



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

IN THE MATTER OF:) Docket No. SDWA-UIC-AOC-2022-0001
)
Whale Spirit Sanctuary, LLC,)
) **[PROPOSED] ADMINISTRATIVE**
) **ORDER ON CONSENT**
)
Respondent.) Proceeding under Sections 1423(c) of the
) Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).
)
)
_____)

I. INTRODUCTION

1. The United States Environmental Protection Agency Region IX (“EPA”) and Whale Spirit Sanctuary, LLC (“Respondent”) (collectively, the “Parties”) voluntarily enter into this Administrative Order on Consent (“Consent Order” or “AOC”). Respondent operates one (1) Large Capacity Cesspool (“LCC”) that serves the main house of the Whale Spirit Sanctuary, located at 82-5988 Napoopoo Road, Captain Cook, HI 96704-8290 (Tax Map Key: 3-8-2-003-036-0003) (the “Property”). The Property is owned by the Dolphins Children’s Trust but leased to Respondent, who manages it.

2. EPA alleges that Respondent has violated and continues to violate requirements of the federal Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300f *et seq.*, and 40 C.F.R. §§ 144.84(b)(2) and 144.88, which required owners or operators of existing LCCs to close them no later than April 5, 2005. This Consent Order directs Respondent to remedy the ongoing violation relating to the identified LCC in accordance with the compliance schedule set forth in this Consent Order.

II. JURISDICTION

3. EPA enters into and issues this Consent Order under the authority vested in the EPA Administrator by section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c).

4. The EPA Administrator has delegated the authority to take these actions to the Regional Administrator for EPA, Region IX, through EPA Delegation 9-34 (May 11, 1994). This authority has been further delegated to the Director of EPA Region IX's Enforcement and Compliance Assurance Division by Regional Delegation R9-9-34 (Feb. 11, 2013).

5. The Parties enter into this Consent Order voluntarily and hereby agree to the terms and issuance of this Consent Order. Respondent agrees not to contest EPA's authority or jurisdiction to issue this Consent Order in this or in any subsequent proceeding to enforce the terms of this Consent Order. This Consent Order constitutes an enforceable agreement between Respondent and EPA.

6. Respondent agrees to undertake and complete all actions required by this Consent Order. Respondent waives the opportunity to receive 30-day notice of this AOC, and to request a hearing on or to appeal this AOC under sections 1423(c)(3)(A) and 1423(c)(6) of the SDWA, 42 U.S.C. §§ 300h-2(c)(3)(A) and 300h-2(c)(6).

III. PARTIES BOUND

7. This AOC shall bind Respondent and its officials, officers, directors, agents, employees, attorneys, successors, and assigns, and all persons, contractors, and consultants acting in concert with Respondent.

8. The undersigned signatory for Respondent certifies that he or she is authorized to execute this Consent Order and legally bind the Respondent.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

9. Pursuant to Part C of the Act, 42 U.S.C. §§ 300h through 300h-8, EPA has promulgated regulations establishing minimum requirements for Underground Injection Control (“UIC”) programs to prevent underground injection that endangers drinking water sources. These regulations are set forth at 40 C.F.R. Part 124, 144, 146, 147 (Subpart M) and 148.

Statutory and Regulatory Authority

10. Section 1421(d)(1) of the SDWA, 42 U.S.C. § 300h(d)(1), defines “underground injection” as the subsurface emplacement of fluids by well injection and excludes the underground injection of natural gas for purposes of storage and the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

11. 40 C.F.R. § 144.1(g) provides that the UIC programs regulate underground injection by six classes of wells, and all owners or operators of these injection wells must be authorized either by permit or rule. “Well injection” means the subsurface emplacement of fluids through a well. 40 C.F.R. § 144.3.

12. Section 1401(6) of the SDWA, 42 U.S.C. § 300f(6), and 40 C.F.R. § 144.3 define “contaminant” as any physical, chemical, biological, or radiological substance or matter in water.

13. 40 C.F.R. § 144.3 defines “fluid” as any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

14. 40 C.F.R. § 144.3 defines “well injection” to mean the subsurface emplacement of fluids through a well.

15. 40 C.F.R. § 144.3 defines “well” to mean, in relevant part, a dug hole whose depth is greater than the largest surface dimension.

16. 40 C.F.R. § 144.3 defines a “cesspool” as a “drywell,” which in turn is a “well” that is completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

17. 40 C.F.R. § 144.81(2) defines “large capacity cesspools” (“LCCs”) to 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.” LCCs do not include (i) single-family residential cesspools or (ii) non-residential cesspools that receive solely sanitary waste and have the capacity to serve fewer than twenty (20) persons per day. *Id.*

18. 40 C.F.R. §§ 144.80(e) and 144.81(2) classifies LCCs as Class V UIC injection wells.

19. 40 C.F.R. § 144.3 defines Class V UIC injection wells as a “facility or activity” subject to regulation under the UIC program.

20. Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), defines “person” as an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency). *See also* 40 C.F.R. § 144.3.

21. 40 C.F.R. § 144.3 defines “owner or operator” to mean the owner or operator of any “facility or activity” subject to regulation under the UIC program.

22. Pursuant to 40 C.F.R. § 144.82, the “owner or operator” of a Class V UIC well “must comply with Federal UIC requirements in 40 C.F.R. Parts 144 through 147,” and must also “comply with any other measures required by States or an EPA Regional Office UIC Program to protect [underground sources of drinking water].”

23. 40 C.F.R. §§ 144.84(b)(2) and 144.88 required that owners or operators of existing LCCs close those LCCs by no later than April 5, 2005 and prohibited new LCCs after that date.

24. Pursuant to Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R. § 147.601, EPA administers the UIC program in the State of Hawaii, and therefore has “primacy” for the program in Hawaii.

25. Section 1423(a)(2) of the SDWA, 42 U.S.C. § 300h-2(a)(2), provides that any person found to be in violation of any requirement of an applicable UIC program in a state that does not have primacy may be subject to an order by EPA pursuant to Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1).

26. Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), authorizes EPA to issue either a penalty order or a compliance order, or both, against any person for violations of any requirement of an applicable UIC program.

Alleged Violations

27. Since at least October 1, 2017, Respondent, as lessee of the Property, has operated one cesspool that serves the main house of the Whale Spirit Sanctuary located at the Property.

28. Respondent is an “owner or operator” of the cesspool identified in Paragraph 27 as that term is defined at 40 C.F.R. § 144.3.

29. Since it is a limited liability corporation, Respondent is 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.

30. EPA alleges that the one cesspool referred to in Paragraph 27 meets the definition of an LCC, and does not have the capacity to serve fewer than 20 people per day, thus is considered an LCC pursuant to 40 C.F.R. § 144.81(2).

31. Respondent failed to close the LCC referenced in Paragraph 30 by April 5, 2005, or anytime thereafter, as required by 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

32. EPA therefore alleges that Respondent is in continuing violation of the LCC prohibition set forth in 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

V. COMPLIANCE PROVISIONS

33. Based on the foregoing findings and pursuant to EPA's authority under section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), Respondent agrees and is hereby ORDERED to complete the following work:

- a. Within thirty (30) days of the effective date of the Final Order in this matter, submit to EPA a copy of a signed contract with either a licensed contractor or a Professional Engineer for closure of the LCC at the Property no later than February 28, 2023. The contract shall be final and binding and not allow for termination prior to performance.
- b. By February 28, 2023, have the contractor or Professional Engineer close the LCC located at the Property in accordance with 40 C.F.R. §§ 144.84(b)(2), 144.88(a), and 144.89(a), and all other applicable requirements, including all Hawaii Department of Health ("HDOH") cesspool closure requirements.
- c. Within thirty (30) days of closure of the LCC, submit to EPA a completed Final Backfilling Completion Report, contained in Attachment A, which includes a description of how the LCC was closed, an identification of the contractor(s) closing the LCC, and photos of the closure activity. If the cesspool receives more than 1,000 gpd, Respondent shall also submit all notices and/or approvals issued by HDOH related to the closure of the LCC within thirty (30) days of such closure, provided that should HDOH not issue

a notice and/or approval within thirty (30) days of closure, Respondent shall submit the notice and/or approval to EPA within fourteen (14) days of Respondent's receipt of the notice and/or approval.

34. Respondent shall inform the EPA in writing if any new information or circumstances cause Respondent to modify any planned actions or schedule for achieving compliance with this Consent Order.

35. If Respondent fails to comply with the requirements set forth in Paragraph 33, above, EPA may request the United States Department of Justice bring an action to seek penalties for violating this AOC under Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b).

B. Stipulated Penalties

36. If Respondent fails to comply with any provision of this Consent Order, Respondent agrees to pay upon EPA's demand the stipulated penalties set forth in this paragraph unless EPA has excused Respondent's delay according to the procedures provided in Subsection B of this Section of the Consent Order. Stipulated penalties shall begin to accrue on the day after complete performance is due, or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Stipulated penalties are calculated as follows:

- a. \$300 per day per violation for the first through the thirtieth day of noncompliance;
- b. \$500 per day per violation for the thirty-first through the sixtieth day of noncompliance;
- c. \$1,000 per day per violation for the sixty-first day of violation and beyond.

37. Respondent must pay the stipulated penalty within thirty (30) days of receipt of EPA's stipulated penalty demand, according to the process provided in the demand. If any

payment is not received within thirty (30) calendar days of being due, interest, handling charges, and late payment penalties will begin to accrue in the same manner as set forth at 31 U.S.C. § 3717 and 40 C.F.R. § 13.11.

38. Neither the demand for, nor payment of, a stipulated penalty relieves Respondent of the obligation to comply with any requirement or deadline of this Consent Order.

39. EPA may, in the unreviewable exercise of its discretion, elect to pursue any other administrative or judicial remedies in lieu of assessing some or all of the stipulated penalties due under this Consent Order.

40. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties due under this Consent Order.

41. Respondent may pay the stipulated penalty by check (mail or overnight delivery), wire transfer, Automated Clearing House (ACH), or online payment. Payment instructions are available at <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America," and delivered to the following address:

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

42. Respondent shall provide notice of stipulated penalty payments made in accordance with Paragraph 43 accompanied by the title and docket number of this action, to the EPA Region IX Compliance Officer at the address provided in Paragraph 54 below.

C. Delays

43. “*Force majeure*,” for purposes of this Consent Order, is defined as any event arising from causes beyond Respondent’s control, the control of any entity controlled by Respondent, or the control of Respondent’s contractors, which delays or prevents the performance of any obligation under this Consent Order, despite Respondent’s reasonable best efforts to fulfill the obligation. The requirement that Respondent exercise “reasonable best efforts to fulfill the obligation” includes using reasonable best efforts to anticipate any potential *force majeure* event and reasonable best efforts to address the effects of any such event as it is occurring and/or after it has occurred, including to prevent or minimize any resulting delay to the greatest extent possible. Examples of events that are not *force majeure* include, but are not limited to, increased costs or expenses of any work to be performed under this Consent Order, failure to diligently pursue funding source(s) for work to be performed under this Consent Order, or normal inclement weather.

44. Respondent shall notify EPA in writing, within 10 business days, of any event that occurs that causes or is likely to cause delay in compliance with any deadline specified in this Consent Order. The notification should explain whether the delay was caused by *force majeure*, as defined in Paragraph 43 should describe the measures Respondent has taken and/or will take to prevent or minimize the delay and should specify the timetable by which Respondent intends to implement these measures to ensure compliance with the applicable requirement or deadline. Respondent shall adopt all reasonable measures to avoid or minimize delay. Submittal of the notice to EPA required by this paragraph does not, by itself, extend any deadline or timeframe in this Consent Order.

45. If, upon receiving notice required under Paragraph 44, EPA agrees that the delay or anticipated delay in compliance with this Consent Order has been or will be caused by

circumstances that constitute *force majeure* as defined in Paragraph 45, and upon request by Respondent, EPA may extend the applicable compliance deadline. A *force majeure* extension of any particular deadline shall not be considered a modification of this Consent Order nor affect any other provisions under this Consent Order.

46. Respondent has a burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be caused by *force majeure*, that the duration of the delay was, or will be warranted under the circumstances, that Respondent exercised or is using its best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this subsection.

47. In the event that EPA does not agree that a delay in achieving compliance with the requirements of this Consent Order has been or will be caused by *force majeure*, EPA will notify Respondent in writing of EPA's decision and any delays will not be excused.

VI. SUBMISSIONS AND NOTIFICATIONS

48. All information and documents submitted pursuant to this Consent Order shall be signed by a duly authorized representative of Whale Spirit Sanctuary, LLC.

49. The person signing Respondent's submissions under this Consent Order shall make the following certification:

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 information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true, 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.

50. Submissions by Respondent shall be deemed made on the date they are sent electronically, or on the date postmarked if sent by U.S. mail.

51. Unless otherwise specified, all reports, notifications, documentation, submissions, and other correspondence required to be submitted by this Consent Order should be submitted to EPA electronically. If electronic submittal is not possible, the submissions must be made by certified mail (return receipt requested). Electronic submissions must be sent to the following addresses: Jelani Shareem – Shareem.jelani@epa.gov. The subject line of all email correspondence must include the facility name, docket number, and subject of the deliverable. All electronically submitted materials must be in final and searchable format, such as Portable Document Format (PDF) with Optical Character Recognition (OCR) applied. Mailed submissions must be sent to the following addresses:

52. All submissions made pursuant to this Consent Order shall be sent to the EPA Region IX Compliance Officer at the following address:

Jelani Shareem
U.S. EPA Region IX
Enforcement and Compliance Assurance Division
Drinking Water Section (ECAD 3-3)
75 Hawthorne Street
San Francisco, CA 94105
shareem.jelani@epa.gov

VII. RECORD PRESERVATION

53. Until five (5) years after termination of this Consent Order, the Respondent shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to the performance of the tasks in this Consent Order. Until five years after termination of this Consent Order, the Respondent shall also instruct its agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in this Consent Order.

VIII. SCOPE OF CONSENT ORDER

54. Notwithstanding any delay subject to *force majeure* as described in Section V.C, Respondent shall fully implement each requirement of this Consent Order, including meeting the compliance and reporting provisions contained in Paragraph 33.

55. Respondent's failure to fully implement all requirements of this Consent Order in the manner and timeframe required shall be deemed a violation of this Consent Order.

56. EPA may use any information submitted in accordance with this Consent Order in support of an administrative, civil, or criminal action against Respondent.

57. The information required to be submitted pursuant to this Consent Order is not subject to the approval requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.*

58. This Consent Order is not and shall not be construed to be a permit under the SDWA, nor shall it in any way relieve or affect Respondent's obligations under the SDWA, or any other applicable federal or State laws, regulations, or permits. Compliance with this Consent Order shall not be a defense to any actions commenced pursuant to such applicable laws, regulations, or permits, nor does it constitute a release.

59. Issuance of this Consent Order is not an election by EPA to forego any remedies available to it under the law, including without limit any administrative, civil or criminal action to seek penalties, fines, or other appropriate relief for any violations of law, including those violations of law identified in this Consent Order. In addition, EPA reserves all available legal and equitable rights and remedies to enforce any violation cited in this Consent Order, and to enforce this Consent Order, and the right to seek recovery of any costs and attorney fees incurred by EPA in any actions against Respondent for non-compliance with this Consent Order.

60. This Consent Order shall in no way affect the rights of EPA or the United States against any person not a party hereto.

IX. WAIVER

61. Respondent waives any and all remedies, claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including, but not limited to, any right of judicial review of the Consent Order under the Administrative Procedures Act. 5 U.S.C. §§ 701-708.

X. INTEGRATION

62. This Consent Order, and any schedules, documents, plans, etc. that will be developed pursuant to this Consent Order are incorporated into and enforceable pursuant to this Consent Order, constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understanding relating to the settlement other than those expressly contained in this Consent Order.

XI. SEVERABILITY

63. The provisions of this Consent Order shall be severable. If any provision is declared by a court of competent jurisdiction to be unenforceable, then the remaining provisions shall remain in full force and effect.

XII. MODIFICATIONS OF CONSENT ORDER

64. Modification of this Consent Order including any plans or schedules developed pursuant thereto shall be in writing and shall take effect only when agreed to in writing by both Parties and after any public notice required by section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B). Any agreed upon Modification may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute the Modification.

XIII. TERMINATION

65. The provisions of this Consent Order shall be deemed terminated and satisfied by Respondent upon written notice from EPA that Respondent has demonstrated that all of the terms of this Consent Order have been addressed to the satisfaction of EPA.

66. Upon a showing by Respondent (including sufficient documentation) that it no longer has any involvement at the Property, including but not limited to the termination and/or non-renewal of its lease for the Property, EPA may terminate this Consent Order even if not all of the provisions of this Consent Order have been satisfied. In such case, EPA retains all remedies at law to pursue any violation of SDWA, whether or not identified in this Consent Order, consistent with Paragraph 59.

XIV. PUBLIC NOTICE

67. EPA's consent to this Consent Order is subject to the requirements of section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B), that EPA provide public notice of, and reasonable opportunity to comment on, any proposed Consent Order. EPA will publicly notice this Consent Order and provide the opportunity to the public to comment for thirty (30) days prior to it being issued by EPA. EPA reserves the right to withdraw or seek modification to


the proposed Consent Order in response to public comments. In such case, Respondent will have no obligations under the proposed Consent Order unless and until a revised Consent Order is agreed upon by the Parties and finalized by EPA. Until such time, EPA may pursue any and all enforcement options provided by law.

XV. EFFECTIVE DATE

68. Pursuant to section 1423(c)(3)(D) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(D), this Consent Order shall become effective thirty (30) days following its issuance.

IT IS SO AGREED AND ORDERED:

For Whale Spirit Sanctuary, LLC:



Jeffrey Goodman
Owner, Whale Spirit Sanctuary, LLC
82-5988 Napoopoo Road, Unit B
Captain Cook, HI 96704-8290

Date: 12/15/21

For U.S. Environmental Protection Agency, Region IX:

for / Amy C. Miller-Bowen
Director, Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Date: _____