

GRETCHEN BUSTERUD
Acting Regional Counsel
United States Environmental Protection Agency, Region IX

Sarah Ferrif
Attorney Advisor
United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105
(415) 972-3854

Attorneys for Complainant



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:

Koloa Partners, LLC
3457 Waikomo Road
Koloa HI 96756

Respondent.

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

DOCKET NO. UIC-09-2022-0043

**CONSENT AGREEMENT
AND
FINAL ORDER**

CONSENT AGREEMENT

I. AUTHORITIES AND PARTIES

1. The United States Environmental Protection Agency (“EPA”), Region IX and Koloa Partners, LLC., (“Respondent”) (collectively the “Parties”) agree to settle this matter and consent to the entry of this Consent Agreement and Final Order (“CA/FO”). This CA/FO is an administrative action commenced and concluded under Section 1423(c) of the Safe Drinking Water Act (SDWA), 42 U.S.C. §300h-2(c)(1), and Sections 22.13(b), 22.18(b)(2) and (3), and 22.45 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil*

Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at 40 C.F.R. Part 22.

2. Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division of EPA, Region 9. The Administrator of EPA delegated to the Regional Administrator of EPA Region 9 the authority to bring and settle this action under the SDWA. In turn, the Regional Administrator further delegated the authority to bring this action and sign a consent agreement settling this action under the SDWA to the Director of the Enforcement and Compliance Assurance Division.

3. Respondent is Koloa Partners LLC, whose headquarters is located at 3457 Waikomo Road, Koloa Hawaii, 96756.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order. *See* 40 C.F.R. § 22.13(b).

5. The Parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CA/FO, including the assessment of the civil penalty of \$18,000.

II. JURISDICTION AND WAIVER OF RIGHT TO JUDICIAL REVIEW AND HEARING

7. Respondent admits the jurisdictional allegations in this CA/FO and neither admits nor denies the factual allegations in this CA/FO. 40 C.F.R. § 22.18(b)(2).

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CA/FO including, but not limited to, its right to request a hearing under 40 C.F.R. § 22.15(c) and Section 1423(c)(3) of SDWA, 42 U.S.C. § 300h-2(c)(3);

its right to seek federal judicial review of the CA/FO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06; any right to contest the allegations in this CA/FO; and its right to appeal this CA/FO under Section 1423(c)(6) of SDWA, 42 U.S.C. § 300h-2(c)(6).

Respondent also consents to the issuance of this CA/FO without further adjudication.

III. STATUTORY AND REGULATORY BACKGROUND

9. Section 1421 of SDWA, 42 U.S.C. § 300h, requires that the Administrator of EPA promulgate regulations, which shall include permitting requirements as well as inspection, monitoring, recordkeeping and reporting requirements, for state underground injection control (UIC) programs to prevent underground injection which endangers drinking water sources.

10. Section 1421(d)(1) of SDWA, 42 U.S.C. § 300h(d)(1), defines “underground injection” as the subsurface emplacement of fluids by well injection and excludes the underground injection of natural gas for purposes of storage and the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

11. Pursuant to Sections 1421 and 1422 of SDWA, 42 U.S.C. §§ 300h and 300h-1, EPA has promulgated UIC regulations at 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.

12. 40 C.F.R. § 144.1(g) provides that the UIC programs regulate underground injection by six classes of wells, and all owners or operators of these injection wells must be authorized either by permit or rule.

13. Section 1401(6) of SDWA, 42 U.S.C. § 300f(6), and 40 C.F.R. § 144.3 define “contaminant” as any physical, chemical, biological, or radiological substance or matter in water.

14. 40 C.F.R. § 144.3 defines “fluid” as any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

15. 40 C.F.R. § 144.3 defines “well injection” to mean the subsurface emplacement of fluids through a well.

16. 40 C.F.R. § 144.3 defines “well” to mean, in relevant part, a dug hole whose depth is greater than the largest surface dimension.

17. 40 C.F.R. § 144.3 defines a “cesspool” as a “drywell,” which is a type of “well” that is completed above the water table.

18. 40 C.F.R. § 144.81(2) defines “large capacity cesspools” (“LCCs”) to 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.” LCCs 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.*

19. 40 C.F.R. §§ 144.80(e) and 144.81(2) classifies LCCs as Class V UIC injection wells.

20. 40 C.F.R. § 144.3 defines Class V UIC injection wells as a “facility or activity” subject to regulation under the UIC program.

21. Section 1401(12) of SDWA, 42 U.S.C. § 300f(12), defines “person” as an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency). *See also* 40 C.F.R. § 144.3.

22. 40 C.F.R. § 144.3 defines “owner or operator” to mean the owner or operator of any “facility or activity” subject to regulation under the UIC program.

23. Pursuant to 40 C.F.R. § 144.82, 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].”

24. 40 C.F.R. §§ 144.84(b)(2) and 144.88 required that owners or operators of existing LCCs to have closed those LCCs by no later than April 5, 2005 and banned new LCCs.

25. Pursuant to Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R. § 147.601, EPA administers the UIC program in the State of Hawaii.

26. Section 1423(a)(2) of SDWA, 42 U.S.C. § 300h-2(a)(2), provides that any person found to be in violation of any requirement of an applicable UIC program in a state that does not have primacy may be assessed a civil penalty and be subject to an order requiring compliance pursuant to Section 1423(c)(1) of SDWA, 42 U.S.C. § 300h-2(c)(1).

27. Under Section 1423(c)(1) of SDWA, 42 U.S.C. § 300h-2(c)(1), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$25,076 for each day of violation, up to a maximum administrative penalty of \$313,448 for violations occurring after November 2, 2015 and where penalties are assessed on or after January 12, 2022 and/or issue an order requiring compliance.

IV. FACTUAL ALLEGATIONS AND ALLEGED VIOLATIONS

28. Respondent is a corporation and thus qualifies as 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.

29. Since at least May 2001, Respondent has owned and operated the property located at 3457 Waikomo Road, Koloa Hawaii, 96756, Tax Map Key 4-2-8-008-004 (the “Property”), which serves as a self-storage business. The Property contains a restroom.

30. Since at least May 2001, Respondent has owned and operated one cesspool servicing the restroom at the Property. The cesspool has the capacity to serve twenty or more people per day.

31. Respondent closed the cesspool at the Property on March 14-15, 2022.

32. The cesspool identified in Paragraph 30 meets the definition of an LCC as that term is defined at 40 C.F.R. § 144.81(2).

33. Each day that Respondent failed to close the LCC at the Property identified in Paragraph 30 after April 5, 2005, constitutes a violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

V. SETTLEMENT TERMS

A. Civil Penalty

34. Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. 300h-2(c)(4)(B), requires the Administrator to take into account the seriousness of the violation, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require, when assessing a civil penalty for violations of the SDWA.

35. Within thirty (30) days of the Effective Date of this CA/FO, Respondent must pay the \$18,000 civil penalty by sending a check (mail or overnight delivery), wire transfer, automated clearing house, or online payment. Payment instructions are available at: <http://2.epa.gov/financial/makepayment>.

For checks sent by regular U.S. Postal Service mail: sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For checks sent by express mail (non-U.S. Postal Service which won't deliver mail to P.O. Boxes): sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, Missouri 63101

The check must state Respondent's name and the docket number of this CA/FO.

For electronic funds transfer: electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045

The comment or description field of the electronic funds transfer must state Respondent's name and the docket number of this CA/FO.

For Automated Clearinghouse (ACH), also known as REX or remittance express: ACH electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22-checking

The comment area of the electronic funds transfer must state Respondent's name and the docket number of this CA/FO.

To pay on-line, go to www.pay.gov. Use the Search Public Forms option on the tool bar and enter SFO 1.1 in the search field. Open the form and complete the required fields.

36. Concurrently with payment, Respondent shall provide proof of payment, using the method described in Paragraph 34, to the Regional Hearing Clerk and EPA at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 9 - Office of Regional Counsel
r9HearingClerk@epa.gov

Respondent shall also send notice of payment and transmittal letter via email to the EPA Region 9 Enforcement and Compliance Assurance Division's Enforcement Officer and the EPA Region 9 Office of Regional Counsel attorney in accordance with Paragraph 48.

37. This civil penalty represents an administrative civil penalty and shall not be deductible for purposes of federal taxes. 26 U.S.C. § 162(f).

38. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, in addition to any stipulated penalties due under Paragraphs 45, 46 and 47 below, Respondent must pay the following on any amount overdue under this CA/FO: interest accrued on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses, including but not limited to attorneys' fees and costs incurred by the United States for collection proceedings; a \$15 handling charge fee each month that any portion of the penalty is more than 30 days past due; and 6% per year penalty on any principal amount 90 days past due.

39. If Respondent does not pay timely the civil penalty due under Paragraph 35 and/or any stipulated penalties due under Paragraphs 41 and 42 below, EPA may request the United States Department of Justice bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action under Section 1423(c)(7) of SDWA, 42 U.S.C. § 300h-2(c)(7). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

B. Stipulated Penalties

40. Respondent shall pay stipulated penalties in accordance with this Section for any violations of this CA/FO.

41. If Respondent fails to make the payment specified in Section IV.A of this CA/FO, Respondent agrees to pay in addition to the assessed penalty, a stipulated penalty of \$250 per day for each day the Respondent is late in making the penalty payment.

42. Respondent agrees to pay any stipulated penalties within thirty (30) days of receipt of EPA's written demand for such penalties. All penalties shall begin to accrue on the first date of noncompliance and shall continue to accrue through the date of completion of the delinquent CA/FO requirement. Respondent will use the method of payment specified in Paragraph 35 and agrees to pay interest, handling charges and penalties that accrue for late payment of the stipulated penalty in the same manner as set forth in Paragraph 38.

43. Neither the demand for, nor payment of, a stipulated penalty relieves Respondent of its obligation to comply with any requirement of this CA/FO or modifies or waives any deadlines set forth in this CA/FO.

44. EPA may, for violations of this CA/FO, in the unreviewable exercise of its discretion, elect to pursue any other administrative or judicial remedies in addition to or in lieu of assessing stipulated penalties and/or reduce or waive stipulated penalties due under this CA/FO.

C. Force Majeure

45. For purposes of this CA/FO, Force Majeure is defined as any event arising from causes that are beyond the control of Respondent, any entity controlled by Respondent, or Respondent's contractors, which delays or prevents the performance of any obligation under this CA/FO 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 (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. Examples of Force Majeure events include, but are not limited to, unforeseen environmental, geological, or archaeological conditions; or pandemics, epidemics, or disease. 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 CA/FO and normal inclement weather.

46. Respondent shall exercise its best efforts to avoid or minimize any delay and any effects of a delay. If any event occurs which causes or may cause delays meeting the deadlines set forth in this CA/FO, Respondent or its attorney shall, within forty-eight (48) hours of the delay or within forty-eight (48) hours of Respondent’s knowledge of the anticipated delay, whichever is earlier, notify EPA by email in accordance with Paragraph 48. Within fifteen (15) 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. Failure to comply with the notice requirement of this paragraph shall preclude Respondent from asserting any claim of Force Majeure.

47. If EPA agrees in writing 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 for the period of the delay resulting from the circumstances causing the delay. In such event, EPA will grant in writing an extension of time. An extension of the time for performing an obligation granted by EPA pursuant to this paragraph shall not, of itself, extend the time for performing a subsequent obligation.

VI. SUBMISSIONS REQUIREMENTS

48. All reports, notifications, documentation, submissions, and other correspondence required to be submitted by this CA/FO must be submitted to EPA electronically, to the extent possible. If electronic submittal is not possible, the submissions must be made by certified mail (return receipt requested). Electronic submissions must be sent to the following addresses: young.emma@epa.gov and ferrif.sarah@epa.gov. The subject line of all email correspondence must include the facility name, docket number, and subject of the deliverable. All electronically submitted materials must be in final and searchable format, such as Portable Document Format (PDF) with Optical Character Recognition (OCR) applied. Mailed submissions must be sent to the following addresses:

Emma Young, Physical Scientist
U.S. Environmental Protection Agency
Region 9, Enforcement and Compliance Assurance Division
75 Hawthorne Street (ENF-3-3)
San Francisco, CA 94105

Sarah Ferrif, Attorney Advisor
U.S. Environmental Protection Agency
Region 9, Office of Regional Counsel
75 Hawthorne Street (ORC-2-3)
San Francisco, CA 94105

49. All reports, notifications, documentation, and submissions must be signed by a duly authorized representative of Respondent and shall include the following statement consistent with 40 C.F.R. § 144.32(d):

“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 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, 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.”

50. If Respondent finds at any time after submitting information that any portion of that information is false or incorrect, the signatory must notify EPA immediately. Knowingly submitting false information to EPA in response to this CA/FO may subject Respondent to criminal prosecution under Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b), as well as 18 U.S.C. §§ 1001 and 1341.

51. Submissions required by this CA/FO shall be deemed submitted on the date they are sent electronically or on the date postmarked if sent by U.S. mail.

52. EPA may use any information submitted in accordance with this CA/FO in support of an administrative, civil, or criminal action against Respondent.

53. The information required to be submitted pursuant to the CA/FO is not subject to the approval requirements of the Paperwork Reduction Act of 1995, 44 U.S.C §3501 et seq.

VII. GENERAL PROVISIONS

54. Full payment of the penalty as described in Paragraph 35, above, and full compliance with this CA/FO shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in this CA/FO. Violation of this CA/FO shall be deemed a violation of SDWA for purposes of Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b).

55. The parties consent to service of this CA/FO by e-mail at the following valid e-mail addresses:

Complainant:	Emma Young,	young.emma@epa.gov ;
Respondent:	Frederick T. Caven Jr.,	fred.caven@gmail.com
	Letitia D. Moore,	letitia.moore@hklaw.com

56. This CA/FO, inclusive of all exhibits, appendices, and attachments, is the entire agreement between the Parties.

57. The provisions of this CA/FO shall apply to and be binding upon Respondent, its officers, directors, agents, servants, authorized representatives, employees, and successors or assigns. 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 except for extensions of time to complete such obligations provided by EPA pursuant to paragraph 47 above.

58. Full compliance with this CA/FO does not in any manner affect the right of EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law, except with respect to the civil penalties for the violations and facts alleged in this CA/FO. 40 C.F.R. § 22.18(c)

59. This CA/FO is not a permit or modification of a permit and does not affect Respondent's obligation to comply with all federal, state, local laws, ordinances, regulations, permits, and orders. 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 SDWA, regulations promulgated thereunder, and any order or permit issued thereunder, except as specifically set forth herein.

60. EPA reserves any and all legal and equitable remedies available to enforce this CA/FO, as well as the right to seek recovery of any costs and attorneys' fees incurred by EPA in any actions against Respondent for noncompliance with this CA/FO.

61. Unless otherwise specified, the Parties shall each bear their own costs and attorneys' fees incurred in this proceeding.

62. This CA/FO 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 an instrument. If any portion of this CA/FO is determined to be unenforceable by a competent court or tribunal, the Parties agree that the remaining portions shall remain in full force and effect.

63. The undersigned representative of each party certifies that he or she is duly and fully authorized to enter into and ratify this CA/FO.

64. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section IV.B (Compliance Requirements) is restitution or required to come into compliance with law.

VIII. EFFECTIVE DATE

65. Pursuant to 40 C.F.R. § 22.45, this CA/FO will be subject to public notice and comment at least 40 days prior to it becoming effective through the issuance of the final order by the Regional Judicial Officer.

66. The parties acknowledge and agree that final approval by EPA of this CA/FO is subject to 40 C.F.R. § 22.45(c)(4), which sets forth requirements under which a person not a party to this proceeding may petition to set aside a consent agreement and final order on the basis that material evidence was not considered.

67. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CA/FO shall be effective on the date that the final order contained in this CA/FO, having been approved and issued by either the Regional Judicial Officer or Regional Administrator, is filed with the Regional Hearing Clerk.

**Consent Agreement and Final Order
In the Matter of: Koloa Partners, LLC.
Docket Number UIC-09-2022-0043**

Koloa Partners, LLC.
3457 Waikomo Road
Koloa HI 96756

Frederick T. Caven, Jr.
Frederick T. Caven, Jr.
Koloa Partners, LLC.

Date: 4/21/22

**Consent Agreement and Final Order
In the Matter of: Koloa Partners, LLC.
Docket Number UIC-09-2022-0043**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

AMY MILLER- Digitally signed by AMY
MILLER-BOWEN
BOWEN Date: 2022.05.19 10:58:07
-07'00'

Date: _____

Amy C. Miller-Bowen
Director, Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency
Region IX

This Final Order is effective on the date that it is filed. This Final Order constitutes full adjudication of the allegations in the Consent Agreement entered into by the Parties in this proceeding.

**STEVEN
JAWGIEL**

Digitally signed by STEVEN
JAWGIEL
Date: 2022.07.28 14:02:39
-07'00'

Steven L. Jawgiel
Regional Judicial Officer, Region IX
U.S. Environmental Protection Agency

CERTIFICATE OF SERVICE

I hereby certify that the forgoing FINAL ORDER incorporating a CONSENT AGREEMENT in the matter of Koloa Partners, LLC (UIC-09-2022-0043) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, and that a true and correct copy of the same was sent to the following parties:

ELECTRONIC MAIL

Respondent:

Frederick T. Caven Jr.,
Koloa Partners, LLC
3457 Waikomo Road
Koloa, HI 96756
Fred.Caven@gmail.com

Letitia D. Moore
Holland & Knight LLP
50 California Street, Suite 2800
San Francisco, CA 94111
Ltitia.Moore@hklaw.com

ELECTRONIC MAIL

EPA Region IX Attorney:

Sarah Ferrif, Attorney Advisor
United States Environmental Protection Agency
Region IX – Office of Regional Counsel (ORC-2-3)
75 Hawthorne Street
San Francisco, CA 94105
Ferrif.Sarah@epa.gov

Tu, Ponly Digitally signed by Tu,
Ponly
Date: 2022.07.29 16:37:01
-07'00'

Ponly J. Tu
Regional Hearing Clerk
U.S. EPA, Region 9