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United States Environmental Protection Agency, Region IX

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16 JULY 2020
U.S. EPA - REGION IX

Attorneys for Complainant

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. UIC-09-2020-0030
)	
Kauai Beach Resort Association)	
4331 Kauai Beach Road)	
Lihue, Hawaii 96766)	CONSENT AGREEMENT
)	AND
Respondent.)	FINAL ORDER
)	
Proceedings under Sections 1423(c) of the)	
Safe Drinking Water Act,)	
42 U.S.C. §§ 300h-2(c).)	

CONSENT AGREEMENT

I. AUTHORITIES AND PARTIES

1. The United States Environmental Protection Agency (“EPA”), Region IX and Kauai Beach Resort Association (“KBRA”) (“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 commences and concludes this proceeding in accordance with 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.45(b).

2. This is a civil administrative action instituted by EPA Region IX against Respondent pursuant to Section 1423(c) of the Safe Drinking Water Act (“SDWA” or “the

Act”), 42 U.S.C. §§ 300h-2(c), for violations of the SDWA and the Underground Injection Control (“UIC”) requirements set forth at 40 C.F.R. Part 144.

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

4. Respondent is Kauai Beach Resort Association headquartered/located at 4331 Kauai Beach Road, Lihue, Hawaii, 96766.

II. APPLICABLE STATUTES AND REGULATIONS

5. Pursuant to SDWA Sections 1421 to 1429, 42 U.S.C. §§ 300h to 300h-8, EPA has promulgated regulations at 40 C.F.R. Part 144 establishing minimum requirements for UIC programs to prevent underground injection that endangers drinking water sources.

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

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

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

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

10. “Large capacity cesspools” (“LCCs”) include “multiple dwelling, community or regional cesspools, or other devices that receive sanitary wastes, containing human excreta, which have an open bottom and sometimes perforated sides.” 40 C.F.R. § 144.81(2). LCCs do

not include single-family residential cesspools or non-residential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day. *Id.*

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

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

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

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

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

16. 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. This UIC program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.

17. Pursuant to Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), and 40 C.F.R. § 19.4, EPA may issue an administrative order either assessing a civil penalty of not more than \$22,927 per day per violation up to a maximum of \$286,586, or requiring compliance, or both, against any person who violates the SDWA or any requirement of an applicable UIC program.

III. ALLEGATIONS

18. 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.

1. Since at least April 5, 2005, Respondent has owned and/or and operated a comfort station containing a public restroom located at Nukoli'i Beach ("Property") on Kauai Beach Road, in the City of Lihue, on the Island of Kauai.

19. Since at least April 5, 2005, Respondent has owned and/or operated one cesspool servicing the public restroom at the Property. The cesspool has the capacity to serve twenty or more people per day.

20. The cesspool identified in Paragraph 19 meets the definition of an LCC as that term is defined at 40 C.F.R. § 144.81(2).

21. Respondent's failure to close the LCC at the Property identified in Paragraph 19 by April 5, 2005 or thereafter constitutes an ongoing violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

IV. SETTLEMENT TERMS

A. General Provisions

22. For the purposes of this proceeding, Respondent (1) admits the jurisdictional allegations contained in this CA/FO, (2) neither admits nor denies the specific factual allegations contained in this CA/FO, (3) consents to the assessment of the penalty and to the specified compliance obligations contained in this CA/FO, and (4) waives any right to contest the allegations or to appeal the final order accompanying this consent agreement. 40 C.F.R. § 22.18(b)(2).

23. This CA/FO, inclusive of all exhibits, appendices, and attachments, is the entire agreement between the Parties to resolve EPA's civil claims against Respondent for the alleged violations of the SDWA identified in Section III of this CA/FO. Full compliance with this CA/FO, which includes (1) bringing the LCC at the Property into compliance with the UIC requirements in accordance with 40 C.F.R. §§ 144.84(b)(2), 144.88(a), and 144.89(a) and in accordance with Section IV.B of this CA/FO; and (2) payment of an administrative civil penalty

of \$55,182 in accordance with Section IV.C of this CA/FO; shall constitute full settlement of Respondent's liability for federal civil claims for the alleged SDWA violations specifically identified in Section III of this CA/FO.

24. 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.

25. Issuance of 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 claims described in Paragraph 21 that have been specifically resolved by this CA/FO.

26. 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.

27. 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.

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

29. 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.

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

31. 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.

B. Compliance Requirements

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

- a. By January 31, 2021, close the LCC located at the Property in accordance with 40 C.F.R. §§ 144.84(b)(2), 144.88(a), and 144.89(a), and all other applicable requirements, including all Hawaii Department of Health (“HDOH”) closure, conversion, and/or replacement requirements. If Respondent installs one or more replacement wastewater systems, such as Individual Wastewater Systems (“IWSs”), then installation and operation of such systems shall comply with all HDOH requirements; and
- b. Within thirty (30) days of closure of the LCC, submit to EPA a description of how the LCC was closed and identify the contractor(s) providing the service as well as copies of the cesspool Backfill Closure Reports for the closure of the cesspool. Respondent shall also submit all related approvals, including for any replacement systems, issued by HDOH within thirty (30) days of closure of each LCC, provided that, should HDOH not issue any approval within thirty (30) days of closure, Respondent shall submit HDOH’s approval to EPA within fourteen (14) days of its receipt of the approval.

C. Penalty

33. Respondent agrees to the assessment of a civil penalty in the amount of \$55,182 for the violations at the Property of the SDWA alleged in Section III of this CA/FO.

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

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

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

36. Concurrent with making the payment, Respondent must provide a letter with evidence of the payment made pursuant to Paragraphs 34 and 35, accompanied by the title and docket number of this action, to the EPA Region IX Regional Hearing Clerk, the EPA Region IX Enforcement and Compliance Assurance Division Compliance Officer, and the EPA Region IX Office of Regional Counsel attorney, via United States mail, at the following addresses:

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

Jelani Shareem, Enforcement Officer
U.S. Environmental Protection Agency
Region IX – Enforcement and Compliance Assurance Division
75 Hawthorne Street (ENF-3-3)
San Francisco, CA 94105

Julia Jackson, Attorney Advisor
U.S. Environmental Protection Agency
Region IX – Office of Regional Counsel
75 Hawthorne Street (ORC-2-3)
San Francisco, CA 94105

37. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13 interest, penalty charges, and administrative costs will be assessed against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the civil administrative penalty by the deadline specified in Paragraph 34.

38. Interest on delinquent penalties will be assessed at an annual rate that is equal to the rate of current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate), as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins. 40 C.F.R. § 13.11(a)(1).

39. A penalty charge will be assessed on all debts more than 90 days delinquent. The penalty charge will be at a rate of 6% per annum and will be assessed monthly. 40 C.F.R. § 13.11(c).

40. In addition, administrative costs for handling and collecting Respondent's overdue debt will be based on either actual or average cost incurred and will include both direct and indirect costs. 40 C.F.R. § 13.11(b).

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

- a. The debt being referred to a credit reporting agency, a collection agency, or to the Department of Justice for filing of a collection action in the appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CA/FO shall not be subject to review.
- b. The department or agency to which this matter is referred (e.g., the

Department of Justice, the Internal Revenue Service) may assess administrative costs for handling and collecting Respondent's overdue debt in addition to EPA's administrative costs.

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

42. Respondent shall tender any interest, handling charges, late penalty payments, and stipulated penalties in the same manner as described in Paragraphs 34 and 35.

D. Stipulated Penalties

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

44. If Respondent fails to pay the assessed civil administrative penalty specified in Section IV.C of this CA/FO by the deadline specified in that section, or fails to meet the compliance deadline for closure of the cesspool at the Property by the deadline specified in Section IV.B 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 or meeting the closure deadline for the Property's LCCs.

45. If Respondent fails to timely submit any reports, referred to in Paragraph 32(b), 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.

46. 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 35.

47. 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.

48. 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.

E. Force Majeure

49. 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.

50. 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 in writing, by email or overnight mail. 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.

51. 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.

F. Notices

52. Respondent must send written communications and/or submittals under this CA/FO, including any requests for extensions of time to meet the compliance deadlines, to the following:

Jelani Shareem, Enforcement Officer
U.S. Environmental Protection Agency
Region IX – Enforcement and Compliance Assurance Division
75 Hawthorne Street (ENF-3-3)
San Francisco, CA 94105
Shareem.Jelani@epa.gov

Julia Jackson, Attorney Advisor
U.S. Environmental Protection Agency
Region IX - Office of Regional Counsel
75 Hawthorne Street (ORC-2-3)
San Francisco, CA 94105
Jackson.Julia@epa.gov

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

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

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.

54. EPA must send any written communications under this CA/FO to the following address:

Jelani Shareem, Enforcement Officer
U.S. Environmental Protection Agency
Region IX – Enforcement and Compliance Assurance Division
75 Hawthorne Street (ENF-3-3)
San Francisco, CA 94105
Shareem.Jelani@epa.gov

VI. EFFECTIVE DATE

55. 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.

56. 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.

FOR THE CONSENTING PARTIES:

Kauai Beach Resort Association:



Ben Dookchitra, Board President

Date: 5/8/20

Linda Kolstad, Board Treasurer

Date: _____

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.

54. EPA must send any written communications under this CA/FO to the following address:

Jelani Shareem, Enforcement Officer
U.S. Environmental Protection Agency
Region IX – Enforcement and Compliance Assurance Division
75 Hawthorne Street (ENF-3-3)
San Francisco, CA 94105
Shareem.Jelani@epa.gov

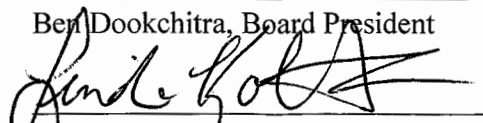
VI. EFFECTIVE DATE

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56. 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.

FOR THE CONSENTING PARTIES:

Kauai Beach Resort Association:

Ben Dookchitra, Board President


Linda Kolstad, Board Treasurer

Date: _____

Date: 5/12/20

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

**AMY MILLER-
BOWEN**

Digitally signed by AMY
MILLER-BOWEN
Date: 2020.07.01 09:09:35
-07'00'

Date: _____

Amy C. Miller **-Bowen**
Director, Enforcement and Compliance Assurance Division
Region IX
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)

DOCKET NO. UIC-09-2020-0030

Kauai Beach Resort Association)

Respondent.)

**CONSENT AGREEMENT
AND**

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

~~PROPOSED~~ FINAL ORDER

FINAL ORDER

The United States Environmental Protection Agency Region IX (“EPA”), and the Respondent, Kauai Beach Resort Association (“Respondent”), having entered into the foregoing Consent Agreement, and EPA having duly publicly noticed the Stipulations and Findings and Final Order regarding the matters alleged therein,

IT IS HEREBY ORDERED THAT:

1. The foregoing Consent Agreement and this Final Order (Docket No. UIC-09-2020-0030) be entered;
2. Respondent pay an administrative civil penalty of fifty-five thousand one hundred eighty-two dollars to the Treasurer of the United States of America in accordance with the terms set forth in the Consent Agreement;
3. Respondent close the cesspool by January 31, 2021 in accordance with the terms set forth in Paragraph 32 of the Consent Agreement; and
4. Respondent comply with all other requirements of the Consent 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.

STEVEN JAWGIEL Digitally signed by STEVEN
JAWGIEL
Date: 2020.07.15 15:21:39 -07'00'

Date: _____

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

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the forgoing CONSENT AGREEMENT and FINAL ORDER in the matter
3 of *Kauai Beach Resort Association* (UIC-09-2020-0030), was filed with the Regional Hearing
4 Clerk and served on the parties as follows:

5 ELECTRONIC MAIL

6 Respondent:

7 Ben Dookchitra,
8 Board President
9 Kauai Beach Resort Association
10 bdookchitra@eaglepointhotels.com

11 ELECTRONIC MAIL

12 Complainant:

13 Julia Jackson,
14 Attorney Advisor
15 U.S. EPA - Region IX
16 jackson.julia@epa.gov

17 Dated: _____

18 _____
19 Steven Armsey
20 Regional Hearing Clerk
21 U.S. EPA, Region 9
22
23
24
25