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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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U.S. EPA, REGION IX
REGIONAL HEARING CLERK

IN THE MATTER OF MAUNA LOA MACADAMIA NUT CO. (a subsidiary of The Hershey Company) HILO, HAWAII Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)	DOCKET NO. UIC-09-2007-0001 **MAUNA LOA MACADAMIA NUT CO.'S ANSWER TO FINDINGS AND PROPOSED ADMINISTRATIVE ORDER WITH ADMINISTRATIVE CIVIL PENALTY** **HEARING REQUESTED**

Respondent Mauna Loa Macadamia Nut Co. ("Mauna Loa" or the "Company") hereby responds to the Findings and Proposed Administrative Order with Administrative Civil Penalty ("Findings") issued by the United State Environmental Protection Agency ("EPA") and makes its request for hearing.

PRELIMINARY STATEMENT

This case concerns Mauna Loa's closure of three "large capacity cesspools," as defined at 40 C.F.R. section 144.81(2), at its macadamia nut processing facility in Hilo, Hawaii. Despite their many years of operation without any evidence of risks of harm to public health or the environment, Mauna Loa closed these three large capacity cesspools to comply with the Safe Drinking Water Act ("SDWA" or "Act"), 42 U.S.C. § 300h, and the Underground Injection Control ("UIC") regulations promulgated pursuant to the Act at 40 C.F.R. Part 144. Since closure of the three large capacity cesspools was not completed by the deadline in the regulations, Mauna Loa has not asserted and does not assert an absolute defense here based on timely compliance with the UIC large cesspool closure regulations.

However, Mauna Loa does contend that EPA's effort in seeking a maximum administrative penalty is inappropriate and unjustified. In addition to completing the closure of the three large capacity cesspools before this enforcement action was filed, Mauna Loa voluntarily closed five additional smaller cesspools at the Hilo facility at considerable expense. Closure of these five cesspools was not required by the UIC regulations and resulted in added environmental benefit. In the course of the closure process, Mauna Loa closely cooperated in good faith with EPA and State of Hawaii representatives, soliciting and relying on their feedback and direction as it developed and implemented its cesspool closure plan. The authorities who gave Mauna Loa positive feedback—and otherwise remained silent until the closure process was virtually

complete— were well aware of the scope and schedule for Mauna Loa's closure program and the infeasibility of affecting immediate compliance.

Moreover, the circumstances and timing surrounding cesspool closure at Mauna Loa were virtually identical in nature to those routinely experienced by numerous other regulated entities in Hawaii, a state that had been dependent on the use of cesspools for many years. EPA has a considerable enforcement record against other Hawaiian entities with respect to UIC large cesspool closure regulations, including federal and Hawaii state agencies. In fact, despite their noncompliance, EPA has provided financial support to entities that were unable to timely comply with the UIC regulations and that will not be in compliance for many months to come. EPA's enforcement history establishes that its current demand for the statutory maximum penalty is neither justifiable nor equitable in this instance.

In short, given the entirety of the circumstances, Mauna Loa asserts that the maximum penalty proposed by EPA here is exorbitant, inequitable and does not serve the interests of deterrence, remediation of environmental harm, or justice.

DISPUTED FACTS

For purposes of this proceeding, Mauna Loa is willing to admit nearly all of the operative facts alleged in the Findings, as specifically set forth below. Mauna Loa contends, however, that EPA's assertion in paragraph eight of the Findings, that Mauna Loa operated three large capacity cesspools at its Hilo facility until August 2007, is factually incorrect. Mauna Loa closed two of its three large capacity cesspools on July 18, 2007 and closed its remaining large capacity cesspool (along with five others not subject to the closure requirement) by August 20, 2007.

STATUTORY AND REGULATORY BACKGROUND

(Response to paragraphs one through six of the Findings)

1. Responding to paragraphs one through six of the Findings, the allegations in those paragraphs contain legal assertions that do not require a response. Mauna Loa does not contest that it is subject to the laws cited in these paragraphs but notes that EPA has not always fully or accurately quoted the relevant language in the statutory provisions at issue.

FINDINGS OF VIOLATION

(Response to paragraphs seven through sixteen of the Findings)

2. Responding to paragraph seven of the Findings, Mauna Loa admits that it is a corporation and a "person" within the meaning of Section 1410(12) of the SDWA and its implementing regulations.

3. Responding to paragraph eight of the Findings, Mauna Loa admits that it is a wholly-owned subsidiary of The Hershey Company and that it owns and operates a nut processing plant in Hilo, Hawaii. Mauna Loa further admits that it owned and operated three large capacity cesspools in compliance with all laws at its Hilo facility from some

time prior to April 5, 2005. Mauna Loa admits that it was in operation of three large capacity cesspools at its Hilo facility through July 18, 2007. Two of those cesspools were closed in accordance with plans approved by the EPA and Hawaii Department of Health ("HDOH") on July 18, 2007. Mauna Loa operated the remaining large capacity cesspool until its closure on August 20, 2007.

4. Responding to paragraph nine of the Findings, Mauna Loa admits that it was not owned by The Hershey Company on July 6, 2004. Following The Hershey Company's acquisition of Mauna Loa in January 2005, Mauna Loa became a wholly-owned subsidiary of The Hershey Company. To the extent any additional response is required, Mauna Loa lacks information regarding the truth of the remaining allegations in paragraph nine, and on that basis cannot admit or deny the allegations regarding EPA's July 6, 2004 communication.

5. Responding to paragraph ten of the Findings, Mauna Loa admits that an inspector acting on EPA's behalf visited Mauna Loa's facility on October 5, 2005. Mauna Loa further admits that the inspector did not request any written documentation of specific closure plans for the cesspools, or conceptual designs for an alternative wastewater system. Mauna Loa avers, however, that the inspector made representations on behalf of EPA that he was pleased with existing closure plans, and he did not express any concerns regarding Mauna Loa's closure schedule. To the extent any additional response is required, Mauna Loa lacks information regarding the truth of the allegations contained in paragraph ten, and on that basis cannot admit or deny the allegations regarding the inspector's report.

6. Responding to paragraph eleven of the Findings, Mauna Loa admits that on February 3, 2006, EPA sent Mauna Loa a request for information regarding the facility's cesspools. Mauna Loa further admits that it replied to the request on March 8, 2006, confirming that it owned and operated three cesspools which served more than 20 people per day.

7. Responding to paragraph twelve of the Findings, Mauna Loa does not contest that EPA likely inspected its facility on August 25, 2006, or that the three large capacity cesspools were in operation on that date, but otherwise lacks information regarding the truth of the allegations contained in paragraph twelve, and on that basis cannot admit or deny them.

8. Responding to paragraph thirteen of the Findings, Mauna Loa admits that an environmental consultant retained by Mauna Loa notified EPA by letter on September 18, 2006, that the HDOH had approved Mauna Loa's conceptual design for a wastewater treatment system to replace the three large capacity cesspools. Mauna Loa further admits that on October 10, 2006, EPA notified Mauna Loa that it did not have comments on the conceptual plan, and that EPA requested information on the construction schedule. Mauna Loa further admits that its plans included the closure of the three large capacity cesspools, as well as voluntary closure of five other unregulated cesspools. Mauna Loa specifically avers that neither EPA nor HDOH voiced concern with its proposed construction plans or schedule prior to June 2007 when it was approaching the end of its cesspool closure process and was contacted by EPA concerning a potential enforcement action and settlement.

9. Responding to paragraph fourteen of the Findings, Mauna Loa admits that HDOH confirmed in an August 28, 2007 letter to the company that the cesspools had been properly closed. Mauna Loa again avers that two of the large capacity cesspools were closed as of July 18, 2007, and the remaining large capacity cesspool was closed on August 20, 2007.

10. Responding to paragraph fifteen of the Findings, Mauna Loa admits that the large capacity cesspools continued in operation beyond April 5, 2005, and further avers that two of the large capacity cesspools were closed as of July 18, 2007, and the remaining cesspool was closed on August 20, 2007. The remaining allegations in paragraph 15 are legal assertions and do not require a response.

11. Responding to paragraph sixteen of the Findings, the allegations in this paragraph contain legal assertions that do not require a response. Mauna Loa does not contest EPA's authority to regulate the large capacity cesspools at issue, or to enforce the SDWA, but does contest EPA's proposed penalty assessment.

PROPOSED ADMINISTRATIVE ORDER
WITH ADMINISTRATIVE CIVIL PENALTY

(Response to paragraphs seventeen through thirty-eight of the Findings)

12. Responding to paragraph seventeen of the Findings, the proposed penalty of $157,500 is the maximum penalty that can be assessed under the SDWA. With the exceptions set forth above, Mauna Loa does not dispute the operative facts alleged by EPA. However, Mauna Loa contends that the facts and applicable law do not support a maximum penalty here. Mauna Loa further contends that the proposed penalty amount is grossly excessive, inequitable, and inappropriate. The remaining allegations in paragraph 17 contain legal assertions that do not require a response.

13. Responding to paragraph eighteen of the Findings, Mauna Loa contends that application of the penalty factors under the SDWA does not support the assessment of the maximum penalty and avers that such a penalty here would be inappropriate, unjust, and highly inequitable relative to EPA's prior treatment of others with respect to enforcement of the UIC closure regulations. The remaining allegations in paragraph eighteen contain legal assertions that do not require a response.

14. Responding to paragraphs nineteen through twenty-eight of the Findings, these paragraphs contain legal assertions that do not require a response.

15. Responding to paragraphs twenty-nine through thirty-three of the Findings, Mauna Loa declines to request an informal settlement conference as Mauna Loa, through counsel, has already conferred with EPA on multiple occasions over the past four months in a good faith attempt to resolve this matter. Mauna Loa has offered to pay an equitable penalty for its failure to close the three cesspools prior to April 5, 2005, and has provided an extensive discussion concerning the rationale therefor. While its preference remains a

reasonable and just settlement, Mauna Loa believes that, based on EPA's prior responses, further attempts at informal resolution may not be productive. The remaining allegations in these paragraphs are legal assertions that do not require a response.

16. Responding to paragraphs thirty-four through thirty-eight of the Findings, the allegations in these paragraphs contain legal assertions that do not require a response.

DEFENSES AND BASIS FOR REDUCTION OF PROPOSED MAXIMUM PENALTY

Other than with respect to the discrete factual dispute set forth above regarding the exact timing of the cesspool closure, Mauna Loa does not seek to raise a defense to liability for its failure to close the cesspools before April 5, 2005. For purposes of an assessment of appropriate penalties, however, Mauna Loa contends that the following information and defenses are highly relevant, and that they further demonstrate that a substantial reduction from the sought-after proposed maximum penalty is appropriate.

17. Paragraphs two through eleven above are hereby incorporated by reference as if the same were set forth herein in full.

18. The SDWA, 42 U.S.C. § 300h-2(c)(4), directs EPA to weigh several factors to assess the appropriate penalty for a violation, including:

    (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.

19. EPA has not alleged, and the evidence does not show, any harm or contamination or proximate or reasonable risk or harm or contamination resulting from the now-inoperative cesspools at Mauna Loa's Hilo facility. EPA confirmed in a Federal Register notice on June 7, 2002 that Class V wells had *not* been shown to contaminate drinking water sources and that its UIC regulations were issued to address potential contamination only (67 Fed. Reg. 39,584). In this regard, Mauna Loa further avers that the type of units involved here lie above the water table and hence are "drywell" cesspools, as defined in the regulations.

20. Mauna Loa worked in good faith with EPA and HDOH to close its cesspools. The Company cooperated with the agencies and sought their feedback and oversight in the review, scheduling, and approval of its closure plans.

21. On May 29, 2007, Mauna Loa learned that a shipment of certain pump system control panels from the mainland was delayed. The shipment delay caused the final closure date on one of the three large cesspools to be extended from July to August 2007. Mauna Loa

promptly notified EPA of the changed circumstances and reasons therefor. EPA did not respond to Mauna Loa's notification regarding the delay.

22. Through its affirmative actions during inspection activities at Mauna Loa and consistent with its other communications with the Company prior to June 2007 (at the tail end of the closure process when it first raised the prospect of enforcement action), EPA caused Mauna Loa to reasonably believe it was acting appropriately.

23. All of the cesspools at Mauna Loa's Hilo facility are now closed and the Findings were not even issued until weeks following the reporting of the completion of the closure process. This enforcement action therefore serves no injunctive or remedial purposes and is completely unnecessary to ensure compliance. There have been no reports of drinking water contamination or a risk of contamination from any Mauna Loa cesspools at any time.

24. Mauna Loa has voluntarily gone well beyond the regulatory requirements and incurred considerable additional expense and effort to close five smaller cesspools not subject to the UIC regulations. All of these cesspools were closed during July and August of 2007.

25. Any economic benefit to Mauna Loa from its failure to close the cesspools before the regulatory deadline is marginal at most. In addressing a total of eight cesspools Mauna Loa incurred approximately $750,000 in expense on the closure project. The Company's voluntary closure of five cesspools not subject to the regulation should not be held against it in a penalty calculation; nor should a penalty calculation cover the time period under which Mauna Loa implemented its closure plan after EPA provided its tacit consent to the proposed construction/compliance schedule.

26. Mauna Loa has no prior violations under the SDWA.

27. EPA has discretion to assess administrative penalties in accordance with the agency's programmatic goals.

28. EPA issued the "UIC Program Judicial and Administrative Order Settlement Penalty Policy" in 1993. The Policy identifies three objectives for an appropriate penalty:

> First, it should deter violations of the law by placing the violator in a worse position financially than those who have complied in a timely fashion. Secondly, there must be fair and equitable treatment of the regulated community. Therefore, the penalty should be consistent with the Agency's penalty policy and promote a more consistent approach to the assessment of civil judicial penalties, allowing for factors unique to the UIC program. Thirdly, the penalty should result in expeditious resolution of the identified problems.

29. EPA has previously acknowledged the unique circumstances faced by the regulated community in Hawaii and has stated: "Cesspools are used more widely in Hawaii than in any other state .... The EPA has discretion on its enforcement actions and may take into consideration actions and progress toward meeting the deadline."

30. Mauna Loa is entitled to fair and equitable treatment, and any penalty should reflect the prevailing norm in the Hawaii regulated community. EPA has routinely settled cases with other public and private operators of significantly higher numbers of large capacity cesspools in Hawaii for zero penalties or only nominal penalties. Additionally, these settlements have often specified later compliance deadlines than Mauna Loa has already met.

PROPOSED ADMINISTRATIVE ORDER

WHEREFORE, Mauna Loa respectfully requests that the Presiding Officer enter an order as follows:

(1) Declining to adopt EPA's proposed penalty of $157,500; and

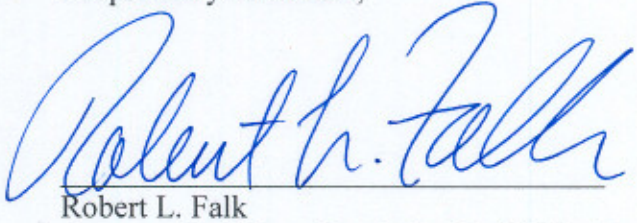
(2) Assessing a reasonable and equitable civil penalty, if any, in accordance with the undisputed facts and a fair application of the appropriate penalty factors.

REQUEST FOR HEARING

Mauna Loa hereby requests a formal hearing in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

Dated: October 23, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482; I am not a party to the within cause; I am over the age of eighteen years; and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited in a box or other facility regularly maintained by UPS or delivered to an authorized courier or driver authorized by UPS to receive documents on the same date that it is placed at Morrison & Foerster for collection.

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MAUNA LOA MACADAMIA NUT CO.'S ANSWER TO FINDINGS AND PROPOSED ADMINISTRATIVE ORDER WITH ADMINISTRATIVE CIVIL PENALTY

on the following by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows for collection by UPS at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482, in accordance with Morrison & Foerster's ordinary business practice.

Brett Moffatt
Office of Regional Counsel (ORC-2)
U.S. Environmental Protection Agency, Region IX
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San Francisco, California 94105

I declare under penalty of perjury that the above is true and correct.

Executed at San Francisco, California, this 23rd day of October, 2007.

Valerie Carter
(typed)

Valerie Carter
(signature)