSUS, LLC'S
MEMORANDUM IN OPPOSITION TO
COMPLAINANT'S MOTION FOR
ACCELERATED DECISION ON
LIABILITY

**NSHE HI NARCISSUS, LLC'S MEMORANDUM IN OPPOSITION TO
COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY**

Respondent, NSHE HI NARCISSUS, LLC, by and through their attorneys Kobayashi Sugita & Goda, LLP, hereby files this Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability ("Motion").

INTRODUCTION

Complainant's Motion for Accelerated Decision on Liability must be denied because Complainants have not meet their burden of proof to establish a prima facie case. Thus genuine issues of material fact exist regarding whether or not the cesspool in question on Respondent's land qualifies as a regulated large capacity cesspool ("LCC"). Accordingly, the Motion must be denied.

STANDARDS FOR ACCELERATED DECISIONS

Respondent agrees with Complainants recitation of the law as it relates to Accelerated Decisions being in the nature of Summary Judgments and the requirement that Accelerated Decisions comply with the standards for Summary Judgment. Respondent's fail to mention that in reviewing a matter for summary judgment, or as here in an accelerated decision, the Presiding Officer may only consider admissible evidence. Affidavits made on personal knowledge and setting forth facts as would be admissible at trial are evidence that a court may consider when determining whether a material issue of fact exists. Fed.R.Civ.P. 56(e). Legal memoranda and oral argument are not evidence and do not create issues of fact. See *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

As admitted, Complainants have the burden of proof and must prove all elements of their complaint with admissible evidence. The law is well established that when the moving party also has the burden of proof in an element of a claim, it has the "burden of establishing a prima facie case on the motion for summary judgment." *UA Local 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994). Complainants have not done so.

Only upon showing a prima facie case by the moving party does the burden of production shift and only then does it become "incumbent on [the nonmoving party] to set forth specific facts showing that there is a genuine issue for trial," by evidence cognizable under that rule." Id. (quoting Fed.R.Civ.P. 56(e)); Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice Procedure § 2727 (3d ed. 1998)). The ultimate burden of persuasion as to the non-existence of any genuine issues of material fact remains on the moving party. *Nissan Fire Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000); accord *Dye v. United States*, 121 F.3d 1399, 1409 (10th Cir. 1997).

ARGUMENT

I. Complainants fail to Establish that there is a Cesspool on Respondent's Land

The central issue of this matter is whether or not there is a cesspool on Respondent's land, that is a regulated LCC under 40 C.F.R. § 144.81(2).

40 C.F.R. § 144.81(2) provides

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. The UIC requirements do not apply to single family residential cesspools nor to non-residential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons a day. [Emphasis Added]

The first element of Complainant's prima facie case is to establish through admissible evidence is that the wastewater collection system on Respondent's property contains a cesspool. As set forth in 40 C.F.R. § 144.81(2), to meet the statutory definition of a "cesspool" the storage portion of the waste water collection system on Respondent's property must be constructed with an open bottom. If it does not have an open bottom, it is not a cesspool and therefore it can never be a LCC. Thus, proving the storage portion of the wastewater collection system on Respondent's property is constructed with an open bottom is part of Complainant's prima facie

case. **Complainants have provided no evidence that the storage facility in question had no bottom.**

The investigation report, Ex D1 to Complainant's Motion reveals that no inspection was performed to establish whether or not there was a cesspool on the Property. Instead, the report notes that "Cao was unsure of the construction of the waste collection system and suggested that the inspection team contact the Property Manager- Duke Pontin for more information." *See* Exhibit D 1 at page 3. Consistent with the lack of investigation on whether or not the storage portion of the waste collection system met the definition of being a cesspool, no determination was made in the report that a cesspool was on the property. Rather, the report concluded by saying "it appeared that the wastewater generated on-site was potentially being discharged to a LCC. Additional follow-up will be necessary." *See* Exhibit D 1 at page 3

This is a critical element of their claim. As admitted in their Memorandum in support of their motion, Complainants have the burden of proof and must prove each element of their claims. The cesspool in question cannot be a regulated LCC unless it was constructed without a bottom. Complainant cannot meet its burden of proof necessary to establish that the cesspool is a LCC unless it provides evidence that the cesspool had no bottom. Because Complainants have provided no evidence of this, the motion must be denied on the basis that Complainants failed to meet their burden of proof on the essential element of their claim establishing the cesspool in question had no bottom. Because Complainants have not provided **any** admissible evidence to establish this essential element of their claim, the burden does not shift to Respondents to produce evidence showing the existence of material fact. *See UA Local 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994). (when the

moving party also has the burden of proof in an element of a claim, it has the "burden of establishing a prima facie case on the motion for summary judgment.")

II Complainants Fail to Establish that the Storage Portion of the Waste Water Collection System on Respondent's Property has the Capacity to Serve 20 or More Persons Per Day

Secondly, Complainants must prove that the storage portion of the wastewater collection system had the capacity to be used by 20 or more persons per day. Capacity is a two-part test consisting of determining the physical capacity of the facility in question, and the number of persons who could potentially access the facility. Complaints attempt to establish that the waste water collection storage facility had the capacity serve 20 or more persons per day solely on the basis of how many people had access to restroom facilities that were served by the cesspool. However, this is inconsistent with published EPA guidance on their website on how to determine if a cesspool is an LCC. Claimant's position is illogical. The EPA set forth its assessment of factors to take into consideration in making the determination as to whether a cesspool qualifies as a LCC on its official EPA website <https://www.epa.gov/uic/large-capacity-cesspools> stating as follows:

For non-residential cesspools, **capacity is determined by design and construction of the cesspool and** the potential usage of the infrastructure it serves. A non-residential cesspool may have the potential to be used by 20 persons or more in a day even if it is not actually used by 20 or more persons per day. **Determining the potential usage of a non-residential cesspool is highly fact-specific and must be done on a case-by-case basis.** Other factors to consider when evaluating a non-residential cesspool's potential usage include structural barriers preventing access to the area where the facility is located, or location on private property that is not accessible to the public. Generally, access to the area must be restricted for reasons other than limiting use of the cesspool. [Emphasis added]

This makes sense. In the real world, even if the restrooms could be accessed by well over 20 persons, if the waste water storage facility does not have the physical capacity to serve 20 or more persons it cannot be considered to be a LCC. This is why the EPA clearly states that

“capacity is determined by design and construction of the cesspool.” Complainants have not presented any evidence as to the actual physical capacity of the cesspool. Further, the cases cited by Respondent discuss capacity in terms of physical capacity of an object. The capacity of a 5-gallon bucket is determined by its physical size, not by how many people have access to the bucket. You can’t put 6 gallons in a 5 gallon bucket, even if there is a line of 20 people with a gallon of waste to put into it. The capacity remains constrained by the physical characteristics of the bucket. So too with a cesspool.

Complainants incorrectly assert that the preamble for EPA’s large capacity cesspool considered and rejected any physical or technical as the determinative factor. What the preamble actually does is acknowledge that the language regarding determination of whether a cesspool is a LCC or not, is flawed. The preamble states:

EPA recognizes that the current criterion as written in § 144.1(g) has weaknesses. However, because no commentor recommended an alternative criterion that would not disrupt existing State programs or that was necessary to ensure better protection of USDWs, today’s rule retains the criterion at § 144.1(g). Under this criterion, nonresidential cesspools, septic systems or similar waste disposal systems are covered under the UIC program if they are used solely for the disposal of sanitary waste, and have the capacity to serve 20 or more persons a day. [Emphasis added]

The EPA did not reject using physical capacity as part of the analysis in determining if a cesspool is a LCC. Instead the EPA rejected using specific size requirements as the sole factor of determination because of the impact on state run programs. EPA knew the LCC definition language was a problem, they just couldn’t figure out better language, so they left the original language. EPA’s admission that the language is problematic, is consistent with its interpretation of the rules on its web site where it states that: “For non-residential cesspools, capacity is determined by design and construction of the cesspool **and** the potential usage of the infrastructure it serves.” [emphasis added] It goes on to state that “Determining the potential usage of a non-

residential cesspool is highly fact-specific and must be done on a case-by-case basis. This is also consistent with the concluding statement in Exhibit D1, inspection report, Complainant's motion: "At the time of the inspection it appeared that the wastewater generated on-site was potentially being discharged to a LCC. Additional follow-up will be necessary."

However, despite acknowledging that additional follow up will be necessary, EPA never undertook any effort to determine if the wastewater collection facility on the property was actually a cesspool as defined in the statute. No investigation was done to determine if there was a leach field as part of the structure. No investigation was done to determine if the storage facility had an open bottom as is necessary to qualify as a cesspool for purposes of potentially being a cesspool and an LCC. No investigation was done to determine the physical capacity of the storage facility. As a result, Complainant has no evidence as to the physical capacity of the storage facility and has presented no evidence of such in its motion. As with failing to prove that the storage facility is actually a cesspool, Complainants fail to meet their burden of proof to prove that the storage facility has the physical capacity to serve 20 or more persons.

Instead, Complainants incorrectly focused solely on the number of people who had access to the restrooms that were served by the cesspool on the property. To establish that more than 20 people had access to the restrooms Complainant rely on inadmissible evidence in the form of Yelp reviews and photographs.

Before a photograph is admitted as evidence, it must first be authenticated; thus, the proper foundation must be established. To establish a foundation for admission of a photograph, a witness with knowledge testify that the photograph fairly and accurately represents the condition, product, person or scene that it depicts. *City of Miami v. McKorkle*, 199 So.2d 575

(Fla. 1940). As stated by the court in *Zerega Ave. Realty v. Hornbeck Offshore*, 571 F.3d 206 (2d Cir. 2009):

[t]he standard for admissibility of photographs requires the witness to recognize and identify the object depicted and testify that the photograph is a fair representation of what it purports to portray. See *Kleveland v. United States*, 345 F.2d 134, 137 (2d Cir. 1965). Although Todino identified the photographs as "pictures of the relieving platform at 1000 Zerega Avenue," counsel failed to follow up with the customary question as to whether the photographs fairly and accurately portrayed the area shown. The objection for lack of a proper foundation was therefore properly sustained. *Zerega Ave. Realty v. Hornbeck Offshore*, 571 F.3d 206 (2d Cir. 2009)

The photographs Complainant seeks to use to establish the element of its claim that 20 or more people had access to the restroom feeding the storage facility are not admissible. Complainants have laid no foundation. No witness with personal knowledge has testified to recognize and identify the object depicted and testify that the photograph is a fair representation of what it purports to portray. Accordingly, no foundation has been laid and as such the yelp photos are inadmissible evidence. As noted above, in making a determination on a Motion for Accelerated Decision the Presiding Officer must only consider admissible evidence. Because all of Complainant's evidence with respect to number of people with access to the bathrooms is inadmissible, it cannot meet its burden of proof with respect to the element of its claim that the cesspool was a LCC with the potential to serve 20 or more person's per day.

CONCLUSION

As set forth above, Complainants have failed to establish any of the 3 essential elements of their claim. They have not submitted any evidence that there is a cesspool on the Property. They have not submitted any evidence that the storage facility portion of the wastewater system on the property has the physical capacity to serve 20 or more people. They have not submitted any admissible evidence to support the allegation that 20 or more people had access to the restroom

serviced by the wastewater system. Accordingly, the Motion for Expedited Decision must be denied. Respondent requests an oral hearing on the Motion.

DATED: Honolulu, Hawaii, January 30, 2023.

/s/ Charles W. Gall

CHARLES W. GALL

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NSHE HI Narcissus, LLC,
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Respondent.

CERTIFICATE OF SERVICE

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The undersigned certifies that on January 30, 2023, NSHE HI NARCISSUS, LLC'S Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability was served upon Complainant's attorneys, who have consented in writing to electronic service pursuant to 40 C.F. R § 22.5(b)(2).

One copy via electronic mail to:

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DATED: Honolulu, Hawaii, January 31, 2023.

/s/ Charles W. Gall

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