

FILED

2010 APR 6 PM 5:08
REGIONAL CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:)
)
Gay & Robinson, Inc.,) U.S. EPA Docket No.
Respondent.) UIC-09-2009-0004
)

ORDER GRANTING COMPLAINANT'S REQUEST TO APPROVE FINAL ORDER

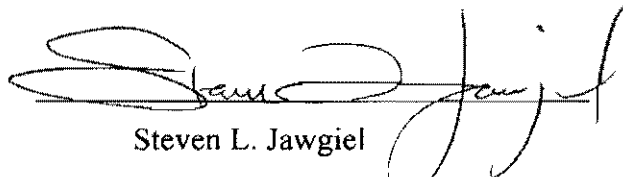
The United States Environmental Protection Agency (Complainant) seeks approval of the parties' Consent Agreement and Proposed Final Order.

Consolidated Rules of Practice at 40 C.F.R. § 22.45 set forth the rules governing public notice and comment in proceedings under sections 1423(c) and 1445(a) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c), 300j-4(a)). As stated in the parties' Consent Agreement and Proposed Final Order, Complainant assessed the penalties in this matter pursuant to sections 1423(c) and 1445(a) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c) and 300j-4(a)). Therefore, Complainant is subject to the mandatory notice and public comment requirements of 40 C.F.R. § 22.45. Complainant submitted sufficient proof that it complied with the notice requirements set forth in 40 C.F.R. § 22.45. Complainant also established it "received no comments in response to the public notice of this proceeding."

IT IS THEREFORE ORDERED THAT:

Complaint's request for a Final Order is GRANTED.

Dated: April 5, 2010


Steven L. Jawgiel
Regional Judicial Officer

1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

2 REGION IX

3
4 Docket No. UIC-09-2009-0004

5 In the Matter of:

FINAL ORDER

6 Gay & Robinson, Inc.

7 Kaunakani, Hawaii

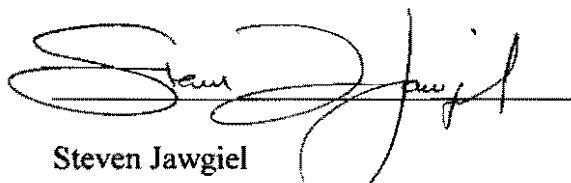
8 Proceedings under Section 1423(c) of
9 the Safe Drinking Water Act, 42
10 U.S.C. § 300h-2(c)
11

12 The United States Environmental Protection Agency Region IX ("EPA"), and Gay &
13 Robinson, ("Respondent") having entered into the foregoing Consent Agreement, and EPA having
14 duly publicly noticed the Stipulations and Findings and Proposed Order regarding the matters
15 alleged therein,
16

17
18 IT IS HEREBY ORDERED THAT:

19 1. The foregoing Consent Agreement and this Final Order (Docket No. UIC-09-
20 2009-0004) be entered; and
21

22 2. Respondent shall comply with the requirements set forth in the Consent Agreement
23 and Proposed Order, which shall become final and effective on the date it is signed below.
24

25 

26 Steven Jawgiel
27 Regional Judicial Officer
28 U.S. Environmental Protection Agency

Date: 04/05/10

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. Pursuant to 40 C.F.R. § 144.88, existing large capacity cesspools are 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 nor 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.

4. 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.

5. Pursuant to Section 1423(c)(1) of the Act, 42 U.S.C. § 300h-2(c)(1), EPA may issue an administrative compliance order to any person who violates any requirement of an applicable UIC program. 42 U.S.C. § 300h-2(c)(1).

6. Pursuant to Section 1445(a)(1)(A) of the Act, 42 U.S.C. § 300j-4(a), 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).

7. Respondent is a corporation. Thus, 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.

8. Respondent owns and operates a sugar plantation in Kaumakani, Pakala Village and Kaawanui Camp, County of Kauai, Hawaii ("the Facility").

9. Respondent operates forty (40) large capacity cesspools ("LCCs") at the Facility.

10. Respondent did not close the LCCs by April 5, 2005 as required by 40 C.F.R. § 144.88.

11. Based on all the foregoing, Respondent has violated the requirement that all LCCs be closed by April 5, 2005, and is therefore in violation of 40 C.F.R. § 144.88.

III. PROPOSED ORDER

Respondent and EPA agree to the issuance of the following, which, upon issuance of the Final Order, shall become effective:

A. COMPLIANCE REQUIREMENTS - KAUMAKANI AVENUE

1. Respondent shall close and abandon the LCC at Kaumakani Avenue in accordance with 40 C.F.R. §144.89(a) no later than May 30, 2010.

2. For each of the homes at Kaumakani Avenue, Respondent shall install Hawaii Department of Health ("DOH") approved Individual Wastewater Systems ("IWSs") (i.e., septic tanks), which may have individual or shared leach fields.

B. COMPLIANCE REQUIREMENTS - PAKALA VILLAGE

1. Respondent shall close the LCCs at Pakala Village in accordance with 40 C.F.R. §144.89(a) no later than September 30, 2011.

2. Respondent shall install DOH approved replacement systems (to be determined) at Pakala Village.

3. Respondent may also convert any LLC at Pakala Village to a small capacity cesspool by disconnecting, plugging plumbing pipes and shutting-off water supplies to

uninhabitable and vacant homes. This action will satisfy closure requirements of an LCC if the number of dwellings that the cesspool serves has been reduced to one single family dwelling. To confirm compliance with this closure option, Respondent must submit to EPA the following information:

a. Photographic evidence that shows that the dwellings have been disconnected from the LCC(s).

b. A complete list of the addresses and TMKs of these single-family dwellings that can now be considered served by small capacity cesspools and the following self-certification language:

The cesspool at [ADDRESS, TMK] serves a single-family dwelling on a residential property. I am aware that a cesspool serving a multiple-family dwelling is considered a large capacity cesspool and is federally prohibited.

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision. 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.

If there are any changes to the wastewater system at the property noted above or any additional information that would be relevant to this requirement, I will advise EPA of this information.

4. Respondent shall either close the LCCs at Pakala Village or convert the LCCs to small capacity cesspools as described in this **Section B** no later than September 30, 2011.

C. COMPLIANCE REQUIREMENTS - CAMP 6

1. Respondent shall close the LCCs at Camp 6 in accordance with 40 C.F.R. §144.89(a) no later than May 30, 2010.

2. Respondent shall install DOH approved IWSs at Camp 6, which will include installation of septic tanks and conversion of LCCs to seepage pits.

3. Respondent may also convert any LLC at Camp 6 to a small capacity cesspool by disconnecting, plugging plumbing pipes and shutting-off water supplies to uninhabitable and vacant homes. This action will satisfy closure requirements of an LCC if the number of dwellings that the cesspool serves has been reduced to one single family dwelling. To confirm compliance with this closure option, Respondent must submit to EPA the following information:

a. Photographic evidence that shows that the dwellings have been disconnected from the LCC(s).

b. A complete list of the addresses and TMKs of these single-family dwellings that can now be considered served by small capacity cesspools and the following self-certification language:

The cesspool at [ADDRESS, TMK] serves a single-family dwelling on a residential property. I am aware that a cesspool serving a multiple-family dwelling is considered a large capacity cesspool and is federally prohibited.

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision. 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.

If there are any changes to the wastewater system at the property noted above or any additional information that would be relevant to this requirement, I will advise EPA of this information.

4. Respondent shall either close the LCCs at Camp 6 or convert the LCCs to small capacity cesspools as described in this Section C no later than May 30, 2010.

D. CLOSURE PLANS FOR ALL LCCs

1. Respondent shall submit closure plans with projected start and completion dates for each step to replace an LCC with a DOH approved IWS and to close the LCCs at Pakala Village, Kaumakani Avenue, and Camp 6. For each of the three sites, Respondent shall include the dates projected for the following steps:

- a. Submittal of an LCC inventory to EPA with the number and location of each LCC;
- b. Submittal of the IWS design plans to DOH for approval;
- c. Submittal of an "Application for Backfilling an Injection Well Cesspool" to DOH, as applicable;
- d. Start of construction on wastewater system upgrades;
- e. Completion of construction and submittal of the construction inspection report to DOH;
- f. Receipt of final approval from DOH to operate the wastewater system;
- g. Receipt of final approval from DOH for LCC abandonment, if applicable;
- h. Closure or conversion of the LCC as required in the above paragraphs; and,
- i. Submittal to EPA of a copy of DOH correspondence indicating approval for use and a copy of the Backfill Closure Report, if applicable.

2. Respondent shall submit such plans within 30 days from the effective date of this Order.

E. PROGRESS REPORTS ON CLOSURE OF LCCs

1. On a quarterly basis, Respondent shall submit progress reports to EPA concerning the status of the steps in the closure plans. If there are delays, Respondent must note the reason(s) for the delay(s) and what action(s) have taken place to meet the agreed upon LCC closure date(s). Respondent shall include confirmation of closure of each LCC to EPA in the progress report. Such progress reports shall be due on January 30, April 30, July 30 and October 30 for the previous calendar quarter.

2. All submittals made pursuant to this CA/FO shall be mailed to:

LCC Project Coordinator
Ground Water Office, WTR-9
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

3. All reports and/or other information submitted to EPA Region IX pursuant to this CA/FO must be signed by a duly authorized representative of Respondent, and shall include the following statement:

"I certify under penalty of law that this document and all attachments were prepared by direct supervision or 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, 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."

[Signature].

F. CIVIL PENALTY

1. The SDWA authorizes civil administrative penalties of up to \$11,000 per day for each violation of the UIC program requirements occurring after March 15, 2004 through

January 12, 2009, and up to \$16,000 per day for each violation occurring after January 12, 2009 up to a maximum of \$177,500. (42 U.S.C. § 300h-2(c)(1)), as amended by 40 C.F.R. 19.4 (2008); 73 Fed. Reg. 75340, 75345 (Dec. 11, 2008) and 74 Fed. Reg. 626, 628 (Jan. 7, 2009). Pursuant to Section 1423(c)(1) of the Act, 42 U.S.C. 300h-2(c)(1), and 40 C.F.R. 19.4, EPA may issue an order either assessing such a civil administrative penalty or requiring compliance, 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). Based upon the facts alleged herein and upon those factors which the Complainant must consider pursuant to 42 U.S.C. § 300h-2(c)(3), EPA has determined that it is appropriate to assess, and Respondent has, without admission, agreed to pay to the United States, a civil administrative penalty in the amount of \$110,000.00.

2. Payment of penalty must be received on or before **thirty (30) calendar days** after the effective date of the CA/FO. The date by which payment must be received by the United States shall be the "due date" for the payment.

3. Respondent shall make payment under this CA/FO in accordance with any of the acceptable methods of payment listed in the attached "EPA Region 9 Collection Information" sheet (Attachment B), which is incorporated by reference as part of this CA/FO. Concurrent with payment of the penalty, Respondent shall provide written notice of payment, referencing the title and docket number of this case and attach a photocopy of the penalty payment, via certified mail to the following:

Nancy Rumrill
U.S. EPA, Region IX
75 Hawthorne Street (Mail Code: WTR-9)
San Francisco, CA 94105

4. If full payment is not received on or before the due date, interest shall accrue on any overdue amount from the due date through the date of payment, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. In addition, a late payment handling charge of \$15.00 will be assessed for each thirty (30) day period (or any portion thereof) following the due date in which the balance remains unpaid. A six percent (6%) per annum penalty will also be applied on any principal amount not paid within ninety (90) days of the due date. Respondent shall tender any interest, handling charges, or late penalty payments in the same manner as described above.

5. Pursuant to Section 1423(c)(7) of the Act, 42 U.S.C. 300h-2(c)(7), if Respondent fails to pay by the due date the administrative civil penalty assessed in Part III, Section F, Paragraph 1 above, EPA may bring a civil action in an appropriate district court to recover the amount assessed (plus costs, attorneys fees, and interest). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. 42 U.S.C. 300h-2(c)(7).

6. The civil penalty, and any interest, late handling fees, or late penalty payments provided for in this CA/FO, shall not be deducted from Respondent's, or any affiliated entity's, federal, state or local taxes.

G. GENERAL REQUIREMENTS AND PROVISIONS

1. For the purpose of this proceeding, Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest, in any administrative or judicial forum, EPA's jurisdiction to enter into this CA/FO.

2. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

3. The provisions of this CA/FO shall be binding upon Respondent and its employees and contractors. 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 CA/FO.

4. Respondent shall give notice, and provide a copy of this CA/FO, to any successor-in-interest prior to transfer of ownership or operation of the large capacity cesspools referred to in **Section II, Paragraph 9**. Such transfer, however, shall have no effect on Respondent's obligation to comply with this CA/FO. Respondent shall notify EPA in writing at least thirty (30) days prior to any such transfer of ownership or operation of the large capacity cesspools referred to in **Section II, Paragraph 9**.

5. Respondent consents to the issuance of this CA/FO and the conditions specified herein.

6. Respondent waives any right to a hearing under Section 1423(c)(3) of the Act, 42 U.S.C. § 300h-2(c)(3), or to otherwise contest the allegations contained in this CA/FO, or to appeal the CA/FO.

7. This CA/FO 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 Act and accompanying regulations.

8. Issuance of or compliance with this CA/FO does not waive, extinguish, satisfy, or otherwise affect Respondent's obligation to comply with all applicable requirements of the Act, regulations promulgated thereunder, and any order or permit issued thereunder.

9. EPA reserves any and all legal and equitable remedies available to enforce this CA/FO. Violation of this CA/FO shall be deemed a violation of the Act.

10. Each party hereto shall bear its own costs and attorneys fees incurred in this proceeding.

11. If any event occurs which causes or may cause delays in either: 1) submission of milestone reports or 2) reaching any of the deadlines set forth in **Part III, Sections A, B or C** of this CA/FO, Respondent shall, within 7 business days of the delay or within 7 business days of Respondent's knowledge of the anticipated delay, whichever is earlier, notify by telephone the EPA Region IX LCC Project Coordinator or, in her/his absence, the Manager of the EPA Region IX Ground Water Office. Within fifteen (15) business days thereafter, Respondent shall provide in writing the reasons for the delay, the anticipated duration of the delay, the measures taken or to be taken to prevent or minimize the delay, and a timetable by which those measures will be implemented. Respondent shall exercise its best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the notice requirement of this paragraph shall preclude Respondent from asserting any claim of *force majeure*.

12. If EPA agrees that the delay or anticipated delay in compliance with this CA/FO has been or will be caused by circumstances entirely beyond the control of Respondent, the time for performance may be extended. EPA may consult with Respondent to determine the amount of time for the extension. In such event, EPA shall grant, in writing signed by the Manager of the EPA Region IX Ground Water Office, the extension of time. To the extent that the *force majeure* incident impacts subsequent milestones, EPA and Respondent may consult to determine whether other changes to the compliance schedule are warranted.

13. In the event that EPA does not agree that a delay in achieving compliance with the requirements of this CA/FO has been or will be caused by circumstances beyond the control of the Respondent, EPA will notify Respondent in writing of its decision and any delays will not be excused.

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

15. All milestone reports, other information and any requests for extension of time required to be submitted pursuant to this CA/FO shall be sent to the following address:

LCC Project Coordinator
Ground Water Office, WTR-9
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

16. No term or condition of this CA/FO shall be interpreted to require the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In cases where the payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be adjusted accordingly by the parties.

17. The provisions of this CA/FO shall be severable. If any provision of this CA/FO is found to be unenforceable, the remaining provisions of this CA/FO shall remain in full force and effect.

18. This Consent Agreement may be executed and transmitted by facsimile, email or other electronic means, and in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument.

19. Each signatory to this CA/FO certifies he or she is fully authorized to enter into and bind the party for whom it is signing to the terms of the CA/FO.


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H. EFFECTIVE DATE

1. The effective date of the CA/FO shall be the date that the Final Order is signed.

FOR THE CONSENTING PARTIES:

For Gay & Robinson, Inc.:



Charles Okamoto
CEO & President

Date: 02/03/2010

For the United States Environmental Protection Agency:



Date: 28 March 2010

Alexis Strauss, Director
Water Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

CERTIFICATE OF SERVICE

I hereby certify that the foregoing ORDER GRANTING COMPLAINANT'S REQUEST TO APPROVE FINAL ORDER, dated April 5, 2010, and the FINAL ORDER (incorporating a CONSENT AGREEMENT AND FINAL ORDER) in the matter of *Gay and Robinson Inc.* (UIC-09-2009-0004), dated April 5, 2010, has been filed with the Regional Hearing Clerk, and a copy was served on Counsel for Respondent, and Counsel for EPA, as indicated below:

FIRST CLASS MAIL - CERTIFIED
(7000 0520 0021 6108 1797)

Respondent -
(By Counsel)

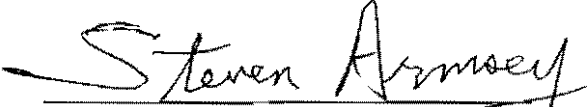
Ian Sandison, Esq.
CARLSMITH BALL LLP
1001 Bishop Street (Suite 2200)
Honolulu, HI 96813

HAND DELIVERED

Complainant -
(By Counsel)

Julia Jackson, Esq.
Office of Regional Counsel
ENVIRONMENTAL PROTECTION AGENCY
75 Hawthorne Street
San Francisco, CA. 94105

Dated at San Francisco, Calif., this 7th day of April, 2010.


Steven Armsey
Regional Hearing Clerk
EPA, Region 9

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