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Director of Council Services
Traci N. T. Fujita, Esq.

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

May 10, 2019

RECEIVED
2019 MAY 10 AM 11:26
OFFICE OF THE
COUNTY CLERK

Mr. Josiah K. Nishita, County Clerk
Office of the County Clerk
County of Maui
Wailuku, Hawaii 96793

Dear Mr. Nishita:

SUBJECT: **SETTLEMENT OF HAWAII WILDLIFE FUND, ET AL.**
V. COUNTY OF MAUI (PAF 19-173)

May I request the attached proposed resolution, entitled "APPROVING SETTLEMENT OF HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT," be placed on the next Council meeting agenda.

Sincerely,

Kelly T. King
KELLY T. KING
Council Chair

paf:dmr:19-173h

Attachment

COUNTY COMMUNICATION NO. 19-225

Resolution

No. _____

APPROVING SETTLEMENT OF HAWAII
WILDLIFE FUND, ET AL. V. COUNTY OF MAUI,
RELATING TO THE CLEAN WATER ACT

WHEREAS, since being passed by overwhelming majorities in the United States House of Representatives and United States Senate and signed into law by President Richard M. Nixon in 1972, the Clean Water Act has been a powerful means of environmental protection; and

WHEREAS, in a case filed under the Clean Water Act, the United States Court of Appeals for the Ninth Circuit ruled against the County of Maui in Hawaii Wildlife Fund, et al. v. County Maui, 886 F.3d 737 (9th Cir. 2018), upholding the Hawaii District Court's judgment in Hawaii Wildlife Fund, et al. v. County Maui, 24 F.Supp.3d 980 (D. Haw. 2014); and

WHEREAS, the courts have thus far concluded the County's injection of treated wastewater into West Maui wells without a National Pollutant Discharge Elimination System permit violated the Clean Water Act; and

WHEREAS, the County's appeal of the Ninth Circuit's ruling is now pending before the United States Supreme Court as County of Maui v. Hawaii Wildlife Fund, et al., Docket No. 18-260; and

WHEREAS, in a petition to the Supreme Court on August 27, 2018, the County's special counsel argued the Ninth Circuit's opinion constituted a "radical expansion" of the Clean Water Act's applicability; and

WHEREAS, in a brief filed in support of the County on October 1, 2018, Pacific Legal Foundation, a property rights organization which frequently challenges environmental regulations, urged the Supreme Court to take the case for the purpose of restricting the scope of the Clean Water Act, which it called an "already bloated statute"; and

WHEREAS, on January 3, 2019, the Trump Administration filed a brief urging the Supreme Court to hear the County's appeal; and

Resolution No. _____

WHEREAS, on February 19, 2019, the Supreme Court agreed to take the case, with oral argument expected to be scheduled during the October 2019 term; and

WHEREAS, in a news article on April 29, 2019, energy and environment trade publication E&E News described the County's appeal as the "biggest environmental case on the Supreme Court's docket in years"; and

WHEREAS, under Supreme Court Rule 46(1), a pending appeal will be dismissed if the parties reach a settlement; and

WHEREAS, if the County's appeal proceeds to an oral argument and subsequent ruling, the Supreme Court could issue an opinion that restricts the Clean Water Act's protections throughout the nation, which is not a desirable outcome; and

WHEREAS, the attached settlement offer proposed by plaintiff Community Groups on May 9, 2019, attached as Exhibit "A," has been provided to the Council and approved for public review by the plaintiffs' counsel; and

WHEREAS, the County's Special Counsel filed an opening brief with the Supreme Court on May 9, 2019, asserting that:

- the County believes the Ninth Circuit's decision in favor of the plaintiffs was "expansive, novel, and disruptive" and, therefore, should be reversed in accordance with a narrower view of the Clean Water Act's protections; and
- the Supreme Court should give credence to the Environmental Protection Agency's new interpretation of the Clean Water Act, adopted by the Trump Administration on April 23, 2019, rescinding the Obama Administration's position in this case; and

WHEREAS, having reviewed the facts and circumstances regarding this case, the Council wishes to authorize settlement; now, therefore,

Resolution No. _____

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

1. That it approves settlement of County of Maui v. Hawaii Wildlife Fund, et al., United States Supreme Court Docket No. 18-260, under the terms proposed by plaintiff Community Groups on May 9, 2019, or substantially similar terms; and
2. That certified copies of this resolution be transmitted to Moana Lutey, Esq., Acting Corporation Counsel, County of Maui; Elbert Lin, Esq., Special Counsel to the County of Maui; Honorable Michael P. Victorino, Mayor, County of Maui; and Eric Nakagawa, Acting Director of Environmental Management, County of Maui.

APPROVED AS TO FORM AND LEGALITY

Deputy Corporation Counsel
County of Maui



EARTHJUSTICE

May 9, 2019

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408¹

By Electronic Mail Only

Moana Lutey
Edward Kushi
Richelle Thomson
Department of the Corporation Counsel
County of Maui
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Re: *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 18-260 (U.S. S. Ct.)

Counsel,

As the Mayor requested at yesterday's meeting, we are following up with you to develop mutually acceptable terms to resolve the above-captioned case. We have done our best to revise our April 26, 2019 settlement offer to address concerns you raised yesterday. Our edits to the numbered paragraphs from our April 26, 2019 settlement offer are in redline format:

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

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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EXHIBIT " A "

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408

Moana Lutey
Edward Kushi
Richelle Thomson
May 9, 2019
Page 2

(Settlement ¶¶ 9-12);² and (3) would pay a \$100,000 penalty to the U.S. Treasury (Settlement ¶ 13).³

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.

4.5. 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.

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).

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408

Moana Lutey
Edward Kushi
Richelle Thomson
May 9, 2019
Page 3

~~5.6.~~ 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.

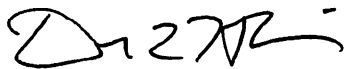
~~6.7.~~ The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. In settling this case, the County ~~The parties also recognize the scientific studies showing the specific impacts of~~ makes no admission regarding whether the LWRF injection wells have an adverse effect on the nearshore marine environment and ~~commit to addressing those impacts as stated above.~~

~~7.8.~~ 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.

While we have not yet had an opportunity to discuss these edits with our clients, we could recommend that they accept this revised settlement and have a high degree of confidence that they would follow our recommendation.

Please let us know if you have any further concerns. Thank you for your prompt attention to this matter.

Respectfully,



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

DLH/tt