

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF	DOCKET NO. UIC-AO-2005-0008
Kailua Arms and Windward Apartments	CONSENT AGREEMENT AND [PROPOSED] FINAL ORDER
Kailua, HI	
Proceedings under Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §300h-2(c)	

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, and with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits,” 64 Fed. Reg. 40,176, Subpart I (July 23, 1999) (hereinafter “Consolidated Rules of Practice”), the Director of the Water Division, EPA Region IX, hereby issues, and Mr. James K. Schuler (“Respondent”) hereby agrees to the issuance of, this Consent Agreement and Final Order (“CA/FO”).

II. STIPULATIONS AND FINDINGS

Respondent 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) of the Act, 42 U.S.C. § 300h-2(c), and 40 C.F.R. § 19.4, EPA may issue an order assessing an administrative civil penalty of not more than \$11,000 for each day of each violation, up to a maximum penalty of \$157,500, or requiring compliance, against any person who violates the Act or any requirement of an applicable Underground Injection Control (“UIC”) program. In assessing a penalty for such violations, EPA must take into account: (1) the seriousness of the violations; (2) the economic benefit resulting from the violations; (3) the history of such violations; (4) any good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) such other matters as justice may require. 42 U.S.C. § 300h-2(c)(4)(B).
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. Mr. James K. Schuler is an individual. 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 thirty one (31) large capacity cesspools at 505 Kailua Road, Kailua, HI and 365 Kailua Road, Kailua, HI.
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 in Section III., including closure of the large capacity cesspools referred to in paragraph 8 by **December 31, 2007.**

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, and EPA agree to issuance of the following order:

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 **December 31, 2007**.
 - A. Submit a Closure Plan to the LCC Project Coordinator at least 60 days prior to closure.
 - B. Within 30 days of receipt of the Closure Plan the LCC Coordinator will disapprove, in writing, any Closure Plan that is unacceptable. If Respondent has not received a written disapproval within 30 days, the Closure Plan will be deemed acceptable.
13. In order to achieve compliance with the ban, and to reduce use of the large capacity cesspools referred to in paragraph 8, Respondent shall:
 - A. Not enter into any new lease agreements after any lease expires, either with: 1) any current tenant; or 2) any party who is not a tenant as of the date that the Final Order is filed. For purposes of compliance with this Order, any tenant who resides in an apartment under a month-to-month tenancy on the date that the Final Order takes effect may continue to reside in that apartment under such month-to-month tenancy until the date that all LCCs referred to in Paragraph 8 are closed, and an alternative treatment system has been installed to replace the LCCs referred to in paragraph 8. In addition, any apartment which is vacated on or after the date that this Final Order is filed shall remain vacant until all LCCs referred to in Paragraph 8 are closed; and an alternative treatment system has been installed to replace the LCCs referred to in paragraph 8. Respondent will be allowed to relocate existing tenants from partially vacated buildings at either 505 Kailua Road, Kailua, HI or 365 Kailua Road, Kailua, HI to other partially vacated buildings at these addresses in order to consolidate tenants and reduce expenses and use of LCCs.
 - B. Institute the following water conservation measures: 1) disconnect and

remove all washing machines on the premises, including but not limited to those machines in individual units and common areas; 2) remove all garbage disposals on the premises; and 3) distribute water conservation material supplied by EPA staff to all residents of the building. In addition, Respondent shall permit EPA on the premises to confirm that such measures have been taken.

- C. Allow EPA access to the cesspools and surrounding areas to study the interaction between the cesspools and ground water, including but not limited to placement of a tracer and collection of groundwater through the installation of monitoring wells or other groundwater collection devices.
 - D. Maintenance of all large capacity cesspools, including, if necessary, the pumping of such large capacity cesspools in the event of failure or overflow of such cesspools.
14. Respondent shall submit quarterly status reports describing progress that has been made towards compliance with the final closure requirement set forth in paragraph **12**. Such status reports shall include a report on any apartments vacated during that quarter.
15. Quarterly status reports shall be sent no later than the **15th** day of every **third** month, beginning the **4th** month following the effective date of this CA/FO, to the LCC Project Coordinator, as set forth in paragraph 39.

B. Penalty

16. To account for the violations set forth in the Stipulations and Findings, Respondent agrees to pay to the United States an administrative civil penalty of Eleven Thousand dollars (\$11,000), no later than thirty days following the effective date of the Final Order (hereafter referred to as the “due date”).
17. The administrative civil penalty referred to in paragraph **16** shall be made payable to via money order or certified check made payable to the Treasurer, United States of America. Respondent shall tender the payment via certified mail to:

U.S. Environmental Protection Agency, Region IX
Regional Hearing Clerk
P.O. Box 371099M
Pittsburgh, PA 15251

18. Respondent shall note on the money order or certified check the title and docket number of this case and mail photocopies of the money order or certified check via certified mail to:

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

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

19. Payment must be *received* at the address referred to in paragraph **17** on or before the due date specified in paragraph **16**.
20. If payment is not received on or before the due date, interest will be assessed, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of \$15.00 will be assessed for each thirty- (30) day period (or any portion thereof) following the due date in which the balance remains unpaid. A six percent (6%) per annum penalty will also be applied on any principal amount not paid within ninety (90) days of the due date. Respondent shall tender any interest, handling charges, or late penalty payments in the same manner as described above.
21. Pursuant to Section 1423(c)(7) of the Act, 42 U.S.C. § 300h-2(c)(7), if Respondent fails to pay by the due date the administrative civil penalty assessed in paragraph **16** of this CA/FO, EPA shall bring a civil action in an appropriate district court to recover the amount assessed (plus costs, attorneys' fees, and interest). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. 42 U.S.C. § 300h-2(c)(7).

C. General Provisions

22. Respondent waives any right to a hearing under Section 1423(c)(3) of the Act, 42 U.S.C. § 300h-2(c)(3). Respondent waives any right to contest the allegations contained in the Consent Agreement, or to appeal the CA/FO.
23. 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.
24. Respondent neither admits nor denies the allegations set forth in the Stipulations

and Findings set forth in the Consent Agreement.

25. Respondent consents to the issuance of this CA/FO and the conditions specified herein, including payment of the administrative civil penalty in accordance with the terms of this CA/FO.
26. 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.
27. 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.
28. 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 cesspools referred to in paragraph 8. Such transfer, however, shall have no effect on Respondent's obligation to comply with Section III. B. 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 cesspools referred to in paragraph 8.
29. Respondent shall not deduct the administrative civil penalty, nor any interest, handling fees, or late penalty payments provided for in this CA/FO from its federal, state, or local income taxes.
30. 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.
31. Issuance of this CA/FO does not in any case affect the right of EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
32. 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.
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 Act.

34. Except as stated in paragraph **32**, each party hereto shall bear its own costs and attorneys fees incurred in this proceeding.
35. If any event occurs which causes or may cause delays in either: 1) submission of quarterly status reports or 2) reaching the deadline for closure of the large capacity cesspools, 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.
36. 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.
37. 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.
38. 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.
39. All quarterly status 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

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

D. Effective Date

40. The effective date of the Consent Agreement and Final Order shall be the date that the Final Order is filed.

FOR THE CONSENTING PARTIES:

For James K. Schuler

James K. Schuler
Owner
Kailua Arms and Windward Apartments
828 Fort Street Mall, Suite 310
Honolulu, HI 96813

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 Mr. James K. Schuler, having entered into the foregoing Consent Agreement, and EPA having duly publicly noticed the Findings and Proposed Administrative Order regarding the matters alleged therein,

IT IS HEREBY ORDERED THAT:

1. The foregoing Consent Agreement and this Final Order (Docket No. UIC-AO-2005-0008 be entered; and

2. Respondent, Mr. James K. Schuler, shall pay an administrative civil penalty of Eleven Thousand dollars (\$11,000), plus interest, to the Treasurer of the United States of America in accordance with the terms set forth in the Consent Agreement.

This Final Order shall become effective on the date that it is filed. This Final Order constitutes full adjudication of the Order issued by EPA in this proceeding.

Joanna DeLucia
Presiding Officer
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Date: _____