

US EPA ARCHIVE DOCUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF

National Park Service:
Kalaupapa National Historical
Park, Kalaupapa, HI

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

DOCKET NO. UIC-AO-2005-0001

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 National Park Service (“Respondent”) hereby agrees to the issuance of, this Consent Agreement and Final Order.

II. FINDINGS

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 issue 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. The National Park Service is a Federal 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 administers Kalaupapa National Historical Park pursuant to 16 U.S.C. §§ 410jj *et seq.* Most of the land within the boundaries of Kalaupapa National Historical Park is owned by the State of Hawaii. Kalaupapa has 20 large capacity cesspools, and the areas of land on which the large capacity cesspools are located is not owned by the United States. As part of Respondent’s administrative responsibilities for Kalaupapa, Respondent currently operates 10 of the large capacity cesspools at Kalaupapa National Historical Park. The list of large capacity cesspools operated by Respondent appears in Table 1 attached hereto and incorporated by reference.
9. In addition, there are 10 large capacity cesspools at Kalaupapa that are operated by the State of Hawaii. The list of large capacity cesspools currently owned and operated by the State of Hawaii appears in Table 2, attached hereto and incorporated by reference. For those large capacity cesspools that are presently operated by the State of Hawaii, Respondent has voluntarily agreed to close these 10 cesspools as well, and Respondent will exert its best efforts to close these cesspools in accordance with 40 C.F.R. § 144.89(a) by April 30, 2007 using the schedule outlined in paragraph **14**.

10. Respondent has informed EPA that due to the lack of a federal appropriation to fund the closure of these large capacity cesspools, Respondent will be unable to close the large capacity cesspools referred to in paragraph **8** by April 5, 2005 as required by 40 C.F.R. § 144.88.
11. Respondent intends to undertake the measures referred to in paragraph **14** by the dates specified in order to close the large capacity cesspools.
12. 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, by and through its authorized representative, the Regional Director for the Pacific West Region, and EPA agree to the issuance of the following, which, upon issuance of the Final Order, shall become effective:

A. Compliance Requirements

13. For those cesspools operated by Respondent and identified in Table 1, Respondent shall close those large capacity cesspools in accordance with 40 C.F.R. §144.89(a) no later than May 31, 2007.
14. Respondent shall submit reports (“milestone reports”) confirming that the milestones set forth in this paragraph have been met in accordance with the schedule below:
 - A. The design of the alternative treatment technology has been completed by **November 30, 2005**. If the alternative treatment system is a septic tank system, an effluent filter is required prior to disposal into the leach field or seepage pit.
 - B. Approval to Construct has been issued by the Hawaii State Department of Health by **January 15, 2006**
 - C. The bidding process for the alternative treatment technology has commenced by **January 15, 2006**
 - D. Construction of the alternative treatment technology has been initiated by **August 15, 2006**
 - E. The Final Inspection has been completed by **March 15, 2007**
 - F. Approval to Use has been issued by the Hawaii State Department of Health by **March 30, 2007**
 - G. The Closure of the Cesspools operated by Respondent and identified in Table 1 has occurred by **April 30, 2007**

- H. A copy of Engineers Report has been sent to the EPA in the manner specified in paragraph **15** by **May 31, 2007**.
15. 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

16. 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.
17. Respondent neither admits nor denies the factual allegations contained in this CA/FO.
18. The provisions of this CA/FO shall be binding upon Respondent and its employees and contractors. 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.
19. 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 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.

20. 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.
21. Respondent consents to the issuance of this CA/FO and the conditions specified herein.
22. Respondent waives 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.
23. 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.
24. 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.
25. EPA reserves any and all legal and equitable remedies available to enforce this CA/FO. Violation of this CA/FO shall be deemed a violation of the Act.
26. Each party hereto shall bear its own costs and attorneys fees incurred in this proceeding.
27. If any event occurs which causes or may cause delays in either: 1) submission of milestone reports or 2) reaching any of the deadlines set forth in Part III.A. of this CA/FO, Respondent shall, within 7 business days of the delay or within 7 business days 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) business 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. 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.

28. 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 may be extended. EPA may consult with Respondent to determine the amount of time for the extension. In such event, EPA shall grant, in writing signed by the Manager of the EPA Region 9 Ground Water Office, the extension of time. To the extent that the force majeure incident impacts subsequent milestones, EPA and Respondent may consult to determine whether other changes to the compliance schedule are warranted.
29. 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.
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:
31. Any correspondence sent by EPA to Respondent regarding this CA/FO shall be sent to the following address, with copies as follows:

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

Original to:
Regional Director
National Park Service
Pacific West Region
1111 Jackson Street, Suite 700
Oakland, CA 94607

Copy to:
Field Solicitor
U.S. Department of the Interior
1111 Jackson Street, Suite 735
Oakland, CA 94607

32. No term or condition of this CA/FO shall be interpreted to require the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In cases where the payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be adjusted accordingly by the parties.

C. Dispute Resolution

33. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this CA/FO.
34. If Respondent disagrees, in whole or in part, with any decision by EPA under this CA/FO, Respondent's Project Coordinator 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.
35. 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 twenty (20) business days from the time the dispute referred to in the previous paragraph arises. 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 twenty (20) business days date the dispute arises, EPA's decision shall be binding on Respondent.
36. 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.
37. 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.

- 38. 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. During such time, if Respondent so requests, the 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. 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.
- 39. The Parties may, by mutual written agreement, extend any of the time periods provided for in the dispute resolution process.
- 40. 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

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

FOR THE CONSENTING PARTIES:

For National Park Service:

 Jonathon B. Jarvis
 Regional Director
 Pacific West Region
 National Park Service
 1111 Jackson Street, Suite 700

Date: _____

Oakland, CA 94607

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 the National Park Service, having entered into the foregoing Consent Agreement, and EPA having duly publicly noticed the 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-2005-0001) be entered; and
2. Respondent, National Park Service, 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: _____