

GRETCHEN BUSTERUD
Acting Regional Counsel
United States Environmental Protection Agency, Region 9

DESEAN GARNETT
Attorney-Advisor
United States Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105
(415) 972-3046

Attorneys for Complainant

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. UIC-09-2022-0062
)	
State of Hawai'i, Department of Land and Natural Resources)	
)	
Respondent.)	CONSENT AGREEMENT AND FINAL ORDER
)	
Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).)	

Consent Agreement

Statutory Authority

1. This is an administrative action commenced and concluded under Section 1423(c)(1) for Class V wells 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, U.S. Environmental Protection Agency (EPA), Region 9.

3. Respondent is the Department of Land and Natural Resources (DLNR), a department of the Hawai'i state government.

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 (CA/FO). *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 \$105,543 and the compliance requirements specified below.

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.

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 the 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 the SDWA, 42 U.S.C. § 300h-2(c)(6). Respondent also consents to the issuance of this CA/FO without further adjudication.

Statutory and Regulatory Authority

9. Section 1421 of the 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 the 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 the SDWA, 42 U.S.C. §§ 300h and 300h-1, respectively, 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 the 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 in turn is a “well.”

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,”

but excludes 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.

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 the 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 prohibits construction of new or converted LCCs and required that owners or operators of existing LCCs close those LCCs by no later than April 5, 2005.

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 Hawai‘i, and therefore has “primacy” for the program.

26. Section 1423(a)(2) of the 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 the SDWA, 42 U.S.C. § 300h-2(c)(1).

27. Under Section 1423(c)(1) of the 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.

Nature of the Alleged Violations

28. Respondent is a department of the State of Hawai'i 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.

Kamokila Hawaiian Village

29. Respondent has owned a parcel of land (TMK: 4-4-2-003-005) (the "Kamokila Hawaiian Village") since at least April 5, 2005 on the island of Kauai that it currently leases to William K. Fernandes. According to its website, the Kamokila Hawaiian Village offers visitors historical tours of a recreated native Hawaiian Village. The Kamokila Hawaiian Village also offers visitors services that include water-related recreation activities (e.g., kayaking the nearby Wailua river), private wedding ceremonies, and large parties.

30. The Kamokila Hawaiian Village is comprised of a comfort station and contains one cesspool meeting Kamokila Hawaiian Village's sanitary waste disposal needs.

31. At least one cesspool at the Kamokila Hawaiian Village meets the definition of LCCs, as that term is defined at 40 C.F.R. § 144.81(2), in that they have the capacity to serve 20 or more persons per day.

Count I: Unauthorized Injection at Kamokila Hawaiian Village

32. The statements in Paragraphs 1 through 31 of this CA/FO are hereby incorporated by reference as if set forth in full.

33. Since at least April 5, 2005, Respondent owned and/or operated at least one LCC located on the Kamokila Hawaiian Village.

34. Respondent closed the one LCC identified in Paragraph 33 on July 9, 2020.

35. Each day that Respondent failed to close the LCC at the Kamokila Hawaiian Village after April 5, 2005 constitutes a violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

Civil Penalty

36. 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.

Within thirty (30) days of the Effective Date of this CA/FO, Respondent must pay a **\$105,543** civil penalty by 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

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

37. Concurrently with payment, Respondent shall provide proof of payment to the Regional Hearing Clerk and EPA at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency, ORC-1

75 Hawthorne Street
San Francisco, CA 94105
r9HearingClerk@epa.gov

and

Jelani Shareem
U.S. Environmental Protection Agency, ECAD-3-3
75 Hawthorne Street
San Francisco, CA 94105
shareem.jelani@epa.gov

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

39. If Respondent does not pay timely the civil penalty due under Paragraph 36 and/or any stipulated penalties due under Paragraphs 51, 52, and 53 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 the 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.

40. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, in addition to any stipulated penalties due under Paragraphs 51, 52, and 53 below, Respondent must pay the following on any penalty 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.

Self-Audit

41. Respondent shall perform a compliance audit (“Audit”) in accordance with Paragraphs 44-47 below of its properties in the state of Hawai‘i to identify and close all identified LCCs in accordance with Paragraph 47 below.

42. The Parties agree that violations reported or otherwise disclosed to EPA and corrected under, and in accordance with, this CA/FO shall be eligible for 100% mitigation of gravity-based penalties.

43. Respondent shall comply with the following Audit requirements:

- a. **Choose an Auditor to Conduct LCC Inspections.** No later than 180 calendar days following the Effective Date of this CA/FO, Respondent shall notify EPA in writing of Respondent’s choice of a proposed Auditor who has a technical educational background relevant to LCCs and at least five years of experience of conducting inspection and/or working on LCCs. Respondent shall provide to EPA along with its notification under this paragraph a curriculum vitae and list of past cesspool projects performed by the proposed Auditor. EPA shall have fifteen (15) calendar days from its receipt of Respondent’s notice to object to the selection of Respondent’s choice of an Auditor, based upon the Auditor not having the requisite educational background or experience. In the event of an objection by EPA, Respondent shall have thirty (30) days in which to provide to EPA with written notification of Respondent’s secondary Auditor choice that meets the requirements of this paragraph, and addresses any additional directions contained in EPA’s objection, along with the curriculum vitae and list of past cesspool projects performed by the secondary Auditor. If EPA does not object to Respondent’s choice of Auditor within the specified timeframe in this paragraph,

then the Auditor shall be deemed to be “approved” and may proceed to the next step in the Audit (Develop an island-by-island by list of properties to be inspected).

- i. Respondent shall ensure that the Auditor supervises the preparation of and signs the Inspection Completion Reports as required by Paragraph 45 of this CA/FO; and prepares and signs the Final LCC Closure Reports as required under Paragraph 47 of this CA/FO.
- ii. Recordkeeping: Respondent shall include in its written agreement with the Auditor a provision requiring that the Auditor maintain all records pertaining to the undertaking or oversight of the Audit for a period of at least three years. The Auditor’s records of the Audit shall be made available to EPA upon request.

b. Develop an Island-by-Island List of Target Properties to be Inspected:

Respondent shall submit for EPA’s approval an island-by-island list of Target Properties to be inspected pursuant to Subparagraph c. of this Paragraph as well as a list of Non-Target Properties that Respondent proposes not to inspect.

- i. Submission of lists of Target and Non-Target Properties shall be made in three phases: (I) Oahu; (II) Kauai/Maui/Molokai (“KMM”); and (III) the Island of Hawai’i (“Big Island”). The term “Audit” as used in this CA/FO refers to collectively all three phases. All Target Properties will be subject to the Audit.

1. For Phase I (Oahu): Within thirty (30) calendar days of EPA approval of the Auditor pursuant to paragraph 44.a. of this CA/FO, Respondent shall submit to EPA a list of Target and Non-Target

Properties in Oahu, consistent with the definitions set forth in Paragraph 44.b.ii and iii of this CA/FO.

2. For Phase II (KMM): Within sixty (60) calendar days of EPA approval of the Auditor pursuant to paragraph 44.a. of this CA/FO, Respondent shall submit to EPA a list of Target and Non-Target Properties in KMM, consistent with the definitions set forth in Paragraph 44.b.ii and iii of this CA/FO.
3. For Phase III (Big Island): Within ninety (90) calendar days of EPA approval of the Auditor pursuant to paragraph 44.a. of this CA/FO, Respondent shall submit to EPA a list of Target and Non-Target Properties for the Big Island, consistent with the definitions set forth in Paragraph 44.b.ii and iii of this CA/FO.

- ii. Target Properties. Target Properties include all properties managed or controlled¹ by Respondent in Hawai'i that contain or potentially contain an LCC and are not otherwise excluded as Non-Target Properties. All Properties managed or controlled by Respondent in the state of Hawai'i shall be treated as Target Properties for purposes of this Audit unless Respondent finds Sufficient Documentation that the property is properly classified as a Non-Target Property pursuant to Subparagraph b.iii of this Paragraph directly below.

¹ Excluded will be properties that are owned by the State of Hawai'i, by and through the DLNR, but which are controlled and managed by an agency other than the DLNR pursuant to an executive order.

iii. Non-Target Properties: Non-Target Properties include those that (A) are connected to a sewer system; (B) contain an on-site wastewater treatment facility permitted by the Hawai‘i Department of Health (“HDOH”); (C) contain an HDOH-permitted Individual Wastewater System (“IWS”) that is not a cesspool; (D) are residential properties that contain one single-family residence or are non-residential properties that clearly have the capacity to serve fewer than 20 persons per day; or (E) are raw land.

iv. Sufficient Documentation: Respondent shall rely on Sufficient Documentation that a particular property is a Non-Target Property and does not otherwise contain an LCC. For the purposes of this CA/FO, Sufficient Documentation means:

1. For properties connected to a sewer: written confirmation of the connection from the county or private sewer operator; building plans documenting the connection to a county or private sewer system; or a sewer bill from the past year.
2. For properties that contain an on-site wastewater treatment system: an HDOH permit or written documentation from HDOH of approval to operate the wastewater treatment system.
3. For properties that contain a non-cesspool IWS: an IWS permit from HDOH or written documentation from HDOH showing that the IWS is permitted.
4. For properties that contain one single-family residence: a Tax Map Key code showing that the property contains only one single-family residence.

5. For non-residential properties where a cesspool has capacity to serve less than 20 people: documentation identifying the capacity of the property, including but not limited to, information about actual use of the parcel, size of the space open to the public, access by public or employees to restrooms, and other relevant information.
 6. For raw land: a "Building Value" of zero according to government tax records as of the Effective Date of this CA/FO.
- v. If EPA approves of the list of Target and Non-Target Properties, on a phase-by-phase basis, then Respondent shall proceed with the next step of the Audit (inspection of Target Properties).
 - vi. If EPA disapproves of a Non-Target Property determination for any property on a phase-by-phase basis and determines a Property is instead a Target Property that should be inspected, it shall provide a rationale for any Property it disapproves. Upon receipt of EPA's written Non-Target Property disapproval, Respondent shall reexamine its Non-Target Property determination and provide EPA with a written response within thirty (30) days of receiving EPA's Non-Target Property disapproval that either confirms EPA's Target Property determination or reaffirms Respondent's initial Non-Target Property determination. If Respondent reaffirms its determination on one or more Properties, EPA shall make the final determination in writing on whether the Property is Target or Non-Target. Upon either Respondent's confirmation of EPA's Target Property determination or a determination by EPA on a disputed Property,

Respondent shall proceed with the next step of the Audit (inspection of Target Properties).

- vii. Upon request from EPA, Respondent shall provide copies to EPA of any documentation relied upon for any purposes of this Audit. With the exception of information obtained through databases maintained by a government entity, Respondent shall maintain the relied-upon documentation until the Audit is complete and at least three (3) years after any and all violations identified have been resolved by formal settlement. Where Respondent obtains information through databases maintained by a government entity, Respondent shall provide EPA with the name of the database and a certified statement from a representative of Respondent documenting when the information was obtained.
- viii. Each list of Target and Non-Target Properties submitted to EPA must be certified by Respondent pursuant to Paragraph 60.

c. **Inspection of the Target Properties:**

- i. Upon EPA approval of a list of Target Properties, the Auditor shall inspect each of the Target Properties for the presence of an LCC based upon the schedule for the phases contained in Paragraph 44.c.iii, below. Inspections may include, but are not limited to, a review of property records, permits, water use records, and/or other documentation, and interviews with Respondent's employees, occupants, tenants and/or lessees, as needed to confirm the presence (or absence) and location of an LCC. If Respondent cannot confirm the absence or location of an LCC during its records review,

then Respondent shall perform an on-site visual inspection of the Target Property.

- ii. All work will be conducted in accordance with accepted standards of professional engineering procedures as practiced by members of the local engineering profession currently practicing in Hawai'i under similar conditions.
- iii. Inspection Schedule:
 1. For Phase I (Oahu): Respondent shall complete the Phase I Inspections of Target Properties on Oahu within ninety (90) calendar days from finalization of the final list of Target and Non-Target Properties for Oahu pursuant to Paragraph 44.b.v. or Paragraph 44.b.vi.
 2. For Phase II (KMM): Respondent shall complete the Phase II Inspections of Target Properties on KMM within ninety (90) calendar days from finalization of the final list of Target and Non-Target Properties for KMM pursuant to Paragraph 44.b.v. or Paragraph 44.b.vi.
 3. For Phase III (Big Island): Respondent shall complete the Phase III Inspections of Target Properties for the Big Island within two hundred seventy (270) calendar days from finalization of the final list of Target and Non-Target Properties for the Big Island pursuant to Paragraph 44.b.v. or Paragraph 44.b.vi.

44. Inspection Completion Reports: No later than 120 days of the Inspection Completion Date for Phases I and II, and 270 days of the Inspection Completion Date for Phase

III, the Auditor shall sign and submit an Inspection Completion Report to EPA documenting the findings of the Auditor's Target Properties inspections for that particular Phase. The Inspection Completion Report shall include:

- a. A description of how the Audit Procedures were followed in completing the Audit.
- b. The number of LCCs located on Target Properties, a description of each LCC, and a description of how the LCC was identified and/or confirmed.
- c. For those Target Properties that were determined not to contain an LCC, a description of how it was determined that the property did not contain an LCC and what, if any, other sewer or wastewater treatment system is being used.

45. **LCCs Closure and Schedule Plan:**

- a. With the Inspection Completion Report for each Phase, Respondent shall also submit for EPA's approval an LCC Closure Plan and Schedule. The LCC Closure Plan and Schedule shall provide a schedule for the closure of any identified LCCs. The proposed schedule for closure of the LCCs should be established to ensure that the identified LCCs are closed as soon as reasonably possible, considering the time it takes to contract for the work, including Respondent's timely and diligent effort to prepare the competitive bid and award the contract. The LCC Closure Plan and Schedule shall include any contracts awarded to close the identified cesspools. In no case shall the schedule required for closure extend beyond three (3) years from the date of submission of the LCC Closure Plan and Schedule to EPA.
- b. EPA shall have sixty (60) days to disapprove in writing the LCC Closure Plan and Schedule for each Phase, along with a description of the basis for the

disapproval and instructions on how to address any identified concerns. Upon receipt of EPA's disapproval of the LCC Closure Plan and Schedule, Respondent shall submit to EPA within thirty (30) days of receipt of such disapproval a revised LCC Closure Plan and Schedule that addresses any concerns identified by EPA. Any LCC Closure Plan and Schedule not disapproved by EPA within sixty (60) days shall be deemed approved by EPA.

- c. Within three (3) months of submission of the LCC Closure Plan and Schedule for Phases I and II and within six (6) months for Phase III, Respondent shall submit either construction plans for an IWS to HDOH for approval or apply for a sewer connection for each LCC targeted for closure, irrespective of the final approved closure date.
- d. LCCs shall be closed in accordance with 40 C.F.R. §§ 144.84(b)(2), 144.88(a) and 144.89(a), and all applicable federal, state, and local closure requirements.

46. **Final LCC Closure Reports:** Within thirty (30 days) of closure of each identified LCC, Respondent shall submit to EPA a Final LCC Closure Report that includes the certification and signature by the Auditor for that particular LCC briefly describing and documenting completion of the LCC closure steps to EPA that includes, at a minimum, the following:

- a. A copy of the HDOH permit to operate an IWS or a copy of the approval to connect to sewer; and
- b. A copy of the US Environmental Protection Agency – Region 9 Groundwater Protection Section's Large Capacity Cesspool (Less than 1,000 gpd) Backfilling Final Completion Report or an approved copy of the HDOH's Underground

Injection Control Program Safe Drinking Water Branch Injection-Well
Abandonment application.

47. The Audit shall not affect EPA's right to bring a claim or cause of action other than those specified in this CA/FO, including a claim or cause of action for an LCC violation that could have been, but was not, reported and closed as part of the Audit or was identified and closed inconsistent with the process and procedures set forth in this CA/FO.

48. Respondent shall bear all costs associated with the Audit.

Stipulated Penalties

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

50. If Respondent fails to pay the \$105,543 civil administrative penalty by the deadline specified in Paragraph 36 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.

51. If Respondent fails to timely submit any reports required by this CA/FO, in accordance with the timelines set forth in this CA/FO, Respondent agrees to pay a stipulated penalty of \$75 for each day after the report was due until it submits the report in its entirety.

52. 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 36 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 36.

53. 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.

54. EPA may, 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.

Force Majeure

55. 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; labor, equipment, or material shortage; 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.

56. 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 seventy-two (72) hours of the delay or within seventy-two (72) hours of Respondent's knowledge of the anticipated delay, whichever is earlier, notify EPA by email in accordance with Paragraph 65. 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.

57. 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.

General Provisions

58. The Parties consent to service of this CA/FO by email at the following valid email addresses: Garnett.Desean@epa.gov (for Complainant) and Linda.L.Chow@hawaii.gov (for Respondent).

59. All reports, notifications, documentation, and submissions required by this CA/FO shall be sent to EPA in the manner described in Paragraph 65. These 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 the 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.”

60. If Respondent finds at any time after submitting information that any portion of that information is false or incorrect, the signee 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 the SDWA, 42 U.S.C. § 300h-2(b), as well as 18 U.S.C. §§ 1001 and 1341.

61. 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.

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

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

64. All reports, notifications, documentation, submissions, and other correspondence required to be submitted by this Order must be submitted to EPA electronically. If electronic submittal is not possible, the submissions must be made by certified mail (return receipt requested), and Respondent should explain why it was unable to submit the correspondence electronically. Electronic submissions must be sent to the following addresses: Jelani Shareem – Shareem.jelani@epa.gov and Desean Garnett – garnett.desean@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:

Jelani Shareem
U.S. Environmental Protection Agency, ECAD-3-3
75 Hawthorne Street
San Francisco, CA 94105
shareem.jelani@epa.gov

and

Desean Garnett
U.S. Environmental Protection Agency, ORC-2-4
75 Hawthorne Street
San Francisco, CA 94105
garnett.desean@epa.gov

65. Full payment of the penalty as described in Paragraph 36, 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 the SDWA for purposes of Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b). EPA reserves the right to assess and collect any and all civil penalties for any violation described herein.

66. If Respondent fails to comply with the requirements set forth in Paragraph 41, then EPA may request the United States Department of Justice bring an action to seek penalties for violating this CA/FO under Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b).

67. Full compliance with this CA/FO shall not in any case affect the rights of EPA or the United States to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violation of law.

68. This CA/FO does not affect Respondent's responsibility to comply with the SDWA and other applicable federal, state, or local laws and permits.

69. Respondent certifies that it is complying with the SDWA and its implementing regulations.

70. The terms of this CA/FO bind Respondent and its successors and assigns.

71. Each person signing this CA/FO certifies that they have the authority to sign for the party whom they represent and to bind that party to the terms of this CA/FO.

72. Each party agrees to bear its own costs and attorney fees in this action.

73. This CA/FO constitutes the entire agreement between the Parties.

74. 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.

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

76. In accordance with 40 C.F.R. § 22.18(b)(3) and 22.31(b), the Effective Date of this CA/FO is the date that the Final Order, having been signed by the Regional Judicial Officer, is filed with the Regional Hearing Clerk ("Effective Date").

77. This CA/FO will terminate after Respondent has complied with all the terms of the CA/FO throughout its duration.

**Consent Agreement and Final Order
In the Matter of: State of Hawai'i, Department of Land and Natural
Resources Docket No. UIC-09-2022-0062**

STATE OF HAWAI'I, DEPARTMENT OF LAND AND NATURAL RESOURCES:

Suzanne D. Case

Date: Jul 13, 2022

Suzanne D. Case, Chairperson
Board of Land and Natural Resources

APPROVED AS TO FORM:

Linda L. W. Chow

LINDA L. W. CHOW
Deputy Attorney General

Dated: Jul 13, 2022

Consent Agreement and Final Order
In the Matter of: State of Hawai‘i, Department of Land and Natural Resources
Docket No. UIC-09-2022-0062

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

AMY MILLER-
BOWEN

Digitally signed by AMY MILLER-
BOWEN
Date: 2022.08.01 11:06:12 -07'00'

Amy C. Miller-Bowen
Director, Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency
Region 9

Consent Agreement and Final Order
In the Matter of: State of Hawai'i, Department of Land and Natural Resources
Docket No. EPA-R9-UIC-2022-0062

Final Order

This Consent Agreement and Final Order, as agreed to by the Parties, shall become effective on the date that it is filed with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. § 22.18, 22.31, and 22.45. IT IS SO ORDERED.

By: STEVEN JAWGIEL Digitally signed by STEVEN
JAWGIEL
Date: 2022.09.23 14:29:30 -07'00'

Steven Jawgiel Date
Regional Judicial Officer
U.S. EPA - Region IX

CERTIFICATE OF SERVICE

I certify that the original of the fully executed CONSENT AGREEMENT AND FINAL ORDER in the matter of State of Hawaii, Department of Land and Natural Resources (Docket No. UIC-09-2022-0062) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct copy of the same was sent to the following parties via electronic mail:

Respondents:

Suzanne D. Case, Chairperson
Hawaii Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96819
Suzanne.Case@hawaii.gov

Linda L. Chow, Attorney
Hawaii Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Linda.l.Chow@hawaii.gov

Complainant:

Desean Garnett, Attorney Advisor
U.S. EPA - Region IX
Office of Regional Counsel (ORC-2-4)
75 Hawthorne Street
San Francisco, CA 94105
Garnett.Desean@epa.gov

Tu, Ponly Digitally signed by Tu, Ponly
Date: 2022.09.23 16:18:10
-07'00'

Ponly J. Tu Date
Regional Hearing Clerk
U.S. EPA - Region IX