

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
2 **REGION 9**

3 75 Hawthorne Street
San Francisco, California 94105

4 IN THE MATTER OF:) DOCKET NO. UIC-09-2020-0005
5)
6 State of Hawai‘i, Department of Land and)
Natural Resources, and City and County of)
Honolulu,)
7 Respondents.) **CONSENT AGREEMENT**
8) **AND**
9 Proceedings under Sections 1423(c) of the) **[PROPOSED] FINAL ORDER**
Safe Drinking Water Act, 42 U.S.C. § 300h-)
10 2(c).)

11 **CONSENT AGREEMENT**

12 **I. AUTHORITIES AND PARTIES**

13 1. The United States Environmental Protection Agency (“EPA”), Region 9, the State
14 of Hawai‘i, Department of Land and Natural Resources (“DLNR”), and the City and County of
15 Honolulu (“CCH”) (collectively the “Parties”) agree to settle this matter and consent to the filing
16 of this Consent Agreement and Final Order (“CA/FO”). The CA/FO commences and concludes
17 this proceeding in accordance with 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.45(b).

18 2. This is a civil administrative action brought by EPA Region 9 against
19 Respondents DLNR and CCH pursuant to Section 1423(c) of the Safe Drinking Water Act
20 (“SDWA”), 42 U.S.C. § 300h-2(c), for violations of the SDWA and the Underground Injection
21 Control (“UIC”) requirements set forth at 40 C.F.R. Part 144.

22 3. Complainant is the Director of the Enforcement and Compliance Assurance
23 Division, EPA Region 9. The Administrator of EPA delegated to the Regional Administrator of
24 EPA Region 9 the authority to bring and settle this action under the SDWA. In turn, the Regional
25 Administrator further delegated the authority to bring this action and sign a consent agreement

1 settling this action under the SDWA to the Director of the Enforcement and Compliance
2 Assurance Division.

3 4. Respondent DLNR is a department of the Hawai‘i state government.

4 5. Respondent CCH is a municipality.

5 6. This CA/FO is entered into voluntarily by the Parties to settle their disputes
6 without the risks of adverse findings and conclusions, or a final order or judgment after
7 litigation.

8 II. APPLICABLE STATUTES AND REGULATIONS

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

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

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

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

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

20 12. “Large capacity cesspools” (“LCCs”) include “multiple dwelling, community or
21 regional cesspools, or other devices that receive sanitary wastes, containing human excreta,
22 which have an open bottom and sometimes perforated sides.” 40 C.F.R. § 144.81(2). LCCs do
23 not include single-family residential cesspools or non-residential cesspools which receive solely
24 sanitary waste and have the capacity to serve fewer than 20 persons per day. *Id.*

1 13. UIC program regulations classify LCCs as Class V UIC injection wells. 40 C.F.R.
2 § 144.80(e).

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

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

7 16. The “owner or operator” of a Class V UIC well must comply with Federal UIC
8 requirements in 40 C.F.R. Parts 144 through 147 and must also comply with any other measures
9 required by the owner’s and operator’s State or EPA Regional Office UIC Program to protect
10 underground sources of drinking water. 40 C.F.R. § 144.82.

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

13 18. Pursuant to Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R.
14 § 147.601, EPA administers the UIC program in the State of Hawai‘i. This UIC program consists
15 of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.

16 19. Pursuant to Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), and 40
17 C.F.R. § 19.4, EPA may issue an administrative order either assessing a civil penalty of not more
18 than \$22,363 per day per violation up to a maximum of \$279,536, or requiring compliance, or
19 both, against any person who violates the SDWA or any requirement of an applicable UIC
20 program.

21 **III. ALLEGATIONS**

22 20. Respondent DLNR is a department of the State of Hawai‘i and thus falls under the
23 definition of a “person” within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. §
24 300f(12), and 40 C.F.R. § 144.3.
25

1 21. Respondent CCH is a municipality and thus falls under the definition of a
2 “person” within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40
3 C.F.R. § 144.3

4 22. The State of Hawai‘i owns a parcel of land (TMK: 1-6-4-003-002) (the
5 “Property”) on the Island of Oahu that DLNR leased to CCH on January 1, 1982, and which
6 CCH in turn subleased on that same day to Opportunities and Resources, Inc. (“ORI”), and on
7 which ORI has established an agricultural training center for the developmentally disabled
8 known as “Helemano Plantation.”

9 23. Since at least January 30, 2014, the State of Hawai‘i and CCH have owned and/or
10 operated at least two (2) LCCs located on the Property that service Helemano Plantation’s
11 sanitary waste disposal needs.

12 24. Respondents have yet to close the two (2) LCCs located on the Property.

13 25. Respondents’ failure to close the LCCs referenced in Paragraph 23 by the
14 regulatory deadline of April 5, 2005 constitutes a violation of 40 C.F.R. §§ 144.84(b)(2) and
15 144.88.

16 IV. SETTLEMENT TERMS

17 A. GENERAL PROVISIONS

18 26. For the purposes of this proceeding, Respondents (1) admit the jurisdictional
19 allegations contained in this CA/FO; (2) neither admit to any liability nor admit or deny the
20 specific factual allegations contained in this CA/FO; (3) consent to the assessment of the penalty
21 specified and to the specified compliance obligations contained in this CA/FO; and (4) waive any
22 right to contest the allegations or to the right to appeal the proposed final order accompanying
23 the consent agreement. 40 C.F.R. § 22.18(b)(2).

24 27. This CA/FO shall be the entire agreement between the Parties to resolve EPA’s
25 civil claims and causes of action alleged under 40 C.F.R. §§ 144.84(b)(2) and 144.88. Full

1 compliance with this CA/FO shall constitute settlement of Respondents' liability for federal civil
2 claims for the SDWA violations identified in Section III of this CA/FO.

3 28. The provisions of this CA/FO shall apply to and be binding upon Respondents,
4 their officers, directors, agents, servants, authorized representatives, employees, and successors
5 or assigns. Action or inaction of any persons, firms, contractors, employees, agents, or
6 corporations acting under, through, or for Respondents shall not excuse any failure of
7 Respondents to fully perform its obligations under this CA/FO.

8 29. Issuance of this CA/FO does not in any manner affect the right of EPA to pursue
9 appropriate injunctive or other equitable relief or criminal sanctions for any violations of law,
10 except with respect to those claims against Respondents described in Paragraph 25 that have
11 been specifically resolved by this CA/FO.

12 30. This CA/FO is not a permit or modification of a permit and does not affect
13 Respondents' obligation to comply with all federal, state, local laws, ordinances, regulations,
14 permits, and orders. Issuance of, or compliance with, this CA/FO does not waive, extinguish,
15 satisfy, or otherwise affect Respondents' obligation to comply with all applicable requirements
16 of the SDWA, regulations promulgated thereunder, and any order or permit issued thereunder,
17 except as specifically set forth herein.

18 31. EPA reserves any and all legal and equitable remedies available to enforce this
19 CA/FO, as well as the right to seek recovery of any costs and attorneys' fees incurred by EPA in
20 any actions against Respondents for noncompliance with this CA/FO.

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

23 33. This CA/FO may be executed and transmitted by facsimile, email or other
24 electronic means, and in multiple counterparts, each of which shall be deemed an original, but all
25 of which shall constitute an instrument. If any portion of this CA/FO is determined to be

1 unenforceable by a competent court or tribunal, the Parties agree that the remaining portions
2 shall remain in full force and effect.

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

5 B. PENALTY

6 35. Respondents agrees to the assessment of a civil penalty in the amount of one
7 hundred and thirty-five thousand seven hundred and thirty dollars (\$135,730) for the violation of
8 the SDWA's UIC Program LCC requirements as alleged in Section III of this CA/FO.

9 36. CCH agrees that it will pay the assessed penalty no later than thirty (30) days
10 from the Effective Date of this CA/FO.

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

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

21 38. Concurrent with making the payment pursuant to this section of the CA/FO, CCH
22 must provide a letter with evidence of the payment and the title and docket number of this action,
23 to the EPA Region 9 Regional Hearing Clerk, via United States mail, at:

24 Regional Hearing Clerk
25 U.S. Environmental Protection Agency
Region 9 - Office of Regional Counsel
75 Hawthorne Street (ORC-1)
San Francisco, CA 94105

Respondents shall also send copies of the letter to the EPA Region 9 Enforcement and

1 Compliance Assurance Division Enforcement Officer and the EPA Region 9 Office of Regional
2 Counsel attorney in accordance with the notice provisions of Section IV.F of this CA/FO.

3 39. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13,
4 interest, penalty charges, and administrative costs will be assessed against the outstanding
5 amount that Respondents owe to EPA for Respondents' failure to pay the civil administrative
6 penalty by the deadline specified in Section IV.B of this CA/FO.

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

11 41. A penalty charge will be assessed on all debts more than 90 days delinquent. The
12 penalty charge will be at a rate of 6% per annum and will be assessed monthly. 40 C.F.R. §
13 13.11(c).

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

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

19 a. The debt being referred to a collection agency, a credit reporting agency,
20 or to the Department of Justice for filing of a collection action in the
21 appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and
22 13.33. In any such collection action, the validity, amount, and
23 appropriateness of the assessed penalty and of this CA/FO shall not be
24 subject to review.

25 b. The department or agency to which this matter is referred (*e.g.*, the

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

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

7 44. Respondents shall tender any interest, handling charges, late penalty payments,
8 and stipulated penalties in the same manner as described in this Section IV.B.

9 C. COMPLIANCE

10 45. Respondents shall close both LCCs that are the subject of this CA/FO in
11 accordance with EPA's UIC Program LCC closure requirements at 40 C.F.R. § 144.89 and in
12 accordance with any additional Hawai'i Department of Health ("HDOH") closure requirements
13 ("Full Closure"), no later than December 31, 2020 (the "Closure Date").

14 46. Respondent CCH shall submit quarterly status reports no later than the 15th day
15 after the end of the quarter to begin January 2020 and then April 2020, July 2020, October 2020,
16 and January 2021, describing progress that has been made toward closing the LCCs that are the
17 subject of this CA/FO. The quarterly status reports shall provide the status of any LCCs that have
18 been closed in accordance with 40 C.F.R. § 144.89 and HDOH requirements, including any
19 HDOH approvals of the conversion of the closed LCCs to individual wastewater systems, and
20 any HDOH letters of approval to operate an individual wastewater system.

21 D. STIPULATED PENALTIES

22 47. If CCH fails to pay the assessed civil administrative penalty specified in Section
23 IV.B of this CA/FO by the deadline specified in that section, CCH agrees to pay in addition to
24 the assessed penalty, a stipulated penalty of \$250 per day for each day CCH is late in making the
25 penalty payment.

1 48. If Respondents fail to meet the compliance deadline for closure of the two (2)
2 cesspools at the Helemano Property by the deadline specified in Section IV.C of this CA/FO,
3 CCH agrees to pay a stipulated penalty of \$250 per day for each day Respondents are late in
4 meeting the closure deadline for the Helemano Property LCCs.

5 49. CCH agrees to pay any stipulated penalties within thirty (30) days of receipt of
6 EPA’s written demand for such penalties. All penalties shall begin to accrue on the first date of
7 noncompliance and shall continue to accrue through the date of completion of the delinquent
8 CA/FO requirement. CCH will use the method of payment specified in Section IV.B of this
9 CA/FO and agree to pay interest, handling charges and penalties that accrue for late payment of
10 the stipulated penalty in the same manner as set forth in Section IV.B of this CA/FO.

11 50. Neither the demand for, nor payment of, a stipulated penalty relieves Respondents
12 of their obligations to comply with any requirement of this CA/FO or modifies or waives any
13 deadlines set forth in this CA/FO.

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

17 E. FORCE MAJEURE

18 52. For purposes of this CA/FO, *force majeure* is defined as any event arising from
19 causes that are beyond the control of Respondents, any entity controlled by Respondents, or
20 Respondents’ contractors, which delays or prevents the performance of any obligation under this
21 CA/FO despite Respondents’ reasonable best efforts to fulfill the obligation. The requirement
22 that Respondents exercise “reasonable best efforts to fulfill the obligation” includes using
23 reasonable best efforts to anticipate any potential *force majeure* event and reasonable best efforts
24 to address the effects of any such event (a) as it is occurring and (b) after it has occurred to
25 prevent or minimize any resulting delay to the greatest extent possible. Examples of *force*

1 *majeure* events include, but are not limited to, unforeseen environmental, geological, or
2 archaeological conditions; labor or equipment shortage; and delays caused by third-party tenants
3 or landowners. Examples of events that are not *force majeure* include, but are not limited to,
4 increased costs or expenses of any work to be performed under this CA/FO and normal
5 inclement weather.

6 53. If any event occurs that causes or is likely to cause delay in the achievement of
7 any requirement or time frame specified in this CA/FO, Respondents shall notify EPA in writing,
8 within ten (10) business days after learning of such event, of the anticipated length and cause of
9 the delay, whether Respondents believe the delay or anticipated delay constitutes a *force majeure*
10 event, as defined in Paragraph 52, the measures Respondents have taken and/or will take to
11 prevent or minimize the delay, and the timetable by which Respondents intend to implement
12 these measures and achieve the requirement or meet the time frame. Respondents shall adopt all
13 reasonable measures to avoid or minimize delay. Submittal of the notice to EPA required by this
14 paragraph does not by itself extend the deadline or timeframe for any requirement specified in
15 this CA/FO.

16 54. If, upon receiving the notice required by this section, EPA agrees that the delay or
17 anticipated delay in compliance with this CA/FO has been or will be caused by circumstances
18 that constitute a *force majeure* event as defined in this section, EPA may grant an extension of
19 time for compliance for a period of time no longer than any delay resulting from the
20 circumstances causing the delay or anticipated delay.

21 55. Respondents have the burden of demonstrating that the actual or anticipated delay
22 has been or will be caused by a *force majeure* event, that the duration of the delay was or will be
23 warranted under the circumstances, that Respondents exercised or are using their best efforts to
24 avoid and mitigate the effects of the delay or anticipated delay, and that Respondents complied
25 with the requirements of this CA/FO.

1 56. In the event that EPA does not agree that a delay or anticipated delay in achieving
2 compliance with the requirements of this CA/FO have been or will be caused by a force majeure
3 event, EPA will notify Respondents in writing of EPA’s decision and the delay or anticipated
4 delay will not be excused.

5 F. NOTICES

6 57. Unless otherwise specified elsewhere in this CA/FO, all written communications
7 required by this CA/FO shall be addressed as follows:

8 For EPA:

9 Jelani Shareem, Enforcement Officer
10 U.S. Environmental Protection Agency
11 Region 9 - Enforcement and Compliance Division
12 75 Hawthorne Street (ENF-3-3)
13 San Francisco, CA 94105

14 Rich Campbell, Attorney Advisor
15 U.S. Environmental Protection Agency
16 Region 9 – Office of Regional Counsel
17 75 Hawthorne Street (ORC-2-3)
18 San Francisco, CA 94105

19 For Respondents:

20 For DLNR:

21 Suzanne Case, Chairperson
22 Department of Land and Natural Resources
23 Kalanimoku Building
24 1151 Punchbowl Street
25 Honolulu, HI 96813

 For CCH:

 Pamela Witty-Oakland, Director
 Department of Community Services
 City and County of Honolulu
 925 Dillingham Boulevard, Suite 200
 Honolulu, HI 96817

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

1 FOR THE CONSENTING PARTIES:

2 FOR RESPONDENT STATE OF HAWAI'I,

3 DEPARTMENT OF LAND AND NATURAL RESOURCES:

4

5

6 Suzanne D. Case “/s/”

Date: October 23, 2019

7 SUZANNE D. CASE

8 Chairperson

9 Board of Land and Natural Resources

10 APPROVED AS TO FORM AND LEGALITY:

11

12 Amanda J. Weston “/s/”

13 AMANDA J. WESTON

14 Deputy Attorney General

15

16

17

18

19

20

21

22

23

24

25

1 FOR RESPONDENT CITY AND COUNTY OF HONOLULU:

2

3

4 Pamela Witty-Oakland “/s/”

Date: November 08, 2019

5 PAMELA WITTY-OAKLAND
6 Director
7 Department of Community Services

7

8

9

APPROVED AS TO FORM AND LEGALITY:

10

11

12 Courtney K. Sue-Ako “/s/”

13 COURTNEY K. SUE-AKO
14 Deputy Corporation Counsel

14

15

16

17

18

19

20

21

22

23

24

25

1 For UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

2
3 Joel E. Jones “/s/” for

Date: November 19, 2019

4 AMY C. MILLER

5 Director

6 Enforcement and Compliance Assurance Division

7 U.S. Environmental Protection Agency, Region 9

8
9 Of counsel:

10 Rich Campbell

11 Attorney-Advisor

12 Office of Regional Counsel

13 U.S. Environmental Protection Agency, Region 9

[PROPOSED] FINAL ORDER

1
2 It is Hereby Ordered that this Consent Agreement and Final Order (U.S. EPA Docket No. UIC-
3 09-2020-0005) be entered and that Respondents shall pay a civil penalty in the amount of one
4 hundred and thirty-five thousand seven hundred and thirty dollars (\$135,730) in accordance with
5 the terms of this Consent Agreement and Final Order.
6

7
8 Date: _____

9
10 _____
11 Regional Judicial Officer
12 U.S. EPA, Region 9
13
14
15
16
17
18
19
20
21
22
23
24
25