RONALD J. TENPAS
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530
ROBERT D. MULLANEY
Environmental Enforcement Section
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
Telephone: (415) 744-6491
Facsimile: (415) 744-6476
E-mail: robert.mullaney@usdoj.gov
EDWARD H. KUBO, JR. 2499
United States Attorney
District of Hawai`i
THOMAS HELPER 5676
Assistant United States Attorney
Room 6-100, PJKK Federal Building
300 Ala Moana Boulevard
Honolulu, Hawai`i 96850
Telephone: (808) 541-2850
Facsimile: (808) 541-2958

Attorneys for Plaintiff United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

UNITED STATES OF AMERICA, and DEPARTMENT OF HEALTH, STATE OF HAWAI`I, Plaintiffs,  v.  JAMES H. PFLUEGER; PFLUEGER PROPERTIES; AND PILA`A 400 LLC, Defendants.	NO. CV 06-00140 BMK FIRST AMENDED CONSENT DECREE; APPENDIX G

APPENDIX G

TO CONSENT DECREE

SEP APPENDIX G

As set forth below and in accordance with the provisions of the Consent Decree to which this Appendix is attached, Defendants shall provide for the design and construction of residential cesspool replacement projects within the Kalihiwai Bay watershed. These cesspool replacement projects shall collectively be known as "the Cesspool Replacement Program" or "SEP". The Cesspool Replacement Program shall consist of the removal of existing residential cesspools[1] and the design and construction of a replacement septic system for each cesspool. This SEP shall be completed as follows:

1. Within 30 days after the Effective Date of the Consent Decree, Defendants shall establish an escrow account for the performance of this SEP and transfer $200,000 into that account, in accordance with Section VI of the Consent Decree.

2. Within 30 days after the Effective Date of the Consent Decree, and in accordance with Section VI of the Consent Decree, Defendants shall designate a Project Manager to manage this project. This Project Manager may be a consultant and may draw upon the escrow account for eligible expenses for the implementation of this SEP. The Project Manager and/or Defendant may hire a contractor to implement this SEP. The contractor may also draw upon the escrow account for eligible expenses to implement the SEP.

3. Within 90 days after the Effective Date of the Consent Decree, the Project Manager shall complete an inventory of residential cesspools located within 1,000 feet of the Kalihiwai Stream and/or ocean at Kalihiwai Bay and submit this list to EPA and DOH for approval.

4. Within 30 days after completion of the inventory, the Project Manager shall submit to EPA and DOH for approval, with a copy to the Citizens, a prioritized list of the cesspools based on the following environmental criteria:

- current condition of the system (including risk of failure based on frequency of pumping),
- proximity to surface water (stream or ocean),
- proximity to groundwater,
- size of residence (number of occupants, bathrooms and bedrooms).

This list is intended to be used to prioritize the expenditures from the escrow account such that work will begin with the highest priority and continue down the list until such time as the escrow funds are either depleted or are insufficient to complete the next cesspool replacement, together with preparation of the Final SEP Report as required by

[1]For purposes of this SEP, "residential cesspools" are defined as cesspools connected to one single family residence and exempt from the April 5, 2005 ban on large capacity cesspools found at 40 C.F.R. § 144.88.

Section VI of the Consent Decree. If funds remain but are insufficient to complete the next project, together with preparation of the SEP Completion Report as required by Section VI of the Consent Decree, those remaining funds shall be paid to the United States in accordance with Section VIII of the Consent Decree.

5. Within 30 days of approval of the priority list by EPA, the Project Manager shall contact the homeowners, in priority order, to provide information on the opportunity for free replacement of their cesspools with a septic system, including a copy of this Appendix. The Project Manager shall determine which landowners are willing to participate in this program based on factors including the landowners' interest in the Cesspool Replacement Program, willingness to provide access to the Project Manager and/or contractor, and agreement to the indemnity agreement and waiver of liability against the Project Manager, contractor and Defendant which is attached hereto. No later than 90 days after approval of the priority list, the Project Manager shall provide to EPA, DOH and the Citizens a list of those homeowners willing to participate in the Cesspool Replacement Program. If no homeowners are willing to participate, then the amount remaining in the escrow account shall be paid to the United States in accordance with Section VIII of the Consent Decree.

6. Following the approval of the list of homeowners willing to participate, the Project Manager shall send notice of completion of each cesspool replacement within 30 days of completion. If, in any 180 day period no such notice of completion has been sent, the Project Manager shall within 15 days send a status update report to EPA, DOH and the Citizens. The Status Report shall set forth the efforts underway to complete the cesspool replacement projects, any obstacles encountered, and an estimated schedule for the next completion.

7. For each homeowner willing to participate and according to priority, the Project Manager shall design a cesspool replacement system consisting of a septic tank and leachfield that is appropriate for that residence. The system as designed shall be in accordance with state and local requirements, with the addition of effluent filters to reduce solids. The leachfield will be sized appropriately and soil replaced or mounded as needed. (Design parameters may be provided by DOH.)

8. The Project Manager shall submit the design and any necessary permit applications to the County of Kaua`i and DOH for approval.

9. Upon approval of the design and/or issuance of permits by the County of Kaua`i and DOH, the Project Manager or contractor shall construct the replacement systems. For each replacement system, construction shall include removal/closure of the cesspool and installation of the replacement system, including all necessary permits. The Project Manager or contractor shall properly dispose of all materials removed in cesspool closure.

10. The Project Manager shall provide the homeowner with written information regarding proper operation and maintenance, e.g. chemical usage, trouble-shooting the system, and instruction on when or whom to call for service. This shall include a simple to understand operation and maintenance manual and a customized quick tips sheet.

11. The Project Manager or contractor shall warranty each cesspool replacement for two months.

12. Total expenditures for this SEP shall be no less than $200,000; however, Defendants shall not be obligated to spend more than $200,000 in eligible expenses. Eligible expenses include: those associated directly with the design of the cesspool replacement systems; permitting; construction; installation; system maintenance and repair as necessary under the warranty for each cesspool replacement; and preparation of the Final SEP Report as required by Section VI of the Consent Decree and paragraph 13 below.

13. Prior to depletion of the escrow account as provided in Paragraph 4 or 5, the Project Manager shall submit to EPA, with copies to DOH and the Citizens, a Final SEP Report, as required by Section VI of the Consent Decree, detailing, at a minimum, if applicable:

    a. names of all eligible property owners contacted for cesspool replacement;
    b. for each individual replacement system:
        i. owner names and replacement location addresses;
        ii. as-built construction drawings;
        iii. construction/installation cost; and
    c. total cost of project.

14. All replacement projects for residences participating in the program shall be completed by the end of the third year following the Effective Date of the Consent Decree.

WAIVER OF LIABILITY AND INDEMNIFICATION AGREEMENT

This WAIVER OF LIABILITY AND INDEMNIFICATION AGREEMENT ("Agreement") is made on the date indicated below by and between Pflueger Properties, Pila'a 400, LLC, James H. Pflueger, ("Pila'a 400 Parties"), _____ ("Homeowners"), and _____ ("Contractor").

This Agreement is made pursuant to the terms and provisions of the Consent Decree including Appendix G dated _____ and filed in the United States District Court For the District of Hawai'i in the United States of America, *et al.* v. James H. Pflueger, Pflueger Properties; and Pila`a 400 LLC, Civil No._____ which provides for the replacement of the Homeowners' existing cesspool system with the installation of a new septic system (the "Work") at no cost to the Homeowners.

Waiver, Release, and Hold Harmless. Homeowners agree to and shall waive, release, and hold harmless Pila'a 400 Parties, including their project manager, trustees, members, managers, employees, agents, representatives, assigns, and successors against any and all claims, actions, losses, damages (including property damage, personal injury, emotional distress, and wrongful death), penalties, liabilities, costs and expenses (including reasonable attorneys fees incurred in connection with defense of such claims), or for payment of any compensation arising out of, related to, based upon, suffered or incurred, or in any way connected with the Work. Notwithstanding the foregoing, Homeowners do not waive, release, or hold harmless any person performing the Work, including the named Contractor (including the project manager if acting in the capacity of the Contractor) and anyone directly or indirectly employed by the Contractor to perform the Work.

Indemnification. The Contractor shall indemnify and hold harmless the Homeowners, Pila'a 400 Parties, project manager, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including loss of use resulting therefrom, to the extent caused in whole or in part by negligent acts or omissions of the Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligations shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this indemnification paragraph.

IN WITNESS WHEREOF, the Pila'a 400 Parties have executed this Waiver of Liability and Indemnification Agreement this _____ day of _____, 2005.

IN WITNESS WHEREOF, Homeowners have executed this Waiver of Liability and Indemnification Agreement this _____ day of _____, 2005.

IN WITNESS WHEREOF, the Contractor has executed this Waiver of Liability and Indemnification Agreement this _____ day of _____, 2005.

Pflueger Properties, Pila'a 400, LLC, James H. Pflueger

By: _____
Name: _____
Title: _____

_____
[Name of Homeowner]

_____
[Name of Contractor]