UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF:	)	
	)	DOCKET NO.: UIC-09-2012-0003
Shaka's Pahoa LLC, Vernon Lindsay, and Noenoe Lindsay,	)	
	)	
Pahoa, Hawaii	)	
	)	
Respondents	)	
	)	
Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)	)	

INITIAL DECISION

This is a proceeding by the United States Environmental Protection Agency ("EPA") under section 1423(c) of the Safe Drinking Water Act, 42 USC § 300h-2(c) ("SDWA") and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 CFR Part 22. In its Complaint, EPA ("Complainant") alleged that Respondents Shaka's Pahoa LLC, Vernon Lindsay, and Noenoe Lindsay (collectively "Respondents") violated Underground Injection Control Program ("UIC") regulations promulgated by EPA under the SDWA at 40 CFR § 144.88 by failing to close two large capacity cesspools that they have owned and/or operated since July 13, 2007. In an Accelerated Decision on Liability issued on May 23, 2014, I found liability as to all Respondents, finding Respondents violated the UIC regulations at 40 CFR § 144.88 by failing to close two large capacity cesspools that they have owned and/or operated as required. This Accelerated Decision on Liability is hereby incorporated in full.

PROCEDURAL BACKGROUND

Following the issuance of the Accelerated Decision on Liability, the parties were ordered to file Prehearing Information Exchanges by June 30, 2014. *Prehearing Order, dated May 23, 2014.* Respondents were ordered, among other things, to provide information on any economic benefit resulting from their failure to close the two large capacity cesspools at issue and a statement explaining why the proposed penalty should be reduced or eliminated, if they so contended. Respondents failed to file their prehearing exchange as required and were subsequently ordered to show cause for their failure to comply with the Prehearing Order.

After being provided an extension, on July 22, 2014, Respondents untimely filed a response to the order to show cause.

On August 7, 2014, I found Respondents failed to show cause for their untimely submission of the Prehearing Information Exchange. *Decision Concerning Respondents' Untimely Prehearing Exchange, dated August 7, 2014.* Pursuant to 40 CFR § 22.19(g), the parties were notified that (1) an adverse inference would be applied against Respondents concerning information on the economic benefit resulting from their failure to close the two large cesspools at issue, including any gross revenues, delayed or avoided costs and (2) that certain information would be excluded from evidence at the hearing barring a showing that the information was not within Respondents control on or before the deadline for filing the prehearing exchange. *Id.*

Pursuant to a Scheduling Order, dated August 7, 2014, on September 26, 2014, Complainant filed a Motion for Accelerated Decision on Penalty. Respondents did not, either individually or collectively, file a response.

On October 15, 2014, the penalty hearing for this matter, which was scheduled for November 6 and 7, 2014, was postponed pending a decision on Complainant's Motion for Accelerated Decision on Penalty.

STATUTORY and REGULATORY BACKGROUND

Section 22.20(a) of the Consolidated Rules authorizes the Presiding Officer to render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as she may require, if no genuine issues of material fact exists and a party is entitled to judgment as a matter of law. The standard of proof is by "preponderance of evidence." 40 CFR § 22.24(b).

Under Section 22.27(b) of the Consolidated Rules, if the Presiding Officer has determined a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. 40 CFR § 22.27(b).

Section 1423 of the SDWA requires that in determining the penalty amount, EPA take into account appropriate factors, 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 matters as justice may require. 42 USC §300h-2(c)(4)(B).

DETERMINATION OF PENALTY

After reviewing Complainant's Motion for Accelerated Decision on Penalty and the record in this proceeding, I find there are no genuine issues of material fact and Complainant is entitled to judgment as a matter of law.

I find that Complainant's Prehearing Statement provides a detailed analysis of how it applied the SDWA penalty factors and EPA's general penalty policies to arrive at the proposed total penalty amount of $82,425, constituting $8,725 for economic benefit and $73,700 for adjusted gravity. Complainant's Prehearing Statement individually discussed each of the SDWA Penalty Factors and included twenty-four exhibits providing evidentiary support for its analysis. The evidence in Complainant's Prehearing Statement includes, among other things, an expert opinion on Economic Benefit prepared by Jonathan Scheffz for EPA and the declaration of EPA Inspector Emmanuelle Rapicavoli. Complainant's analysis is incorporated herein.

Respondents have failed to raise any genuine issues of fact related to the proposed penalty. Not only did Respondents fail to file an opposition to Complainant's Motion of Accelerated Decision for Penalty, but they have provided no evidence opposing Complainant's proposed penalty amount despite having several opportunities to do so. For instance, Respondents were required to include in their Answer to the Complaint any contention "that the proposed penalty . . . is inappropriate" and to state the basis for opposing any proposed penalty. 40 CFR §22.15(a) and (b). In Respondents' jointly filed Answer, they simply asserted they have attempted to fix the problem without anything further about the appropriateness of the penalty. *Answer, ¶3.*

In addition, Respondents were required to include in their Prehearing Exchange a statement explaining why the proposed penalty should be reduced or eliminated, if they so

contended. *See Prehearing Order;* 40 CFR §22.19(a)(3). As noted earlier, Respondents failed to file a prehearing exchange. In response to an Order to Show Cause, Respondents asserted they "have not located meaningful documents to respond to the allegations against them" and identified Respondent Vernon Lindsay as a witness who will testify about the purchase of the property, its condition at the time of purchase, attempts to correct the situation and other matters regarding the property and alleged violation. See *Response to the Order to Show cause and Respondents' Prehearing Exchange, Certificate of Service.* Respondents have filed no statements or evidence contradicting Complainant's proposed penalty; indeed, they have failed to address in any way the appropriateness of Complainant's proposed penalty.

Therefore, I hereby GRANT Complainant's motion for accelerated decision on penalty and issue this decision.

PENALTY CALCULATIONS

As required by the Consolidated Rules of Practice, I have determined the amount of the recommended penalty to assess in this matter based on the evidence in the record and in accordance with any penalty criteria set forth in the Act, taking into consideration applicable policy factors relied on by EPA for cases of this type.[1] As detailed below, a penalty of $82,425, as proposed by Complainant, is warranted for Respondents' violations of the SDWA.

Seriousness of the Violation: One of the statutory factors guiding penalty analysis under the SDWA is the "seriousness of the violation" 42 U.S.C. § 300h-2(c)(4)(B). Respondents' violations are serious and significant.

[1] EPA does not have a penalty policy for applying SDWA's statutory criteria in administrative or civil adjudication. EPA references general penalty policy, such as General Enforcement Penalties ("GM") 21 and 22.

The threat to human health from the operation of large capacity cesspools ("LLCs") was such that EPA determined an outright nationwide ban regardless of proximity to groundwater protection areas was necessary. *Final Rule: Revisions to the Underground Injection Control Regulations for Class v Wells*, 63 Fed. Reg. 40586, 40592 (July 29, 1998). In its determination that the potential harm to drinking water from untreated sanitary waste disposal warranted an outright national ban on the operation of new and existing LLCs, EPA stated that the agency found "that extending the rule's coverage is the most appropriate course of action given that many States already ban new [LCCs], the acute nature of the risks posed by these wells, and the relative ease of developing alternate means to dispose of sanitary waste on-site." 64 Fed. Reg. 68546, 68551 (Dec. 7, 1999).

The scope and duration of the violations are important aspects of the seriousness of Respondents' violations. Respondents have been in violation of the LCC ban since July 13, 2007, well after the LCC ban's effective date of April 5, 2005. Respondents did not submit plans to the Hawaii Department of Health ("DOH") to close Cesspool No. 1 and replace it with an Individual Wastewater System ("IWS") until April 29, 2012. To date, Respondents have not closed Cesspool No.2 and there appears to be no plans to discontinue its operation.

As such, I find Respondents' violation of the LCC ban to be extremely serious. The record supports an assessment of an initial civil penalty amount of $67,000, as Complainant proposed in its Prehearing Submissions due to the seriousness of the violation and the size of the violator.[2]

[2] This amount is far below the $177,500 maximum penalty amount allowed under the SDWA at the time of the filing of the Administrative Complaint and proposed therein. Further, the administrative penalty cap has since been raised to $187,500. *EPA Modifications to Civil Monetary Penalty Inflation Adjustment Rule*, 78 Fed. Reg. 66643 (November 6, 2013).

Good Faith Efforts to Comply With the Applicable Requirements: Respondents stated in their Answer that they "attempted to fix the problem", and in their prehearing exchange, that Vernon Lindsay will testify regarding "attempts made to correct the situation." Otherwise, there is limited evidence demonstrating Respondents made a good faith effort to comply with the applicable requirements.

The only evidence of Respondents' efforts to comply with the LCC ban are the steps they took to close Cesspool No. 1. Although Cesspool No. 1 has since been replaced with an IWS, the record shows Respondents did not have their engineer submit a plan for closure of Cesspool No. 1 to DOH until April 29, 2012, over two years after EPA's inspection of the Property and seven years after the LCC ban went into effect.

Additionally, there is nothing in the record to indicate Respondents have made any attempts to close or otherwise replace Cesspool No. 2.

Therefore, I find Respondents have not made good faith efforts to comply with the SDWA's UIC regulations. Complainant's proposed 10% upward adjustment[3] to the initial gravity amount is reasonable and warranted. The net amount of the penalty adjustment of a 10% increase from the initial gravity penalty of $67,000 totals $73,700.

The economic benefit (if any) resulting from the violation: The record shows Complainant used an expert, Jonathan Shefftz, to calculate the economic benefit that Respondents gained by: (1) delaying the cost of closing Cesspool No. 1 and replacing it with a legal wastewater treatment system, from September 20, 2007, until October 13, 2013, and (2) delaying the cost of closing Cesspool No. 2 from September 20, 2007 until an assumed

[3] This adjustment reflects the fact the violations were completely foreseeable, fully within Respondents' control, and Respondents had numerous notices of violations.

compliance date of October 1, 2014. Mr. Shefftz chose September 20, 2007, as the beginning date of noncompliance, which marks five years from the date of Complainant's filing of the complaint in this matter. Because Respondents have not provided an estimated date for the closure of the Cesspool No. 2, Mr. Shefftz assumed a compliance date and used his best professional judgment to generate the costs associated with closing and replacing LCCs in Hawaii. Mr. Shefftz determined that the economic benefit of Respondents' violations totals $8,725 as of June 27, 2014.

Despite having numerous opportunities, Respondents have not provided any documents to counter Complainant's evidence related to the economic benefit derived from their failure to close the LCCs as required under the UIC regulations.

An assessment of $8,725 for the economic benefit of Respondents' violations is appropriate.

***Any History of Such Violations*:** Complainant has stated it is not aware of any other similar violations by Respondents. Therefore, no adjustment is made for this factor.

Economic Impact of the Penalty on the Violator and Any Other Matters as Justice May Require: Respondents have suggested ability to pay concerns in their filings, however, they have not provided any documentation or statements demonstrating the basis for their assertion of inability to pay. Therefore, no penalty adjustment has been made for these factors.

Upon consideration of the statutory penalty factors, EPA's general penalty policy, and the evidence in the record, I find that a total civil penalty amount of $82,425 (constituting $73,700 for adjusted gravity and $8,725 for economic benefit) should be assessed for Respondents' violation of the UIC regulations.

Furthermore, since Respondents continue to violate the UIC regulations by failing to close and replace Cesspool No. 2, they are required to come into compliance as ordered herein.

ORDER

1. A penalty of $82,425 is hereby jointly assessed against Respondents Shaka's Pahoa, LLC, Vernon Lindsay and NoeNoe Lindsay.
2. No later than 30 days after the date this Initial Decision becomes a final order under 40 CFR § 22.27(c), Respondents shall make payment of the full amount of the penalty. Payment shall be made by submitting a certified or cashier's check payable to the "Treasurer, United States of America" in the full penalty amount of $82,425 by regular mail to the following address:

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

   Respondents shall include on the certified or cashier's check the case name and docket number of this administrative action. Respondents must simultaneously send a photocopy of the check to the Regional Hearing Clerk at the following address:

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

3. Should Respondents fail to pay the penalty specified above in full by its due date, Respondents shall also be responsible for payment of the following amounts:
   a. **Interest.** Any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(e)(1) from the date this Initial Decision becomes final, provided, however, that no interest shall

be payable on any portion of the assessed penalty that is paid within 60 days after this Initial Decision becomes final.

b. **Handling Charge.** Pursuant to 31 U.S.C. § 3717(e)(1) and Chapter 9 of EPA Resources Management Directive 2540, a monthly handling charge of $15 shall be assessed if any portion of the assessed penalty is more than 30 days past due.

c. **Penalty Charge.** Pursuant to 31 U.S.C. § 3717(e)(2), Respondents shall be assessed a penalty charge of not more than 6 percent per year for failure to pay a portion of the penalty more than 90 days past its due date.

In the event of failure by Respondents to make payment as directed above this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.

4. No later than 60 days after the effective date of the Final Order, Respondents shall properly close Cesspool NO. 2 in accordance with 40 CFR §144.89(a) and all other applicable requirements, including the DOH closure, conversion and/or replacement requirements for large capacity cesspools. If Respondents install new Individual Wastewater Systems (IWDs), then installation and operation of the IWSs shall comply with DOH requirements.

5. Respondents shall submit to EPA either (a) a copy of each of the Backfill Closure Reports for Cesspool 2 or (b) DOH's approval to use the IWSs. In any event, Respondents must submit to EPA a copy of the DOH approval to operate the IWSs within 10 days of receipt.

Documents shall be sent to EPA as follows:

Emmanuelle Rapicavoli
U.S. EPA, Region IX
Groundwater Office, Water Division (WTR-9)
75 Hawthorne Street
San Francisco, CA 94105

The documentation shall include the following certification made in accordance with 40 CFR §144.32(b) and (d):

> *I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true and accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

6. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision will become the final order in this matter within forty-five days after its service upon the parties unless it is appealed to the Environmental Appeals Board or the Environmental Appeals Board elects, *sua sponte*, to review the initial decision..

IT IS SO ORDERED.

Dated: March 31, 2015

BEATRICE WONG
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that the foregoing INITIAL DECISION was sent as follows:

By Inter-Office Mail

Richard Campbell
U.S. Environmental Protection Agency
Office of Regional Counsel
75 Hawthorne Street
San Francisco, CA 94105

By Facsimile and US Mail

Ramon J. Ferrer
135 S. Wakea Avenue, Suite 204
Kahului, HI 96732
Fax: (808) 877-3682

April 1, 2015
Date

Steven Armsey
Interim Regional Hearing Clerk