



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION 9
 75 Hawthorne Street
 San Francisco, CA 94105-3901**

IN THE MATTER OF:)	Docket No. SDWA-UIC-AOC-2018-004
)	
United States Department of Agriculture, Forest Service)	
)	
)	ADMINISTRATIVE
)	ORDER ON CONSENT
)	
Respondent.)	Proceeding under Sections 1423(c) and 1447(b) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c) and 300j-6(b)
)	
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I. INTRODUCTION

1. The United States Environmental Protection Agency (“EPA”) and the United States Department of Agriculture, Forest Service (“Respondent”) for the Pacific Southwest Region voluntarily enter into this Administrative Order on Consent (“Consent Order” or “AOC”). Respondent owns and operates large capacity cesspools (“LCCs”) located in the State of California.
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 large capacity cesspools (“LCCs”) to close them no later than April 5, 2005.
3. This Consent Order directs Respondent to remedy the ongoing violations relating to the continued operation of LCCs in the State of California in accordance with the compliance schedule set forth in this Consent Order.
4. EPA and Respondent recognize that this Consent Order was negotiated in good faith and that Respondent has fully cooperated with the EPA.

II. JURISDICTION

5. EPA enters into and issues this Consent Order under the authority vested in the EPA Administrator by sections 1423(c) and 1447(b) of the SDWA, 42 U.S.C. §§ 300h-2(c) & 300j-6(b).

6. The EPA Administrator has delegated the authority to take these actions to the Regional Administrator for EPA, Region 9 through EPA Delegations 9-62 and 9-35.

7. The Regional Administrator of EPA Region 9 and Respondent, together referred to as “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.

8. Respondent received 30-day notice of this AOC pursuant to section 1423(c)(3)(A) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(A). Respondent agrees to undertake and complete all actions required by this Consent Order. Respondent waives the opportunity to request a hearing on this AOC under section 1423(c)(3)(A) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(A), and the opportunity to confer with the Administrator and to request a hearing under section 1447(b)(3) of the SDWA, 42 U.S.C. § 300j-6(b)(3).

III. PARTIES BOUND

9. This AOC shall bind Respondent and its successor departments, agencies, and instrumentalities.

10. 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

11. 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 144.

12. “Underground injection” means the subsurface emplacement of fluids by well injection. 42 U.S.C. § 300h(d)(1); 40 C.F.R. § 144.3.

13. “Well injection” means the subsurface emplacement of fluids through a well. 40 C.F.R. § 144.3.

14. A “cesspool” is a “drywell,” which in turn is a “well,” as those terms are defined in 40 C.F.R. § 144.3. “Large capacity cesspools” (“LCCs”) 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). LCCs do not include single family residential cesspools or non-residential cesspools that receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day. *Id.*

15. UIC program regulations classify LCCs as Class V UIC injection wells. 40 C.F.R. § 144.80(e).

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

17. “Owner or operator” means the owner or operator of any “facility or activity” subject to regulation under the UIC program. 40 C.F.R. § 144.3.

18. 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].” 40 C.F.R. § 144.82.

19. Owners or operators of existing LCCs were required to have closed those LCCs no later than April 5, 2005. 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

20. Pursuant to Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R. § 147.251, EPA administers the Class V UIC program in the State of California.

21. Since at least April 5, 2005, Respondent has owned and operated at least sixty-two (62) LCCs in the State of California.

22. Respondent is a department, agency, and/or instrumentality of the United States and is thus a “Federal agency”. Therefore, 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.

23. EPA alleges that each of the cesspools referred to in Paragraph 21 at all times relevant to this Consent Order, have the capacity to serve 20 or more people per day, and thus each is considered an LCC pursuant to 40 C.F.R. § 144.81(2).

24. Respondent failed to close the LCCs referenced in Paragraph 23 by April 5, 2005, as required by 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

25. EPA therefore alleges that Respondent is in continuing violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

26. Pursuant to sections 1423(c) and 1447(a) of the SDWA, 42 U.S.C. § 300h-2(c) and 300j-6(a), EPA may issue an order requiring compliance against a “person”, which includes a “Federal agency”, that violates the SDWA or any requirement of an applicable UIC program.

V. COMPLIANCE PROVISIONS

27. Based on the foregoing findings and pursuant to EPA’s authority under sections 1423(c), 1447(a) and 1447(b) of the SDWA, 42 U.S.C. §§ 300h-2(c), 300j-6(a) & 300j-6(b), Respondent agrees and is hereby ORDERED to complete the following work:

A. General Requirements

28. As soon as practicable, but no later than December 31, 2020, Respondent shall close all LCCs identified in Appendix A to this AOC pursuant to SDWA and 40 C.F.R. Part 144. Within 60 days of the Effective Date, Respondent shall submit to EPA for approval a closure schedule with milestones that documents how Respondent shall comply with the final closure deadline of December 31, 2020. The proposed schedule shall ensure closure of all LCCs identified in Appendix A by the final closure deadline, with a reasonable margin of error. While Respondent has reported that it has already closed certain LCCs referenced in Appendix A, these closures have not been verified and Respondent shall submit documentation verifying such closures as part of the first semi-annual report required by

Paragraph 46. For any part of the schedule that is disapproved by EPA, Respondent shall have 30 days to submit a revised schedule that addresses any identified deficiencies. Disapproval of the schedule by EPA does not extend or modify any compliance requirement of this AOC. Once approved, the terms of the closure schedule shall become enforceable under this Consent Order.

29. In complying with Paragraph 28 of this Consent Order, Respondent shall comply with all federal, state and local laws governing the proper closure and/or conversion of cesspools based upon the location of those cesspools, including timely submittal of all necessary permit applications and diligent pursuit of issuance of such permits.

30. In performing the work set forth in this Consent Order, Respondent shall also ensure compliance with all state and federal cross-cutter environmental laws, including National Environmental Policy Act (“NEPA”), the National Historic Preservation Act (“NHPA”), and the Endangered Species Act (“ESA”), as appropriate.

31. 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. Respondent may, where appropriate, petition for an extension of the deadline contained in Paragraph 28. Any such request should be made according to the procedures set forth in Subsection C of this Consent Order.

32. Notwithstanding any delay subject to *force majeure* as described in Subsection C, Respondent shall fully implement each requirement of this Consent Order.

33. Respondent’s failure to fully implement any requirements of this Consent Order or comply with all applicable requirements of the SDWA and 40 C.F.R. Part 144 may subject Respondent to additional enforcement action.

B. Stipulated Penalties

34. 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 C of this 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, and are calculated as follows:

a. \$300 per day per violation for the first through the thirtieth day of failure to close one or more LCCs pursuant to the approved schedule submitted under Paragraph 28;

b. \$500 per day per violation for the thirty-first through the sixtieth day of failure to close one or more LCCs pursuant to the approved schedule submitted under Paragraph 28;

c. \$1,000 per day per violation for the sixty-first day of violation and beyond for failure to close one or more LCCs pursuant to the approved schedule submitted under Paragraph 28.

35. 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, Respondent's failure shall be a violation of this Consent Order.

36. 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.

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

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

39. 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

40. Respondent shall provide notice of stipulated penalty payments made pursuant to Paragraph 39, accompanied by the title and docket number of this action, to the EPA Region 9 Compliance Officer at the address provided in Paragraph 52 below.

C. Delays

41. “*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 including federal and state funding sources, failure to diligently pursue any necessary permit or approvals, or normal inclement weather.

42. 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 41, 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.

43. If, upon receiving notice required under Paragraph 42, 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 41, and upon request by Respondent, EPA may extend the applicable compliance deadline. Modification of any particular deadline shall not affect any other deadlines under this Consent Order unless expressly authorized in writing by EPA.

44. 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.

45. 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. EPA may demand stipulated penalties for unexcused delay, as set forth in Subsection B.

VI. REPORTING REQUIREMENTS

46. Semi-Annual Reports. Respondent shall submit compliance reports to the EPA Region 9 Compliance Officer and the EPA Region 9 LCC Project Coordinator on a semi-annual basis, with the first report (covering the period July 1, 2018 through December 31, 2018) due on January 31, 2019, and the second report due on July 31, 2019. Subsequent reports shall be due thirty (30) days after the close of each semi-annual reporting period thereafter. Each compliance report shall discuss Respondent's progress toward meeting the compliance deadline in Paragraph 28 and shall include, at a minimum, invoices, receipts, photographs, and/or other such documentation to confirm closure of the subject LCCs; description and status of all closure activities; description and documents evidencing alternative wastewater disposal systems; and copies of any permits or approvals received for the work. Upon

notification to Respondent, EPA may require additional status reports, or fewer status reports, and/or request additional documentation to support the compliance reports for purposes of documenting compliance with this Consent Order. EPA shall use its best efforts to notify Respondent within thirty (30) days of receipt of a report whether there are any deficiencies in the report. Respondent shall continue to submit semi-annual compliance reports until this Consent Order has been terminated pursuant to the terms of Section XIV (Termination) of this Consent Order.

47. Each compliance report must be accompanied by a certification, as described in Paragraph 50, from Respondent's authorized representative documenting progress toward meeting the compliance deadline referenced in Paragraph 28.

48. Semi-Annual Meetings. Respondent must convene semi-annual meetings (by teleconference or at a centralized meeting location) with EPA to discuss Respondent's progress in complying with the requirements and schedules of this Consent Order. Respondent shall be responsible for scheduling meetings required under this paragraph. Respondent shall provide the EPA Compliance Officer and the EPA LCC Coordinator with notice of the proposed meeting date at the addresses listed in Paragraphs 52 and 53 of this Consent Order at least fifteen (15) days in advance of the proposed meeting. The first semi-annual meeting shall take place no later than December 1, 2018.

VII. SUBMISSIONS AND NOTIFICATIONS

49. All information and documents submitted pursuant to this Consent Order shall be signed by a duly authorized representative of the Respondent.

50. 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.

51. 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. Electronic submissions are preferred.

52. All submissions made pursuant to this Consent Order shall be sent to the EPA Region 9 Compliance Officer at the following address:

Mr. Aaron Setran
U.S. EPA Region 9
SDWA/FIFRA Enforcement Office (ENF 3-3)
75 Hawthorne Street
San Francisco, CA 94105
setran.aaron@epa.gov

53. Where the Consent Order so specifies, submissions shall also be sent to the EPA Region 9 LCC Project Coordinator, at the following address:

Ms. Kate Rao
U.S. EPA Region 9
Drinking Water Protection Section (WTR 3-2)
75 Hawthorne Street
San Francisco, CA 94105
rao.kate@epa.gov

VIII. RECORD PRESERVATION

54. 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.

IX. SCOPE OF CONSENT ORDER

55. 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.

56. 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 or criminal action to seek penalties, fines, or other appropriate relief for any violations of law. EPA reserves all available legal and equitable rights and remedies to enforce any violation of this Consent Order, law, or undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment to the public health, welfare, or the environment.

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

X. WAIVER

58. 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 and any right to confer with the EPA Administrator under SDWA § 1447(b)(3), 42 U.S.C. § 300j-6(b)(3).

XI. INTEGRATION

59. 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 and 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.

XII. SEVERABILITY

60. 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.

XIII. MODIFICATIONS OF CONSENT ORDER

61. 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. 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.

XIV. TERMINATION

62. Upon completing the requirements set forth in Section V of this Consent Order, including any Modifications thereto, Respondent shall submit a final written certification of completion documenting the actions taken and that Respondent has complied with the requirements of this Consent Order. Respondent's final written certification of completion shall comply with the requirements set forth above in Section VII. If EPA determines that the work performed has not been completed in accordance with this Consent Order, EPA will make its best effort to notify Respondent of the basis of that determination. This Consent Order shall terminate when EPA issues a written approval of Respondent's written certification that Respondent has fully completed all work required under this Consent Order.

XV. PUBLIC NOTICE

63. 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 becoming effective pursuant to Paragraph 64. EPA reserves the right to withdraw or seek modification to this Consent Order in response to public comments on the proposed Order. In such case, Respondent will have no obligations under this Consent Order unless and until a revised Consent Order is agreed upon by the Parties and finalized by EPA.

XVI. EFFECTIVE DATE

64. This Consent Order shall become effective no sooner than the end of the 30-day comment period after signature by both EPA and Respondent, in accordance with Section XV, and upon written notice to the Respondent identifying the Effective Date of the Order.

IT IS SO AGREED AND ORDERED:

For the USDA Forest Service, Pacific Southwest Region:

_____/s/_____
Randy Moore
Regional Forester
USDA Forest Service, Pacific Southwest Region
1323 Club Drive
Vallejo, CA 94592

__8/1/18_____
Date

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

_____/s/_____
Michael Stoker
Regional Administrator
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

__8/9/18_____
Date