

US EPA ARCHIVE DOCUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF

Lealani Corporation and Poipu Inn, Inc.,
Koloa, HI

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

DOCKET NO. UIC-09-2012-0002

**CONSENT AGREEMENT
AND [PROPOSED] FINAL ORDER**

CONSENT AGREEMENT

I. STATUTORY AUTHORITY

This Consent Agreement and Final Order ("CA/FO") 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 and the Revocation/Termination or Suspension of Permits," 40 C.F.R. Part 22 (hereinafter "Consolidated Rules of Practice"), the Director of the Water Division, EPA Region IX, hereby issues, and Lealani Corporation and Poipu Inn, Inc. ("Respondents"), each hereby agree to the issuance of, this CA/FO.

Respondents and Complainant (the "Parties") agree that settlement of the matters at issue without litigation will save time and resources, is in the public interest, is consistent with the provisions and objectives of the Act and applicable regulations, and that entry of this CA/FO is the most appropriate means of resolving such matters.

II. STIPULATIONS AND FINDINGS

Respondents stipulate, 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 Underground Injection Control ("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. 40 C.F.R. § 144.3 defines a "well" as "a subsurface fluid distribution system" and "well injection" as "the subsurface emplacement of fluids through a well."
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 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 UIC 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), and 40 C.F.R. § 19.4, EPA may issue an order either assessing an administrative civil penalty of not more than \$11,000 for each day of each violation occurring before January 12, 2009 and not more than \$16,000 for each day of each violation occurring after January 12, 2009, up to a maximum penalty of \$177,500, or requiring compliance, or both, against any person who violates the Act or any requirement of an applicable 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. Lealani Corporation and Poipu Inn, Inc. ("Respondents") are corporations, and each is a "person" within the meaning of Section 1401(12) of the Act, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

8. The Brennecke's Beach Broiler restaurant and related businesses ("Brennecke's") are located at 2100 Ho'one Road, Koloa, Hawai'i. Prior to March 30, 2012, sanitary wastes from the Brennecke's facility were discharged into two (2) large capacity cesspools ("LCCs") on and adjacent to the facility.
9. Poipu Inn, Inc. owns the Brennecke's property and holds an easement to adjacent land for the purpose of constructing and operating one of the LCCs. Lealani Corporation owns the Brennecke's businesses and operated the two LCCs.
10. Respondents did not close the two LCCs referred to in paragraph 8 by April 5, 2005, as required by 40 C.F.R. § 144.88.
11. Respondents submitted proof of closure of the two LCCs to the Hawai'i Department of Health, verifying proper abandonment of the LCCs as of March 30, 2012.
12. Based on all the foregoing, Respondents have violated the requirement that all large capacity cesspools be closed by April 5, 2005, in violation of 40 C.F.R. § 144.88.

III. PROPOSED ORDER

Respondents and EPA agree to issuance of the following, which, upon filing of the Final Order, shall become effective:

A. Supplemental Environmental Project

13. The County of Kauai owns and operates public restrooms at Poipu Beach Park, a very popular recreational area near Brennecke's. Wastewater from the restrooms had been discharged into septic systems located a short distance from coastal waters. Septic systems do not violate the SDWA, federal UIC regulations, or State wastewater treatment requirements, but they only provide primary treatment of sewage. Due to their close proximity to shallow coastal waters, these septic systems were a potential source of contamination to surface waters subject to regular human contact.
14. Respondents proposed and implemented a Supplemental Environmental Project ("SEP") to close the septic systems and connect the County of Kauai's restrooms at Poipu Beach Park to the Poipu Wastewater Reclamation Plant. Respondents certify that they spent more than \$500,000 on the design, permitting and construction of this sewer connection, and that none of this work was necessary for Respondents to bring the Brennecke's facility into compliance with the UIC regulations, or to obtain any other benefit from the County. The SEP was

completed, and the Poipu Beach Park restrooms connected to the sewer system as of July 5, 2012. The County of Kauai accepted the installation of the new sewer system from Respondents.

15. EPA has determined that Respondents have satisfactorily completed the SEP.
16. Each Respondent certifies that it is not a party to any open federal financial assistance transaction that funded or could have been used to fund the same activity as the SEP. Each Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there was no such open federal financial transaction that funded or could have been used to fund the same activity as the SEP, nor had the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

B. Civil Penalty

17. To account for the violations set forth in the Stipulations and Findings, Respondents agree to pay to the United States an administrative civil penalty of **forty-seven thousand, four hundred and fifty-five dollars (\$47,455)**, no later than thirty (30) days following the effective date of the Final Order (hereafter referred to as the "due date").
18. The administrative civil penalty referred to in paragraph 17 shall be made payable to the Treasurer, United States of America in accordance with any acceptable method of payment listed in Attachment A "EPA Region 9 Collection Information," which is incorporated by reference as part of this CA/FO.
19. Concurrent with the payment of any penalty, Respondents shall provide written notice of payment, referencing the title and docket number of this case, via certified mail to each of the following:

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

Aaron Setran
Water Division (Mail Code: WTR-9)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

20. Payment must be received on or before the due date specified in paragraph 17.
21. If the full payment is not received on or before the due date, interest shall accrue on any overdue amount from the due date through the date of payment, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. 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. Respondents shall tender any interest, handling charges, or late penalty payments in the same manner as described above.
22. Pursuant to Section 1423(c)(7) of the Act, 42 U.S.C. § 300h-2(c)(7), if Respondents fail to pay by the due date the administrative civil penalty assessed in paragraph 17 of this CA/FO, EPA may 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

23. For the purpose of this proceeding, Respondents admit the jurisdictional allegations of the Consent Agreement and agree not to contest, in any administrative or judicial forum, EPA's jurisdiction to enter into this CA/FO.
24. Respondents neither admit nor deny the factual allegations contained in this Consent Agreement.
25. Respondents consent 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. Full payment of the penalty set forth in this Consent Agreement and Final Order shall only resolve Respondents' liability for federal civil penalties for the violations and facts alleged in the Consent Agreement.
26. Respondents waive any right to a hearing under Section 1423(c)(3) of the Act, 42 U.S.C. § 300h-2(c)(3), or to otherwise contest the allegations contained in the Consent Agreement, or to appeal the CA/FO.

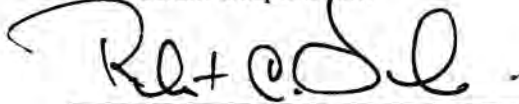
27. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement.
28. The provisions of this CA/FO shall be binding upon Respondents, their officers, directors, agents, servants, authorized representatives, employees, and successors or assigns. Action or inaction of any persons, firms, contractors, employees, agents, or corporations acting under, through, or for Respondents shall not excuse any failure of Respondents to fully perform its obligations under this CA/FO.
29. Respondents 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. 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.
31. Issuance of or compliance with this CA/FO does not waive, extinguish, satisfy, or otherwise affect Respondents' obligation to comply with all applicable requirements of the Act, regulations promulgated thereunder, and any order or permit issued thereunder.
32. 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 Respondents for noncompliance with this CA/FO. Violation of this CA/FO shall be deemed a violation of the Act.
33. Except as stated in paragraph 32, each party hereto shall bear its own costs and attorneys fees incurred in this proceeding.

D. Effective Date

34. The effective date of the CA/FO shall be the date that the Final Order is filed.

FOR THE CONSENTING PARTIES:

For Lealani Corporation:

 Date: 8/9/12
Robert French, President

For Poipu Inn, Inc.:

 Date: 8/7/12
Jed Sueoka, President

For the United States Environmental Protection Agency:

 Date: 21 Aug 2012
for Nancy Woo
Acting Director, Water Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

ATTACHMENT A

Lealani Corp. & Poipu Inn, Inc. CA/FO
Docket No. UIC-09-2012-0002

EPA REGION 9 COLLECTION INFORMATION:

ELECTRONIC FUNDS TRANSFERS

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency "

CHECK PAYMENTS

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

OVERNIGHT MAIL

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

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[PROPOSED]
FINAL ORDER

The United States Environmental Protection Agency Region IX ("EPA"), and Lealani Corporation and Poipu Inn, Inc. ("Respondents"), having entered into the foregoing Consent Agreement, and EPA having duly publicly noticed the Stipulations and Findings and proposed Final Order regarding the matters alleged therein,

IT IS HEREBY ORDERED THAT:

1. The foregoing Consent Agreement and this Final Order (Docket No. UIC-09-2012-0002) be entered; and
2. Respondents shall comply with the requirements set forth in the Consent Agreement and this Final Order.

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

Steven Jawgiel
Presiding Officer
U.S. Environmental Protection Agency
Region 9

Date: _____

