

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
2 **REGION IX**

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4
5 **In the Matter of:**

Docket No. UIC-AO-2005-0007

6 **United States Army, Hawaii**
7 **25th Infantry Division (Light):**

**CONSENT AGREEMENT
AND FINAL ORDER**

8 **Pohakuloa Training Area, Island of Hawaii**

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

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12 **I. AUTHORITY**

13 This Consent Agreement and proposed Final Order (“CA/FO”) is issued under the authorities
14 vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by
15 Sections 1423(c) and 1445(a) of the Safe Drinking Water Act (“SDWA” or the “Act”), 42 U.S.C. §§
16 300h-2(c), 300j-4(a). The Administrator has delegated these authorities to the Regional
17 Administrator of EPA Region IX. The Regional Administrator in turn has delegated these
18 authorities to the Director of the Water Division, EPA Region IX. In accordance with these
19 authorities, the Director of the Water Division, EPA Region IX, hereby issues, and the U.S. Army,
20 Hawaii, 25th Infantry Division (Light) (“Respondent”) hereby agrees to the issuance of, this CA/FO.

21 **II. FINDINGS OF VIOLATION**

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

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

1 3. Pursuant to 40 C.F.R. § 144.88, existing large capacity cesspools are required to be closed no
2 later than April 5, 2005. “Large capacity cesspools” include “multiple dwelling, community or
3 regional cesspools, or other devices that receive sanitary wastes, containing human excreta, which
4 have an open bottom and sometimes perforated sides.” 40 C.F.R. § 144.81(2). Large capacity
5 cesspools do not include single family residential cesspools or a non-residential cesspools which
6 receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day. *Id.* A
7 “cesspool,” is a “drywell,” which in turn is a “well,” as those terms are defined in 40 C.F.R. § 144.3.

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

11 5. Pursuant to Section 1423(c)(1) of the Act, 42 U.S.C. § 300h-2(c)(1), EPA may issue an
12 administrative compliance order to any person who violates any requirement of an applicable UIC
13 program. 42 U.S.C. § 300h-2(c)(1).

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

17 7. Respondent U.S. Army, Hawaii (USARHAW) is a Federal agency. Thus, Respondent is a
18 “person” within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40
19 C.F.R. § 144.3.

20 8. Respondent operates the USARHAW Pohakuloa Training Area, on the Island of Hawaii,
21 pursuant to 10 U.S.C. §§ 4411 *et seq.*

22 9. Respondent operates six (6) large capacity cesspools at the USARHAW Pohakuloa
23 Training Area. The large capacity cesspools operated by Respondent at the USARHAW Pohakuloa
24 Training Area are listed in **Table 1** attached hereto and incorporated by reference.

25 10. Respondent has informed EPA that due to the lack of a federal appropriation to fund the
26 closure of these large capacity cesspools, Respondent will be unable to close the large capacity
27 cesspools referred to in **Table 1** by April 5, 2005 as required by 40 C.F.R. § 144.88.

11. Respondent intends to undertake the measures referred to in **Paragraphs 14 and 16** by the dates specified in order to close the large capacity cesspools.

12. Based on all the foregoing, Respondent has violated the requirement that all large capacity cesspools be closed by April 5, 2005, and is therefore in violation of 40 C.F.R. § 144.88.

III. PROPOSED ORDER

Respondent, by and through its authorized representative, the Garrison Commander for the USARHAW, and EPA agree to the issuance of the following, which, upon issuance of the Final Order, shall become effective:

A. COMPLIANCE REQUIREMENTS

1. POHAKULOA TRAINING AREA - CESSPOOLS 18 and 28

13. Respondent shall close two of the large capacity cesspools (Nos. 18 and 28) referred to in **Table 1** in accordance with 40 C.F.R. §144.89(a) no later than **December 30, 2006**.

14. Respondent shall submit reports ("milestone reports") confirming that the milestones set forth in this paragraph have been met in accordance with the schedule below:

a. By **April 30, 2005**, Respondent shall complete the design of the alternative treatment technology. If the alternative treatment system is a septic tank system, an effluent filter is required prior to disposal into the leach field or seepage pit.

b. By **June 30, 2005**, Respondent shall have obtained an Approval to Construct issued by the Hawaii State Department of Health.

c. By **December 30, 2005**, Respondent shall initiate construction of the alternative treatment technology designed pursuant to subparagraph (a) above.

d. By **October 30, 2006**, Respondent shall have arranged a final inspection of the alternative treatment system.

e. By **November 30, 2006**, Respondent shall have obtained an Approval to Use issued by the Hawaii State Department of Health.

f. By **November 30, 2006**, Respondent shall have obtained a UIC permit for injection wells issued by the Hawaii Department of Health.

g. By **December 30, 2006**, Respondent shall complete the closure of the cesspools identified as No. 18 and No. 28 in Table 1 to this CA/FO in the manner required by EPA, the Hawaii State Department of Health, and applicable regulations at 40 C.F.R. Part 144.

h. By **January 6, 2007**, Respondent shall provide a copy of an Engineering Report to the EPA in the manner specified in **Paragraph 17**. The Engineering Report should summarize the actions taken to achieve the milestones contained in this subparagraph. At a minimum, the Engineering Report shall describe and document for each cesspool: the design (including flows) of the alternative wastewater system installed as a replacement; what was actually installed, and how and when the cesspool was converted or closed. In addition it should provide the actual dates for accomplishment or achievement of the milestones listed in subparagraphs (a) through (h) of this paragraph. Where there are permits issued, the Engineering Report should list the permit numbers (e.g., UIC permit numbers).

2. POHAKULOA TRAINING AREA - CESSPOOLS 6, 10, 26 and 27

15. Respondent shall close four (cesspools Nos. 6, 10, 26 and 27) of the large capacity cesspools referred to in **Table 1** in accordance with 40 C.F.R. §144.89(a) no later than **February 28, 2007**.

16. Respondent shall submit reports ("milestone reports") confirming that the milestones set forth in this paragraph have been met in accordance with the schedule below:

a. By **June 15, 2005**, Respondent shall complete the design of the alternative treatment technology. If the alternative treatment system is a septic tank system, an effluent filter is required prior to disposal into the leach field or seepage pit.

b. By **August 15, 2005**, Respondent shall have obtained an Approval to Construct issued by the Hawaii State Department of Health.

c. By **February 28, 2006**, Respondent shall initiate construction of the alternative treatment technology designed pursuant to subparagraph (a) above.

d. By **December 30, 2006**, Respondent shall have arranged a final inspection of the alternative treatment system.

1 e. By **January 30, 2007**, Respondent shall have obtained an Approval to Use
2 issued by the Hawaii State Department of Health.

3 f. By **January 30, 2007**, Respondent shall have obtained a UIC permit for
4 injection wells issued by the Hawaii Department of Health.

5 g. By **February 28, 2007**, Respondent shall complete the closure of the
6 cesspools identified as Nos. 6, 10, 26 and 27 in **Table 1** to this CA/FO in the manner required by
7 EPA, the Hawaii State Department of Health, and applicable regulations at 40 C.F.R. Part 144.

8 h. By **March 7, 2007**, Respondent shall provide a copy of an Engineering
9 Report to the EPA in the manner specified in **Paragraph 17**. The Engineering Report should
10 summarize the actions taken to achieve the milestones contained in this subparagraph. At a
11 minimum, the Engineering Report shall describe and document for each cesspool: the design
12 (including flows) of the alternative wastewater system installed as a replacement; what was actually
13 installed, and how and when the cesspool was converted or closed. In addition it should provide the
14 actual dates for accomplishment or achievement of the milestones listed in subparagraphs (a)
15 through (h) of this paragraph. Where there are permits issued, the Engineering Report should list the
16 permit numbers (e.g., UIC permit numbers).

17 17. All submittals made pursuant to this CA/FO shall be mailed to:

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

21 18. All reports submitted to EPA Region IX pursuant to this CA/FO must be signed by a duly
22 authorized representative of Respondent, and shall include the following statement:

23 "I certify under penalty of law that this document and all attachments were prepared
24 by direct supervision or in accordance with a system designed to assure that qualified
25 personnel properly gather and evaluate the information submitted. Based on my
26 inquiry of the person or persons who manage the system, or those persons directly
27 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." [signature].

1 **B. GENERAL REQUIREMENTS AND PROVISIONS**

2 19. For the purpose of this proceeding, Respondent admits the jurisdictional allegations of the
3 Consent Agreement and agrees not to contest, in any administrative or judicial forum, EPA's
4 jurisdiction to enter into this CA/FO.

5 20. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

6 21. The provisions of this CA/FO shall be binding upon Respondent and its employees and
7 contractors. Action or inaction of any persons, firms, contractors, employees, agents, or
8 corporations acting under, through, or for Respondent shall not excuse any failure of Respondent to
9 fully perform its obligations under this CA/FO.

10 22. Respondent shall give notice, and provide a copy of this CA/FO, to any successor-in-interest
11 prior to transfer of ownership or operation of the large capacity cesspools referred to in **Paragraph**
12 **9** and **Table 1**. Such transfer, however, shall have no effect on Respondent's obligation to comply
13 with this CA/FO. Respondent shall notify EPA in writing at least thirty (30) days prior to any such
14 transfer of ownership or operation of the large capacity cesspools referred to in **Table 1**.

15 23. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and
16 fully authorized to enter into and ratify this Consent Agreement.

17 24. Respondent consents to the issuance of this CA/FO and the conditions specified herein.

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

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

24 27. Issuance of or compliance with this CA/FO does not waive, extinguish, satisfy, or otherwise
25 affect Respondent's obligation to comply with all applicable requirements of the Act, regulations
26 promulgated thereunder, and any order or permit issued thereunder.

28. EPA reserves any and all legal and equitable remedies available to enforce this CA/FO. Violation of this CA/FO shall be deemed a violation of the Act.

29. Each party hereto shall bear its own costs and attorneys fees incurred in this proceeding.

30. If any event occurs which causes or may cause delays in either: 1) submission of milestone reports or 2) reaching any of the deadlines set forth in **Part III.A.** of this CA/FO, Respondent shall, within 7 business days of the delay or within 7 business days of Respondent's knowledge of the anticipated delay, whichever is earlier, notify by telephone the EPA Region IX LCC Project Coordinator or, in her/his absence, the Manager of the EPA Region IX Ground Water Office. Within fifteen (15) business days thereafter, Respondent shall provide in writing the reasons for the delay, the anticipated duration of the delay, the measures taken or to be taken to prevent or minimize the delay, and a timetable by which those measures will be implemented. Respondent shall exercise its best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the notice requirement of this paragraph shall preclude Respondent from asserting any claim of *force majeure*.

31. If EPA agrees that the delay or anticipated delay in compliance with this CA/FO has been or will be caused by circumstances entirely beyond the control of Respondent, the time for performance may be extended. EPA may consult with Respondent to determine the amount of time for the extension. In such event, EPA shall grant, in writing signed by the Manager of the EPA Region IX Ground Water Office, the extension of time. To the extent that the *force majeure* incident impacts subsequent milestones, EPA and Respondent may consult to determine whether other changes to the compliance schedule are warranted.

32. In the event that EPA does not agree that a delay in achieving compliance with the requirements of this CA/FO has been or will be caused by circumstances beyond the control of the Respondent, EPA will notify Respondent in writing of its decision and any delays will not be excused.

33. 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.

34. All milestone reports and any requests for extension of time required to be submitted pursuant to this CA/FO shall be sent to the following address:

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

Any correspondence sent by EPA to Respondent regarding this CA/FO shall be sent to:

Environmental Law Counsel
Office of the Staff Judge Advocate
25th Infantry Division (Light)
Bldg 580, APVG-GC
Schofield Barracks, HI 96857-5000

35. Telephone inquiries should be made to the LCC Project Coordinator at (415) 972-3538.

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

37. The provisions of this CA/FO shall be severable. If any provision of this CA/FO is found to be unenforceable, the remaining provisions of this CA/FO shall remain in full force and effect.

C. DISPUTE RESOLUTION

38. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this CA/FO.

39. If Respondent disagrees, in whole or in part, with any decision by EPA under this CA/FO,

1 Respondent's Project Coordinator shall orally notify EPA's LCC Coordinator of the dispute
2 ("Project Coordinators"). The Project Coordinators shall use their best efforts to informally and in
3 good faith resolve all disputes or difference of opinion relating to this CA/FO. The period for
4 informal negotiations shall not exceed ten (10) business days from the time the dispute arises, unless
5 it is modified by written agreement of the parties.

6 40. In the event that the Project Coordinators cannot resolve a dispute by informal negotiations
7 under the preceding paragraph, Respondent may pursue the matter by submitting its objection to
8 EPA in writing. Respondent must send its written objections to EPA within twenty (20) business
9 days from the time the dispute referred to in the previous paragraph arises. Respondent's written
10 objections must set forth the specific points of the dispute, the basis for Respondent's position and
11 any matters which it considers necessary for EPA's determination. If Respondent does not invoke
12 formal dispute resolution within twenty (20) business days of the date the dispute arises, EPA's
13 decision shall be binding on Respondent.

14 41. EPA and Respondent shall have ten (10) business days from receipt of Respondent's written
15 objections to attempt to resolve the dispute through formal discussions. During such time, if
16 Respondent so requests, the Associate Director, Water Division, will meet with Respondent in
17 person to discuss the dispute either by telephone or at EPA's offices in San Francisco, unless another
18 location is mutually agreed upon.

19 42. Within twenty (20) business days of EPA's receipt of Respondent's written objections, EPA,
20 through its Associate Director, Water Division, will provide to Respondent in writing EPA's
21 decision on the pending dispute.

22 43. If the Respondent disagrees with the written decision, the Respondent may, within ten (10)
23 business days of receipt of the written decision, appeal to the Director, Water Division.
24 Respondent's appeal must set forth the specific points of the dispute, the basis for Respondent's
25 position and any matters which it considers necessary for EPA's determination. During such time, if
26
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Respondent so requests, the Director, Water Division, will meet with Respondent in person to discuss the dispute either by telephone or at EPA's offices in San Francisco unless another location is mutually agreed upon. Within thirty (30) business days of receipt of the appeal, the Director, Water Division, for Region IX will issue a written decision which shall be the final decision and which EPA and Respondent agree to be bound by and to follow.

44. The Parties may, by mutual written agreement, extend any of the time periods provided for in the dispute resolution process.

45. EPA and Respondent have agreed to the foregoing dispute resolution procedures solely for the purposes, and based on the unique circumstances, of this CA/FO.

D. EFFECTIVE DATE

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

FOR THE CONSENTING PARTIES:

For the U.S. Army, Hawaii:

Date:_____

Colonel Howard J. Killian
Garrison Commander
U.S. Army, Hawaii
25th Infantry Division (Light)
Bldg 580, APVG-GC
Schofield Barracks, HI 96857-5000

For the United States Environmental Protection Agency:

Date:_____

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

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
2 **REGION IX**

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6 **In the Matter of:**

Docket No. UIC-AO-2005-0007

7 **United States Army, Hawaii**
8 **25th Infantry Division (Light):**

FINAL ORDER

9 **Pohakuloa Training Area, Island of Hawaii**

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

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13 The United States Environmental Protection Agency Region IX (“EPA”), and the U.S. Army,
14 Hawaii (USARHAW), having entered into the foregoing Consent Agreement, and EPA having duly
15 publicly noticed the Stipulations and Findings and Proposed Order regarding the matters alleged
16 therein,

17 **IT IS HEREBY ORDERED THAT:**

18 1. The foregoing Consent Agreement and this Final Order (Docket No. UIC-AO-2005-0007) be
19 entered; and

20 2. Respondent, USARHAW, shall comply with the requirements set forth in the Consent
21 Agreement and Proposed Order, which shall become final and effective on the date it is signed
22 below.

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25 _____
26 Alexis Strauss
27 Director, Water Division
28 U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Date: _____

CONSENT AGREEMENT and
FINAL ORDER

In Re: U.S. Army, Hawaii
Pohakuloa Training Area