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EPA--REGION 10

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

ESSENTIAL OIL RESEARCH FARM, LLC,
d/b/a YOUNG LIVING LAVENDER FARMS

St. Maries, Idaho

Respondent.

DOCKET NO. SDWA-10-2015-0021

**COMPLAINANT'S RESPONSE TO
ORDER TO SHOW CAUSE**

**COMPLAINANT'S UNOPPOSED
MOTION FOR EXTENSION OF TIME
AND FOR LEAVE TO AMEND THE
CONSENT AGREEMENT AND FINAL
ORDER**

COMPLAINANT'S RESPONSE TO ORDER TO SHOW CAUSE

On December 31, 2014, the Regional Judicial Officer ("RJO") for the United States Environmental Protection Agency, Region 10 ("EPA"), issued an order entitled "Order to Show Cause" ("Order") requiring Complainant to demonstrate on or before January 30, 2015, how the proposed Consent Agreement and Final Order ("CAFO") is consistent 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 ("Part 22 Rules"), and therefore, should be approved.

In response to the Order, Complainant respectfully requests an extension of time to address two issues identified by the RJO, as detailed below. Complainant also explains how the proposed CAFO, as amended, is consistent with the Part 22 Rules and therefore should be approved. Complainant has been in contact with Respondent, Essential Oil Research Farm,

LLC, dba Young Living Lavender Farms, and Respondent has represented that it will stipulate to the extension of time and modification of the CAFO by a separate filing, to be filed on or before January 30, 2015.

If the RJO approves the unopposed Motion for an Extension of Time, Complainant will revise the public notice and the original CAFO as explained below, reinstate the public comment period and file the amended CAFO with the RJO.

COMPLAINANT'S UNOPPOSED MOTION FOR EXTENSION OF TIME AND FOR LEAVE TO AMEND THE CONSENT AGREEMENT AND FINAL ORDER

Complainant respectfully requests a postponement in the proceedings of 60 days, during which time Complainant will publish a correction to the public notice. In the Order, the RJO observed that the original public notice incorrectly stated the proposed penalty amount. EPA agrees that the notice should have stated "up to a total amount of \$27,440," instead of the \$25,920 amount listed in the public notice. In addition, the public notice cited both Sections 1423(c) and 1447(b) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h-2(c) and 300j-6(b). Complainant agrees that only the former reference should have been included. If the RJO grants the requested 60 day postponement, Complainant intends to publish a correction to the public notice no later than 20 days from the date of the RJO's decision.

Complainant also respectfully requests leave to amend the proposed CAFO, pursuant to Rules 22.14(c) and 22.16 of the Part 22 Rules. 40 C.F.R. §§ 22.14(c), 22.16. In response to the RJO's Order, Complainant respectfully requests leave to amend the Compliance Order within the proposed CAFO to add a new subparagraph after subparagraph 5.17.5, which will require Respondent to provide analytic results from the end-sample to EPA no later than 20 weeks after the date the Final Order becomes effective.

If the proposed extension of time requested above is granted by the RJO, Complainant proposes to publish the proposed amended CAFO for public comment and then submit the proposed amended CAFO to the RJO within the requested 60-day extension.

CONSISTENCY WITH THE PART 22 RULES

The RJO has asked Complainant to explain how the proposed CAFO satisfies the requirements for consent agreements under the Part 22 Rules. The Part 22 Rules allow the parties to settle the matter before the filing of a complaint pursuant to Rule 22.13(b), as long as the consent agreement contains the elements described at Rule 22.14(a)(1)-(3) and (8), as follows:

§ 22.14 Complaint.

- (a) Content of complaint. Each complaint shall include:
- (1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;
 - (2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;
 - (3) A concise statement of the factual basis for each violation alleged; ...
 - (8) Instructions for paying penalties, if applicable.

As described below, Complainant's amended CAFO contains all the above elements.

§ 22.14(a)(1): A statement reciting the section(s) of the Act authorizing the issuance of the complaint

Part II of the CAFO contains the recital of the sections of the SDWA that authorize the issuance of the CAFO. The proposed CAFO would be issued under Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c). CAFO at ¶ 2.1. As such, Complainant believes the proposed CAFO is consistent with Rule 22.14(a)(1).

As the underground injection at issue here does not involve oil or natural gas production or recovery, Complainant's action relies on Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), which authorizes the issuance of civil penalties, or compliance orders, or both, for violations of the Underground Injection Control ("UIC") regulations, as follows:

SDWA § 1423(c) Administrative Orders¹

- (1) In any case in which the Administrator is authorized to bring a civil action under this section with respect to any regulation or other requirement of this Part ... the Administrator may also issue an order under this subsection either assessing a civil penalty of not more than \$10,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of \$125,000, or requiring compliance with such regulation or other requirement, or both.

In respect to this case, the compliance order which requires Respondent to investigate the injection well, and possibly to close the injection well, is authorized under Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c).²

As the penalty authority and compliance order authority are located in Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c), which is identified in the proposed CAFO along with the relevant delegations of authority, Complainant believes the proposed CAFO is consistent with Rule 22.14(a)(1).

¹ The Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. part 19, adjusts the maximum civil penalty under SDWA § 1423(c)(a), 42 U.S.C. § 300h-2(c)(1). For example, EPA may assess a civil penalty of not more than \$16,000 for each day of each violation, up to a maximum penalty of \$187,500, for violations which occur after December 6, 2013.

² EPA could also require these same activities through its implementing regulations. The investigation portion of the Compliance Order could cite the implementing regulations at 40 C.F.R. § 144.17, in which EPA may require "an owner or operator of an injection well to establish and maintain records, make reports, conduct monitoring, and provide other information as is deemed necessary to determine whether the owner or operator has acted or is acting in compliance with Part C of the SDWA or its implementing regulations." The closure portion of the Compliance Order could cite the implementing regulations at 40 C.F.R. § 144.12(c)(2), in which EPA may "order the injector to take such actions (including, where required, closure of the injection well) as may be necessary to prevent the violation."

§ 22.14(a)(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated

Part III of the proposed CAFO contains the specific references to the UIC regulations that Respondent is alleged to have violated. CAFO at ¶¶ 3.12, 3.16, and 3.21. Complainant has stated a sufficient factual basis, with reference to relevant statutory and regulatory provisions, to allege that Respondent is liable for the alleged violations set out in the Consent Agreement. As such, Complainant believes the proposed CAFO is consistent with Rule 22.14(a)(2).

The RJO inquired as to whether Counts 2 and 3 are alleged violations, or potential violations that would require further investigation. In the proposed CAFO, Complainant is alleging violations of the SDWA. Complainant can allege violations for Counts 2 and 3 in this case without the presence of any contamination, so the investigation work is not necessary for establishing liability. Complainant is requiring additional investigation for purposes of determining the appropriate penalty amount. The additional investigation is not used for determining liability, just for determining the appropriate penalty.

Injection wells under the UIC regulations are defined by whether fluids are injected into the well, not whether fluids from the injection well are injected into the subsurface. *See* 40 C.F.R. § 144.3 at “injection well.” The SDWA prohibits owners and operators from injecting into a well if that injection *may* introduce any contaminant into an Underground Source of Drinking Water (“USDW”) which *may* result in any public water system not complying with any national primary drinking water regulation, or otherwise adversely affect the health of persons. *See* 42 U.S.C. § 300h (emphasis added). As a result, endangerment to USDWs can exist without contaminants entering the drinking water source, and EPA is authorized to take enforcement

actions against facilities where operation of an injection well creates an unacceptable degree of risk of contamination to a USDW.

Furthermore, almost all settlements that occur prior to a hearing will involve resolution of potential violations because a trier of fact has not decided on the validity of the alleged violations. The Part 22 Rules recognize this in Rule 22.18(b)(2) by allowing respondents to neither admit nor deny the specific factual allegations contained in the complaint. Courts have also recognized that EPA can settle potential violations through consent agreements. *See, e.g., In the matter of: Advance Auto Parts, Inc., et al.*, 2004 EPA App. LEXIS 46 (EAB, 2004); *In re: Consent Agreement and Proposed Final Orders for Animal Feeding Operations*, 2006 EPA App. LEXIS 11 (EAB, 2006). *See also*, *United States v. Chevron U.S.A. Inc.*, 380 F. Supp. 2d 1104.

For the above reasons, Complainant believes that the proposed CAFO is consistent with Rule 22.14(a)(2).

§ 22.14(a)(3) A concise statement of the factual basis for each violation alleged

The concise statement of the factual basis for each violation alleged is found in Part III of the proposed CAFO. Based upon the details within the allegations in Part III of the proposed CAFO, Complainant believes the proposed CAFO is consistent with Rule 22.14(a)(3).

§ 22.14(a)(8) Instructions for paying penalties, if applicable

Instructions for paying and the time for paying the civil penalty are contained within Part IV of the proposed CAFO. CAFO at ¶¶ 4.3-4.8. As stated in more detail above, Complainant has requested permission to amend the Compliance Order within the proposed CAFO in a manner that provides additional certainty to the date by which analytic results would be delivered to EPA. The proposed change to the terms of the Compliance Order would provide additional certainty as to the last date by which payment for Violation 2 and Violation 3 would be paid.

CAFO at ¶¶ 4.6 and 5.18. As such, Complainant submits that if leave to amend is granted, the proposed amended CAFO will be consistent with Rule 22.14(a)(8).

In the proposed amended CAFO, the analytic results are used for determining the amount of the penalty for Counts 2 and 3. The presence of contamination is not required to determine a violation occurred, but the degree of contamination is relevant for determining the appropriate penalty for the violation. *See* 42 U.S.C. § 300h-2(c)(4)(B). As a result, the proposed amount for the penalties for Counts 2 and 3 was based upon the degree of contamination, or lack thereof, found during execution of the Compliance Order.

The Part 22 Rules do not contain explicit restrictions upon how the civil penalty is stated within a consent agreement other than that the respondent must consent to the assessment of the stated civil penalty. Although complaints must include a description of all relief sought, such as the amount of the civil penalty which is proposed to be assessed, the Part 22 Rules explicitly exclude Rule 22.14(a)(4) from the requirements that consent agreements need to meet. 40 C.F.R. §§ 22.14(a)(4) and 22.18(b)(2).

As stated by the Environmental Appeals Board (“EAB”), “the level of specificity in a complaint required in the adversarial context is not necessarily the level needed in the context of a consent agreement. ... [I]n the adversarial context, respondents need sufficient information to be able to answer the complaint. An inadequate complaint in an adversarial proceeding may not provide adequate notice of the violation and therefore impair a respondent’s ability to formulate a defense. This, however, is not a concern in the context of a consent agreement, for no answer is required and all the parties are expected to know and understand the allegations and the terms of the agreement to which they voluntarily give consent.” *See In re: Consent Agreement and Proposed Final Orders for Animal Feeding Operations*, 2006 EPA App. LEXIS 11 (EAB, 2006).

Complainant believes the proposed penalty is consistent with Rule 22.14(a)(8), and that nothing in the Part 22 Rules or the SDWA prohibit the penalty structure within the proposed Consent Agreement. In fact, the Part 22 Rules allow for a wide range of penalty provisions in consent agreements. For example, the EAB found that the Part 22 Rules do not prohibit a consent agreement in which the amount of penalty was determined by a formula dependent upon the number of farms and the total number of animals at each farm. *See* 70 Fed. Reg. 4958, 4966. *See also, In re: Consent Agreements and Proposed Final Orders for Animal Feeding Operations*, 2006 EPA App. LEXIS 11. Similarly, the Part 22 Rules do not prohibit consent agreements that include Supplemental Environmental Projects (“SEPs”) as part of the penalty. In cases with SEPs, the penalty can vary depending on the work performed. As nothing in the Part 22 Rules or the SDWA prohibit the penalty framework expressed within the proposed Consent Agreement, Complainant believes the proposed amended CAFO is consistent with Rule 22.14(a)(8).

If leave to amend the CAFO is granted as requested above, Complainant believes that the proposed amended CAFO will be consistent with Rule 22.14(a)(1)-(3) and (8).

Conclusion

If leave to amend the CAFO is granted, as respectfully requested above, Complainant submits that the proposed amended CAFO will be consistent with the Part 22 Rules. For the reasons cited above, Complainant respectfully requests additional time to file the amended CAFO and reinitiate public notice. Respondent has consented to Complainant’s request for an extension of time in order to publish a corrected public notice. In addition, after consultation, Respondent has stipulated to the proposed amendments to the CAFO, as reflected by Respondent’s concurrent response to the Order. Respondent does not disagree with the other portions of this Response.

Complainant's Counsel may be contacted by phone at (206) 553-2723, by email at bellovary.chris@epa.gov, or by mail at Christopher W. Bellovary, EPA Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158, Seattle, Washington 98101.

Respectfully submitted this 30th day of January, 2015.



Christopher W. Bellovary
COUNSEL FOR COMPLAINANT
U.S. Environmental Protection Agency, Region 10

Certificate of Service

The undersigned certifies that the original of the attached **COMPLAINANT'S RESPONSE TO ORDER TO SHOW CAUSE; COMPLAINANT'S UNOPPOSED MOTION FOR EXTENSION OF TIME AND FOR LEAVE TO AMEND THE CONSENT AGREEMENT AND FINAL ORDER, In the Matter of Essential Oil Research Farm, LLC, d/b/a Young Living Lavender Farms, Docket No.: SDWA-10-2015-0021**, was sent to the email addressee in the following manner on the date specified below:

The undersigned certifies that a PDF copy of the following document, 2015-01-30 Motion Responding to Order to Show Cause.pdf, was emailed to:

Linda B. Jones, Esquire
ljones@hollandhart.com

Respectfully submitted this 30th day of January, 2015.



Christopher W. Bellovary
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U.S. Environmental Protection Agency, Region 10

