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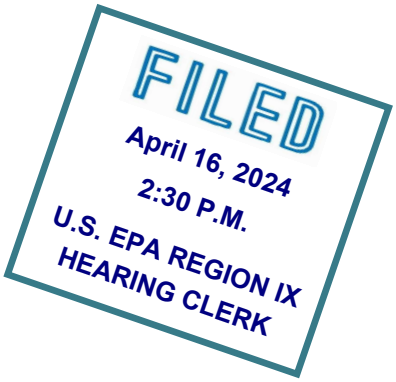

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF	)	
	)	DOCKET NO. UIC-09-2022-0058
NSHE HI Narcissus, LLC	)	**COMPLAINANT'S**
	)	**STATEMENT OF PROPOSED**
Respondent	)	**PENALTY**
Proceeding under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	)	

Pursuant to 40 C.F.R. § 22.19(a)(4), Complainant files the attached document specifying a proposed penalty in the matter of NSHE HI Narcissus, LLC, Docket. No. UIC-09-2022-0058, and explaining how the proposed penalty was calculated in accordance with the criteria set forth under the Safe Drinking Water Act at 42 U.S.C. § 300h-2(c)(4)(B).

Respectfully submitted,

KIMBERLY WELLS
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Kimberly Wells
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Complainant's Explanation of the Proposed Penalty Assessment
***In the Matter of NSHE HI Narcissus, LLC*, Docket No. UIC-09-2022-0058**

April 16, 2024

Respondent, NSHE HI Narcissus, LLC has violated the Safe Drinking Water Act ("SDWA") by owning or operating one large capacity cesspool ("LCC") after April 5, 2005. Order Granting Partial Accelerated Decision on Liability 16 Aug. 28, 2023. The SDWA authorizes the Environmental Protection Agency ("EPA") to issue an administrative order "assessing a civil penalty . . . for any past or current violation." 42 U.S.C. § 300h-2(c)(1). EPA has broad discretion to assess a penalty for violation of the SDWA up to a maximum of $27,894 per day during which the violation continues and $348,671 total for each violation. 42 U.S.C. § 300h-2(c)(5); *see also* § 300h-2(c)(1) modified as mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 88 Fed. Reg. 89,312 (Dec. 27, 2023), codified at 40 C.F.R. § 19.4. In assessing the penalty, EPA must consider:

i) the seriousness of the violation;
ii) the economic benefit (if any) resulting from the violation;
iii) any history of such violations;
iv) any good-faith efforts to comply with the applicable requirements;
v) the economic impact of the penalty on the violator; and
vi) such other matters as justice may require.

42 U.S.C. § 300h-2(c)(4)(B).

In administrative litigation, the Presiding Officer is granted broad discretion to assess a penalty within the range authorized by the statute. *See* 42 U.S.C. § 300h-2(c)(1); s*ee also In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 2005 WL 4905111 at *18 (EAB 2005). When applying similar penalty provisions in other environmental statutes,

courts have generally determined that it is appropriate to start with the maximum penalty allowed by the statute and reduce the penalty as appropriate considering the statutory penalty factors. *See, e.g.*, *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc*., 897 F.2d 1128, 1142 (11th Cir. 1990) (When assessing a penalty under the Clean Water Act "the district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out."); *United States v. B&W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994) ("In considering fines under the [Clean Air] Act, courts generally presume that the maximum penalty should be imposed"); *United States v. HVI Cat Canyon, Inc.*, Case No. CV 11-5097 FMO (SSx), 2023 WL 2212825 *33 (C.D. Cal, Feb. 25, 2023) (summarizing caselaw on penalty calculations and finding that courts within the Ninth Circuit generally have adopted the approach of starting with the statutory maximum and applying the statutory factors to determine if reduction is appropriate).

Complainant carries the burden to demonstrate by a preponderance of the evidence that the relief sought in this matter is appropriate. *See* 40 C.F.R. § 22.24. Specifically, Complainant must touch upon each factor and provide analysis showing that the proposed penalty is appropriate. *In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 1994 WL 615377 at *6 (EAB 1994). Complainant does not bear a separate burden to prove each factor. *Id.*

For the reasons explained below, Complainant has determined that **$133,450** is an appropriate penalty for Respondent, NSHE HI Narcissus, LLC's violation of the SDWA.[1] The proposed penalty has been determined in accordance with 42 U.S.C. § 300h-2(c)(4)(B).

[1] The proposed penalty differs from the penalty proposed by Complainant on March 23, 2023, due to updates mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015; updated economic benefit calculations; and Respondent's degree of cooperation..

Complainant has taken into account the particular facts and circumstances of this case with specific reference to applicable civil penalty guidelines. Complainant requests that the Presiding Officer assess a penalty in this amount against Respondent.

Relevant Law and Facts

Complainant seeks this penalty pursuant to section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), for Respondent's ownership and operation of an LCC in violation of EPA's Underground Injection Control ("UIC") regulations at 40 C.F.R. § 144.88(a)(1). The UIC regulations were promulgated pursuant to section 1421(a)(1) of the SDWA, 42 U.S.C. § 300h(a)(1).

Respondent owns at least three properties in Hawai'i in the communities of Haleiwa and Kahuku. Complainant's Exhibits 14, 34, and 56. Respondent owned and operated an LCC on the Haleiwa property from at least October 4, 2017, when it purchased the property, until at least April 28, 2021, when the restrooms served by the cesspool were closed. Complainant's Exhibits 18a, 18b, and 18d. The Presiding Officer has determined that Respondent's ownership and operation of the LCC violated the SDWA and that Respondent is liable as a matter of law for the violation. Order Granting Partial Accelerated Decision on Liability 16 Aug. 28, 2023.

Civil Penalty Guidelines

The Presiding Officer shall consider civil penalty guidelines when assessing the civil penalty and shall determine the amount of the penalty based on the evidence in the record and in accordance with penalty criteria set forth in the SDWA. 40 C.F.R. § 22.27(b). The predecessor to EPA's Office of Enforcement and Compliance Assurance ("OECA")[2] issued civil penalty

[2] The guidelines were issued by EPA's Assistant Administrator for Enforcement and Compliance Monitoring.

guidelines for consistently applying statutory penalty factors and determining an appropriate penalty for purposes of administrative and civil judicial enforcement actions. Complainant's Exhibit 36, Policy on Civil Penalties (GM-21), and its companion document, A Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). The goal of the Policy on Civil Penalties is to apply the statutory factors consistently to achieve deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems. Complainant's Exhibit 36, GM-21 at 1. The guidelines provide a rational, consistent, and equitable calculation methodology for applying the SDWA's penalty factors at 42 U.S.C. § 300h-2(c)(4)(B) to particular cases.

Consistent with EPA's policy that any civil penalty should at least recapture the economic benefit the violator has obtained through its unlawful actions, these guidelines state that penalties should, at a minimum, be sufficient to recover the economic benefit of violations. Complainant's Exhibit 58, 70 Fed. Reg. 50,326, 50,326 (Aug. 26, 2005); and Complainant's Exhibit 36, GM-21 at 3-4 and GM-22 at 2-4. Courts share this view. *See, e.g.*, *Atlantic States Legal Foundation,* 897 F.2d 1141 ("[i]nsuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are to successfully deter violations"). The penalty should also include a component to account for the gravity of the violation. Complainant's Exhibit 36, GM-22 at 13; *see also* 42 U.S.C. § 300h-2(c)(4)(B)(i). "The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to

ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation." Complainant's Exhibit 36, GM-21 at 3.

The gravity component of the penalty addresses the violation's actual or possible harm to the environment, as well as its importance to the regulatory program. Complainant's Exhibit 36, GM-22 at 14-15. The actual or possible harm to the environment focuses on "whether (and to what extent) the activity of the [violator] actually resulted or was likely to result in an . . . exposure." Complainant's Exhibit 36, GM-22 at 14. The actual or possible harm is determined based on consideration of the amount and toxicity of the pollutant, sensitivity of the environment, and duration of the violation. *Id.* at 14. The importance of the violation to the regulatory scheme focuses on the importance of the requirement which was violated to achieving the goal of the statute or regulation. *Id.*

The civil penalty guidelines also recognize the "size of the violator" as a gravity factor, which is equivalent to the "economic impact of the penalty on the violator" under the SDWA. *See* Complainant's Exhibit 36, GM-22 at 3 and 42 U.S.C. § 300h-2(c)(4)(B)(v). The guidelines recommend increasing the penalty where, based on the size of the violator, it is clear that the penalty would otherwise have little impact. Complainant's Exhibit 36, GM-22 at 15. The purpose of the size consideration is to ensure that the gravity component of the penalty is sufficient to deter noncompliance with the regulatory program. Complainant's Exhibit 36, GM-21 at 3.

The combination of economic benefit and gravity produce a "preliminary deterrence figure," which may be adjusted upward or downward to account for case-specific conditions. *Id.* at 3. GM-21 and GM-22 identify a number of case-specific considerations, including the

violator's degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, extent of noncompliance in specific areas of the United States, and any other unique factors. *Id.* at 4-5 and GM-22 at 10-15. A respondent's ability to pay is presumed and no adjustment should be made unless the respondent has raised its inability to pay as an issue. *In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8.

The framework established in the civil penalty guidelines considers the SDWA's six penalty factors by: (1) determining economic benefit (the second SDWA factor); (2) determining the gravity based on the seriousness of the violation and economic impact of the penalty on the violator (the first and fifth SDWA factors); then (3) adjusting the gravity based on Respondent's history of violations; good-faith efforts to comply, including the level of cooperation with EPA; and such other matters as justice may require (the third, fourth, and sixth SDWA factors).

Consideration of Statutory Factors

Complainant has taken the six statutory factors into consideration, in accordance with the civil penalty guidelines, as follows:

I. Economic benefit resulting from the violation

In assessing a penalty, EPA shall consider the economic benefit resulting from the violation. 42 U.S.C. § 300h-2(c)(4)(B)(ii). The economic benefit represents the amount of money an entity gained by not complying with an environmental law in a timely manner. Complainant's Exhibit 48, Report Calculating the Economic Benefit of Noncompliance at 3. An appropriate penalty should remove any significant economic benefit that accrued as a result of noncompliance. Complainant's Exhibit 36, GM-21 at 3; Complainant's Exhibit 58, 70 Fed. Reg. 50,326; *see also Atlantic States,* 897 F.2d 1141.

There are three types of economic benefit an entity can derive from environmental noncompliance: delayed costs, avoided costs, and wrongful profits. Complainant's Exhibit 48 at 3. Delayed costs occur when an entity should have paid money to be compliant and did not, but subsequently, the entity incurred the necessary costs to come into compliance. *Id.* Avoided costs occur when an entity should have paid money to be compliant, it did not, and to date, the entity still has not incurred the necessary costs to come into compliance. *Id.* Wrongful profits occur when an entity's violation of the law directly results in increased profits, thereby providing the entity with an unfair competitive advantage.[3] *Id.* For delayed and avoided costs, the costs can further be categorized as capital investments, one-time non-depreciable expenditures, and annually recurring costs. *Id*. at 4. Capital investments are costs of items that depreciate, such as purchasing and installing pollution control equipment (e.g., buildings, equipment). *Id.* One-time non-depreciable expenditures are costs that are made once and do not depreciate, such as staff costs and disposal costs. *Id*. Annual recurring costs are average annual incremental costs, such as costs for operating or maintaining the required pollution control measures. *Id.*

EPA's National Coordinator for Civil Penalties and Financial Analyses, David Smith-Watts calculated the economic benefit for delayed and avoided costs using a cash flow analysis, in accordance with EPA policy. Complainant's Exhibit 48 at 4; Complainant's Exhibit 58, 70 Fed. Reg. 50,328. A cash flow analysis is a standard and widely accepted technique for evaluating costs and investments that examines the effect that the delayed and avoided compliance costs

[3] EPA's National Coordinator for Civil Penalties and Financial Analyses determined wrongful profits are not applicable in this case, and therefore, they not discussed further. Complainant's Exhibit 48 at 3.

have on the entity's cash flow. Complainant's Exhibit 48 at 4; Complainant's Exhibit 58, 70 Fed. Reg. 50,329. Consistent with EPA policy, Mr. Smith-Watts's analysis compared a hypothetical scenario in which the violator had complied on time with the actual scenario in which the violator delayed or avoided the costs of compliance, and then adjusted the economic benefit to the estimated penalty payment date by accounting for inflation, taxes, and the time value of money. Complainant's Exhibit 48 at 4; Complainant's Exhibit 58, 70 Fed. Reg. 50,329.

In this case, the economic benefit of noncompliance is the present value of cost savings from: delaying the costs of closing the LCC and replacing the LCC with a legal wastewater treatment system, and avoiding the costs of operating and maintaining the new wastewater treatment system during the period of violation. Respondent delayed the costs of closing and replacing the LCC between October 4, 2017, when Respondent purchased the property, and the time when the costs were incurred. Respondent's delayed capital investments for installing a septic system are listed in *Figure 1*. A properly maintained septic system should last approximately 50 years. Complainant's Exhibit 52. Respondent's delayed one-time non-depreciable expenditures are listed in *Figure 2*. Respondent's capital investment costs and one-time non-depreciable expenditures for septic system design and installation were all incurred by June 3, 2022, when Respondent replaced the LCC with a septic system. Complainant's Exhibit 51.

Figure 1 Respondent's Delayed Capital Investments[4]

Delayed Cost	Capital Investment
$8,010	Septic tank
$6,570	Chambers
$670	Piping
$730	Sand
$1,140	Rock
$17,120	Total

Figure 2 Respondent's Delayed One-Time Non-Depreciable Expenditures

Delayed Cost	Item or Service	Cost estimate date	Citation
$175	Cesspool Pumping	Nov. 11, 2021	Complainant's Exhibit 19c
$665	Cesspool Backfill	Dec. 2, 2021	Respondent's Exhibit C; Complainant's Exhibit 19d
$1,880	Geotechnical Survey	June 3, 2022	Respondent's Exhibit C
$2,800	Engineering/Design	June 3, 2022	Respondent's Exhibit C
$600	Dirt Hauling	June 3, 2022	Respondent's Exhibit C
$1,355	Rock Hauling	June 3, 2022	Respondent's Exhibit C
$1,228.51	Hauling Fee	June 3, 2022	Respondent's Exhibit C

Respondent would also have incurred annual septic system operating and maintenance costs of $852 if the property had been served by a 1,000-gallon septic tank with chamber drain field between October 4, 2017, when Respondent acquired the property, and April 28, 2021, when the restrooms served by the cesspool were closed.[5] *See* Complainant's Exhibit 30 at 5.

[4] Cost information is based on Respondent's Exhibit C "$$ new system fill old," which Respondent submitted in its March 9, 2023, prehearing information exchange. On February 24, 2023, Complainant requested information on closure costs from Respondent in order to develop this penalty calculation. Complainant's Exhibit 50. Respondent failed to provide the requested information. Respondent's Exhibit C is neither an invoice nor a receipt, and contains various dollar figures. Cost information is based on Complainant's interpretation of Respondent's Exhibit C. Complainant's interpretation of the costs is also consistent with estimates in HDOH's January 2021 Cesspool Conversions Finance Research Summary Report, which is a study that evaluates the funding, financing, and affordability of cesspool conversions in Hawai'i. HDOH estimates that most conventional septic system replacements will cost an average of $23,000, however many systems cost more due to site-specific conditions. *See* Complainant's Exhibit 30 at 5.

[5] The annual operating and maintenance costs are based on an estimated $71 in monthly costs.

Due to Respondent's noncompliance, Respondent avoided the costs of operating and maintaining a septic system.

Mr. Smith-Watts used the costs detailed above and an estimated penalty payment date of December 31, 2024 to calculate Respondent's economic benefit from delaying and avoiding the costs of closing the LLC and replacing it with a septic system. Complainant's Exhibit 48 at 7. Respondent's economic benefit from owning and operating an LCC past the regulatory deadline for closure is $4,317.98. *Id.* at 19.

II. Gravity

In assessing a penalty for a violation of the SDWA, EPA shall consider the seriousness of the violation and the economic impact of the penalty on the violator. 42 U.S.C. § 300h-2(c)(4)(B)(i) and (v). The civil penalty guidelines refer to these factors as the gravity component of the penalty calculation. Complainant's Exhibit 36, GM-21 at 3 and GM-22 at 3. An appropriate penalty achieves retribution and deterrence, in addition to restitution. *See Tull v. U.S.*, 481 U.S. 412, 422 (1987). The gravity component of the penalty achieves deterrence and fundamental fairness to those who have complied because it ensures that a violator is worse off than if it had obeyed the law. Complainant's Exhibit 36, GM-21 at 3; *see also Tull*, 481 U.S. 422.

a. Seriousness of the violation

As explained above, "seriousness" refers to the actual or potential threat the violation posed to the environment or public health, and the extent to which Respondent's actions (or inaction) violated critical requirements of the regulatory program. Complainant's Exhibit 36, GM-22 at 3. Applying these criteria to the facts of this case, the circumstances of Respondent's operation of an LCC in violation of 40 C.F.R. § 144.88(a)(1) constitutes a serious violation.

The penalty guidelines state that EPA should consider the seriousness of the *risk* of harm where the risk exceeds the actual, documented harm. *See* Complainant's Exhibit 36, GM-22 at 14. To evaluate the seriousness of the risk of harm, EPA should look to the amount of the pollutant, the toxicity of the pollutant, the sensitivity of the environment, and the duration of the violation. Complainant's Exhibit 36, GM-22 at 3.

The SDWA UIC program prevents endangerment of underground sources of drinking water by regulating the construction, operation, permitting, and closure of injection wells that place fluids underground for storage or disposal. 42 U.S.C. § 300h(b). LCCs are regulated under the UIC program. 40 C.F.R. § 144.85(a). EPA's nationwide cesspool ban on LCCs resulted from EPA's findings that LCCs endanger drinking water. Complainant's Exhibit 35, 64 Fed. Reg. 68,546, 68,550 (Dec. 7, 1999). In assessing the risk of harm posed by the amount of pollutants and the toxicity of the pollutants from LCCs, EPA found that

> Large-capacity cesspools have a high potential to contaminate [underground sources of drinking water] because: they are not designed to treat sanitary waste; they frequently exceed drinking water [maximum contaminant levels] for nitrates, total suspended solids and coliform bacteria; and, they may contain other constituents of concern such as phosphates, chlorides, grease, viruses, and chemicals used to clean cesspools such as trichloroethane and methylene chloride. Pathogens in untreated sanitary waste released into large capacity cesspools could contaminate the water supply . . . and pose an ''acute'' risk if consumed (meaning there could be a serious health risk with a single exposure given the nature of contamination).

Id. at 68,551.

In addition to the acute risks posed by all LCCs, Respondent's LCC was located in a high-risk area identified by the 2022 Hawai'i Cesspool Hazard Assessment & Prioritization Tool, Updated Report. Complainant's Exhibit 37.1 at 60. Respondent's cesspool was located in an area identified as the highest priority for cesspool closure (Priority Area Level 1) due risks posed

to human health and the environment. *Id.* The prioritization of this area is based on multiple risk factors including: distance to domestic drinking water wells; depth to groundwater; cesspool density; unfavorable soil conditions; distance to streams; and distance to coastline. Complainant's Exhibit 37.1 at 79. Respondent owned or operated an LCC in an environmentally sensitive area, adding weight to the seriousness of the violation.

EPA's OECA has developed a system for quantifying the gravity of UIC violations, including quantifying the significance of the type of violation in the context of the UIC regulatory program. *See* Complainant's Exhibits 38 and 39. The UIC Program is designed to protect all current and potential underground sources of drinking water from contamination by injection wells. Complainant's Exhibit 35, 64 Fed. Reg. 68,550. The requirement that all LCCs must be closed by April 5, 2005 is a critical requirement of the UIC regulatory program. *Id.* at 68,549-68,550. Owning or operating an LCC is an unauthorized injection of wastewater, which is a significant violation of the UIC program's core requirements. *See* Complainant's Exhibit 39; *see also* Complainant's Exhibit 38 at 2. Respondent's unauthorized injection through an LCC from October 4, 2017 to April 28, 2021 in violation of the LCC ban constitutes a serious violation of a critical requirement of the UIC regulatory program. Complainant's Exhibit 47a, Declaration of Jelani Shareem ¶29.

The risk of harm posed by the LCC and the significance of the violation in the context of the UIC Program both demonstrate that the violation is serious. Therefore, Complainant has determined that after accounting for the economic benefit, consideration of the seriousness of the violation warrants the assessment of at least fifty percent of the remaining statutorily allowable penalty. Complainant's Exhibit 47a ¶36. *See* calculation in *Figure 3*, below.

b. Economic impact of the penalty on the violator

The penalty must have an economic impact on the violator to achieve deterrence. *See* Complainant's Exhibit 36, GM-22 at 15. The penalty guidelines use the size of the violator to evaluate the economic impact of the penalty on the violator, as required by 42 U.S.C. § 300h-2(c)(4)(B)(v). *Id.* The size of the violator is used to account for the variations in financial capabilities among different violators and to ensure adequate deterrence. *Id.* OECA has clarified that when calculating the size of violator component of a civil penalty, case teams should consider related parties, such as corporate affiliates in appropriate circumstances, including when "transactions between the violating entity and related party are less than arm's length transactions; the violating entity is grossly undercapitalized, and the related party finances the violating entity's operations; or monies are commingled to such a degree that it is not possible to determine what funds belong to which entity." Complainant's Exhibit 49.

In the present matter, Respondent is a Hawai'ian domestic limited liability company that owns the real property located at 66-532 Kamehameha Highway, Haleiwa, HI 96712, Tax Map Key (TMK) 1-6-2-007-019, in addition to real property located at 56-1030 Kamehameha Highway, Kahuku, HI 96731, TMK 1-5-6-005-024 and real property located at 56-1048 Kamehameha Highway, Kahuku, HI 96731, TMK: 1-5-6-005-006. Complainant's Exhibits 14, 34, and 56. The Haleiwa Property comprises a commercial building and a parking lot, which is leased to mobile food vendors, and has an assessed value of $2,528,100. Complainant's Exhibit 8.1. The Kahuku properties are agricultural properties with assessed land values of $901,900 and $26,500. Complainant's Exhibits 33 and 56. One property in Kahuku leases to Kahuku Wind Power II LLC and Amorient Aquaculture International. Complainant's Exhibit 33. EPA Region 9's

UIC Enforcement Program was unable to find other reliable information about Respondent's business size.[6] One database estimated that Respondent's annual sales are approximately $53,480, however the accuracy of the estimate is uncertain because the database had "incomplete or invalid data" on the company and the estimate did not include revenues for related parties. Complainant's Exhibit 55.

Complainant was unable to obtain business information from Respondent itself. Each party's prehearing information exchange "shall include . . . all factual information [the party] considers relevant to the assessment of a penalty." 40 C.F.R. § 22.19(a)(4). On February 24, 2023, Complainant specifically requested that Respondent provide information on assets, liabilities, and incomes to adequately assess the economic impact of the penalty on the violator pursuant to 42 U.S.C. § 300h-2(c)(4)(B)(v). Complainant's Exhibit 50. Complainant also sought documentation related to the costs incurred for the closing of the LCC and the installation of the individual wastewater system to learn whether Respondent's liabilities and assets are being comingled with those belonging to its managing member or other related parties. *Id*. Respondent did not respond to Complainant's request, nor did Respondent provide any business information in its prehearing information exchange.

Based on Respondent's estimated annual revenue and assessment of Respondent's known assets, Complainant is unable to determine whether the penalty will have a sufficient economic impact on Respondent to achieve deterrence. Because Complainant was unable to

[6] EPA Region 9's UIC Enforcement Program searched Dun & Bradstreet Finance Analytics, Hoovers, Westlaw Company Investigator, Reference USA Business Database, and Hawai'i Business Express. EPA Region 9's UIC Enforcement Program found information about several related parties, including Respondent's managing member Duke Pontin and other parties affiliated with Respondent's Haleiwa property. Complainant's Exhibits 2, 3.1, 5, 6, 7, 10, 10.1, 11, 12, 13, 24.1, 27, 46a, and 46b.

obtain sufficient information detailing the financial means of the Respondent, Complainant is applying no adjustment to the penalty based on economic impact on the violator. Although Complainant is limited by the available information, the Presiding Officer is not; 40 C.F.R. § 22.19(g) allows the Presiding Officer to draw an adverse inference based on Respondent's failure to provide information that is within its control. The Presiding Officer also maintains the discretion to increase the proposed penalty, where appropriate and supported by the record. *See In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18.

c. Preliminary Deterrence Figure

In the terminology used in GM-22, the preliminary deterrence figure is the economic benefit plus the gravity. Respondent's economic benefit is $4,317.98. Complainant has considered the seriousness of the violation and the economic impact of the penalty on Respondent, and found the appropriate gravity to be at least fifty percent of the remaining statutorily allowable penalty. Complainant's Exhibit 47a ¶36. *See Figure 3* for Complainant's Preliminary Deterrence Figure calculation considering Respondent's economic benefit, seriousness of the violation, and the economic impact of the penalty on Respondent.

Figure 3 Preliminary Deterrence Figure

Preliminary Deterrence Figure	**=**	**[Economic Benefit] + [Gravity]** where Gravity = 50% of the remaining statutorily allowable penalty and where the statutorily allowable penalty = $348,671
	=	**[Economic Benefit] + [(($348,671) – (Economic Benefit)) x (0.5)]** where Economic Benefit = $4,317.98
	=	**[$4,317.98] + [(($348,671) – ($4,317.98)) x (0.5)]**
	=	**[$4,317.98] + [$172,176.51]**

III. Penalty Adjustment Factors

In assessing a penalty, EPA shall consider Respondent's history of similar violations, any good faith efforts to comply with the applicable requirements, and other matters as justice may require. 42 U.S.C. § 300h-2(c)(4)(B)(iii),(iv), and (vi). GM-22 provides guidelines for considering these factors and determining whether an adjustment to the preliminary deterrence figure of the penalty is appropriate. Complainant's Exhibit 36, GM-22 at 3.

a. Respondent's history of similar violations

A history of violations would indicate that a greater penalty is needed to deter future violations. EPA Region 9's UIC Enforcement Program is not aware of any other similar violations by Respondent. Complainant's Exhibit 47a ¶37.c. Therefore, Respondent's history does not merit a greater penalty to achieve deterrence and Complainant has not adjusted the penalty for this factor.

b. Respondent's good faith efforts to comply with the applicable requirements

Respondent made certain good faith efforts to comply with the LCC ban at 40 C.F.R. § 144.88(a)(1) after EPA informed it of the violation. Respondent restricted access to the restrooms served by the LCC on April 28, 2021, soon after receiving EPA's March 4, 2021 Inspection Report, and closed the LCC on December 2, 2021, ten days after receiving EPA's Show Cause Letter. Complainant's Exhibits 18a, 18d, and 19b. The civil penalty guidelines state that where "the violator [has taken] all necessary steps towards correcting the problem, but [refuses] to reach any agreement on penalties. . . the gravity component of the penalty may be reduced up to 25%." Complainant's Exhibit 36, GM-22 at 20. Complainant considered Respondent's good faith efforts to comply in the penalty calculation. Although the violation was

fully within Respondent's control since October 4, 2017, Complainant acknowledges Respondent's efforts to come into compliance with the LCC ban in 2021 and has applied a twenty five percent downward adjustment to the gravity component of the penalty.

c. Other matters as justice may require

Complainant also considered other matters as justice may require. The penalty guidelines acknowledge that where there is extensive noncompliance with certain regulatory programs in specific areas of the United States, the normal penalty assessments have not been sufficient to achieve general deterrence. Complainant's Exhibit 36, GM-21 at 4. In such cases, the civil penalty guidelines recommend considering an increase to the penalty to achieve general deterrence. *Id. at 4-5.*

There is extensive noncompliance with the LCC ban set forth at 40 C.F.R. § 144.88(a)(1) in the State of Hawai'i. Complainant's Exhibit 47a ¶37.e; Complainant's Exhibit 54, Declaration of Katherine Rao ¶11. EPA's enforcement actions since 2005 have resulted in closure of 1,250 LCCs in Hawai'i, including closures within 0.1 miles and 0.5 miles of Respondent's property. Complainant's Exhibit 47a ¶37.e FN 2; Complainant's Exhibit 47b. Normally, each enforcement action has an associated press release. Complainant's Exhibit 54 at ¶10. However, HDOH estimates that there are still 88,000 cesspools remaining in Hawai'i, a portion of which are LCCs operating in violation of the SDWA. Complainant's Exhibit 53. Even Respondent's Managing Member, Duke Pontin, acknowledged that he is aware that there are cesspools "all over the state of Hawaii" in an email to Jelani Shareem dated November 23, 2021. Complainant's Exhibit 18a. Respondent's LCC was located in an area where past enforcement has not been sufficient to deter ongoing extensive noncompliance with the LCC ban. While Complainant has not

adjusted the penalty on the basis of Respondent's location in an area with extensive noncompliance, the civil penalty guidelines and caselaw support the Presiding Officer in exercising his discretion to adjust the penalty by up to 10% to achieve a greater deterrent effect. *In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18; Complainant's Exhibit 36, GM-21 at 4-5 and GM-22 at 24.

Finally, Complainant has considered Respondent's ability to pay. Respondent's ability to pay should be presumed unless Respondent has raised its inability to pay as an issue. *In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8. Complainant has considered Respondent's estimated annual revenues and known assets (including, the three properties referenced above) and those of related parties. Complainant's Exhibits 8.1, 14, 33, 34, 55, and 56. On April 11, 2024, Respondent's counsel confirmed in an email to counsel for Complainant that Respondent will not claim an inability to pay the proposed penalty. Furthermore, Respondent has provided no information to support such a claim. Each party's prehearing information exchange "shall include . . . all factual information [the party] considers relevant to the assessment of a penalty." 40 C.F.R. § 22.19(a)(4). On February 24, 2023, Complainant requested that Respondent provide information on assets, liabilities, and incomes pursuant to 42 U.S.C. § 300h-2(c)(4)(B)(v). Complainant's Exhibit 50. Respondent did not respond to Complainant's request nor did Respondent provide any information about its ability to pay in its prehearing information exchange. Respondent has not raised inability to pay as an issue and has provided no information in support of such a claim. Complainant's Exhibit 47a ¶37.d. Therefore, Complainant has not adjusted the penalty on the basis of Respondent's ability to pay. *Id.*

d. Penalty Calculation

In summary, Complainant has applied no adjustment for Respondent's history of violations, has applied a twenty five percent downward adjustment to the gravity component of the penalty based on certain good faith efforts Respondent made to comply with the LCC ban after EPA informed it of the violation, and has applied no adjustment based on other factors. In total, Complainant has applied a twenty five percent downward adjustment to the gravity component of the penalty. *See Figure 5* for Complainant's penalty calculation.

Figure 4 Penalty Calculation

Penalty	**=**	**[Economic Benefit]**	**+**	**[Adjusted Gravity]**
		where Economic Benefit = $4,317.98;		
		where Gravity = $172,176.51;		
		and where the gravity adjustment is a 25% reduction		
	=	**[$4,317.98]**	**+**	**[$172,176.51 + (- 0.25 x $172,176.51)]**
	=	**[$4,317.98]**	**+**	**[$129,132.38]**
Penalty	**=**	**$133,450.36**		

Conclusion

In consideration of the statutory factors at 42 U.S.C. § 300h-2(c)(4)(B) and for the reasons described above, Complainant has determined that $133,450 is an appropriate penalty for Respondent's violation of the SDWA. Complainant requests that the Presiding Officer assess a penalty in the amount of **$133,450** against Respondent.

Certificate of Service

The undersigned certifies that on the date indicated below this Statement of Proposed Penalty was served upon Respondent's attorney, who has 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: April 16, 2024

KIMBERLY WELLS

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Kimberly Wells
Assistant Regional Counsel
Office of Regional Counsel, EPA 9