

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

DARON RAVENBORG
Attorney-Advisor
United States Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105
(415) 972-3866

Attorneys for Complainant

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. UIC-09-2021-0054
)	
Olowalu Elua Associates LLC,)	
)	
Respondent.)	CONSENT AGREEMENT
)	AND
)	[PROPOSED] FINAL ORDER
Proceedings under Sections 1423(c) of the)	
Safe Drinking Water Act,)	
42 U.S.C. §§ 300h-2(c).)	
_____)	

Consent Agreement

Statutory Authority

1. This 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, U.S. Environmental Protection Agency (EPA), Region 9.

3. Respondent is the limited liability company Olowalu Elua Associates (OEA), which owns and operates the Olowalu Plantation House (OPH) in Maui, 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 (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 \$96,221 and the compliance requirements specified below.

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 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.

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 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 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) 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. After that date, new LCCs are prohibited. *Id.*

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 \$23,607 for each day of violation, up to a maximum administrative penalty of \$295,008 for violations occurring after November 2, 2015 and where penalties are assessed on or after December 23, 2020 and/or issue an order requiring compliance.

Alleged Violations

28. Respondent is a limited liability company incorporated in the State of Hawaii, whose corporate office is at 305 E. Wakea Ave., Ste. 100, Kahului, Hawaii 96732, 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 a parcel of land (TMK: 2-4-8-003-005) located at 810 Olowalu Village Road, Lahaina, Hawaii 96761, on the Island of Maui (the “Property”), since April 5, 2005. Respondent operates the land parcel as a venue for hosting events, such as weddings.

30. During all times that it has owned and operated the Property, Respondent has used a cesspool for the disposal of sanitary wastewater from the OPH at the Property.

31. The OPH regularly hosts events with more than twenty (20) people.

32. The cesspool that services OPH 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 twenty (20) or more persons per day.

33. The LCC identified in the preceding paragraphs currently remains open.

34. 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.

Civil Penalty

35. 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.

36. Within thirty (30) days of the Effective Date of this CA/FO, Respondent must pay a **\$96,221** civil penalty by one of the payment methods below.

37. Respondent may pay the penalty by check (mail or overnight delivery), wire transfer, automated clearing house, or online payment. Additional 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 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.

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.

38. Currently 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 must also send a copy of the proof of payment to EPA at the following addresses:

Jelani Shareem
U.S. Environmental Protection Agency, ECAD-3-3
75 Hawthorne Street
San Francisco, CA 94105
shareem.jelani@epa.gov

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

40. 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 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 30 days past due; and 6% per year penalty on any principal amount 90 days past due.

41. If Respondent does not pay timely the civil penalty due under Paragraph 36 and/or any stipulated penalties due under Paragraphs 45, 46, and 47 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 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.

Compliance Requirements

42. 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 28, 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 County of Maui sewer connection requirements; and

b. Within forty-five (45) days of closure of the LCC, submit to EPA a description 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. At the same time, Respondent shall also submit all related approvals, including for any replacement systems, issued by HDOH provided that, should HDOH not issue any approval within forty-five (45) days of closure, Respondent shall submit HDOH's approval to EPA within fourteen (14) days of its receipt of the approval.

43. If Respondent fails to comply with the requirements set forth in Paragraph 42, 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).

Stipulated Penalties

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

45. If Respondent fails to pay the \$96,221 civil administrative penalty by the deadline specified in Paragraph 36 of this CA/FO or fails to meet the compliance deadline for closure of the cesspool at the OPH by the applicable deadline specified in Paragraph 42 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 Olowalu Plantation House LCC.

46. If Respondent fails to timely submit any reports, referred to in Paragraph 42.b, 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.

47. 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 37 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.

48. 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.

49. 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.

Force Majeure

50. 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.

51. 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 by email in accordance with Paragraph 38. 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.

52. 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.

General Provisions

53. The Parties consent to service of this CA/FO by email at the following valid email addresses: ravenborg.daron@epa.gov (for Complainant) and pmchenry@cades.com (for Respondent).

54. Unless otherwise specified, 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: Jelani Shareem – Shareem.jelani@epa.gov and Daron Ravenborg – ravenborg.daron@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:

Jelani Shareem
U.S. Environmental Protection Agency, ECAD-3-3
75 Hawthorne Street
San Francisco, CA 94105
shareem.jelani@epa.gov

and

Daron Ravenborg
U.S. Environmental Protection Agency, ORC-2-4
75 Hawthorne Street
San Francisco, CA 94105
ravenborg.daron@epa.gov

55. The reports, notifications, documentation, and submissions submitted pursuant to Paragraph 42, above, 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.”

56. 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.

57. 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.

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

59. 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.*

60. Full payment of the payment as described in Paragraph 36 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 the SDWA for purposes of Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b). EPA reserves the right to assess and collect any and all civil penalties for any violation described herein.

61. Full compliance with this CA/FO shall not in any case affect the rights of EPA or the United States to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violation of law.

62. This CA/FO does not affect Respondent's responsibility to comply with the SDWA and other applicable federal, state, or local laws and permits.

63. Other than as stated in this CA/FO, Respondent certifies that it is complying with the SDWA and its implementing regulations.

64. The terms of this CA/FO bind Respondent and its successors and assigns.

65. Each person signing this CA/FO certifies that they have the authority to sign for the party whom they represent and to bind that party to the terms of this CA/FO.

66. Each party agrees to bear its own costs and attorney fees in this action.

67. This CA/FO constitutes the entire agreement between the Parties.

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 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.

69. 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.

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 (“Effective Date”).

71. This CA/FO will terminate after Respondent has complied with all the terms of the CA/FO throughout its duration.

**Consent Agreement and Final Order
In the Matter of: Olowalu Elua Associates
Docket No. UIC-09-2021-0054**

OLOWALU ELUA ASSOCIATES:

Peter K. Martin “/s/”
Peter K. Martin
Olowalu Elua Associates

Date: July 13, 2021

**Consent Agreement and Final Order
In the Matter of: Olowalu Elua Associates
Docket No. UIC-09-2021-0054**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Amy C. Miller-Bowen “/s/”

Date: July 22, 2021

Amy C. Miller-Bowen
Director, Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency
Region 9

**Consent Agreement and [Proposed] Final Order
In the Matter of: Olowalu Elua Associates
Docket No. EPA-R9-UIC-2021-0054**

[Proposed] 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: _____
Steven Jawgiel
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 9