

1 SYLVIA QUAST
2 Regional Counsel
3 United States Environmental Protection Agency, Region 9

4 JULIA JACKSON
5 Assistant Regional Counsel
6 United States Environmental Protection Agency, Region 9
7 75 Hawthorne Street
8 San Francisco, California 94105
9 (415) 972-3948

10 Attorneys for Complainant

11 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
12 **REGION 9**

13 IN THE MATTER OF:) DOCKET NO. UIC-09-2016-0003
14 Aloha Petroleum, Ltd.,)
15 Captain Cook, Hawaii,)
16 Respondent.) **PROPOSED ADMINISTRATIVE ORDER**
17) **FOR PENALTIES**
18) **(Administrative Complaint)**
19 Proceedings under Section 1423(c) of the Safe)
20 Drinking Water Act, 42 U.S.C. § 300h-2(c).)
21)
22)
23)
24)
25)

26 **I. AUTHORITY**

27 1. The United States Environmental Protection Agency (EPA) issues this Proposed
28 Administrative Order for Penalties pursuant to the authority vested in the Administrator of EPA
29 and properly delegated to the EPA Region 9 Director of the Enforcement Division under Section
30 1423(c) of the Safe Drinking Water Act (Act), 42 U.S.C. § 300h-2(c). The rules for this
31 proceeding are the “Consolidated Rules of Practice Governing the Administrative Assessment of
32 Civil Penalties and the Revocation/Termination or Suspension of Permits” (“Rules of Practice”),
33

34 **In re: Aloha Petroleum**
35 **Notice of Proposed Administrative Order (Complaint)**

1 40 Code of Federal Regulation (C.F.R.) Part 22, a copy of which is enclosed. *See, specifically* 40
2 C.F.R. § 22.1(a)(9). Pursuant to the Rules of Practice, this Proposed Order (hereinafter referred
3 to as the “Complaint”) conforms to the prehearing procedures at 40 C.F.R. § 22.14 governing
4 administrative complaints and therefore commences an administrative proceeding pursuant to 40
5 C.F.R. § 22.13(a). EPA alleges as follows:

6 **II. JURISDICTION**

7
8 2. The Regional Judicial Officer for EPA Region 9 is the Presiding Officer with
9 jurisdiction over this action pursuant to the Rules of Practice, 40 C.F.R. Part 22, Subpart I, §§
10 22.50(a)(2) and 22.51.

11 **III. STATUORY AND REGULATORY BACKGROUND**

12 1. To prevent underground injection which endangers drinking water sources, EPA
13 has promulgated regulations pursuant to Part C of the Act, 42 U.S.C. §§ 300h – 300h-8, which
14 establish minimum requirements for Underground Injection Control (UIC) programs. These UIC
15 regulations are set forth in 40 C.F.R. Part 144.

16 2. The UIC regulations define “underground injection” to mean the subsurface
17 emplacement of fluids by well injection. 42 U.S.C. § 300 h(d)(1), 40 C.F.R. § 144.3.

18 3. “Well injection” is defined by 40 C.F.R. § 144.3 to mean the subsurface
19 emplacement of fluids through a well.

20 4. A “drywell” is a type of well, other than an improved sinkhole or subsurface fluid
21 distribution system, completed above the water table so that its bottom and sides are typically dry
22 except when receiving fluids. 40 C.F.R. § 144.3.

23 5. A “cesspool” is a type of drywell that receives untreated sanitary waste containing
24 human excreta, and which sometimes has an open bottom and/or perforated sides. 40 C.F.R. §
25

1 144.3. "Sanitary waste" is defined at 40 C.F.R. § 144.3 to include: "wastes collected from toilets,
2 showers, wash basins, sinks used for cleaning domestic areas, sinks used for food preparation,
3 clothes washing operations, and sinks or washing machines where food and beverage serving
4 dishes, glasses and utensils are cleaned."

5 6. "Large capacity cesspool" or LCC is defined as a cesspool that receive sanitary
6 waste from "multiple dwelling, community or regional cesspools, or other devices." 40 C.F.R. §
7 144.81(2). Large capacity cesspools do not include single family residential cesspools or non-
8 residential cesspools which receive solely sanitary waste and have the capacity to serve fewer
9 than 20 persons per day. *Id.*

10 7. "Person" means an "individual, association, partnership, corporation,
11 municipality, State, Federal, or Tribal agency, or an agency or employee thereof." 42 U.S.C. §
12 300f(12); and 40 C.F.R. § 144.3.

13 8. The UIC regulations at 40 C.F.R. § 144.88 required owners or operators of existing
14 large capacity cesspools to close them no later than April 5, 2005 in accordance with the closure
15 specifications contained in 40 C.F.R. § 144.89.

16 9. EPA administers the UIC program in the State of Hawaii pursuant to section
17 1422(c) of the Act, 42 U.S.C. § 300h-1(c), and 40 C.F.R. § 147, Subpart M, § 147.601.

18 10. Pursuant to section 1423(c) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. §
19 19.4, EPA may issue an administrative order against any person who violates the Act or any
20 requirement of an applicable UIC regulation, and the administrative order may:
21

- 22 a. assess an administrative civil penalty of not more than \$16,000 for each day of
23 each violation occurring after January 12, 2009, up to a maximum penalty of
24 \$187,500, or
25

1 18. From at least April 5, 2005 to December 23, 2014, the Property, including the two
2 restrooms located at the convenience store, has been served by a cesspool.

3 19. The doors to the restrooms specified in Paragraph 17 are and have been located on
4 the outside of the convenience store.

5 20. During periods relevant to this Complaint, Aloha Petroleum employees provided
6 access to the restrooms upon request by customers of the gas station or convenience store.

7 21. During periods relevant to this Complaint, at least one of the restrooms identified
8 in Paragraph 17 has been accessible to members of the public without a key.

9 22. Between at least May 1, 2011 and November 30, 2014, there were never less than
10 314 business transactions per day at the Property, and as many as 871.

11 23. The business transactions at the Property identified in Paragraph 22 included
12 purchases of gas, purchase of items at the convenience store, or both.

13 24. As a result, at a minimum, from 314 to 871 individuals could have potentially
14 accessed one or both of the restrooms on a daily basis during periods of time relevant to this
15 Complaint.

16 25. From at least April 5, 2005 to the present, Respondent has also employed at least
17 five employees at the Property, and five different vendors/contactors have visited the Property
18 daily, three different vendors/contractors have visited the Property monthly, and two different
19 vendors/contractors have visited the Property annually.

20 26. The cesspool located at the Property had the capacity to serve more than 20
21 persons per day from between April 5, 2005 and December 23, 2014.

22 27. Based upon the foregoing, the cesspool serving the Property is a “large capacity
23 cesspool” as that term is defined at 40 C.F.R. § 144.81(2), because it receives sanitary waste,
24 including human excreta, from the associated convenience store, which is a non-residential
25 facility that has the capacity to serve more than 20 persons per day.

1 28. Respondent closed the cesspool at the Property on December 23, 2014.

2 29. Respondent's failure to close the cesspool at the Property by April 5, 2005,
3 constituted an ongoing violation until at least December 23, 2014 of the requirements of the Act
4 and of the UIC regulations at 40 C.F.R. § 144.88 to close all LCCs by April 5, 2005.

5 **V. RELIEF SOUGHT: PROPOSED ORDER FOR**
6 **PENALTIES**

7 30. Pursuant to 40 C.F.R. § 22.27, EPA requests that the Presiding Officer issue an
8 initial decision in this matter assessing an administrative penalty.

9 31. Pursuant to Section 1423(c) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. §
10 19.4, EPA seeks an administrative penalty of *up to* one hundred and eighty-seven thousand five
11 hundred dollars (**\$187,500.00**), for Respondent's failure to comply with the UIC regulations at
12 40 C.F.R. Part 144.

13 32. The proposed penalty amount is based upon the foregoing facts and findings and
14 after taking into consideration the factors set forth in Section 1423(c)(4) of the Act: (1) the
15 seriousness of the violations; (2) the economic benefit resulting from the violations; (3) any
16 history of such violations; (4) any good faith efforts to comply with the applicable requirements;
17 (5) the economic impact of the penalty on Respondents; and (6) such other matters as justice may
18 require.

19 33. As provided in 40 C.F.R. § 22.14(a)(4), the following is a brief explanation of the
20 severity of Respondent's violation: Respondent violated a crucial provision of the UIC
21 regulations by owning and/or operating an LCC since February 3, 1995, when Respondent
22 purchased the Property, up until December 23, 2014, when it finally closed the cesspool. Thus,
23 Respondent has owned and/or operated an LCC well past the April 5, 2005 deadline for closure
24 of all LCCs clearly set forth in the UIC regulations at 40 C.F.R. § 144.88.
25

1 34. The Act’s UIC regulations at 40 C.F.R. § 144.88 required closure of all LCCs by
2 April 5, 2005 to assure the safety of the country’s drinking water sources by preventing direct
3 contamination of identified water supplies and minimizing the risk that any potential drinking
4 water sources be contaminated. 64 Fed. Reg 66546 (Dec. 7, 1999). In promulgating the LCC
5 closure requirement, EPA found LCCs have a high potential to contaminate underground sources
6 of drinking water and to threaten human health because:

- 7 a. sanitary waste entering large capacity cesspools can percolate out the bottom of the
8 well to shallow groundwater sources of drinking water;
- 9 b. large capacity cesspools are not designed to treat sanitary waste;
- 10 c. wastewater from large capacity cesspools frequently exceed drinking water health
11 standards for nitrates, total suspended solids, and coliform bacteria;
- 12 d. wastewater from large capacity cesspools may contain other constituents of concern
13 such as phosphates, chlorides, grease, viruses, and chemicals used to clean cesspools
14 (e.g., trichloroethane and methylene chloride);
- 15 e. areas that rely on cesspools are in general more likely to rely on groundwater for their
16 drinking water supplies; and
- 17 f. pathogens in untreated sanitary waste released from large capacity cesspools could
18 pose an acute health risk (i.e. a person could become ill by taking one drink from an
19 affected drinking water supply). *Id.* at 68553.

20
21 35. Within thirty (30) days of the effective date of any Final Order in this matter,
22 Respondent shall pay the assessed penalty in accordance with any acceptable methods of
23 payment listed in the attached “EPA Region 9 Collection Information,” which is incorporated by
24
25

1 reference as part of this Complaint, unless an appeal to a United States District Court is taken
2 pursuant to section 1423(c)(6) of the Act, 42 U.S.C. § 300h-2(c)(6).

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

5
6 Steven Armsey
7 Regional Hearing Clerk
8 Office of Regional Counsel (ORC-1)
9 U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Jelani Shareem
Safe Drinking Water Office
(ENF-3-3)
Enforcement Division
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, Ca 94105

10
11 37. Notwithstanding compliance with the terms of any Final Order, EPA is not
12 precluded from taking any action authorized by law including, but not limited to, the issuance of
13 additional administrative orders, and/or the initiation of judicial actions, against Respondent.

14
15 **VII. ANSWERING THE COMPLAINT AND REQUESTING A HEARING ON**
16 **THE PROPOSED ORDER FOR PENALITIES**

17 A. Answer to the Complaint

18 38. If Respondent intends to contest any material fact upon which the Complaint is
19 based, or wishes to contend that the Proposed Order for Penalties is inappropriate, or that
20 Respondent is entitled to judgment as a matter of law, then the Rules of Practice at 40 C.F.R. §
21 22.15(a) require that Respondent file an original and one copy of a written Answer with EPA
22 Region 9's Regional Hearing Clerk within thirty (30) days after service of this Complaint and
23 Proposed Order at the address below:

24 Steven Armsey
25 Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 9

**In re: Aloha Petroleum
Notice of Proposed Administrative Order (Complaint)**

75 Hawthorne Street (mail code: ORC-1)
San Francisco, CA 94105

39. The Rules of Practice at 40 C.F.R. § 22.15(a) also require that Respondent serve an additional copy of the Answer on EPA to the following person who is authorized to receive service related to this proceeding:

Julia Jackson
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street (mail code: ORC-2)
San Francisco, CA 94105
Phone: (415) 972-3948

40. In accordance with 40 C.F.R. § 22.15(b), the contents of the Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. Under 40 C.F.R. Section 22.15(d), Respondent's failure to admit, deny or explain any material factual allegation contained in this Complaint constitutes an admission of the allegation. The Answer must also, in accordance with 40 C.F.R. § 22.15(b), state: (1) The circumstances or arguments that are alleged to constitute the grounds of any defense; (2) the facts that Respondent disputes; (3) the basis for opposing the proposed relief; and (4) whether a hearing is requested.

B. Request for a Hearing

41. In accordance with section 1423(c)(3)(A) of the Act, 42 U.S.C. § 300h-2(c)(3)(A), EPA gives Respondent this written notice of EPA's Proposed Order for Penalties and of the opportunity to request a hearing upon the issues raised by the Complaint and Answer, and on the appropriateness of the Proposed Order for Penalties. As provided under 40 C.F.R. Section 22.15(c), if Respondent wishes to request such a hearing, it must include the request in it's

1 Answer. Such hearing shall not be subject to Sections 554 or 556 of the Administrative
2 Procedures Act, 5 U.S.C. §§ 554 and 556, but shall provide a reasonable opportunity to be heard
3 and to present evidence. If a hearing is requested, Subpart I of the Rules of Practice, 40 C.F.R.
4 Part 22, governs and sets forth the procedures of such hearing.

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

8 C. Default

9 43. To avoid the Presiding Officer's entry of a default order pursuant to 40 C.F.R. §
10 22.17(a) for a penalty of up to \$187,500, Respondent must file a written Answer with the
11 Regional Hearing Clerk in the manner described above.

12 44. Any penalty assessed in a default order will become due and payable by
13 Respondent without further proceedings thirty 30 days after the default order becomes final. 40
14 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such Final Order of Default
15 against Respondent, and seek compliance and collect the assessed penalty amount, which may be
16 up to \$187,500, in federal court.

18 VIII. REQUESTING AN INFORMAL SETTLEMENT CONFERENCE

19 45. In accordance with 40 C.F.R. § 22.18(b), whether or not Respondent requests a
20 hearing, Respondent may request an informal settlement conference to discuss the facts of this
21 case, the proposed penalty and settlement. To request such a settlement conference, please
22 contact:

23 Julia Jackson
24 Office of Regional Counsel
25 U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street (mail code: ORC-2)

San Francisco, CA 94105
(415) 972-3870

1
2 46. A request for an informal settlement conference constitutes neither an admission
3 nor a denial of any of the matters alleged herein. EPA does not deem a request for an informal
4 settlement conference to be a request for a hearing as specified in 40 C.F.R. § 22.15(c), or as
5 provided for by Section 1423(c)(3)(A) of the Act, 42 U.S.C. § 300h-2(c)(3)(A).

6
7 47. Settlement discussions do not affect Respondent's obligation to file a timely
8 Answer to the Complaint, 40 C.F.R. §§ 22.15 and 22.18(b)(1), or meet any of the deadlines set
9 forth in the Rules of Practice or established by the Presiding Officer.

10 48. The terms and conditions of any settlement that may be reached as a result of a
11 settlement conference will be recorded in a written Consent Agreement signed by all parties. 40
12 C.F.R. § 22.18(b)(2). To conclude the proceeding, the parties will seek a Final Order by the
13 Presiding Officer ratifying the parties' Consent Agreement. 40 C.F.R. § 22.18(b)(3). In accepting
14 the Consent Agreement, Respondent would waive any right to contest the allegations herein and
15 waive any right to appeal any Final Order ratifying the Consent Agreement. 40 C.F.R. §
16 22.18(b)(2). Any Consent Agreement will not become a final settlement until the public notice
17 and comment requirements set forth in 40 C.F.R. § 22.45 are met and a Final Order is issued.

18
19 49. Respondent entering into a Consent Agreement would not extinguish, waive,
20 satisfy, or otherwise affect Respondent's obligation to comply with all applicable statutory and
21 regulatory requirements and legal orders.

22 IX. Appearances

23 50. In accordance with 40 C.F.R. § 22.10, any party may appear in person or by
24 counsel or other representative. A partner may appear on behalf of a partnership and an officer
25 may appear on behalf of a corporation. Persons who appear as counsel or other representatives

1 must conform to the standards of conduct and ethics required of practitioners before the courts of
2 the United States.

3 Dated this ____ day of August, 2016
4

5 _____
6 Kathleen H. Johnson, Director
7 Enforcement Division
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 **CERTIFICATE OF SERVICE**

2
3 I certify that the original and foregoing Complaint and Notice of Opportunity for
4 Hearing, Docket Number UIC-09-2016- was filed on August ____, 2016, with the Regional
5 Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and
6 that a true and correct copy of:

7 (1) the Complaint; and

8 (2) the Consolidated Rules of Practice, 40 C.F.R. Part 22;

9 were placed in the United States Mail, certified mail, return receipt requested, addressed to the
10 following:

11 Richard Parry, President
12 Aloha Petroleum, LTD.
13 1132 Bishop Street, Ste. 1700
Honolulu, Hawaii 96813

14 Patricia J. McHenry
15 Cades Schutte LLP
16 1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

17
18
19
20 Dated: _____

21 Beatrice Plack
22 Administrative Support
23 Enforcement Division
24 U.S. EPA, Region IX
25