

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)

DOCKET NO. UIC-09-2019- 0048

LuckyU Enterprises, Inc.)
59-397 Wilinau Road)
Haleiwa, HI 96712)

Respondent.)

**CONSENT AGREEMENT
AND
PROPOSED 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. 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

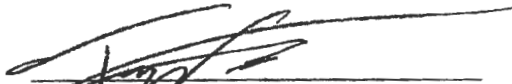
Julia Jackson, Attorney-Advisor
U.S. Environmental Protection Agency
Region IX – Office of Regional Counsel
75 Hawthorne Street (ORC-2)
San Francisco, CA 94105

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

Date: 6/6/19

President

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:



Amy C. Miller

Date: 6/25/19

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

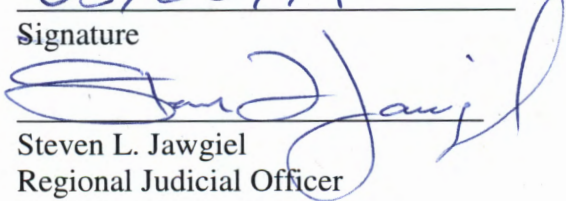
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. UIC-09-2019-0048
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LuckyU Enterprises, Inc.)	
59-397 Wilinau Road)	
Haleiwa, HI 96712)	CONSENT AGREEMENT
)	AND
)	PROPOSED FINAL ORDER
)	
Respondent.)	
)	
Proceedings under Section 1423(c) of the Safe)	
<u>Drinking Water Act, 42 U.S.C. § 300h-2(c).</u>)	

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.

08/26/19

Signature


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

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the forgoing FINAL ORDER incorporating the CONSENT AGREEMENT
3 in the matter of LuckyU Enterprises (UIC-09-2019-0048), dated _____,
4 was filed with the Regional Hearing Clerk and sent.

5 FIRST CLASS MAIL - CERTIFIED

Tracking Numbers: 7018 0680 0000 3319 8314

6 Respondent

Troy Nitsche, President
LuckyU Enterprises, Inc.
59-397 Wilinau Road
Haleiwa, HI 96712

9 HAND DELIVERED

10 EPA Region IX Attorney:

11 Julia Jackson, Attorney Advisor
12 United States Environmental Protection Agency
13 Region IX – Office of Regional Counsel (ORC-2)
14 75 Hawthorne Street
15 San Francisco, CA 94105

16 Dated at San Francisco, California: _____

8/27/19

17 

18
19 *For* : Steven Armsey
Regional Hearing Clerk
20 U.S. EPA, Region 9