

cc JMS

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MAY 14 2018

at 2 o'clock and 10 min. P. M.
SUE BEITIA, CLERK

625

ORIGINAL

CASE NO.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

SANDRA LEE DEMORUELLE, *Pro Se*

Redacted

PLAINTIFF

- v. -

F. SCOTT PRUITT, in his official capacity
as Administrator of the United States
Environmental Protection Agency, and
ALEXIS STRAUSS, in her official capacity
as Acting Regional Administrator of the United
States Environmental Protection Agency
Region 9,

DEFENDANTS

CV18 00172 JMS KSC

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF;
ATTACHMENT A;
~~SUMMONS~~

Jury Trial: NO

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1) Plaintiff SANDRA LEE DEMORUELLE *Pro Se*, brings this action to compel F. SCOTT PRUITT in his capacity as Administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA") and Defendant ALEXIS STRAUSS in her capacity as Acting Regional Administrator of the EPA

Region 9 to perform their mandatory duties to ensure that EPA grant funds are used in compliance with the National Environmental Protection Act (“NEPA”) and EPA regulations.

2) The EPA Region 9 has been derelict in ensuring that the County of Hawaii Department of Environmental Management (“COHDEM”), an assisted agency, used EPA grant funds in compliance with 40 CFR 53.917-5 (Public Participation) when the Naalehu/Pahala Large-Capacity Cesspool (“LCC”) Replacement Project became two separate Wastewater System (“WWS”) Projects in 2012 and these two projects were subsequently tasked with milestones in the EPA Administrative Order On Consent dated June 22, 2017.

3) The Plaintiff attests that the EPA final decision in the Administrative Order On Consent (“AOC”) approving the Naalehu WWS Work Plan (AOC Attachment B) and the Pahala WWS Work Plan (AOC Attachment A) was arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law because no detailed statement evaluating the Projects’ impact on the environment, environmental costs and alternative measures was provided that described any appropriate alternatives to the COHDEM sole recommended course of action [NEPA 102(2)(C) and (E)].

4) This is a civil action for judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. Sec. 702 *et seq.*, as the final Administrative Order On

Consent between EPA and COHDEM is a final agency action providing the EPA with “power, authority and control” over the three AOC Attachment Work Plans (herein called the “Projects”) which are specific work plans with a Task timeline and defined milestones and with punitive measures in case the COH fails to timely perform the Tasks.

5) Defendants’ EPA grant funding and approval of the AOC Work Plans Projects without an Environmental Impact Statement (“EIS”) violate the National Environmental Protection Act Sec. 102(2), 42 U.S.C. Sec. 4332 (1970) which require a “hard look” at the environmental effects of the Projects before any agency decision is made.

6) Plaintiff seeks declaratory and injunctive relief to protect Plaintiff’s interests at law, especially her interests that the EPA comply with the NEPA and EPA regulatory requirements for public participation in identifying alternatives to the recommended projects (40 CFR 1501.7) and the EPA’s failure to review a COHDEM EIS before the AOC bound the COHDEM to the three Work Plans when significant environmental impacts should have been reasonably anticipated from two secondary wastewater treatment plant Projects placed where none have ever existed, one being located next to an elementary school (*see* Attachment A).

7) Further, without documented consideration of alternatives which included implementing the original decision to simply convert the LCCs to septic systems

that has a Final Environmental Assessment (“FEA”) with a Finding of No Significant Impact (“FONSI”) that was approved in 2007, EPA and COHDEM were not able to make intelligent, optimally beneficial decisions on the stringent AOC contractual commitments without an early EIS (40 CFR 1501.2).

8) Plaintiff requests that the approval of the AOC and Work Plans be set aside pursuant to 5 U.S.C. Sec. 706(2)(A) and that the Court enjoin the EPA and COHDEM from implementing the Projects until Defendants fully comply with NEPA and their own 40 CFR 35.917-5 to require public participation during the EPA-funded agency Projects’ environmental review process. EPA 40 CFR 25.12(a)(1) states: “No financial assistance shall be awarded unless EPA is satisfied that the public participation policies and requirements will be met.”

9) As well, 40 CFR 25.12 (2)(i) required EPA to evaluate the COHDEM compliance with this public participation requirement “using the [Project] work plan...” and when the assisted agency has not fully met public participation requirements “EPA shall take actions...to mitigate the adverse effects of the failure and make sure that the failure is not repeated.”

10) Based on the EPA failure to oversee the assisted agency’s public participation leading to failure to receive any public input into development of the AOC Work Plans, Plaintiff seeks a declaratory judgment, injunctive relief, the award of costs of suit, and other such relief as this Court deems just and proper.

PARTIES

11) PLAINTIFF SANDRA LEE DEMORUELLE, natural-born citizen of the United States of America, is and, at all times relevant, was a resident of the County and State of Hawaii.

12) DEFENDANT F.SCOTT PRUITT is Administrator of the EPA. The Administrator is charged with implementing and enforcing the NEPA.

13) DEFENDANT ALEXIS STRAUSS is Acting Regional Administrator of the EPA Region 9, with authority delegated by the EPA Administrator, EPA Delegation 9-34 (May 11, 1994), to take actions to close the Ka'u LCCs.

BASIS FOR JURISDICTION AND VENUE

14) This action arises under the laws of the United States and involves the United States as a defendant. Therefore, this Court has jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. Secs. 1331 (federal question jurisdiction) and 1361 (action to compel officer or agency to perform a duty owed to the Plaintiff).

15) Venue in this case is proper under 28 U.S.C. 1391(e)(1)(B). A substantial part of the events and omissions giving rise to this claim occurred in the State of Hawaii.

STATEMENT OF CLAIM

16) As a resident of Naalehu in the District of Ka'u, County and State of Hawaii, the Plaintiff's aesthetic, recreational, scientific, spiritual, educational and economic interests have been and will be adversely affected and irreparably injured if the Defendants continue to enforce the AOC Work Plans activities and timelines to install two secondary wastewater treatment plants in the Ka'u District without any evidence of public participation that resulted in generation of any "appropriate alternatives" to the COH recommended course of action.

17) The COHDEM Naalehu Work Plan dated April 21, 2017 and incorporated into the contractual terms of the AOC with fines resulting from delays in implementation, placed a full-sized secondary sewage treatment plant with four open sewage lagoons adjacent to the Naalehu Elementary School kindergarten classrooms – *see* Attachment A, Redacted, Mrs. Demoruelle's great-grandson, at the April 12, 2018 Brown and Caldwell "outreach" meeting with the Naalehu community where he is pointing to his kindergarten classroom beside the open sewage lagoons depicted less than a football field away.

18) The reason the wastewater treatment plant ("WWTP") is depicted on this specific site is because that was the only site listed as being under consideration in the AOC Naalehu WWTP Work Plan, AOC Attachment B.

19) In reliance on the AOC Naalehu Work Plan, during November 2017, COHDEM began condemnation proceedings on both the Pahala (by introducing COH Res 412-17) and Naalehu Souza family ranch properties (listed as Task 3.3 in Attachment B) to accomplish land acquisition by July 2018.

20) The COHDEM, EPA and Hawaii Department of Health-Wastewater (“DOH”) have provided very limited access to records to allow Plaintiff’s review of documents providing background information on the Project decision-making leading to the final AOC Work Plans, limiting Plaintiff’s ability to understand the administrative record of the scientific data and other environmental studies results supporting the decision-making balance between a proposed project being cost effective while remaining environmentally sound.

21) The COHDEM failed to provide on-site record review on April 25, 2018 because they failed to inform Plaintiff of the availability of said records before she left Hilo, but the unspecified fee for Sandy Shore’s “search and segregation” would have deterred and embarrassed Mrs. Demoruelle from seeing the UIPA documents because Plaintiff did not have funds available to pay any fees.

22) To date of this filing, Plaintiff has not been given COHDEM access to the documents she has requested.

23) The COHDEM stated it failed to provide public review of environmental assessment documents as required by HRS 343-3 when they wrote in the Naalehu Work Plan (p. 3): “The revised draft EA has not been issued for public review and comment ...”

24) At least by the time the final project Work Plans became a formal “proposal” – April 21, 2017 – the Federal Environmental Impact Statement requirement to examine the COH recommended projects and alternatives [per NEPA 102(2)(E)] had been triggered because of the EPA agency assistance provided to the Projects.

25) The decision to prepare an EIS is not a matter committed to the particular agency’s discretion because NEPA’s statutory EIS Directive is mandatory in nature.

26) Herein, are described actual and concrete injuries caused by the Defendants’ failure to comply with mandatory duties, including requiring the assisted agency to prepare EISs with EPA remedial public participation [40 CFR (2)(ii)] for the Projects, under NEPA and the APA.

27) By way of COH wastewater background in the region, the District of Ka’u has two areas, Naalehu and Pahala, that contain three Large-Capacity Cesspool (“LCCs”).

28) The three LCCs were owned by C. Brewer, who, in 2003, requested COH assistance to close these LCCs.

29) The EPA Region 9 Shannon Fitzgerald and her assistant Laura Bose, around 2002, met with COH department heads and Naalehu resident, Jerome Warren, to do LCC site inspections around Hawaii Island because COH had not taken steps to close the LCCs.

30) In 2002-03, before the COH held their meetings, the EPA held meetings in Pahala and Naalehu to allow public input on the EPA decisions requiring the closure of the Ka'u LCCs.

31) To guide EPA and COH decision-making, a letter was sent to all affected homeowners on August 31, 2004 with a ballot to be returned with a preferred alternative, from two collection system choices in Naalehu, to be selected.

32) On November 5, 2004, the affected homeowners received a follow-up letter from Hawaii County Mayor Harry Kim indicating the community had selected Alternative 1, a new sewage collection pipe system would be used for the LCC conversion to septic.

33) Acting upon this public input, the COH prepared and all parties approved, the FEA with a FONSI in 2007 for new collection within COH right-of-way; construction of large capacity septic tanks ("LCS"); and conversion of the LCCs to seepage pits.

34) The COH Capital Improvements Program (“CIP”) for 2005-06 listed the NAALEHU AND PAHALA LCC REPLACEMENT project as Priority 3 with \$330,000 in COH funding for 2005-06 and \$3,300,000 for the next year [06-07] for a total cost for the three LCC replacements to be \$3,630,000.

35) The EPA provided major funding for the \$3,600,000 “Ka’u Cesspool Replacement Project” with grant funding (XP-96942401-0 Original and XP 96942401-1) totaling \$1,980,000 in EPA funding with a 45% COH matching funding of \$1,620,000.

36) In 2010, COHDEM notified the Naalehu households on the LCCs of a meeting in Pahala; at the April 25, 2010 meeting, the COHDEM Lono Tyson told the LCC users that, henceforth, they would have to pay a sewage fee.

37) The sole EPA response to Mrs. Demoruelle’s recent FOIA request for EPA Grant XP-96942401 documentation of award and payments provided only records on the COH’s EFT Payment Request No. 8 for the “Ka’u (Naalehu) Cesspool Replacement Project.”

38) On January 4, 2011, Kate Rao of the EPA Region 9 Ground Water Office approved the payment of \$133,853 of COH contact Robin Bauman’s \$207,006 requested for EFT # 90204 U.S. EPA Payment Request of November 5, 2010.

39) Subsequent to the FEA with FONSI, the COH did “field studies” (AOC Attachment B, p. 2), and without public participation as required by EPA

regulations 40 CFR 53.917-5 and 40 CFR 25.12(a)(1) by holding timely public meetings or formal hearings giving the public adequate opportunity to participate in this new planning process, the COHDEM decided to look for new sites for the seepage pit or leach field.

40) At this same time (between the 2011 and 2012 DEM CIP budgets) and without public participation, with absolutely no expressed community need, and for no convincingly documented reason, the COHDEM changed the single LCC conversions Project costing \$3,630,000 into two secondary treatment systems Projects funded separately for Pahala and Naalehu from 2012 to the current \$41,051,000 for the two Projects in the DEM CIP 2018-19 budget.

41) Factually, COH explanations for Project size, complexity and cost expansion fail logically because the COH knew the Naalehu 2010 population figures showed a declining population from 919 people in 2000 down to 866 in 2010.

42) In spite of the fact that the affected Naalehu LCC area has a declining population and many abandoned properties, the COH said the new construction secondary treatment sewage plants, including the one in AOC Attachment B that was specifically sited to include TMK 9-5-011:003 and shown at the sole Naalehu community “outreach” meetings in April 2018 with four open lagoons beside Naalehu Elementary School (*see* Attachment A), were required “for possible growth of the community.”

43) The reasons the COH abandoned the original agreement with the affected Naalehu homeowners is unclear because no records of the “field studies” on which the decision “that septic/seepage pit system was not the best wastewater treatment” have been made available to Plaintiff through UIPA requests.

44) No reason has been given by COHDEM for why the “field studies” were done after the FEA concluded the LCC conversion projects had no significant impacts.

45) As well, there is no documentation of consideration of any appropriate alternatives to the COH recommended course of action to construct two secondary treatment systems or any evidence of public input in this decision.

46) In fact, the COH unilateral decision to construct two full-size secondary wastewater treatment plant in Naalehu and Pahala was in direct contradiction to the recommended course of action which public participation through the August 31, 2004 vote deemed optimally beneficial to both communities.

47) The first time any venue for public input on the twin sewage plant Projects occurred was when EPA allowed public input on the AOC and its three COHDEM Work Plan Attachments in May 2017.

48) Although EPA received six comments from members of the affected Naalehu community, in its response, EPA dismissed all the critiques because, despite the specific WWTP site locations (including acquisition of TMK 9-5-

011:003) defined in the Tasks and milestone AOC performance requirements, the EPA maintained the site and type of treatment systems were not yet decided.

49) The Environmental Management Commissioners could find no opportunity for any change in the Naalehu WWTP siting or for public input in the plans explained by DEM Director Kucharski at their meeting on April 25, 2018 meeting.

50) The “outreach” meetings held in Pahala and Naalehu were carefully structured by COHDEM contractor Brown and Caldwell to present no opportunity to provide any public input into appropriate alternatives to the recommended action for the two sewage plants or provide any alternative sites for the facilities. (*See Attachment A for a view of the Project depiction provided for public input at the April 2018 Naalehu meetings.*)

51) The COHDEM has received and in the AOC Work Plans states it anticipates future EPA Grant XP 96942401 funding assistance while failing to provide public participation in the process and withholding environmental assessment documents from public review in violation of HRS 343-3.

52) The requested relief would redress these injuries and this Court has authority to grant the Plaintiff’s requested relief.

Claim 1: The EPA final decision entering into the AOC approving the Naalehu Wastewater System Work Plan (AOC Attachment B) and the Pahala Wastewater System Work Plan (AOC Attachment A) was arbitrary and

capricious, an abuse of discretion, and/or otherwise not in accordance with law.

53) Plaintiff hereby incorporates all the allegations contained in paragraphs 1 through 52 above.

54) In preparation of reaching the final agreement in the AOC, the COHDEM provided no detailed statement to EPA evaluating the Naalehu and Pahala WWS Projects' impact on the environment, environmental costs and alternative measures that described any appropriate alternatives to the COHDEM sole recommended course of action [NEPA 102(2)(C) and (E)].

55) Initially, the EPA provided major funding for the \$3,600,000 "Ka'u Cesspool Replacement Project" with grant funding (XP-96942401-0 Original and XP 96942401-1) totaling \$1,980,000 in EPA funding with a 45% COH matching funding.

56) On January 4, 2011, Kate Rao of the EPA Region 9 Ground Water Office approved the payment of \$133,853 of the \$207,006 COH requested.

57) Having received grant funding from EPA, COHDEM became an assisted agency and EPA Region 9 was required to provide oversight of the agency's environmental assessment of the Project's Work Plans.

58) The decision to prepare an EIS is not a matter committed to the particular agency's discretion because NEPA's statutory EIS Directive is mandatory in nature.

Claim 2: The EPA Region 9 has been derelict in ensuring that the COHDEM, an EPA assisted agency, used EPA grant funds in compliance with 40 CFR 53.917-5 (Public Participation).

59) Plaintiff hereby incorporates all the allegations contained in paragraphs 1 through 58 above.

60) The reasons the COH abandoned the original 2004 LCC conversion agreement with the affected Naalehu homeowners is unclear as no reason has been given by COHDEM for why the "field studies" were done after the FEA concluded the LCC conversion projects had no significant impacts.

61) There is no documentation available for Plaintiff's review of consideration of any appropriate alternatives to the COH recommended course of action to construct two new secondary wastewater treatment systems, nor is there any evidence of public input in this WWS Projects' decision.

62) The COH unilateral decision to construct two full-size secondary wastewater treatment plants in Naalehu and Pahala was in direct contradiction to the recommended course of action which public participation through the August 31, 2004 vote deemed optimally beneficial to both communities.

63) The first time any venue for public input on the twin sewage plant Projects occurred was when EPA allowed public input through comments on the AOC and its three COHDEM Work Plan Attachments in May 2017.

64) Although EPA received six comments from members of the affected Naalehu community, all six critiques were dismissed because, despite the specific WWTP site locations (including acquisition of TMK 9-5-011:003) defined in the Tasks and timeline of the AOC performance requirements, the EPA disingenuously maintained the site and type of treatment systems were not yet decided.

65) The EPA assisted agency Work Plans show no evidence of public participation prior to the “outreach” meetings after the EPA and COHDEM had finalized the Work Plan Projects in the AOC Tasks and milestones with fines for failure to timely perform.

66) 40 CFR 25.12 (2)(i) required EPA to evaluate the COHDEM compliance with EPA’s public participation requirement “using the [Project] work plan...”

67) The EPA had reason to know that COHDEM had failed to provide public review of environmental assessment documents as required by HRS 343-3 because it is in the AOC Attachment B Naalehu Work Plan (p. 3) that: “The revised draft EA has not been issued for public review and comment”

Plaintiff requests that the approval of the AOC and Work Plans be set aside pursuant to 5 U.S.C. Sec. 706(2)(A) and that the Court enjoin EPA so that: “No financial assistance shall be awarded unless EPA is satisfied that the public participation policies and requirements will be met.”

REQUESTED RELIEF

68) WHEREFORE, Plaintiff Sandra Demoruelle requests that the Court award her the following relief:

- (a) The AOC and Work Plans be set aside pursuant to 5 U.S.C. Sec. 706(2)(A);
- (b) the COHDEM be instructed to produce a NEPA EIS for the two WWS Projects to optimize the potential that beneficial decisions be incorporated into a new AOC;
- (c) enjoin the EPA and COHDEM from implementing the Naalehu and Pahala Wastewater System Projects until EPA fully complies with NEPA and their own 40 CFR 35.917-5 to require public participation during the EPA-funded agency Projects’ environmental review process;
- (d) instruct COHDEM to make all environmental assessment documents, notices of meetings and comment periods, drafts and final documents available for public review, both in the Hilo Wastewater Department office and in the Pahala and Naalehu Libraries for community review because of

the communities' remote locations and limited access to public transportation.

- (e) enjoin EPA to take remedial actions to mitigate the adverse effects of the COHDEM's failure since 2010 to meet the public participation requirement in decision-making and assure the COHDEM does not avoid public input in the future per 40 CFR 25.12 (2)(ii);
- (f) award Plaintiff costs and reasonable attorney's fees, as incurred in this action;
- (g) grant such other relief as the Court may deem just and proper.

CERTIFICATION AND CLOSING

69) Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by non-frivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support and the complaint otherwise complies with the requirements of Rule 11.

70) I agree to provide the Clerk's Office with any changes to my address where case-related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Dated: May 10, 2018 at Naalehu, Hawaii

Plaintiff:

A handwritten signature in black ink that reads "Sandra Lee Demoruelle". The signature is written in a cursive style with a large initial 'S'.

Sandra Lee Demoruelle, *Pro Se*

Redacted



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