

**COUNCIL OF THE COUNTY OF MAUI**  
**POLICY COMMITTEE**

July 22, 2011

**Committee**  
**Report No.** \_\_\_\_\_

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

Chair and Members:

Your Policy Committee, having met on June 15, 2011 and June 29, 2011, makes reference to County Communication No. 11-30, from Council Chair Danny A. Mateo, regarding litigation matters.

By correspondence dated June 6, 2011, the Department of the Corporation Counsel requested consideration of the possible settlement of allegations by the U.S. Environmental Protection Agency ("EPA") regarding the operation of the Lahaina Wastewater Reclamation Facility ("Facility"). The EPA alleges that the County violated certain provisions of the Safe Drinking Water Act and certain terms of the County's Underground Injection Control ("UIC") Permit issued by the EPA for the operation of the Facility. Attached to the request is a proposed resolution entitled "AUTHORIZING SETTLEMENT OF IN THE MATTER OF COUNTY OF MAUI, DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IX DOCKET NO. UIC-09-2011-0002". Attached to the proposed resolution as Exhibit "A" is a proposed consent agreement. The purpose of the proposed resolution is to authorize settlement of the dispute with the EPA under the terms set forth in the proposed consent agreement.

According to the Department of the Corporation Counsel, the EPA has not filed a formal complaint. However, the EPA has proposed resolving the alleged violations by means of the consent agreement. Among other things, the consent agreement would require the County to increase the Facility's capacity for disinfection of wastewater disposed of through its Class V injection wells by December 31, 2013. The County must also comply with reporting and monitoring requirements.

Your Committee recommended that the Department of the Corporation Counsel transmit a proposed bill authorizing the Mayor to enter into an intergovernmental agreement, pursuant to Section 2.20.020, Maui County Code.

Your Committee received a proposed bill entitled "A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO

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ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR THE SETTLEMENT OF ALLEGED SAFE DRINKING WATER ACT VIOLATIONS AT THE LAHAINA WASTEWATER RECLAMATION FACILITY". The purpose of the proposed bill is to authorize the Mayor to enter into an intergovernmental agreement between the County and the EPA to resolve the allegations by the EPA under the terms set forth in the consent agreement.

A Deputy Corporation Counsel provided an overview of the EPA's allegations. She informed your Committee that the proposed consent agreement was the result of lengthy discussions between the County and the EPA that were initiated when the County sought to renew its UIC Permit for the Facility. The Deputy Corporation Counsel advised that several years ago the State Department of Health had declared certain zones on the Island of Maui to be "exempt aquifers", or aquifers the State had concluded were not being used and would not reasonably be used in the future as sources of drinking water. The Facility is located in an exempt-aquifer zone. The EPA has, however, characterized the aquifer as an underground source of drinking water. Although the County and the EPA disagree on this characterization, the Department of Environmental Management supports the work contemplated by the consent agreement.

The Deputy Corporation Counsel further explained that paragraph numbers 58 through 61 of the proposed consent agreement provide certain disclaimers concerning the agreement. For instance, those paragraphs note that the County admits no liability by entering into the consent agreement, that the "Findings" in the consent agreement involve disputed questions of fact and issues of law, and that the County accepts the EPA's jurisdiction over the matter for purposes of the consent agreement only.

Your Committee discussed the status of State and Federal permits for the Facility, and debated the need to bring the Facility into compliance with Safe Drinking Water Act standards.

The Deputy Corporation Counsel requested the opportunity to discuss the matter in executive meetings, closed to the public.

Your Committee voted to convene executive meetings, closed to the public, to consult with legal counsel pursuant to Section 92-5(a)(4), Hawaii Revised Statutes.

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Following the executive meetings, your Committee reconvened in regular session. Your Committee recommended that the title of the proposed bill be revised by deleting the phrase “for the settlement of alleged safe drinking water act violations at”, and inserting in its place the word “regarding”. Your Committee notes that, under the consent agreement, stipulated penalties would not necessarily be imposed by the EPA if a deadline is missed. Your Committee, therefore, recommended that Section 2 of the proposed bill be revised by changing both references to the phrase “the County would accrue stipulated penalties” to “the County may accrue stipulated penalties”.

Based on the information received and the recommendation of the Department of the Corporation Counsel, your Committee voted 6-0 to recommend passage of the proposed bill on first reading, incorporating your Committee’s recommended revisions. Committee Chair Hokama, Vice-Chair Carroll, and members Cochran, Mateo, Pontanilla, and White voted “aye”. Committee members Baisa, Couch, and Victorino were excused.

Your Committee is in receipt of a revised proposed bill 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 REGARDING THE LAHAINA WASTEWATER RECLAMATION FACILITY”, approved as to form and legality by the Department of the Corporation Counsel, incorporating your Committee’s recommended revisions.

Your Policy Committee RECOMMENDS that Bill No. \_\_\_\_\_ (2011), attached hereto, 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 REGARDING THE LAHAINA WASTEWATER RECLAMATION FACILITY”, 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.

  
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G. RIKI HOKAMA, Chair

ORDINANCE NO. \_\_\_\_\_

BILL NO. \_\_\_\_\_ (2011)

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 REGARDING THE LAHAINA WASTEWATER RECLAMATION FACILITY

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

SECTION 1. Purpose. The United States Environmental Protection Agency ("EPA") has alleged violations regarding the disinfection of wastewater disposed of through injection wells at the Lahaina Wastewater Reclamation Facility. The County of Maui ("County") disputes the EPA's allegations, including the facts, legal conclusions, and jurisdictional basis for the same. To resolve their dispute, the County and EPA have agreed to enter into a negotiated consent agreement instead of having the disputed issues resolved in an enforcement action. To avoid incurring the expense and the uncertainty of a federal court's determination of the parties' respective rights and liabilities, the Department of Environmental Management has reviewed the proposed Consent Agreement, attached hereto as Exhibit "A" ("Agreement"), and agrees with the terms and conditions contained therein.

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 2. Authorization. The Council approves attempts to reach resolution of the disputed disinfection issues at the Lahaina Wastewater Reclamation Facility by way of the Agreement, in substantial conformance with Exhibit "A", which includes additional monitoring and reporting requirements, the submission of a long-term treatment plan, and the requirement to upgrade the disinfection capacity at the Lahaina Wastewater Reclamation Facility. The Agreement requires the County to have an approved non-chlorine disinfection method in operation to treat the injected fluid by December 31, 2013. In the event that County fails to timely implement the disinfection requirements of the Agreement, the County may accrue stipulated penalties of TWO HUNDRED FIFTY AND NO/100 DOLLARS (\$250.00) per day for the first 15 days, FIVE HUNDRED AND NO/100 DOLLARS (\$500.00) per day for days 16 to 60, and ONE THOUSAND AND NO/100 DOLLARS (\$1,000.00) per day for days 61 and beyond. In the event that County fails to timely submit a complete long-term treatment plan and schedule or to timely comply with the monitoring or reporting requirements of the Agreement, the County may accrue stipulated penalties of ONE HUNDRED AND NO/100 DOLLARS (\$100.00) per day for the first 15 days and TWO HUNDRED AND NO/100 DOLLARS (\$200.00) per day for days 16 and beyond. The Council hereby authorizes the Mayor to execute the Agreement, all other

necessary documents relating to the Agreement, and any amendments thereto.

SECTION 3. Effective date. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

  
\_\_\_\_\_  
JANE E. LOVELL  
Deputy Corporation Counsel  
County of Maui

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

IN THE MATTER OF

County of Maui,  
Department of Environmental Management,  
2200 Main Street, Suite 100  
Wailuku, HI

Respondent

DOCKET NO. UIC-09-2011-0002

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

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

**CONSENT AGREEMENT**

**I. STATUTORY AUTHORITY**

This Consent Agreement and Final Order ("CA/FO") is issued pursuant to 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" or "SDWA"), 42 U.S.C. §§ 300h-2(c), 300j-4(a). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IX, who 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 the County of Maui, Department of Environmental Management, ("Respondent"), hereby agrees to the issuance of, this CA/FO. Notice of this action has been given to the State of Hawai'i.

**II. FINDINGS OF VIOLATION**

**Statutory and Regulatory Requirements**

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. 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 Hawai'i. This UIC program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.

3. An underground source of drinking water ("USDW") is any aquifer, or portion of aquifer, "which contains a sufficient quantity of ground water to supply a public water system; and (i) Currently supplies drinking water for human consumption; or (ii) Contains fewer than 10,000 mg/l total dissolved solids," and which is not an exempted aquifer. 40 C.F.R. § 144.3.
4. "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."
5. The UIC regulations prohibit owners and operators from operating wells "in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. Part 142 or otherwise adversely affect the health of persons. The applicant for a permit shall have the burden of showing that the requirements of this paragraph have been met." 40 C.F.R. § 144.12(a). 40 C.F.R. Part 142 implements the national primary drinking water standards of 40 C.F.R. Part 141. 40 C.F.R. § 142.1.
6. For owners and operators of Class V wells, this means that injection activity "cannot allow the movement of fluid containing any contaminant into USDWs, if the presence of that contaminant may cause a violation of the primary drinking water standards under 40 C.F.R. Part 141, other health based standards, or may otherwise adversely affect the health of persons." 40 C.F.R. § 144.82(a).
7. 40 C.F.R. Part 141 establishes maximum contaminant levels ("MCLs") and maximum contaminant level goals ("MCLGs") for specified contaminants in drinking water, including fecal coliform and total trihalomethanes ("TTHM"). An MCL is "the maximum permissible level of a contaminant in water which is delivered to any user of a public water system." An MCLG is "the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety." 40 C.F.R. § 141.2.
8. The MCL for fecal coliform is based on the presence or absence of total coliforms in a sample. 40 C.F.R. § 141.63(a). Total coliforms are generally not harmful themselves, but the presence of the coliform bacteria indicates that the water may be contaminated with disease-causing organisms such as fecal coliform or E. coli. For public water systems that test more than 40 times per month, no more than 5.0 percent of the samples collected during a month may be total coliform-positive; for systems that test less than 40 times per month, no more than one sample collected during a month may be total coliform-positive. "Any fecal coliform-positive repeat sample or E. coli-positive repeat sample, or any total coliform-positive repeat sample following a fecal coliform-positive or E. coli-positive routine sample constitutes a violation of the MCL for total coliforms." 40 C.F.R. § 141.63(b).

9. The MCLG for total coliform (including fecal coliform or E. coli) is zero. 40 C.F.R. § 141.52, and Part 141 Appendix B.
10. The MCL for total trihalomethanes ("TTHM") is 0.080 mg/L. The MCL for haloacetic acids ("HAA5") is 0.060 mg/L. 40 C.F.R. § 141.64(b).
11. For Class V wells, "[i]f the Director of the UIC Program in your State or EPA Region learns that your injection activity may endanger USDWs, he or she may require you to close your well, require you to get a permit, or require other actions listed in § 144.12(c), (d), or (e)." 40 C.F.R. § 144.82(a)(2).
12. For Class V wells, "if at any time the Director learns that a Class V well may cause a violation of primary drinking water regulations under 40 C.F.R. Part 142, he or she shall ... (2) Order the injector to take such actions (including, where required, closure of the injection well) as may be necessary to prevent the violation. For EPA administered programs, such orders shall be issued in accordance with the appropriate provisions of the Act; or (3) Take enforcement action." 40 C.F.R. § 144.12(c).
13. 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).

The Lahaina Wastewater Reclamation Facility

14. Respondent, County of Maui, Hawai'i, is a municipality and 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.
15. Respondent owns and operates four (4) underground injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF") in Lahaina, HI.
16. Respondent treats approximately five million gallons per day ("MGD") of residential, commercial and industrial wastewater at the LWRF. All wastewater is subjected to screening, grit removal, an activated sludge process, including two stages of aeration to promote biological consumption of the waste and denitrification, and a secondary clarifier. All wastewater is then routed through a chlorine contact chamber, followed by coagulation injection to coagulate organic matter and sand filtration to remove the remaining coagulated organic matter.
17. At the sand filters, some additional chlorine is introduced to the wastewater. After sand filtration, the effluent is split into two streams. Approximately 1.2 MGD, on average, is sent through an ultraviolet ("UV") disinfection system so that the resulting effluent can be used off-site as reclaimed non-potable water. The UV disinfection system has a maximum flow capacity of 2.0 MGD. The remaining wastewater, averaging approximately 3.0 to 4.0 MGD, is discharged through the four injection wells without

disinfection by ultraviolet radiation. On occasion, some excess UV-disinfected effluent is also discharged through the injection wells.

18. Injection Well No. 2 receives approximately half of the injected effluent during normal operation. This well has a permitted total depth of 180 feet below ground surface ("bgs"). Respondent measures total depth of each well semi-annually. The measured total depth in January, 2010, was 161 feet bgs. The upper portion of the well is cased down to 85 feet bgs; the well has no casing (open hole) below 85 feet bgs.
19. Injection Well No. 3 is permitted for a total depth of 225 feet bgs. The measured total depth in January, 2010, was 218 feet bgs. The upper portion of the well is cased down to 105 feet bgs; the well has no casing (open hole) below 105 feet bgs.
20. Injection Well No. 1 is permitted for a total depth of 200 feet bgs. The measured total depth in January, 2010, was 195 feet bgs. The upper portion of the well is cased down to 99 feet bgs; the well has perforated casing below 99 feet bgs.
21. Injection Well No. 4 is 255 feet deep. The measured total depth in January, 2010, was 233 feet bgs. The upper portion of the well is cased down to 120 feet bgs; the well has perforated casing below 120 feet bgs.
22. EPA issued a Class V UIC permit (Permit No. HI596001) for operation of four injection wells to Respondent on March 15, 1995. The permit was revised on June 11, 1996, further modified on June 15, 1999, and made effective through June 11, 2005.
23. Permit No. HI596001 (Condition III.A.) states, in pertinent part:

The permittee, authorized by this permit, shall not construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. Part 141 or may otherwise adversely affect the health of persons. ... Compliance with this permit during its term constitutes compliance for purposes of enforcement with Part C of the Safe Drinking Water Act (SDWA). Such compliance does not constitute a defense to any action brought under Section 1431 of the SDWA, or any other common or statutory law other than Part C of the SDWA.
24. Respondent submitted an application for renewal of its federal UIC permit on December 1, 2004. As this application was timely, the expired permit conditions continue in force until the effective date of a new permit. 40 C.F.R. § 144.37.

25. As of June 1, 2011, EPA has not issued a final decision on Respondent's permit application, in part, because EPA has determined that Respondent must obtain a Clean Water Act Section 401 water quality certification from the State in order for EPA to grant a permit.
26. At EPA's request, Respondent submitted an application to the State for a Section 401 water quality certification on May 7, 2010. The State is currently processing the application.
27. The State of Hawai'i, Department of Health, pursuant to state law, has issued Respondent a separate UIC permit, No. UM-1357 (the "State UIC permit") for operation of the LWRF's four injection wells. Prior to July 15, 2005, the State UIC permit required Respondent to maintain a total residual chlorine ("TRC") level of at least 0.1 mg/L in the injected effluent. This permit was revised on July 15, 2005 to eliminate the requirement to maintain a minimum TRC level in the injected effluent.

#### The Underground Source of Drinking Water and the Effluent Injection

28. The shallow groundwater aquifer underneath the LWRF, and extending downgradient towards the coast, is a USDW. The aquifer (or portion of aquifer), that is approximately 28 feet bgs to 95 feet bgs in depth, contains a sufficient quantity of ground water to supply a public water system, and contains fewer than 10,000 mg/l total dissolved solids ("TDS"). The information on the depth of the USDW was submitted by the County's Department of Public Works and Waste Management on April 7, 1994, as salinity profile data in its original UIC permit application. Respondent identified the information as delineating the USDW below the LWRF. The precise depth of this aquifer fluctuates somewhat, depending on water inputs and other conditions.
29. Respondent's injection wells discharge effluent into the lower portion of this USDW, and into the unconfined aquifer immediately below the USDW.
30. Respondent's consultant for the inspection, well cleaning and rating of the injection wells reported that "the lithologic units into which treated effluent is injected consist of highly permeable, thin to medium bedded basalt lava flows." Cleaning and Rating of Subsurface Injection Wells, Brown and Caldwell Consultants, January 21, 1993, Page 4.
31. After the effluent is injected, it is "likely that buoyant forces cause it to travel upward, intercept the unconfined groundwater at some point above, and flow seaward." Environmental Assessment and Negative Declaration for the Lahaina Wastewater Reclamation Facility Stage 1 Design by the County of Maui's consultant Brown and Caldwell, September 1991. The injected effluent has much lower salinity levels, and is therefore less dense than the native groundwater, which forces the effluent to rise upward in the aquifer.

32. The U.S. Geological Survey ("USGS") has found that injected wastewater effluent in Hawai'i has "a strong propensity to rise back to shallow depths as it spreads areally. This buoyant behavior has been known locally and simulated in laboratory and computer models since at least the 1970s." USGS report 2009-5253, "A Multitracer Approach to Detecting Wastewater Plumes from Municipal Injection Wells in Nearshore Marine Waters at Kihei and Lahaina, Maui, Hawai'i."

#### Fecal Coliform Exceedences

33. As required by the State UIC permit, Respondent analyzes its injected effluent twice annually, in June and December, for fecal coliform and TRC, as well as other parameters. As the Most Probable Number ("MPN") analytical method for fecal coliform used by Respondent's laboratory has a maximum determination limit of 1600 MPN/100ml, all densities that may exceed 1600 MPN/100ml are reported as > 1600 MPN/100ml. The State UIC permit requires Respondent to monitor for fecal coliform as a fecal bacteria indicator organism and does not require any other indicators, such as E. coli, to be monitored.
34. Prior to approximately July 2005, Respondent generally chlorinated its injected effluent and at times added chlorine to injected effluent at levels intended to achieve the TRC level of at least 0.1 mg/L required by the State UIC permit. From June 2002 to June 2005, TRC levels in the sampled injected effluent were reported to range from 0.1 to 0.6 m/l.
35. From June 2002 through January 2005, fecal coliform levels in the sampled injected effluent were reported to range from 17 to 110 MPN/100 ml.
36. Beginning in approximately July 2005, when the State eliminated the requirement that the injected effluent contain a minimum TRC of 0.1 mg/L, Respondent reduced the addition of chlorine to the wastewater. After July 2005, TRC levels in the sampled injected effluent have been reported to range from 0.01 to 0.1 mg/L.
37. Since reducing chlorination, Respondent has not modified its operations to add disinfection processes, or expand its capacity for UV disinfection for treatment of the injected effluent.
38. After July 2005, fecal coliform levels in the sampled injected effluent have significantly increased, with levels reported to range from 110 to more than 1600 MPN/100 ml.
39. The injected effluent does not undergo any further treatment to reduce fecal coliform levels past the sampling point, before the injected effluent enters the subsurface environment from the uncased or perforated sections of the injection wells.
40. Effluent containing fecal coliform enters the USDW directly from the injection wells (at depths of approximately 85-95 feet bgs), and from lower depths as a result of the buoyant

forces that convey effluent injected below the USDW upward through the unconfined groundwater.

41. At the normal injection rates, effluent containing fecal coliform at concentrations of 110 MPN/100 ml and higher, is expected to cause water in the USDW to exceed the MCL for total coliforms, which includes fecal coliform and E. Coli.
42. This injection of effluent containing total coliforms, including fecal coliform, in the USDW may cause a violation of a primary drinking water regulation.
43. At the LWRF, effluent destined for reuse goes to the ultraviolet (UV) disinfection system based on reuse demand. UV disinfection is currently operated at a maximum flow rate of 2 MGD. Respondent proposed, in a June 9, 2010 letter to EPA, to upgrade the existing UV channel to 2.5 MGD capacity and to construct a second UV channel for an additional 2.5 MGD capacity.
44. Respondent's December 1, 2004 UIC permit application incorrectly indicated that all effluent was treated to meet State standards for recycled wastewater, referred to as "R-1 Waters." See HAR 11-62-03. The UIC Injection Well Status Report (dated July 2004) included in the application describes treatment of the primary discharge as "...disinfection to R-1 standards." Attachment U (Description of Business) also stated that the wastewater is treated to R-1 standards. Following an inquiry by EPA, Respondent revised these statements in an e-mail dated September 28, 2008, to state that only wastewater destined for reuse is disinfected to R-1 quality, and the wastewater destined for injection is not treated to R-1 quality.
45. Based on all the foregoing, Respondent has violated the requirements of permit condition III.A., 40 C.F.R. §§ 144.12(a) and 144.82(a), and 42 U.S.C. § 300h.

### III. PROPOSED ORDER

#### A. Compliance Requirements

46. Beginning immediately after the effective date of this CA/FO, Respondent shall monitor its injected effluent for the specified parameters with the following frequency and sample type:

| <u>Parameters</u>                          | <u>Monitoring Frequency</u> | <u>Sample Type</u> |
|--|-----------------------------|--------------------|
| Fecal Coliform, MPN/100 ml                 | weekly                      | Grab               |
| Total Residual Chlorine, mg/L <sup>1</sup> | weekly                      | Grab               |
| TTHM, mg/L <sup>1,2</sup>                  | quarterly                   | Grab               |
| HAA5, mg/L <sup>1,3</sup>                  | quarterly                   | Grab               |

1. Parameter monitoring is only required when chlorine is used in the treatment process.
2. Sum of chloroform, bromodichloromethane, dibromochloromethane, and bromoform.
3. Sum of mono-, di-, and trichloroacetic acids and mono- and dibromoacetic acids.

Respondent shall comply with all requirements of Part II, section D of Permit No. HI596001 (or any subsequently issued federal UIC permit) in monitoring, recordkeeping, and reporting of results for these parameters. Respondent shall include the monitoring results in the quarterly reports required pursuant to the UIC permit.

47. Within 30 days of the effective date of this CA/FO, Respondent shall treat all injected fluid to meet the R-2 standards specified in Hawaii State Regulations § 11-62-26, while minimizing total residual chlorine levels to the greatest extent possible.
48. Total trihalomethanes ("TTHM"), measured as the sum concentration of chloroform, bromodichloromethane, dibromochloromethane and bromoform shall not exceed 0.080 mg/L (running annual arithmetic average for the last four calendar quarters). If test measurements over the first year are consistently below the 0.080 mg/L standard, Respondent may request to reduce testing to an annual frequency. If approved by EPA in writing, Respondent may reduce testing to an annual frequency, subject to any conditions set forth in EPA's approval.
49. Haloacetic acids ("HAA5"), measured as the sum concentration of monochloroacetic acid, dichloroacetic acid, trichloroacetic acid, monobromoacetic acid, and dibromoacetic acid shall not exceed 0.060 mg/L (running annual arithmetic average for the last four calendar quarters). If test measurements over the first year are consistently below the 0.060 mg/L standard, Respondent may request to reduce the testing to an annual frequency. If approved by EPA in writing, Respondent may reduce testing to an annual frequency, subject to any conditions set forth in EPA's approval.
50. Within 120 days of the effective date of this CA/FO, Respondent shall submit a Long-Term Treatment Plan and schedule for the LWRF wastewater to meet the R-1 disinfection requirement for fecal coliform, as specified in Hawaii State Regulations § 11-62-26, without the use of chlorination, by December 31, 2013. Respondent has identified 7.5 MGD (recycled water supply and injected fluid combined) as a feasible R-1 disinfection design capacity, but acknowledges that additional capacity may be needed in the future. Upon EPA approval, Respondent shall implement the Long-Term Treatment Plan according to the approved schedule.
51. By December 31, 2013, Respondent shall have an approved non-chlorine disinfection method in operation to treat the fluid injected at the LWRF.
52. After December 31, 2013, the injected fluid may not exceed the R-1 disinfection requirements for fecal coliform as specified in Hawaii State Regulations § 11-62-26, unless an exceedence is unavoidable to prevent loss of life, personal injury, or severe property damage, and there is no feasible alternative, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment down time. "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable,

or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of an exceedence.

53. Any noncompliance with any of the effluent requirements of subsection III.A (Compliance Requirements) of this CA/FO must be reported to EPA within five (5) days. The following information shall be provided: the reason for the noncompliance, the duration of the noncompliance, date of the event or occurrence, and the remedial measures taken or planned to be taken to correct the noncompliance.

**B. Delay in Performance and Stipulated Penalties**

54. Respondent agrees to pay upon EPA's demand the stipulated penalties set forth below, unless Respondent claims, and EPA agrees, that the delay is caused by a *force majeure* event as defined below in paragraph 71. Stipulated penalties begin to accrue on the date performance is due and are calculated as follows:
- a. For failure to timely implement the disinfection requirements of paragraphs 47 or 51:
    - i. \$250 per day for the first 15 days.
    - ii. \$500 per day for days 16 to 60.
    - iii. \$1,000 per day for days 61 and beyond.
  - b. For failure to timely submit a complete Long-Term Treatment Plan and schedule in compliance with the requirements of paragraph 50, or to timely comply with the monitoring or reporting requirements of paragraphs 46 or 53:
    - i. \$100 per day for the first 15 days.
    - ii. \$200 per day for days 16 and beyond.
55. EPA may demand stipulated penalties within one (1) year after the date Respondent becomes subject to the stipulated penalty. Respondent must pay the stipulated penalty within thirty (30) days of receipt of EPA's demand, according to the process provided in the demand. If any payment is not received within thirty (30) calendar days of being due, interest, handling charges and late-payment penalties will begin to accrue in the same manner as set forth at 31 U.S.C. § 3717 and 40 C.F.R. § 13.11.
56. 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 any subsequent deadline.
57. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties due under this CA/FO.

**C. General Provisions**

58. For the purpose of this proceeding only, Respondent admits the jurisdictional allegations of the CA/FO and agrees not to contest, in any administrative or judicial forum, EPA's jurisdiction to enter into this CA/FO. Respondent reserves the right to contest EPA's jurisdiction over the matters addressed in this CA/FO in any administrative or judicial proceeding unrelated to the implementation or enforcement of this CA/FO.
59. The Findings herein involve disputed questions of fact and issues of law. Respondent consents to the issuance of this CA/FO and the conditions specified herein solely to resolve disputed claims.
60. The Parties acknowledge and agree that this CA/FO is the result of compromise and is entered into in good faith. Respondent's execution of this CA/FO, and performance of the terms hereof, shall not be considered an admission of liability respecting any action taken or action not taken by Respondent. No admission of past or present violation(s) of law, or violation(s) of any permit condition(s), on the part of Respondent shall be implied by the obligations undertaken by Respondent pursuant to this CA/FO or by Respondent's consent thereto.
61. The provisions of this CA/FO shall only apply to this proceeding and any proceedings to enforce the CA/FO or any of its requirements.
62. Respondent waives any right to a hearing under Section 1423(c)(3) of the Act, 42 U.S.C. § 300h-2(c)(3). Respondent waives any right to contest the allegations contained in the CA/FO, or to appeal the CA/FO.
63. This CA/FO does not create any right in or grant any cause of action to any third party.
64. All information and documents submitted pursuant to this CA/FO shall be signed by a duly authorized representative of Respondent, as specified by 40 C.F.R. § 122.22(b)(2), and shall include the following statement:

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 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.

65. The provisions of this CA/FO shall be binding upon Respondent, its 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 Respondent shall not excuse any failure of Respondents to fully perform its obligations under this CA/FO.
66. 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 facility. Such transfer, however, shall have no effect on Respondents' obligation to comply with this CA/FO.
67. 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, regulations promulgated thereunder, and any permit or order issued thereunder.
68. 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.
69. 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.
70. If any event occurs, or is expected to occur, which may delay the performance of any obligation under this CA/FO, Respondent shall notify EPA's primary contact, identified in paragraph 75, by telephone or email within five (5) business days of when Respondent knew or reasonably should have known that the event might cause a delay. If the primary contact is not available, or receipt of the notice has not been confirmed by EPA's primary contact, Respondent shall notify the alternate contact, identified in paragraph 75, within the same time period. Within ten (10) days thereafter, Respondent shall provide to EPA, 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.
71. "Force Majeure," for purposes of this CA/FO, is any event entirely beyond the control of Respondent, or any entity controlled by Respondent, that delays or prevents performance of any obligation under this CA/FO notwithstanding Respondent's best efforts to avoid the delay. The best efforts requirement includes using best efforts to anticipate any such event and minimize the delay caused by any such event to the greatest extent practicable. Examples of events that are not force majeure events include, but are not limited to,

increased costs or expenses of any work to be performed under this CA/FO, financial or business difficulties of Respondent's, and normal inclement weather.

72. If EPA agrees that an actual or anticipated delay is attributable to force majeure, the time for performance of the obligation shall be extended by written agreement of the parties. It is within EPA's sole discretion to determine whether or not Respondent shall be relieved of an obligation of this CA/FO. An extension of the time for performing an obligation directly affected by the force majeure event shall not, of itself, extend the time for performing a subsequent obligation.
73. 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 a force majeure event, EPA will notify Respondent in writing of its decision and any delays will not be excused.
74. Respondent shall have the burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that Respondent did exercise or is using its best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this section.
75. Written and verbal communications shall be made to EPA's primary contact:

Nancy Rumrill  
Ground Water Office (WTR-9)  
Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
fax: (415) 947-3545  
phone: (415) 972-3293  
email: rumrill.nancy@epa.gov

If EPA's primary contact is unavailable, or timely receipt of a communication cannot be confirmed, written and verbal communications shall be made to EPA's alternate contact:

David Albright  
Ground Water Office (WTR-9),  
Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
fax: (415) 947-3545  
phone: (415) 972-3971  
email: albright.david@epa.gov

76. This CA/FO shall terminate when all requirements have been met and Respondent has submitted a request for termination which EPA has granted in writing, or by other written mutual agreement of the parties.
77. The effective date of the CA/FO shall be the date that a Final Order is issued.

FOR THE CONSENTING PARTIES:

For the County of Maui:

\_\_\_\_\_ Date: \_\_\_\_\_  
Alan M. Arakawa, Mayor

APPROVAL RECOMMENDED:

\_\_\_\_\_ Date: \_\_\_\_\_  
Kyle K. Ginoza, Director  
Department of Environmental Management

APPROVED AS TO FORM AND LEGALITY:

\_\_\_\_\_ Date: \_\_\_\_\_  
Jane E. Lovell  
Deputy Corporation Counsel

For the United States Environmental Protection Agency:

\_\_\_\_\_ Date: \_\_\_\_\_  
Alexis Strauss, Director  
Water Division