

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
2 **REGION IX**

3 75 Hawthorne Street
San Francisco, California 94105

4 IN THE MATTER OF:) DOCKET NO. UIC-09-2018-0006
5)

6 Smith Waterhouse Family of Koloa – Old
7 Koloa Town – LLC,
149 Irving St., Watertown, MA 02472)

**CONSENT AGREEMENT
AND
FINAL ORDER**

8 Respondent.)

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

11 **CONSENT AGREEMENT**

12 **I. AUTHORITIES AND PARTIES**

13 1. The United States Environmental Protection Agency (“EPA” or “Complainant”),
14 Region IX, and Smith Waterhouse Family of Koloa – Old Koloa Town – LLC (“SWFOK” or
15 “Respondent”) (collectively, the “Parties”) agree to settle this matter and consent to the entry of
16 this Consent Agreement and Final Order (“CA/FO”), which commences this proceeding in
17 accordance with 40 C.F.R. §§ 22.13(b), 22.18(b)(2), and 22.45(b). Pursuant to 40 C.F.R. §
18 22.18(b)(3), this proceeding will conclude upon the issuance of a Final Order by the Regional
19 Judicial Officer.

20 2. This is a civil administrative action instituted by EPA Region IX against
21 Respondent pursuant to Section 1423(c) of the Safe Drinking Water Act (“SDWA”), 42 U.S.C.
22 § 300h-2(c), for violations of the SDWA and the Underground Injection Control (“UIC”)
23 requirements set forth at 40 C.F.R. Part 144.
24

25 3. Complainant is the Director of the Enforcement Division, EPA Region IX. The
Administrator of EPA delegated to the Regional Administrator of EPA Region IX the authority

1 to bring and settle this action under the SDWA. The Regional Administrator of EPA Region IX
2 further delegated the authority to bring and sign a consent agreement settling this action under
3 the SDWA to the Director of the Enforcement Division.

4 4. Respondent Smith Waterhouse Family of Koloa – Old Koloa Town – LLC is a
5 Hawaii limited liability company. Its mailing address is 149 Irving Street, Watertown,
6 Massachusetts 02472. Its agent’s address is 2930 Kolepa Street, Koloa, Hawaii 96756.

7 **II. APPLICABLE STATUTES AND REGULATIONS**

8 5. Pursuant to Part C of the SDWA, 42 U.S.C. §§ 300h to 300h-8, EPA has
9 promulgated regulations at 40 C.F.R. Part 144 establishing minimum requirements for UIC
10 programs to prevent underground injection that endangers drinking water sources.

11 6. Per Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R.
12 § 147.601, EPA administers the UIC program in the State of Hawaii. This UIC program consists
13 of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.

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

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

18 9. “Well” means, in relevant part, a dug hole whose depth is greater than the largest
19 surface dimension. 40 C.F.R. § 144.3.

20 10. A “cesspool” is a “drywell,” which in turn is a “well,” as those terms are defined
21 in 40 C.F.R. § 144.3.

22 11. “Large capacity cesspools” (“LCCs”) include “multiple dwelling, community or
23 regional cesspools, or other devices that receive sanitary wastes, containing human excreta,
24 which have an open bottom and sometimes perforated sides.” 40 C.F.R. § 144.81(2). LCCs do
25 not include single-family residential cesspools or non-residential cesspools which receive solely
sanitary waste and have the capacity to serve fewer than twenty persons per day. *Id.*

1 12. UIC program regulations classify LCCs as Class V UIC injection wells. 40 C.F.R.
2 § 144.80(e).

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

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

7 15. The “owner or operator” of a Class V UIC well “must comply with Federal UIC
8 requirements in 40 C.F.R. Parts 144 through 147,” and must also “comply with any other
9 measures required by States or an EPA Regional Office UIC Program to protect [underground
10 sources of drinking water].” 40 C.F.R. § 144.82.

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

13 17. Pursuant to Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1); 40
14 C.F.R. § 19.4, EPA may issue an administrative order either assessing a civil penalty of not more
15 than \$22,363 per day per violation up to a maximum of \$279,536, or requiring compliance, or
16 both, against any person who violates the SDWA or any requirement of an applicable UIC
17 program.

18 **III. ALLEGATIONS**

19 18. Respondent is a company and thus qualifies as a “person” within the meaning of
20 Section 1401(12) of the SDWA. 42 U.S.C. § 300f(12); 40 C.F.R. § 144.3.

21 19. In or about December 1995, Respondent acquired a commercial property located
22 at 5400 Koloa Road, Koloa, Hawaii 96756 (the “Property”) on the Island of Kauai.

23 20. Since at least April 5, 2005, the Property has contained at least two “cesspools,”
24 as defined at 40 C.F.R. § 144.3.

1 violations of the SDWA identified in Section III of this CA/FO. Full compliance with this
2 CA/FO, which includes (1) bringing the LCCs at the Property into compliance with the UIC
3 requirements in accordance with 40 C.F.R. §§ 144.84(b)(2), 144.88(a), and 144.89(a) and in
4 accordance with Section IV.B of this CA/FO; and (2) payment of an administrative civil penalty
5 of \$81,549 in accordance with Section IV.B of this CA/FO, shall constitute full settlement of
6 Respondent's liability for federal civil claims for the alleged SDWA violations identified in
7 Section III of this CA/FO.

8 28. The provisions of this CA/FO shall apply to and be binding upon Respondent, its
9 officers, directors, agents, servants, authorized representatives, employees, and successors or
10 assigns. Action or inaction of any persons, firms, contractors, employees, agents, or corporations
11 acting under, through, or for Respondent shall not excuse any failure of Respondent to fully
12 perform its obligations under this CA/FO.

13 29. Issuance of this CA/FO does not in any manner affect the right of EPA to pursue
14 appropriate injunctive or other equitable relief or criminal sanctions for any violations of law,
15 except with respect to those claims that have been specifically resolved pursuant to Paragraph
16 27.
17

18 30. This CA/FO is not a permit or modification of a permit, and does not affect
19 Respondent's obligation to comply with all federal, state, local laws, ordinances, regulations,
20 permits, and orders. Issuance of, or compliance with, this CA/FO does not waive, extinguish,
21 satisfy, or otherwise affect Respondent's obligation to comply with all applicable requirements
22 of the SDWA, regulations promulgated thereunder, and any order or permit issued thereunder,
23 except as specifically set forth herein.

24 31. EPA reserves any and all legal and equitable remedies available to enforce this
25 CA/FO, as well as the right to seek recovery of any costs and attorneys' fees incurred by EPA in

1 any actions against Respondent for noncompliance with this CA/FO. A violation of this CA/FO
2 shall be deemed a violation of the SDWA.

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

5 33. This CA/FO may be executed and transmitted by facsimile, email, or other
6 electronic means, and in multiple counterparts, each of which shall be deemed an original, but all
7 of which shall constitute an instrument. If any portion of this CA/FO is determined to be
8 unenforceable by a competent court or tribunal, the Parties agree that the remaining portions
9 shall remain in full force and effect.

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

12 **B. COMPLIANCE**

13 35. As required by Section 1423(c)(1) of the Act, 42 U.S.C. § 300h-2(c)(1), and
14 consistent with the timeframes set forth below, Respondent shall

15
16 a. By June 30, 2020, close the LCCs located at the Property in accordance with
17 40 C.F.R. §§ 144.84(b)(2), 144.88(a), and 144.89(a), and all other applicable
18 requirements, including all Hawaii Department of Health ("HDOH") closure,
19 conversion, and/or replacement requirements;

20 b. For the installation and operation of the replacement system to receive wastes
21 currently received by the LCCs, such as an on-site treatment plant or
22 individual wastewater system ("IWS"), comply with HDOH requirements;
23 and

24 c. Within twenty (20) days of closure of the last of the two LCCs, submit to EPA
25 receipt of approval to operate any replacement system from HDOH, such as

1 an on-site treatment plant or IWS, and a description of how the LCCs were
2 closed and who closed them, including copies of the Backfill Closure Reports
3 and other approvals issued by HDOH.

4 36. Respondent shall submit quarterly status reports no later than the fifteenth day of
5 every third month, beginning the fourth month following the Effective Date of this CA/FO.

6 These status reports shall describe the progress that has been made toward closure of the LCCs in
7 accordance with Paragraph 35. Respondent shall submit quarterly status reports until
8 Respondent's closure of the LCCs in accordance with Paragraph 35.

9 C. PENALTY

10 37. Respondent agrees to the assessment of a civil penalty in the amount of eighty-
11 one thousand five-hundred forty-nine dollars (\$81,549).

12 38. Respondent shall pay the assessed penalty no later than thirty (30) days from the
13 Effective Date of this CA/FO.

14 39. Respondent may pay the penalty by check (mail or overnight delivery), wire
15 transfer, automated clearing house, or online payment. Payment instructions are available at
16 <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified
17 check must be payable to the order of "Treasurer, United States of America" and delivered to the
18 following address:
19

20 U.S. Environmental Protection Agency
21 Fines and Penalties
22 Cincinnati Finance Center
23 P.O. Box 979077
24 St. Louis, Missouri 63197-9000

25 40. Respondent must provide a letter with evidence of the payment made pursuant to
this CA/FO, accompanied by the title and docket number of this action, to EPA Region IX's
Regional Hearing Clerk, Enforcement Division Compliance Officer, and Office of Regional

1 Counsel attorney, via United States mail, at the following addresses:

2 Regional Hearing Clerk
3 U.S. Environmental Protection Agency
4 Region IX - Office of Regional Counsel
5 75 Hawthorne Street (ORC-1)
6 San Francisco, CA 94105

7 Jelani Shareem, Enforcement Officer
8 U.S. Environmental Protection Agency
9 Region IX - Enforcement Division
10 75 Hawthorne Street (ENF-3-3)
11 San Francisco, CA 94105

12 Nathaniel Boesch, Attorney-Advisor
13 U.S. Environmental Protection Agency
14 Region IX - Office of Regional Counsel
15 75 Hawthorne Street (ORC-2)
16 San Francisco, CA 94105

17 41. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13,
18 interest, penalty charges, and administrative costs will be assessed against the outstanding
19 amount that Respondent owes to EPA for Respondent's failure to pay the civil administrative
20 penalty by the deadline specified in Paragraph 38.

- 21 a. Interest on delinquent penalties will be assessed at an annual rate that is equal
22 to the rate of current value of funds to the United States Treasury (i.e., the
23 Treasury tax and loan account rate) as prescribed and published by the
24 Secretary of the Treasury in the Federal Register and the Treasury Fiscal
25 Requirements Manual Bulletins. 40 C.F.R. § 13.11(a)(1).
- 26 b. A penalty charge will be assessed on all debts more than ninety (90) days
27 delinquent. The penalty charge will be at a rate of 6% per annum and will be
28 assessed monthly. 40 C.F.R. § 13.11(c).
- 29 c. Administrative costs for handling and collecting Respondent's overdue debt
30 will be based on either actual or average cost incurred, and will include both
31 direct and indirect costs. 40 C.F.R. § 13.11(b).

1 42. Failure to pay any civil administrative penalty by the deadline may also lead to
2 any or all of the following actions:

3 a. EPA may refer the debt to a credit reporting agency, a collection agency, or to
4 the Department of Justice for filing of a collection action in the appropriate
5 United States District Court. 40 C.F.R. §§ 13.13-14, 13.33. In any such
6 collection action, the validity, amount, and appropriateness of the assessed
7 penalty and of this CA/FO shall not be subject to review.

8 b. The department or agency to which this matter is referred (e.g., the
9 Department of Justice, the Internal Revenue Service) may assess
10 administrative costs for handling and collecting Respondent's overdue debt in
11 addition to EPA's administrative costs.

12 c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; or
13 (ii) suspend or disqualify Respondent from doing business with EPA or
14 engaging in programs EPA sponsors or funds. 40 C.F.R. § 13.17.

15 43. Respondent shall tender any interest, handling charges, late penalty payments, and
16 stipulated penalties in the same manner as described in Paragraphs 39 and 40.

17 D. STIPULATED PENALTIES

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

20 45. If Respondent fails to meet the LCC closure requirements set forth in Paragraph
21 35, Respondent agrees to pay the following amounts:

22 a. \$75 for each and every day for the first 90 days that Respondent fails to
23 properly close the cesspools;

24 b. \$150 for each and every day from days 91 through 365 that Respondent fails
25 to properly close the cesspools; and

 c. \$250 for each and every day from day 366 and afterwards that Respondent
 fails to properly close the cesspools.

1 46. If Respondent fails to pay the assessed civil administrative penalty specified in
2 Paragraph 37 by the deadline specified in Paragraph 38, Respondent agrees to pay a stipulated
3 penalty of \$250 per day for each day the assessed penalty is late, in addition to the assessed
4 penalty and other fees assessed pursuant to Paragraph 41.

5 47. If Respondent fails to timely submit any reports, including any of the quarterly
6 status reports required by Paragraph 36, in accordance with the timelines set forth in this CA/FO,
7 Respondent agrees to pay a stipulated penalty of \$100 for each day after the report was due until
8 it submits the report.

9 48. Respondent agrees to pay any stipulated penalties within thirty (30) days of
10 receipt of EPA's written demand for such penalties. All penalties shall begin to accrue on the
11 first date of noncompliance, and shall continue to accrue through the date of completion of the
12 delinquent CA/FO requirement. Respondent will use the method of payment specified in
13 Paragraphs 39 and 40, and agrees to pay interest, handling charges and penalties that accrue for
14 late payment of the stipulated penalty in the same manner as set forth in Paragraphs 41 through
15 43.

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

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

22 E. FORCE MAJEURE

23 51. Respondent shall exercise its best efforts to avoid or minimize any delay and any
24 effects of a delay. If any event occurs which causes or may cause delays meeting the deadlines
25 set forth in this CA/FO, Respondent or its attorney shall, within two (2) business days of the
delay or within two (2) business days of Respondent's knowledge of the anticipated delay,
whichever is earlier, notify EPA in writing, by email or overnight mail. Within fifteen (15) days

1 thereafter, Respondent shall provide in writing the reasons for the delay, the anticipated duration
2 of the delay, the measures taken or to be taken to prevent or minimize the delay, and a timetable
3 by which those measures will be implemented. Failure to comply with the notice requirement of
4 this paragraph shall preclude Respondent from asserting any claim of *force majeure*.

5 52. If EPA agrees in writing that the delay or anticipated delay in compliance with
6 this CA/FO has been or will be caused by circumstances entirely beyond the control of
7 Respondent, the time for performance may be extended for a period of no longer than the delay
8 resulting from the circumstances causing the delay. In such event, EPA will grant in writing an
9 extension of time. An extension of the time for performing an obligation granted by EPA
10 pursuant to this paragraph shall not, of itself, extend the time for performing a subsequent
11 obligation.

12 53. EPA will not impose stipulated penalties for performance of a task during any
13 time period covered by an extension of time for that task granted pursuant to Paragraph 52.

14 F. NOTICES

15 54. Respondent must send any written communications and/or submittals, including
16 any requests for extensions of time to meet the compliance deadlines, to the following:

17 Jelani Shareem, Enforcement Officer
18 U.S. Environmental Protection Agency
19 Region IX - Enforcement Division
20 75 Hawthorne Street (ENF-3-3)
21 San Francisco, CA 94105
22 shareem.jelani@epa.gov

21 Nathaniel Boesch, Attorney Advisor
22 U.S. Environmental Protection Agency
23 Region IX – Office of Regional Counsel
24 75 Hawthorne Street (ORC-2)
25 San Francisco, CA 94105
boesch.nathaniel@epa.gov

24 For each written communication and/or submittal, Respondent shall identify the case name, the
25 case Docket Number, and the paragraph and/or requirement of this CA/FO under which the
submission is being made.

1 55. Respondent shall include the following signed certification made in accordance
2 with 40 C.F.R. § 144.32(b) and (d) with all written communications required by this CA/FO:

3 *I certify under penalty of law that this document and all attachments*
4 *were prepared under my direction or supervision in accordance with*
5 *a system designed to assure that qualified personnel properly gather*
6 *and evaluate the information submitted. Based on my inquiry of the*
7 *person or persons who manage the system, or those persons directly*
8 *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.

9 56. EPA must send any written communications to the following addresses:

10 Smith Waterhouse Family of Koloa - Old Koloa Town - LLC
11 2930 Kolepa Street
12 Koloa, Hawaii 96756

13 **IV. EFFECTIVE DATE**

14 57. Pursuant to 40 C.F.R. § 22.45, the CA/FO will be subject to a thirty (30)-day
15 public notice and comment period at least forty (40) days prior to it becoming effective through
16 the issuance of the Final Order by the Regional Judicial Officer.

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

21 59. This CA/FO shall terminate only after Respondent has complied with all
22 requirements of the CA/FO, including payment of any interest and late fees, and after EPA has
23 issued a written notice of termination.

1 FOR THE CONSENTING PARTIES:

2 FOR SMITH WATERHOUSE FAMILY OF KOLOA – OLD KOLOA TOWN – LLC:

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4 Priscilla A. Budge

Date: 7-11-18

Name

5 Managing Member

6 Title

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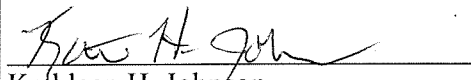
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1 FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

2 
3 Kathleen H. Johnson
4 Director, Enforcement Division
5 U.S. Environmental Protection Agency, Region IX
6 75 Hawthorne Street
7 San Francisco, CA 94105

Date: July 25, 2018

8 Of counsel:

9 Nathaniel D. Boesch
10 Attorney-Advisor
11 Office of Regional Counsel
12 U.S. Environmental Protection Agency, Region IX
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1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
2 **REGION IX**

3 75 Hawthorne Street
4 San Francisco, California 94105

5 IN THE MATTER OF:) DOCKET NO. UIC-09-2018-0006
6)
7 Smith Waterhouse Family of Koloa – Old)
8 Koloa Town – LLC,)
9 149 Irving St., Watertown, MA 02472) **FINAL ORDER**
10 Respondent.)
11 Proceedings under Section 1423(c) of the Safe)
12 Drinking Water Act, 42 U.S.C. § 300h-2(c).)

13 **FINAL ORDER**

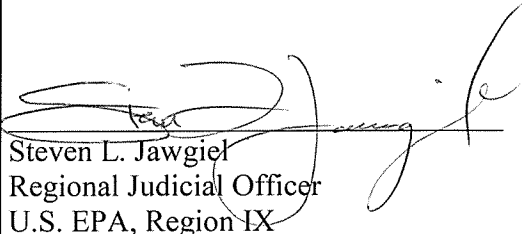
14 The United States Environmental Protection Agency Region IX (“EPA”) and Smith
15 Waterhouse Family of Koloa – Old Koloa Town (“Respondent”), having entered into the
16 foregoing Consent Agreement, and EPA having duly publicly noticed the Consent Agreement
17 and Final Order,

18 **IT IS HEREBY ORDERED THAT:**

- 19 1. The foregoing Consent Agreement and this Final Order (Docket No. UIC-09-2018-0006)
20 be entered;
- 21 2. Respondent close the LCCs in accordance with the terms set forth in Paragraph 35 of the
22 Consent Agreement; and
- 23 3. Respondent pay an administrative civil penalty of \$81,549 dollars to the Treasurer of the
24 United States of America in accordance with the terms set forth in the Consent
25 Agreement.

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.

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Steven L. Jawgiel
Regional Judicial Officer
U.S. EPA, Region IX

Date: 09/13/18

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the forgoing FINAL ORDER incorporating a CONSENT AGREEMENT in
3 the matter of Smith Waterhouse Family of Koloa - Old Koloa Town - LLC (UIC-09-2018-0006),
dated Sept. 13, 2018, was filed with the Regional Hearing Clerk and sent.

4
5 FIRST CLASS MAIL - CERTIFIED

Tracking Numbers: 7015 0640 0001 1121 8212

6 Respondent

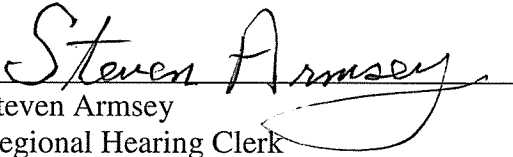
Priscilla Bailey, Managing Member
SWFOK
149 Irving Street
Watertown, MA 02472

9
10 HAND DELIVERED

11 EPA Region IX Attorney:

Nathaniel D. Boesch, Attorney Advisor
United States Environmental Protection Agency
Region IX – Office of Regional Counsel (ORC-2)
75 Hawthorne Street
San Francisco, CA 94105

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15 Dated at San Francisco, California: Sept. 14, 2018

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17
18 
19 Steven Armsey
20 Regional Hearing Clerk
U.S. EPA, Region 9