

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

FILED
2011 OCT 11 PM 2:11
U.S. EPA REGION IX
REGIONAL HEARING CLERK

IN THE MATTER OF

GLACS, LLC,
Kailu-Kona, Hawaii
Respondent.

Proceedings under Section 1423(c)
of the Safe Drinking Water Act,
42 U.S.C. § 300h-2(c)

DOCKET NO. UIC-09-2011-0003

**MOTION FOR
RECONSIDERATION
or in the Alternative
REQUEST FOR INTERLOCUTORY
APPEAL**

I. Scope of the Motion

Complainant, United States Environmental Protection Agency, Region 9 (EPA), moves for reconsideration of the Regional Judicial Officer's (RJO) Order of September 29, 2011 denying approval of the proposed Consent Agreement and Final Order (CA/FO) for this matter. Complainant specifically seeks reconsideration of the determination that Complainant's 30-day public notice of the proposed CA/FO did not meet the requirements of 40 C.F.R. § 22.45(b)(1). Respondent has informed Complainant that it concurs with this motion.

If the motion for reconsideration is denied, Complainant requests in the alternative, pursuant to 40 C.F.R. § 22.29, that the Presiding Officer forward the Order to the Environmental Appeals Board (EAB) for review, together with the Presiding Officer's recommendation that the EAB accept the appeal to hear the arguments set forth below. This ruling will have a significant impact on longstanding public notice practices in Region 9, and may conflict with the practices of many other Regions. These public notice practices have broad application beyond Safe Drinking Water Act proceedings, as 40 C.F.R. § 22.45 is also applicable to proceedings under section 309(g) and 311 Clean Water Act. 40 C.F.R. § 22.45(a).

Complainant does not dispute the finding that the proposed settlement incorrectly stated the effective date of the CA/FO. Complainant and Respondent hereby request that the Presiding Officer strike the word "signed" at the end of paragraph 31 of the Consent Agreement, and replace it with the word "filed," consistent with the RJO's second ruling in the September 29, 2011 Order.

II. Background

The parties to this matter, EPA and GLACS, LLC, agreed to settle an enforcement action initiated pursuant to Section 1423(c) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(c), and executed a proposed CA/FO without the filing of a complaint, pursuant to the

quick resolution and settlement procedures of 40 C.F.R. §§ 22.13(b) and 22.18(b)(2). On August 17, 2011, Complainant filed the proposed CA/FO with the Regional Hearing Clerk and published public notice of the settlement and opportunity to comment. The notice stated that the public comment period would close on September 16, 2011, 30 days after publication. See Notice of Proposed Consent Agreement, included with Attachment 1 (Declaration of Julia A. Jackson) to the September 29, 2011 Order.

On September 19, 2011, after the Regional Hearing Clerk informed Complainant that no comments were received, Complainant submitted a motion for approval of the CA/FO, including issuance of the Final Order. On September 29, 2011, thirteen (13) days after the close of the public comment period, the RJO denied the motion, ordered the parties to execute a new CA/FO, and ordered Complainant to “comply with the forty (40) day public notice requirement under 40 C.F.R. § 22.45(b)(1).” The Order was served on September 30, 2011.

Complainant requests reconsideration of the September 29, 2011 Order on the grounds that there is no requirement for a 40-day public comment period under 40 C.F.R. § 22.45(b)(1) and that the 30-day public comment period which Complainant provided satisfies the regulatory requirements in 40 C.F.R. § 22.45(b)(1) and (c)(3).

III. Part 22 Does Not Require a 40-Day Public Comment Period for SDWA Section 1423(c) CA/FOs

The SDWA requires EPA to provide “public notice of, and reasonable opportunity to comment on” proposed administrative orders, but does not specify timeframes for notice and comment. 42 U.S.C. § 300h-2(c)(3)(B). More specific public notice requirements for proceedings under Section 1423(c) of the SDWA, as well as for proceedings under Sections 309(g) and 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. §§ 1319(g) and 1321(b)(6)(B)(ii), are found in the Consolidated Rules of Practice Governing the Administrative Assessment of Penalties and the Revocation/Termination or Suspension of Permits (the “CROP”), 40 C.F.R. Part 22.

Specifically, subsection 22.45 of the CROP establishes two timing requirements for public notice of proposed CA/FOs: (1) a period after publication of notice to give the public opportunity to comment; and (2) a 10-day period following the close of the public comment period for EPA to consider any comments before issuing a final order.

First, subsection 22.45(b)(1) provides:

Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided . . . in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

This subsection does not explicitly state the minimum amount of time a proposed CA/FO filed pursuant to § 22.13(b) must be open for public comment. Rather, it establishes the earliest date that a Final Order can be issued (40 days after the start of the comment period).

The logic of providing a 30-day public comment period under this provision becomes clear when it is read in conjunction with subsection 22.45(c)(3) which states:

No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), *until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.* (emphasis added)¹

Since 40 days is the minimum amount of time allowed between EPA's first publication of public notice and the issuance of a final order, 40 C.F.R. § 22.45(b)(1), and 10 days must elapse after the comment period closes, 40 C.F.R. § 22.45(c)(3), these sections can both be satisfied where there is a 30-day public comment period followed by another 10 days before issuance of the Final Order.²

IV. The Federal Register Notices of Rulemaking for Part 22 Shed Further Light on the 40-Day and 10-Day Requirements

In the Proposed Rulemaking for the present CROP, the Agency proposed to create expedited settlement procedures – Sections 22.13(b) and 22.18 – to allow for the simultaneous commencement and conclusion of a case through the filing of a CA/FO. 63 Fed. Reg. 9464, at 9485, 9486 (Feb. 25, 1998). At this time, EPA did not intend to permit this quick settlement procedure to be used for SDWA Section 1423(c) and CWA Section 309(g) and 311(b)(6) cases because the SDWA and CWA required EPA to provide public notice of the filing of a complaint. 63 Fed. Reg. at 9468, 9484. In the preamble to the proposed rule, EPA explained its concern about satisfying those public notice requirements:

The commenter rights provisions of section 309(g) and 311(b)(6) of the Clean Water Act, and section 1423(c) of the Safe Drinking Water Act do not permit resolution of a case until the public has had opportunity to comment on the complaint. Commenters could provide information indicating that the violations are more serious than indicated in the administrative complaint. In order to give meaning to the public comment requirements, and to allow EPA the opportunity to act upon any such comments before resolution of a case, a respondent would not be permitted to take advantage of the quick resolution provision in a commenter-eligible action until ten days after the period for public comment has closed.

63 Fed. Reg. at 9471.

¹ Subsection 22.45(c)(1) also does not specify a time period for public comment but refers back to subsection 22.45(b)(1).

² Subsection 22.18(a), 40 C.F.R. § 22.18(a), reinforces this interpretation. This section governs “quick resolution” cases in which a respondent concludes an action by paying the penalty set forth in a complaint or prehearing exchange. As with Section 22.13(b) CA/FOs, the “quick resolution” of a matter subject to section 22.45 “is not available until 10 days after the close of the comment period.” For these proceedings, EPA is required to publish notice within 30 days of filing the complaint. 40 C.F.R. § 22.45(b)(1).

For the final rule, however, EPA determined that Section 22.45 could address the statutory notice requirements of the SDWA and CWA, and revised Sections 22.13(b) and 22.45 to make clear that these administrative cases could be commenced and concluded through CA/FOs. See 64 Fed. Reg. 40138, at 40150, 40174-40175 (July 23, 1999). To ensure that the public would have a reasonable opportunity to comment on proposed penalty assessments, and that EPA would have sufficient time to consider any comments, the Agency promulgated the complimentary requirements of Section 22.45 that proceedings subject to public notice may not be resolved “until 10 days after the close of the comment period” (40 C.F.R. § 22.45(c)(3)), and that public notice of the proceedings be given “no less than 40 days before issuance of an order” (40 C.F.R. § 22.45(b)(1)).


In conclusion, neither the SDWA, nor the CROP, sets a specific minimum public comment period for complaints or proposed CA/FOs. Rather the CROP establishes a process in which at least 10 days of the 40-day period identified in 40 C.F.R. § 22.45(b)(1), must follow the close of the public comment period, 40 C.F.R. § 22.45(c)(3). The public notice provisions of the CROP work in harmony to ensure an adequate time for both public notice and consideration of any comments before a final order on a CA/FO is issued. In this case, the Region fully satisfied these requirements by supplying a 30-day public comment period and allowing more than ten days to pass before issuance of the final order on the CA/FO.

IV. Relief Sought

For the foregoing reasons, Complainant respectfully requests that the Presiding Officer:

- (1) Modify or withdraw the September 29, 2011 Order to find that the original public notice of this matter was sufficient;
- (2) Strike the word “signed” at the end of paragraph 31 of the Consent Agreement, and replace it with the word “filed;” and
- (3) Issue the attached Final Order for the corrected CA/FO.

Respectfully submitted,


Brett P. Moffatt
Assistant Regional Counsel



Re: RJO Monthly Conference Call , December 8, 2011 - 11:30 EST 

Steven Jawgiel to: Elyana Sutin

12/07/2011 02:57 PM

Elyana Sutin, ferrara.helen, Jill Metcalf, Joann Asami, Karina
Cc: Borromeo, Leann Jensen, Patrick Rankin, Renee Sarajian, Robert
Patrick, Susan Schub, Thomas Jahnke

Hello everyone.

I would like to seek your advice on the interpretation of 40 CFR 22.45(b)(1). I have a matter before me in which EPA and the respondent settled an enforcement action pursuant to Section 1423(c) of the Safe Drinking Water Act, 42 USC 300h-2c, and executed a proposed CA/FO without filing a complaint. The parties filed a proposed CA/FO and other documents to show compliance with the notice requirements under 40 CFR 22.45(b)(1). Based on my interpretation of 40 CFR 22.45(b)(1), I concluded that the Agency was required to hold the public notice period open for 40 days. I denied the proposed CA/FO because the record clearly demonstrated that the Agency only held the public notice period open for 30 days. The Agency filed a motion for reconsideration arguing that 40 CFR 22.45(b)(1) does not require a 40 public notice period. Instead, the Agency holds that 40 CFR 22.45(b)(1) does not specify the duration of the public comment period, rather it states that the earliest date a Final Order may be issued is 40 days after the start of the comment period. The Agency goes on to argue that it met the requirements of 40 CFR 22.45(b)(1) because it held the public comment period open for 30 days and then more than 10 days lapsed after the close of the comment period before the matter came to me for consideration. The Agency argues that my Final Order would not have been issued less than the 40 days after the start of the comment period. As the Agency points out in its motion, its interpretation seems consistent with the language of 40 CFR 22.18(a) - Quick Resolution. Rethinking my position, I tend to agree but thought I would see what all of you think???

Thanks! Look forward to touching base with everyone tomorrow.

Steven L. Jawgiel
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Elyana Sutin

Hi Everyone- Just a reminder that we are havin...

12/05/2011 02:27:01 PM

From: Elyana Sutin/R8/USEPA/US
To: Karina Borromeo/CNSL/R7/USEPA/US@EPA, Patrick Rankin/R6/USEPA/US@EPA, Renee Sarajian/R3/USEPA/US@EPA, Susan Schub/R4/USEPA/US@EPA, Marcy Toney/R5/USEPA/US@EPA, Robert Patrick/CNSL/R7/USEPA/US@EPA, Elyana Sutin/ENF/R8/USEPA/US@EPA, ferrara.helen@epa.gov, Joann Asami/R9/USEPA/US@EPA, Steven Jawgiel/R9/USEPA/US@EPA, Jill Metcalf/R1/USEPA/US@EPA, Leann Jensen/R1/USEPA/US@EPA, Thomas Jahnke/R10/USEPA/US@EPA
Date: 12/05/2011 02:27 PM
Subject: RJO Monthly Conference Call, December 8, 2011 - 11:30 EST

Hi Everyone-

Just a reminder that we are having our November/December call this Thursday.

The call-in number is (866) 299-3188. Access Code 303 312 6899#.

At the tone, please state your name and hit the # sign. If you call in before the leader, you will hear only music until the call is established. If you need operator assistance, please hit 00. The Main Line is (202) 384-1330 and the Trouble Line is (202) 384-1333.

Please let me know if you have any agenda items .

Elyana
Elyana R. Sutin
Regional Judicial Officer
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF

GLACS, LLC,
Kailua-Kona, HI

Proceedings under Section 1423(c)
of the Safe Drinking Water Act,
42 U.S.C. § 300h-2(c)

DOCKET NO. UIC-09-2011-0003

FINAL ORDER

The United States Environmental Protection Agency Region IX ("EPA"), and GLACS, LLC ("Respondent"), having entered into the foregoing Consent Agreement, and EPA having duly publicly noticed the Stipulations and Findings and proposed Final Order regarding the matters alleged therein,

IT IS HEREBY ORDERED THAT:

1. The foregoing Consent Agreement and this Final Order (Docket No. UIC-09-2011-0003) be entered; and
2. Respondent shall comply with the requirements set forth in the Consent Agreement and Final Order, which shall become final and effective on the date it is filed.

Steven Jawgiel
Presiding Officer
U.S. Environmental Protection Agency
Region 9

Date: _____

CERTIFICATE OF SERVICE

In the Matter of GLACS, LLC,
Docket No. UIC-09-2011-0003

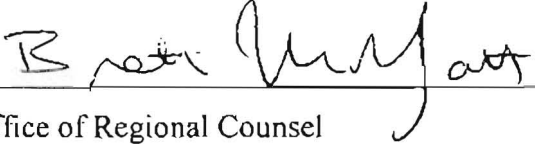
I hereby certify that the foregoing **MOTION FOR RECONSIDERATION or ing the Alternative REQUEST FOR INTERLOCUTORY APPEAL** was filed with the Regional Hearing Clerk for EPA Region IX, and that a copy was sent by electronic mail, and a copy by regular mail, to the address listed below:

Patricia J. McHenry, Esq.
Cades Schutte LLP
1000 Bishop Street, 12th Floor
Honolulu, HI 96813
email: pmchenry@cades.com

and a copy was retained by:

Brett Moffatt
Asst. Regional Counsel (ORC-2)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Dated October 11, 2011, San Francisco, California



Office of Regional Counsel