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U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9

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7
8 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION 9

9
10 IN THE MATTER OF:

) DOCKET NO. UIC-09-2010-0005

11
12 Hawaii Housing Finance and Development
Corporation, Jack Hall Memorial Housing,
13 Kona, Hawaii

)
)
) **CONSENT AGREEMENT**
) **AND FINAL ORDER**
)

14 Respondent.

15
16 Proceedings under Sections 1423(c) and
1445(a) of the Safe Drinking Water Act, 42
17 U.S.C. §§ 300h-2(c) and 300j-4(a).

18
19 **CONSENT AGREEMENT**

20 **I. STATUTORY AUTHORITY**

21 This Consent Agreement and Final Order ("CA/FO") is issued under the authorities
22 vested in the Administrator of the United States Environmental Protection Agency ("EPA") by
23 Sections 1423(c) and 1445(a) of the Safe Drinking Water Act (the "SDWA" or the "Act"), 42
24 U.S.C. §§ 300h-2(c), 300j-4(a). The Administrator has delegated these authorities to the
25 Regional Administrator of EPA Region 9. The Regional Administrator in turn has delegated

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1 these authorities to the Director of the Water Division, EPA Region 9. In accordance with these
2 authorities, and with the “Consolidated Rules of Practice Governing the Administrative
3 Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits,” 40
4 C.F.R. Part 22 (hereinafter “Consolidated Rules of Practice”), the Director of the Water Division,
5 EPA Region 9, hereby issues, and the Hawaii Housing Finance and Development Corporation,
6 (“Respondent”) hereby agrees to the issuance of, this CA/FO.

7 Respondent and EPA (the “Parties”) agree that settlement of the matters at issue without
8 litigation will save time and resources, is in the public interest, is consistent with the provisions
9 and objectives of the Act and applicable regulations, and that entry of this CA/FO is the most
10 appropriate means of resolving such matters.

11 **II. STIPULATIONS AND FINDINGS**

12 Respondent stipulates and EPA finds as follows:

13 1. Pursuant to Part C of the Act, 42 U.S.C. §§ 300h to 300h-8, EPA has promulgated
14 regulations establishing minimum requirements for Underground Injection Control (“UIC”)
15 programs, to prevent underground injection which endangers drinking water sources. These
16 regulations are set forth at 40 C.F.R. Part 144.

17 2. “Underground injection” means the subsurface emplacement of fluids by well injection.
18 42 U.S.C. § 300h(d)(1); 40 C.F.R. § 144.3.

19 3. A “cesspool” is a “drywell,” which in turn is a “well,” as those terms are defined in 40
20 C.F.R. § 144.3. “Large capacity cesspools” (or “LCCs”) include “multiple dwelling, community
21 or 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). Large
23 capacity cesspools do not include single family residential cesspools or non-residential cesspools
24 which receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day.

25 *Id.*

1 4. Pursuant to 40 C.F.R. § 144.88, existing large capacity cesspools are required to be
2 closed no later than April 5, 2005.

3 5. Pursuant to Section 1422(c) of the Act, 42 U.S.C. § 300h-1(c), and 40 C.F.R. Part 147
4 Subpart M, § 147.601, EPA administers the UIC program in the State of Hawaii. This UIC
5 program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart
6 M), and 148.

7 6. Respondent Hawaii Housing Finance and Development Corporation is a public
8 corporation, and thus qualifies as a “person” within the meaning of Section 1401(12) of the Act,
9 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

10 7. Respondent owns and operates thirteen (13) large capacity cesspools that serve the Jack
11 Hall Memorial Housing Project at 74-895 Kealakehe St., Kailua-Kona, Hawaii.

12 8. Respondent failed to close the large capacity cesspools referred to in paragraph 7 by
13 April 5, 2005, and is therefore in violation of 40 C.F.R. § 144.88.

14 9. Pursuant to Section 1423(c)(1) of the Act, 42 U.S.C. § 300h-2(c)(1), and 40 C.F.R. §
15 19.4, EPA may issue an order either assessing an administrative civil penalty of not more than
16 \$11,000 for each day of each violation occurring before January 12, 2009, and not more than
17 \$16,000 for each day of each violation occurring after January 12, 2009, up to a maximum
18 penalty of \$177,500, or requiring compliance, or both, against any person who violates the Act
19 or any requirement of an applicable UIC program. In assessing a penalty for such violations,
20 EPA must, in accordance with Section 1423(c)(4)(B) of the Act, 42 U.S.C. § 300h-2(c)(4)(B),
21 take into account: (1) the seriousness of the violations; (2) the economic benefit resulting from
22 the violations; (3) the history of such violations; (4) any good faith efforts to comply with the
23 applicable requirements; (5) the economic impact of the penalty on the violator; and (6) such
24 other matters as justice may require.
25

1 10. Pursuant to Section 1445(a)(1)(A) of the Act, 42 U.S.C. § 300j-4(a), EPA may require
2 any person who is subject to the requirements of the Act to submit information relating to such
3 person's compliance with the requirements of the Act

4 **III. PROPOSED ORDER**

5 Respondent, by and through its attorneys, the State Attorney General, and EPA agree that
6 upon issuance of the Final Order and the effective date of this CA/FO, Respondent must satisfy
7 the following requirements:

8 **A. Compliance Requirements**

9 11. Pursuant to EPA's authority under Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c),
10 Respondent must close the thirteen large capacity cesspools that serve Jack Hall Memorial
11 Housing no later than **March 31, 2011**.

12 12. If Respondent fails to close all thirteen large capacity cesspools that serve Jack Hall
13 Memorial Housing by March 31, 2011, Respondent agrees to pay upon EPA's demand the
14 stipulated penalties set forth below in this paragraph, unless Respondent claims and EPA agrees
15 that the delay is caused by a *force majeure* event as defined below in paragraph 18. Stipulated
16 penalties will be calculated as follows:

- 17 a. \$100 per day beginning April 1, 2011 to May 31, 2011.
18 b. \$500 per day beginning June 1, 2011 to August 31, 2011.
19 c. \$1,000 for each subsequent day of noncompliance beginning September 1, 2011 until
the LCCs are closed to EPA's satisfaction.

20 EPA may demand stipulated penalties pursuant to this paragraph within one (1) year after the
21 date Respondent becomes subject to the stipulated penalty. Respondent must pay the stipulated
22 penalty within thirty (30) days of EPA's demand (hereafter referred to as the "stipulated penalty
23 due date") according to the process provided in Section III.B below.

24 13. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated
25 penalties due under this CA/FO.

1 14. If any event occurs which causes or may cause delays reaching the March 31, 2011
2 deadline for closure of the large capacity cesspools at issue in this CA/FO, then Respondent or
3 its attorney must, within forty-eight (48) hours of the delay or within 48 hours of Respondent's
4 knowledge of the anticipated delay, whichever is earlier, notify by telephone the EPA Region 9
5 LCC Project Coordinator or, in the LCC Project Coordinator's absence, the Manager of the EPA
6 Region 9 Ground Water Office. Within fifteen (15) days thereafter, Respondent must provide in
7 writing the reasons for the delay, including whether the delay constitutes a *force majeure* event,
8 as defined in paragraph 18 below, the anticipated duration of the delay, the measures taken or to
9 be taken to prevent or minimize the delay, and a timetable by which those measures will be
10 implemented. Respondent must exercise its best efforts to avoid or minimize any delay and any
11 effects of a delay. Failure to comply with the notice requirement of this paragraph precludes
12 Respondent from asserting any claim of *force majeure*.

13 15. If EPA agrees that the delay or anticipated delay in compliance with this CA/FO has been
14 or will be caused by circumstances entirely beyond the control of Respondent and constitutes a
15 force majeure event, as defined in paragraph 18 below, the March 31, 2011 deadline for closing
16 the LCCs may be extended for a period of no longer than the delay resulting from the
17 circumstances causing the delay. In such event, EPA may grant, in writing signed by the
18 Manager of the EPA Region 9 Ground Water Office, the extension of time. An extension of the
19 time for performing an obligation granted by EPA pursuant to this paragraph will not, of itself,
20 extend the time for performing a subsequent obligation.

21 16. Respondent has the burden of demonstrating, by a preponderance of the evidence, that
22 the actual or anticipated delay has been or will be caused by a *force majeure* event, that the
23 duration of the delay was or will be warranted under the circumstances, that Respondent did
24 exercise or is using its best efforts to avoid and mitigate the effects of the delay, and that
25 Respondent complied with the requirements of this section.

1 17. In the event that EPA does not agree that a delay in achieving compliance with the
2 requirements of this CA/FO has been or will be caused by a force majeure event , EPA will
3 notify Respondent in writing of its decision and any delays will not be excused. Upon this
4 occurrence, the stipulated penalties specified in paragraph 12 will become due and must be paid
5 by Respondent according to the process expressed in Section III.B below.

6 18. "*Force majeure*," for purposes of this Consent Agreement, is defined as any event arising
7 from causes beyond Respondent's control, or of any entity controlled by Respondent, or of
8 Respondent's contractors, that delays or prevents the performance of any obligation under this
9 CA/FO despite Respondent's best efforts to fulfill the obligation. The requirement that
10 Respondent exercised "best efforts to fulfill the obligation" includes using best efforts to
11 anticipate any potential *force majeure* event and best efforts to address the effects of any such
12 event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay
13 to the greatest extent possible. Examples of events that are not *force majeure* events include, but
14 are not limited to, increased costs or expenses of any work to be performed under this Consent
15 Agreement, state budget funding difficulties of Respondent, and normal inclement weather.

16 19. Respondent must send any written communications, including any requests for extension
17 of time to meet the deadline set forth in paragraph 11 above, to the following address:

18 LCC Project Coordinator
19 Water Division
20 Ground Water Office, WTR-9
21 Environmental Protection Agency
22 75 Hawthorne Street
23 San Francisco, CA 94105
24 Fax: (415) 947-3545

25 20. The person signing Respondent's submissions must make the following certification:

"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 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

1 responsible for gathering the information, the information submitted is, to the best of my
2 knowledge and belief, true, accurate, and complete. I am aware that there are significant
3 penalties for submitting false information, including the possibility of fine and
4 imprisonment for knowing violations.”

5 21. Subject to the provisions of paragraph 31 related to the effect of this settlement, the
6 stipulated penalties provided for in this Consent Agreement shall be in addition to any other
7 rights, remedies, or sanctions available to EPA for Respondent’s violation of this CA/FO or
8 applicable law.

9 **B. Penalty**

10 22. To settle this matter, Respondent agrees to pay to the United States an administrative
11 civil penalty of one-hundred ten thousand dollars (\$110,000) no later than thirty (30) days
12 following the effective date of the Final Order (hereafter referred to as the “due date”).

13 23. The administrative civil penalty referred to immediately above (as well any stipulated
14 penalties referred to in paragraph 12) must be made payable to the Treasurer, United States of
15 America, in accordance with any acceptable method of payment listed in Attachment A (“EPA
16 Region 9 Collection Information”) which is incorporated by reference as part of this CA/FO.

17 24. Concurrent with the penalty payment, Respondent must provide written notice of its
18 payment, referencing the title and docket number of this case, via certified mail, to each of the
19 following:

20 Steven Armsey
21 Regional Hearing Clerk (ORC-1)
22 U.S. Environmental Protection Agency, Region 9
23 75 Hawthorne Street
24 San Francisco, CA 94105

25 and

26 Rich Campbell
27 Assistant Regional Counsel
28 Office of Regional Counsel (ORC-2)
29 U.S. Environmental Protection Agency, Region 9
30 75 Hawthorne Street
31 San Francisco, CA 94105

1 25. Payment must be received on or before the due date specified in paragraph 22 (or the
2 stipulated penalty due date specified in paragraph 12).

3 26. If the full penalty payment is not received on or before the due date (or stipulated penalty
4 due date), interest will accrue on any overdue amount from the due date through the date of
5 payment, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. §
6 3717. In addition, a late payment handling charge of \$15.00 will be assessed for each thirty (30)
7 day period (or any portion thereof) following the due date (or stipulated penalty due date) in
8 which the balance remains unpaid. A six percent (6%) per annum penalty will also be applied on
9 any principal amount not paid within ninety (90) days of the due date (or stipulated penalty due
10 date). Respondent must tender any interest, handling charges, or late penalty payments in the
11 same manner as described above.

12 27. Pursuant to Section 1423(c)(7) of the Act, 42 U.S.C. § 300h-2(c)(7), if Respondent fails
13 to pay by the due date the administrative civil penalty assessed in paragraph 22 of this CA/FO or,
14 if applicable, fails to pay by the stipulated penalty due date the stipulated penalties due in
15 accordance with paragraph 12 of this CA/FO, EPA may bring a civil action in an appropriate
16 district court to recover the amount assessed (plus costs, attorneys' fees, and interest). In such an
17 action, the validity, amount, and appropriateness of such penalty is not subject to review.

18 **IV. GENERAL PROVISIONS**

19 28. Respondent waives any right to a hearing under Section 1423(c)(3) of the Act, 42 U.S.C.
20 § 300h-2(c)(3). Respondent waives any right to contest the allegations contained in the Consent
21 Agreement, or to appeal the CA/FO.

22 29. For the purpose of this proceeding, Respondent admits the jurisdictional allegations of
23 the Consent Agreement and agrees not to contest, in any administrative or judicial forum, EPA's
24 jurisdiction to enter into this CA/FO.
25

1 30. Respondent neither admits nor denies the allegations set forth in the Stipulations and
2 Findings set forth in the Consent Agreement.

3 31. Respondent consents to the issuance of this CA/FO and the conditions specified herein,
4 including payment of the administrative civil penalty, and any stipulated penalties. Full payment
5 of the administrative civil penalty, and any stipulated penalties, and closure of the thirteen Jack
6 Hall large capacity cesspools, will only resolve Respondent's liability for federal civil penalties
7 for the SDWA violations specifically alleged in the Consent Agreement.

8 32. Each undersigned signatory to this Consent Agreement certifies that the signatory is duly
9 and fully authorized to enter into and ratify this Consent Agreement.

10 33. The provisions of this CA/FO apply to and are binding upon Respondent, its officers,
11 directors, agents, servants, authorized representatives, employees, and successors or assigns.
12 Action or inaction of any persons, firms, contractors, employees, agents, or corporations acting
13 under, through, or for Respondent will not excuse any failure of Respondent to fully perform its
14 obligations under this Consent Agreement.

15 34. Respondent must give notice, and provide a copy of this CA/FO, to any successor-in-
16 interest prior to transfer of ownership or operation of the large capacity cesspools referred to in
17 paragraph 7. Respondent must notify EPA in writing at least thirty (30) days prior to any such
18 transfer of ownership or operation. Such transfer, however, will have no effect on Respondent's
19 obligation to comply with Sections III.A and III.B of this CA/FO.

20 35. Respondent must not deduct the administrative civil penalty, or any stipulated penalties,
21 or any interest, late penalty payments, or administrative handling fees provided for in this
22 CA/FO, from its federal, state, or local income taxes.

23 36. This CA/FO does not constitute a waiver, suspension, or modification of the requirements
24 of any federal, state, or local statute, regulation or condition of any permit issued thereunder,
25 including the requirements of the Act and accompanying regulations.

1 37. Issuance of this CA/FO does not in any case affect the right of EPA to pursue appropriate
2 injunctive or other equitable relief or criminal sanctions for any violations of law, nor does it
3 affect Respondent's rights to contest any such action by EPA.

4 38. This CA/FO is not a permit or modification of a permit, and does not affect Respondent's
5 obligation to comply with all federal, state, local laws, ordinances, regulations, permits, and
6 orders. Issuance of, or compliance with, this CA/FO does not waive, extinguish, satisfy, or
7 otherwise affect Respondent's obligation to comply with all applicable requirements of the
8 SDWA, regulations promulgated thereunder, and any order or permit issued thereunder.

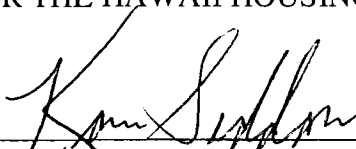
9 39. EPA reserves any and all legal and equitable remedies available to enforce this CA/FO,
10 as well as the right to seek recovery of any costs and attorneys' fees incurred by EPA in any
11 actions against Respondent for noncompliance with this CA/FO. Violation of this CA/FO will
12 be deemed a violation of the Act.

13 40. Except as stated in paragraph 26, each party hereto will bear its own costs and attorneys'
14 fees incurred in this proceeding.

15 **V. EFFECTIVE DATE**

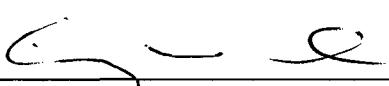
16 41. The effective date of the CA/FO is the date that the Final Order is filed.

17 FOR THE HAWAII HOUSING FINANCE AND DEVELOPMENT CORPORATION:

18
19 
20 _____
21 Karen Seddon
22 Executive Director
23 Hawaii Housing Finance and Development Corporation

Date: 08/24/10

24 Approved as to Form:

25 

Deputy Attorney General
State of Hawaii

**In re: HHFDC
Consent Agreement and Final Order**

1 FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

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Alexis Strauss

Date: 30 August 2010

Alexis Strauss
Director, Water Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

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