NSHE's Prehearing Information Exchange Exhibits List
In the Matter of NSHE HI Narcissus, LLC, Docket No. UIC-09-2022-0058

Exhibit A – EPA General Enforcement Policy #GM – 21, "Policy on Civil Penalties," dtd. Feb. 16, 1984

Exhibit B – EPA General Enforcement Policy #GM – 22, "A Framework For Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties," dtd. Feb. 16, 1984

Exhibit C – Complainant's Statement of Proposed Penalty, dtd. Mar. 23, 2023

Exhibit D – Complainant's Statement of Proposed Penalty, dtd. Apr. 16, 2024

Exhibit E – Partial Accelerated Decision on Liability, dtd. Aug. 28, 2023

Exhibit F – Site Plan of 66-532 Kam. Hwy.

Exhibit G – EPA Compliance Evaluation Inspection Report, dtd. Mar. 4, 2021.

Exhibit H-1 – UIC-09-2022-0061: SKS Management LLC, Kailua-Kona, HI; Consent Agreement and Final Order

Exhibit H-2 – UIC-09-2022-0015: Halona Pacific LLC, Honolulu, HI; Consent Agreement and Final Order

Exhibit H-3 – UIC-09-2023-0060: Hawaii Conference Foundation; Consent Agreement and Proposed Final Order

Exhibit H-4 – UIC-09-2023-0074: Hawthorne Pacific Corp.; Consent Agreement and Proposed Final Order

Exhibit H-5 – SDWA-UIC-AOC-09-2022-0002: Chieko Takahashi Family Limited Partnership, Haleiwa, HI; Administrative Order on Consent

Exhibit H-6 – UIC-09-2019-0048: LuckyU Enterprises Inc., Haleiwa, HI; Consent Agreement and Final Order

Exhibit H-7 – UIC-09-2023-0036: Seven-Eleven Hawaii Inc.; Consent Agreement and Proposed Final Order

Exhibit I – Invoice from Unitek Solvent Services, Inc., dtd. Nov. 9, 2017

Exhibit J – Invoice from Unitek Solvent Services, Inc., dtd. Nov. 15, 2017

Exhibit K – Letter from GeoTek Hawaii, Inc., dtd. May 25, 2018

Exhibit L – UST Removal and Closure Report, dtd. Jun. 17, 2018

Exhibit M – Invoice from Unitek Solvent Services, dtd. Apr. 19, 2018

Exhibit N – Letter to Mr. Duke Pontin, dtd. Aug. 2, 2018.

Exhibit O – Invoice from Unitek Solvent Services, dtd. November 13, 2017

Exhibit P – TestAmerica Honolulu, Chain of Custody Record

Exhibit Q – Letter to Amy Miller-Bowen, U.S. EPA, from Jeff Wallace

Exhibit R – Resourceful Ranching, article published by Cowgirl Magazine

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Introduction

This document, Policy on Civil Penalties, establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions. These goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - are presented here in general terms. An outline of the general process for the assessment of penalties is contained in Attachment A.

A companion document, A Framework for Statute-Specific Approaches to Penalty Assessments, will also be issued today. This document provides guidance to the user of the policy on how to write penalty assessment guidance specific to the user's particular program. The first part of the Framework provides general guidance on developing program-specific guidance; the second part contains a detailed appendix which explains the basis for that guidance. Thus, the user need only refer to the appendix when he wants an explanation of the guidance in the first part of the Framework.

In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty actions should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented. Documentation for deviations from the Framework in program-specific guidance should be located in that guidance. Documentation for deviations from the program-specific guidance in calculating individual penalties should be contained in both the case files and in any memoranda that accompany the settlements.

The Agency will make every effort to urge administrative law judges to impose penalties consistent with this policy and any medium-specific implementing guidance. For cases that go to court, the Agency will request the statutory maximum penalty in the filed complaint. And, as proceedings warrant, EPA will continue to pursue a penalty no less than that supported by the applicable program policy. Of course, all penalties must be consistent with applicable statutory provisions, based upon the number and duration of the violations at issue.

Applicability

This policy statement does not attempt to address the specific mechanisms for achieving the goals set out for penalty assessment. Nor does it prescribe a negotiation strategy to achieve the penalty target figures. Similarly, it does not address differences between statutes or between priorities of different programs. Accordingly, it cannot be used, by itself, as a basis for determining an appropriate penalty in a specific

action. Each EPA program office, in a joint effort with the Office of Enforcement and Compliance Monitoring, will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework.

Until new program-specific policies are issued, the current penalty policies will remain in effect. Once new program-specific policies are issued, the Agency should calculate penalties as follows:

- For cases that are substantially settled, apply the old policy.

- For cases that will require further substantial negotiation, apply the new policy if that will not be too disruptive.

Because of the unique issues associated with civil penalties in certain types of cases, this policy does not apply to the following areas:

- CERCLA §107. This is an area in which Congress has directed a particular kind of response explicitly oriented toward recovering the cost of Government cleanup activity and natural resource damage.

- Clean Water Act §311(f) and (g). This also is cost recovery in nature. As in CERCLA §107 actions, the penalty assessment approach is inappropriate.

- Clean Air Act §120. Congress has set out in considerable detail the level of recovery under this section. It has been implemented with regulations which, as required by law, prescribe a non-exclusive remedy which focuses on recovery of the economic benefit of noncompliance. It should be noted, however, that this general penalty policy builds upon, and is consistent with the approach Congress took in that section.

Much of the rationale supporting this policy generally applies to non-profit institutions, including government entities. In applying this policy to such entities, EPA must exercise judgment case-by-case in deciding, for example, how to apply the economic benefit and ability to pay sanctions, if at all. Further guidance on the issue of seeking penalties against non-profit entities will be forthcoming.

Deterrence

The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the "benefit component" of the penalty.

Where the penalty fails to remove the significant economic benefit, as defined by the program-specific guidance, the case development team must explain in the case file why it fails to do so. The case development team must then include this explanation in the memorandum accompanying each settlement for the signature of the Assistant Administrator of Enforcement and Compliance Monitoring, or the appropriate Regional official.

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to

achieve general deterrence. These extra assessments should balance the other goals of this policy, particularly equitable treatment of the regulated community.

This approach is consistent with the civil penalty provisions in the environmental laws. Almost all of them require consideration of the seriousness of the violation. This additional amount which reflects the seriousness of the violation is referred to as the "gravity component". The combination of the benefit and gravity components yields the "preliminary deterrence figure."

As explained later in this policy, the case development team will adjust this figure as appropriate. Nevertheless, EPA typically should seek to recover, at a minimum, a penalty which includes the benefit component plus some non-trivial gravity component. This is important because otherwise, regulated parties would have a general economic incentive to delay compliance until the Agency commenced an enforcement action. Once the Agency brought the action, the violator could then settle for a penalty less than their economic benefit of noncompliance. This incentive would directly undermine the goal of deterrence.

Fair and Equitable Treatment of the Regulated Community

The second goal of penalty assessment is the fair and equitable treatment of the regulated community. Fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility. The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

But any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Methods for quantifying the benefit and gravity components are explained in the Framework guidance. These methods significantly further the goal of equitable treatment of violators. To begin with, the benefit component promotes equity by removing the unfair economic advantage which a violator may have gained over complying parties. Furthermore, because the benefit and gravity components are generated systematically, they

will exhibit relative consistency from case to case. Because the methodologies account for a wide range of relevant factors, the penalties generated will be responsive to legitimate differences between cases.

However, not all the possibly relevant differences between cases are accounted for in generating the preliminary deterrence amount. Accordingly, all preliminary deterrence amounts should be increased or mitigated for the following factors to account for differences between cases:

- Degree of willfulness and/or negligence
- History of noncompliance.
- Ability to pay.
- Degree of cooperation/noncooperation.
- Other unique factors specific to the violator or the case.

Mitigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation.

The preliminary deterrence amount adjusted prior to the start of settlement negotiations yields the "initial penalty target figure". In administrative actions, this figure generally is the penalty assessed in the complaint. In judicial actions, EPA will use this figure as the first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels that it is appropriate. The initial penalty target may be further adjusted as negotiations proceed and additional information becomes available or as the original information is reassessed.

Swift Resolution of Environmental Problems

The third goal of penalty assessment is swift resolution of environmental problems. The Agency's primary mission is to protect the environment. As long as an environmental violation continues, precious natural resources, and possibly public health, are at risk. For this reason, swift correction of identified environmental problems must be an important goal of any enforcement action. In addition, swift compliance conserves Agency personnel and resources.

The Agency will pursue two basic approaches to promoting quick settlements which include swift resolution of environmental problems without undermining deterrence. Those two approaches are as follows:

1. Provide incentives to settle and institute prompt remedial action.

EPA policy will be to provide specific incentives to settle, including the following:

- The Agency will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation.[1]/ This would be considered in the adjustment factor called degree of cooperation/noncooperation discussed above.

- The Agency will consider accepting additional environmental cleanup, and mitigating the penalty figures accordingly. But normally, the Agency will only accept this arrangement if agreed to in pre-litigation settlement.

Other incentives can be used, as long as they do not result in allowing the violator to retain a significant economic benefit.

2. Provide disincentives to delaying compliance.

The preliminary deterrence amount is based in part upon the expected duration of the violation. If that projected period of time is extended during the course of settlement negotiations due to the defendant's actions, the case development team should adjust that figure upward. The case development team should consider making this fact known to the violator early in the negotiation process. This will provide a strong disincentive to delay compliance.

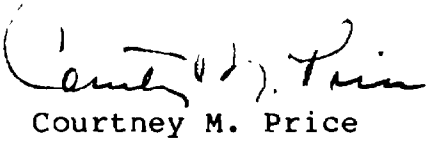
1/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or

- for judicial actions - when an Assistant United States Attorney files a complaint in court.

Intent of Policy and Information Requests for Penalty Calculations

The policies and procedures set out in this document and in the Framework for Statute-Specific Approaches to Penalty Assessment are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice. In addition, any penalty calculations under this policy made in anticipation of litigation are exempt from disclosure under the Freedom of Information Act. Nevertheless as a matter of public interest, the Agency may elect to release this information in some cases.



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Attachment

ATTACHMENT A

Outline of Civil Penalty Assessment

I. Calculate Preliminary Deterrence Amount

A. Economic benefit component and

B. Gravity component

(This yields the preliminary deterrence amount.)

II. Apply Adjustment Factors

A. Degree of cooperation/noncooperation (indicated through pre-settlement action.)

B. Degree of willfulness and/or negligence.

C. History of noncompliance.

D. Ability to pay (optional at this stage.)

E. Other unique factors (including strength of case, competing public policy concerns.)

(This yields the initial penalty target figure.)

III. Adjustments to Initial Penalty Target Figure After Negotiations Have Begun

A. Ability to pay (to the extent not considered in calculating initial penalty target.)

B. Reassess adjustments used in calculating initial penalty target. (Agency may want to reexamine evidence used as a basis for the penalty in the light of new information.)

C. Reassess preliminary deterrence amount to reflect continued periods of noncompliance not reflected in the original calculation.

D. Alternative payments agreed upon prior to the commencement of litigation.

(This yields the adjusted penalty target figure.)

A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

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Introduction

This document, A Framework for Statute-Specific Approaches to Penalty Assessment, provides guidance to the user of the Policy on Civil Penalties on how to develop a medium-specific penalty policy. Such policies will apply to administratively imposed penalties and settlements of both administrative and judicial penalty actions.

In the Policy on Civil Penalties, the Environmental Protection Agency establishes a single set of goals for penalty assessment. Those goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - will be substantially impaired unless they are pursued in a consistent fashion. Even different terminology could cause confusion that would detract from the achievement of these goals. At the same time, too much rigidity will stifle negotiation and make settlement impossible.

The purpose of this document is to promote the goals of the Policy on Civil Penalties by providing a framework for medium-specific penalty policies. The Framework is detailed enough to allow individual programs to develop policies that will consistently further the Agency's goals and be easy to administer. In addition, it is general enough to allow each program to tailor the policy to the relevant statutory provisions and the particular priorities of each program.

While this document contains detailed guidance, it is not cast in absolute terms. Nevertheless, the policy does not encourage deviation from this guidance in either the development of medium-specific policies or in developing actual penalty figures. Where there are deviations in developing medium-specific policies, the reasons for those changes must be recorded in the actual policy. Where there are deviations from medium-specific policies in calculating a penalty figure, the case development team must detail the reasons for those changes in the case file. In addition, the rationale behind the deviations must be incorporated in the memorandum accompanying the settlement package to Headquarters or the appropriate Regional official.

This document is divided into two sections. The first one gives brief instructions to the user on how to write a medium-specific policy. The second section is an appendix that gives detailed guidance on implementing each section of the instructions and explains how the instructions are intended to further the goals of the policy.

Writing a Program Specific Policy

Summarized below are those elements that should be present in a program-specific penalty policy. For a detailed discussion of each of these ideas, the corresponding portions of the appendix should be consulted.

I. Developing a Penalty Figure

The development of a penalty figure is a two step process. First the case development team must calculate a preliminary deterrence figure. This figure is composed of the economic benefit component (where applicable) and the gravity component. The second step is to adjust the preliminary deterrence figure through a number of factors. The resulting penalty figure is the initial penalty target figure. In judicial actions, the initial penalty target figure is the penalty amount which the government normally sets as a goal at the outset of settlement negotiations. It is essentially an internal settlement goal and should not be revealed to the violator unless the case development team feels it is appropriate. In administrative actions, this figure generally is the penalty assessed in the complaint. While in judicial actions, the government's complaint will request the maximum penalty authorized by law.

This initial penalty target figure may be further adjusted in the course of negotiations. Each policy should ensure that the penalty assessed or requested is within any applicable statutory constraints, based upon the number and duration of violations at issue.

II. Calculating a Preliminary Deterrence Amount

Each program-specific policy must contain a section on calculating the preliminary deterrence figure. That section should contain materials on each of the following areas:

- Benefit Component. This section should explain:
  - a. the relevent measure of economic benefit for various types of violations,
  - b. the information needed,
  - c. where to get assistance in computing this figure and
  - d. how to use available computer systems to compare a case with similar previous violations.

- Gravity Component. This section should first rank different types of violations according to the seriousness of the act. In creating that ranking, the following factors should be considered:

  a. actual or possible harm,
  b. importance to the regulatory scheme and
  c. availability of data from other sources.

In evaluating actual or possible harm, your scheme should consider the following facts:

- amount of pollutant,
- toxicity of pollutant,
- sensitivity of the environment,
- length of time of a violation and
- size of the violator.

The policy then should assign appropriate dollar amounts or ranges of amounts to the different ranked violations to constitute the "gravity component". This amount, added to the amount reflecting economic benefit, constitutes the preliminary deterrence figure.

III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure (Prenegotiation Adjustment)

Each program-specific penalty policy should give detailed guidance on applying the appropriate adjustments to the preliminary deterrence figure. This is to ensure that penalties also further Agency goals besides deterrence (i.e. equity and swift correction of environmental problems). Those guidelines should be consistent with the approach described in the appendix. The factors may be separated according to whether they can be considered before or after negotiation has begun or both.

Adjustments (increases or decreases, as appropriate) that can be made to the preliminary deterrence penalty to develop an initial penaly target to use at the outset of negotiation include:

- Degree of willfulness and/or negligence
- Cooperation/noncooperation through pre-settlement action.
- History of noncompliance.

- Ability to pay.
- Other unique factors (including strength of case, competing public policy considerations).

The policy may permit consideration of the violator's ability to pay as an adjustment factor before negotiations begin. It may also postpone consideration of that factor until after negotiations have begun. This would allow the violator to produce evidence substantiating its inability to pay.

The policy should prescribe appropriate amounts, or ranges of amounts, by which the preliminary deterrence penalty should be adjusted. Adjustments will depend on the extent to which certain factors are pertinent. In order to preserve the penalty's deterrent effect, the policy should also ensure that, except for the specific exceptions described in this document, the adjusted penalty will: 1) always remove any significant economic benefit of noncompliance and 2) contain some non-trivial amount as a gravity component.

IV. Adjusting the Initial Penalty Target During Negotiations

Each program-specific policy should call for periodic reassessment of these adjustments during the course of negotiations. This would occur as additional relevant information becomes available and the old evidence is re-evaluated in the light of new evidence. Once negotiations have begun, the policy also should permit adjustment of the penalty target to reflect "alternative payments" the violator agrees to make in settlement of the case. Adjustments for alternative payments and pre-settlement corrective action are generally permissible only before litigation has begun.

Again, the policy should be structured to ensure that any settlement made after negotiations have begun reflects the economic benefit of noncompliance up to the date of compliance plus some non-trivial gravity component. This means that if lengthy settlement negotiations cause the violation to continue longer than initially anticipated, the penalty target figure should be increased. The increase would be based upon the extent that the violations continue to produce ongoing environmental risk and increasing economic benefit.

Use of the Policy In Litigation

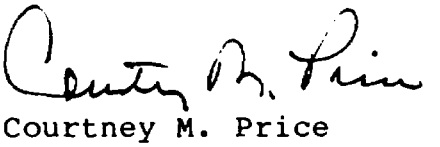
Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

should account for all the factors identified in the relevant statute and still allow for compromises in settlement without exceeding the parameters outlined in this document. (For each program, all the statutory factors are contained in the Framework either explicitly or as part of broader factors.) For administrative proceedings, the policy should explain how to formulate a penalty figure, consistent with the policy. The case development team will put this figure in the administrative complaint.

In judicial actions, the EPA will use the initial penalty target figure as its first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels it is appropriate. In judicial litigation, the government should request the maximum penalty authorized by law in its complaint. The policy should also explain how it and any applicable precedents should be used in responding to any explicit requests from a court for a minimum assesment which the Agency would deem appropriate.

Use of the Policy as a Feedback Device

Each program-specific policy should first explain in detail what information needs to be put into the case file and into the relevant computer tracking system. Furthermore, each policy should cover how to use that system to examine penalty assessments in other cases. This would thereby assist the Agency in making judgments about the size of adjustments to the penalty for the case at hand. Each policy should also explain how to present penalty calculations in litigation reports.



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Attachment

APPENDIX

Introduction

This appendix contains three sections. The first two sections set out guidelines for achieving the goals of the Policy on Civil Penalties. The first section focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty which reflects the seriousness of the violation. The second section provides adjustment factors so that both a fair and equitable penalty will result and that there will be a swift resolution of the environmental problem. The third section of the framework presents some practical advice on the use of the penalty figures generated by the policy.

The Preliminary Deterrence Amount

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it specifies that any penalty should, at a minimum, remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of economic benefit to reflect the seriousness of the violation. That portion of the penalty which removes the economic benefit of noncompliance is referred to as the "benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section of the document provides guidelines for calculating the benefit component and the gravity component. It will also present and discuss a simplified version of the economic benefit calculation for use in developing quick penalty determinations. This section will also discuss the limited circumstances which justify settling for less than the benefit component. The uses of the preliminary deterrence amount will be explained in subsequent portions of this document.

I. The Benefit Component

In order to ensure that penalties remove any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues

to be considered when computing the benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. This section concludes with a discussion of the proper use of the benefit component in developing penalty figures and in settlement negotiations.

A. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which fails to construct required settling ponds will eventually have to spend the money needed to build those ponds in order to achieve compliance. But, by deferring these one-time nonrecurring costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which result in savings from deferred cost are the following:

- Failure to install equipment needed to meet discharge or emission control standards.
- Failure to effect process changes needed to eliminate pollutants from products or waste streams.
- Testing violations, where the testing still must be done to demonstrate achieved compliance.
- Improper disposal, where proper disposal is still required to achieve compliance.
- Improper storage where proper storage is still required to achieve compliance.
- Failure to obtain necessary permits for discharge, where such permits would probably be granted. (While the avoided cost for many programs would be negligible, there are programs where the the permit process can be expensive).

The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date

compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate. The applicable medium-specific guidance should state what that method is.

The rule of thumb method can usually be used in making decisions on whether to develop a case or in setting a penalty target for settlement negotiations. In using this rule of thumb method in settlement negotiations, the Agency may want to make the violator fully aware that it is using an estimate and not a more precise penalty determination procedure. The decision whether to reveal this information is up to the negotiators.

The "rule of thumb" method only provides a first-cut estimate of the benefit of delayed compliance. For this reason, its use is probably inappropriate in situations where a detailed analysis of the economic effect of noncompliance is needed to support or defend the Agency's position. Accordingly, this "rule of thumb" method generally should not be used in any of the following circumstances:

- A hearing is likely on the amount of the penalty.
- The defendant wishes to negotiate over the amount of the economic benefit on the basis of factors unique to the financial condition of the company.
- The case development team has reason to believe it will produce a substantially inaccurate estimate; for example, where the defendant is in a highly unusual financial position, or where noncompliance has or will continue for an unusually long period.

There usually are avoided costs associated with this type of situation. Therefore, the "rule of thumb for avoided costs" should also be applied. (See pages 9-10). For most cases, both figures are needed to yield the major portion of the economic benefit component.

When the rule of thumb method is not applicable, the economic benefit of delayed compliance should be computed using the Methodology for Computing the Economic Benefit of Noncompliance. This document, which is under development, provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method will largely be a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and Title I of the Clean Air Act. It will also be consistent with the regulations

implementing Section 120 of the Clean Air Act. A computer program will be available to the Regions to perform the analysis, together with instructions for its use. Until the Methodology is issued, the economic model contained in the July 8, 1980, Civil Penalty Policy should be used. It should be noted that the Agency recently modified this guidance to reflect changes in the tax law.

B. Benefit from avoided costs

Many kinds of violations enable a violator to permanently avoid certain costs associated with compliance.

- Cost savings for operation and maintenance of equipment that the violator failed to install.
- Failure to properly operate and maintain existing control equipment.
- Failure to employ sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Improper storage, where commercial storage is reasonably available.
- Improper disposal, where redisposal or cleanup is not possible.
- Process, operational, or maintenance savings from removing pollution equipment.
- Failure to conduct necessary testing.

As with the benefit from delayed costs, the benefit component for avoided costs may be estimated by another "rule of thumb" method. Since these costs will never be incurred, the estimate is the expenses avoided until the date compliance is achieved less any tax savings. The use of this "rule of thumb" method is subject to the same limitations as those discussed in the preceding section.

Where the "rule of thumb for avoided costs" method cannot be used, the benefit from avoided costs must be computed using the Methodology for Computing the Economic Benefit of Noncompliance. Again, until the Metholology is issued, the method contained in the July 8, 1980, Civil Penalty Policy should be used as modified to reflect recent changes in the tax law.

C. Benefit from competitive advantage

For most violations, removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator clearly has gained from noncompliance. But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. Examples of such violations include:

- Selling banned products.
- Selling products for banned uses.
- Selling products without required labelling or warnings.
- Removing or altering pollution control equipment for a fee, (e.g., tampering with automobile emission controls.)
- Selling products without required regulatory clearance, (e.g., pesticide registration or premanufacture notice under TSCA.)

To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transactions (i.e. those transactions which would not have occurred if the party had complied). The case development team is responsible for identifying violations in which this element of economic benefit clearly is present and significant. This calculation may be substantially different depending on the type of violation. Consequently the program-specific policies should contain guidance on identifying these types of violations and estimating these profits. In formulating that guidance, the following principles should be followed:

- The amount of the profit should be based on the best information available concerning the number of transactions resulting from noncompliance.
- Where available, information about the average profit per transaction may be used. In some cases, this may be available from the rulemaking record of the provision violated.
- The benefit derived should be adjusted to reflect the present value of net profits derived in the past.

It is recognized that the methods developed for estimating the profit from those transactions will sometimes rely substantially on expertise rather than verifiable data. Nevertheless, the programs should make all reasonable efforts to ensure that the estimates developed are defensible. The programs are encouraged to work with the Office of Policy, Planning and Evaluation to ensure that the methods developed are consistent with the forthcoming Methodology for Computing the Economic Benefit of Noncompliance and with methods developed by other programs. The programs should also ensure that sufficient contract funds are available to obtain expert advice in this area as needed to support penalty development, negotiation and trial of these kinds of cases.

D. Settling cases for an amount less than the economic benefit

As noted above, settling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount. There are three general areas where settling for less than economic benefit may be appropriate. But in any individual case where the Agency decides to settle for less than enconomic benefit, the case development team must detail those reasons in the case file and in any memoranda accompanying the settlement.

1. Benefit component involves insignificant amount

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is not likely to be significant, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, the case development team has the discretion not to seek the benefit component where it appears that the amount of that component is likely to be less than $10,000. (A program may determine that other cut-off points are more reasonable based on the likelihood that retaining the benefit could encourage noncomplying behavior.) In exercising that discretion, the case development team should consider the following factors:

- Impact on violator: The likelihood that assessing the benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by

itself, to achieve the goals of this policy.

- The certainty of the size of the benefit component: If the economic benefit is quite well defined, it is not likely to require as much effort to seek to include it in the penalty assessment. Such circumstances also increase the likelihood that the economic benefit was a substantial motivation for the noncompliance. This would make the inclusion of the benefit component more necessary to achieve specific deterrence.

It may be appropriate not to seek the benefit component in an entire class of violation. In that situation, the rationale behind that approach should be clearly stated in the appropriate medium-specific policy. For example, the most appropriate way to handle a small non-recurring operation and maintenance violation may be a small penalty. Obviously it makes little sense to assess in detail the economic benefit for each individual violation because the benefit is likely to be so small. The medium-specific policy would state this as the rationale.

2. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider settling a case for less than the benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlements might be appropriate where the following circumstances occur:

- There is a very substantial risk of creating precedent which will have a significant adverse effect upon the Agency's ability to enforce the law or clean up pollution if the case is taken to trial.

- Settlement will avoid or terminate an imminent risk to human health or the environment. This is an adequate justification only if injunctive relief is unavailable for some reason, and if settlement on remedial responsibilities could not be reached independent of any settlement of civil penalty liability.

- Removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business.

Alternative payment plans should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

3. Litigation practicalities

The Agency realizes that in certain cases, it is highly unlikely the EPA will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty in litigation which would remove the economic benefit. The case development team then may pursue a lower penalty amount.

II. The Gravity Component

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should not only remove any economic benefit of noncompliance, but also include an amount reflecting the seriousness of the violation. This latter amount is referred to as the "gravity component." The purpose of this section of the document is to establish an approach to quantifying the gravity component. This approach can encompass the differences between programs and still provide the basis for a sound consistent treatment of this issue.

A. Quantifying the gravity of a violation

Assigning a dollar figure to represent the gravity of a violation is an essentially subjective process. Nevertheless, the relative seriousness of different violations can be fairly accurately determined in most cases. This can be accomplished by reference to the goals of the specific regulatory scheme and the facts of each particular violation. Thus, linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way.

Such a linkage promotes consistency. This consistency strengthens the Agency's position both in negotiation and before a trier of fact. This approach consequently also encourages swift resolution of environmental problems.

Each program must develop a system for quantifying the gravity of violations of the laws and regulations it administers.

This development must occur within the context of the penalty amounts authorized by law for that program. That system must be based, whenever possible, on objective indicators of the seriousness of the violation. Examples of such indicators are given below. The seriousness of the violation should be based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation. In some cases, the seriousness of the risk of harm will exceed that of the actual harm. Thus, each system should provide enough flexibility to allow EPA to consider both factors in assessing penalties.

Each system must also be designed to minimize the possibility that two persons applying the system to the same set of facts would come up with substantially different numbers. Thus, to the extent the system depends on categorizing events, those categories must be clearly defined. That way there is little possibility for argument over the category in which a violation belongs. In addition, the categorization of the events relevant to the penalty decision should be noted in the penalty development portion of the case file.

B. Gravity Factors

In quantifying the gravity of a violation, a program-specific policy should rank different types of violations according to the seriousness of the act. The following is a suggested approach to ranking the seriousness of violations. In this approach to ranking, the following factors should be considered:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required size would not normally be considered as serious.

- Availability of data from other sources: The violation of any recordkeeping or reporting requirement is a very serious

matter. But if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate. (E.g. a customer of the violator purchased all the violator's illegally produced substance. Even though the violator does not have the required records, the customer does.)

- Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by other factors.

The assessment of the first gravity factor listed above, risk or harm arising from a violation, is a complex matter. For purposes of ranking violations according to seriousness, it is possible to distinguish violations within a category on the basis of certain considerations, including the following:

- Amount of pollutant: Adjustments for the concentration of the pollutant may be appropriate, depending on the regulatory scheme and the characteristics of the pollutant. Such adjustments need not be linear, especially if the pollutant can be harmful at low concentrations.

- Toxicity of the pollutant: Violations involving highly toxic pollutants are more serious and should result in relatively larger penalties.

- Sensitivity of the environment: This factor focuses on the location where the violation was committed. For example, improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.

- The length of time a violation continues: In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm.

Although each program-specific policy should address each of the factors listed above, or determine why it is not relevant, the factors listed above are not meant to be exhaustive. The programs should make every effort to identify all factors relevant to assessing the seriousness of any violation. The programs should then systematically prescribe a dollar amount to yield a gravity component for the penalty. The program-specific policies may prescribe a dollar range for a certain category of violation rather than a precise dollar amount within that range based on the specific facts of an individual case.

The process by which the gravity component was computed must be memorialized in the case file. Combining the benefit component with the gravity component yields the preliminary deterrence amount.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. The medium specific policies should address this issue. One possible approach would be to direct the case development team to consider increasing the gravity component within a certain range to achieve general deterrence. These extra assessments should be consistent with the other goals of this policy.

Initial and Adjusted Penalty Target Figure

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the benefit component discussed above in a civil penalty assessment. This approach would prevent violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the preliminary deterrence amount when those facts occur. The application of these adjustments to the preliminary deterrence amount prior to the commencement of negotiation yields the initial penalty target figure. During the course of negotiation, the case development team may further adjust this figure to yield the adjusted penalty target figure.

Nevertheless, it should be noted that equitable treatment is a two-edged sword. While it means that a particular violator will receive no higher penalty than a similarly situated violator, it also means that the penalty will be no lower.

I. Flexibility-Adjustment Factors

The purpose of this section of the document is to establish additional adjustment factors to promote flexibility and to identify management techniques that will promote consistency. This section sets out guidelines for adjusting penalties to account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness and/or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, and other unique factors. Unless otherwise specified, these adjustment factors will apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors.

Within each factor there are three suggested ranges of adjustment. The actual ranges for each medium-specific policy will be determined by those developing the policy. The actual ranges may differ from these suggested ranges based upon program specific needs. The first, typically a 0-20% adjustment of the gravity component, is within the absolute discretion of the case development team. 1/ The second, typically a 21-30% adjustment, is only appropriate in unusual circumstances. The third range, typically beyond 30% adjustment, is only appropriate in extraordinary circumstances. Adjustments in the latter two ranges, unusual and extraordinary circumstances, will be subject to scrutiny in any performance audit. The case development team may wish to reevaluate these adjustment factors as the negotiations progress. This allows the team to reconsider evidence used as a basis for the penalty in light of new information.

Where the Region develops the penalty figure, the application of adjustment factors will be part of the planned Regional audits. Headquarters will be responsible for proper application of these factors in nationally-managed cases. A detailed discussion of these factors follows.

A. Degree of Willfulness and/or Negligence

Although most of the statutes which EPA administers are strict liability statutes, this does not render the violator's

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1/ Absolute discretion means that the case development team may make penalty development decisions independent of EPA Headquarters. Nevertheless it is understood that in all judicial matters, the Department of Justice can still review these determinations if they so desire. Of course the authority to exercise the Agency's concurrence in final settlements is covered by the applicable delegations.

willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:

- How much control the violator had over the events constituting the violation.
- The forseeability of the events constituting the violation.
- Whether the violator took reasonable precautions against the events constituting the violation.
- Whether the violator knew or should have known of the hazards associated with the conduct.
- The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute, where applicable.
- Whether the violator in fact knew of the legal requirement which was violated.

It should be noted that this last point, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied is also relevent in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and out of its control, the penalty may be reduced.

The suggested approach for this factor is for the case development team to have absolute discretion to adjust the penalty up or down by 20% of the gravity component. Adjustments in the $\pm$ 21-30% range should only be made in unusual circumstances.

Adjustments for this factor beyond ± 30% should be made only in extraordinary circumstances. Adjustments in the unusual or extraordinary circumstance range will be subject to scrutiny in any audit of performance.

B. Degree of Cooperation/Noncooperation

The degree of cooperation or noncooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Such adjustments are mandated by both the goals of equitable treatment and swift resolution of environmental problems. There are three areas where this factor is relevant.

1. Prompt reporting of noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, such behavior should result in the mitigation of any penalty.

The suggested ranges of adjustment are as follows. The case development team has absolute discretion on any adjustments up to ± 10% of the gravity component for cooperation/noncooperation. Adjustments can be made up to ± 20% of the gravity component, but only in unusual circumstances. In extraordinary circumstances, such as self reporting of a TSCA premanufacture notice violation, the case development team may adjust the penalty beyond the ± 20% factor. Adjustments in the unusual or extraordinary circumstances ranges will be subject to scrutiny in any performance audit.

2. Prompt correction of environmental problems

The Agency should provide incentives for the violator to commit to correcting the problem promptly. This correction must take place before litigation is begun, except in extraordinary circumstances.2/ But since these incentives must be consistent with deterrence, they must be used judiciously.

2/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or
- for judicial actions - when an Assistant United States Attorney files a complaint in court.

The circumstances under which the penalty is reduced depend on the type of violation involved and the source's response to the problem. A straightforward reduction in the amount of the gravity component of the penalty is most appropriate in those cases where either: 1) the environmental problem is actually corrected prior to initiating litigation, or 2) ideally, immediately upon discovery of the violation. Under this approach, the reduction typically should be a substantial portion of the unadjusted gravity component.

In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider. At the discretion of the case development team, the unadjusted gravity component may be reduced up to 50%. This would depend on how long the environmental problem continued before correction and the amount of any environmental damage. Adjustments greater than 50% are permitted, but will be the subject of close scrutiny in auditing performance.

It should be noted that in some instances, the violator will take all necessary steps toward correcting the problem but may refuse to reach any agreement on penalties. Similarly, a violator may take some steps to ameliorate the problem, but choose to litigate over what constitutes compliance. In such cases, the gravity component of the penalty may be reduced up to 25% at the discretion of the case development team. This smaller adjustment still recognizes the efforts made to correct the environmental problem, but the benefit to the source is not as great as if a complete settlement is reached. Adjustments greater than 25% are permitted, but will be the subject of close scrutiny in auditing performance.

In all instances, the facts and rationale justifying the penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement.

3. Delaying compliance

Swift resolution of environmental problems will be encouraged if the violator clearly sees that it will be financially disadvantageous for the violator to litigate without remedying noncompliance. The settlement terms described in the preceding section are only available to parties who take steps to correct a problem prior to initiation of litigation. To some extent, this is an incentive to comply as soon as possible. Nevertheless, once litigation has commenced, it should be clear that the defendant litigates at its own risk.

In addition, the methods for computing the benefit component and the gravity component are both structured so that the penalty target increases the longer the violation remains uncorrected. The larger penalty for longer noncompliance is systematically linked to the benefits accruing to the violator and to the continuing risk to human health and the environment. This occurs even after litigation has commenced. This linkage will put the Agency in a strong position to convince the trier of fact to impose such larger penalties. For these reasons, the Policy on Civil Penalties provides substantial disincentives to litigating without complying.

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

In deciding how large these adjustments should be, the case development team should consider the following points:

- How similar the previous violation was.
- How recent the previous violation was.
- The number of previous violations.
- Violator's response to previous violation(s) in regard to correction of the previous problem.

Detailed criteria for what constitutes a "similar violation" should be contained in each program-specific policy. Nevertheless a violation should generally be considered "similar" if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.

- A similar act or omission (e.g. the failure to properly store chemicals) was the basis of the violation.

For purposes of this section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g. notice of violation, warning letter, complaint, consent decree, consent agreement, or final order). It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation. In some situations the same persons or the same organizational unit had or reasonably should have had control or oversight responsibility for violative conduct. In those cases, the violation will be considered part of the compliance history of that regulated party.

In general, the case development team should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, the case development team should be wary of a party changing operators or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should probably apply unless the violator can demonstrate that the other violating corporate facilities are independent.

The following are the Framework's suggested adjustment ranges. If the pattern is one of "dissimilar" violations, relatively few in number, the case development team has absolute discretion to raise the penalty amount by 35%. For a relatively large number of dissimilar violations, the gravity component can be increased up to 70%. If the pattern is one of "similar" violations, the case development team has absolute discretion to raise the penalty amount up to 35% for the first repeat violation, and up to 70% for further repeated similar violations. The case development team may make higher adjustments in extraordinary circumstances, but such adjustments will be subject to scrutiny in any performance audit.

D. Ability to pay

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The financial ability adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, the case development team should assess this factor after commencement of negotiation with the source.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the case development team should disregard this factor in adjusting the penalty. The National Enforcement Investigations Center (NEIC) has developed the capability to assist the Regions in determining a firm's ability to pay. Further information on this system will be made available shortly under separate cover.

When it is determined that a violator cannot afford the penalty prescribed by this policy, the following options should be considered:

- Consider a delayed payment schedule: Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. This approach is a real burden on the Agency and should only be considered on rare occasions.

- Consider non-monetary alternatives, such as public service activities: For example, in the mobile source program, fleet operators who tampered with pollution control devices

on their vehicles agreed to display anti-tampering ads on their vehicles. Similar solutions may be possible in other industries.

- Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the case development team's conclusion as to the size of the necessary reduction should be made a part of the formal enforcement file and the memorandum accompanying the settlement. 3/

- Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is still expected to comply with the law.

E. Other unique factors

Individual programs may be able to predict other factors that can be expected to affect the appropriate penalty amount. Those factors should be identified and guidelines for their use set out in the program-specific policies. Nevertheless, each policy should allow for adjustment for unanticipated factors which might affect the penalty in each case.

It is suggested that there be absolute discretion to adjust penalties up or down by 10% of the gravity component for such reasons. Adjustments beyond the absolute discretion range will be subject to scrutiny during audits. In addition, they will primarily be allowed for compelling public policy concerns or the strengths and equities of the case. The rationale for the reduction must be expressed in writing in the case file and in any memoranda accompanying the settlement. See the discussion on pages 12 and 13 for further specifics on adjustments appropriate on the basis of either compelling public policy concerns or the strengths and equities of the case.

II. Alternative Payments

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to

3/ If a firm fails to pay the agreed-to penalty in an administrative or judicial final order, then the Agency must follow the Federal Claims Collection Act procedures for obtaining the penalty amount.

pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.

In addition, the acceptance of alternative payments for environmentally beneficial expenditures is subject to certain conditions. The Agency has designed these conditions to prevent the abuse of this procedure. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before alternative payments may be accepted:4/

- No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).

- The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.

- The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.

4/ In extraordinary circumstances, the Agency may choose not to pursue higher penalties for "alternative" work done prior to commencement of negotiations. For example, a firm may recall a product found to be in violation despite the fact that such recall is not required. In order for EPA to forgo seeking higher penalties, the violator must prove that it has met the other conditions herein stated. If the violator fails to prove this in a satisfactory manner, the case development team has the discretion to completely disallow the credit project. As with all alternative projects, the case development team has the discretion to still pursue some penalties in settlement.

- EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.5/

In all cases where alternative payments are allowed, the case file should contain documentation showing that each of the conditions listed above have been met in that particular case. In addition when considering penalty credits, Agency negotiators should take into account the following points:

- The project should not require a large amount of EPA oversight for its completion. In general the less oversight the proposed credit project would require from EPA to ensure proper completion, the more receptive EPA can be toward accepting the project in settlement.

- The project should receive stronger consideration if it will result in the abatement of existing pollution, ameliorate the pollution problem that is the basis of the government's claim and involve an activity that could be ordered by a judge as equitable relief.

- The project should receive stronger consideration if undertaken at the facility where the violation took place.

- The company should agree that any publicity it disseminates regarding its funding of the project must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.

5/ This limitation does not apply to public awareness activities such as those employed for fuel switching and tampering violations under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these violations are often the result of public misconceptions about the economic value of these violations. Consequently, the public awareness activities can be effective in preventing others from violating the law. Thus, the high general deterrent value of public awareness activities in these circumstances obviates the need for the one-to-one requirement on penalty credits.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds which are to be spent at EPA's discretion unless the relevant statute specifically provides that authority. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe as precisely as possible the credit project the violator is expected to perform.

III. Promoting Consistency

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for settlement and for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial penalty target prior to beginning settlement negotiations or an adjusted penalty target after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the Policy on Civil Penalties.

To facilitate the use of this information, Office of Legal and Enforcement Policy will pursue integration of penalty information from judicial enforcement actions into a computer system. Both Headquarters and all Regional offices will have access to the system through terminals. This would make it possible for the Regions to compare the handling of their cases with those of other Regions. It could potentially allow the Regions, as well as Headquarters, to learn from each others' experience and to identify problem areas where policy change or further guidance is needed.

Use of Penalty Figure in Settlement Discussions

The Policy and Framework do not seek to constrain negotiations. Their goal is to set settlement target figures for the internal use of Agency negotiators. Consequently, the penalty figures under negotiation do not necessarily have to be as low as the internal target figures. Nevertheless, the final settlement figures should go no lower than the internal target figures unless either: 1) the medium-specific penalty policy so provides or 2) the reasons for the deviation are properly documented.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF	)	DOCKET NO. UIC-09-2022-0058
NSHE HI Narcissus, LLC	)	**COMPLAINANT'S STATEMENT OF PROPOSED PENALTY**
Respondent	)	
Proceeding under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	)	

Pursuant to 40 C.F.R. § 22.19(a)(4) Complainant files the attached document specifying a proposed penalty in the Matter of NSHE HI Narcissus, LLC, and explaining how the proposed penalty was calculated in accordance with the criteria set forth at 42 U.S.C. § 300h-2(c)(4)(B).

Respectfully submitted,

KIMBERLY WELLS

Digitally signed by KIMBERLY WELLS
Date: 2023.03.23 16:28:36 -07'00'

Kimberly Wells
Assistant Regional Counsel
Office of Regional Counsel, EPA 9

Complainant's Explanation of the Proposed Penalty Assessment
***In the Matter of NSHE HI Narcissus, LLC*, Docket No. UIC-09-2022-0058**

March 23, 2023

The Safe Drinking Water Act ("SDWA") authorizes the Environmental Protection Agency ("EPA") to issue an administrative order "assessing a civil penalty . . . or requiring compliance with respect to any such regulation or other requirement, or both." 42 U.S.C. § 300h-2(c)(1). EPA has broad discretion to assess a penalty for violation of the SDWA up to a maximum of $27,018 per day during which the violation continues and $337,725 total for each violation. 42 U.S.C. § 300h-2(c)(5); *see also* § 300h-2(c)(1) modified as mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 88 Fed. Reg. 986, 989 (January 6, 2023), codified at 40 C.F.R. § 19.4. In assessing the penalty, EPA must consider

i) the seriousness of the violation;
ii) the economic benefit (if any) resulting from the violation;
iii) any history of such violations;
iv) any good-faith efforts to comply with the applicable requirements;
v) the economic impact of the penalty on the violator; and
vi) such other matters as justice may require.

42 U.S.C. § 300h-2(c)(4)(B).

In administrative litigation the Presiding Officer is granted broad discretion to assess a penalty within the range authorized by the statute. *See* 42 U.S.C. § 300h-2(c)(1); s*ee also In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 2005 WL 4905111 at *18 (EAB 2005). When evaluating whether a penalty is within the range authorized by other environmental statutes with similar penalty provisions, courts have generally determined that it is appropriate to start with the maximum penalty allowed by the statute and reduce the penalty as appropriate considering the statutory penalty factors. *See, e.g.*, *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc*., 897 F.2d 1128, 1142 (11th Cir. 1990) (holding that when assessing a

penalty under the Clean Water Act "the district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out"); *United States v. B&W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994) ("In considering fines under the [Clean Air] Act, courts generally presume that the maximum penalty should be imposed"); *United States v. HVI Cat Canyon, Inc.*, Case No. CV 11-5097 FMO (SSx), 2023 WL 2212825 slip op at *53 (C.D. Cal, Feb. 25, 2023) (summarizing caselaw on penalty calculations).

Complainant carries the burden to demonstrate that the relief sought in this matter is appropriate. *See* 40 C.F.R. § 22.24(a). Specifically, Complainant must touch upon each factor and provide analysis showing that the proposed penalty is appropriate. *In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 1994 WL 615377 at *6 (EAB 1994). Complainant does not bear a separate burden to prove each factor. *Id.*

For the reasons explained below, Complainant requests that the Presiding Officer assess a penalty of **$123,855.20** against Respondent, NSHE HI Narcissus, LLC.

Relevant Law and Facts

Complainant seeks this penalty pursuant to section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), for Respondent's ownership and operation of a large capacity cesspool ("LCC") in violation of EPA's Underground Injection Control ("UIC") regulations at 40 C.F.R. § 144.88(a)(1). The UIC regulations were promulgated pursuant to section 1421(a)(1) of the SDWA, 42 U.S.C. § 300h(a)(1).

Respondent owns at least two properties in Hawai'i in Haleiwa and Kahuku, respectively. Complainant's Exhibits 14 and 34. Respondent owned and operated the LCC on the Haleiwa

property from at least October 4, 2017, when it purchased the property, until at least April 28, 2021, when the restrooms served by the cesspool were closed.

EPA Guidance

EPA does not have a penalty policy for applying the SDWA's statutory criteria in administrative or civil adjudications. EPA has developed guidance for calculating bottom-line penalties for settlement of UIC enforcement actions, the UIC Program Judicial and Administrative Order Settlement Penalty Policy ("UIC Settlement Penalty Policy"), September 1993 (Complainant's Exhibit 20b), but with the exception of the economic benefit calculation, this policy is expressly not applicable to adjudications.[1]

Without an applicable UIC penalty policy, the EPA Region 9 UIC Enforcement Program looks to two general penalty policies for the purpose of identifying and explaining considerations that are relevant for applying the SDWA statutory factors. The Policy on Civil Penalties (GM-21), and its companion document, A Framework for Statute-Specific Approaches to Penalty Assessments (GM-22), Feb. 16, 1984, (together, Complainant's Exhibit 36), were written to help EPA develop program-specific penalty guidance by providing an approach for evaluating statutory penalty factors.

These guidance documents provide that penalties should, at a minimum, be sufficient to recover the economic benefit of violations. Complainant's Exhibit 36, GM-21 at 3-4; GM-22 at 2-4. Courts share this view. *See, e.g.*, *Atlantic States Legal Foundation,* 897 F.2d

[1] The UIC Settlement Penalty Policy provides a framework for calculating "the lowest penalty figure which the Federal Government is generally willing to accept in settlement . . .." UIC Settlement Penalty Policy at 1. "This policy only establishes how the Agency calculates the minimum penalty for which it would be willing to settle a case. The development of the penalty amount to plead in an administrative or judicial complaint is developed independent of this policy . . . Of course, the Agency will not use the settlement Penalty Policy in arguing for a penalty at trial or in an administrative penalty hearing." *Id.* at 2. However, as described further below, calculation of economic benefit remains the same for litigation and for settlement. Guidance on the Distinction Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act, January 19, 1989 at 8 (applicable to SDWA enforcement actions, *see* UIC Settlement Penalty Policy at 2).

1141 ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are to successfully deter violations"). The penalty must also include a component to account for the gravity of the violation. "The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation." Complainant's Exhibit 36, GM-21 at 3.

The gravity component of the penalty assessment addresses the violation's impact on public health and the environment, as well as its impact on the regulatory program. *See, e.g.*, Complainant's Exhibit 36, GM-22 at 9-10. The seriousness of the environmental impact is "whether (and to what extent) the activity of the [violator] actually resulted or was likely to result in an . . . exposure." Some of the common considerations here relate to the amount and toxicity of the pollutant, sensitivity of the environment, and duration of the violation. *Id.* at 10. The seriousness of the regulatory impact depends on the importance of the requirement which was violated to achieving the goal of the statute or regulation." *Id.* EPA guidance also recognizes "size of the violator" as a gravity factor, which is equivalent to the "economic impact of the penalty on the violator" under the SDWA. *See* Complainant's Exhibit 36, GM-22 at 3, *see also* 42 U.S.C. § 300h-2(c)(4)(B). EPA's guidance on considering the size of the violator recommends increasing the penalty where it is clear that the penalty would otherwise have little impact on the violator to ensure that the penalty is sufficient to promote compliance with the regulatory program and fairness within the regulated community. Complainant's Exhibit 36, GM-22 at 15.

The combination of economic benefit and gravity produce a "preliminary deterrence figure," which may be adjusted upward or downward to account for case-specific conditions. *Id.* at 3. GM-21 and GM-22 identify a number of case-specific considerations, including the violator's degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, extent of noncompliance in specific areas of the United States, and any other unique factors. Complainant's Exhibit 36, GM-21 at 4-5; GM-22 at 10-15. Respondent's ability to pay is presumed unless Respondent has raised its inability to pay as an issue. *In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8.

In applying the GM-21 and GM-22 framework EPA considers the SDWA's six penalty factors by: (1) determining economic benefit (the second SDWA factor); (2) determining the gravity based on the seriousness of the violation and economic impact of the penalty on the violator (the first and fifth SDWA factors); then (3) adjusting the gravity based on Respondent's history of violations; good-faith efforts to comply, including the level of cooperation with EPA; and such other matters as justice may require (the third, fourth, and sixth SDWA factors).

Consideration of Statutory Factors

In proposing a penalty of **$123,855.20**, consistent with EPA's guidance, Complainant has taken the six statutory factors into consideration, as follows:

I. Economic benefit resulting from the violation

In assessing a penalty, EPA shall consider the economic benefit resulting from the violation. 42 U.S.C. § 300h-2(c)(4)(B)(ii). An appropriate penalty should remove any significant economic benefit that accrued as a result of noncompliance. Complainant's Exhibit 36, GM-21 at 3; *see also Atlantic States,* 897 F.2d 1141.

EPA has a standard policy and methodology for calculating the economic benefit based on the calculation of avoided and delayed costs of noncompliance. Complainant's Exhibit 20b, UIC Settlement Penalty Policy at 4. This analysis remains the same for litigating penalties because the posture of the proceeding is irrelevant to the calculation of the economic benefit that accrued to Respondent as a result of noncompliance. *See* Complainant's Exhibit 40, Guidance on the Distinction Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases under the Clean Water Act at 8, (applicable to SDWA enforcement actions, *see* Complainant's Exhibit 20b, UIC Settlement Penalty Policy at 2).

In accordance with EPA's standard methodology, the economic benefit of noncompliance is the present value of Respondent's cost savings from: (1) delaying the costs of closing the LCC and replacing the LCC with a legal wastewater treatment system, and (2) avoiding the costs of operating and maintaining the new wastewater treatment system during the period of violation. Complainant used the BEN (2022.0.0) model[2] and calculated Respondent's economic benefit gained from noncompliance in accordance with the September 1999 BEN User's Manual (Complainant's Exhibit 28). The BEN (2022.0.0) model adjusts the delayed and avoided costs for inflation, taxation, and the time value of money.

Respondent delayed the costs of closing and replacing the LCC between October 4, 2017, when Respondent purchased the property, and at least April 28, 2021, when the restrooms served by the cesspool were closed. The precise amount of the delayed costs must be inferred from the record because Respondent has not provided invoices or receipts for the specific project costs of closing and replacing the LCC. On February 24, 2023, Complainant requested this information from Respondent in order to develop this penalty calculation, but Respondent failed to respond.

[2] BEN (2022.0.0) is available at https://www.epa.gov/enforcement/penalty-and-financial-models.

See Complainant's Request for Other Discovery, attached hereto. Respondent provided Exhibit C in its pre-hearing exchange, titled "$$ new system fill old," which is neither an invoice nor a receipt, and contains various dollar figures.[3] Complainant interprets Respondent's Exhibit C "$$ new system fill old" to assert that Respondent spent between $27,249 and $27,262.51 to install a septic system and backfill the LCC.[4] Based on interpretation of Respondent's Exhibit C, Complainant assumes that Respondent spent $27,252.51[5] to install a septic system and backfill the LCC. This figure is consistent with the cost estimates provided in the HDOH January 2021 Cesspool Conversions Finance Research Summary Report, which is a study that evaluates the funding, financing, and affordability of cesspool conversions in the State, and estimates that most conventional septic system replacements will cost an average of $23,000, however many systems cost more due to site-specific conditions. *See* Complainant's Exhibit 30, HDOH January 2021 Summary Report at 5.

Respondent also incurred, or should have incurred, one-time nondepreciable costs for design and permitting of a 1,000-gallon septic tank with chamber drain field. The precise amount of the costs must be inferred because, as described above, Respondent failed to respond to Complainant's request for information on the costs of LCC closure and replacement. *See* Complainant's Request for Other Discovery, attached. Based on past experience with similar

[3] On December 3, 2021 Respondent's managing member sent EPA a document labeled "Receipt fo backfill material and volume" from Aloha Trucking but this document did not include any costs. Complainant's Exhibit 19d.
[4] The dollar figures in Respondent's Exhibit C "$$ new system fill old" are mostly unlabeled and are subject to various interpretations. The number $25,800 is circled and labeled "NEW SYS." indicating that this was the cost of the new septic system, however adding the two nearest columns of numbers yields $25,803.51. Based on interpretation of Respondent's Exhibit C, $25,803.51 appears to be the most likely representation of the cost of installing the septic system. Based on the title of the exhibit, Complainant assumes that the other, unlabeled column of numbers represents the cost of backfilling Respondent's LCC. The total for the unlabeled column is indicated as "1459" however the sum of the numbers in the column is actually 1,449. Therefore $1,449 appears to be the most likely representation of the cost of backfilling Respondent's LCC.
[5] For purposes of the BEN (2022.0.0) Model this figure has been rounded to $27,253.

LCC closure and replacement projects in Hawai‘i, EPA Region 9's UIC Enforcement Program estimates that Respondent's costs for design and permitting should have been at least $750.00.

EPA Region 9's UIC Enforcement Program estimates that Respondent would also have incurred annual septic system operating and maintenance costs of $852 if the property had been served by a 1,000-gallon septic tank with chamber drain field between October 4, 2017, when Respondent acquired the property, and April 28, 2021, when the restrooms served by the cesspool were closed.[6] *See* Complainant's Exhibit 30, HDOH January 2021 Summary Report at 5. Due to Respondent's noncompliance, Respondent avoided these costs.

EPA Region 9's UIC Enforcement Program calculated the economic benefit Respondent realized through noncompliance by inputting the estimates for delayed and avoided costs into the BEN (2022.0.0) model. The BEN (2022.0.0) model projects that Respondent's economic benefit from noncompliance is **$8,694.**

II. Gravity

In assessing a penalty, EPA shall consider the seriousness of the violation and the economic impact of the penalty on the violator. 42 U.S.C. § 300h-2(c)(4)(B)(i) and (v). EPA's guidance refers to these factors as the gravity component of the penalty calculation. Complainant's Exhibit 36, GM-21 at 3; GM-22 at 3. An appropriate penalty achieves retribution and deterrence, in addition to restitution. *See Tull v. U.S.*, 481 U.S. 412, 422 (1987). The gravity is a necessary component of a penalty that achieves deterrence and fundamental fairness to those who have complied because it ensures that a violator is worse off than if it had obeyed the law. Complainant's Exhibit 36, GM-21 at 3; *see also Tull*, 481 U.S. 422.

[6] The annual operating and maintenance costs are based on an estimated $71 in monthly costs.

a. Seriousness of the violation

As explained above, "seriousness" refers to both the actual or potential threat the violation posed to the environment or public health, and the extent to which Respondent's actions (or inaction) violated critical requirements of the regulatory program. Complainant's Exhibit 36, GM-22 at 3. Applying these criteria to the specific facts of this case, the circumstances of Respondent's operation of an LCC in violation of 40 C.F.R. § 144.88(a)(1) constitutes a serious violation.

EPA considers the seriousness of the *risk* of harm where the risk exceeds the actual, documented harm. *See* Complainant's Exhibit 36, GM-22 at 14. To evaluate the seriousness of the risk of harm, EPA looks to the amount of the pollutant, the toxicity of the pollutant, the sensitivity of the environment, and the duration of the violation. Complainant's Exhibit 36, GM-22 at 3.

EPA found that LCCs endanger drinking water and therefore banned them nationwide. Complainant's Exhibit 35, 64 Fed. Reg. 68546, 68550 (Dec. 7, 1999). In assessing the risk of harm posed by the amount of pollutants and the toxicity of the pollutants from LCCs, EPA found that

> Large-capacity cesspools have a high potential to contaminate [underground sources of drinking water] because: they are not designed to treat sanitary waste; they frequently exceed drinking water [maximum contaminant levels] for nitrates, total suspended solids and coliform bacteria; and, they may contain other constituents of concern such as phosphates, chlorides, grease, viruses, and chemicals used to clean cesspools such as trichloroethane and methylene chloride. Pathogens in untreated sanitary waste released into large capacity cesspools could contaminate the water supply . . . and pose an ''acute'' risk if consumed (meaning there could be a serious health risk with a single exposure given the nature of contamination).

Id. at 68551.

Although LCCs are banned nationwide, EPA also found that certain hydrogeologic settings are of particular concern. *Id.* In the present matter, Respondent's cesspool was located in

a geographic area that was identified by HDOH as being Priority Level 1 for closure because of the elevated risk cesspools in this area pose to human health and the environment. Complainant's Exhibit 37, HDOH 2021 Hawai'i Cesspool Hazard Assessment & Prioritization Tool report.[7] From October 4, 2017 to April 28, 2021, Respondent owned or operated an LCC in an environmentally sensitive area, adding weight to the seriousness of the violation.

EPA has developed a consistent system for quantifying the gravity of UIC violations, including quantifying the significance of the type of violation in the context of the UIC regulatory program, in accordance with GM-22 at 13. *See* Complainant's Exhibit 39, UIC Federal Reporting System Part II: Compliance Evaluation Significant Noncompliance, EPA Form 7520-2B (Revised April 2019), Instructions and Definitions; *see also* Complainant's Exhibit 38, UIC Program Definition of Significant Noncompliance Memorandum from Michael B. Cook, Director, Office of Drinking Water, Dec. 4, 1986. The UIC Program is designed to protect all current and potential underground sources of drinking water from contamination by injection wells. Complainant's Exhibit 35, 64 Fed. Reg. 68550. The requirement that all LCCs must be closed by April 5, 2005 is a critical requirement of the UIC regulatory program. *Id.* at 68549-68550. Owning or operating an LCC is an unauthorized injection of wastewater, which is a significant violation of the UIC program's core requirements. *See* Complainant's Exhibit 39, Instructions and Definitions; *see also* Complainant's Exhibit 38, at 2. Enforcement of the LCC ban is a central component of the UIC program. Respondent's injection from October 4, 2017 to

[7] The tool analyzes fifteen risk factors to develop a single prioritization system that organizes census-based regions into categories of Priority Level 1, Priority Level 2, and Priority Level 3 for determining whether cesspools that are located in a specific census boundary area will have a higher or lower potential to cause negative social and environmental impacts. The fifteen risk factors that were analyzed to calculate the geographic prioritization score include: Distance to municipal or domestic drinking water wells; Well capture zones; Distance to streams and wetlands; Distance to coastline; Sea level rise zones; Precipitation; Depth to groundwater; Groundwater flow paths; Soil characteristics; Cesspool density; Coral cover; Fish biomass/recovery potential; Beach user-days; Proximity to lifeguarded beach; and Coastal Ocean circulation proxy.

April 28, 2021 in violation of the LCC ban constitutes a serious violation of a critical requirement of the UIC regulatory program.

The risk of harm posed by the LCC and the significance of the violation in the context of the UIC Program both demonstrate that the violation is serious. Therefore, Complainant proposes that after accounting for the economic benefit, consideration of the seriousness of the violation warrants the assessment of at least fifty percent of the remaining statutorily allowable penalty. *See* calculation in *Figure 1*, below.

b. Economic impact of the penalty on the violator

The penalty must have an economic impact on the violator to achieve deterrence. *See* Complainant's Exhibit 36, GM-22 at 15. EPA looks to the size of the violator when evaluating the economic impact of the penalty on the violator, to account for the variations in financial capabilities among different violators and ensure adequate deterrence. *Id.*

In the present matter, Respondent is a Hawai'ian domestic limited liability company that owns the real property located at 66-532 Kamehameha Highway, Haleiwa, HI 96712, Tax Map Key (TMK) 1-6-2-007-019, in addition to real property located at 56-1030 Kamehameha Highway, Kahuku, HI 96731, TMK 1-5-6-005-024. Complainant's Exhibits 14 and 34. The Haleiwa Property comprises a commercial building and a parking lot, which is leased to mobile food vendors, and has an assessed value of $2,489,900. Complainant's Exhibit 8. EPA Region 9's UIC Enforcement Program was unable to locate business size information for NSHE HI Narcissus, LLC using Dun & Bradstreet Finance Analytics or Hoovers; Westlaw Company Investigator; Reference USA Business Database; or Hawai'i Business Express. However, assessment of Respondent's known assets (including, at least, the two properties referenced above) indicates that Respondent is able to pay a penalty.

Further, Respondent has not claimed that it is unable to pay and has refused to provide any information about business size. Each party's prehearing information exchange "shall include . . . all factual information [the party] considers relevant to the assessment of a penalty." 40 C.F.R. § 22.19(a)(4). On February 24, 2023, Complainant requested that Respondent provide information on assets, liabilities, and incomes to adequately assess the economic impact of the penalty on the violator pursuant to 42 U.S.C. § 300h-2(c)(4)(B)(v). *See* Complainant's Request for Other Discovery, attached. Respondent did not reply to Complainant's request and did not provide any information about business size or ability to pay in its prehearing exchange. Through its omission Respondent has conveyed that it has no factual information that it considers relevant to determine business size or ability to pay. Therefore, it may be presumed that Respondent is able to pay. *See In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8.

Because the Complainant was unable to obtain any information that details the financial means of the Respondent, Complainant is not proposing an adjustment to the gravity component to ensure that the penalty will have an appropriate economic impact on Respondent. However, while Complainant has not done so, the Presiding Officer may infer from Respondent's omissions that an adjustment to the gravity component is warranted. *In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18.

c. Preliminary Deterrence Figure

In the terminology used in GM-22, the preliminary deterrence figure is the economic benefit plus the gravity. Considering the seriousness of the violation and the economic impact of the penalty on Respondent, Complainant proposes a gravity adjustment of at least fifty percent of the remaining statutorily allowable penalty. *See Figure 1* for Complainant's Proposed

Preliminary Deterrence Figure calculation considering Respondent's economic benefit, seriousness of the violation, and the economic impact of the penalty on Respondent.

Figure 1

Preliminary Deterrence Figure	=	**[Economic Benefit]** **+ [Gravity]** where Gravity = 50% of the remaining statutorily allowable penalty and where the statutorily allowable penalty = $337,725
	=	**[Economic Benefit]** **+ [(($337,725) – (Economic Benefit)) x (0.5)]** where Economic Benefit = $8,694
	=	**[$8,694]** **+ [(($337,725) – ($8,694)) x (0.5)]**
	=	**[$8,694]** **+ [$164,516]**

III. Penalty Adjustment Factors

In assessing a penalty, EPA shall consider Respondent's history of similar violations, any good faith efforts to comply with the applicable requirements, and other matters as justice may require. 42 U.S.C. § 300h-2(c)(4)(B)(iii),(iv) and (vi). Consistent with GM-22, EPA considers these factors and determines whether an adjustment to the preliminary deterrence figure of the penalty is appropriate. Complainant's Exhibit 36, GM-22 at 3.

EPA Region 9's UIC Enforcement Program is not aware of any other similar violations by Respondent. Therefore, Respondent's history of violations does not merit a greater penalty to achieve deterrence and Complainant proposes no adjustment for this factor.

On the second factor, Respondent made certain good faith efforts to comply with the LCC ban at 40 C.F.R. § 144.88(a)(1) after EPA informed it of the violation. Respondent restricted access to the restrooms served by the LCC on April 28, 2021, after EPA's March 4, 2021, inspection and closed the LCC ten days after receiving EPA's Show Cause Letter on November 22, 2021. Although the violation was fully within Respondent's control since October 4, 2017, Complainant acknowledges Respondent's efforts to come into compliance with the LCC

ban in 2021 and proposes a thirty percent downward adjustment to the preliminary gravity component of the penalty.

Complainant also considered other matters as justice may require. EPA recognizes that where there is extensive noncompliance with certain regulatory programs in specific areas of the United States, the normal penalty assessments have not been sufficient to achieve general deterrence. GM-21 at 4. In such cases, EPA guidance recommends considering an increase to the penalty to achieve general deterrence. *Id. at 4-5.*

There is extensive noncompliance with the LCC ban set forth at 40 C.F.R. § 144.88(a)(1) in the State of Hawai‘i. EPA's enforcement actions since 2005 have resulted in closure of 1,219 LCCs in Hawai‘i, including closures within 0.1 miles of Respondent's property.[8] However, the HDOH estimates that there are 88,000 cesspools remaining in Hawai‘i, a significant number of which are LCCs operating in violation of the SDWA. Complainant's Exhibit 37, HDOH 2021 Hawai‘i Cesspool Hazard Assessment & Prioritization Tool report at 7. Therefore, it is evident that Respondent's LCC was located in an area where past enforcement has not been sufficient to deter ongoing extensive noncompliance. Consistent with EPA guidance, Complainant could request a higher penalty, however, Complainant has taken a conservative approach and proposes no adjustment on the basis of this factor. If the Presiding Officer finds that an adjustment is appropriate, the Presiding Officer has discretion to adjust the penalty based on this factor. *In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18.

Finally, Complainant has considered Respondent's ability to pay. Because Respondent has not raised inability to pay as an issue and has provided no information to support such a claim, Complainant proposes no adjustment on the basis of this factor.

[8] A list of EPA's enforcement actions in Hawai‘i is available at https://www.epa.gov/uic/hawaii-cesspool-administrative-orders (last visited March 16, 2023).

In summary, Complainant Proposes no adjustment for Respondent's history of violations, a thirty percent downward adjustment to the preliminary gravity component of the penalty based on certain good faith efforts to comply with the LCC ban, and no adjustment based on other factors as justice may require. In total, Complainant proposes a thirty percent downward adjustment to the preliminary gravity component of the penalty. *See Figure 2* for Complainant's proposed penalty calculation.

Figure 2

Penalty	**=**	**[Economic Benefit]**	**+**	**[Adjusted Gravity]**
		where Economic Benefit = $8,694;		
		where Gravity = $164,516;		
		and where the adjustment is a 30% reduction or 70% remaining of the total amount		
	=	**[$8,694]**	**+**	**[$164,516 x 0.7]**
	=	**[$8,694]**	**+**	**[$115,161.20]**
Penalty	**=**	**$123,855.20**		

Conclusion

In consideration of the statutory factors at 42 U.S.C. § 300h-2(c)(4)(B) and for the reasons described above, Complainant proposes that the Presiding Officer assess a total penalty of **$123,855.20** for Respondent's violation of the UIC requirements.

Certificate of Service

The undersigned certifies that on the date indicated below this Statement of Proposed Penalty was served upon Respondent's attorney, who has consented in writing to electronic service pursuant to 40 C.F.R. § 22.5(b)(2).

One copy via electronic mail to:

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Dated: March 23, 2023

_____
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

IN THE MATTER OF	)	
	)	DOCKET NO. UIC-09-2022-0058
NSHE HI Narcissus, LLC	)	**COMPLAINANT'S**
	)	**STATEMENT OF PROPOSED**
Respondent	)	**PENALTY**
Proceeding under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	)	

Pursuant to 40 C.F.R. § 22.19(a)(4), Complainant files the attached document specifying a proposed penalty in the matter of NSHE HI Narcissus, LLC, Docket. No. UIC-09-2022-0058, and explaining how the proposed penalty was calculated in accordance with the criteria set forth under the Safe Drinking Water Act at 42 U.S.C. § 300h-2(c)(4)(B).

Respectfully submitted,

KIMBERLY WELLS

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Date: 2024.04.16 11:54:48 -07'00'

Kimberly Wells
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Complainant's Explanation of the Proposed Penalty Assessment
***In the Matter of NSHE HI Narcissus, LLC*, Docket No. UIC-09-2022-0058**

April 16, 2024

Respondent, NSHE HI Narcissus, LLC has violated the Safe Drinking Water Act ("SDWA") by owning or operating one large capacity cesspool ("LCC") after April 5, 2005. Order Granting Partial Accelerated Decision on Liability 16 Aug. 28, 2023. The SDWA authorizes the Environmental Protection Agency ("EPA") to issue an administrative order "assessing a civil penalty . . . for any past or current violation." 42 U.S.C. § 300h-2(c)(1). EPA has broad discretion to assess a penalty for violation of the SDWA up to a maximum of $27,894 per day during which the violation continues and $348,671 total for each violation. 42 U.S.C. § 300h-2(c)(5); *see also* § 300h-2(c)(1) modified as mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 88 Fed. Reg. 89,312 (Dec. 27, 2023), codified at 40 C.F.R. § 19.4. In assessing the penalty, EPA must consider:

i) the seriousness of the violation;
ii) the economic benefit (if any) resulting from the violation;
iii) any history of such violations;
iv) any good-faith efforts to comply with the applicable requirements;
v) the economic impact of the penalty on the violator; and
vi) such other matters as justice may require.

42 U.S.C. § 300h-2(c)(4)(B).

In administrative litigation, the Presiding Officer is granted broad discretion to assess a penalty within the range authorized by the statute. *See* 42 U.S.C. § 300h-2(c)(1); s*ee also In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 2005 WL 4905111 at *18 (EAB 2005). When applying similar penalty provisions in other environmental statutes,

courts have generally determined that it is appropriate to start with the maximum penalty allowed by the statute and reduce the penalty as appropriate considering the statutory penalty factors. *See, e.g.*, *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc*., 897 F.2d 1128, 1142 (11th Cir. 1990) (When assessing a penalty under the Clean Water Act "the district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out."); *United States v. B&W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994) ("In considering fines under the [Clean Air] Act, courts generally presume that the maximum penalty should be imposed"); *United States v. HVI Cat Canyon, Inc.*, Case No. CV 11-5097 FMO (SSx), 2023 WL 2212825 *33 (C.D. Cal, Feb. 25, 2023) (summarizing caselaw on penalty calculations and finding that courts within the Ninth Circuit generally have adopted the approach of starting with the statutory maximum and applying the statutory factors to determine if reduction is appropriate).

Complainant carries the burden to demonstrate by a preponderance of the evidence that the relief sought in this matter is appropriate. *See* 40 C.F.R. § 22.24. Specifically, Complainant must touch upon each factor and provide analysis showing that the proposed penalty is appropriate. *In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 1994 WL 615377 at *6 (EAB 1994). Complainant does not bear a separate burden to prove each factor. *Id.*

For the reasons explained below, Complainant has determined that **$133,450** is an appropriate penalty for Respondent, NSHE HI Narcissus, LLC's violation of the SDWA.[1] The proposed penalty has been determined in accordance with 42 U.S.C. § 300h-2(c)(4)(B).

[1] The proposed penalty differs from the penalty proposed by Complainant on March 23, 2023, due to updates mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015; updated economic benefit calculations; and Respondent's degree of cooperation..

Complainant has taken into account the particular facts and circumstances of this case with specific reference to applicable civil penalty guidelines. Complainant requests that the Presiding Officer assess a penalty in this amount against Respondent.

Relevant Law and Facts

Complainant seeks this penalty pursuant to section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), for Respondent's ownership and operation of an LCC in violation of EPA's Underground Injection Control ("UIC") regulations at 40 C.F.R. § 144.88(a)(1). The UIC regulations were promulgated pursuant to section 1421(a)(1) of the SDWA, 42 U.S.C. § 300h(a)(1).

Respondent owns at least three properties in Hawai'i in the communities of Haleiwa and Kahuku. Complainant's Exhibits 14, 34, and 56. Respondent owned and operated an LCC on the Haleiwa property from at least October 4, 2017, when it purchased the property, until at least April 28, 2021, when the restrooms served by the cesspool were closed. Complainant's Exhibits 18a, 18b, and 18d. The Presiding Officer has determined that Respondent's ownership and operation of the LCC violated the SDWA and that Respondent is liable as a matter of law for the violation. Order Granting Partial Accelerated Decision on Liability 16 Aug. 28, 2023.

Civil Penalty Guidelines

The Presiding Officer shall consider civil penalty guidelines when assessing the civil penalty and shall determine the amount of the penalty based on the evidence in the record and in accordance with penalty criteria set forth in the SDWA. 40 C.F.R. § 22.27(b). The predecessor to EPA's Office of Enforcement and Compliance Assurance ("OECA")[2] issued civil penalty

[2] The guidelines were issued by EPA's Assistant Administrator for Enforcement and Compliance Monitoring.

guidelines for consistently applying statutory penalty factors and determining an appropriate penalty for purposes of administrative and civil judicial enforcement actions. Complainant's Exhibit 36, Policy on Civil Penalties (GM-21), and its companion document, A Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). The goal of the Policy on Civil Penalties is to apply the statutory factors consistently to achieve deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems. Complainant's Exhibit 36, GM-21 at 1. The guidelines provide a rational, consistent, and equitable calculation methodology for applying the SDWA's penalty factors at 42 U.S.C. § 300h-2(c)(4)(B) to particular cases.

Consistent with EPA's policy that any civil penalty should at least recapture the economic benefit the violator has obtained through its unlawful actions, these guidelines state that penalties should, at a minimum, be sufficient to recover the economic benefit of violations. Complainant's Exhibit 58, 70 Fed. Reg. 50,326, 50,326 (Aug. 26, 2005); and Complainant's Exhibit 36, GM-21 at 3-4 and GM-22 at 2-4. Courts share this view. *See, e.g.*, *Atlantic States Legal Foundation,* 897 F.2d 1141 ("[i]nsuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are to successfully deter violations"). The penalty should also include a component to account for the gravity of the violation. Complainant's Exhibit 36, GM-22 at 13; *see also* 42 U.S.C. § 300h-2(c)(4)(B)(i). "The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to

ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation." Complainant's Exhibit 36, GM-21 at 3.

The gravity component of the penalty addresses the violation's actual or possible harm to the environment, as well as its importance to the regulatory program. Complainant's Exhibit 36, GM-22 at 14-15. The actual or possible harm to the environment focuses on "whether (and to what extent) the activity of the [violator] actually resulted or was likely to result in an . . . exposure." Complainant's Exhibit 36, GM-22 at 14. The actual or possible harm is determined based on consideration of the amount and toxicity of the pollutant, sensitivity of the environment, and duration of the violation. *Id.* at 14. The importance of the violation to the regulatory scheme focuses on the importance of the requirement which was violated to achieving the goal of the statute or regulation. *Id.*

The civil penalty guidelines also recognize the "size of the violator" as a gravity factor, which is equivalent to the "economic impact of the penalty on the violator" under the SDWA. *See* Complainant's Exhibit 36, GM-22 at 3 and 42 U.S.C. § 300h-2(c)(4)(B)(v). The guidelines recommend increasing the penalty where, based on the size of the violator, it is clear that the penalty would otherwise have little impact. Complainant's Exhibit 36, GM-22 at 15. The purpose of the size consideration is to ensure that the gravity component of the penalty is sufficient to deter noncompliance with the regulatory program. Complainant's Exhibit 36, GM-21 at 3.

The combination of economic benefit and gravity produce a "preliminary deterrence figure," which may be adjusted upward or downward to account for case-specific conditions. *Id.* at 3. GM-21 and GM-22 identify a number of case-specific considerations, including the

violator's degree of willfulness or negligence, level of cooperation, history of noncompliance, ability to pay, extent of noncompliance in specific areas of the United States, and any other unique factors. *Id.* at 4-5 and GM-22 at 10-15. A respondent's ability to pay is presumed and no adjustment should be made unless the respondent has raised its inability to pay as an issue. *In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8.

The framework established in the civil penalty guidelines considers the SDWA's six penalty factors by: (1) determining economic benefit (the second SDWA factor); (2) determining the gravity based on the seriousness of the violation and economic impact of the penalty on the violator (the first and fifth SDWA factors); then (3) adjusting the gravity based on Respondent's history of violations; good-faith efforts to comply, including the level of cooperation with EPA; and such other matters as justice may require (the third, fourth, and sixth SDWA factors).

Consideration of Statutory Factors

Complainant has taken the six statutory factors into consideration, in accordance with the civil penalty guidelines, as follows:

I. Economic benefit resulting from the violation

In assessing a penalty, EPA shall consider the economic benefit resulting from the violation. 42 U.S.C. § 300h-2(c)(4)(B)(ii). The economic benefit represents the amount of money an entity gained by not complying with an environmental law in a timely manner. Complainant's Exhibit 48, Report Calculating the Economic Benefit of Noncompliance at 3. An appropriate penalty should remove any significant economic benefit that accrued as a result of noncompliance. Complainant's Exhibit 36, GM-21 at 3; Complainant's Exhibit 58, 70 Fed. Reg. 50,326; *see also Atlantic States,* 897 F.2d 1141.

There are three types of economic benefit an entity can derive from environmental noncompliance: delayed costs, avoided costs, and wrongful profits. Complainant's Exhibit 48 at 3. Delayed costs occur when an entity should have paid money to be compliant and did not, but subsequently, the entity incurred the necessary costs to come into compliance. *Id.* Avoided costs occur when an entity should have paid money to be compliant, it did not, and to date, the entity still has not incurred the necessary costs to come into compliance. *Id.* Wrongful profits occur when an entity's violation of the law directly results in increased profits, thereby providing the entity with an unfair competitive advantage.[3] *Id.* For delayed and avoided costs, the costs can further be categorized as capital investments, one-time non-depreciable expenditures, and annually recurring costs. *Id*. at 4. Capital investments are costs of items that depreciate, such as purchasing and installing pollution control equipment (e.g., buildings, equipment). *Id.* One-time non-depreciable expenditures are costs that are made once and do not depreciate, such as staff costs and disposal costs. *Id*. Annual recurring costs are average annual incremental costs, such as costs for operating or maintaining the required pollution control measures. *Id.*

EPA's National Coordinator for Civil Penalties and Financial Analyses, David Smith-Watts calculated the economic benefit for delayed and avoided costs using a cash flow analysis, in accordance with EPA policy. Complainant's Exhibit 48 at 4; Complainant's Exhibit 58, 70 Fed. Reg. 50,328. A cash flow analysis is a standard and widely accepted technique for evaluating costs and investments that examines the effect that the delayed and avoided compliance costs

[3] EPA's National Coordinator for Civil Penalties and Financial Analyses determined wrongful profits are not applicable in this case, and therefore, they not discussed further. Complainant's Exhibit 48 at 3.

have on the entity's cash flow. Complainant's Exhibit 48 at 4; Complainant's Exhibit 58, 70 Fed. Reg. 50,329. Consistent with EPA policy, Mr. Smith-Watts's analysis compared a hypothetical scenario in which the violator had complied on time with the actual scenario in which the violator delayed or avoided the costs of compliance, and then adjusted the economic benefit to the estimated penalty payment date by accounting for inflation, taxes, and the time value of money. Complainant's Exhibit 48 at 4; Complainant's Exhibit 58, 70 Fed. Reg. 50,329.

In this case, the economic benefit of noncompliance is the present value of cost savings from: delaying the costs of closing the LCC and replacing the LCC with a legal wastewater treatment system, and avoiding the costs of operating and maintaining the new wastewater treatment system during the period of violation. Respondent delayed the costs of closing and replacing the LCC between October 4, 2017, when Respondent purchased the property, and the time when the costs were incurred. Respondent's delayed capital investments for installing a septic system are listed in *Figure 1*. A properly maintained septic system should last approximately 50 years. Complainant's Exhibit 52. Respondent's delayed one-time non-depreciable expenditures are listed in *Figure 2*. Respondent's capital investment costs and one-time non-depreciable expenditures for septic system design and installation were all incurred by June 3, 2022, when Respondent replaced the LCC with a septic system. Complainant's Exhibit 51.

Figure 1 Respondent's Delayed Capital Investments[4]

Delayed Cost	Capital Investment
$8,010	Septic tank
$6,570	Chambers
$670	Piping
$730	Sand
$1,140	Rock
$17,120	Total

Figure 2 Respondent's Delayed One-Time Non-Depreciable Expenditures

Delayed Cost	Item or Service	Cost estimate date	Citation
$175	Cesspool Pumping	Nov. 11, 2021	Complainant's Exhibit 19c
$665	Cesspool Backfill	Dec. 2, 2021	Respondent's Exhibit C; Complainant's Exhibit 19d
$1,880	Geotechnical Survey	June 3, 2022	Respondent's Exhibit C
$2,800	Engineering/Design	June 3, 2022	Respondent's Exhibit C
$600	Dirt Hauling	June 3, 2022	Respondent's Exhibit C
$1,355	Rock Hauling	June 3, 2022	Respondent's Exhibit C
$1,228.51	Hauling Fee	June 3, 2022	Respondent's Exhibit C

Respondent would also have incurred annual septic system operating and maintenance costs of $852 if the property had been served by a 1,000-gallon septic tank with chamber drain field between October 4, 2017, when Respondent acquired the property, and April 28, 2021, when the restrooms served by the cesspool were closed.[5] *See* Complainant's Exhibit 30 at 5.

[4] Cost information is based on Respondent's Exhibit C "$$ new system fill old," which Respondent submitted in its March 9, 2023, prehearing information exchange. On February 24, 2023, Complainant requested information on closure costs from Respondent in order to develop this penalty calculation. Complainant's Exhibit 50. Respondent failed to provide the requested information. Respondent's Exhibit C is neither an invoice nor a receipt, and contains various dollar figures. Cost information is based on Complainant's interpretation of Respondent's Exhibit C. Complainant's interpretation of the costs is also consistent with estimates in HDOH's January 2021 Cesspool Conversions Finance Research Summary Report, which is a study that evaluates the funding, financing, and affordability of cesspool conversions in Hawai'i. HDOH estimates that most conventional septic system replacements will cost an average of $23,000, however many systems cost more due to site-specific conditions. *See* Complainant's Exhibit 30 at 5.

[5] The annual operating and maintenance costs are based on an estimated $71 in monthly costs.

Due to Respondent's noncompliance, Respondent avoided the costs of operating and maintaining a septic system.

Mr. Smith-Watts used the costs detailed above and an estimated penalty payment date of December 31, 2024 to calculate Respondent's economic benefit from delaying and avoiding the costs of closing the LLC and replacing it with a septic system. Complainant's Exhibit 48 at 7. Respondent's economic benefit from owning and operating an LCC past the regulatory deadline for closure is $4,317.98. *Id.* at 19.

II. Gravity

In assessing a penalty for a violation of the SDWA, EPA shall consider the seriousness of the violation and the economic impact of the penalty on the violator. 42 U.S.C. § 300h-2(c)(4)(B)(i) and (v). The civil penalty guidelines refer to these factors as the gravity component of the penalty calculation. Complainant's Exhibit 36, GM-21 at 3 and GM-22 at 3. An appropriate penalty achieves retribution and deterrence, in addition to restitution. *See Tull v. U.S.*, 481 U.S. 412, 422 (1987). The gravity component of the penalty achieves deterrence and fundamental fairness to those who have complied because it ensures that a violator is worse off than if it had obeyed the law. Complainant's Exhibit 36, GM-21 at 3; *see also Tull*, 481 U.S. 422.

a. Seriousness of the violation

As explained above, "seriousness" refers to the actual or potential threat the violation posed to the environment or public health, and the extent to which Respondent's actions (or inaction) violated critical requirements of the regulatory program. Complainant's Exhibit 36, GM-22 at 3. Applying these criteria to the facts of this case, the circumstances of Respondent's operation of an LCC in violation of 40 C.F.R. § 144.88(a)(1) constitutes a serious violation.

The penalty guidelines state that EPA should consider the seriousness of the *risk* of harm where the risk exceeds the actual, documented harm. *See* Complainant's Exhibit 36, GM-22 at 14. To evaluate the seriousness of the risk of harm, EPA should look to the amount of the pollutant, the toxicity of the pollutant, the sensitivity of the environment, and the duration of the violation. Complainant's Exhibit 36, GM-22 at 3.

The SDWA UIC program prevents endangerment of underground sources of drinking water by regulating the construction, operation, permitting, and closure of injection wells that place fluids underground for storage or disposal. 42 U.S.C. § 300h(b). LCCs are regulated under the UIC program. 40 C.F.R. § 144.85(a). EPA's nationwide cesspool ban on LCCs resulted from EPA's findings that LCCs endanger drinking water. Complainant's Exhibit 35, 64 Fed. Reg. 68,546, 68,550 (Dec. 7, 1999). In assessing the risk of harm posed by the amount of pollutants and the toxicity of the pollutants from LCCs, EPA found that

> Large-capacity cesspools have a high potential to contaminate [underground sources of drinking water] because: they are not designed to treat sanitary waste; they frequently exceed drinking water [maximum contaminant levels] for nitrates, total suspended solids and coliform bacteria; and, they may contain other constituents of concern such as phosphates, chlorides, grease, viruses, and chemicals used to clean cesspools such as trichloroethane and methylene chloride. Pathogens in untreated sanitary waste released into large capacity cesspools could contaminate the water supply . . . and pose an ''acute'' risk if consumed (meaning there could be a serious health risk with a single exposure given the nature of contamination).

Id. at 68,551.

In addition to the acute risks posed by all LCCs, Respondent's LCC was located in a high-risk area identified by the 2022 Hawai'i Cesspool Hazard Assessment & Prioritization Tool, Updated Report. Complainant's Exhibit 37.1 at 60. Respondent's cesspool was located in an area identified as the highest priority for cesspool closure (Priority Area Level 1) due risks posed

to human health and the environment. *Id.* The prioritization of this area is based on multiple risk factors including: distance to domestic drinking water wells; depth to groundwater; cesspool density; unfavorable soil conditions; distance to streams; and distance to coastline. Complainant's Exhibit 37.1 at 79. Respondent owned or operated an LCC in an environmentally sensitive area, adding weight to the seriousness of the violation.

EPA's OECA has developed a system for quantifying the gravity of UIC violations, including quantifying the significance of the type of violation in the context of the UIC regulatory program. *See* Complainant's Exhibits 38 and 39. The UIC Program is designed to protect all current and potential underground sources of drinking water from contamination by injection wells. Complainant's Exhibit 35, 64 Fed. Reg. 68,550. The requirement that all LCCs must be closed by April 5, 2005 is a critical requirement of the UIC regulatory program. *Id.* at 68,549-68,550. Owning or operating an LCC is an unauthorized injection of wastewater, which is a significant violation of the UIC program's core requirements. *See* Complainant's Exhibit 39; *see also* Complainant's Exhibit 38 at 2. Respondent's unauthorized injection through an LCC from October 4, 2017 to April 28, 2021 in violation of the LCC ban constitutes a serious violation of a critical requirement of the UIC regulatory program. Complainant's Exhibit 47a, Declaration of Jelani Shareem ¶29.

The risk of harm posed by the LCC and the significance of the violation in the context of the UIC Program both demonstrate that the violation is serious. Therefore, Complainant has determined that after accounting for the economic benefit, consideration of the seriousness of the violation warrants the assessment of at least fifty percent of the remaining statutorily allowable penalty. Complainant's Exhibit 47a ¶36. *See* calculation in *Figure 3*, below.

b. Economic impact of the penalty on the violator

The penalty must have an economic impact on the violator to achieve deterrence. *See* Complainant's Exhibit 36, GM-22 at 15. The penalty guidelines use the size of the violator to evaluate the economic impact of the penalty on the violator, as required by 42 U.S.C. § 300h-2(c)(4)(B)(v). *Id.* The size of the violator is used to account for the variations in financial capabilities among different violators and to ensure adequate deterrence. *Id.* OECA has clarified that when calculating the size of violator component of a civil penalty, case teams should consider related parties, such as corporate affiliates in appropriate circumstances, including when "transactions between the violating entity and related party are less than arm's length transactions; the violating entity is grossly undercapitalized, and the related party finances the violating entity's operations; or monies are commingled to such a degree that it is not possible to determine what funds belong to which entity." Complainant's Exhibit 49.

In the present matter, Respondent is a Hawai'ian domestic limited liability company that owns the real property located at 66-532 Kamehameha Highway, Haleiwa, HI 96712, Tax Map Key (TMK) 1-6-2-007-019, in addition to real property located at 56-1030 Kamehameha Highway, Kahuku, HI 96731, TMK 1-5-6-005-024 and real property located at 56-1048 Kamehameha Highway, Kahuku, HI 96731, TMK: 1-5-6-005-006. Complainant's Exhibits 14, 34, and 56. The Haleiwa Property comprises a commercial building and a parking lot, which is leased to mobile food vendors, and has an assessed value of $2,528,100. Complainant's Exhibit 8.1. The Kahuku properties are agricultural properties with assessed land values of $901,900 and $26,500. Complainant's Exhibits 33 and 56. One property in Kahuku leases to Kahuku Wind Power II LLC and Amorient Aquaculture International. Complainant's Exhibit 33. EPA Region 9's

UIC Enforcement Program was unable to find other reliable information about Respondent's business size.[6] One database estimated that Respondent's annual sales are approximately $53,480, however the accuracy of the estimate is uncertain because the database had "incomplete or invalid data" on the company and the estimate did not include revenues for related parties. Complainant's Exhibit 55.

Complainant was unable to obtain business information from Respondent itself. Each party's prehearing information exchange "shall include . . . all factual information [the party] considers relevant to the assessment of a penalty." 40 C.F.R. § 22.19(a)(4). On February 24, 2023, Complainant specifically requested that Respondent provide information on assets, liabilities, and incomes to adequately assess the economic impact of the penalty on the violator pursuant to 42 U.S.C. § 300h-2(c)(4)(B)(v). Complainant's Exhibit 50. Complainant also sought documentation related to the costs incurred for the closing of the LCC and the installation of the individual wastewater system to learn whether Respondent's liabilities and assets are being comingled with those belonging to its managing member or other related parties. *Id*. Respondent did not respond to Complainant's request, nor did Respondent provide any business information in its prehearing information exchange.

Based on Respondent's estimated annual revenue and assessment of Respondent's known assets, Complainant is unable to determine whether the penalty will have a sufficient economic impact on Respondent to achieve deterrence. Because Complainant was unable to

[6] EPA Region 9's UIC Enforcement Program searched Dun & Bradstreet Finance Analytics, Hoovers, Westlaw Company Investigator, Reference USA Business Database, and Hawai'i Business Express. EPA Region 9's UIC Enforcement Program found information about several related parties, including Respondent's managing member Duke Pontin and other parties affiliated with Respondent's Haleiwa property. Complainant's Exhibits 2, 3.1, 5, 6, 7, 10, 10.1, 11, 12, 13, 24.1, 27, 46a, and 46b.

obtain sufficient information detailing the financial means of the Respondent, Complainant is applying no adjustment to the penalty based on economic impact on the violator. Although Complainant is limited by the available information, the Presiding Officer is not; 40 C.F.R. § 22.19(g) allows the Presiding Officer to draw an adverse inference based on Respondent's failure to provide information that is within its control. The Presiding Officer also maintains the discretion to increase the proposed penalty, where appropriate and supported by the record. *See In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18.

c. Preliminary Deterrence Figure

In the terminology used in GM-22, the preliminary deterrence figure is the economic benefit plus the gravity. Respondent's economic benefit is $4,317.98. Complainant has considered the seriousness of the violation and the economic impact of the penalty on Respondent, and found the appropriate gravity to be at least fifty percent of the remaining statutorily allowable penalty. Complainant's Exhibit 47a ¶36. *See Figure 3* for Complainant's Preliminary Deterrence Figure calculation considering Respondent's economic benefit, seriousness of the violation, and the economic impact of the penalty on Respondent.

Figure 3 Preliminary Deterrence Figure

Preliminary Deterrence Figure	**=**	**[Economic Benefit] + [Gravity]** where Gravity = 50% of the remaining statutorily allowable penalty and where the statutorily allowable penalty = $348,671
	=	**[Economic Benefit] + [(($348,671) – (Economic Benefit)) x (0.5)]** where Economic Benefit = $4,317.98
	=	**[$4,317.98] + [(($348,671) – ($4,317.98)) x (0.5)]**
	=	**[$4,317.98] + [$172,176.51]**

III. Penalty Adjustment Factors

In assessing a penalty, EPA shall consider Respondent's history of similar violations, any good faith efforts to comply with the applicable requirements, and other matters as justice may require. 42 U.S.C. § 300h-2(c)(4)(B)(iii),(iv), and (vi). GM-22 provides guidelines for considering these factors and determining whether an adjustment to the preliminary deterrence figure of the penalty is appropriate. Complainant's Exhibit 36, GM-22 at 3.

a. Respondent's history of similar violations

A history of violations would indicate that a greater penalty is needed to deter future violations. EPA Region 9's UIC Enforcement Program is not aware of any other similar violations by Respondent. Complainant's Exhibit 47a ¶37.c. Therefore, Respondent's history does not merit a greater penalty to achieve deterrence and Complainant has not adjusted the penalty for this factor.

b. Respondent's good faith efforts to comply with the applicable requirements

Respondent made certain good faith efforts to comply with the LCC ban at 40 C.F.R. § 144.88(a)(1) after EPA informed it of the violation. Respondent restricted access to the restrooms served by the LCC on April 28, 2021, soon after receiving EPA's March 4, 2021 Inspection Report, and closed the LCC on December 2, 2021, ten days after receiving EPA's Show Cause Letter. Complainant's Exhibits 18a, 18d, and 19b. The civil penalty guidelines state that where "the violator [has taken] all necessary steps towards correcting the problem, but [refuses] to reach any agreement on penalties. . . the gravity component of the penalty may be reduced up to 25%." Complainant's Exhibit 36, GM-22 at 20. Complainant considered Respondent's good faith efforts to comply in the penalty calculation. Although the violation was

fully within Respondent's control since October 4, 2017, Complainant acknowledges Respondent's efforts to come into compliance with the LCC ban in 2021 and has applied a twenty five percent downward adjustment to the gravity component of the penalty.

c. Other matters as justice may require

Complainant also considered other matters as justice may require. The penalty guidelines acknowledge that where there is extensive noncompliance with certain regulatory programs in specific areas of the United States, the normal penalty assessments have not been sufficient to achieve general deterrence. Complainant's Exhibit 36, GM-21 at 4. In such cases, the civil penalty guidelines recommend considering an increase to the penalty to achieve general deterrence. *Id. at 4-5.*

There is extensive noncompliance with the LCC ban set forth at 40 C.F.R. § 144.88(a)(1) in the State of Hawai'i. Complainant's Exhibit 47a ¶37.e; Complainant's Exhibit 54, Declaration of Katherine Rao ¶11. EPA's enforcement actions since 2005 have resulted in closure of 1,250 LCCs in Hawai'i, including closures within 0.1 miles and 0.5 miles of Respondent's property. Complainant's Exhibit 47a ¶37.e FN 2; Complainant's Exhibit 47b. Normally, each enforcement action has an associated press release. Complainant's Exhibit 54 at ¶10. However, HDOH estimates that there are still 88,000 cesspools remaining in Hawai'i, a portion of which are LCCs operating in violation of the SDWA. Complainant's Exhibit 53. Even Respondent's Managing Member, Duke Pontin, acknowledged that he is aware that there are cesspools "all over the state of Hawaii" in an email to Jelani Shareem dated November 23, 2021. Complainant's Exhibit 18a. Respondent's LCC was located in an area where past enforcement has not been sufficient to deter ongoing extensive noncompliance with the LCC ban. While Complainant has not

adjusted the penalty on the basis of Respondent's location in an area with extensive noncompliance, the civil penalty guidelines and caselaw support the Presiding Officer in exercising his discretion to adjust the penalty by up to 10% to achieve a greater deterrent effect. *In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 2005 WL 4905111 at *18; Complainant's Exhibit 36, GM-21 at 4-5 and GM-22 at 24.

Finally, Complainant has considered Respondent's ability to pay. Respondent's ability to pay should be presumed unless Respondent has raised its inability to pay as an issue. *In re: New Waterbury, Ltd.*, 1994 WL 615377 at *8. Complainant has considered Respondent's estimated annual revenues and known assets (including, the three properties referenced above) and those of related parties. Complainant's Exhibits 8.1, 14, 33, 34, 55, and 56. On April 11, 2024, Respondent's counsel confirmed in an email to counsel for Complainant that Respondent will not claim an inability to pay the proposed penalty. Furthermore, Respondent has provided no information to support such a claim. Each party's prehearing information exchange "shall include . . . all factual information [the party] considers relevant to the assessment of a penalty." 40 C.F.R. § 22.19(a)(4). On February 24, 2023, Complainant requested that Respondent provide information on assets, liabilities, and incomes pursuant to 42 U.S.C. § 300h-2(c)(4)(B)(v). Complainant's Exhibit 50. Respondent did not respond to Complainant's request nor did Respondent provide any information about its ability to pay in its prehearing information exchange. Respondent has not raised inability to pay as an issue and has provided no information in support of such a claim. Complainant's Exhibit 47a ¶37.d. Therefore, Complainant has not adjusted the penalty on the basis of Respondent's ability to pay. *Id.*

d. Penalty Calculation

In summary, Complainant has applied no adjustment for Respondent's history of violations, has applied a twenty five percent downward adjustment to the gravity component of the penalty based on certain good faith efforts Respondent made to comply with the LCC ban after EPA informed it of the violation, and has applied no adjustment based on other factors. In total, Complainant has applied a twenty five percent downward adjustment to the gravity component of the penalty. *See Figure 5* for Complainant's penalty calculation.

Figure 4 Penalty Calculation

Penalty	**=**	**[Economic Benefit]**	**+**	**[Adjusted Gravity]**
		where Economic Benefit = $4,317.98;		
		where Gravity = $172,176.51;		
		and where the gravity adjustment is a 25% reduction		
	=	**[$4,317.98]**	**+**	**[$172,176.51 + (- 0.25 x $172,176.51)]**
	=	**[$4,317.98]**	**+**	**[$129,132.38]**
Penalty	**=**	**$133,450.36**		

Conclusion

In consideration of the statutory factors at 42 U.S.C. § 300h-2(c)(4)(B) and for the reasons described above, Complainant has determined that $133,450 is an appropriate penalty for Respondent's violation of the SDWA. Complainant requests that the Presiding Officer assess a penalty in the amount of **$133,450** against Respondent.

Certificate of Service

The undersigned certifies that on the date indicated below this Statement of Proposed Penalty was served upon Respondent's attorney, who has consented in writing to electronic service pursuant to 40 C.F.R. § 22.5(b)(2).

One copy via electronic mail to:

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Dated: April 16, 2024

_____

Kimberly Wells
Assistant Regional Counsel
Office of Regional Counsel, EPA 9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

In the Matter of:	)	
	)	
NSHE HI Narcissus, LLC,	)	
Kahuku, Hawaii,	)	Docket No. UIC-09-2022-0058
	)	
Respondent.	)	

PARTIAL ACCELERATED DECISION ON LIABILITY

I. INTRODUCTION

The Environmental Protection Agency ("EPA" or "Complainant") filed a Penalty Complaint and Notice of Opportunity for Hearing in this matter on August 2, 2022. EPA alleges NSHE HI Narcissus, LLC ("Respondent") violated 40 C.F.R. § 144.88, a requirement of an applicable underground injection control program that is actionable under Section 1423(a)(2) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(a)(2), by owning or operating a large capacity cesspool (LCC) after April 5, 2005. On August 29, 2022, Respondent filed an Answer in this matter and requested a hearing. Pursuant to 40 C.F.R. § 22.50(a)(2), the provisions set forth in 40 C.F.R. §§ 22.50 – 52 apply to all proceedings for "[t]he assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g-3(g)(3)(B) and 300h-2(c)…." Furthermore, 40 C.F.R. § 22.51 states, "The Presiding Officer shall be the Regional Judicial Officer. The Presiding Officer shall conduct the hearing, and rule on all motions until the initial decision has become final or has been appealed."

Region 9's Regional Judicial Officer ("Presiding Officer") issued a Prehearing Order on December 6, 2022, which set forth a schedule for the exchange of information and a prehearing conference. On December 9, 2022, Complainant filed a Motion for Extension of Time requesting the dates in the Prehearing Order be extended to January 2023 to allow Complainant time to file a motion for accelerated decision on the liability issues in this matter. Respondent informed the Presiding Officer it concurred with Complainant's Motion for Extension of Time. On December 19, 2022, the Presiding Officer granted Complainant's Motion for Extension of Time. On January 13, 2023, Complainant filed its Motion for Accelerated Decision on Liability. On January 31, 2023, Respondent filed its Opposition to Complainant's Motion for Accelerated Decision on Liability. In its Opposition, Respondent requested a hearing on the Motion for Accelerated Decision. Complainant filed its Reply to Respondent's Opposition on February 8, 2023. Under 40 C.F.R. § 22.16(d) the Presiding Officer or the Environmental Appeals Board may permit oral argument on motions in its discretion. After reviewing the parties' written briefs, I conclude the Presiding Office has sufficient information in order to issue a ruling in this matter. Therefore, a hearing in this motion proceeding is not necessary.

II. STANDARD FOR GRANTING AN ACCELERATED DECISION

Pursuant to 40 C.F.R § 22.20(a), the Presiding Officer may: render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. 40 C.F.R § 22.20(b)(2) further states, if an acerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts

exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

The EPA Environmental Appeals Board "has construed an accelerated decision to be in the nature of summary judgment and has adopted the formulation of the Supreme Court in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), construing Federal Rule of Civil Procedure 56." *In Re: Amvac Chemical Corporation; Grower-shipper Association of Central California; J&D Produce; Ratto Bros., Inc.; and Huntington Farms*, 2022 WL 4968470, at *8 (EAB 2022); *see also BWX Techs., Inc.,* 9 E.A.D. 61, 74-75 (EAB 2000). In deciding such motions, the evidence must be viewed in a light most favorable to the non-moving party. *See Rogers Corp. v. E.P.A.*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In order to prevail with a motion for summary judgement, a complainant has the burden of establishing its *prima facie* case against a respondent. *UA Local 343 of the United Ass'n of Journeymen v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994). To defeat a motion for summary judgment, the opposing party must not only "raise an issue of material fact, but that party must demonstrate that this dispute is 'genuine' by referencing probative evidence in the record, or by producing such evidence." *Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 793 (EAB 1997). "The requirement that a dispute be genuine means simply that there must be more than some metaphysical doubt as to the material facts." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (1986) (internal quotations omitted). Additionally, where the nonmoving party's

assertion is clearly contradicted or discredited by the record, the Court should adopt the moving-party's version of the facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

The evidentiary standard of proof is a "preponderance of the evidence." 40 C.F.R. § 22.24(b). The Complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the Complaint, and Respondent bears the burdens of presentation and persuasion for any affirmative defenses. *Id.* § 22.24(a). Pursuant to 40 C.F.R. § 22.22(a), the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.

III. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Safe Drinking Water Act, commonly referenced as the SDWA, to protect underground sources of drinking water from contamination caused by, *inter alia*, the underground injection of fluids. *See* SDWA Part C, 42 U.S.C. §§ 300h to 300h-9. Pursuant to Part C of the SDWA, EPA promulgated regulations at 40 C.F.R. Part 144 to establish minimum requirements for the underground injection control (UIC) program. As part of the UIC program, EPA issued a final rule on December 7, 1999, categorically banning new and existing large capacity cesspools, nationwide, after April 5, 2005. 64 Fed. Reg. 68546, 68553-54 (codified at 40 C.F.R. § 144.88(a)). Large capacity cesspools 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. The UIC requirements do not apply to. . . nonresidential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons a day. *Id.* at 68567 (codified at 40 C.F.R. § 144.81(2)).

EPA administers the UIC program directly in the State of Hawaii pursuant to Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R. § 147.601, because the State has not been delegated primary enforcement responsibility. Sections 1423(a)(2) and 1423(c) of the SDWA, 42 U.S.C. §§ 300h-2(a)(2) and 300h-2(c), authorize EPA to issue an order for compliance and to seek a penalty where "any person subject to any requirement of any applicable underground injection control program in such State is violating such requirement."

IV. UNDISPUTED FACTS

1. Respondent is a Hawaiian domestic limited liability company. (Complaint filed on August 2, 2022 ("Complaint") attached to Complainant's Motion for Accelerated Decision as Exhibit A, ¶ 9; Answer filed on August 29, 2022 ("Answer") attached to Complainant's Motion for Accelerated Decision as Exhibit B, ¶ 31).

2. Since at least October 4, 2017, Respondent has owned the real property located at 66-532 Kamehameha Highway, Haleiwa, HI 96712, Tax Map Key (TMK) 1-6-2-007-019 (hereafter, the "Property"). (Ex. A, ¶ 11; Ex. B, ¶ 1).

3. The Property comprises a commercial building and a parking lot. (Ex. A, ¶ 12; Ex. B, ¶ 4; *see also* EPA Inspection Report from March 4, 2021 ("Inspection Report") attached to Complainant's Motion for Accelerated Decision as Exhibit C, Figure A).

4. The Property had two restrooms, which were connected to a single cesspool from at least October 4, 2017, until April 28, 2021. (Ex. A, ¶ 14; Ex. B, ¶ 62; Ex. C, Figure A, Section IV IMG_1436).

5. At various times between at least October 4, 2017, and April 28, 2021, the Property's commercial building was rented. (Ex. A, ¶ 16; Ex. B, ¶ 7; *see also* Electronic-Mail from Duke Pontin, attached to Complainant's Motion for Accelerated Decision as Exhibit E.)

6. At various times between at least October 4, 2017, and April 28, 2021, the parking lot on the Property was rented to mobile food vendors, including Jenny's Shrimp Truck since at least April 10, 2018, and Island Fresh Takeout since at least July 19, 2020. (Ex. A, ¶¶ 18, 22; Ex. B, ¶¶ 9, 13; Ex. C, pp. 3).

7. Persons visiting the commercial building and customers and workers from Jenny's Shrimp Truck had access to at least one of the restrooms connected to the cesspool on the Property. (Ex. A, ¶¶ 17, 21; Ex. B, ¶¶ 8, 12).

8. On December 2, 2021, Anchor Builders Hawaii LLC issued a "Large Capacity Cesspool Backfilling Completion Report." The Report was issued by Scott Olson, a licensed contractor and described the cesspool on the Property as being five feet in diameter, ten feet deep, and needing eight cubic yards of material to backfill the cesspool. Mr. Olson referred to the cesspool as a large capacity cesspool and included photos of the backfill project. (Complainant's Reply to Respondent's Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability, Ex. F-6 and F-7). The Report was sent to EPA by Respondent's Property Manager. (*Id.)*

V. FINDINGS

I find EPA proved by a preponderance of evidence that Respondent violated Section 1423(a)(2) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(a)(2) by owning or operating a large capacity cesspool after April 5, 2005.

Under the SDWA, a person is liable for violating the ban on large capacity cesspools where (1) the "person" (2) owns or operates a cesspool after April 5, 2005, (3) that is nonresidential and (4) that has the capacity to serve twenty or more persons in a day. 40 C.F.R. § 144.81(2).

A. Respondent is a "Person" for Purposes of the SDWA.

Complainant established Respondent is a "person" as defined in Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12) and at 40 C.F.R. §144.3, which is an "individual, corporation, company, association, partnership, State, municipality, or Federal agency." Respondent admits it is a domestic limited liability company, and therefore a "person" under the SDWA. (Ex. A, ¶¶ 9, 10; Ex. B, ¶¶ 1, 3). Therefore, Respondent is a "person" as defined by Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12) and at 40 C.F.R. §144.3. (See Ex. B, ¶¶ 1 and 3).

B. Respondent Owned or Operated the Cesspool After April 5, 2005.

Under the UIC regulations, an "owner or operator" is defined as "the owner or operator of any 'facility or activity' subject to regulation under the UIC program." 40 C.F.R. § 144.3. A "facility or activity" is defined as "any UIC 'injection well,' or an other facility or activity that is subject to regulation under the UIC program." *Id.* A "cesspool" is one type of injection well. *Id.*

Complainant established Respondent owned the Property, including the cesspool and the restrooms connected to the cesspool, since at least October 4, 2017 (Ex. A, ¶ 11; Ex. B, ¶ 1) and that Respondent owned or operated the cesspool for purposes of 40 C.F.R. § 144.3. Except for temporary periods of closure, Respondent admits it was the owner of the Property that periodically operated a single cesspool which was connected to the restrooms located on the Property and that individuals visiting the Property had access to at least one restroom during the

periods of operation. (Ex. B ¶¶ 1, 6, and 8). Therefore, I find Respondent owned or operated a cesspool after April 5, 2005.

C. Respondent's Cesspool is Non-Residential.

Complainant claims both common usage and the Merriam-Webster dictionary define "residential" as relating to one or more residences. A "residence" is a dwelling or a building used as a home. *See* Merriam-Webster Online Dictionary, https://www.merriamwebster.com (last visited Dec. 9, 2022).

The record shows the Property does not contain a dwelling or building used as a home and it has a commercial building which was open to the public, and a parking lot which was rented to two mobile food vendor businesses. (Ex. A, ¶¶ 16, 18, 22; Ex. B, ¶¶ 7, 9, 13). Since the cesspool on the Property does not serve a residence and it is therefore a non-residential cesspool. Respondent did not contest Complainant's characterization of the cesspool on the Property as "non-residential." Instead, Respondent affirmed the cesspool was associated with the commercial use of the Property. (Ex. B ¶¶ 8, 9, 12, 13). Therefore, Complainant has shown Respondent's cesspool is non-residential.

D. Complainant Established the Cesspool on the Property is a Large Capacity Cesspool.

The crux of the dispute between the parties in the current motion for accelerated decision is whether the cesspool on the property is a large capacity cesspool.

i. Complainant has the burden of proof.

As stated above, Complainant has the burden of establishing the cesspool located on the Property is a Large Capacity Cesspool under 40 C.F.R. § 144.81(2), which states,

> Large capacity cesspools including 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. The UIC requirements do not apply to single family residential cesspools nor to non-residential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons a day.

ii. Capacity is a measure of a device's potential or ability.

As Complainant stated, there does not appear to be any caselaw interpreting "capacity" in the large capacity cesspool context. Therefore, it is appropriate to consider dictionary definitions, the common understanding of the word, and judicial opinions interpreting the term in other contexts. *See Carbon Injection Sys. LLC*, 17 E.A.D. 1, 23 (EAB 2016) ("[T]he Board frequently relies on dictionaries in interpreting regulatory language."); *Odessa Union Warehouse Co-Op, Inc.*, 4 E.A.D. 550, 557 (EAB 1993) ("[I]n the absence of a statutory or regulatory definition, it is appropriate to use the common meaning of the terms at issue.").

In its effort to define the term "capacity", Complainant cites the Merriam-Webster Dictionary, which defines "capacity" to mean "the potential or suitability for holding, storing, or accommodating." Merriam-Webster Online Dictionary, https://www.merriam-webster.com(last visited Dec. 9, 2022). Complainant notes, Black's Law Dictionary provides a similar definition: "[t]he amount of something that a factory, company, machine, etc. can produce or deal with." CAPACITY, Black's Law Dictionary (11th ed. 2019). These definitions align with the common understanding of the term, which connotes potentiality and suitability and is not limited by the actual use of the item. I generally agree with Complainant's dictionary definitions and example that a bucket with a five-gallon capacity would retain its five-gallon capacity even if it was filled only to the three-gallon mark. And while actual use does not define the capacity of an item, it can be informative. If the capacity of a bucket is unknown but three gallons of water are poured into the bucket without causing it to overflow, the common understanding would be that the bucket

has the capacity to hold *at least* three gallons. In other words, the known actual use of an item provides a floor, not a ceiling, that informs our understanding of the item's capacity.

Complainant further explains courts agree with this understanding of the term. For example, in a recent Telephone Consumer Protection Act case, the Second Circuit concluded that "capacity" is best understood to refer to the functions a device is currently able to perform, regardless of whether it has actually performed those functions. *King v. Time Warner Cable Inc.,* 894 F.3d 473, 477, 480 (2d Cir. 2018); *accord Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). In reaching this conclusion, the court noted that the D.C. Circuit had considered and rejected a narrow interpretation limiting "capacity" to actual use because such an interpretation is inconsistent with the plain meaning of the term. *King*, 894 F.3d at 478-79 (citing *ACA International v. FCC*, 885 F.3d 687, 696 (D.C. Cir. 2018)). The Second Circuit proceeded to hold that "capacity" refers to a device's "current ability" or "current functions, absent any modifications." *Id.* at 481.

In sum, an item's capacity is a measure of its ability or functionality when the claims arose, whether or not that functionality was in use at the time. *See King*, 894 F.3d at 477, 479, 480. Applying that definition to the current issue at hand, a cesspool has the capacity to serve twenty or more persons a day—making it a large capacity cesspool—when it has the present ability or potential to serve twenty or more persons in a day. *See also* 64 Fed. Reg. 68557 ("Under this criterion…cesspools are covered under the UIC program if they … have the capacity to serve 20 or more persons a day."). Although Complainant correctly states capacity is a measure of a device's potential or ability, Complainant still has the burden of proving the subject cesspool's potential or ability with reliable evidence.

iii. There is No Genuine Dispute that the Cesspool on the Property Had the Capacity to Serve Twenty or more Person in a Single Day Between April 10, 2018, and April 28, 2021.

Large Capacity Cesspool Backfilling Final Completion Report: I find Anchor Builders Hawaii LLC's December 2, 2021 "Large Capacity Cesspool Backfilling Final Completion Report" to be relevant, reliable, and providing high probative value in establishing the cesspool on the Property was a Large Capacity Cesspool under 40 C.F.R. § 144.81(2). This Report establishes the cesspool on the Property was five feet in diameter, ten feet deep, and required eight cubic yards of backfill. Scott Olson, a licensed contractor with Anchor Builders Hawaii LLC characterized the cesspool on the property as a "large capacity cesspool" and provided photographs of backfilling process. (Complainant's Reply to Respondent's Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability, Ex. F-6 and F-7).

Complainant's March 4, 2021, Inspection Report: On March 2, 2021, two EPA inspectors conducted a physical inspection of the Property. These inspectors included statements regarding their observations and photographs of the uncovered cesspool and restroom facilities on the Property in their March 4, 2021, Compliance Evaluation Inspection Report. (Complainant's Motion for Accelerated Decision, Ex. C). Although the Report contains photographs of the uncovered cesspool, it lacks any measurements of the cesspool's dimensions or volume.

On January 9, 2023, EPA Region 9's Principle Enforcement Officer executed a declaration in this matter. The Declaration establishes the Principle Enforcement Officer's experience with LCC inspections since 2013. In her Declaration, the Principle Enforcement

Officer concludes the subject cesspool is a LCC based on: 1) City and County of Honolulu (CCH) sewer maps; 2) County Assessor Tax Maps and Hawaii's Department of Commerce and Consumer Affairs business registration website; 3) the State of Hawaii, Department of Health (HDOH) individual wastewater system (IWS) extract from February 2021; 4) geographic imagery via Google Maps; and 5) EPA's R9iWells database for inventoried Class V Injection Wells, which includes large capacity septic systems; 5) the March 4, 2021 Compliance Evaluation Inspection Report; 6) her conversations with one of the inspectors who wrote the Report; and 7) photographs she obtained from Yelp.com.

Respondent claims "the cesspool did not have the physical capacity to service 20 or more persons per day and the EPA must take into account the physical capacity of the cesspool in determining if a cesspool is a large capacity cesspool subject to EPA regulation." (Ex. B, ¶ 24). However, Complainant asserts the preamble for EPA's large capacity cesspool rule considered and rejected any physical or technical test as the determinative factor. Complainant explains, during its rulemaking, EPA received and considered numerous comments on whether technical or physical criteria such as "waste flow rate or septic tank size" should be considered. *See* 64 Fed. Reg. 68557. In light of the conclusion that such technical or physical criteria would "disrupt existing state programs" and that no alternatives were offered during comment period that were "necessary to ensure better protection of [underground sources of drinking water]," EPA affirmed the proper threshold to be the "capacity to serve 20 or more persons a day." without requiring a physical or technical criteria. *Id.*

Complainant's own assessment factors clearly state, "For non-residential cesspools, capacity is determined by design and construction of the cesspool and the potential usage of the infrastructure it serves." The Complainant's assessment factors go on to say, "determining the

potential usage of a non-residential cesspool is highly fact-specific and must be done on a case-by case basis." Here, Respondent claims Complainant failed to satisfy its burden of proof because Complainant failed to inspect the physical capacity of the cesspool on the Property. I disagree with Respondent's conclusion that Complainant did not physically inspect the cesspool. Although Complainant did not physically measure the dimensions or volume of the cesspool, Complainant did physically inspect and photograph the uncovered cesspool on the Property. I agree physical measurements of a cesspool's dimensions and volume would have bolstered Complainant's conclusions, yet I agree that these measurements are not required for Complainant to assess whether a given cesspool is a LLC. Instead, Complainant's inspectors may rely on their experience with LLCs to determine whether their observation of a given cesspool's approximate dimensions and volume satisfy the 20-person capacity threshold.

Yelp.com Photographs: Complainant explained it is acceptable to consider, among other things, the infrastructure a cesspool serves and location, as well as whether it is publicly accessible when determining if a cesspool can serve twenty or more persons in a day. Respondent admitted every visitor to the commercial building and every customer and employee of Jenny's Shrimp Truck had access to the open restroom. (Ex. A, ¶¶ 17, 21; Ex. B, ¶¶ 8, 12). Respondent also admitted Jenny's Shrimp Truck has been operating in the parking lot from at least April 10, 2018, until April 28, 2021. (Ex. A, ¶ 18; Ex. B, ¶ 9). However, Complainant relied on Yelp.com photographs of persons claimed to be food truck patrons, and Yelp,com photographs of seating arrangements in the Property's parking lot to prove Jenny's Shrimp Truck alone served at least twenty customers on multiple days, including May 3, 7, 10, and 18 of 2018. (Ex. D, ¶ 14; Ex. D.2, pp. 1-10). Although Respondent asserts the Presiding Officer may only

consider evidence that is properly authenticated under the Federal Rules of Evidence, I disagree that this is the evidentiary standard set forth in 40 C.F.R. § 22.22(a), which states, "The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value…"

Authentication under the Federal Rules of Evidence would certainly bolster the reliability of proffered evidence, but it is not mandatory to determine reliability. On the other hand, Complainant claims the Yelp.com photographs indisputably demonstrate the cesspool on the Property had the potential to serve *at least* twenty persons in a day from at least April 10, 2018, until April 28, 2021. Given the ease at which anyone can alter photographs or post inaccurate images online, I do not consider the Yelp.com photographs reliable evidence without having additional verification of the images. Therefore, I conclude the proffered Yelp.com photographs are not reliable. As such, I did not admit them into evidence or use them in reaching my decision.

Design and construction: Respondent argues Complainant must prove the cesspool on the Property had an open bottom in order to establish its *prima facie* case against Respondent. Respondent further claims Complainant cannot satisfy this legal element without having conducted a physical inspection of the cesspool. Complainant argues Respondent is incorrectly interpreting the language in 40 C.F.R. § 144.81(2) in relation to 40 C.F.R. § 144.3. Complainant explains 40 C.F.R. § 144.3 defines cesspools to be a drywell that receives untreated sanitary waste containing human excreta, and which *sometimes* has an open bottom and/or perforated sides [emphasis added]. Complainant further explains 40 C.F.R. § 144.81(2), which defines "large capacity cesspool", does not exclude cesspools defined in 40 C.F.R. § 144.3. Instead, 40 C.F.R. § 144.81(2) expands the physical definition to "include" cesspools which have an open

bottom and sometimes perforated sides. I agree with Complainant's interpretation that LCCs can include cesspools with open or closed bottoms.

E. "Legal Defenses" in Respondent's Answer are Not Relevant to the Question of Legal Liability

Respondent's "Ninth Defense" asserts "the property is located makai of the state of Hawaii UIC injection line and is not above a drinking water aquifer and therefore the cesspool was incapable of polluting the aquifer." (Ex. B, ¶ 30; *see also* ¶ 2). "Makai" is Hawaiian for "toward the sea" or "seaward." Although Respondent seems to argue that there is a geographic exception to the large capacity cesspool ban, I agree with Complainant's assertion that 40 C.F.R. § 144.88(a) clearly states the large capacity cesspool ban applies to all new and existing large capacity cesspools "regardless of [their] location."

Similarly, Respondent's "Fourteenth Defense" asserts "the alleged violation was not serious and there was no actual or threatened impact to the aquifer and environment." (Ex. B, ¶ 35). Here, as with its "Ninth Defense," Respondent seems to argue for an exception based on the alleged lack of endangerment or harm posed by a large capacity cesspool. Again, I concur with Complainant's position that 40 C.F.R. § 144.88(a) contains no such limitation.

VI. CONCLUSION

Based on the foregoing, I conclude Complainant established its *prima* facie case against Respondent, with no genuine issue of material fact, for a violation of Section 1423(a)(2) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(a)(2). I hereby **GRANT** Complainant's Motion for Accelerated Decision on Liability and find NSHE HI Narcissus LLC liable as a matter of law for violating the SDWA.

STEVEN JAWGIEL

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Date: 2023.08.28 11:19:02 -07'00'

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

CERTIFICATE OF SERVICE

This is to certify a true and correct copy of the Partial accelerated Decision In the Matter of NSHE HI Narcissus, LLC (UIC-09-2022-0058) was sent to the following parties via electronic mail, as indicated below:

COMPLAINANT:

Kimberly Y. Wells
United States Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

Email: wells.kimberly@epa.gov

RESPONDENT:

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PONLY TU

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Date: 2023.08.28 13:39:23 -07'00'

Ponly Tu
Office of Regional Counsel, Region 9
Office of the Regional Hearing Clerk

INDIVIDUAL WASTEWATER SYSTEM FOR 66-532 KAMEHAMEHA HIGHWAY

HALEIWA, HI 96712

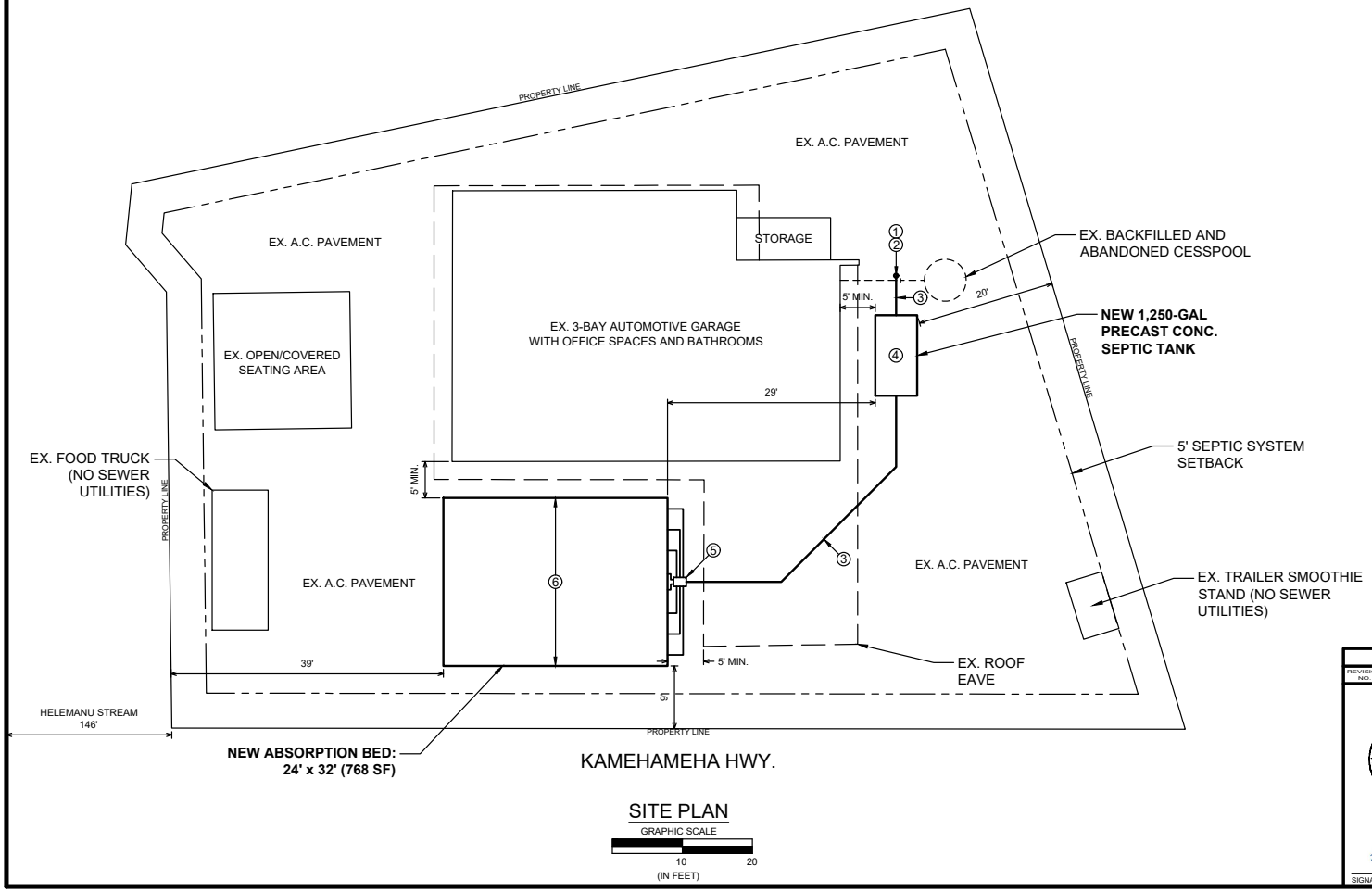
TMK: (1) 6-2-007:019

INSTALLATION NOTES:

1. CONNECT TO SEWER LINE FROM DWELLING. MAINTAIN MIN. 2% SLOPE TO NEW SEPTIC TANK.
2. INSTALL CLEANOUT TO GRADE, SEE DETAIL ON SHEET C-2.
3. INSTALL ~52 LF 4" SCH. 40 PVC PIPE AND NEC. FITTINGS. MAINTAIN MIN. 2% SLOPE INTO/OUT OF SEPTIC TANK.
4. INSTALL 1,250-GALLON PRECAST CONCRETE, DUAL COMPARTMENT SEPTIC TANK, JENSEN PRECAST MODEL HJ1250ST.
5. INSTALL 9-HOLE DISTRIBUTION BOX, TUF-TITE 9HD2.
6. ABSORPTION BED : 24' x 32' (768 SF). INSTALL 8 ROWS OF H-20 TRAFFIC RATED INFILTRATOR CHAMBERS, INSTALLED LEVEL, ADJACENT TO EACH OTHER.
7. REMOVE ALL LARGE TREES WITHIN 10' OF ABSORPTION BED AND 5' OF SEPTIC TANK.
8. FACE OF RETAINING WALLS SHALL BE A MINIMUM OF 5' SETBACK FROM SEPTIC TANK AND/OR ABSORPTION BED.
9. SEPTIC TANK AND ABSORPTION BED SIZED TO ACCOMMODATE UP TO 1,000 GPD.

DRAWING INDEX

DRAWING NO.	SHEET NO.	DESCRIPTION
C-1	1	SITE PLAN
C-2	2	DETAILS
C-3	3	FLOOR PLAN



SITE PLAN

GRAPHIC SCALE

10 20

(IN FEET)

REVISION NO.	SYM.	DESCRIPTION	SHT./OF	DATE	APPROVED

FINN D. MCCALL LICENSED PROFESSIONAL ENGINEER No. 14042-C HAWAII U.S.A.

SIGNATURE 4/30/2022 EXP. DATE

INDIVIDUAL WASTEWATER SYSTEM
66-532 KAMEHAMEHA HWY.

SITE PLAN

DESIGNED:	FM	SUBMITTED:	
DRAWN:	FM	DATE:	12/31/21
CHECKED:		SCALE:	

THIS WORK WAS DONE BY ME AND CONSTRUCTION OF THIS PROJECT WILL BE UNDER MY OBSERVATION.

DRAWING NO. C-1

EPA United States Environmental Protection Agency

Region 9 Enforcement and Compliance Assurance Division

COMPLIANCE EVALUATION INSPECTION REPORT

Inspection Date(s):	March 4, 2021	**Inspection Announced:** No	
Time:	**Entry:** approximately 11:20 PM	**Exit:** approximately 11:41 PM	
Media:	Safe Drinking Water Act		
Regulatory Program(s)	Underground Injection Control		
Company Name:	Jenny's Shrimp Truck		
Facility or Site Name:	Commercial Property (Jenny's Shrimp Truck, Island Fresh Takeout, former service station)		
Facility Location(s):	66-532 Kamehameha Highway, Haleiwa, HI 96712		
Mailing address:	Same as facility address		
(city, state, zip code)			
County:	County of Honolulu		
Facility/Site Contact(s):	QianYing Cao- Tenant (Jenny's Shrimp Truck) Duke Pontin- Property Manager (not present)		
Site Identifier:	Tax Map Key(s): 1-6-2-007-019		
Inspector(s):			
Connor Adams (author)	Signature: CONNOR ADAMS Digitally signed by CONNOR ADAMS Date: 2021.04.16 13:04:05 -10'00'		
	ECAD-3-2	Inspector	808-541-2752
Brandon Boatman	Signature: BRANDON BOATMAN Digitally signed by BRANDON BOATMAN Date: 2021.04.16 14:01:41 -10'00'		
	ECAD-2-3	Inspector	808-539-0540
Supervisor Review:			
Roberto Rodriguez	Signature: ROBERTO RODRIGUEZ Digitally signed by ROBERTO RODRIGUEZ Date: 2021.04.19 09:12:59 -07'00'		
	ECAD-3-3	Supervisor	415-972-3302

SECTION I – INTRODUCTION

Facility/Site Description

The "Commercial Property", located at 66-532 Kamehameha Highway in Haleiwa, HI is comprised of a central building (former service station) with the mobile Jennys Shrimp Truck to the north and mobile Island Fresh Takeout cart to the south. Two restrooms are located within the former service station. At the time of the inspection, I observed that the restooms were open to employees and customers.

Figure A- Google Maps Street View of the Commerical Property. Red arrows indicate approximate location of the two restrooms and waste clean-out. Island Fresh Cart not depticted in this image, but it's approximate location has been identified by the blue star..

Purpose of the Inspection

On March 4, 2021, Brandon Boatman and I conducted a Class V well compliance evaluation inspection ("CEI") of the Commerical Property. The primary purpose of the inspection was to investigate the type of wastewater system being operated on-site and to gather information on compliance with the Safe Drinking Water Act ("SDWA"), Underground Injection Control ("UIC") program's Class V Well regulations provided in the Code of Federal Regulations ("CFR"), Title 40, Parts 144-148. Specifically, we were investigating the subject property's compliance with EPA's ban on Large Capacity Cesspools ("LCCs"), pursuant to 40 CFR § 144.88(a)(1)(i).

On-Site Inspection Procedures

At approximately 11:20 pm, we approached the Commerical Property and identified ourselves to the Jenny's Shrimp Truck Operator, QianYang Cao. We explained to Cao why we were there,

showed our EPA inspector credentials, and provided Cao with the Notice of Inspection ("NOI") (Attachment 1). Cao explained that they are familiar with the restrooms on-site as well as the location of the wastewater collection system. Cao reviewed the NOI and agreed to sign it. The Island Fresh Take Out Cart was closed, however, the former service station appeared to be operating. The windows of the service station building were covered, security cameras encompassed the permiter of the building and no one answered our attempts to identify ourselves. Cao explained that the service station occupants would be unlikely to speak with us.

SECTION II – INSPECTION OBSERVATIONS

During the CEI, we observed that the subject property is comprised of a central building (former service station) with two mobile foods vendors on either side. Cao showed us the location of the two restrooms, which are located on the western side of the service station building. Cao explained that Jenny's Shrimp truck pays the property manager for access to the single restroom as well as space to park their food truck. When we arrived for the inspection, there were no other customers at the food truck. Cao estimated that up to ten individuals may use this restroom in a day. The adjacent restroom was unlocked by a patron of the former service station, who denied us any indentifiable information, but said we could take a photo of the second restroom. Cao said that they believe both restrooms discharge to a location immediately west of the restrooms which was covered by a steel plate. Cao was unsure of the construction of the waste collection system and suggested that the inspection team contact the Property Manager- Duke Pontin for more information. We briefly discussed EPA's regulation for UIC Class V wells in Hawaii, including EPA's ban of large capacity cesspools ("LCCs").

SECTION III – REGULATORY CONCERNS

An LCC is a cesspool that serves multiple dwellings, or for non-residential facilities, is a cesspool that has the capacity to serve 20 or more persons per day (See 40 C.F.R. § 144.81(2)). Pursuant to the UIC program regulations, all existing LCCs should have been closed by **April 5, 2005** (See 40 C.F.R. § 144.88). The UIC requirements do not apply to single family residential cesspools, nor to non-residential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons a day 40 CFR § 144.81(2). Any cesspool that does not fit within one of the two exceptions is considered a Large Capacity Cesspool and should have been closed.

At the time of the inspection it appeared that the wastewater generated on-site was potentially being discharged to a LCC. Additional follow-up will be necessary.

SECTION IV – INSPECTION PHOTO LOG

IMG_1436.jpg- Overview of the two restrooms located on the west side of the former service station building.

IMG_1437.jpg – Inside the restroom that Jenny's Shrimp truck pays for access to. Door number 2 (see previous photo).

IMG_1438.jpg – Steel plate covering wastewater collection system for the two restrooms.

IMG_1439.jpg – Steel plate covering wastewater collection system for the two restrooms.


IMG_1440.jpg – Underneath the steel plate covering the restrooms wastewater collection system.
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IMG_1441.jpg – Overview of the closed Island Fresh Take-Out cart.

IMG_1442.jpg – Inside of the #1 restroom. (see first photo).

GRETCHEN BUSTERUD
Acting Regional Counsel
U.S. Environmental Protection Agency, Region IX

NATHANIEL BOESCH
Assistant Regional Counsel
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Attorneys for Complainant

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: SKS Management LLC, Respondent. Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).	)	DOCKET NO. UIC-09-2022-0061 **CONSENT AGREEMENT AND FINAL ORDER**

CONSENT AGREEMENT

I. Authorities and Parties

1. The U.S. Environmental Protection Agency (EPA), Region IX, and SKS Management 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 IX. The Administrator of EPA delegated to the Regional Administrator of EPA Region IX the authority to bring and settle this action under the SDWA. The Regional Administrator further delegated the authority to bring and settle this action to the Director of EPA Region IX's Enforcement and Compliance Assurance Division.

3. Respondent SKS Management LLC is a California limited liability company principally located at 1939 Harrison Street, Suite 410, Oakland, CA, 94612.

4. Where the Parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be simultaneously commenced and concluded by the issuance of a 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 **$28,780** and the compliance requirements specified below.

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.

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 under 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.

III. Statutory and Regulatory Background

9. Section 1421 of the SDWA, 42 U.S.C. § 300h, requires the Administrator of EPA to 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, 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." 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 twenty (20) persons per day. *Id.*

19. 40 C.F.R. §§ 144.80(e) and 144.81(2) classify 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 required owners or operators of existing LCCs to close those LCCs by April 5, 2005, and prohibited new LCCs after that date.

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 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.

IV. Alleged Violations

28. Respondent is a company and thus 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 November 2012, Respondent has operated a commercial storage facility, including a restroom, at 76-6201 Walua Road, Kailua-Kona, Hawaii 96740 (TMK 3-7-6-024-034) (the "Property").

30. At all times that Respondent has operated the Property, a cesspool has serviced its restroom.

31. The cesspool servicing the Property's restroom meets the definition of an LCC as that term is defined at 40 C.F.R. § 144.81(2), in that it has the capacity to serve at least twenty (20) persons.

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

V. Settlement Terms

A. Civil Administrative Penalty

33. 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.

34. Within thirty (30) days of the effective date of this CA/FO, Respondent must pay a **$28,780** civil penalty by one of the payment methods below. 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 will not deliver mail to P.O. Boxes): sending a cashier's or certified check, payable to "Treasurer, United States of America," to the following address:

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 the following address:

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 here:

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 online, visit 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.

35. Concurrently with payment, Respondent shall provide proof of payment to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, ORC-1
75 Hawthorne Street
San Francisco, CA 94105
r9HearingClerk@epa.gov

Respondent shall also send notice of payment and a transmittal letter via e-mail to the EPA Region IX Enforcement and Compliance Assurance Division's enforcement officer and the EPA Region IX Office of Regional Counsel attorney identified in Paragraph 52.

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

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, in addition to any stipulated penalties due under Paragraphs 44, 45, and 46, 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 under 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 for each month that any portion of the penalty is more than thirty (30) days past due; and a 6% per year penalty on any principal amount ninety (90) days past due.

38. If Respondent does not timely pay the civil penalty due under Paragraph 34 and/or any stipulated penalties due under Paragraphs 44, 45, and 46, EPA may request that the U.S. 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.

B. Injunctive Relief

39. 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 September 1, 2023, close the LCC 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. If Respondent connects to a municipal sewer system, then that connection shall comply with all applicable sewer connection requirements; and

b. Within thirty (30) days of closure of the LCC, submit to EPA a final report describing 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 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.

40. If Respondent fails to comply with the requirements set forth in Paragraph 39, EPA may request that the U.S. 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).

C. Reporting

41. Respondent shall submit compliance reports to the EPA Region 9 Enforcement and Compliance Assurance Division's enforcement officer on a semiannual basis, with the first report (covering the period of July 1, 2022, to December 30, 2022) due on January 3, 2023, and the second report due on July 3, 2023. Subsequent reports shall be due on the first business day following each six-month period thereafter, until the final report is submitted pursuant to

Paragraph 39(b). Each compliance report shall discuss Respondent's progress toward meeting the compliance deadline specified in Paragraph 39(a).

42. Each compliance report must be accompanied by a certification, as described in Paragraph 53, from Respondent's authorized representative documenting the progress toward meeting the compliance deadline specified in Paragraph 39(a).

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 make payment as specified in Section V.A of this CA/FO, or fails to meet the compliance deadline for closure of the cesspool at the Property by the deadline specified in Section V.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 LCC.

45. If Respondent fails to timely submit any reports, as referred to in Paragraphs 39(b) and 41, 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 34 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 34.

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; 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.

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 by e-mail in accordance with Paragraph 52. 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. Submissions

52. All reports, notifications, documentation, submissions, and other correspondence required to be submitted by this Order 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: shih.alex@epa.gov and boesch.nathaniel@epa.gov. The subject line of all e-mail 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:

Alex Shih
U.S. Environmental Protection Agency, Region IX
Enforcement and Compliance Assurance Division
75 Hawthorne Street (ECAD-3-3)
San Francisco, CA 94105

and

Nathaniel Boesch
U.S. Environmental Protection Agency, Region IX
Office of Regional Counsel
75 Hawthorne Street (ORC-2-4)
San Francisco, CA 94105

53. The 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.*

54. 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.

55. 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.

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

57. 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*.

58. The Parties consent to service of this CA/FO by e-mail at the following e-mail addresses: shih.alex@epa.gov (for Complainant) and nochi@sksmgmt.com (for Respondent).

G. General Provisions

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

60. Full compliance with this CA/FO shall resolve only 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).

61. Full compliance with this CA/FO shall not in any manner affect the right of EPA to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violation of law, except with respect to the claims described in Section IV that have been specifically resolved by this CA/FO.

62. 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, and 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.

63. The provisions of this CA/FO shall apply to and be binding upon Respondent, its officers, directors, employees, and successors or assigns. Action or inaction of any persons, firms, contractors, employees, 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 the extensions of time to complete such obligations provided by EPA pursuant to Paragraph 50.

64. 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.

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

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

67. 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 III.B (Injunctive Relief) is restitution or required to come into compliance with law.

V. Effective Date

68. 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.

69. 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 the conditions under which a person not party to a proceeding may petition to set aside a CA/FO on the basis that material evidence was not considered.

70. 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 SKS Management LLC
Docket No. UIC-09-2022-0061

SKS MANAGEMENT LLC:

_____ Date: September 8, 2022

Natalie Ochi
President
SKS Management LLC

Consent Agreement and Final Order
In the Matter of SKS Management LLC
Docket No. UIC-09-2022-0061

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

AMY MILLER-BOWEN

Digitally signed by AMY MILLER-BOWEN
Date: 2022.09.30 12:59:03 -07'00'

_____

Date: _____

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: SKS Management LLC, Respondent. Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).	)	DOCKET NO. UIC-09-2022-0061 **CONSENT AGREEMENT AND FINAL ORDER**

FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region IX, and SKS Management LLC ("Respondent"), having entered into the foregoing Consent Agreement, and EPA Region IX 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 (Docked No. UIC-09-2022-0061) be entered;
2. Respondent pay an administrative civil penalty of $28,780 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 September 1, 2023, in accordance with the terms set forth in 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.

_____ Date: _____

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

SYLVIA QUAST
Regional Counsel
United States Environmental Protection Agency, Region 9

DARON RAVENBORG
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: Hawaii Conference Foundation, Respondent. Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).	DOCKET NO. UIC-09-2023-0060 **CONSENT AGREEMENT AND FINAL ORDER**

CONSENT AGREEMENT

I. AUTHORITIES AND PARTIES

1. The United States Environmental Protection Agency, Region 9 ("EPA") and Hawaii Conference Foundation ("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)(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*, 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 the authority to bring and settle this action under the SDWA to the Regional Administrator of EPA Region 9. 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 the Hawaii Conference Foundation, a non-profit corporation whose headquarters is located at 700 Bishop Street, Suite 825, Honolulu, Hawaii.

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 $50,633, and the performance of the compliance requirements specified below.

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

7. Consistent with 40 C.F.R. § 22.18(b), for purposes of the proceeding, Respondent: admits the jurisdictional allegations of the CA/FO; neither admits nor denies specific factual allegations contained in the CA/FO; consents to the assessment of any stated civil penalty, and to any conditions specified in the Consent Agreement; and waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying the Consent Agreement.

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.

III. 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 from endangering 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 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 twenty (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 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 required that owners or operators of existing LCCs were 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 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 where penalties are assessed between January 12, 2022 and January 6, 2023, and issue an order requiring compliance.

IV. FACTUAL ALLEGATIONS AND ALLEGED VIOLATIONS

28. Respondent is a non-profit 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. Respondent has owned one (1) parcel property, located at 54-364 Kamehameha Park Road (TMK 3-5-4-009-016) in Kapaau on the Island of Hawaii, since February 20, 2015, and one (1) parcel property, located at 66-090 Kamehameha Highway (TMK 1-6-2-005-005) in

Haleiwa on the Island of Oahu, since at least April 5, 2005 (hereafter, the "Properties" or "Property").

30. During all times that Respondent has owned and operated the Properties, the Properties have each been serviced by one (1) cesspool located on each Property, a total of two (2) cesspools, for the disposal of sanitary wastewater.

31. Cesspools like the two (2) servicing the Properties are used throughout the state of Hawaii, including the Islands of Oahu and Hawaii, for the disposal of untreated sanitary waste. The subsurface discharge of raw, untreated sewage to a cesspool can contaminate groundwater that may serve as an underground source of drinking water, thereby impacting human health. The subsurface discharge of untreated sewage can also contaminate oceans and streams via groundwater, thereby causing damage to land or aquatic ecosystems, including the nearshore ecosystems of the Hawaiian Islands.[1]

32. The EPA alleges that the cesspools that serviced the Properties meet the definition of an LCC, as that term is defined at 40 C.F.R. § 144.81(2), in that each Property had the capacity to serve twenty (20) or more persons per day.

33. The EPA alleges that each day that Respondent failed to close the alleged LCCs at the Kapaau Property after February 20, 2015, and the Haleiwa Property after April 5, 2005, constitutes a violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

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[1] *See*, https://www.epa.gov/uic/cesspools-hawaii#:~:text=There%20are%20approximately%2088%2C000%20cesspools,onsite%20wastewater%20systems%2C%20including%20cesspools.
See also, https://www.coris.noaa.gov/activities/coral_research_plan/pdfs/hawaiian_islands.pdf#:~:text=The%20Hawaiian%20Archipelago%20stretches%20for%20over%202%2C500%20km,(NWHI)%20consisting%20of%20mostly%20uninhabited%20atolls%20and%20banks.

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 a civil penalty of fifty thousand six hundred and thirty-three dollars ($50,633) by sending a check (mail or overnight delivery), wire transfer, automated clearing house, or online payment. Payment instructions are available at: http://www2.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 979078
St. Louis, Missouri 63197-9000

For checks sent by express mail (non-U.S. Postal Service which will not 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, NY 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.

For on-line payment, 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. After payment, Respondent shall immediately provide proof of payment to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, ORC-1
75 Hawthorne Street
San Francisco, CA 94105
r9HearingClerk@epa.gov

Respondent shall also send notice of payment and a 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 identified in Paragraph 70.

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 61, 62, and 63, 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 thirty (30) days past due; and 6% per year penalty on any principal amount ninety (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 61, 62, and 63, 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 expense 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.

B. Compliance Requirements

40. 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 June 30, 2025, close the LCCs at the Properties 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 ("IWS"), then installation and operation of such systems shall comply with all HDOH requirements. If Respondent connects to a municipal sewer system, then that connection shall comply with all applicable sewer connection requirements; and

b. Within thirty (30) days of the closure of the LCCs, submit to EPA a Final LCC Closure Report which includes the following information for each LCC:

   i. A description of the process by which the LCC was closed, including the equipment used;

   ii. Photographic evidence of construction and completion;

   iii. Identification of the contractor(s) providing the service;

   iv. A copy of the cesspool backfill closure report; and

   v. A copy of all approvals related to the closure of the LCCs and any replacement wastewater systems, such as an IWS or sewer connection, issued by HDOH, the County, or any other agency. Should the applicable agency issue its approval after the Final LCC Closure Report is due, Respondent shall note the pending status and submit the approval to EPA within fourteen (14) days of Respondent's receipt of the approval.

41. If Respondent fails to comply with the requirements set forth in Paragraph 40, above, 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).

C. Compliance Audit

42. Respondent shall perform a compliance audit ("Audit") of all properties it owns or operates in the state of Hawaii to identify and close all LCCs in accordance with this Section.[2]

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

44. Respondent shall comply with the following Audit requirements:

a. **Retain an Auditor to Conduct LCC Inspections.**

i. Within forty-five (45) days of the Effective Date of this CA/FO, Respondent shall identify and submit to EPA for its review and approval a proposed Auditor.

ii. Qualifications. The proposed Auditor shall have a technical or educational background relevant to LCCs and at least five years of experience conducting inspections or working on LCCs. Respondent shall provide EPA with a curriculum vitae and list of past cesspool projects performed by the proposed Auditor.

iii. Approval. Upon written EPA approval, Respondent shall proceed to the next step of the Audit. If EPA does not respond to Respondent's proposed Auditor within two (2) weeks of Respondent's submission, then the Auditor shall be deemed to be approved.

[2] To the extent Respondent includes properties that Respondent does not own or operate in its Audit, EPA will extend the same offer of 100% mitigation of gravity-based penalties to the applicable owners or operators.

iv. Disapproval. EPA shall have two (2) weeks from its receipt of Respondent's submission to disapprove the proposed Auditor. Any EPA disapproval will be in writing and include a rationale for disapproval and instructions on how to address any identified concerns. Within one (1) month of EPA's disapproval, Respondent shall propose a new Auditor, address any additional directions contained in EPA's disapproval, and provide the new proposed Auditor's curriculum vitae and list of past cesspool projects performed by the Auditor.

v. Auditor's Obligations. Respondent shall ensure that the Auditor supervises the preparation of and signs and certifies the Inspection Completion Report as required by Paragraph 44.d. and the Final LCC Closure Reports as required by Paragraph 44.f.

vi. Record Retention. Respondent shall include in its written agreement with the Auditor a provision requiring (1) the Auditor maintain all records pertaining to the undertaking or oversight of the Audit for at least five (5) years after the Audit is complete, and (2) the Auditor's records of the Audit shall be made available to EPA upon request.

b. **Develop a Target and Non-Target Property Report.**

i. Within six (6) months of EPA's written approval of Respondent's proposed Auditor, Respondent shall submit to EPA for review and approval a Target and Non-Target Property Report for all properties owned or operated by Respondent that includes a list of Target Properties to be inspected by the Auditor, and a list and narrative description of Non-

Target Properties that Respondent proposes not to inspect accompanied with Sufficient Documentation.

ii. Target Properties. All Properties owned or operated by Respondent in the state of Hawaii are presumptively Target Properties for purposes of this Audit, unless Respondent produces Sufficient Documentation to properly classify the property as a Non-Target Property.

iii. Non-Target Properties. Non-Target Properties include those that (1) are connected to a sewer system; (2) contain an on-site wastewater treatment facility permitted by the HDOH; (3) contain an HDOH-permitted IWS that is not a cesspool; (4) are residential properties that contain one single-family residence; (5) are non-residential properties that have the capacity to serve fewer than 20 persons per day; or (6) are undeveloped land with no restrooms or other structure associated with a sanitary wastewater disposal system. For each property classified as a Non-Target Property, Respondent must summarize the factual basis for the conclusion and provide Sufficient Documentation to support the conclusion.

iv. Sufficient Documentation: Respondent shall provide Sufficient Documentation for each Non-Target Property identified on the Non-Target Property list. In addition to the documentation identified in subparts (1) – (6) below, Respondent may support its position with other relevant records, such as interviews, oral testimony, and/or e-mail correspondence with Respondent's employees, occupants, tenants and/or lessees, and other individuals with knowledge, including members of a religious

organizations utilizing the site, as needed to confirm the presence (or absence) and location of any LCCs. If Respondent obtains information through databases maintained by a government entity, Respondent shall identify the government entity and the name of the database, provide EPA with a copy or screenshot of the database, identify the pertinent information thereon, and include a statement documenting the date and time the information was obtained. Notwithstanding the above, for the purposes of this CA/FO, the following will qualify as Sufficient Documentation:

1. For properties connected to a sewer: written confirmation of the connection from HDOH or private sewer operator; building plans documenting the connection to a county or private sewer system; or a sewer bill within the last 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, or other reliable documentation, showing that the cesspool on the property is connected exclusively to one (1) single-family residence. The property may, however, contain other buildings or structures thereon that are not connected to or

otherwise utilize the cesspool on the property.

5. For non-residential properties where a cesspool has capacity to serve less than 20 people: present and historical documentation identifying the nature and use of the property and the structure connected to the cesspool, and any other relevant information.
6. For undeveloped land: a "Building Value" of zero according to government tax records as of the Effective Date of this CA/FO.

v. Approval. Upon written EPA approval, Respondent shall proceed to the next step of the Audit.

vi. Disapproval. If EPA disapproves the Target and Non-Target Property Report and determines that a Non-Target Property should have been included in the Target Property list, EPA will provide its rationale for disapproval and instructions on how to address any identified concerns in writing.

1. Within one (1) month of receiving EPA's disapproval of the Target and Non-Target Property Report, Respondent shall provide EPA with a written response, identified as an "Addendum," to the Target and Non-Target Property Report. The Addendum shall address EPA's identified concerns and either confirm EPA's Target Property determination(s) or reaffirm Respondent's initial characterization.
2. After consideration of Respondent's Addendum, EPA shall make, in its sole discretion, the final determination in writing on whether the property is subject to the Target or Non-Target

Property list.

3. Upon receipt of EPA's final determination, Respondent shall proceed to the next step of the Audit in accordance with EPA's final approved Target and Non-Target Property Report, as modified by any final determination by EPA on the Target and Non-Target Property lists.

vii. Certification. The Target and Non-Target Property Report and Addendum must be signed and accompanied by a certification from Respondent, pursuant to Paragraph 71.

c. **Conduct Target Property Inspections.**

i. Within eighteen (18) months of EPA's approval of the Target and Non-Target Property Report or EPA's final determination following a disapproval, whichever comes later, the Auditor shall perform an on-site visual inspection for the presence of an LCC for all properties identified on the Target Property list.

ii. All work shall be conducted in accordance with accepted standards of professional engineering procedures as practiced by members of the local engineering profession currently practicing in Hawaii under similar conditions.

d. **Develop Inspection Completion Report.**

i. Within three (3) months of inspecting the last Target Property, the Respondent shall require the Auditor to submit an Inspection Completion Report to EPA for review and approval that documents the Auditor's

findings from the Target Property inspections. The Inspection Report shall include:

1. A description of the procedures followed in completing the Audit.
2. The number of LCCs located on each Target Property, a description of each LCC, and a description of how the LCC was identified and/or confirmed, along with any supporting documentation.
3. 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, wastewater treatment facility, or IWS is being used, along with any supporting documentation.

ii. Approval. Upon written EPA approval of the Inspection Completion Report, Respondent shall proceed to the next step of the Audit.

iii. Disapproval. Any EPA disapproval will be in writing and include a rationale for disapproval and instructions on how to address any identified concerns. Within one (1) month of EPA's disapproval, the Respondent shall have the Auditor provide an amended Inspection Completion Report to EPA and address any additional directions contained in EPA's disapproval.

iv. Certification. The Inspection Completion Report submitted to EPA must be signed and accompanied by a certification from the Respondent, pursuant to Paragraph 71.

e. **LCC Closure Plan.**

i. Within four (4) months of EPA's approval of the Inspection Completion Report to EPA, Respondent shall submit an LCC Closure Plan to EPA for review and approval.

ii. Schedule. The LCC Closure Plan should ensure the closure of all identified LCCs as soon as reasonably possible, and in no case shall the schedule for closure extend beyond three (3) years from the date of the EPA's approval of the LCC Closure Plan. HCF may request an extension of this three-year deadline if necessary to comply with historic preservation, native Hawaiian burial sites, and related laws and regulations. HCF's request for an extension of time must be supported with evidence demonstrating HCF's exercise of reasonable best efforts to comply with the original deadline.

iii. Approval: Upon written EPA approval of the LCC Closure Plan, Respondent shall implement the LCC Closure Plan in accordance with the approved schedule.

iv. Disapproval. EPA shall have two (2) months to disapprove the LCC Closure Plan. Any EPA disapproval will be in writing and include a rationale for disapproval and instructions on how to address any identified concerns. Within one (1) month of receipt of EPA's disapproval, Respondent shall submit a revised LCC Closure Plan that addresses any concerns identified by EPA for review and approval. Any LCC Closure Plan not disapproved by EPA within two (2) months, shall be deemed approved by EPA.

v. Submission of Applications. Excluding LCCs that will be permanently closed and not replaced, if any, within six (6) months of EPA's approval of the LCC Closure Plan, Respondent shall submit construction plans for IWS(s) to HDOH for approval or apply for a sewer connection for each LCC targeted for closure, irrespective of the EPA approved closure date. Proof of submission shall be made available to EPA upon request.

vi. Closure Requirements. All 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.

f. **Final LCC Closure Report for Audited Properties.** Within one (1) month of the closure of the LCC(s) of each Target Property, Respondent shall submit to EPA a Final LCC Closure Report for that Audited Property,[3] accompanied with a signature and certification, as described in Paragraph 71. The Final LCC Closure Report for each Audited Property shall include and the following:

i. A description of the process by which the LCC was closed, including the equipment used;

ii. Photographic evidence of construction and completion;

iii. Identification of the contractor(s) providing the service;

iv. A copy of the cesspool backfill closure report; and

v. A copy of all approvals related to the closure of the LCCs and any replacement wastewater systems, such as an IWS or sewer connection,

[3] Each Target Property with LCC closures will have its own Final LCC Closure Report.

issued by HDOH, the County, or any other agency. Should the applicable agency issue its approval after the Final LCC Closure Report for Audited Property is due, Respondent shall note the pending status and submit the approval to EPA within fourteen (14) days of Respondent's receipt of the approval.

45. 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.

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

D. Supplemental Environmental Project

47. In response to the alleged violations of the SDWA and in settlement of this matter, although not required by the SDWA or any other federal, state or local law, Respondent agrees to implement a supplemental environmental project ("SEP"), as described below in Paragraphs 48 – 57.

48. As a SEP, Respondent shall:

a. Convert no fewer than one (1) HCF owned or operated single-family home small-capacity cesspool ("SCC") to an IWS, approved by HDOH; and

b. Convert no fewer than one (1) single-family home SCC to IWS, approved by HDOH, that satisfies the following criteria:

i. The SCC is located on the island of Hawaii;

ii. The SCC must be in close proximity to a surface water or coastal waters;

iii. The SCC must be located in an area with a high density of cesspools;

iv. The SCC must be located in a disadvantaged community, where the median household income is below $75,000 per year;

v. The owner(s) of the SCC must certify that he/she/they cannot afford the SCC conversion; and

vi. There are no approved plans or allocated funding to connect the SCC to a sewer system.

49. Respondent shall complete closure and replacement of the SCCs referenced in Paragraph 48 no later than June 30, 2025.

50. Respondent shall spend no less than fifty thousand four hundred and sixty dollars ($50,460) on implementing the SEP. Respondent shall include documentation of the expenditures made in connection with the SEP as part of the SEP Completion Report.

51. As part of this SEP, Respondent shall submit the following information and/or reports to EPA:

a. Within two (2) weeks of identifying the SCC to be converted in accordance with Paragraph 48(b) above, submit to EPA for review and approval the location of that SCC and a description of how the criteria in Paragraph 48(b) were met, along with supporting documentation.

b. Within one (1) month of the closure of the last SCC, Respondent shall submit to EPA a SEP completion report ("SEP Completion Report"), accompanied by certification from a responsible corporate official. The SEP Completion Report must include the following information:

i. A detailed description of the process by which the SCCs were closed, including the equipment used;

ii. Itemized costs;

iii. Certification that the SEP has been fully implemented pursuant to the provisions of this CA/FO;

iv. A description of the environmental and public health benefits resulting from implementation of the SEP;

v. Photographic evidence of construction and completion of the closure and replacement of each SCC;

vi. Identification of the contractor(s) providing the services;

vii. A copy of the cesspool backfill closure reports for each closure; and

viii. A copy of all approvals related to the closure of the SCCs and any replacement wastewater systems, such as an IWS or sewer connection, issued by HDOH, the County, or any other agency. Should the applicable agency issue its approval after the SEP Completion Report is due, Respondent shall note the pending status and submit the approval to EPA within fourteen (14) days of Respondent's receipt of the approval

52. The SEP will be deemed to be satisfactorily completed only when Respondent has (a) closed at least the two SCCs referenced in Paragraph 48(a) and (b) and replaced them with appropriate wastewater systems, such as an IWS; (b) expended the minimum amount identified in Paragraph 50; and (c) submitted the SEP Completion Report to EPA. Respondent agrees that failure to submit the SEP Completion Report or any periodic report required by Paragraph 58 below shall be deemed a violation of this CA/FO and Respondent shall become liable for stipulated penalties pursuant to Paragraphs 61, 62, 63 below.

53. The determination of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of this agreement) shall be reserved to the sole discretion of EPA.

54. The SEP is consistent with applicable EPA policy and guidelines regarding SEPs, including the *U.S. Environmental Protection Agency Supplemental Environmental Projects Policy 2015 Update to the 1988 Supplemental Environmental Projects Policy (March 10, 2015)*.[4] The SEP advances at least one of the objectives of the SDWA and the UIC regulations cited above by reducing the potential for releases of untreated sanitary waste to groundwater, which can serve as an underground source of drinking water. The SEP is not inconsistent with any provision of the SDWA. The SEP relates to the violations alleged in Section IV of this CA/FO, in that it is designed to reduce the adverse impact and potential risk to public health and/or the environment to which these violations contribute. The SEP and the violations relate to the same contaminants (untreated sanitary waste), the same media (groundwater), the same potential human health exposure pathways (ingestion of impacted groundwater or contact with surface or coastal waters impacted via groundwater), the SCCs are located in the same geographic area as the violation—the Island of Hawaii, and the reduction in pollutant loading from closing the SCCs is to the same types of ecosystems that may have been impacted by the violations, namely the nearshore aquatic ecosystems of the Hawaiian Islands.

55. For a period of five (5) years following the Effective Date of this CA/FO, Respondent shall maintain legible copies of all documentation relevant to the SEP or reports submitted to EPA pursuant to this CA/FO and shall provide such documentation or reports to EPA not more than seven (7) days after a request for such information.

56. Respondent certifies the truth and accuracy of each of the following:

[4] *See*, https://www.epa.gov/sites/default/files/2015-04/documents/sepupdatedpolicy15.pdf.

a. That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that the Respondent in good faith estimates that the cost to implement the SEP is a minimum of fifty thousand four hundred and sixty dollars ($50,460);

b. That Respondent will not include administrative costs for employee oversight of the implementation of the SEP in its project costs;

c. That, as of the date of executing this CA/FO, Respondent is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

d. That the SEP is not a project that Respondent was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this CA/FO;

e. That Respondent has not received and will not have received credit for the SEP in any other enforcement action;

f. That Respondent will not receive reimbursement for any portion of the SEP from another person or entity;

g. That Respondent is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in Paragraph 48; and

h. That for federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

57. Any public statement, oral or written, in print, film, or other media, made by Respondent or a representative of Respondent making reference to the SEP from the Effective Date of this CA/FO shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for alleged violations of the Safe Drinking Water Act."

E. Reporting Requirements

58. Respondent shall submit progress reports to the EPA Region 9 Compliance Officer on a quarterly basis, with the first report (covering the preceding three-month period) due three (3) months after the Effective Date of this CA/FO. Subsequent reports shall be due on the first business day following each three-month period, until the final reports (Final LCC Closure Report, Final LCC Closure Report for Audited Properties, and SEP Completion Report) have been submitted. Each progress report shall detail Respondent's work during the three-month period towards meeting all applicable compliance deadlines.

59. Each progress report must be accompanied with a certification, as described in Paragraph 71, from Respondent's authorized representative.

F. Stipulated Penalties

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

61. If Respondent fails to make the payment specified in Section V.A., fails to comply with the requirements regarding the closure of the alleged LCCs at the properties specified in Section V.B., or fails to comply with the requirements regarding the SEP specified in Section V.D., Respondent agrees to pay in addition to the assessed penalty, a stipulated penalty of $300 per day per violation for each day the Respondent is late meeting the applicable requirements.

62. If Respondent does not expend the entire amount specified in Paragraph 50 of Section V.D., while otherwise meeting the requirements of the SEP, Respondent shall pay a stipulated penalty equal to the difference between the amount expended as demonstrated in the SEP Completion Report and the amount specified in Paragraph 50, multiplied by 1.1 (an additional 10% of the remaining balance). Respondent shall pay the stipulated penalty using the method of payment specified in Paragraph 35, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts that are not paid within thirty (30) days of submission of the SEP Completion Report.

63. If Respondent fails to timely submit any reports, such as those required under Sections V.B., V.D., or V.E. in accordance with the timelines set forth in this CA/FO, Respondent agrees to pay a stipulated penalty of $100 for each day after the report was due until Respondent submits the report in its entirety.

64. 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.

65. 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.

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

G. Force Majeure

67. 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, unforeseeable 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.

68. 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 points of contact in Paragraph 70 by email. 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.

69. 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

70. All reports, notifications, documentation, submissions, and other correspondence required to be submitted by this Order must be submitted to EPA electronically, to the extent possible. If electronic submittal is not possible, submissions may be made by certified mail (return receipt requested). 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. Electronic or mailed submissions shall be sent to the individuals identified below:

EPA Region 9 Enforcement and Compliance Assurance Division's Enforcement Officer:
Maria Alberty
U.S. Environmental Protection Agency, ECAD-3-3
75 Hawthorne Street
San Francisco, CA 94105
alberty.maria@epa.gov

and

EPA Region 9 Office of Regional Counsel Attorney:
Daron Ravenborg
U.S. Environmental Protection Agency, ORC-2-4
75 Hawthorne Street
San Francisco, CA 94105
ravenborg.daron@epa.gov

71. 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 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*."

72. 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.

73. 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.

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

75. 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*.

VI. GENERAL PROVISIONS

76. Full payment of the penalty as described in Section V.A., above, and full compliance with this CA/FO as described in Sections V.B. and V.D. shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in Section IV of 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).

77. The parties consent to service of this CA/FO by e-mail at the following valid e-mail addresses: ravenborg.daron@epa.gov (for Complainant) and dcodiga@schlackito.com (for Respondent).

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

79. The provisions of this CA/FO shall apply to and be binding upon Respondent and its officers, directors, 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 69.

80. Full compliance with this CA/FO does not in any manner affect the right of EPA or the United States to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violation of law, except with respect to the claims described in Section IV that have been specifically resolved by this CA/FO.

81. This CA/FO is not a permit or modification of a permit and does not affect Respondent's obligations 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, or any order or permit issued thereunder, except as specifically set forth herein.

82. 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.

83. Unless otherwise specified, the Parties shall each bear their own costs and attorney fees in this action.

84. 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.

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

86. 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 V.B. is restitution or required to come into compliance with law.

VII. EFFECTIVE DATE

87. 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.

88. 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.

89. 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: Hawaii Conference Foundation
Docket No. UIC-09-2023-0060

HAWAII CONFERENCE FOUNDATION

/s/
Andrew R. Bunn
Executive Director

Date: 6/23/2023

Consent Agreement and Final Order
In the Matter of: Hawaii Conference Foundation
Docket No. UIC-09-2023-0060

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

/s/ Date: 07/12/2023
Amy C. Miller-Bowen, Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 9
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: Hawaii Conference Foundation, Respondent. Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).	)	DOCKET NO. UIC-09-2023-0060 **CONSENT AGREEMENT AND FINAL ORDER**

FINAL ORDER

The United States Environmental Protection Agency Region 9 ("EPA"), and the Respondent, Hawaii Conference Foundation ("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-09-2023-0060) be entered;

2. Respondent pay an administrative civil penalty of $50,633 to the Treasurer of the United States of America in accordance with the terms set forth in the Consent Agreement;

3. Respondent close the large capacity cesspools identified in Section IV of the Consent Agreement by June 30, 2025, in accordance with the terms set forth in Paragraph 40;

4. Respondent complete the Supplemental Environmental Project in accordance with the terms set forth in Section V.D. of the Consent Agreement.

5. Respondent comply with all other requirements of the Consent Agreement.

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.

_____ Date: _____

Beatrice Wong
Regional Judicial Officer, Region 9
U.S. Environmental Protection Agency

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

Julia Jackson
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: Halona Pacific LLC P.O. Box 235117 Honolulu, HI 96823-3501 Respondent. Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).	DOCKET NO. UIC-09-2022-0015 **CONSENT AGREEMENT AND FINAL ORDER**

CONSENT AGREEMENT

I. AUTHORITIES AND PARTIES

1. The United States Environmental Protection Agency ("EPA"), Region IX and Halona Pacific 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 Halona Pacific LLC whose headquarters is located at 91-254 Olai St., Kapolei, HI 96707.

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 $70,000, and the compliance requirements specified below.

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 $23,331 for each day of violation, up to a maximum administrative penalty of $291,641 for violations occurring after November 2, 2015 and where penalties are assessed on or after January 13, 2020 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 November 2013, Respondent has owned the property located at 91-254 Olai Street, Kapolei, HI 96707, Tax Map Key 1-9-1-031-029 (the "Property"). The Property contains three restrooms, one additional sink, and one additional drinking water fountain.

30. Since at least November 2013, Respondent has owned one cesspool servicing the restrooms, sink, and drinking water fountain at the Property. The cesspool has the capacity to serve twenty or more people per day.

31. 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).

32. Each day that Respondent failed to close the LCC at the Property identified in Paragraph 30 after January 14, 2018 constitutes a violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

V. SETTLEMENT TERMS

A. Civil Penalty

33. 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 withthe 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.

34. Within thirty (30) days of the Effective Date of this CA/FO, Respondent must pay the $70,000 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 casher'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.

35. 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 52.

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

37. 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.

38. If Respondent does not pay timely the civil penalty due under Paragraph 34 and/or any stipulated penalties due under Paragraphs 44, 45 and 46 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. Compliance Requirements

39. 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 31st, 2023, close the LCC located at the Property in accordance with40 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 final report describing 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 the 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.

40. If Respondent fails to comply with the requirements set forth in Paragraph 39, above, 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 SDWA, 42 U.S.C. § 300h-2(b).

C. Reporting Requirements

41. Respondent shall submit compliance reports to the EPA Region 9 Compliance Officer and the EPA Region 9 LCC Project Coordinator on a semiannual basis, with the first report (covering the period January 1, 2021 through July 1, 2022) due on July 4, 2022, and the second report due on January 3, 2023. Subsequent reports shall be due on the first business day

following each six-month period thereafter, until the final report is submitted pursuant to Paragraph 39(b). Each compliance report shall discuss Respondent's progress toward meeting the compliance deadline in Paragraph 39.

42. Each compliance report must be accompanied by a certification, as described in Paragraph 53, from Respondent's authorized representative documenting progress toward meeting the compliance deadline referenced in Paragraph 39.

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 make the payment specified in Section IV.A of this CA/FO 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 Paragraphs 39 and 42, 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 34 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 34.

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 by email in accordance with Paragraph 53. 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.

VI. SUBMISSIONS REQUIREMENTS

52. 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: munoz.maureen@epa.gov and jackson.julia@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:

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

53. 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."*

54. 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.

55. 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.

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

57. 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.

VI. GENERAL PROVISIONS

58. Full payment of the penalty as described in Paragraph 34, 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).

59. The parties consent to service of this CA/FO by e-mail at the following valid e-mail addresses: munoz.maureen@epa.gov (for Complainant) and wendy.chang@pcshi.com (for Respondent).

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

61. 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 51 above.

62. 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 claims described in Paragraph 32 that have been specifically resolved by this CA/FO.

63. 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.

64. 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.

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

66. 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.

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

68. 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.

VII. EFFECTIVE DATE

69. 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.

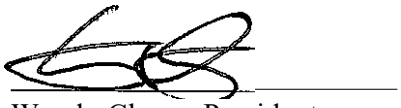
70. The parties acknowledge and agree that final approval by EPA of this CA/FO is subject to 40 C.F.R. § 22.45(c)(4), which sets forth requirements under which a person not a

party to this proceeding may petition to set aside a consent agreement and final order on the basis that material evidence was not considered.

71. 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: Halona Pacific LLC
Docket Number UIC-09-2022-0015

Halona Pacific, LLC



Date: 12/07/21

Wendy Chang, President
Halona Pacific, LLC

Consent Agreement and Final Order
In the Matter of: Halona Pacific LLC
Docket Number UIC-09-2022-0015

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

JOEL JONES Digitally signed by JOEL JONES
Date: 2022.01.04 14:59:18 -08'00'

_____ Date: _____

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: Halona Pacific LLC Respondent. Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).	DOCKET NO. UIC-09-2022-0015 **CONSENT AGREEMENT AND FINAL ORDER**

FINAL ORDER

The United States Environmental Protection Agency Region IX ("EPA"), and the Respondent, Halona Pacific LLC ("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-09-2022-0015) be entered.

2. Respondent pay an administrative civil penalty of $70,000 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, 2023 in accordance with the terms set forth in Paragraph 39 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.

_____ Date: _____

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

SYLVIA QUAST
Regional Counsel
U.S. Environmental Protection Agency, Region IX

JANET A. MAGNUSON
Attorney Advisor
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105
(415) 972-3886

Attorneys for Complainant

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: Hawthorne Pacific Corp., Respondent. Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	DOCKET NO. UIC-09-2023-0074 **CONSENT AGREEMENT AND FINAL ORDER**

CONSENT AGREEMENT

I. Authorities and Parties

1. The U.S. Environmental Protection Agency (EPA), Region IX, and Hawthorne Pacific Corp. (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 IX.

3. Respondent Hawthorne Pacific Corp. is a Hawaii corporation located at 470 S. Hana Highway, Kahului, Hawaii, 96732.

4. Where the Parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be simultaneously commenced and concluded by the issuance of a 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 $71,422 and the compliance requirements specified below.

II. Jurisdiction and Waiver of Right to Judicial Review and Hearing

7. Consistent with 40 C.F.R. § 22.18(b)(2), for the purpose of this proceeding, Respondent: admits the jurisdictional allegations of the CA/FO; neither admits nor denies the specific factual allegations contained in the CA/FO; consents to the assessment of the stated civil penalty, and to all conditions specified in the Consent Agreement; and waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying the Consent Agreement.

8. Respondent further 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 under 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.

III. Statutory and Regulatory Background

9. Section 1421 of the SDWA, 42 U.S.C. § 300h, requires the Administrator of EPA to 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, 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." 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 twenty (20) persons per day. *Id.*

19. 40 C.F.R. §§ 144.80(e) and 144.81(2) classify 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 required owners or operators of existing LCCs to close those LCCs by April 5, 2005, and prohibited new LCCs after that date.

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 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 issue an order requiring compliance and assessing a civil penalty of not more than $27,018 for each day of violation, up to a maximum administrative penalty of $337,725 for violations occurring after November 2, 2015.

IV. Alleged Violations

28. Respondent is a corporation and thus 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 2014, Respondent has owned and/or operated the facility at 470 S. Hana Highway, Kahului, Hawaii, 96732 (TMK 2-3-8-065-001) (the Property).

30. At all times that Respondent has owned and/or operated the Property, two cesspools have serviced their restrooms.

31. The cesspools servicing the Property's restrooms meet the definition of LCCs as defined at 40 C.F.R. § 144.81(2), in that they have the capacity to serve at least twenty (20) persons a day.

32. Each day that Respondent fails to close the LCCs at the Properties after April 5, 2005, constitutes a violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

V. Settlement Terms

A. Civil Administrative Penalty

33. 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.

34. Within thirty (30) days of the effective date of this CA/FO, Respondent must pay a SEVENTY-ONE THOUSAND FOUR HUNDRED TWENTY-TWO DOLLARS ($71,422) civil penalty by one of the payment methods below. 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 979078
St. Louis, Missouri 63197-9000

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

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 the following address:

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 here:

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 online, visit 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.

35. Concurrently with payment, Respondent shall provide proof of payment to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, ORC-1
75 Hawthorne Street
San Francisco, CA 94105

r9HearingClerk@epa.gov

Respondent shall also send notice of payment and a transmittal letter via e-mail to the EPA Region IX Enforcement and Compliance Assurance Division's enforcement officer and the EPA Region IX Office of Regional Counsel attorney identified in Paragraph 51.

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

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, in addition to any stipulated penalties due under Paragraphs 43, 44, and 45, 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 under 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 for each month that any portion of the penalty is more than thirty (30) days past due; and a 6% per year penalty on any principal amount ninety (90) days past due.

38. If Respondent does not timely pay the civil penalty due under Paragraph 34 and/or any stipulated penalties due under Paragraphs 43, 44, and 45, EPA may request that the U.S. 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.

B. Injunctive Relief

39. 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 April 1, 2025, close the LCCs 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. If Respondent connects to a municipal sewer system, then that connection shall comply with all applicable sewer connection requirements; and

b. Within thirty (30) days of closure of the LCCs, submit to EPA a final report describing how each 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 cesspools. Respondent shall also submit all related approvals, including for any replacement systems, issued by HDOH 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.

40. If Respondent fails to comply with the requirements set forth in Paragraph 39, EPA may request that the U.S. 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).

C. Stipulated Penalties

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

42. If Respondent fails to make payment as specified in Section V.A of this CA/FO, or fails to meet the compliance deadline for closure of the cesspools at the Properties by the

deadline specified in Section V.B of this CA/FO, Respondent agrees to pay, in addition to the assessed penalty, a stipulated penalty of $300 per day for each day the Respondent is late in making the penalty payment or meeting the closure deadline for the Properties' LCCs.

43. If Respondent fails to timely submit any reports, as referred to in Paragraph 39(b), in accordance with the timelines set forth in this CA/FO, Respondent agrees to pay a stipulated penalty of $100 for each day after the report was due until it submits the report in its entirety.

44. 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 34 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 34.

45. 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.

46. 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.

D. Force Majeure

47. 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.

48. 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 five (5) business days of the delay or within five (5) business days of Respondent's knowledge of the anticipated delay, whichever is earlier, notify EPA by e-mail in accordance with Paragraph 51. 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.

49. 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.

E. Submissions

50. All reports, notifications, documentation, submissions, and other correspondence required to be submitted by this Order 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: shih.alex@epa.gov and magnuson.janet@epa.gov. The subject line of all e-mail 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:

Alex Shih
U.S. Environmental Protection Agency, Region IX
Enforcement and Compliance Assurance Division
75 Hawthorne Street (ECAD-3-3)
San Francisco, CA 94105

and

Janet A. Magnuson
U.S. Environmental Protection Agency, Region IX
Office of Regional Counsel
75 Hawthorne Street (ORC-2-3)
San Francisco, CA 94105

51. The 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.*

52. 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.

53. 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.

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

55. 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*.

56. The Parties consent to service of this CA/FO by e-mail at the following e-mail addresses: shih.alex@epa.gov (for Complainant) and jboman@hawthornecat.com (for Respondent).

F. General Provisions

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

58. Full compliance with this CA/FO shall resolve only 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).

59. Full compliance with this CA/FO shall not in any manner affect the right of EPA to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any

violation of law, except with respect to the claims described in Section IV that have been specifically resolved by this CA/FO.

60. 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, and 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.

61. The provisions of this CA/FO shall apply to and be binding upon Respondent, its officers, directors, employees, and successors or assigns. Action or inaction of any persons, firms, contractors, employees, 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 the extensions of time to complete such obligations provided by EPA pursuant to Paragraph 50.

62. 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.

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

64. This CA/FO may be executed and transmitted by facsimile, e-mail, 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.

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

66. 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 V.B (Injunctive Relief) is restitution or required to come into compliance with law.

VI. Effective Date

67. 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.

68. 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 the conditions under which a person not party to a proceeding may petition to set aside a CA/FO on the basis that material evidence was not considered.

69. 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 Hawthorne Pacific Corp.
Docket No. UIC-09-2023-0074

Hawthorne Pacific Corp.:

_____/s/_____ Date: __8/3/2023_____

Jeffrey Boman, Secretary

Consent Agreement and Final Order
In the Matter of Hawthorne Pacific Corp.
Docket No. UIC-09-2023-0074

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

_____/s/_____ Date: ___8/7/2023_____
Amy C. Miller-Bowen, Director
Enforcement and Compliance Assurance Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: Hawthorne Pacific Corp., Respondent. Proceedings under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c).	)	DOCKET NO. UIC-09-2023-0074 **CONSENT AGREEMENT AND FINAL ORDER**

FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region IX, and Hawthorne Pacific Corp. ("Respondent"), having entered into the foregoing Consent Agreement, and EPA Region IX 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-09-2023-0074) be entered;
2. Respondent pay an administrative civil penalty of $71,422 to the Treasurer of the United States of America in accordance with the terms set forth in the Consent Agreement;
3. Respondent close the cesspools by April 1, 2025, in accordance with the terms set forth in 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.

_____ Date: _____

Beatrice Wong
Regional Judicial Officer
U.S. EPA, Region IX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

IN THE MATTER OF:	)	Docket No. SDWA-UIC-AOC-09-2022-0002
	)	
Chieko Takahashi Family Limited Partnership	)	**[PROPOSED] ADMINISTRATIVE ORDER ON CONSENT**
	)	
Respondent.	)	Proceeding under Sections 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).
	)	
	)	
	)	

I. INTRODUCTION

1. The United States Environmental Protection Agency ("EPA") and the Chieko Takahashi Family Limited Partnership ("Respondent") (collectively, the "Parties") voluntarily enter into this Administrative Order on Consent ("Consent Order" or "AOC"). Respondent owns two (2) Large Capacity Cesspools ("LCCs") that serve the commercial building leased to Café Haleiwa and Haleiwa Bottle Shop, located at 66-460 and 66-452 Kamehameha Highway, Haleiwa, Hawai'i 96712 (Tax Map Key: 1-6-2-006-012) ("Property").

2. EPA alleges that Respondent has violated and continues to violate requirements of the federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq.*, and 40 C.F.R. §§ 144.84(b)(2) and 144.88, which required owners or operators of existing LCCs to close them no later than April 5, 2005. This Consent Order directs Respondent to remedy the ongoing alleged violations relating to the continued ownership of LCCs at the Property in accordance with the compliance schedule set forth in this Consent Order.

II. JURISDICTION

3. Respondent admits the jurisdictional allegations in this Consent Order and neither admits nor denies the factual allegations in this Consent Order.

4. EPA enters into and issues this Consent Order under the authority vested in the EPA Administrator by section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c).

5. The EPA Administrator has delegated the authority to take these actions to the Regional Administrator for EPA, Region IX, through EPA Delegation 9-34 (May 11, 1994). This authority has been further delegated to the Director of EPA Region IX's Enforcement and Compliance Assurance Division by Regional Delegation R9-9-34 (Feb. 11, 2013).

6. The Parties enter into this Consent Order voluntarily and hereby agree to the terms and issuance of this Consent Order. Respondent agrees not to contest EPA's authority or jurisdiction to enter this Consent Order in this or in any subsequent proceeding to enforce the terms of this Consent Order. This Consent Order constitutes an enforceable agreement between Respondent and EPA.

7. Respondent agrees to undertake and complete all actions required by this Consent Order. Respondent waives the opportunity to receive 30-day notice of this AOC, and to request a hearing on or to appeal this AOC under sections 1423(c)(3)(A) and 1423(c)(6) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(A), (c)(6).

III. PARTIES BOUND

8. This AOC shall bind Respondent and its officials, officers, directors, agents, employees, attorneys, successors, and assigns, and all persons, contractors, and consultants acting in concert with Respondent.

9. The undersigned signatory for Respondent certifies that they are authorized to execute this Consent Order and legally bind the Respondent.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

10. Pursuant to Part C of the Act, 42 U.S.C. §§ 300h through 300h-8, EPA has promulgated regulations establishing minimum requirements for Underground Injection Control ("UIC") programs to prevent underground injection that endangers drinking water sources. These regulations are set forth at 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.

Statutory and Regulatory Authority

11. 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.

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

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" that is completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

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 (i) single-family residential cesspools or (ii) non-residential cesspools that receive solely sanitary waste and have the capacity to serve fewer than twenty (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 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 required that owners or operators of existing LCCs close those LCCs by no later than April 5, 2005 and prohibited new LCCs after that date.

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, and therefore has "primacy" for the program in Hawaii.

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 subject to an order by EPA pursuant to section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1).

27. Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), authorizes EPA to issue either a penalty order or a compliance order, or both, against any person for violations of any requirement of an applicable UIC program.

Alleged Violations

28. Since at least April 5, 2005, Respondent has owned two (2) Large Capacity Cesspools ("LCCs") that serve the commercial building leased to Café Haleiwa and Haleiwa Bottle Shop, located at 66-460 and 66-452 Kamehameha Highway, Haleiwa, Hawai‘i 96712, respectively. (Tax Map Key: 1-6-2-006-012.)

29. Respondent is an "owner or operator" of these cesspools as that term is defined at 40 C.F.R. § 144.3.

30. Respondent is a limited partnership in the State of Hawai'i, and 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.

31. EPA alleges that each of the two cesspools referred to in Paragraph 28 meets the definition of an LCC and does not service a single-family residence or have the capacity to serve fewer than twenty (20) persons per day pursuant to 40 C.F.R. § 144.81(2).

32. Respondent failed to close the LCCs referenced in Paragraph 28 by April 5, 2005, or any time thereafter, as required by 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

33. EPA therefore alleges that Respondent is in continuing violation of the LCC prohibition set forth in 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

V. COMPLIANCE PROVISIONS

34. Based on the foregoing findings and pursuant to EPA's authority under section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), Respondent agrees and is hereby ORDERED to complete the following work:

a. By January 31, 2024, close the two LCCs 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 and conversion 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 LCCs, submit to EPA a final report describing how each LCC was closed, including copies of the cesspool Backfill Closure Reports for the closure of each 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 HDOH approval.

35. Respondent shall inform the EPA in writing if any new information or circumstances cause Respondent to modify any planned actions or schedule for achieving compliance with this Consent Order.

36. If Respondent fails to comply with the requirements set forth in Paragraph 34, above, EPA may request the United States Department of Justice bring an action to seek penalties for violating this Consent Order pursuant to Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b).

A. Reporting Requirements

37. Respondent shall submit quarterly compliance reports no later than the fifteenth day of every third month, beginning the June following the Effective Date of this AOC. These compliance reports shall describe the progress that has been made toward closure of each LCC in accordance with Paragraph 34. Respondent shall submit quarterly compliance reports until Respondent's final closure of the two LCCs in accordance with Paragraph 34.

38. Each compliance report must be accompanied by a certification, as described in Paragraph 52, from Respondent's authorized representative.

B. Stipulated Penalties

39. If Respondent fails to comply with any provision of this Consent Order, Respondent agrees to pay upon EPA's demand the stipulated penalties set forth in this paragraph unless EPA has excused Respondent's delay according to the procedures provided in Subsection C of this Section of the Consent Order. Stipulated penalties shall begin to accrue on the day after complete performance is due, or the day a violation occurs and shall continue to accrue through

the final day of the correction of the noncompliance or completion of the activity. Stipulated penalties are calculated as follows:

i. $300 per day per violation for the first through the thirtieth day of noncompliance;

ii. $500 per day per violation for the thirty-first through the sixtieth day of noncompliance;

iii. $1,000 per day per violation for the sixty-first day of violation and beyond.

40. Respondent must pay the stipulated penalty within thirty (30) days of receipt of EPA's stipulated penalty demand, according to the process provided in the demand. If any payment is not received within thirty (30) calendar days of being due, interest, handling charges, and late payment penalties will begin to accrue in the same manner as set forth at 31 U.S.C. § 3717 and 40 C.F.R. § 13.11.

41. Neither the demand for, nor payment of, a stipulated penalty relieves Respondent of the obligation to comply with any requirement or deadline of this Consent Order.

42. EPA may, in the unreviewable exercise of its discretion, elect to pursue any other administrative or judicial remedies in lieu of assessing some or all of the stipulated penalties due under this Consent Order.

43. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties due under this Consent Order.

44. Respondent may pay the stipulated penalty by check (mail or overnight delivery), wire transfer, Automated Clearing House (ACH), 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

45. Respondent shall provide notice of stipulated penalty payments made in accordance with Paragraph 44 accompanied by the title and docket number of this action, to the EPA Region IX Compliance Officer at the address provided in Paragraph 55 below.

C. Delays

46. "*Force majeure*," for purposes of this Consent Order, is defined as any event arising from causes beyond Respondent's control, the control of any entity controlled by Respondent, or the control of Respondent's contractors, which delays or prevents the performance of any obligation under this Consent Order, despite Respondent's reasonable best efforts to fulfill the obligation. The requirement that Respondent exercises "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 as it is occurring and/or after it has occurred, including to prevent or minimize any resulting delay to the greatest extent possible. 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 Consent Order, failure to diligently pursue funding source(s) for work to be performed under this Consent Order, or normal inclement weather.

47. Respondent shall notify EPA in writing, within 10 business days, of any event that occurs that causes or is likely to cause delay in compliance with any deadline specified in this Consent Order. The notification should explain whether the delay was caused by *force majeure*, as defined in Paragraph 46 should describe the measures Respondent has taken and/or

will take to prevent or minimize the delay and should specify the timetable by which Respondent intends to implement these measures to ensure compliance with the applicable requirement or deadline. Respondent shall adopt all reasonable measures to avoid or minimize delay. Submittal of the notice to EPA required by this paragraph does not, by itself, extend any deadline or timeframe in this Consent Order.

48. If, upon receiving notice required under Paragraph 47, EPA agrees that the delay or anticipated delay in compliance with this Consent Order has been or will be caused by circumstances that constitute *force majeure* as defined in Paragraph 46, and upon request by Respondent, EPA may extend the applicable compliance deadline. A *force majeure* extension of any particular deadline shall not be considered a modification of this Consent Order nor affect any other provisions under this Consent Order.

49. Respondent has a burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be caused by *force majeure*, that the duration of the delay was, or will be warranted under the circumstances, that Respondent exercised or is using their best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this subsection.

50. In the event that EPA does not agree that a delay in achieving compliance with the requirements of this Consent Order has been or will be caused by *force majeure*, EPA will notify Respondent in writing of EPA's decision and any delays will not be excused.

VI. SUBMISSIONS AND NOTIFICATIONS

51. All information and documents submitted pursuant to this Consent Order shall be signed by a duly authorized representative of the Chieko Takahashi Family Limited Partnership.

52. The person signing Respondent's submissions under this Consent Order shall make the following certification:

> *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 information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, I certify that 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.*

53. Submissions by Respondent shall be deemed made on the date they are sent electronically, or on the date postmarked if sent by U.S. mail.

54. Unless otherwise specified, all reports, notifications, documentation, submissions, and other correspondence required to be submitted by this Consent Order should be submitted to EPA electronically. 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 address: Shareem.jelani@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.

55. All submissions made pursuant to this Consent Order via mail shall be sent to the EPA Region IX Compliance Officer at the following address:

Jelani Shareem
U.S. EPA Region IX
Enforcement and Compliance Assurance Division
Drinking Water Section (ECAD 3-3)
75 Hawthorne Street
San Francisco, CA 94105
shareem.jelani@epa.gov

VII. RECORD PRESERVATION

56. Until five (5) years after termination of this Consent Order, Respondent shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to the performance of the tasks in this Consent Order. Until five (5) years after termination of this Consent Order, Respondent shall also instruct its agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in this Consent Order.

VIII. SCOPE OF CONSENT ORDER

57. Notwithstanding any delay subject to *force majeure* as described in Section V.C., Respondent shall fully implement each requirement of this Consent Order, including meeting the compliance provisions contained in Paragraph 34 and the reporting provisions contained in Paragraph 37.

58. Respondent's failure to fully implement all requirements of this Consent Order in the manner and timeframe required shall be deemed a violation of this Consent Order.

59. EPA may use any information submitted in accordance with this Consent Order in support of an administrative, civil, or criminal action against Respondent.

60. The information required to be submitted pursuant to this Consent Order is not subject to the approval requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq*.

61. This Consent Order is not and shall not be construed to be a permit under the SDWA, nor shall it in any way relieve or affect Respondent's obligations under the SDWA, or any other applicable federal or State laws, regulations, or permits. Compliance with this Consent Order shall not be a defense to any actions commenced pursuant to such applicable laws, regulations, or permits, nor does it constitute a release.

62. Issuance of this Consent Order is not an election by EPA to forego any remedies available to it under the law, including without limit any administrative, civil or criminal action to seek penalties, fines, or other appropriate relief for any violations of law. EPA reserves all available legal and equitable rights and remedies to enforce any violation alleged in this Consent Order, and to enforce this Consent Order, and the right to seek recovery of any costs and attorney fees incurred by EPA in any actions against Respondent for non-compliance with this Consent Order.

63. This Consent Order shall in no way affect the rights of EPA or the United States against any person not a party hereto.

IX. WAIVER

64. Respondent waives any and all remedies, claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including, but not limited to, any right of judicial review of the Consent Order under the Administrative Procedures Act. 5 U.S.C. §§ 701-708.

X. INTEGRATION

65. This Consent Order, and any schedules, documents, plans, etc. that will be developed pursuant to this Consent Order are incorporated into and enforceable pursuant to this Consent Order, constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understanding relating to the settlement other than those expressly contained in this Consent Order.

XI. SEVERABILITY

66. The provisions of this Consent Order shall be severable. If any provision is declared by a court of competent jurisdiction to be unenforceable, then the remaining provisions shall remain in full force and effect.

XII. MODIFICATIONS OF CONSENT ORDER

67. Modification of this Consent Order including any plans or schedules developed pursuant thereto shall be in writing and shall take effect only when agreed to in writing by both Parties and after any public notice required by section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B). Any agreed upon Modification may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute the Modification.

XIII. COMPLETION

68. Respondent may request that EPA issues a written notice of completion once Respondent have fully completed all work required under this Consent Order.

XIV. PUBLIC NOTICE

69. EPA's consent to this Consent Order is subject to the requirements of section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B), that EPA provide public notice of, and reasonable opportunity to comment on, any proposed Consent Order. EPA will publicly notice this Consent Order and provide the opportunity to the public to comment for thirty (30) days prior to it being issued by EPA. EPA reserves the right to withdraw or seek modification to the proposed Consent Order in response to public comments. In such case, Respondent will have no obligations under the proposed Consent Order unless and until a revised Consent Order is agreed upon by the Parties and finalized by EPA. Until such time, EPA may pursue any and all enforcement options provided by law.

XV. EFFECTIVE DATE

70. Pursuant to section 1423(c)(3)(D) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(D), this Consent Order shall become effective thirty (30) days following its issuance.

IT IS SO AGREED AND ORDERED:

For Chieko Takahashi Family Limited Partnership:

Geri T. Guillemot "/s/" — February 9, 2022
Geri T. Guillemot — Date
General Partner, Chieko Takahashi Family Limited Partnership
P.O. Box 36
Haleiwa, HI 96712

For U.S. Environmental Protection Agency, Region IX:

Amy C. Miller-Bowen "/s/" — February 25, 2022
Amy C. Miller-Bowen — Date
Director, Enforcement and Compliance Division
U.S. Environmental Protection Agency, Region IX
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: LuckyU Enterprises, Inc. 59-397 Wilinau Road Haleiwa, HI 96712 Respondent. Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	)	DOCKET NO. UIC-09-2019-0048 **CONSENT AGREEMENT AND** [PROPOSED] **FINAL ORDER**

CONSENT AGREEMENT

I. AUTHORITIES AND PARTIES

1. The United States Environmental Protection Agency ("EPA" or "Complainant"), Region IX and Respondent LuckyU Enterprises, Inc. ("LuckyU") (collectively the "Parties") agree to settle this matter and consent to the entry of this Consent Agreement and [Proposed] Final Order ("CA/FO"), which commences this proceeding in accordance with 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.45(b). Pursuant to 40 C.F.R. § 22.18(b)(3), this proceeding will conclude upon the issuance of a Final Order by the Regional Judicial Officer.

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"), 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 LuckyU Enterprises, Inc. is a Hawaii corporation with its principal place of business located at 56-505 Kamehameha Highway, Kahuku, Hawaii, 96731.

II. APPLICABLE STATUTES AND REGULATIONS

5. Pursuant to Part C of the SDWA, 42 U.S.C. §§ 300h to 300h-8, EPA has promulgated regulations at 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148 establishing minimum requirements for State UIC programs to prevent underground injection that endangers drinking water sources within the meaning of Section 1421(d)(2) of the SDWA, 42 U.S.C. § 300h(d)(2).

6. Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), authorizes EPA to administer the UIC program in states that do not have EPA-approved state programs. The State of Hawaii has not acquired primacy of the UIC program. Therefore, EPA Region IX directly implements UIC program in the State of Hawaii. *See* 40 C.F.R. § 147.601.

7. Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), defines a "person" to mean 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.

8. Section 1421(d)(1) of the SDWA, 42 U.S.C. § 300h(d)(1), and 40 C.F.R. § 144.3, defines "underground injection" to mean, in relevant part, "the subsurface emplacement of fluids by well injection." *See also* 40 C.F.R. § 144.3.

9. 40 C.F.R. § 144.3 defines "well injection" to mean "the subsurface emplacement of fluids through a well."

10. 40 C.F.R. § 144.3 defines a "well" to mean, in relevant part, "[a] bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system."

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

12. 40 C.F.R. § 144.3 defines "injection well" to mean "a 'well' into which 'fluids' are being injected."

13. 40 C.F.R. § 144.3 defines "fluid" to mean "any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state."

14. 40 C.F.R. § 144.3 defines "contaminant" to mean "any physical, chemical, biological, or radiological substance or matter in water."

15. 40 C.F.R. § 144.3 defines "owner or operator" as "the owner or operator of any 'facility or activity' subject to regulation under the UIC program."

16. 40 C.F.R. § 144.3 defines "facility or activity" to mean "any UIC 'injection well,' or any other facility or activity that is subject to regulation under the UIC program."

17. 40 C.F.R. § 144.6 provides for six classes of injection wells, and 40 C.F.R. § 144.81 provides that "Class V" injection wells include large capacity cesspools ("LCCs"), which 40 C.F.R. § 144.81(2) defines 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" and which 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."

18. 40 C.F.R. § 144.82 provides that the "owner or operator" of a Class V UIC well "must comply with other Federal UIC requirements in 40 C.F.R. parts 144 through 147," and must also "comply with any other measures required by your State or EPA Regional Office UIC Program to protect [underground sources of drinking water]."

19. 40 C.F.R. §§ 144.84(b)(2) and 144.88 required the owners or operators of all existing LCCs to have closed these wells by April 5, 2005.

20. 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 $22,363 per day per violation up to a maximum of $279,536, or requiring compliance, or both, against any person who violates the SDWA or any requirement of an applicable UIC program.

III. ALLEGATIONS

21. Respondent is a corporation and thus 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.

22. Since at least 2006, Respondent has been the fee simple owner of a commercial property located at 56-505 Kamehameha Highway (the "Property") containing various foods stands and a public restroom (the "Facility") in the Kahuku on the Island of Oahu.

23. Since at least 2006, Respondent has owned and/or operated four non-residential cesspools located on the Property with the capacity to serve at least 20 persons at the Facility. These cesspools are therefore considered LCCs pursuant to 40 C.F.R. § 144.81(2).

24. In September 2017, the Hawaii Department of Health ("HDOH") approved Respondent's plans to replace three of the LCCs located on the Property with a connection to the Honolulu County sewer system. One of the LCCs was closed by the Respondent in 2014.

25. In accordance with Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), and 40 C.F.R. § 19.4, Respondent is liable for administrative penalties of up to $22,363 per day per violation up to a maximum of $279,536 for failing to close the LCC by April 5, 2005 in accordance with 40 C.F.R. §§ 144.84(b)(2) and 144.88 until January 17, 2019.

IV. SETTLEMENT TERMS

A. GENERAL PROVISIONS

26. 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) and waives any right to contest the allegations or to appeal the Final Order accompanying this CA/FO. 40 C.F.R. § 22.18(b)(2).

27. Respondent also expressly waives any right to contest the allegations contained in the Consent Agreement and to appeal the Final Order under the SDWA or the Administrative Procedures Act, 5 U.S.C. §§ 701-706.

28. Respondent acknowledges and agrees to the terms of this CA/FO as the owner and/or operator of the LCCs described above.

29. 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 specific SDWA violations identified in this CA/FO. Full compliance with this CA/FO, which includes payment of an administrative civil penalty in accordance with Section IV.B of this CA/FO, shall constitute full settlement of Respondent's liability for federal civil claims for the specific SDWA violations identified in this CA/FO.

30. 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.

31. 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 those claims that have been specifically resolved pursuant to Paragraph 31 above.

32. This CA/FO is not a permit or modification of a permit, and does not affect Respondent's obligation to comply with any and 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.

33. 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. Violation of this CA/FO shall be deemed a violation of the SDWA.

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

35. 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 Consent Agreement 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.

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

B. CIVIL ADMINISTRATIVE PENALTY

37. Respondent agrees to the assessment of a civil administrative penalty in the amount of sixty-two thousand one hundred forty three dollars ($62,143).

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

39. The penalty may be paid 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

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 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

Christopher Chen, Compliance Officer

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

41. 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 Respondents owe to EPA for Respondent's failure to pay the civil administrative penalty by the deadline specified in Paragraph 38.

a. 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).

b. 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).

c. 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).

42. Stipulated Penalties.

a. If Respondent fails to pay the assessed civil administrative penalty specified in Paragraph 37 by the deadline specified in Paragraph 38, Respondent agrees to pay in addition to the assessed penalty, a stipulated penalty of $250 per day for each day the payment is late.

b. 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 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 41.

c. 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.

d. 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.

43. 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.

44. Respondent shall tender any interest, handling charges, and late penalty payments, and stipulated penalty payments, in the same manner as described in Paragraphs 41 and 42 above.

C. INJUNCTIVE RELIEF

45. Respondent shall close the three LCCs that are the subject of this CA/FO in accordance with EPA's UIC LCC closure requirements at 40 C.F.R §144.89 and in accordance with any additional Hawaii Department of Health ("HDOH") closure requirements ("Full Closure"), no later than 7 months from this CA/FO's Effective Date (hereinafter, the "Closure Date").

46. Respondent shall submit quarterly status reports no later than the 15th of every month, beginning the 2nd month following the Effective Date of this CA/FO, describing progress that has been made closing the remaining three (3) LCCs that are the subject of this CA/FO. The quarterly status reports shall describe the status of any LCCs that have been closed in accordance with 40 C.F.R §144.89 and HDOH requirements, including any HDOH approvals of the closure of the LCCs and/or conversion of the closed LCCs to individual wastewater systems, and any HDOH letters of approval to operate an individual wastewater system.

47. If Respondent fails to pay the assessed civil administrative penalty specified in Section IV.B of this CA/FO by the deadline specified in that section, or fails

to meet the compliance deadline for closure of the three (3) LCCs at the Property by the deadline specified in Section IV.C of this CA/FO, Respondent agrees to pay in addition to the assessed penalty, a stipulated penalty of $250 per day for each day Respondent is late in making the penalty payment or meeting the closure deadline for the LCCs on the Property.

D. NOTICES

48. Respondent must send any written communications to the following addresses:

Christopher Chen, Compliance 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)
San Francisco, CA 94105

V. EFFECTIVE DATE

49. 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:

FOR LUCKYU ENTERPRISES, INC:

Troy Nitsche "/s/" Date: June 06, 2019
Troy Nitsche

_____

President

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Amy C. Miller "/s/" Date: June 25, 2019
Amy C. Miller
Director, Enforcement and Compliance Assurance Division, Region IX
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Of counsel:

Julia Jackson
Attorney-Advisor
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF: LuckyU Enterprises, Inc. 59-397 Wilinau Road Haleiwa, HI 96712 Respondent. Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	)	DOCKET NO. UIC-09-2019-0048 **CONSENT AGREEMENT AND** [PROPOSED] **FINAL ORDER**

It is Hereby Ordered that this Consent Agreement and Final Order (U.S. EPA Docket No. UIC-09-2019-0048) be entered and that Respondent shall pay a civil penalty in the amount of sixty-two thousand one hundred forty three dollars ($62,143) in accordance with the terms of this Consent Agreement and Final Order.

_____
Signature

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

SYLVIA QUAST
Regional Counsel
United States Environmental Protection Agency, Region 9

JULIA JACKSON
Attorney-Advisor
United States Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105
(415) 972-3948

Attorneys for Complainant

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, California 94105

Seven-Eleven Hawaii, Inc.	)	DOCKET NO. UIC-09-2023-0036
Respondent.	)	**CONSENT AGREEMENT AND FINAL ORDER**
Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).	)	

CONSENT AGREEMENT

I. AUTHORITIES AND PARTIES

1. This is an administrative action commenced and concluded under Section1423(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 Seven-Eleven Hawaii, Inc. (Respondent). Respondent was incorporated in the State of Hawaii on November 30, 1989.

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 $145,000 and the compliance requirements specified below.

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

7. Consistent with 40 C.F.R. § 22.18(b)(2), for the purpose of this proceeding, Respondent: admits the jurisdictional allegations of the CA/FO; neither admits nor denies the specific factual allegations contained in the CA/FO; consents to the assessment of the stated civil penalty, and to all conditions specified in the Consent Agreement; and waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying the Consent Agreement.

8. Respondent further waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to 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 under 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.

III. STATUTORY AND REGULATORY BACKGROUND

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 (6) 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 be a cesspool that includes "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) classify 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 injection 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 prohibit 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 Hawaii, 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.

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. Respondent operates 66 (sixty-six) convenience stores in Hawaii. Respondent is the operator or owner of the sanitary waste system at 55 (fifty-five) of those 66 (sixty-six) locations ("Subject Convenience Stores"). Of the 54 Subject Convenience Stores, EPA investigated the following three stores in July 2021: 51-484 Kamehameha Highway, Kaaawa, HI 96730 (TMK: 5-1-011:044); 15-2875 Government Road, Pahoa, HI 96778 (TMK: 3-1-5-011-014); and 1311 Kilauea Avenue, Hilo, HI 96720 (TMK: 3-2-2-054-018). The three investigated stores are collectively referenced herein as the "Store Locations."

30. The bathroom in each Store Location is serviced by a cesspool. EPA alleges that each cesspool at the Store Locations meets the definition of a LCC, 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.

31. Since at least April 5, 2005, Respondent has operated the three (3) LCCs located at the Store Locations.

32. Each day that Respondent failed to close the LCCs at the Store Locations, identified in Paragraph 29, after April 5, 2005, constitutes an ongoing violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

V. SETTLEMENT TERMS

A. Civil Penalty

33. Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), requires the EPA 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.

34. Within thirty (30) days of the Effective Date of this CA/FO, Respondent must pay a civil penalty of ONE HUNDRED FORTY-FIVE THOUSAND DOLLARS ($145,000) 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.

35. 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 59.

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

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, in addition to any stipulated penalties due under Section V.C, 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 thirty (30) days past due; and 6% per year penalty on any principal amount ninety (90) days past due.

38. If Respondent does not pay timely the civil penalty due under Paragraph 34 and/or any stipulated penalties due under Section V.C, 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, non-payment 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.

B. Compliance Requirements
LCC Closures – Store Locations

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

a. Within fifteen (15) days after this CA/FO becomes effective, Respondent shall execute contracts with an architect and an engineering firm for the closure of the cesspools at the Store Locations.

b. Within ninety (90) days after Respondent executes the contracts referenced in Paragraph 39(a), Respondent shall complete the initial design for the closures and retrofits of

the cesspools at the Store Locations and submit complete applications for permits for the installation of a state approved individual wastewater system ("Installation Permits") to the State of Hawaii Department of Health (HDOH).

c. Within ninety (90) days after HDOH issues Installation Permits on Oahu and within one hundred and twenty (120) days after HDOH issues Installation Permits on the Big Island (Hawaii), Respondent shall complete the closure of the cesspools at the Store Locations and the installation/retrofit of the new wastewater systems, 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 HDOH closure requirements, and shall submit documentation to HDOH requesting final approval. The total time from the submission of complete applications in Paragraph 39(b) until the closures of the cesspools at the Store Locations shall not exceed three hundred (300) days.

d. Within thirty (30) days of closure of the last of the cesspools at the Store Locations, Respondent shall submit to EPA a Final LCC Closure Report describing how each LCC was closed, including copies of any cesspool backfill closure reports for the closure of each cesspool; and

e. If Respondent installs one or more replacement wastewater systems, such as Individual Wastewater Systems ("IWS(s)"), then the design and installation of such systems shall comply with all HDOH requirements.

f. In addition, as part of the Final LCC Closure Report, Respondent shall submit to EPA all approvals for the closure of the LCCs and any replacement systems issued by HDOH, provided that, should HDOH not issue any approval within thirty (30) days of closure of the last cesspool at the Store Locations, Respondent shall submit such approval within fourteen (14) days of receipt of the approval by Respondent.

40. Respondent shall inform the EPA in writing if any new information or circumstances cause Respondent to modify any planned actions or schedule for achieving compliance with this CA/FO.

41. If Respondent fails to comply with the requirements set forth in Paragraph 39, above, pursuant to Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b), EPA may request the United States Department of Justice to bring an action in federal district court seeking an order requiring compliance with this CA/FO and/or penalties for violating this CA/FO.

42. Respondent shall perform a compliance audit ("Audit") in accordance with Paragraphs 44-47 below of the 54 Subject Convenience Stores[1] to identify and close all identified LCCs in accordance with Paragraph 46 below.

43. The Parties agree that for violations reported or otherwise disclosed to EPA and corrected (i.e. cesspool closure) under, and in accordance with, the Audit provisions of this CA/FO, below, and subject to the last sentence of this Paragraph, Respondent shall pay a per-LCC economic benefit payment of $6,607 (to be paid contemporaneously with Respondent's submission of its Final LCC Closure Report and using the method of payment specified in Paragraph 34) and thereby will receive 100% mitigation of gravity-based penalties for the identified LCCs. The foregoing 100% mitigation of gravity-based penalties is provided on condition that: (i) Respondent audits the 54 Subject Convenience Stores and closes all identified LCCs in accordance with the requirements of this CA/FO; and (ii) Respondent is correct in its

[1] The convenience stores whose wastewater systems Respondent represents it does not to operate or own, and are therefore not subject to the Self-Audit requirements of Paragraph 44-47, are: (1) 4805 Bougainville Drive, Oahu; (2) 111 Alamaha Street, Maui; (3) 98-150 Kaonohi Street, Oahu; (4) 99-197 Aiea Heights Drive, Oahu; (5) 1199 Dillingham Drive, Oahu; (6) 1960 Kapiolani Boulevard, Oahu; (7) 900 N. Nimitz Highway, Oahu; (8) 46-047 Kamehameha Highway, Oahu; (9) 555 N. King Street, Oahu; (10) 693 Komohana Street, Oahu, and (11) 1040 Bishop Street, Oahu.

representations regarding the 11 convenience stores whose waste systems it does not operate or own, as identified in footnote 1.

Compliance Audit

44. Respondent shall comply with the following Audit requirements:

a. **Choose an Auditor to Conduct LCC Inspections**: No later than one-hundred eighty (180) calendar days after 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 or educational background relevant to LCCs and at least five (5) 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 or technical 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. 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.

i. 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 (3) years. The Auditor's records of the Audit shall be made available to EPA upon request.

ii. 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 HDOH; (C) contain an HDOH-permitted 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 twenty (20) persons per day; or (E) are raw land.

iii. Sufficient Documentation: No later than ninety (90) days of the Effective Date of this CA/FO, Respondent shall submit to EPA a proposed list of Target and Non-Target Properties (which together will encompass all of the Subject Convenience Stores). This list may be prepared and submitted by Respondent without using its Auditor, but 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 (1) single-family residence: a Tax Map Key code showing that the property contains only one single-family residence.

5. For raw land: a "Building Value" of zero according to government tax records as of the Effective Date of this CA/FO.

iv. If EPA approves of the list of Target and Non-Target Properties, then Respondent shall proceed with the next step of the Audit (inspection of Target Properties).

v. If EPA disapproves of a Non-Target Property determination for any property and determines a Property is instead a Target Property that should be inspected, it shall provide a rationale for any Non-Target Property it disapproves. Upon receipt of EPA's written Non-Target Property disapproval, Respondent shall re-examine 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).

vi. 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 at least three (3) years after the Audit is complete. 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.

vii. Each list of Target and Non-Target Properties submitted to EPA must be certified by Respondent pursuant to Paragraph 60.

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

i. No later than ninety (90) days after EPA's approval of the list of Target Properties, the Auditor shall inspect each of the Target Properties for the presence of an LCC. 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 Hawaii under similar conditions.

45. **Inspection Completion Reports**: No later than one-hundred twenty (120) days of the Inspection Completion Date, the Auditor shall sign and submit an Inspection Completion Report to EPA documenting the findings of the Auditor's Target Properties inspections. 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.

46. **LCC Closure and Schedule Plan**:

a. With the Inspection Completion Report, 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: (i) 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; and (ii) the time it takes to obtain state and local approvals for the work. 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, 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 months of EPA's actual or deemed approval—pursuant to Paragraph 46(b)—of the LCC Closure Plan and Schedule, 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.

47. **Final Audit LCC Closure Reports**: Within thirty (30) days of closure of each LCC identified through this Audit, Respondent shall submit to EPA a Final Audit LCC Closure Report that includes the certification and signature by the Auditor for that particular LCC and that briefly describes and documents completion of the LCC closure steps 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 any closure backfill reports for the closure activity.

48. 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.

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

C. Stipulated Penalties

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

51. If Respondent fails to make the payment specified in Section V.A of this CA/FO or fails to meet the compliance deadline for closure of any of the LCCs at the Store Locations by the deadline specified in Section V.B of this CA/FO, Respondent agrees to pay in addition to the assessed penalty, a stipulated penalty of $300 per day for each day the Respondent is late in making the penalty payment or meeting the closure deadline for the LCC.

52. 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 $100 for each day after the report was due until it submits the report in its entirety.

53. 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 34 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 37.

54. 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.

55. 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.

D. Force Majeure

56. For purposes of this CA/FO, Force Majeure is defined as any event arising from causes that are beyond the control of Respondent or its employees and agents, any entity controlled by Respondent, or Respondent's consultants or contractors, which delays or prevents the performance of any obligation under this CA/FO despite Respondent's reasonable best efforts to fulfil the obligation. The requirement that Respondent exercise "reasonable best efforts to fulfil 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; or normal inclement weather.

57. 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 two (2) business days of the delay or within three (3) business days of Respondent's knowledge of the anticipated delay, whichever is earlier, notify EPA by email in accordance with Paragraph 59. 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.

58. If EPA agrees that the delay or anticipated delay is due to a Force Majeure event as defined in Paragraph 56 above, 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

59. 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 Jackson.Julia@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
U.S. Environmental Protection Agency
Region 9, 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 9, Office of Regional Counsel

75 Hawthorne Street (ORC-2-3)
San Francisco, CA 94105

60. 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 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."

61. 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.

62. 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.

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

64. 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.

VII. GENERAL PROVISIONS

65. Full payment of the penalty as described in Paragraph 34 for the LCCs at the Store Locations identified in Paragraph 29 and full compliance with this CA/FO shall resolve Respondent's liability for federal civil penalties for the violations and facts alleged in this CA/FO regarding those three locations. For those LCCs identified and closed in accordance with the Audit provisions of this CA/FO, Respondent's potential liability for federal civil penalties for LCC violations are resolved to the extent that Respondent complies with the conditions set forth in Paragraph 39. 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).

66. The Parties consent to service of this CA/FO by e-mail at the following valid e-mail addresses: Young.Emma@epa.gov (for Complainant) and both Greg.Hanna@7-11hawaii.com and Deborahschmall@Paulhastings.com (for Respondent).

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

68. 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 58 above.

69. 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: (i) the claims described in Section IV for cesspools at the Store Locations identified in Paragraph 29 which Respondent has closed in full compliance with this CA/FO and has paid both gravity-based and economic benefit penalties as part of the civil penalty required by this CA/FO; and (ii) any claims for SDWA violations at any LCC identified and closed by Respondent pursuant to the Audit provision of this CA/FO to the extent resolved by Respondent's payment of economic benefit as set forth in Paragraph 43.

70. 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.

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

72. 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.

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

74. This CA/FO may be executed and transmitted by facsimile, e-mail 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.

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

76. 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 V.B (Compliance Requirements) is restitution or required to come into compliance with law.

VIII. EFFECTIVE DATE

77. 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.

78. 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.

79. 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.

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

SEVEN-ELEVEN HAWAII, INC.:

Date: 6/6/2023

Greg Hanna, President & CEO
Seven-Eleven Hawai'i, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

AMY MILLER-BOWEN Digitally signed by AMY MILLER-BOWEN Date: 2023.06.20 12:35:24 -07'00'

_____ Date: _____

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

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: _____ Date: _____

Beatrice Wong
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 9

Unitek Solvent Services, Inc.

ZONE NUMBER	CUSTOMER TELEPHONE	CUSTOMER NUMBER	SERVICE WEEK	INVOICE NUMBER
OAHU	8086828284	10-60	17-45	AF16463

AF16463

SERVICE DATE	ZONE MGR. NUMBER	CUSTOMER PURCHASE ORDER	PAYMENT TERMS
11/09/17	RKS		COD

Recycling Facility
91-125 Kaomi Loop
Kapolei, HI 96707
EPA ID HID982443715
Phone: (808) 682-8284
Fax: (808) 673-3241

Mail Payment to
Unitek Solvent Services, Inc.
P.O. Box 700370
Kapolei, HI 96709

BILL TO
***CASH SALES
PO BOX 700370
KAPOLEI HI 967090370

LOCATION
BIG ROCK RANCH
66-540 KAMEHAMEHA HWY.
HALEIWA HI 96712

ID / Description	Unit	Ordered	Shipped	Unit Price	Extension
2500 ANTIFREEZE DISPOSAL MANIFEST# 7459AF PICKED UP ON 11/9/2017	Gal	146	146	$4.15	$605.90

CONTRACT SECTION

TERMS ARE NET 30 DAYS FROM SERVICE DATE. PAST DUE ACCOUNTS ARE SUBJECT TO A **FINANCE CHARGE OF 1.5% PER MONTH (18% PER ANNUM).** IN THE EVENT OF DELINQUENCY, CUSTOMER HEREBY AGREES TO REIMBURSE UNITEK FOR ALL REASONABLE COLLECTION COSTS INCLUDING ATTORNEY'S FEES.

I FULLY UNDERSTAND THE INFORMATION PRINTED ON THE REVERSE SIDE OF THIS INVOICE AND I HEREBY INDEMNIFY UNITEK AGAINST ANY LOSS OR CLAIM ARISING FROM THE USE OF ITS PRODUCTS AND/OR SERVICES.

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PRINT NAME: _____

CUSTOMER SIGNATURE X _____

SUB-TOTAL INVOICE AMOUNT	$605.90
TAX @ 4.712 %	$28.55
INVOICE TOTAL	$634.45

PAID

PAYMENT RECEIVED SECTION

☐ CASH	TOTAL RECEIVED	APPLY PAYMENT TO:
CHECK NUMBER paid by credit card		☑ TODAY'S PRODUCTS AND SERVICES ☐ PREVIOUS BALANCE AS FOLLOWS

INV. # _____ AMOUNT $ _____

INV. # _____ AMOUNT $ _____

INV. # _____ AMOUNT $ _____

REVISED 01/16

ORIGINAL

Unitek Solvent Services, Inc.

M44658

Recycling Facility
91-125 Kaomi Loop
Kapolei, HI 96707
EPA ID HID982443715
Phone: (808) 682-8284
Fax: (808) 673-3241

Mail Payment to
Unitek Solvent Services, Inc.
P.O. Box 700370
Kapolei, HI 96709

ZONE NUMBER	CUSTOMER TELEPHONE	CUSTOMER NUMBER	SERVICE WEEK
OAHU	8086828284	10-60	17-46

INVOICE NUMBER M44658

SERVICE DATE	ZONE MGR. NUMBER	CUSTOMER PURCHASE ORDER	PAYMENT TERMS
11/15/17	ACD		COD

BILL TO
***CASH SALES
PO BOX 700370
KAPOLEI HI 967090370

LOCATION
BIG ROCK RANCH
66-540 KAMEHAMEHA HWY
HALEIWA HI 96712

ID / Description	Unit	Ordered	Shipped	Unit Price	Extension
4003 OILY WATER DISPOSAL MANIFEST# N15434A PICKED UP ON 11/15/2017	Gal	55	55	$0.79	$43.45
40035 HYDRO-CLOR TEST	EA	1	1	$30.00	$30.00
4005 DRUM DISPOSAL	Each	1	1	$45.00	$45.00
4001 PICK UP FEE	Each	1	1	$79.00	$79.00

CONTRACT SECTION

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PRINT NAME: _____

CUSTOMER SIGNATURE X _____

SUB-TOTAL INVOICE AMOUNT	$197.45
TAX @ 4.712 %	$9.30
INVOICE TOTAL PAID	$206.75

PAYMENT RECEIVED SECTION

☐ CASH	TOTAL RECEIVED	APPLY PAYMENT TO:
CHECK NUMBER 8738	$206.75	☑ TODAY'S PRODUCTS AND SERVICES ☐ PREVIOUS BALANCE AS FOLLOWS

INV. # _____ AMOUNT $ _____
INV. # _____ AMOUNT $ _____
INV. # _____ AMOUNT $ _____

REVISED 01/16

ORIGINAL

GeoTek Hawaii, Inc.

May 25, 2018
HG18-016

Duke Pontin
dpontin@hawaii.rr.com
(305) 923-5458

RE: Letter Report. UST investigation at Haleiwa Project Site

GeoTek Hawaii, Inc. (GTH) preformed ground penetrating radar services on March 29, 2018 at the project site located at 66-540 Kamehameha Highway in Haleiwa. The purpose of the survey was to locate any subsurface features that could be interpreted as a tank, fill lines or other anomalies that could be associated with an Underground Storage Tank (UST).

Two (2) Ground Penetrating Radar (GPR) survey grids were run along the southern and western boundaries of the property. Grid 1 was thirty two feet by sixty six feet (32-ft x 66-ft) in size to the west of the building and Grid 2 was forty six feet by thirty four feet (46-ft x 34-ft) in size to the south of the building. A subsurface anomaly at a depth of approximately three feet (3-ft) bgs could be seen running north for thirty feet (30-ft) from the abandoned fill island where it abruptly stops along the edge of a new asphalt patch. The location of the asphalt patch shows signs of a subsurface trench/pit. There are no signs of UST within the two survey grids on the southern and western sides of the building on the property.

GeoTek Hawaii, Inc. appreciates this opportunity to support Duke Pontin with the geophysical surveys in Haleiwa. Should you have any questions or require any additional information, please do not hesitate to contact us at (808) 223-9810.

Kevin T. Rogers
Senior Geologist

GeoTek Hawaii, Inc.
krogers@geotekhawaii.com
Phone (808)223-9810 / Fax (808)676-4948

Unitek Solvent Services, Inc.

ZONE NUMBER	CUSTOMER TELEPHONE	CUSTOMER NUMBER	SERVICE WEEK	INVOICE NUMBER
OAHU	8086828284	10-60	18-16	M45564

M45564

SERVICE DATE	ZONE MGR. NUMBER	CUSTOMER PURCHASE ORDER	PAYMENT TERMS
04/19/18	BIV		COD

Recycling Facility
91-125 Kaomi Loop
Kapolei, HI 96707
EPA ID HID982443715
Phone: (808) 682-8284
Fax: (808) 673-3241

Mail Payment to
Unitek Solvent Services, Inc.
P.O. Box 700370
Kapolei, HI 96709

BILL TO
***CASH SALES
PO BOX 700370
KAPOLEI HI 967090370

LOCATION
POHAKU NUI RANCH
66-540 KAMEHAMEHA HWY.
HALEIWA HI 96712

ID / Description	Unit	Ordered	Shipped	Unit Price	Extension
40087 PETROLEUM SOLIDS LAB TEST LAB ANALYSIS# 18031400	EA	1	1	$550.00	$550.00
4008 PETROLEUM SOLID LOCAL DISPOSAL MANIFEST# N15709A PICKED UP ON 4/19/2018	Drums	2	2	$350.00	$700.00
4001 PICK UP FEE	Each	1	1	$79.00	$79.00

CONTRACT SECTION

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PRINT NAME: _____

CUSTOMER SIGNATURE X _____

SUB-TOTAL INVOICE AMOUNT	$1,329.00
TAX @ 4.712 %	$62.62
INVOICE TOTAL	$1,391.62

PAYMENT RECEIVED SECTION

☐ CASH	TOTAL RECEIVED	✓ APPLY PAYMENT TO:
CHECK NUMBER Paid by Credit Card		☑ TODAY'S PRODUCTS AND SERVICES ☐ PREVIOUS BALANCE AS FOLLOWS

INV. # _____ AMOUNT $ _____

INV. # _____ AMOUNT $ _____

INV. # _____ AMOUNT $ _____

REVISED 01/16

ORIGINAL

WG

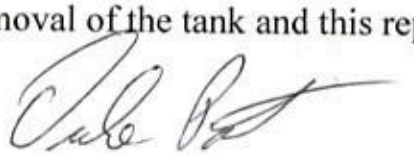
UST Removal and Closure Report
66-532 Kamehameha Hwy.
Haleiwa, Hi.
Facility ID # 9-202483
June 17, 2018

550 gallon used oil UST. Permit No. P-2016-117-T1

November 13, 2017 pumped out 205 gallons of used oil
February 5, 2018 called Nicole to introduce myself
March 12, 2018 re-pump tank, 13 gallons
March 17th and 18th 2018 remove sludge from the tank and stored in two 55-gallon salvage drums for testing and eventually pick up
March 22, 2018 met with Nicole and Roxanne to transfer the UST operating permit into my name along with submitting the necessary paperwork.
March 27, 2018 called Rich, very helpful provide me with a lot of information
March 29, 2018 use ground-penetrating radar to determine there were no other subterranean tanks on the property
April 19, 2018 had the two drums of sludge tested, picked up with 70 gallons of sludge from tank
May 23, 2018 received operating permit for UST, 550 gallon used oil tank
May 25, 2018 met with Rich, went over expectation of tank removal
May 31, 2018 3 PM removed tank from ground, Took soil samples to lab June 1, 2018 Friday morning
June 11, 2018 Monday received analytical report from TestAmerica on the soil tested, no pollution
June 12, 2018 Tuesday send report to Rich, called to discuss
June 14, 2018 Thursday mailed Roxanne notice of UST permanent closure
June 15, 2018 Friday removed the steel plate and backfilled the hole

Tank pumping and sludge disposal documentation from Unitek enclosed in this report.
TestAmerica analytical soil report of 32 pages provides an in-depth analysis.
This report includes three pictures; one is the tank still in the ground. #2 shows the bottom tank out of the ground and in a flawless state. #3 is taking soil samples at the bottom of the hole.
Site sketch with location of the UST
UST current operating permit

The Double wall fiberglass coated tank is in like new condition and will be reused at my ranch in Kahuku, Hi. Not as a UST
The owner of the tank Duke Pontin did the removal of the tank and this report.
305-923-5458 Dpontin@hawaii.rr.com



August 2, 2018 URT

Mr. Duke Pontin
66-532 Kamehameha Highway
Haleiwa, Hawaii 96712

Dear Mr. Pontin:

SUBJECT: 66-532 Kamehameha Highway
Facility ID 9-202483

The Department of Health has reviewed the following report: *UST Removal and Closure Report,* dated June 17, 2018 and prepared by yourself regarding the removal of one (1) 550-gallon underground storage tank (UST) at the subject site. Please note the report has been placed with the public record.

DOH notes the UST previously stored used oil. The report states the UST was drained of used oil and stored in drums. Unitek removed the drums in November 2017. The UST was excavated and removed from the ground on May 31, 2018 and soil samples were collected from the excavation.

Laboratory analyses of the soil samples were largely non-detectable for contaminants with the exception of 4.4 mg/kg of Total Petroleum Hydrocarbons as oil (TPH-o) vs. the DOH environmental action level (EAL) of 500 mg/kg. PCBs, chlorinated solvents, and metals were non-detectable in the soil samples.

Based on the information provided, DOH concurs that a UST release has not occurred and issues a status of *No Further Work* (NFW) for the subject UST system.

Please note that Hawaii UST regulations require evidence of petroleum or other stored substances discovered in the sub-surface of current or former UST facilities to be reported to DOH UST at (808) 586-4226 within 24 hours, including contamination found at concentrations below EALs and contamination found after receiving a status of NFA or NFW.

Generally, further work will not be required if contaminant concentrations are below appropriate EALs but notification to this office is required within 24 hours. If you have any questions regarding this letter, please contact Mr. Richard Takaba of our Underground Storage Tank Section at (808) 586-4226.

Unitek Solvent Services, Inc.

USED OIL COLLECTION

ZONE NUMBER	CUSTOMER TELEPHONE	CUSTOMER NUMBER	SERVICE WEEK	INVOICE NUMBER
60		10-60	45-17	W0922563

W0922563

Recycling Facility
91-125 Kaomi Loop
Kapolei, HI 96707
EPA ID HID982443715
Phone: (808) 682-8284
Fax: (808) 673-3241

Mail Payment to
Unitek Solvent Services, Inc.
P.O. Box 700370
Kapolei, HI 96709

SERVICE DATE	REP. NUMBER	CUSTOMER PURCHASE ORDER	PAYMENT TERMS
11-13-17	7 / A		COD

POC: Duke (305)923-5458 Surf+IDM

BILL TO
Big Rock Ranch
66-540 Kamehameha Hwy.
Haleiwa, HI 96712

LOCATION
Same as bill to

AS AN AUTHORIZED REPRESENTATIVE OF THE GENERATOR, I HEREBY CERTIFY: that our storage tank(s) and/or drum(s) contain only used oil; that this used oil is subject to regulation under 40 CFR Part 279; that it does not contain PCBs greater than or equal to 2 ppm; and that it has not been contaminated with caburetor cleaners, brake spray, freon, halogenated solvents, or other hazardous materials and/or hazardous wastes. I also certify that no other used oil collector or other entity has advised me, or anyone in my company, that this used oil is or may be contaminated with hazardous materials and/or hazardous wastes and, therefore, may have to be transported to the mainland for proper disposal.

NAME (print): DUKE PONTIN SIGNATURE:

Container No.	1	2	3	4	5	6	7	8	9	10	11	12
Tank or Drum												
Water/Sludge												
Appearance												
Clor-D-Tect												

AS AN AUTHORIZED REPRESENTATIVE OF UNITEK, I HEREBY CERTIFY: that all tests have been properly performed on each tank and/or drum; that I have only collected used oil which passed all tests; and that I have not removed any water or sludge. If any tank or drum failed these tests, I also certify that I have advised the generator that such material may be a hazardous waste, that additional laboratory analysis must be performed, and that if determined to be hazardous, such waste is not suitable for local reclamation as industrial fuel oil but instead must be transported to a government-authorized facility on the mainland for proper disposal.

NAME (print): SIGNATURE:

Material Not Regulated by D.O.T. (USED OIL)

____ DM _1_ TT _205_ GL

NOTES:

24 Hr. Emergency
No. 808-673-3229

(NAERG2008 128)

Item	Description	Price		
4000	USED OIL COLLECTION	$00.89/Gal	205	= $ 182.45
4001	PICK UP FEE	$79.00/Each	1	= $ 79.00
4002	CLOR-D-TECT TEST	$25.00/Each	1	= $ 25.00
4004	USED OIL MINIMUM/STOP CHARGE	$120.00/Each		= $
4006	USED OIL LAB ANALYSIS	$285.00/Each		= $

CONTRACT SECTION

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CUSTOMER SIGNATURE X

SUB-TOTAL INVOICE AMOUNT	182.45
TAX @ 4.712 %	
INVOICE TOTAL	182.45

PAYMENT RECEIVED SECTION

☐ CASH	TOTAL RECEIVED	APPLY PAYMENT TO:
CHECK NUMBER	182.45	☐ TODAY'S PRODUCTS AND SERVICES ☐ PREVIOUS BALANCE AS FOLLOWS

INV. # AMOUNT $

INV. # AMOUNT $

INV. # AMOUNT $

REVISED 01/16

TestAmerica Honolulu
1946 Young Street
Suite 400A
Honolulu, HI 96826
Phone: 808.486.5227 Fax:

Chain of Custody Record

131750

TestAmerica
THE LEADER IN ENVIRONMENTAL TESTING
TestAmerica Laboratories, Inc.

TAL-8210 (0713)

Regulatory Program: ☐ DW ☐ NPDES ☐ RCRA ☐ Other:

Client Contact	Project Manager: Sheri Fama	Site Contact:	Date: 6/1/18	COC No:
Company Name: DUKE PONTIN	Tel/Fax:	Lab Contact:	Carrier:	____ of ____ COCs
Address: 66-532 KAM HWY	Analysis Turnaround Time			Sampler:
City/State/Zip: HALEIWA HI 96712	☐ CALENDAR DAYS ☐ WORKING DAYS			For Lab Use Only:
Phone: 305 923 5458	TAT if different from Below ____			Walk-in Client:
Fax:	☒ 2 weeks			Lab Sampling:
Project Name: 44020435	☐ 1 week			
Site: 66-532 KAM HWY	☐ 2 days			Job / SDG No.:
PO#	☐ 1 day			

Sample Identification	Sample Date	Sample Time	Sample Type (C=Comp, G=Grab)	Matrix	# of Cont.	Filtered Sample (Y/N)	Perform MS / MSD (Y/N)	6010B 8082	8270C SIM	6010B 8260B	CHLORINATED SOLVENTS	TOTAL PCBs	Sample Specific Notes:
1	5/31/18	3PM	G	SOIL	1			√	√	√	√	√	√
1A		3PM	G		1			√	√	√	√	√	√
1B		3PM	G		1			√	√	√	√	√	√
2		3PM	G		1			√	√	√	√	√	√
2A		3PM	G		1			√	√	√	√	√	√
2B	↓	3PM	G	↓	1			√	√	√	√	√	√

Preservation Used: 1= Ice, 2= HCl; 3= H2SO4; 4=HNO3; 5=NaOH; 6= Other ____

Possible Hazard Identification:
Are any samples from a listed EPA Hazardous Waste? Please List any EPA Waste Codes for the sample in the Comments Section if the lab is to dispose of the sample.

☒ Non-Hazard ☐ Flammable ☐ Skin Irritant ☐ Poison B ☐ Unknown

Sample Disposal (A fee may be assessed if samples are retained longer than 1 month)

☐ Return to Client ☐ Disposal by Lab ☐ Archive for ____ Months

Special Instructions/QC Requirements & Comments:
Received on ice 5.4C/5.4C IR-93

Custody Seals Intact: ☐ Yes ☐ No | Custody Seal No.: | Cooler Temp. (°C): Obs'd: ____ Corr'd: ____ | Therm ID No.: ____

Relinquished by:	Company:	Date/Time:	Received by:	Company:	Date/Time:
DUKE Pontin		6-1 11AM	Eric Yates	TA-HON	6/1/18 1100
Relinquished by:	Company:	Date/Time:	Received by:	Company:	Date/Time:
Relinquished by:	Company:	Date/Time:	Received in Laboratory by:	Company:	Date/Time:

United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Attn: Amy Miller-Bowen

Ms. Bowen:

Aloha my name is Jeff Wallace and I'm writing on behalf of my colleague and close friend Mr. Duke Pontin.

As a 1974 Kahuku High School graduate, I've remained tied to this area in various capacities since, serving as manager of Amorient Aquafarms from 1978 to 1994, a state-licensed operator of the Kahuku Airbase Water System since 1999 and currently as firefighter at Kahuku Station 13 since 2000. I lay this out only to emphasize I'm committed to ensure for the well-being of our community. And this is where I feel a need to speak up on Mr. Pontin's behalf.

The airbase water system is old infrastructure. It dates back to the war when the Army-Air Corp built the airfield on Kahuku Point to support the war effort. The key word here is "old". When I first got involved with the system, it was owned and operated by Campbell Estate. Outside of meeting public health standards, little importance was put into maintaining the system, thus there were continuous leaks resulting in huge losses of water. Fast-forward to 2011, the system had been sold and Board of Directors of the new owner made a commitment to fix the problem. Trouble was, they hired a management company to the tune of $100,000 per year to manage a system that in no way could afford this ridiculous amount. And here's where Mr. Pontin stepped up.

For free, he convinced the board to let him manage the Kahuku Water Association, which not only saved it from financial ruin, it also committed him to fix the problem. With his own money, equipment and personnel, it took two years to revamp the underground piping system, but his efforts prevailed saving over sixty-million gallons of drinking water a year from being drawn out the aquafer. But he didn't stop there. Once the system was sound, he designed and implemented ways to detect future leaks. Today, our system is one of the most efficient and cost effective in the state. Something we're quite proud of.

The point of this is to show, Mr. Pontin is truly a responsible and caring champion for protecting the environment. It is something I hope you take into consideration. Mahalo for your time.

Sincerely
Jeff Wallace

COWGIRL LIFE

Resourceful Ranching

BY PARIS M STARN

DECEMBER 23, 2021

Big Rock Ranch's Indoor arena from the sky.

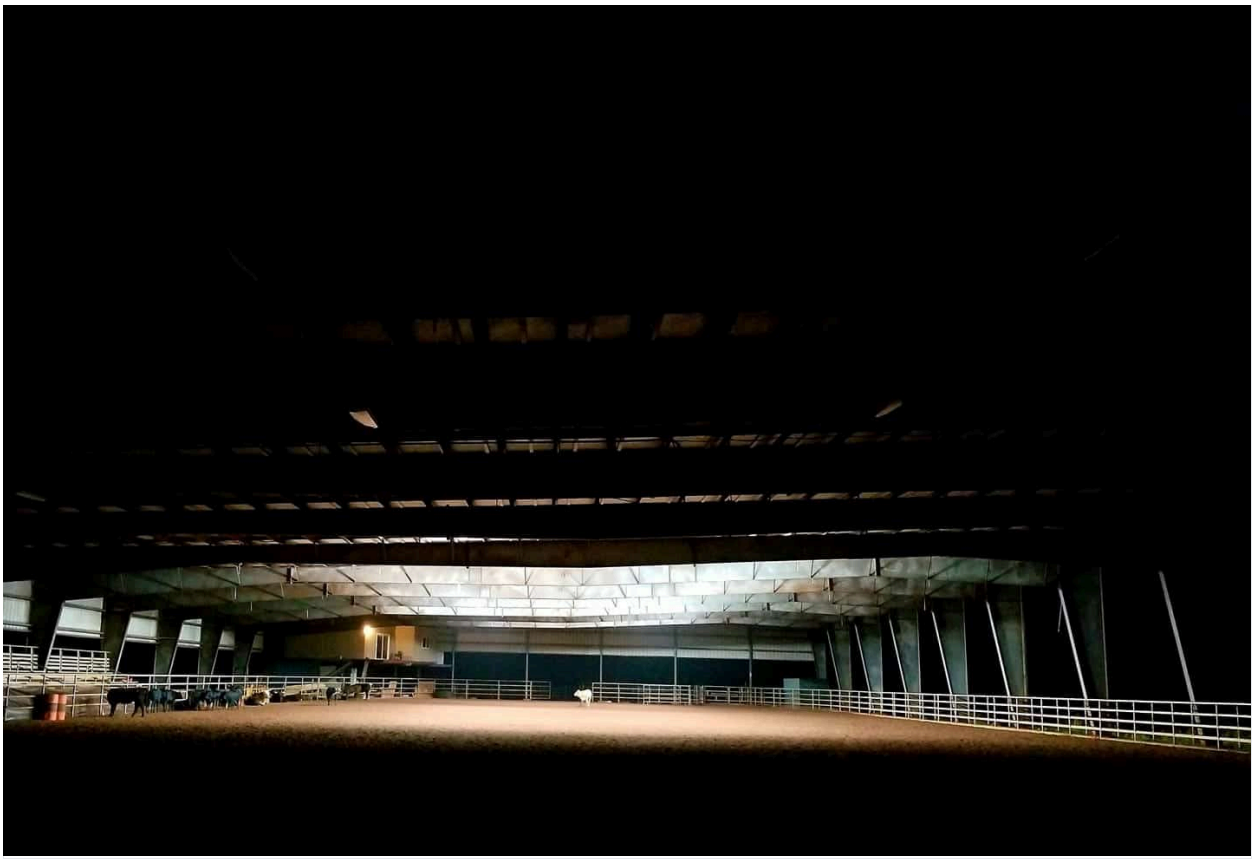
SHARE

On the island of Oahu, in the tropical state of Hawaii, there is a ranch like no other in the nation. Despite the arena being 125 x 300 and made entirely from anodized aluminum, it is under a 51,450 square foot building. But here's the catch, the roof is solar panels and the pastures have wind turbines. The Big Rock Ranch takes their resources seriously.

Big Rock Ranch, also known by its Hawaiian name "Pohaku Nui Ranch", is a tucked away secret in the islands. The arena was handmade by the Pontin family with love. Duke Pontin purchased the property for his wife, Brandi, to enjoy with her horses. The idea was always to have an indoor arena with great views of the ocean and mountain ranges. But the idea of a solar roof, an alternative source of income, quickly became a reality for the family. The energy produced from the solar is sold to local energy sources and utilized by the community.

Birds eye view of the ranch. Over 1,200 acres in total is utilized for the grass feed operation.

Yes, that's right. The roof itself is made up entirely of solar panels. It was the first building in the nation to have a 100% solar roof. Before, the solar would have to be placed on top of an already existing roof. With this type of solar roof, the efficiency increases given that there is more airflow under the panels enabling them to not get too hot.



Built in arena lights to enable the party to go on all night long.

That's not the only alternative energy that has gone on around here. Big Rock Ranch borders a wind turbine farm. They managed to secure the lease of the green grass that is under the turbines, and have been able to have a successful grass fed beef operation there, known as North Shore Livestock.

The family has worked diligently to be great stewards to the land. By clearing excess trees, they were able to encourage grass to grow freely in their pastures. North Shore Livestock has specialized in two types of cattle industries. The most prolific one is their grass fed beef operation. Known for their superior genetic program, North Shore Livestock has been producing beautiful calves out of their Hereford cows.

All of their Hereford cows are covered by Angus bulls to produce the ideal cross for their grass fed operation, a black baldy. The ranch has flown bulls in from the mainland to ensure their genetics are elite. The ranch also runs a large purebred Corriente herd. The roping cattle are flown out to the mainland to be used by producers. The ranches original Corriente cows were flown in from a ranch in Oregon.

No matter where you stand on the ranches property you are sure to have a view. It is not rare to be able to see whales jumping in the ocean while you are getting ready to rope in the arena.

The people that live and work here are dedicated to tradition and core values. Horses are used daily to sort and process cattle, cow dogs are used to clear pastures, and rain is always cherished. The operation has also been able to fully utilize land grants provided by the state of Hawaii. The ranch works diligently on their safe grazing practices and uses intenseive rotational grazing on the cattle operation.

The grass fed beef has taken off locally and the ranch is famous for their juicy ground beef and flavorful steaks. You can find their meat in restaurants around Oahu or purchase them locally for your family.

The Pontin fam today holds events such as High School Rodeos and other horse shows. They also enjoy the arena space for themselves and their team roping carriers. Eventually they would like to spread their wings into weddings as time evolves.

COWGIRL HOTLIST

Email address:*

Sign Up

COWGIRL LIFE

HOME & RANCH

HORSES

|

BIG ROCK RANCH

COWGIRL

COWGIRL MAGAZINE

DUKE PONTIN

GRASS FEED BEEF

HORSES

KEAL PONTIN

NORTH SHORE LIVESTOCK

POHAKU NUI RANCH

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HORSES

What Does A Good Mover Look Like?

COWGIRL EDITORIAL

COWGIRL Empowered: CARA BREWER

Endless inspiration for women living the Western way of life.

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Sign me up