

REQUEST FOR LEGAL SERVICES

RECEIVED

RECEIVED CORPORATION COUNSEL

Date: September 11, 2019
From: Michael J. Molina, Chair
Governance, Ethics, and Transparency Committee

2019 SEP 12 AM 10:09

2019 SEP 11 PM 3:56

MEMORANDUM
Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Richelle Thomson, Esq.

Subject: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM
BMK, U.S. SUPREME COURT DOCKET 18-260 (GET-26)

Background Data: Consistent with the Committee's discussion, please review the further revised
proposed resolution, and if appropriate, approve as to form and legality. A hard copy of the
approved resolution is requested with your response.

Work Requested: [X] FOR APPROVAL AS TO FORM AND LEGALITY
[] OTHER:

Requestor's signature: Michael J. Molina
Contact Person: Shelly Espeleta (Telephone Extension: 7134)

- [] ROUTINE (WITHIN 15 WORKING DAYS)
>[] RUSH (WITHIN 5 WORKING DAYS)
>[] PRIORITY (WITHIN 10 WORKING DAYS)
>[] URGENT (WITHIN 3 WORKING DAYS)

[X] SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): September 12, 2019
REASON: For posting on September 20, 2019 Council agenda.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: ESK
ASSIGNMENT NO. 2019-0065
BY: JEO

TO REQUESTOR: [X] APPROVED [] DISAPPROVED [] OTHER (SEE COMMENTS BELOW)
[] RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE):

DEPARTMENT OF THE CORPORATION COUNSEL

Date: 9/12/19

By: RDM

(Rev. 7/03)

Resolution

No. _____

AUTHORIZING SETTLEMENT IN HAWAII
WILDLIFE FUND, ET AL. V. COUNTY OF MAUI,
CIVIL 12-00198 SOM BMK, U.S. SUPREME
COURT CASE 18-260

WHEREAS, Plaintiffs Hawaii Wildlife Fund, et al. filed a lawsuit in the United States District Court (“District Court”) on April 16, 2012, Civil 12-00198 SOM BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act; and

WHEREAS, on January 23, 2015, and June 25, 2015, District Court granted Plaintiffs’ motions for partial summary judgment; and

WHEREAS, to avoid incurring expenses and the uncertainty of a judicial determination of the parties’ respective rights and liabilities, the County Council approved a Settlement Agreement by Resolution 15-75 (“2015 Settlement Agreement”); and

WHEREAS, the 2015 Settlement Agreement was lodged with District Court on September 24, 2015, and following Federal government review pursuant to 40 C.F.R. §135.5, District Court entered the Settlement Agreement and Order and entered its Judgment on November 17, 2015; and

WHEREAS, pursuant to the terms of the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the U.S. Supreme Court; and

WHEREAS, the County of Maui appealed District Court’s decision to the Ninth Circuit Court of Appeals 15-17447, and the Ninth Circuit Court of Appeals denied the appeal on February 1, 2018; and

WHEREAS, the County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui’s petition 18-260; and

Resolution No. _____

WHEREAS, in accordance with Section 3.16.020(F), Maui County Code, the Department of the Corporation Counsel may transmit to Council settlement offers involving claims not specified by the Council pursuant to Section 3.16.020(D), Maui County Code; and

WHEREAS, the Department of the Corporation Counsel has received from Plaintiffs' counsel and transmitted to the Council's Governance, Ethics, and Transparency Committee, "Confidential Settlement Communication – FRE 408," dated April 26, 2019 (with amendments made on May 9, 2019), attached hereto as Exhibits "A" and "B" ("Plaintiffs' 2019 Settlement Proposals"); and

WHEREAS, in open session on September 6, 2019, at the reconvened September 3, 2019, meeting of the Governance, Ethics, and Transparency Committee, the Committee revised the terms of paragraph four of Exhibit "B" to read as follows:

"As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit—which could be 'an equivalent control document' (see Hawaii Administrative Rules §11-55-01)—for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells."; and

WHEREAS, having reviewed the facts, circumstances, ramifications, and consequences regarding the case and pending appeal before the U.S. Supreme Court, and being advised in the premises, the County Council wishes to authorize the settlement; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of the case under the terms set forth in the Plaintiffs' 2019 Settlement Proposals, as amended in open session before the reconvened September 3, 2019 meeting of the Governance, Ethics, and Transparency Committee on September 6, 2019;

Resolution No. _____

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in the case;
3. That it hereby authorizes the Director of Finance to satisfy said settlement of the case; and
4. That certified copies of the resolution be transmitted to the Mayor, the Director of Finance, the Director of Environmental Management, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY



Department of the Corporation Counsel
County of Maui

get:misc:026areso01



April 26, 2019

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408¹

By Electronic Mail Only

Moana Lutey
Edward Kushi
Richelle Thomson
Department of the Corporation Counsel
County of Maui
Moana.Lutey@co.maui.hi.us
Edward.Kushi@co.maui.hi.us
Richelle.Thomson@co.maui.hi.us

Re: *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 18-260 (U.S. S. Ct.)

Counsel,

For more than a decade, Maui community groups Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association (collectively, "the Community Groups"), represented by Earthjustice, have sought to work with the County of Maui to address the harm to the nearshore marine environment associated with use of the injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). We have never expressed or shown any interest in having the County spend money on litigation or pay Clean Water Act penalties to the federal treasury. On the contrary, the Community Groups have consistently sought to encourage the County to invest its taxpayer dollars to find solutions, including investments in infrastructure to increase re-use of treated wastewater from the LWRF to meet the irrigation needs of West Maui agriculture, golf courses and commercial landscaping.

Now that the County has a new Mayor and a new Council, we are hopeful that we can work productively together. We provide this offer in the interest of bringing to a close the litigation over the LWRF injection wells, which is now pending before the United States Supreme Court and, with the national attention such a case attracts, threatens the County of Maui's reputation as a champion of environmental quality and stewardship. We offer to work cooperatively and in good faith with the County to reduce reliance on the injection wells to dispose of treated

¹ Please note that, in the spirit of public transparency, our preference and request is to have this settlement offer be made public and not be sealed for purposes of County deliberations. We cite Federal Rule of Evidence 408 here solely for the purpose of ensuring that this good faith settlement offer will not be used against us in any court proceedings.

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wastewater, to increase the beneficial reuse of that treated wastewater, and to ensure that any wastewater that is injected does not harm the marine environment. As long as the County is making good faith efforts to achieve these goals, we provide assurances that the Community Groups will not bring additional litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells. We also provide assurances that the Community Groups will not bring litigation against businesses and other consumers of recycled water from the LWRF who are irrigating responsibly, so as not to cause pollution of waters of the United States. We are, after all, deeply committed to increasing beneficial reuse of recycled water from the LWRF.

Specifically, we offer to settle the above-captioned case as follows:

1. The parties would jointly dismiss the County's pending appeal to the U.S. Supreme Court pursuant to Supreme Court Rule 46.1. Each party would bear its own costs of litigation (including attorneys' fees) for all proceedings before the Supreme Court.
2. Pursuant to the previously entered Settlement Agreement and Order Re: Remedies in *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Nov. 17, 2015), the County (1) would make good faith efforts to secure and comply with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit for the LWRF injection wells (Settlement ¶ 8); (2) would fund and implement one or more projects located in West Maui, to be valued at a minimum of \$2.5 million, the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui (Settlement ¶¶ 9-12);² and (3) would pay a \$100,000 penalty to the U.S. Treasury (Settlement ¶ 13).³

² We understand that, as part of the current budgeting process, the County may include far more than \$2.5 million in next year's budget to fund projects to divert treated wastewater from the LWRF injection wells for reuse. If the County does that, it should readily be able to satisfy this settlement provision.

³ As mentioned, we have no desire to have the County pay penalties to the U.S. Treasury. The parties were required to include this relatively modest penalty in the settlement in order to secure approval from the Environmental Protection Agency, which reviews all settlements in Clean Water Act citizen suits pursuant to 33 U.S.C. § 1365(c)(3).

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3. Pursuant to the parties' prior agreements, which have been entered as court orders, the County would reimburse the Community Groups' costs of litigation (including attorneys' fees) for litigation in the district court and Ninth Circuit Court of Appeals. *See Stipulated Settlement Agreement Regarding Award of Plaintiffs' Costs of Litigation, Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Dec. 29, 2015); *Order, Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 15-17447 (9th Cir. Apr. 25, 2018). As mentioned above, each party would bear its own costs of litigation for all proceedings before the U.S. Supreme Court.
4. As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells.
5. The Community Groups further commit that they will not bring Clean Water Act litigation against any end users of recycled water from the LWRF, as long as those consumers are irrigating responsibly, so as not to cause pollution of waters of the United States.
6. The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. The parties also recognize the scientific studies showing the specific impacts of the LWRF injection wells on the nearshore marine environment and commit to addressing those impacts as stated above.
7. The parties recognize that, apart from this case specifically regarding the LWRF, any other cases would depend on their own specific factual circumstances, which are not at issue in this case. The parties reserve their positions and all rights on the merits of any other case.

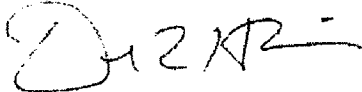
We hope that the foregoing settlement will not only resolve the pending litigation, but will promote a more cooperative relationship between the County and the Community Groups, allowing us to move forward and work together on behalf of the people of Maui to address the challenges posed by the LWRF injection wells.

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We appreciate your prompt attention to this time-sensitive matter. Please feel free to contact me via email (dhenkin@earthjustice.org) or telephone (808-599-2436, ext 6614) should you wish to discuss any aspect of this settlement offer.

Respectfully,

A handwritten signature in black ink, appearing to read "DLH", with a horizontal line extending to the right.

David L. Henkin
Isaac H. Moriwake
Attorneys for the Community Groups

DLH/tt



April 26, 2019 (with May 9, 2019 edits)

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408¹

By Electronic Mail Only

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Now that the County has a new Mayor and a new Council, we are hopeful that we can work productively together. We provide this offer in the interest of bringing to a close the litigation over the LWRF injection wells, which is now pending before the United States Supreme Court and, with the national attention such a case attracts, threatens the County of Maui's reputation as a champion of environmental quality and stewardship. We offer to work cooperatively and in good faith with the County to reduce reliance on the injection wells to dispose of treated

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MID-PACIFIC 850 RICHARDS STREET, SUITE 400 HONOLULU, HI 96813

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EXHIBIT ' B '

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² We understand that, as part of the current budgeting process, the County may include far more than \$2.5 million in next year's budget to fund projects to divert treated wastewater from the LWRF injection wells for reuse. If the County does that, it should readily be able to satisfy this settlement provision.

³ As mentioned, we have no desire to have the County pay penalties to the U.S. Treasury. The parties were required to include this relatively modest penalty in the settlement in order to secure approval from the Environmental Protection Agency, which reviews all settlements in Clean Water Act citizen suits pursuant to 33 U.S.C. § 1365(c)(3).

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4. As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells.
5. As long as the County makes good faith efforts to reduce its reliance on injection wells to dispose of treated wastewater at its other wastewater treatment facilities, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for its injection wells where legally required, the Community Groups will not bring litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of those injection wells.
6. The Community Groups further commit that they will not bring Clean Water Act litigation against any end users of recycled water from the LWRF, as long as those consumers are irrigating responsibly, so as not to cause pollution of waters of the United States.
7. The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. In settling this case, the County makes no admission regarding whether the LWRF injection wells have an adverse effect on the nearshore marine environment.
8. The parties recognize that, apart from this case specifically regarding the LWRF, any other cases would depend on their own specific factual circumstances, which are not at issue in this case. The parties reserve their positions and all rights on the merits of any other case.

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Respectfully,

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