

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF

Hawaii Department of Land and
Natural Resources,
Honolulu, HI

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

DOCKET NO. UIC-AO-2005-0003

CONSENT AGREEMENT

AND FINAL ORDER

CONSENT AGREEMENT

I. STATUTORY AUTHORITY

This Consent Agreement and Final Order is issued under the authorities vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by Sections 1423(c) and 1445(a) of the Safe Drinking Water Act (the “Act”), 42 U.S.C. §§ 300h-2(c), 300j-4(a). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IX. The Regional Administrator in turn has delegated these authorities to the Director of the Water Division, EPA Region IX. In accordance with these authorities, the Director of the Water Division, EPA Region IX, hereby issues, and the State of Hawaii, Department of Land and Natural Resources (“Respondent”) hereby agrees to the issuance of, this Consent Agreement and Final Order.

II. STIPULATIONS AND FINDINGS

Respondent, through Peter T. Young, Chairperson, Board of Land and Natural Resources, stipulates, and EPA finds as follows:

1. Pursuant to Part C of the Act, 42 U.S.C. §§ 300h-300h-8, EPA has promulgated regulations establishing minimum requirements for UIC programs, to prevent underground injection which endangers drinking water sources. These regulations are set forth at 40 C.F.R. Part 144.
2. “Underground injection” means the subsurface emplacement of fluids by well injection. 42 U.S.C. § 300h(d)(1), 40 C.F.R. § 144.3.
3. Pursuant to 40 C.F.R. § 144.88, existing large capacity cesspools are required to

be closed no later than April 5, 2005. “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.”. 40 C.F.R. § 144.81(2). Large capacity cesspools do not include single family residential cesspools or a non-residential cesspools which receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day. *Id.* A “cesspool,” is a “drywell,” which in turn is a “well,” as those terms are defined in 40 C.F.R. § 144.3.

4. Pursuant to Section 1422(c) of the Act, 42 U.S.C. § 300h-1(c), and 40 C.F.R. Part 147 Subpart M, § 147.601, EPA administers the Underground Injection Control program in the State of Hawaii. This UIC program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.
5. Pursuant to Section 1423(c)(1) of the Act, 42 U.S.C. § 300h-2(c)(1), EPA may assess an administrative compliance order to any person who violates any requirement of an applicable Underground Injection Control (“UIC”) program. 42 U.S.C. § 300h-2(c)(1).
6. Pursuant to Section 1445(a)(1)(A) of the Act, 42 U.S.C. § 300j-4(a), EPA may require any person who is subject to the requirements of the Act to submit information relating to such person’s compliance with the requirements of the Act. 42 U.S.C. § 300j-4(a)(1)(A).
7. Respondent, State of Hawaii, Department of Land and Natural Resources, is a state agency. Thus, Respondent is 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.
8. Respondent owns and operates 60 large capacity cesspools. The list of large capacity cesspools owned and operated by Respondent appears in Schedule 1, attached hereto and incorporated by reference.
9. Respondent did not close the large capacity cesspools referred to in paragraph **8** by April 5, 2005 as required by 40 C.F.R. § 144.88.
10. Respondent intends to undertake the measures outlined in Schedule 1, attached hereto and incorporated by reference, by the dates specified in order to close the large capacity cesspools referred to in paragraph **8**.
11. Based on all the foregoing, Respondent has violated the requirement that all large capacity cesspools be closed by April 5, 2005, and is therefore in violation of 40 C.F.R. § 144.88.

III. PROPOSED ORDER

Respondent, State of Hawaii, Department of Land and Natural Resources, and EPA agree to issuance of the following, which, upon issuance of the Final Order, shall become effective:

A. Compliance Requirements

12. Respondent shall close the large capacity cesspools referred to in paragraph 8 in accordance with 40 C.F.R. § 144.89(a) no later than May 31, 2009 and submit an Engineer's Report for those large capacity cesspools by June 30, 2009.
13. Respondent shall submit semi-annual reports, in accordance with paragraph 14 below, beginning January 1, 2006, confirming that the milestones set forth in Schedule 1, attached hereto and incorporated by reference, have been met. The semi-annual reports shall be sent to EPA within thirty (30) days of January 1 and July 1 of each year until all large capacity cesspools listed in Schedule 1 have been closed and the Engineer's Report submitted.
14. Such submittals shall be in writing and shall be sent to:

LCC Project Coordinator
Ground Water Office, WTR-9
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

and shall include the following certification signed by a duly authorized representative:

“I certify under penalty of law that this document and all attachments were prepared by direct supervision or 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, 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.”

B. General Provisions

15. For the purpose of this proceeding, Respondent admits the jurisdictional

allegations of the Consent Agreement and agrees not to contest, in any administrative or judicial forum, EPA's jurisdiction to enter into this CA/FO.

16. The provisions of this CA/FO shall 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.
17. Respondent shall give notice, and provide a copy of this CA/FO, to any successor-in-interest prior to transfer of ownership or operation of the large capacity cesspool referred to in paragraph 8. Such transfer, however, shall have no effect on Respondent's obligation to comply with this CA/FO. Respondent shall notify EPA in writing at least thirty (30) days prior to any such transfer of ownership or operation of the large capacity cesspool referred to in paragraph 8.
18. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement.
19. Respondent consents to the issuance of this CA/FO and the conditions specified herein.
20. Respondent waives any right to a hearing under Section 1423(c)(3) of the Act, 42 U.S.C. §300h-2(c)(3) for the violations alleged in the Consent Agreement, to otherwise contest the allegations contained in the Consent Agreement, or to appeal the CA/FO.
21. This CA/FO does not constitute a waiver, suspension, or modification of the requirements of any federal, state, or local statute, regulation, or condition of any permit issued thereunder, including the requirements of the Act and accompanying regulations.
22. Issuance of this CA/FO does not in any case affect the right of EPA to pursue civil or criminal remedies and/or sanctions including appropriate injunctive or other equitable relief and/or penalties, for any violations of law.
23. 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 Act, regulations promulgated thereunder,

and any order or permit issued thereunder.

24. 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 Act.
25. Except as stated in paragraph **24**, each party hereto shall bear its own costs and attorneys fees incurred in this proceeding.
26. If any event occurs which causes or may cause delays in either: 1) submission of milestone reports or 2) reaching the deadline for closure of the large capacity cesspool[s], as set forth in Part III.A. of this CA/FO, Respondent shall, within 48 hours of the delay or within 48 hours of Respondent's knowledge of the anticipated delay, whichever is earlier, notify by telephone the EPA Region 9 LCC Project Coordinator or, in her/his absence, the Manager of the EPA Region 9 Ground Water Office. 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, a timetable by which those measures will be implemented. Respondent shall exercise its best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the notice requirement of this paragraph shall preclude Respondent from asserting any claim of force majeure.
27. If EPA agrees 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 maybe extended for a period of no longer than the delay resulting from the circumstances causing the delay. In such event, EPA shall grant, in writing signed by the Manager of the EPA Region 9 Ground Water Office, to the 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.
28. In the event that EPA does not agree that a delay in achieving compliance with the requirements of this CA/FO has been or will be caused by circumstances beyond the control of the Respondent, EPA will notify Respondent in writing of its decision and any delays will not be excused.
29. Respondent shall have the burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be

caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that Respondent did exercise or is using its best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this section.

30. All milestone reports and any requests for extension of time required to be submitted pursuant to this CA/FO shall be sent to the following address:

LCC Project Coordinator
Ground Water Office, WTR-9
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Such submittals may be faxed to the LCC Project Coordinator at (415) 947-3549. The original must follow by mail, to the address above, within 24 hours of fax transmission.

31. Respondent's closure of the large capacity cesspools listed in Schedule 1 and submission of the Engineer's Report, by the dates set forth in Schedule 1, shall constitute full and complete satisfaction of this CA/FO.

C. Dispute Resolution

32. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this CA/FO.
33. If Respondent disagrees, in whole or in part, with any decision by EPA under this CA/FO, Respondent's Project Coordinator or equivalent shall orally notify EPA's LCC Coordinator of the dispute ("Project Coordinators"). The Project Coordinators shall use their best efforts to informally and in good faith resolve all disputes or difference of opinion relating to this CA/FO. The period for informal negotiations shall not exceed ten (10) business days from the time the dispute arises, unless it is modified by written agreement of the parties.
34. In the event that the Project Coordinators cannot resolve a dispute by informal negotiations under the preceding paragraph, Respondent may pursue the matter by submitting its objection to EPA in writing. Respondent must send its written objections to EPA within seven (7) business days of Respondent's receipt of the EPA's decision referred to in the previous paragraph. Respondent's written objections must set forth

the specific points of the dispute, the basis for Respondent's position and any matters which it considers necessary for EPA's determination. If Respondent does not invoke formal dispute resolution within seven (7) business days, EPA's decision shall be binding on Respondent.

35. EPA and Respondent shall have ten (10) business days from receipt of Respondent's written objections to attempt to resolve the dispute through formal discussions. During such time, if Respondent so requests, the Associate Director, Water Division, will meet with Respondent in person to discuss the dispute either by telephone or at EPA's offices in San Francisco unless another location is mutually agreed upon.
36. Within twenty (20) business days of EPA's receipt of Respondent's written objections, EPA, through its Associate Director, Water Division, will provide to Respondent in writing EPA's decision on the pending dispute.
37. If the Respondent disagrees with the written decision, the Respondent may, within ten (10) business days of receipt of the written decision, appeal to the Director, Water Division. Respondent's appeal must set forth the specific points of the dispute, the basis for Respondent's position and any matters which it considers necessary for EPA's determination. Within thirty (30) business days of receipt of the appeal, the Director, Water Division will issue a written decision which shall be the final decision and which EPA and Respondent agree to be bound by and to follow.
38. The Parties may, by mutual written agreement, extend any of the time periods provided for in the dispute resolution process.
39. EPA and Respondent have agreed to the foregoing dispute resolution procedures solely for the purposes, and based on the unique circumstances, of this CA/FO.

D. Effective Date

40. The effective date of the CA/FO shall be the date that the Final Order is signed.

FOR THE CONSENTING PARTIES:

For State of Hawaii, Department of Land and Natural Resources

Peter T. Young
Chairperson
Board of Land and Natural Resources
State of Hawaii
P.O Box 621
Honolulu, HI 96809

Date: _____

For the United States Environmental Protection Agency:

Alexis Strauss
Director, Water Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Date: _____

FINAL ORDER

The United States Environmental Protection Agency Region IX (“EPA”), and State of Hawaii, Department of Land and Natural Resources, having entered into the foregoing Consent Agreement, and EPA having duly publicly noticed the Stipulations and Findings and Proposed Order regarding the matters alleged therein,

IT IS HEREBY ORDERED THAT:

1. The foregoing Consent Agreement and this Final Order (Docket No.UIC-AO-2005-0003) be entered; and
2. Respondent, State of Hawaii, Department of Land and Natural Resources, shall comply with the requirements set forth in the Consent Agreement and Proposed Order, which shall become final and effective on the date it is signed below.

Alexis Strauss
Director, Water Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Date: _____