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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AH 10: 2

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGIONAL HEARING OFFICE

IN THE MATTER OF

Jose P. Jazmin and Betty Jazmin, Trustees
of The Jazmin Family Trust

Kailua-Kona, Hawaii

Proceedings under Section 1423(c)
of the Safe Drinking Water Act,
42 U.S.C. § 300h-2(c)

DOCKET NO. UIC-09-2010-0006

COMPLAINT AND PROPOSED
ADMINISTRATIVE ORDER WITH
ADMINISTRATIVE CIVIL PENALTY

AUTHORITY

The following findings are made and Proposed Order issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Sections 1423(c) and 1445(a) of the Safe Drinking Water Act ("SDWA" or "the Act"), 42 U.S.C. §§ 300h-2(c), 300j-4(a). 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 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 - 300h-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. “Well injection” means the subsurface emplacement of fluids through a “well”, which includes “a dug hole whose depth is greater than the largest surface dimension” and “a subsurface fluid distribution system”. 40 C.F.R. § 144.3.
3. Pursuant to 40 C.F.R. § 144.88, existing large capacity cesspools were required to be closed no later than April 5, 2005 in accordance with the closure specifications contained in 40 C.F.R. § 144.89.
4. “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 either assessing an administrative civil penalty of not more than

\$11,000 for each day of each violation occurring before January 12, 2009 and not more than \$16,000 for each day of each violation occurring after January 12, 2009, up to a maximum penalty of \$177,500, or requiring compliance with any regulation or other requirement, or both, 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).

7. Pursuant to Section 1445(a)(1)(A) of the Act, EPA may require any person who is subject to the requirements of the Act to submit information relating to such person's compliance with the requirements of the Act. 42 U.S.C. § 300j-4(a)(1)(A).

FINDINGS OF VIOLATION

8. Jose P. Jazmin and Betty Jazmin, Trustees of The Jazmin Family Trust ("Jazmin Family Trust" or "Respondents"), are "persons" within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.
9. Respondents own the real property at 75-177 Ala Onaona St, Kailua-Kona, Hawaii (TMK: 3-7-5-022-170).
10. Respondents operate Kailua Vista Apartments (the "Facility"), which is located at 75-177 Ala Onaona St, Kailua-Kona, Hawaii.
11. The Facility is one apartment building, which consists of fifteen apartment units.

12. The Facility is serviced by two cesspools, both of which are “large capacity cesspools,” pursuant to 40 C.F.R. § 144.81(2), because the apartment complex is a “multiple dwelling.”
13. Since sometime prior to April 5, 2005, Respondents have owned the two large capacity cesspools, referenced in paragraph 12, at the Facility.
14. In a letter dated October 6, 2004, EPA informed Respondents that they believe Respondents are owners of a large capacity cesspool. In addition, EPA informed Respondents that regulations required Respondents to close all large capacity cesspools by April 5, 2005. Respondents did not respond to EPA’s correspondence.
15. On September 29, 2004, the State of Hawaii Department of Health informed Respondents that it believed Respondents owned a large capacity cesspool and that federal regulations require closure of all large capacity cesspools by April 5, 2005.
16. On May 27, 2009, EPA sent Respondents, by certified mail, a Notice of Violation and Request for Information regarding the operation and closure of the large capacity cesspools at the Facility.
17. On June 10, 2009, Respondent, Jose P. Jazmin, responded and admitted that the two large capacity cesspools, referred to in paragraph 12, were in operation at the Facility.
18. Respondents have not yet closed the two large capacity cesspools, referred to in paragraph 12.
19. Respondents’ failure to close the two large capacity cesspools, referred to in paragraph 12, by the April 5, 2005 deadline and continued daily operation of those cesspools since the deadline are violations of 40 C.F.R. § 144.88.

20. These violations are 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 FOR COMPLIANCE AND
ADMINISTRATIVE CIVIL PENALTY**

21. 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 Respondents in an amount not to exceed one hundred seventy-seven thousand, five hundred dollars (\$177,500), for Respondents' failure to comply with the UIC regulations at 40 C.F.R. Part 144 and directing Respondents to properly close the two large capacity cesspools at the Facility in accordance with 40 C.F.R. § 144.89(a) and other applicable requirements.
22. 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 Respondents; and (6) such other matters as justice may require.
23. Within 30 days of the effective date of a Final Order, Respondents shall make payment of \$177,500, or such other amount as determined by the Presiding Officer, in accordance with any acceptable method of payment listed in the attached "EPA Region 9 Collection Information," which is incorporated by reference as part of this Complaint.

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

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

25. Respondents shall properly close the two large capacity cesspools at the Facility in accordance with 40 C.F.R. § 144.89(a) and all other applicable requirements, including the Hawaii Department of Health (DOH) closure, conversion, and/or replacement requirements, no later than **December 30, 2010**.

26. Respondents must comply with DOH's large capacity cesspool conversion and abandonment procedures and techniques and any other requirements of DOH's UIC program. Respondents shall notify DOH and EPA when replacement of the two large capacity cesspools is complete. The large capacity cesspools will be considered closed when either: (a) DOH issues an Approval to Use after receipt of an Individual Wastewater System ("IWS") final inspection report, "Certification of Construction" for the IWS, and As Built Plans for the IWS; or (b) Respondents submit to EPA a completed "Large Capacity Cesspool Backfilling Final Completion Report."

27. If Respondents install a new IWS, installation and operation of the IWS shall comply with DOH's wastewater requirements.

28. Respondents shall submit to EPA all documentation relating to the proper closure of the two large capacity cesspools, including copies of all required applications, plans, drawings, approvals, permits, and final inspections, within ten days of receipt or preparation of the documentation. All submittals must be signed and certified by Respondents in accordance with 40 C.F.R. § 144.32 (b) and (d). The submittals must be sent to EPA's Ground Water Office at the address specified in paragraph 24.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

29. 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 Respondents written notice of EPA's proposal to issue such Final Order and the opportunity to request, within 30 days of the date the notice is received by Respondents, a hearing on the Proposed Order. Such hearing shall not be subject to Section 554 or 556 of the Administrative Procedure 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.

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

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

ANSWERING THE COMPLAINT AND PROPOSED ORDER

31. If Respondents intend to contest any material fact upon which the Complaint and Proposed Order is based, or to contend that the proposed penalty or compliance order is inappropriate, or that Respondents are entitled to judgment as a matter of law, Respondents 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 30 days after service of this Complaint and Proposed Order. 40 C.F.R. § 22.15(a). The Answer must be filed with:

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

Respondents must also serve a copy of the Answer upon EPA, to the person and address listed in Paragraph 37, below, as required by 40 C.F.R. § 22.15(a).

32. Respondents' Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint and Proposed Order for which Respondents have any knowledge. 40 C.F.R. § 22.15(b). Where Respondents have no knowledge of a particular factual allegation and so state in their Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). If Respondents fail in their Answer to admit, deny, or explain any material factual allegation contained in the Complaint and Proposed Order, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d).

33. The Answer must also state: (1) the circumstances or arguments that are alleged to constitute the grounds of any defense; (2) the facts that Respondents dispute and thus

intend to place at issue in the proceeding; (3) the basis for opposing the proposed relief; and (4) whether Respondents request a hearing. 40 C.F.R. § 22.15(b).

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

FAILURE TO ANSWER

35. To avoid entry of a default order against you pursuant to 40 C.F.R. § 22.17 for compliance and a penalty of up to \$177,500, as proposed in this Order, Respondents must file a written Answer with the Regional Hearing Clerk at the address above within 30 days after service of this Complaint and Proposed Order.
36. Any penalty assessed in a default order will become due and payable by Respondents without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). Similarly, any compliance required under a default order shall be effective and enforceable without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). *Id.* If necessary, EPA may then seek to enforce such Final Order of Default against Respondents, and to seek compliance and collect the assessed penalty amount, which may be up to \$177,500, in federal court.

INFORMAL SETTLEMENT CONFERENCE

37. Whether or not Respondents request a formal hearing, Respondents may request an informal settlement conference to discuss the facts of this case, the proposed penalty and

compliance order, and settlement. 40 C.F.R. § 22.18(b). To request such a settlement conference, please contact:

Erica Maharg
Office of Regional Counsel (ORC-2)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3943

Ms. Maharg is also authorized to receive service related to this proceeding.

38. 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).
39. Settlement discussions do not affect Respondents' obligation to file a timely Answer to the Complaint and 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 and compliance order simply because an informal settlement conference is held.
40. 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, Respondents 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).
41. Respondents' entering into a settlement does not extinguish, waive, satisfy, or otherwise affect Respondents' obligation to comply with all applicable statutory and regulatory requirements and legal orders.

GENERAL PROVISIONS

42. The provisions of this Proposed Order shall apply to and be binding upon Respondents, its officers, directors, agents, successors, and assigns. Respondents shall give notice and a copy of this Proposed Order to any successor-in-interest prior to transfer of ownership or operation of Respondents' Facility or operations at Kailua-Kona, Hawaii. Such transfer, however, shall have no effect on Respondents' obligation to comply with this Proposed Order. Action or inaction of any persons, firms, contractors, employees, agents, or corporations acting under, through, or for Respondents shall not excuse any failure of Respondents to fully perform their obligations under this Proposed Order.
43. This Proposed 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 Proposed Order is not an election by EPA to forgo any civil or any criminal action otherwise authorized under the SDWA.
44. Notwithstanding compliance with the terms of this Proposed 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 Respondents. EPA expressly reserves the right to enforce this Proposed Order through appropriate proceedings.
45. Violation of any term of this Proposed Order, or failure or refusal to comply with this Proposed Order, may subject Respondents to additional enforcement action pursuant to Section 1423(b), 42 U.S.C. § 300h-2(b), and/or Section 1423(c)(7), 42 U.S.C. § 300h-2(c)(7) of the SDWA.

EFFECTIVE DATE

46. 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 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).

8 September 2010

Date

Alexis Strauss

Alexis Strauss, Director

Water Division

U.S. Environmental Protection Agency, Region IX

CERTIFICATE OF SERVICE

In the Matter of Jose P. Jazmin and Betty Jazmin, Trustees of The Jazmin Family Trust,
Docket No. UIC-09-2010-0006

I hereby certify that the foregoing COMPLAINT AND PROPOSED ADMINISTRATIVE ORDER WITH ADMINISTRATIVE CIVIL PENALTY was filed with the Regional Hearing Clerk, Region IX and that a copy was sent, along with a copy of the 40 CFR Part 22 *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, certified mail, return receipt requested, to:

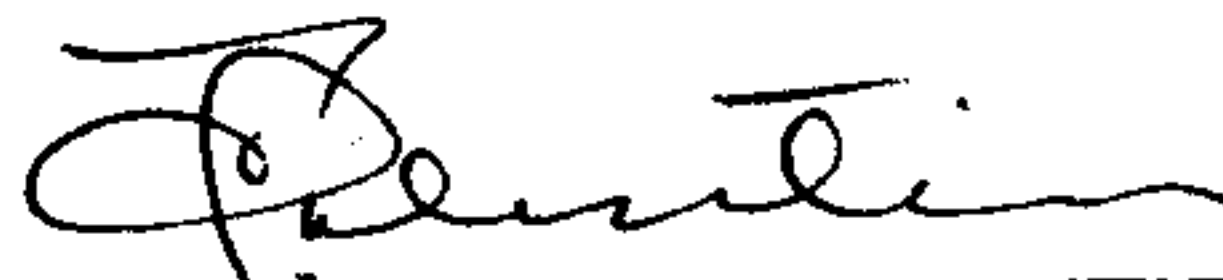
Jose P. Jazmin & Betty Jazmin, Trustees
Jazmin Family Trust
348 El Toyonal
Orinda, CA 94563

Receipt # 7000 0520 0021 6107 1378

Jeffrey W. Allen, Esq.
Van de Poel, Levy, & Allen, LLP
1600 South Main Plaza, Suite 325
Walnut Creek, CA 94596

7000 0520 0021 6107 1385

Dated at San Francisco, California: 9/13/10



Name

SECRETARY

Position