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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

2007 SEP 27 PM 1:31

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

FINDINGS AND PROPOSED
ADMINISTRATIVE ORDER WITH
ADMINISTRATIVE CIVIL PENALTY

AUTHORITY

The following findings are made and Order issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 1423(c) of the Safe Drinking Water Act ("SDWA" or "the Act"), 42 U.S.C. § 300h-2(c). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IX. The Regional Administrator in turn has delegated these authorities to the Director of the Water Division for EPA Region IX. This Order is issued in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (hereinafter "Part 22"; enclosed).

STATUTORY AND REGULATORY BACKGROUND

1. Pursuant to Part C of the Act, 42 U.S.C. §§ 300h - 300(h)-8, EPA has promulgated regulations establishing minimum requirements for Underground Injection Control ("UIC") programs, to prevent underground injection which endangers drinking water sources. These regulations are set forth in 40 C.F.R. Part 144.
2. "Underground injection" means the subsurface emplacement of fluids by well injection. 42 U.S.C. § 300h(d)(1), 40 C.F.R. § 144.3.
3. 40 C.F.R. § 144.3 defines a "well" as "a subsurface fluid distribution system" and "well injection" as "the subsurface emplacement of fluids through a well."
4. Pursuant to 40 C.F.R. § 144.88, existing large capacity cesspools were required to be closed no later than April 5, 2005. "Large capacity cesspools" include "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.” 40 C.F.R. § 144.81(2). Large capacity cesspools do not include single family residential cesspools or non-residential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day. Id. A “cesspool,” is a “drywell,” which in turn is a “well,” as those terms are defined in 40 C.F.R. § 144.3.

5. Pursuant to Section 1422(c) of the Act, 42 U.S.C. § 300h-1(c), and 40 C.F.R. Part 147 Subpart M, § 147.601, EPA administers the UIC program in the State of Hawaii. This UIC program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M) and 148.

6. Pursuant to Section 1423(c) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. § 19.4, EPA may issue an order assessing an administrative civil penalty of not more than \$11,000 for each day of each violation, up to a maximum penalty of \$157,500, or requiring compliance, against any person who violates the Act or any requirement of an applicable UIC program. In assessing a penalty for such violations, EPA must take into account: (1) the seriousness of the violations; (2) the economic benefit resulting from the violations; (3) the history of such violations; (4) any good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) such other matters as justice may require. 42 U.S.C. § 300h-2(c)(4)(B).

FINDINGS OF VIOLATION

7. The Respondent, Mauna Loa Macadamia Nut Corporation (“MLMN”), is a corporation. Respondent is therefore a “person” within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

8. Respondent, a subsidiary of The Hershey Company, owns and operates a nut processing plant, including a visitor center, in Hilo, Hawaii. From sometime prior to the large capacity cesspool closure deadline of April 5, 2005, to August 2007, Respondent owned and operated three (3) large capacity cesspools at its Hilo facility.

9. Prior to the April 5, 2005 closure deadline, on July 6, 2004, EPA notified Respondent by letter of the requirement to close its large capacity cesspools and requested that Respondent submit a completed injection well inventory form and provide its closure plans. Respondent (which was not owned by the Hershey Company at this time) did not respond to the letter.

10. EPA sent a contract inspector, a duly designated representative of EPA, to Respondent’s facility on October 5, 2005. The inspector reported that Respondent was operating the three large capacity cesspools. The contractor also reported that Respondent’s representatives were familiar with the cesspool closure requirement and that Respondent stated it was developing closure plans. The contractor did not request, and Respondent did not provide,

any written documentation of specific closure plans or conceptual designs for an alternative wastewater system.

11. On February 3, 2006, EPA sent Respondent a request for information regarding all of the facility's cesspools and wastewater discharges. Respondent replied on March 8, 2006, confirming that it owned and operated three cesspools which served more than 20 people per day.

12. On August 25, 2006, EPA inspected Respondent's facility and found that the three large capacity cesspools were still in use.

13. Respondent's contractor notified EPA by letter on September 18, 2006, that the Hawaii Department of Health ("HDOH") had approved Respondent's conceptual design for a sanitary wastewater treatment system to replace the large capacity cesspools. On October 10, 2006, EPA notified Respondent by letter that it did not have comments on the conceptual plan, except that EPA requested further information on the construction schedule. HDOH approved Respondent's final closure plan on March 22, 2007. These plans included the closure of the three large capacity cesspools, as well as closure of five other unregulated operational and non-operational cesspools.

14. HDOH confirmed in an August 27, 2007 letter to EPA that Respondent had properly closed the three large capacity cesspools and other unregulated cesspools.

15. Respondent's continued operation of three large capacity cesspools, as defined by 40 C.F.R. § 144.81(2), from April 5, 2005, to August 2007, is a violation of 40 C.F.R. § 144.88.

16. This violation is subject to enforcement action under Section 1423 of the Act, 42 U.S.C. § 300h-2. Section 1423 authorizes EPA to initiate civil and/or criminal enforcement actions in court, as well as to issue administrative orders that mandate compliance with the Act and its regulations and/or assess civil penalties for violations.

PROPOSED ADMINISTRATIVE ORDER WITH ADMINISTRATIVE CIVIL PENALTY

17. Pursuant to Section 1423(c) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. § 19.4, EPA proposes that the Presiding Officer issue a decision assessing an administrative penalty against Respondent in an amount not to exceed one hundred fifty-seven thousand, five hundred dollars (\$157,500), for Respondent's failure to comply with the UIC regulations at 40 C.F.R. Part 144.

18. EPA proposes this penalty amount based upon the foregoing facts and findings, and taking into consideration the factors set forth in Section 1423(c)(4) of the Act: (1) the seriousness of the violations; (2) the economic benefit resulting from the violations; (3) any history of such violations; (4) any good faith efforts to comply with the applicable requirements;

(5) the economic impact of the penalty on Respondent; and (6) such other matters as justice may require.

19. Within thirty (30) days of the effective date of a Final Order, Respondent shall make payment of \$157,500, or such other amount as determined by the Presiding Officer, in accordance with any acceptable method of payment listed in Attachment A "EPA Region 9 Collection Information," which is incorporated by reference as part of this Complaint.

20. Concurrent with payment of any penalty, Respondent shall provide written notice of payment, referencing the title and docket number of this case, via certified mail to each of the following:

Danielle Carr
Regional Hearing Clerk (ORC-1)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Aaron Setran
Ground Water Office (WTR-9)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

21. As provided in Section 1423(c)(3)(A) of the Act, 42 U.S.C. § 300h-2(c)(3)(A), before issuing a Final Order in this matter, EPA gives Respondent written notice of EPA's proposal to issue such Final Order and the opportunity to request, within thirty (30) days of the date the notice is received by Respondent, a hearing on the Proposed Order. Such hearing shall not be subject to Section 554 or 556 of the Administrative Procedures Act, 5 U.S.C. §§ 554 and 556, but shall provide a reasonable opportunity to be heard and to present evidence. If a hearing is requested, Subpart I of the Consolidated Rules of Practice, 40 C.F.R. Part 22, governs and sets forth the procedures of such hearing.

22. Respondent must send any request for a hearing to the EPA, Region IX, Regional Hearing Clerk:

Danielle Carr
Regional Hearing Clerk (ORC-1)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

ANSWERING THE ORDER

23. If Respondent intends to contest any material fact upon which the Proposed Order is based, or contend that the proposed penalty is inappropriate, or that Respondent is entitled to

judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA Region IX both an original and one copy of a written Answer. 40 C.F.R. § 22.15(a). Such Answer must be filed within thirty (30) days after service of this Proposed Order. 40 C.F.R. § 22.15(a). The Answer must be filed with:

Danielle Carr
Regional Hearing Clerk (ORC-1)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Respondent must also serve a copy of the Answer upon EPA, to the person and address listed in Paragraph 29, below, as required by 40 C.F.R. § 22.15(a).

24. Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Proposed Order for which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent has no knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Proposed Order, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d).

25. The Answer must also state: (1) the circumstances or arguments that are alleged to constitute the grounds for any defense, (2) the facts that Respondent disputes, and thus intends to place at issue in the proceeding, (3) the basis for opposing the proposed relief, and (4) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

26. Respondent's failure to affirmatively raise in the Answer facts that constitute or might constitute grounds for its defense may preclude Respondent from raising such facts and/or from having such facts admitted into evidence at a hearing.

FAILURE TO ANSWER

27. To avoid entry of a default order against you pursuant to 40 C.F.R. § 22.17 for a penalty of up to \$157,500, as proposed in this Order, Respondent must file a written Answer with the Regional Hearing Clerk at the address above within thirty (30) days of receipt of this Order.

28. Any penalty assessed in a default order will become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.17(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such Final Order of Default against Respondent, and to collect the assessed penalty amount, which may be up to \$157,500, in federal court.

INFORMAL SETTLEMENT CONFERENCE

29. Whether or not Respondent requests a formal hearing, Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and settlement. 40 C.F.R. § 22.18(b). To request such a settlement conference, please contact:

Brett Moffatt
Office of Regional Counsel (ORC-2)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3946

Mr. Moffatt is also authorized to receive service related to this proceeding.

30. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged herein. EPA does not deem a request for an informal settlement conference to be a request for a hearing as specified in 40 C.F.R. § 22.15(c).

31. Settlement discussions do not affect Respondent's obligation to file a timely Answer to the Proposed Order pursuant to 40 C.F.R. § 22.15; *see also* 40 C.F.R. § 22.18(b)(1). EPA will not modify its proposed penalty simply because an informal settlement conference is held.

32. The terms and conditions of any settlement that may be reached as a result of a settlement conference will be recorded in a written Consent Agreement signed by all parties. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, EPA will execute a Final Order ratifying the parties' Consent Agreement. 40 C.F.R. § 22.18(b)(3). In accepting the Consent Agreement, Respondent would be required to waive any right to contest the allegations herein and waive any right to appeal the Final Order accompanying the Consent Agreement. 40 C.F.R. § 22.18(b)(2).

33. Respondent's entering into a settlement does not extinguish, waive, satisfy, or otherwise affect Respondent's obligation to comply with all applicable statutory and regulatory requirements and legal orders.

GENERAL PROVISIONS

34. The provisions of this Order shall apply to and be binding upon Respondent, its officers, directors, agents, successors, and assigns. Notice of this Order shall be given to any successors in interest prior to transfer of Respondent's facility or operations at Hilo, Hawaii. Action or inaction of any persons, firms, contractors, employees, agents, or corporations acting under, through, or for Respondent shall not excuse any failure of Respondent to fully perform its

obligations under this Order.

35. This Order does not constitute a waiver, suspension, or modification of the requirements of any federal, state, or local statute, regulation, or condition of any permit issued thereunder, including the requirements of the SDWA and accompanying regulations. Issuance of this Order is not an election by EPA to forgo any civil or any criminal action otherwise authorized under the SDWA.

36. Notwithstanding compliance with the terms of this Order, EPA is not precluded from taking any action authorized by law including, but not limited to, the issuance of additional administrative orders, and/or the initiation of judicial actions, against Respondent. EPA expressly reserves the right to enforce this Order through appropriate proceedings.

37. Violation of any term of this Order, or failure or refusal to comply with this Order, may subject Respondent to additional enforcement action pursuant to Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b), and/or Section 1423(c)(7), 42 U.S.C. § 300h-2(c)(7).

EFFECTIVE DATE

38. Pursuant to Section 1423(c)(3)(D) of the Act, 42 U.S.C. § 300h-2(c)(3)(D), a Final Order in this matter will become effective thirty (30) days following its issuance unless an appeal to a United States District Court is taken pursuant to Section 1423(c)(6) of the Act, 42 U.S.C. § 300h-2(c)(6).

27 September 2007
Date

Alexis Strauss
Alexis Strauss, Director
Water Division
U.S. Environmental Protection Agency, Region IX

ATTACHMENT A

EPA REGION 9 COLLECTION INFORMATION:

ELECTRONIC FUNDS TRANSFERS

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency "

CHECK PAYMENTS

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

CERTIFIED MAIL No.
RETURN RECEIPT REQUESTED

September 27, 2007

Robert Falk, Esq.
Morrison Foerster
425 Market Street
San Francisco, California 94105-2482

Re: **Administrative Penalty Order For Safe Drinking Water Act
Violations by Mauna Loa Macadamia Nut Co. at Hilo Hawaii**

Dear Mr. Falk:

Enclosed please find the Findings and Proposed Administrative Order With Administrative Civil Penalty directed to Mauna Loa Macadamia Nut Co. ("MLMN"). The Water Division of the Environmental Protection Agency, Region IX ("EPA") is seeking penalties from MLMN for violations of Part C of the Safe Drinking Water Act ("the Act"), 42 U.S.C. §§ 300h - 300(h)-8, which regulates underground injection. Pursuant to 40 C.F.R. § 144.88, promulgated pursuant to the Act, structures defined as "large capacity cesspools" were required to be closed no later than April 5, 2005. Information available to the Water Division indicates that MLMN operated three large capacity cesspools in violation of this requirement from April 5, 2005, to approximately August 27, 2007.

Pursuant to Section 1423(c) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. § 19.4, EPA may issue an order assessing an administrative civil penalty of not more than \$11,000 for each day of each violation, up to a maximum penalty of \$157,500. The enclosed Order proposes a penalty of up to \$157,500. MLMN must file an Answer to the Proposed Order, in accordance with requirements of 40 C.F.R. Part 22, to avoid entry of a default order against it.

EPA remains interested in resolving this matter through settlement, if possible. Our staff will be in contact with MLMN to follow up on the parties' last settlement discussions.

MAIL CODE	WTR-9	ORC-2	WTR9	WTR1		
SURNAME	Setran	Nutt	Albright	Sh		
DATE	26 Sep 07	9/26/07	9/26/07	27 Sept		

U.S. EPA CONCURRENCES

OFFICIAL FILE COPY

CERTIFICATE OF SERVICE

I hereby certify that the forgoing FINDINGS AND PROPOSED ADMINISTRATIVE ORDER WITH ADMINISTRATIVE CIVIL PENALTY in the matter of Mauna Loa Macadamia Nut Co., Docket No. UIC-09-2007-0001, was sent to the following persons, in the manner specified, on the date specified:

Original and one copy
hand-delivered:

Danielle Carr
Regional Hearing Clerk (ORC-1)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Copy by certified mail,
return receipt requested:

Robert Falk, Esq.
Morrison Foerster
425 Market Street
San Francisco, California 94105-2482
Fax: (415) 268-7522
Phone: (415) 268-7000

Copy by Facsimile:

Robert Falk, Esq.
Morrison Foerster
425 Market Street
San Francisco, California 94105-2482
Fax: (415) 268-7522
Phone: (415) 268-7000

Dated at San Francisco, California:

27 Sept 07



Aaron Setran
Water Division
U.S. Environmental Protection Agency, Region IX



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

CERTIFIED MAIL No.
RETURN RECEIPT REQUESTED

September 27, 2007

Robert Falk, Esq.
Morrison Foerster
425 Market Street
San Francisco, California 94105-2482

**Re: Administrative Penalty Order For Safe Drinking Water Act Violations by
Mauna Loa Macadamia Nut Co. at Hilo Hawaii**

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EPA remains interested in resolving this matter through settlement, if possible. Our staff will be in contact with MLMN to follow up on the parties' last settlement discussions.

If you have any questions, please contact Brett Moffatt of our Office of Regional Counsel at the above address, by telephone at (415) 972-3946, or by fax at (415) 947-3570.

Sincerely,



Alexis Strauss

Director

Water Division

27 September 2007

Enclosures: Findings and Proposed Administrative Order With Administrative Civil Penalty;
40 C.F.R. Part 22

cc: Charlie Young, Plant Manager, Mauna Loa Macadamia Nut Corp., One
Macadamia Drive, HC 1 Box 3, Hilo HI, 96720-7000