

DAVID L. HENKIN #6876  
ELENA L. BRYANT #9548  
EARTHJUSTICE  
850 Richards Street, Suite 400  
Honolulu, Hawai‘i 96813  
Telephone No.: (808) 599-2436  
Email: dhenkin@earthjustice.org  
ebryant@earthjustice.org

Attorneys for Plaintiff\*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAI‘I

HUI MĀLAMA HONOKŌHAU, an ) Case No. CV 23-00393 JMS-KJM  
unincorporated association, )  
 )  
Plaintiff, ) REMEDY PHASE SETTLEMENT  
 ) AGREEMENT; ATTACHMENTS  
v. ) “A” AND “B”  
 )  
COUNTY OF HAWAI‘I, ) Judge: Hon. J. Michael Seabright  
 ) Trial Date: Feb. 24, 2026  
Defendant. )  
 )  
 )

---

REMEDY PHASE SETTLEMENT AGREEMENT

WHEREAS, on September 25, 2023, Plaintiff Hui Mālama Honokōhau (“the Hui”) filed a complaint (ECF No. 1) against Defendant County of Hawai‘i

---

\* Pursuant to Local Rule 10.2(b), please refer to the signature page for the complete list of parties represented.

(“Defendant”) alleging violations of the federal Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 *et seq.*, associated with Defendant’s discharges of wastewater from the Kealakehe Wastewater Treatment Plant (“Kealakehe WWTP”) into a disposal percolation basin, which enter the Pacific Ocean via groundwater, without the required National Pollutant Discharge Elimination System permit;

WHEREAS, on November 20, 2023, the Court bifurcated this lawsuit into a “Liability Phase” (*i.e.*, adjudicating Defendant’s potential CWA liability for unpermitted discharges from the Kealakehe WWTP) and a “Remedy Phase” (*i.e.*, issuing injunctive relief and assessing civil penalties, should any liability be found, for any CWA violations);

WHEREAS, the Hui and Defendant (collectively, “the Parties”) reached a settlement of the Liability Phase (ECF No. 38), which, following the U.S. Department of Justice’s and the U.S. Environmental Protection Agency’s review pursuant to 33 U.S.C. § 1365(c) and 40 C.F.R. § 135.5 (*see* ECF No. 42), the Court approved and ordered on August 22, 2024 (ECF No. 43);

WHEREAS, the Parties have agreed to enter into a Settlement Agreement, which they consider to be a just, fair, adequate, and equitable resolution of the Remedy Phase of this lawsuit; and,

WHEREAS, it is in the best interests of the public, the parties, and judicial economy to resolve the Remedy Phase without protracted litigation;

NOW, THEREFORE, the Parties agree as follows:

1. This Remedy Phase Settlement Agreement (“Agreement”) resolves the Remedy Phase of the above-captioned lawsuit.

KEALAKEHE WWTP R-1 UPGRADE PROJECT

2. Defendant will upgrade the Kealakehe WWTP so that its treated wastewater satisfies the water quality standards applicable to R-1 Recycled Water as set forth in “Reuse Guidelines, Volume 1: Recycled Water Facilities,” prepared by the Wastewater Branch, Hawai‘i Department of Health dated January 2016, attached hereto as Attachment “A” (“R-1 Project”).

3. Defendant shall complete the R-1 Project according to the following schedule:

- a. No later than September 1, 2025, Defendant will issue an invitation for bid for the construction proposal for the R-1 Project.
- b. No later than March 1, 2026, Defendant will begin construction of the R-1 Project.
- c. No later than June 30, 2029, Defendant will complete the R-1 Project.

4. Defendant shall provide notification to the Hui in accordance with Paragraph 25, below, when the invitation for bid for the construction proposal for

the R-1 Project is issued (*see* Paragraph 3(a)), when construction of the R-1 Project begins (*see* Paragraph 3(b)), and when the R-1 Project is complete (*see* Paragraph 3(c)).

SUPPLEMENTAL ENVIRONMENTAL PROJECT(S)  
IN LIEU OF ADDITIONAL CIVIL PENALTIES

5. Within eighteen (18) months after the Parties sign this Remedy Phase Settlement Agreement, Defendant shall complete a Reuse Feasibility Study to identify potential supplemental environmental projects (“SEPs”), the purpose of which is to divert treated wastewater from the Kealakehe WWTP for reuse (“Reuse Project”).

6. The Reuse Feasibility Study shall analyze potential Reuse Projects that satisfy the project parameter requirements in Paragraph 7 below, without limitation with respect to cost. The Reuse Projects that the Reuse Feasibility Study will analyze shall include, but are not limited to, use of recycled water (1) at the Old Airport Park; (2) to convert green waste into soil; and (3) to establish and maintain the Kealakehe Regional Park.

7. The Reuse Project parameters are as follows:

- a. The Reuse Project will reuse wastewater from the Kealakehe WWTP;

- b. The Reuse Project will reuse at least an average of 100,000 gallons per day (“gpd”) of recycled wastewater from the Kealakehe WWTP;
- c. The Reuse Project shall be operational within seventy-two (72) months from the Parties’ signing of this Remedy Phase Settlement Agreement.

8. For the purposes of determining compliance with the project parameter of reusing 100,000 gpd of recycled wastewater from the Kealakehe WWTP (and related assessment of any additional civil penalties; *see* Paragraph 15, below), the average daily amount of reuse will be assessed over a period of one (1) year from the date that the Reuse Project begins operations.

9. After completing the Reuse Feasibility Study, Defendant will have the option to construct and implement one or more Reuse Projects as a SEP in lieu of paying additional civil penalties (*see* Paragraphs 14 and 15, below). To avoid paying additional civil penalties, Defendant must:

- a. No later than six (6) months after completion of the Reuse Feasibility Study, select one or more Reuse Projects that Defendant will construct and implement;
- b. No later than seventy-two (72) months from the Parties’ signing of this Remedy Phase Settlement Agreement, complete

construction and begin operation of the selected Reuse Project(s); and

- c. Ensure that the selected Reuse Project(s) complies/comply with the parameters set forth in Paragraph 7.

10. Reuse Projects under this Agreement shall not include any projects that Defendant is otherwise obliged to implement and/or any projects required to be implemented by any third party.

11. Defendant shall provide notification to the Hui in accordance with Paragraph 25, below, when Defendant has completed each of its obligations under Paragraphs 5 (completion of the Reuse Feasibility Study), 9(a) (selection of one or more Reuse Projects), and 9(b) (completion of construction and start of operation of the selected Reuse Project(s)).

#### CIVIL PENALTIES

12. The civil penalties set forth herein resolve the Hui's claim for civil penalties in this lawsuit through the date that the Parties sign this Remedy Phase Settlement Agreement.

13. No later than ninety (90) days after the Court's approval of this Remedy Phase Settlement Agreement (*see* Paragraphs 30 to 33, below), Defendant will pay a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00) to the U.S. Treasury.

14. If Defendant fails to comply with (1) the deadline in Paragraph 9(a) to select one or more Reuse Projects that Defendant will construct and implement or (2) the deadline in Paragraph 9(b) to complete construction and begin operation of the selected Reuse Project(s), Defendant will, no later than ninety (90) days after the first missed deadline, pay an additional civil penalty in the amount of Nine Hundred Ninety Thousand Dollars (\$990,000.00) to the U.S. Treasury.

15. If Defendant complies with the deadlines in Paragraph 9(a) and (b) but the selected Reuse Project(s) use(s) less than an average of 100,000 gpd of recycled wastewater from the Kealakehe WWTP (assessed over a period of one year from the date the Reuse Project(s) is/are operational), Defendant will pay an additional civil penalty to the U.S. Treasury no later than ninety (90) days after the one-year anniversary of the date the Reuse Project(s) is/are operational. The amount of the additional civil penalty that Defendant would owe in this situation will be calculated as follows: Nine Hundred Ninety Thousand Dollars (\$990,000.00), reduced in proportion to the amount of reuse compared with the 100,000 gpd requirement (*e.g.*, if the Reuse Project uses an average of 50,000 gpd of recycled wastewater from the Kealakehe WWTP, the penalty shall be reduced to Four Hundred Ninety-Five Thousand Dollars (\$495,000.00)).

DELAY IN PERFORMANCE AND STIPULATED PENALTIES

16. Unless excused due to a Force Majeure event as defined below, Defendant shall be liable for Stipulated Penalties for each day it fails to timely comply with any of the deadlines set forth in Paragraphs 3(a) to 3(c) (R-1 Project) and/or 5 (Reuse Feasibility Study), as follows:

- a. \$250 per day for the first fifteen (15) days;
- b. \$500 per day for days 16 to 60; and
- c. \$1,000 per day for days 61 and beyond.

Stipulated Penalties shall begin to accrue on the day a violation occurs and shall continue to accrue through the final day of the correction of that violation.

Stipulated Penalties shall accrue separately for each violation.

17. The Hui may seek Stipulated Penalties under this Section by making a written demand, as follows:

- a. The Hui shall send notice to Defendant in accordance with Paragraph 25 that the Hui intends to seek Stipulated Penalties and stating the basis for the Hui's demand.
- b. If Defendant disputes the Hui's demand for Stipulated Penalties, the Parties shall meet and confer (in-person not required) in a good faith effort to resolve the dispute. If the Parties are unable to resolve their dispute within ten (10) days



after receipt of the written notice, the Hui may submit the dispute to the Court for resolution. Stipulated Penalties shall continue to accrue during the Court's resolution of any dispute, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

- i. If the Hui prevails in whole or in part in a Court action regarding Stipulated Penalties, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within thirty (30) days of receiving the Court's decision or order, except as provided in subparagraph ii, below. Defendant shall also pay the Hui's costs of litigation (including reasonable attorneys' fees).
- ii. If any party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) days of receiving the final appellate court decision. If the Hui prevails in whole or in part in an appeal regarding

Stipulated Penalties, Defendant shall also pay the Hui's costs of litigation (including reasonable attorneys' fees).

- c. If Defendant does not dispute the Hui's demand for Stipulated Penalties, within thirty (30) days of service of the written demand, Defendant shall pay the Stipulated Penalties set forth in the Hui's demand.

18. Defendant shall pay any Stipulated Penalties by certified check or cashier's check in the amount due, payable to the Hawaiian Islands Environmental Finance Center (<https://www.hawaiianislandsefc.org/>) and provide timely proof of payment to the Hui in accordance with Paragraph 25.

19. The payment of Stipulated Penalties shall not alter in any way Defendant's obligation to comply with the terms of this Remedy Phase Settlement Agreement.

#### FORCE MAJEURE

20. A "Force Majeure event" is any event beyond the control of Defendant, or the control of Defendant's consultants or contractors or any entity controlled by Defendant, that delays or prevents the performance of any obligation under this Agreement despite Defendant's best efforts to fulfill the obligation.

"Best efforts" includes anticipating any potential Force Majeure event and

addressing 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.

21. “Force Majeure” may include Defendant’s failure to obtain, or delay in obtaining, a permit or other governmental approval, if Defendant has made best efforts to secure the permit or approval in a timely fashion. “Force Majeure” may also include Defendant’s unexpected loss of funding to perform any obligation under this Agreement, but does not include Defendant’s failure to budget reasonably for its obligations under this Agreement.

22. If and to the extent Defendant suffers a delay in performing any of its obligations as a result of a Force Majeure event, (i) Defendant shall be entitled to a reasonable extension of time to complete performance of the delayed obligation, and (ii) Defendant shall make its best efforts during such delay to continue to perform its obligations under this Remedy Phase Settlement Agreement as far as is reasonably practicable.

23. Defendant shall provide timely notice to the Hui by electronic mail as soon as practicable after the time Defendant first becomes aware that a claimed Force Majeure event has commenced or occurred. The notice shall state the nature and (to the extent known by Defendant) the then-expected duration of the Force Majeure event, its cause(s), the anticipated delay of performance of any obligation(s) under this Agreement, a schedule for carrying out the obligation

whose performance is being delayed (to the extent the duration of the Force Majeure event is known by Defendant), and Defendant's rationale for attributing the delay to a Force Majeure event. Within ten (10) days following the delivery of such notice, Defendant shall provide to the Hui a formal written notice in accordance with Paragraph 25 stating whether such a Force Majeure event has in fact commenced or occurred and (to the extent further information is known by Defendant than was known at the time of initial notice) updating the information included in the original notice.

24. If the Hui disagrees that a Force Majeure event has occurred as claimed by Defendant, or disagrees about the duration of a Force Majeure event, then they shall initiate informal dispute resolution under Paragraph 29 prior to seeking judicial relief. In any dispute, Defendant shall bear the burden of proving that (a) the identified event is a Force Majeure event and (b) the length of the extension of time that Defendant seeks to complete performance is reasonable under the circumstances.

ADDRESSES FOR NOTICES, SUBMISSIONS, OTHER COMMUNICATIONS

25. Whenever notifications, submissions, and/or communications are required by this Remedy Phase Settlement Agreement, they shall be in writing, and be addressed and sent via U.S. Mail or electronic mail as follows:

To the Hui, via the Hui's attorney of record:

David Lane Henkin  
Earthjustice  
850 Richards Street, Suite 400  
Honolulu, Hawai'i 96813  
Phone: (808) 599-2436  
E-mail: [dhenkin@earthjustice.org](mailto:dhenkin@earthjustice.org)

To Defendant, via Defendant's attorney of record:

Regan M. Iwao  
Douglas A. Codiga  
Schlack Ito LLC  
745 Fort Street Suite 1500  
Honolulu, HI 96813  
[riwao@schlackito.com](mailto:riwao@schlackito.com)  
[dcodiga@schlackito.com](mailto:dcodiga@schlackito.com)

With a copy to:

Office of the Corporation Counsel  
Lerisa L. Heroldt, Deputy Corporate Counsel Section Chief  
Hilo Lagoon Centre  
101 Aupuni Street, Suite 325  
Hilo, HI 96720  
[corpcounsel@hawaiicounty.gov](mailto:corpcounsel@hawaiicounty.gov)  
[Lerisa.Heroldt@hawaiicounty.gov](mailto:Lerisa.Heroldt@hawaiicounty.gov)

26. Any Party may, by written notice to the other Party, change its designated notice recipient or notice address provided above.

#### ATTORNEYS' FEES AND COSTS

27. Within sixty (60) days of the Court's entry of this Remedy Phase Settlement Agreement, the Parties will meet and confer (in-person not required) in a good faith effort to reach agreement as to the amount of the Hui's costs of

litigation (including reasonable attorneys' and expert witness fees) pursuant to Section 505(d) of the CWA, 33 U.S.C. § 1365(d), for proceedings before this Court. If the Parties are unable to reach agreement, the Hui may file a motion with this Court for the recovery of fees and costs no later than sixty (60) days after the Court's entry of this Agreement, pursuant to Federal Rule of Civil Procedure 54(d)(2)(B).

#### ENFORCEMENT OF THIS SETTLEMENT AGREEMENT

28. This Court retains jurisdiction to enforce the terms of this Remedy Phase Settlement Agreement. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

29. In the event that either Party seeks to enforce the terms of this Agreement, including any of the deadlines for any action set forth herein, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either Party believes that the other Party has failed to comply with any term or condition of this Agreement, the Party raising the dispute, or seeking enforcement, shall provide the other Party with written notice of the claim. The Parties agree that they will meet and confer (in-person not required) at the earliest possible time in a good faith effort to resolve the claim before bringing any matter to the Court. If the Parties are unable to resolve the claim within ten (10) days after the notice, either Party may bring the claim to the Court.

APPROVAL OF SETTLEMENT AGREEMENT BY THE COURT

30. The Parties jointly submit this Remedy Phase Settlement Agreement to the Court and ask the Court to enter the attached proposed order approving this Agreement and retaining jurisdiction to enforce it (“Proposed Order”). *See* Attachment “B.”

31. Pursuant to 33 U.S.C. § 1365(c)(3) and 40 C.F.R. § 135.5, the Court shall not enter the Proposed Order prior to forty-five (45) days following the receipt of a copy of the Agreement by the United States Attorney General and the United States Environmental Protection Agency Administrator (collectively, “the Federal Government”). The Hui shall notify the Court: (a) when the Hui has confirmed the dates of service of the Agreement upon the Federal Government, and (b) when the forty-five (45)-day period has expired.

32. Upon the Federal Government’s confirmation of no objection to, or no action on, this Agreement within forty-five (45) days of receipt of this Agreement, the Court shall enter the Proposed Order.

33. The Parties shall not withdraw their consent to this Agreement during the Federal Government’s review, provided, however, that either Party has the right to withdraw its consent to this Agreement if, prior to its entry, the Court changes any term or provision of this Agreement, including but not limited to

declining to retain jurisdiction to enforce the terms of the settlement without modification.

AUTHORIZATION TO SIGN

34. This Remedy Phase Settlement Agreement shall apply to and be binding upon the Parties, their members, delegates, and assigns. The undersigned representatives certify that they are authorized by the Party they represent to enter into this Agreement and to execute and legally bind that Party to the terms and conditions of this Agreement.

INTERPRETATION

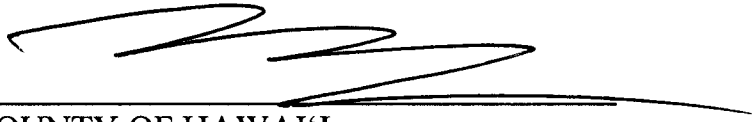
35. This Remedy Phase Settlement Agreement shall be considered as having been drafted by both Parties and shall not be construed or interpreted against any party, but shall be construed and interpreted in accordance with the fair import of its terms and conditions.

DATED: Kailua-Kona, Hawai‘i, March 31, 2025.

  
\_\_\_\_\_  
HUI MĀLAMA HONOKŌHAU  
By: Michael Nakachi  
Its: President



DATED: Hilo, Hawai'i, April 3, 2025.



COUNTY OF HAWAI'I

By: WILLIAM V. BRILHANTE, JR

Its: **Managing Director**

APPROVED AS TO FORM AND LEGALITY:

/s/ David L. Henkin

DAVID L. HENKIN

ELENA L. BRYANT

EARTHJUSTICE

Attorneys for Plaintiff Hui Mālama Honokōhau



REGAN M. IWAO

DOUGLAS A. CODIGA

Attorneys for Defendant County of Hawai'i

---

*Hui Mālama Honokōhau v. County of Hawai'i*, 1-23-cv-00393 JMS-KJM (D. Haw.), REMEDY PHASE SETTLEMENT AGREEMENT; ATTACHMENTS "A" AND "B"