

COUNCIL OF THE COUNTY OF MAUI

GOVERNMENT RELATIONS, ETHICS, AND TRANSPARENCY COMMITTEE

June 7, 2024

**Committee
Report No.** _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Government Relations, Ethics, and Transparency Committee, having met on May 17, 2024, makes reference to Bill 79 (2024), entitled “A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR SETTLEMENT OF ALLEGED VIOLATIONS.”

Bill 79’s purpose is to authorize the Mayor to enter into a Consent Agreement and Final Order (“Agreement”) with the United States Environmental Protection Agency (“EPA”), attached as Exhibit “1,” to settle alleged violations related to the Safe Drinking Water Act.

Your Committee notes that under Section 2.20.020, Maui County Code, the Mayor may not enter into any intergovernmental agreement or any amendment that places a financial obligation on the County or any department or agency, unless authorized by ordinance.

A Deputy Corporation Counsel explained that the EPA alleges violations for seven large-capacity cesspools on various County-owned properties in Hāna, in Makawao, and on Molokai. The Agreement requires a payment of a \$193,274 fine, closure of the large-capacity cesspools, and a Countywide audit of all County-owned or County-managed properties to determine the existence of any other large-capacity cesspools that may also need to be closed.

The Agreement defines a “large capacity cesspool” to include multiple dwelling, community, or regional cesspools, or other devices that receive sanitary waste and contain human excreta, with an open bottom and sometimes perforated sides. Further, large-capacity cesspools do not

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include single-family residential cesspools or non-residential cesspools that receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day.

The Deputy Corporation Counsel noted the closure of large-capacity cesspools is currently underway, including the closure of two cesspools in Hāna, which are required by the Agreement.

The Deputy Corporation Counsel added that the Department of Public Works has been working on the design, permitting, and construction for the closure of the cesspools. This process involves permanently plugging and cutting off all piping that drains to the cesspool, creating individual wastewater systems and ensuring the County is in compliance with the Safe Drinking Water Act.

The Deputy Corporation Counsel also said the Department of Management will continue to lead the Countywide audit to ensure coordination with all County departments.

The Deputy Corporation Counsel said the passage of Bill 79 is necessary to finalize an intergovernmental agreement with the Federal government and approve payment of the fine.

Your Committee expressed support for the bill and noted its appreciation to County departments for their work to address the alleged violations and ensure compliance moving forward.

Your Committee voted 7-0 to recommend passage of Bill 79 (2024), on first reading. Committee Chair U‘u-Hodgins, Vice-Chair Paltin, and members Cook, Johnson, Kama, Lee, and Sugimura voted “aye.” Committee members Rawlins-Fernandez and Sinenci were excused.

Your Government Relations, Ethics, and Transparency Committee **RECOMMENDS** that Bill 79 (2024), attached hereto, entitled “A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE

COUNCIL OF THE COUNTY OF MAUI
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR SETTLEMENT OF ALLEGED VIOLATIONS," be PASSED ON FIRST READING and be ORDERED TO PRINT.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



NOHELANI U'U-HODGINS, Chair

great:cr:24025aa:kmata

ORDINANCE NO. _____

BILL NO. 79 (2024)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR SETTLEMENT OF ALLEGED VIOLATIONS

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Purpose. The United States Environmental Protection Agency (EPA), Region 9, alleges that the County operates seven (7) large capacity cesspools (LCC) at various locations throughout the County of Maui, including one (1) parcel of land which includes the Hana Police Station, the Hana Motor Vehicle and Licensing Office and the Hana Public Works Vehicle Maintenance Shop (TMK: 2-1-4-006-003) with two (2) alleged LCCs; one (1) parcel of land which includes the Makawao Baseyard (TMK: 2-2-4-017-021) with three (3) alleged LCCs; one (1) parcel of land which includes the Maui Veterans Cemetery (TMK: 2-2-4-002-018) with one (1) alleged LCC; and one (1) parcel of land which includes the Molokai Veterans Cemetery (TMK: 2-5-2-017-022) with one (1) alleged LCC, in violation of the Safe Drinking Water Act, 42 U.S.C. Section 300f et. seq. (the Alleged Violations). The County and EPA, to avoid incurring expenses and the uncertainty of an administrative or judicial determination of the parties' respective rights and liabilities, have attempted to reach a resolution of the Alleged Violations by way of a negotiated Consent and Final Order (CAFO), which is attached hereto and made a part hereof as Exhibit "1".

Section 2.20.020, Maui County Code, provides that, unless authorized by ordinance, the Mayor shall not enter into any intergovernmental agreement or any amendment thereto which places a financial obligation upon the County or any department or agency thereof.

Section 3.16.020(B), Maui County Code, provides that any settlement in excess of \$7,500 shall require Council authorization. The Department of the Corporation Counsel has requested authority to settle the Alleged Violations under the terms set forth in Exhibit "1".

SECTION 2. Council Authorization. The Council, having reviewed the facts and circumstances regarding this case, and being advised of attempts to reach a resolution by way of a negotiated settlement and CAFO between the County and the EPA, hereby approves settlement of the Alleged Violations by way of the CAFO and payment of a penalty not to exceed \$193,274 in accordance with the terms of the CAFO attached as Exhibit "1". The CAFO also requires the County to perform a county-wide audit of properties it owns and controls to locate and decommission any additional LCCs.

Pursuant to Section 2.20.020, Maui County Code, the Council of the County of Maui hereby authorizes the Mayor to execute the CAFO attached as Exhibit "1", all other necessary documents relating to the agreement, and any amendments thereto as may be imposed, and agreed to, by the Corporation Counsel. This includes a county-wide audit as set forth in the CAFO.

SECTION 3. EFFECTIVE DATE. This ordinance shall take effect upon its approval. Certified copies of this Ordinance shall be transmitted to the Mayor, the Managing Director, the Budget Director, the Director of Finance, the Director of Public Works, and the Corporation Counsel.


APPROVED AS TO FORM AND LEGALITY:

/s/Michael J. Hopper

MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

LF2022-1370
2024-04-15 Ord Countywide Cesspool Settlement Agrmt

INTRODUCED BY:

A handwritten signature in cursive script, appearing to read "Chris Lee", is written above a horizontal line.

Upon the request of the Mayor.

EXHIBIT "1"

SUZANNE ANDREWS
Acting Regional Counsel

ERIN BREWER
Assistant Regional Counsel
United States Environmental Protection Agency, Region 9

Attorneys for Complainant

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:

DOCKET NO. UIC-09-2024-0052

County of Maui,

Respondent.

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

**CONSENT AGREEMENT
AND
FINAL ORDER**

CONSENT AGREEMENT

I. AUTHORITIES AND PARTIES

1. The United States Environmental Protection Agency, Region 9 ("EPA") and the County of Maui ("Respondent") (collectively the "Parties") agree to settle this matter and consent to the entry of this Consent Agreement and Final Order ("CA/FO"). This CA/FO is an administrative action commenced and concluded under Section 1423(c)(1) 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 of EPA, Region 9. The Administrator of EPA delegated the authority to bring and settle this action under the SDWA to the Regional Administrator of EPA Region 9. In turn, the Regional Administrator further delegated the authority to bring this action and sign a consent agreement settling this action under the SDWA to the Director of the Enforcement and Compliance Assurance Division.

3. Respondent is the County of Maui, a local governmental body in the state of Hawaii, which consists of the islands of Maui, Lānaʻi, Kahoʻolawe, Molokini, and portions of Molokaʻi.

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. *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 \$193,274, and the performance of the compliance requirements specified below.

II. JURISDICTION AND WAIVER OF RIGHT TO JUDICIAL REVIEW AND HEARING

7. Consistent with 40 C.F.R. § 22.18(b), for purposes of the proceeding, Respondent: admits the jurisdictional allegations of the CA/FO; neither admits nor denies specific factual allegations contained in the CA/FO; consents to the assessment of any stated civil penalty, and to any conditions specified in the Consent Agreement; and waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying the Consent Agreement.

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.

III. 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 from endangering 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 is a type of “well” that is completed above the water table.

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 injection wells.

20. 40 C.F.R. § 144.3 defines Class V 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 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 owners or operators of existing LCCs to close them by April 5, 2005. New LCCs were prohibited as of April 5, 2000. *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.

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 \$27,018 for each day of violation, up to a maximum administrative penalty of \$337,725, for violations occurring after November 2, 2015 where penalties are assessed on or after January 6, 2023, and issue an order requiring compliance.

IV. FACTUAL ALLEGATIONS AND ALLEGED VIOLATIONS

28. Respondent is a municipality, within the meaning of Section 1401(10) of the SDWA, 42 U.S.C. §300f(10), 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 the following properties (hereafter, the “Properties,” or each individually a “Property”), among others, on the island of Maui since at least 2005:

- One (1) parcel of land which includes the Hana Police Station, the Hana Motor Vehicle and Licensing Office, and the Hana Public Works Vehicle Maintenance Shop (TMK: 2-1-4-006-003);
- One (1) parcel of land which includes the Makawao Baseyard (TMK: 2-2-4-017-021);
- One (1) parcel of land which includes the Maui Veterans Cemetary (TMK: 2-2-4-002-018); and
- One (1) parcel of land which includes the Molokai Veterans Cemetary (TMK: 2-5-2-017-022).

30. During all times that Respondent has owned and operated the Properties, the Properties have each been serviced by at least one cesspool located on the Property for the disposal of sanitary wastewater. Specifically, each Property is serviced by the following number of cesspools, for a total of seven (7) cesspools:

- Two (2) cesspools (LCCs) service the Hana Police Station, the Hana Motor Vehicle and Licensing Office, and the Hana Public Works Vehicle Maintenance Shop;
- Three (3) LCCs service the Makawao Baseyard;
- One (1) LCC services the Maui Veterans Cemetary; and
- One (1) LCC services the Molokai Veterans Cemetary.

31. Cesspools like the seven (7) servicing the Properties are used throughout the state of Hawaii for the disposal of untreated sanitary waste. The subsurface discharge of raw, untreated sewage to a cesspool can contaminate groundwater that may serve as an underground source of drinking water, thereby impacting human health. The subsurface discharge of untreated sewage can also contaminate oceans and streams via groundwater, thereby causing damage to land or aquatic ecosystems, including the nearshore ecosystems of the Hawaiian Islands.¹

32. The EPA alleges that the cesspools that serviced the Properties meet the definition of an LCC, as that term is defined at 40 C.F.R. § 144.81(2), in that each cesspool had the capacity to serve twenty (20) or more persons per day.

33. The EPA alleges that each day that Respondent failed to close the alleged LCCs at the Properties after April 5, 2005, constitutes a violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88.

V. SETTLEMENT TERMS

A. Civil Penalty

34. 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

¹ See,

<https://www.epa.gov/uic/cesspools-hawaii#:~:text=There%20are%20approximately%2088%2C000%20cesspools,onsite%20wastewater%20systems%2C%20including%20cesspools.>

See also,

[https://www.coris.noaa.gov/activities/coral_research_plan/pdfs/hawaiian_islands.pdf#:~:text=The%20Hawaiian%20Archipelago%20stretches%20for%20over%202%2C500%20km,\(NWHI\)%20consisting%20of%20mostly%20uninhabited%20atolls%20and%20banks.](https://www.coris.noaa.gov/activities/coral_research_plan/pdfs/hawaiian_islands.pdf#:~:text=The%20Hawaiian%20Archipelago%20stretches%20for%20over%202%2C500%20km,(NWHI)%20consisting%20of%20mostly%20uninhabited%20atolls%20and%20banks.)

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.

35. Within thirty (30) days of the Effective Date of this CA/FO, Respondent must pay a civil penalty of one hundred ninety-three thousand, two hundred and seventy-four dollars (\$193,274) by sending a check (mail or overnight delivery), wire transfer, automated clearing house, or online payment. Payment instructions are available at:

<http://www2.epa.gov/financial/makepayment>.

Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, Missouri 63197-9000

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, NY 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.

36. After payment, Respondent shall immediately 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 shall also send notice of payment and a transmittal letter via email to the EPA Region 9 Enforcement and Compliance Assurance Division's Enforcement Officer and the EPA Region 9 Office of Regional Counsel attorney identified in Paragraph 56.

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

38. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, in addition to any stipulated penalties due under Paragraphs 47-52, 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 thirty (30) days past due; and 6% per year penalty on any principal amount ninety (90) days past due.

39. If Respondent does not pay timely the civil penalty due under Paragraph 35 and/or any stipulated penalties due under Paragraphs 47-52, 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.

B. Compliance Requirements

40. 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 December 31, 2025, close the seven (7) LCCs at the Properties 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 ("IWS"), 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 applicable sewer connection requirements; and
- b. Within thirty (30) days of the closure of the LCCs, submit to EPA a Final LCC Closure Report which includes the following information for each LCC:

- i. A description of the process by which the LCC was closed, including the equipment used;
- ii. Photographic evidence of construction and completion;
- iii. Identification of the contractor(s) providing the service;
- iv. A copy of the cesspool backfill closure report; and
- v. A copy of all approvals related to the closure of the LCCs and any replacement wastewater systems, such as an IWS or sewer connection, issued by HDOH, the County, or any other agency.

Should the applicable agency issue its approval after the Final LCC Closure Report is due, Respondent shall note the pending status and submit the approval to EPA within fourteen (14) days of Respondent's receipt of the approval.

41. Permits. Where any compliance obligation under this Section requires Respondent to obtain a federal, state, or local permit approval, Respondent shall submit timely and complete applications to obtain all such permits or approvals. Respondent may seek relief under the provision of Section E ("Force Majeure") of this CA/FO for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining any permit or approval required to fulfill such obligation, if Respondent has submitted timely and complete applications to obtain all such permits or approvals.

42. If Respondent fails to comply with the requirements set forth in Paragraph 40, 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).

C. Compliance Audit

43. Respondent shall perform a compliance audit (“Audit”) of all properties it owns or operates in the state of Hawaii to identify and close all LCCs in accordance with this Section.²

44. The Parties agree that violations reported or otherwise disclosed to EPA and corrected under and in accordance with this Section shall be eligible for 100% mitigation of gravity-based penalties.

45. Respondent shall comply with the following Audit requirements:

a. **Retain an Auditor to Conduct LCC Inspections.**

- i. Within forty-five (45) days of the Effective Date of this CA/FO, Respondent shall identify and submit to EPA for its review and approval a proposed Auditor.
- ii. **Qualifications.** The proposed Auditor shall have a technical or educational background relevant to LCCs and at least five years of experience conducting inspections or working on LCCs. Respondent shall provide EPA with a curriculum vitae and list of past cesspool projects performed by the proposed Auditor.
- iii. **Approval.** Upon written EPA approval, Respondent shall proceed to the next step of the Audit. If EPA does not respond to Respondent’s proposed Auditor within two (2) weeks of Respondent’s submission, then the Auditor shall be deemed to be approved.

² To the extent Respondent includes properties that Respondent does not own or operate in its Audit, EPA will extend the same offer of 100% mitigation of gravity-based penalties to the applicable owners or operators.

- iv. **Disapproval.** EPA shall have two (2) weeks from its receipt of Respondent's submission to disapprove the proposed Auditor. Any EPA disapproval will be in writing and include a rationale for disapproval and instructions on how to address any identified concerns. Within thirty (30) days of EPA's disapproval, Respondent shall propose a new Auditor, address any additional directions contained in EPA's disapproval, and provide the new proposed Auditor's curriculum vitae and list of past cesspool projects performed by the Auditor.
 - v. **Auditor's Obligations.** Respondent shall ensure that the Auditor supervises the preparation of and signs and certifies the Inspection Completion Report as required by Paragraph 44.d. and the Final LCC Closure Reports as required by Paragraph 44.f.
 - vi. **Record Retention.** Respondent shall include in its written agreement with the Auditor a provision requiring (1) the Auditor maintain all records pertaining to the undertaking or oversight of the Audit for at least five (5) years after the Audit is complete, and (2) the Auditor's records of the Audit shall be made available to EPA upon request.
- b. Develop a Target and Non-Target Property Report.**
- i. Within six (6) months of EPA's written approval of Respondent's proposed Auditor, Respondent shall submit to EPA for review and approval a Target and Non-Target Property Report for all properties controlled by Respondent that includes a list of Target Properties to be inspected by the Auditor, and a list and narrative description of Non-

Target Properties that Respondent proposes not to inspect accompanied with Sufficient Documentation.

- ii. Target Properties. All Properties controlled by Respondent in the state of Hawaii are presumptively Target Properties for purposes of this Audit, unless Respondent produces Sufficient Documentation to properly classify the property as a Non-Target Property.
- iii. Non-Target Properties. Non-Target Properties include those that (1) are connected to a sewer system; (2) contain an on-site wastewater treatment facility permitted by the HDOH; (3) contain an HDOH-permitted IWS that is not a cesspool; (4) are residential properties that contain one single-family residence; (5) are non-residential properties that clearly have the capacity to serve fewer than 20 persons per day; or (6) are undeveloped land with no restrooms or other structure associated with a sanitary wastewater disposal system. For each property classified as a Non-Target Property, Respondent must summarize the factual basis for the conclusion and provide Sufficient Documentation to support the conclusion.
- iv. Sufficient Documentation: Respondent shall provide Sufficient Documentation for each Non-Target Property identified on the Non-Target Property list. In addition to the documentation identified in subparts (1) – (6) below, Respondent may support its position with other relevant records, such as interviews, oral testimony, and/or e-mail correspondence with Respondent’s employees, occupants, tenants and/or lessees, and other

individuals with knowledge, including members of a religious organizations utilizing the site, as needed to confirm the presence (or absence) and location of any LCCs. If Respondent obtains information through databases maintained by a government entity, Respondent shall identify the government entity and the name of the database, provide EPA with a copy or screenshot of the database, identify the pertinent information thereon, and include a statement documenting the date and time the information was obtained. Notwithstanding the above, for the purposes of this CA/FO, the following will qualify as Sufficient Documentation:

1. For properties connected to a sewer: written confirmation of the connection from the County of Maui, Department of Environmental Management or private sewer operator; building plans documenting the connection to a county or private sewer system; or a sewer bill within the last year.
2. For properties that contain an on-site wastewater treatment system: an HDOH permit or written documentation from HDOH of approval to operate the wastewater treatment system.
3. For properties that contain a non-cesspool IWS: an IWS permit from HDOH or written documentation from HDOH showing that the IWS is permitted.
4. For properties that contain one single-family residence: a Tax Map Key code, or other reliable documentation, showing that

the cesspool on the property is connected exclusively to one (1) single-family residence. The property may, however, contain other buildings or structures thereon that are not connected to or otherwise utilize the cesspool on the property.

5. For non-residential properties where a cesspool has actual and potential capacity to serve less than 20 people: present and historical documentation identifying the nature and use of the property and the structure connected to the cesspool, and any other relevant information.
 6. For undeveloped land: a “Building Value” of zero according to government tax records as of the Effective Date of this CA/FO.
- v. Approval. Upon written EPA approval, Respondent shall proceed to the next step of the Audit.
- vi. Disapproval. If EPA disapproves the Target and Non-Target Property Report and determines that a Non-Target Property should have been included in the Target Property list, EPA will provide its rationale for disapproval and instructions on how to address any identified concerns in writing.
1. Within one (1) month of receiving EPA’s disapproval of the Target and Non-Target Property Report, Respondent shall provide EPA with a written response, identified as an “Addendum,” to the Target and Non-Target Property Report. The Addendum shall address EPA’s identified concerns and

either confirm EPA's Target Property determination(s) or reaffirm Respondent's initial characterization.

2. After consideration of Respondent's Addendum, EPA shall make, in its sole discretion, the final determination in writing on whether the property is subject to the Target or Non-Target Property list.
 3. Upon receipt of EPA's final determination, Respondent shall proceed to the next step of the Audit in accordance with EPA's final approved Target and Non-Target Property Report, as modified by any final determination by EPA on the Target and Non-Target Property lists.
- vii. Certification. The Target and Non-Target Property Report and Addendum must be signed and accompanied by a certification from Respondent, pursuant to Paragraph 57.
- c. Conduct Target Property Inspections.
- i. Within eighteen (18) months of EPA's approval of the Target and Non-Target Property Report or EPA's final determination following a disapproval, whichever comes later, the Auditor shall perform an on-site visual inspection for the presence of an LCC for all properties identified on the Target Property list.
 - ii. All work shall be conducted in accordance with accepted standards of professional engineering procedures as practiced by members of the local

engineering profession currently practicing in Hawaii under similar conditions.

d. **Develop Inspection Completion Report.**

i. Within three (3) months of inspecting the last Target Property, the Respondent shall require the Auditor to submit an Inspection Completion Report to EPA for review and approval that documents the Auditor's findings from the Target Property inspections. The Inspection Report shall include:

1. A description of the procedures followed in completing the Audit.
2. The number of LCCs located on each Target Property, a description of each LCC, and a description of how the LCC was identified and/or confirmed, along with any supporting documentation.
3. For those Target Properties that were determined not to contain an LCC, a description of how it was determined that the property did not contain an LCC and what, if any, other sewer, wastewater treatment facility, or IWS is being used, along with any supporting documentation.

ii. **Approval.** Upon written EPA approval of the Inspection Completion Report, Respondent shall proceed to the next step of the Audit.

iii. **Disapproval.** Any EPA disapproval will be in writing and include a rationale for disapproval and instructions on how to address any

identified concerns. Within one (1) month of EPA's disapproval, the Respondent shall have the Auditor provide an amended Inspection Completion Report to EPA and address any additional directions contained in EPA's disapproval.

- iv. Certification. The Inspection Completion Report submitted to EPA must be signed and accompanied by a certification from the Respondent, pursuant to Paragraph 57.

e. LCC Closure Plan.

- i. Within four (4) months of EPA's approval of the Inspection Completion Report to EPA, Respondent shall submit an LCC Closure Plan to EPA for review and approval.
- ii. Schedule. The LCC Closure Plan should ensure the closure of all identified LCCs as soon as reasonably possible, and in no case shall the schedule for closure extend beyond four (4) years from the date of the EPA's approval of the LCC Closure Plan. Respondent may request an extension of this three-year deadline if necessary to comply with historic preservation, native Hawaiian burial sites, and related laws and regulations. Respondent's request for an extension of time must be supported with evidence demonstrating Respondent's exercise of reasonable best efforts to comply with the original deadline.
- iii. Approval: Upon written EPA approval of the LCC Closure Plan, Respondent shall implement the LCC Closure Plan in accordance with the approved schedule.

- iv. **Disapproval.** EPA shall have two (2) months to disapprove the LCC Closure Plan. Any EPA disapproval will be in writing and include a rationale for disapproval and instructions on how to address any identified concerns. Within one (1) month of receipt of EPA's disapproval, Respondent shall submit a revised LCC Closure Plan that addresses any concerns identified by EPA for review and approval. Any LCC Closure Plan not disapproved by EPA within two (2) months, shall be deemed approved by EPA.
- v. **Submission of Applications.** Excluding LCCs that will be permanently closed and not replaced, if any, within twelve (12) months of EPA's approval of the LCC Closure Plan, Respondent shall submit construction plans for IWS(s) to HDOH for approval or apply for a sewer connection for each LCC targeted for closure, irrespective of the EPA approved closure date. Proof of submission shall be made available to EPA upon request.
- vi. **Closure Requirements.** All LCCs shall be closed in accordance with 40 C.F.R. §§ 144.84(b)(2), 144.88(a) and 144.89(a), and all applicable federal, state, and local closure requirements.
- f. **Final LCC Closure Report for Audited Properties.** Within one (1) month of the closure of the LCC(s) of each Target Property, Respondent shall submit to EPA a Final LCC Closure Report for that Audited Property,³ accompanied with a

³ Each Target Property with LCC closures will have its own Final LCC Closure Report.

signature and certification, as described in Paragraph 57. The Final LCC Closure Report for each Audited Property shall include the following:

- i. A description of the process by which the LCC was closed, including the equipment used;
- ii. Photographic evidence of construction and completion;
- iii. Identification of the contractor(s) providing the service;
- iv. A copy of the cesspool backfill closure report; and
- v. A copy of all approvals related to the closure of the LCCs and any replacement wastewater systems, such as an IWS or sewer connection, issued by HDOH, the County, or any other agency. Should the applicable agency issue its approval after the Final LCC Closure Report for Audited Property is due, Respondent shall note the pending status and submit the approval to EPA within fourteen (14) days of Respondent's receipt of the approval.

46. The Audit shall not affect EPA's right to bring a claim or cause of action other than those specified in this CA/FO, including a claim or cause of action for an LCC violation that could have been, but was not, reported and closed as part of the Audit or was identified and closed inconsistent with the process and procedures set forth in this CA/FO.

47. Respondent shall bear all costs associated with the Audit.

D. Stipulated Penalties

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

49. If Respondent fails to make the payment specified in Section V.A., fails to comply with the requirements regarding the closure of the alleged LCCs at the properties specified in Section V.B., Respondent agrees to pay in addition to the assessed penalty, a stipulated penalty of \$300 per day per violation for each day the Respondent is late meeting the applicable requirements.

50. If Respondent fails to timely submit any reports, such as those required under Sections V.B., V.D., or V.E. in accordance with the timelines set forth in this CA/FO, Respondent agrees to pay a stipulated penalty of \$100 for each day after the report was due until Respondent submits the report in its entirety.

51. 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 35 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 35.

52. Respondent may seek an extension of the 30-day deadline to pay stipulated penalties if Respondent can demonstrate that it has submitted an appropriation request to the Maui County Council to pay the stipulated penalty, and that the appropriation request is pending the County Council's approval. Failure to receive an appropriation from the County Council does not relieve Respondent from its obligation to pay any stipulated penalties assessed under this CA/FO.

53. 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.

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

E. Force Majeure

55. 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, unforeseeable environmental, geological, or archaeological conditions; or pandemics, epidemics, or disease; or the failure to obtain, or delay in obtaining a permit, as provided in Paragraph 41, above. 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.

56. 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 points of contact in Paragraph 56 by email. 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.

57. 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.

VI. SUBMISSIONS REQUIREMENTS

58. 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, submissions may be made by certified mail (return receipt requested). 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. Electronic or mailed submissions shall be sent to the individuals identified below:

EPA Region 9 Enforcement and Compliance Assurance Division's Enforcement Officer:

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

and

EPA Region 9 Office of Regional Counsel Attorney:
Erin Brewer
U.S. Environmental Protection Agency, ORC-2-4
75 Hawthorne Street
San Francisco, CA 94105
brewer.erin@epa.gov

59. All reports, notifications, documentation, and submissions 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."

60. 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.

61. 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.

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

63. 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.*

VI. GENERAL PROVISIONS

64. Full payment of the penalty as described in Section V.A., above, and full compliance with this CA/FO as described in Sections V.B. and V.D. shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in Section IV of 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).

65. The parties consent to service of this CA/FO by e-mail at the following valid e-mail addresses: brewer.erin@epa.gov (for Complainant) and Michael.Hopper@co.maui.hi.us (for Respondent).

66. This CA/FO, inclusive of all exhibits, appendices, and attachments, is the entire agreement between the Parties.

67. The provisions of this CA/FO shall apply to and be binding upon Respondent and its officers, directors, employees, and successors or assigns. 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 except for extensions of time to complete such obligations provided by EPA pursuant to Paragraph 55.

68. Full compliance with this CA/FO does not in any manner affect the right of EPA or the United States to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violation of law, except with respect to the claims described in Section IV that have been specifically resolved by this CA/FO.

69. This CA/FO is not a permit or modification of a permit and does not affect Respondent's obligations to comply with all federal, state, local laws, ordinances, regulations, permits, and orders. 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 SDWA, regulations promulgated thereunder, or any order or permit issued thereunder, except as specifically set forth herein.

70. 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 Respondent for noncompliance with this CA/FO.

71. Unless otherwise specified, the Parties shall each bear their own costs and attorney fees in this action.

72. This CA/FO may be executed and transmitted by facsimile, email, or other electronic means, and in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute an instrument. If any portion of this CA/FO is determined to be unenforceable by a competent court or tribunal, the Parties agree that the remaining portions shall remain in full force and effect.

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

74. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section V.B. is restitution or required to come into compliance with law.

VII. EFFECTIVE DATE

75. 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.

76. 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.

77. 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.

In re: County of Maui
UIC-09-2024-0052

**Consent Agreement and Final Order
In the Matter of: County of Maui
Docket No. UIC-09-2024-0052**

County of Maui

Richard Bissen
Mayor, County of Maui

Date: _____

Approved as to Form and Legality

Michael J. Hopper
Deputy Corporation Counsel

In re: County of Maui
UIC-09-2024-0052

**Consent Agreement and Final Order
In the Matter of: County of Maui
Docket No. UIC-09-2024-0052**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

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

Date: _____