

GET Committee

From: honsofio@everyactioncustom.com on behalf of Ellen Sofio
<honsofio@everyactioncustom.com>
Sent: Monday, September 02, 2019 10:51 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is ____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Ellen Sofio
2708 Hipawai Pl Honolulu, HI 96822-1824 honsofio@aol.com

GET Committee

From: Troy Ching <troy.ching@gmail.com>
Sent: Monday, September 02, 2019 10:14 PM
To: GET Committee
Cc: Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura
Subject: Hawaii Wildlife Fund et al. v. County of Maui, GET-26
Attachments: 2019 09 02 GET Testimony TChing.pdf

Aloha Committee Chair Mike Molina and Members of the Governance, Ethics, and Transparency Committee,

Please find the attached written testimony for Hawaii Wildlife Fund et al. v. County of Maui, GET-26

Mahalo for your time and consideration.

Troy Ching, PE
219 Lau Oliwa Loop
Wailuku, HI 96793

02 September 2019

Honorable Michael J. Molina, Chair
County of Maui, Governance, Ethics, and Transparency Committee
200 South High Street, 8th Floor
Wailuku, Maui, Hawaii, 96793

SUBJECT: Hawaii Wildlife Fund et al. v. County of Maui, GET-26

Aloha Chair Molina and Members of the Governance, Ethics, and Transparency Committee

My name is Troy Ching and I am practicing civil engineer. I am the current President of the Hawaii Society of Professional Engineers and a Past President of the American Society of Civil Engineers Younger Member Forum. I am submitting this testimony as a private citizen.

I am submitting this testimony to urge you not to settle, and continue your appeal to the US Supreme Court. Under current regulations, the County's injection wells are regulated under the Safe Drinking Water Act, not the Clean Water Act. Clarification of the limits of the Clean Water Act and Safe Drinking Water Act is required not just for the County of Maui, but for the United States as a whole. The EPA released an interpretive statement on April 19, 2019 indicating that discharges to groundwater are excluded from the Clean Water Act. However, the interpretive statement does not apply to the Fourth and Ninth Circuit, creating inconsistent application of the Clean Water Act. It is for this reason that clarification is required.

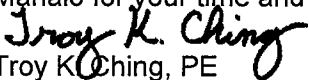
If the County were to settle its case before going to the US Supreme Court or the US Supreme Court agrees with the ruling of the Ninth Circuit Court, the County will likely be required to obtain NPDES permits for its injection wells. Use of the injections wells may be prohibitive because the County will be required to meet the nutrient limits required by an NPDES at the end of the discharge pipe instead of relying on a zone of mixing, that is used in effluent disposal. Without the use of injections wells the County will need to explore alternative methods to dispose of the effluent.

The most likely alternatives are a deep ocean outfall, expanded reuse through irrigation, and overland treatment through infiltration basins. Each alternative will involve a significant cost impact to the County and its tax payers. For the Lahaina Wastewater Reclamation Facility, a deep ocean outfall will likely be required to discharge over 3 miles off shore. Expanded reuse will be limited by the amount of available users and will require upgrades to the existing reuse system. Overland treatment may be a viable solution but will require substantial land acreage required to meet daily effluent volume.

While an ocean outfall is known to be regulated under the Clean Water Act, it is unclear how the Clean Water Act will apply to expanded reuse and overland treatment. For example, overland application through irrigation or infiltration basins are functionally similar to an injection well but operate at the ground surface. It is possible that they will be treated the same as an injection well.

Without clarity of the Clean Water Act and its application, the legal use of the County's injection wells and possible alternative disposal methods remains uncertain. Please continue the appeal to the US Supreme Court so that a determination can be made to clarify the intent and application of the Clean Water Act for the County and the nation.

Mahalo for your time and consideration.


Troy K. Ching, PE
219 Lau Oliwa Loop
Wailuku, HI 96793

GET Committee

From: Kamalani Uehara <Kamalani.Uehara.225630732@p2a.co>
Sent: Monday, September 02, 2019 9:13 PM
To: GET Committee
Subject: RE: 9/3/19 GET meeting; GET-26: It's time to make the pono choice and withdraw the attack against th

Dear Maui County GET Committee,

Hi, my name is Kamalani Uehara and I live in Kahului, Hawaii. I am submitting this testimony for the September 3, 2019 committee meeting on item GET-26 (settlement in Hawai'i Wildlife Fund, et al., v. County of Maui).

I hope my kids get to go diving with me and see the reef alive and well in the future.

As a resident of Hawai'i, I urge you to withdraw the appeal to the Supreme Court, focus on solutions for wastewater pollution, and stop the damage to priceless ocean and reef resources. The county should invest in Maui's future by building the necessary infrastructure to reuse the Lahaina facility's treated wastewater for irrigation, which is a true "win-win" solution. In contrast, destroying the law to advance the county's "right to pollute" the ocean is a "lose-lose" for both the county and the people.

We need Maui County's elected representatives to show leadership and turn this situation around. It's time to stop the reckless attack on the law and focus on building a responsible wastewater system of the future at the Lahaina facility.

We don't want Maui to do the dirty work with the Trump administration for our nation's worst polluters by dismantling the nation's bedrock clean water law.

We need your help before Maui County goes down in history as the champion for water pollution in the United States. Please, create a lasting, positive legacy by focusing on the solutions for this pollution problem and upholding—not destroying—the legal protections of clean water for Maui, Hawai'i, and the entire nation.

Regards,
Kamalani Uehara
60 Kunihi Lane, Unit 337
Kahului, HI 96732

GET Committee

From: bhaktirocks@everyactioncustom.com on behalf of ane takaha
<bhaktirocks@everyactioncustom.com>
Sent: Monday, September 02, 2019 7:03 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is __Ane Takaha__ and I am a resident of __Maui__. I care about this issue because it affects the future of our planet._____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
ane takaha
511 Kupulau Dr Kihei, HI 96753-9315
bhaktirocks@sbcglobal.net

GET Committee

From: Ray Matasci <raymatasci@hawaii.rr.com>
Sent: Monday, September 02, 2019 5:26 PM
To: GET Committee; Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura
Subject: Hawaii Wildlife Fund et al. v. County of Maui, GET-26
Attachments: attachment 1.pdf

Dear Honorable Committee Chair Molina and Members of the Governance, Ethics, and Transparency Committee,

Mahalo for the opportunity to submit this written testimony in reference to your deliberations on the subject court case. I have lived on Maui for 29 years and have practiced civil and environmental engineering for 39 years. Water and wastewater management have been my professional passion and I share my written perspective as a keenly interested citizen of Maui. I sincerely apologize for this late submittal as I'm sure you have received many. I won't be able to testify in person, so please accept this written testimony as a substitute.

Again mahalo,

Raymond N. Matasci, PE
raymatasci@hawaii.rr.com
(808) 298-7238
80 Pukolu Place
Kihei, HI 96753

September 2, 2019

Mike Molina, Chair, Governance, Ethics, and Transparency Committee
Members of the Governance, Ethics, and Transparency Committee

Subject: Hawaii Wildlife Fund et al. v. County of Maui, GET-26

Dear Honorable Chair Molina and Members of the Governance, Ethics, and Transparency Committee,

I'm a registered civil engineer with an advanced degree and have practiced environmental consulting and engineering for 39 years. My passion has long been water: particularly, what comes out of our faucets, what goes down household drains, and what flows off the land during a storm. I have devoted much of my professional life to developing effective, practical systems for wastewater collection, treatment, disposal, and beneficial reuse that help protect communities and the environment throughout Hawaii and Guam.

Today, as a local practicing engineer and Maui resident of 29 years, I share with you my perspectives about the Lahaina injection well issue and whether the County should allow the Supreme Court to hear its appeal. First, I'd like to provide some background on the current quality of the water entering the injection wells, complications regarding our water quality standards, and the fate and impact of injection well subsurface discharges.

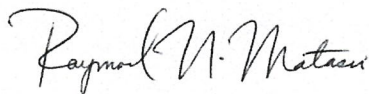
- Lahaina R-1 Recycled Water. Water entering Lahaina's injection wells typically has been purified to a high degree to meet Hawaii's R-1 Recycled Water standard. That purification process allows that same water to be used for unrestricted irrigation in our parks, schools, common areas, golf courses, and would qualify for vegetable crop irrigation. The County's challenge has been finding enough users and creating a practical, cost-effective system that can beneficially use that resource. Virtually all recycled water systems around the country include an alternate means of disposal when the water is not needed.
- R-1 Recycled Water vs. Drinking Water and Other Discharges. Does the existing purification system make it safe enough to drink? No, but it does meet many, if not most, drinking water standards and when placed in a glass of water next to one from your faucet, it would be difficult to tell the difference. Lahaina's R-1 water should be clearly distinguished from discharges from our island's cesspools, which is untreated raw sewage; and from our island's septic tank and leach field discharges, which is typically lightly treated in comparison to R-1 Recycled Water.
- Complications of Hawaii's Water Quality Standards. Hawaii has extremely stringent Water Quality Standards (Chapter 11-54), which are highly protective of our ocean water environment, and many have argued are applied in a restrictive way that is not as originally intended. It is technically possible to purify Lahaina's wastewater to meet drinking water standards. However, it is not technologically possible to purify that same wastewater to meet all Hawaii Water Quality Standards (WQS) established for our oceans because some WQS parameters are 2000 times more stringent than drinking water standards. The result could be the highly purified water would be safe enough to drink, but not permissible to discharge to a receiving water, without other important allowances. This conflict makes it difficult to plan for Maui's future because the Water Quality Standards in Chapter 11-54 currently do not apply to injection well discharges or other subsurface discharges.

- Where do the subsurface discharges go and what are their impacts? There is no dispute that Lahaina injection well discharges enter the groundwater and ultimately make their way into the ocean at some point. The same can be true of other subsurface water discharges including those from stormwater detention basins, excess irrigation of all types including recycled water, as well as cesspools and septic tank systems. The question is what impact do these different subsurface discharges have on the ocean relative to other surface discharges like stormwater runoff? Numerous studies assessing the fate and impact of Lahaina's injection well discharges reach different conclusions. In my opinion, it has not been convincingly demonstrated that Lahaina injection well discharges are negatively affecting the nearshore water environment.

With that said, given the uncertainty, I support efforts to reduce and potentially eliminate Lahaina's injection well discharges, except for emergency backup purposes. However, I strongly urge you to allow the Supreme Court to hear Maui's appeal and here's why:

1. Provide Clarity. The US Supreme Court has agreed to hear Maui's case because various EPA Regions have interpreted the Clean Water Act differently when it comes to subsurface discharges. Maui County, our state regulators, and USEPA need clarity on what regulations should apply, so the County can best set a clear path to reducing its reliance on injection wells. Without clarity from the nation's highest court, the County and regulators will not have the guidance they need to move forward with confidence that future approaches and expenditures (which could exceed \$200 million) are well supported by the regulations.
2. Avoid Potential Unintended Consequences. Many current practices produce subsurface discharges that ultimately reach our oceans, including existing cesspools and septic tank systems. Additionally, systems that are meant to protect the environment, like stormwater detention basins and irrigation systems that beneficially reuse R-1 Recycled Water, could potentially be subject to new permit requirements because they produce subsurface discharges. Lastly, potential alternatives that could effectively reduce or eliminate injection well use like soil aquifer treatment systems could also be subject to NPDES permits. In any of these cases, it is best to get the clarification from the Supreme Court ruling so Maui County can plan accordingly.
3. Spend Money Wisely. There are many potential impacts on our nearshore waters coming from a multitude of surface and subsurface discharges. USEPA has promoted a watershed approach that considers all elements that affect water quality, so that limited resources can be put to the best and highest use.

I have watched the County's environmental stewardship improve steadily over the last 30 years to become a state leader in the beneficial reuse of its purified water. There is yet much more work to do and I am confident the County will continue to do the right thing through its leadership. I strongly urge the County Council to allow the Supreme Court to provide the clarity through its appeal process so we avoid potential unintended consequences and the county taxpayer's resources will be spent wisely.



Raymond N. Matasci, PE
raymatasci@hawaii.rr.com
(808) 298-7238
80 Pukolu Place
Kihei, HI 96753

GET Committee

From: Camille Chong <Camille.Chong.9393196@p2a.co>
Sent: Monday, September 02, 2019 5:23 PM
To: GET Committee
Subject: RE: 9/3/19 GET meeting; GET-26: It's time to make the pono choice and withdraw the attack against th

Dear Maui County GET Committee,

Hi, my name is Camille Chong and I live in Honolulu, Hawaii. I am submitting this testimony for the September 3, 2019 committee meeting on item GET-26 (settlement in Hawai'i Wildlife Fund, et al., v. County of Maui).

As a resident of Hawai'i, I urge you to withdraw the appeal to the Supreme Court, focus on solutions for wastewater pollution, and stop the damage to priceless ocean and reef resources. The county should invest in Maui's future by building the necessary infrastructure to reuse the Lahaina facility's treated wastewater for irrigation, which is a true "win-win" solution. In contrast, destroying the law to advance the county's "right to pollute" the ocean is a "lose-lose" for both the county and the people.

We need Maui County's elected representatives to show leadership and turn this situation around. It's time to stop the reckless attack on the law and focus on building a responsible wastewater system of the future at the Lahaina facility.

We don't want Maui to do the dirty work with the Trump administration for our nation's worst polluters by dismantling the nation's bedrock clean water law.

We need your help before Maui County goes down in history as the champion for water pollution in the United States. Please, create a lasting, positive legacy by focusing on the solutions for this pollution problem and upholding—not destroying—the legal protections of clean water for Maui, Hawai'i, and the entire nation.

Regards,
Camille Chong
1617 Young Street, A101
Honolulu, HI 96826

GET Committee

From: nookie1916@everyactioncustom.com on behalf of Joan Salvato <nookie1916@everyactioncustom.com>
Sent: Monday, September 02, 2019 5:17 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,

Joan Salvato

19 W115 Avenue Barbizon Oak Brook, IL 60523-1055 nookie1916@gmail.com

GET Committee

From: riversong23@everyactioncustom.com on behalf of Erica Bergquist <riversong23@everyactioncustom.com>
Sent: Monday, September 02, 2019 4:49 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is __Erica Bergquist__ and I am a resident of __maui__. I care about this issue because ___I want there to be clean water and oceans for the next generations to come__.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

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Sincerely,
Erica Bergquist
230 Kekaulike Ave Kula, HI 96790-7808
riversong23@gmail.com

GET Committee

From: st.fjames@everyactioncustom.com on behalf of Frances Salvato
<st.fjames@everyactioncustom.com>
Sent: Monday, September 02, 2019 4:38 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

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Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Frances Salvato
284 Elilani St Makawao, HI 96768-8332
st.fjames@gmail.com

GET Committee

From: tomnooney@everyactioncustom.com on behalf of Thomas Nooney
<tomnooney@everyactioncustom.com>
Sent: Monday, September 02, 2019 4:13 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is Tom Nooney and I am a resident of Maui. I care about this issue because Our beautiful Island is being polluted & it's insanity to pump wastewater into our Oceans, killing the Reef, Fish & releasing untold amounts of harmful Bacteria into our Coastal waters. Our economy depends on Tourism! If the Environment is destroyed there will be no Tourism. Greed & Shortsightedness is a poor example for all! _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

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Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Thomas Nooney
1163 A Freitas Pl Makawao, HI 96768-9609 tomnooney@gmail.com

GET Committee

From: Irina Constantinescu <irina.constantinescu@gmail.com>
Sent: Monday, September 02, 2019 2:59 PM
To: GET Committee
Cc: Mike J. Molina
Subject: Hawaii Wildlife v. County of Maui, GET-26
Attachments: 20190829 GET Committee_ILC.pdf

Honorable Committee Chair Mike Molina and Members of the Governance, Ethics, and Transparency Committee,

I understand my original testimony may not have been received as an attachment. I am re-sending it, along with incorporating the text below, just in case it is easier to read.

Please consider my testimony (attached and below) during your discussion regarding the Wildlife Hawaii v. County of Maui at your upcoming GET meeting. I strongly urge you NOT to drop / settle the current legal case. The Supreme Court can provide a clear answer and help all of us protect our environment without the fear of future litigation or misunderstandings.

Mahalo for taking my voice into consideration and mahalo for your continued work for our communities.

*Irina Constantinescu
(808)419-0142
49 Kokea St Unit 1103
Wailuku, HI 96793*

DATE: August 29, 2019

TO: Committee Chair Mike Molina and Members of the Governance, Ethics, and Transparency Committee

SUBJECT: Hawaii Wildlife v. County of Maui, GET-26

Honorable Council,

My name is Irina Constantinescu and I am an environmental engineer. I am writing you today to again urge you NOT to withdraw from the lawsuit against the County regarding the injection wells. I became an environmental engineer because I want to leave the world a little better than I found it. Throughout the years, I have worked on various projects which improved our water quality, reduced the chance of wastewater spills, and protected native species throughout the islands. However, dropping these lawsuits is not the answer. Whether or not the County wins, the environmental and the engineering communities need clarification from the higher courts. Please allow me to explain as best I can.

None of us want to pollute our water (groundwater or ocean) and the engineering community is trying to find reasonable solutions to address the issues raised by the injection wells. Other disposal options would be ocean outfalls or some version of land treatment, all of which would highly minimize the impact our waste has on the environment. Ocean outfalls would need to be built under the reef and extend thousands of feet into the ocean to reach an area where the currents could provide enough dilution to meet current permit requirements. Land treatment would provide additional treatment before the treated water would very slowly percolate through the ground. However, without clarity from the higher courts, it is hard to estimate which specific disposal system would be legal and which may suffer from future litigation. Without an answer from the higher courts, the County may invest in new disposal systems which may later be found controversial and be again subject to litigation.

NPDES permits may also be required for individual cesspool systems. While off the record DOH may have indicated that they would not enforce this on individual home owners, the EPA is ultimately the deciding agency. If the legal case is settled before reaching the Supreme Court, the EPA has indicated that they would have to uphold the current court decision in all cases, including residential cesspools. The state of Hawaii has approximately 88,000 cesspools in operation and the impact of upgrading all cesspools to homeowners throughout the islands would add up to billions of dollars.

I write to you this week as a concerned citizen and a diligent engineer. As part of the engineering licensing exam, I have vowed to do my best to protect the health and safety of the public. Whether or not the County wins the lawsuit, the County's constituents, including myself, would be winners by simply knowing the right course of action. Taxpayers will see their taxes spent on the correct transition away from the injection wells currently used at all 5 of the County's wastewater treatment reclamation facilities. Without a clear path forward, a lot of money and time will be wasted on solutions that may later be interpreted as inadequate.

As a member of the National Society of Professional Engineers, I have heard communities from across the US express concern over the need for an answer from the Supreme Court. I am certain you have received additional support to continue to the lawsuit from agencies (both private and government) from across the US. I hope you realize that the County is not going against the Clean Water Act and the community at large is not seeing the County of Maui as a rule-breaking institution. Communities and government agencies from ACROSS the United States are eagerly awaiting a final ruling from the Supreme Court in order to better understand HOW to uphold the Clean Water Act and the Safe Drinking Water Act, and which systems required an NPDES permit. Regardless of how the Courts rule, please continue to support the appeal of the lawsuit in order to provide the nation with the clarity needed to move forward in order to better protect our waters. *By water all things find life.*

Sincerely,

Irina Constantinescu, PE

irina.constantinescu@gmail.com

(808)419-0142

49 Kokea St Unit 1103

Wailuku, HI 96793

DATE: August 29, 2019

TO: Committee Chair Mike Molina and Members of the Governance, Ethics, and
Transparency Committee

SUBJECT: Hawaii Wildlife v. County of Maui, GET-26

Honorable Council,

My name is Irina Constantinescu and I am an environmental engineer. I am writing you today to again urge you NOT to withdraw from the lawsuit against the County regarding the injection wells. I became an environmental engineer because I want to leave the world a little better than I found it. Throughout the years, I have worked on various projects which improved our water quality, reduced the chance of wastewater spills, and protected native species throughout the islands. However, dropping these lawsuits is not the answer. Whether or not the County wins, the environmental and the engineering communities need clarification from the higher courts. Please allow me to explain as best I can.

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Sincerely,

A handwritten signature in black ink, appearing to read 'Irina Constantinescu', with a long horizontal flourish extending to the right.

Irina Constantinescu, PE

irina.constantinescu@gmail.com

(808)419-0142

49 Kokea St Unit 1103

Wailuku, HI 96793

GET Committee

From: MARY KADOOKA <MARY.KADOOKA.109397083@p2a.co>
Sent: Monday, September 02, 2019 2:46 PM
To: GET Committee
Subject: RE: 9/3/19 GET meeting; GET-26: It's time to make the pono choice and withdraw the attack against th

Dear Maui County GET Committee,

Hi, my name is MARY KADOOKA and I live in Honolulu, Hawaii. I am submitting this testimony for the September 3, 2019 committee meeting on item GET-26 (settlement in Hawai'i Wildlife Fund, et al., v. County of Maui).

As a resident of Hawai'i, I urge you to withdraw the appeal to the Supreme Court, focus on solutions for wastewater pollution, and stop the damage to priceless ocean and reef resources. The county should invest in Maui's future by building the necessary infrastructure to reuse the Lahaina facility's treated wastewater for irrigation, which is a true "win-win" solution. In contrast, destroying the law to advance the county's "right to pollute" the ocean is a "lose-lose" for both the county and the people.

We need Maui County's elected representatives to show leadership and turn this situation around. It's time to stop the reckless attack on the law and focus on building a responsible wastewater system of the future at the Lahaina facility.

We don't want Maui to do the dirty work with the Trump administration for our nation's worst polluters by dismantling the nation's bedrock clean water law.

We need your help before Maui County goes down in history as the champion for water pollution in the United States. Please, create a lasting, positive legacy by focusing on the solutions for this pollution problem and upholding—not destroying—the legal protections of clean water for Maui, Hawai'i, and the entire nation.

Regards,
MARY KADOOKA
Mary Kadooka, 2752H Pali Hwy,
Honolulu, HI 96817

GET Committee

From: Eassie Miller <EassieMiller@KennedyJenks.com>
Sent: Monday, September 02, 2019 2:36 PM
To: GET Committee
Cc: Michael.Victorino@co.maui.hi.us; Maui_County Council_mailbox; Kelly King; Keani N. Rawlins; Tasha A. Kama; Alice L. Lee; Riki Hokama; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura; Richelle Thomson; Eric Nakagawa (eric.nakagawa@co.maui.hi.us)
Subject: RE: GET-26 - Hawaii Wildlife v. County of Maui
Attachments: Maui_Office_Letter-Testimony GET Committee.docx

Aloha Chairman Molina:

Please find attached our testimony for GET 26 - Hawaii Wildlife v. County of Maui.



Mahalo,

Benjamin Rasa P.E. | Operations Manager
707 Richards Street, Suite 528
Honolulu, HI 96817
P: 808.218.6030 | Direct: 808.218.6042

Service is Our Legacy | EST 1919 | KENNEDYJENKS.COM



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2 September 2019

To: get.committee@mauicounty.us

Subject: GET-26 - Hawai'i Wildlife v. County of Maui

To Whom it May Concern:

The County of Maui and its employees are Keiki O Ka Aina of Maui and serve as the key stewards in protecting our island environment. The Department of Environmental Management is to be commended for their leadership, vision and actions to broaden the County's water reuse efforts throughout Maui County. Through the continued vision and collaboration with the Maui County Council and the Maui community our award-winning water recycling program can further flourish while, preserving our precious potable water resource for its highest use.

The ongoing appeal of the lawsuit that the County of Maui is undertaking is for the **greater good of our Maui and must not be settled**, as being pursued by some community members and environmental groups. The ramifications of settling this lawsuit are too great and will have a devastating impact to our Maui community and the State of Hawai'i economy and available limited Capital Improvement Projects (CIP) funding resources. If settled, the County will be required to invest millions of their funding resources to comply with the currently undefined National Pollutant Discharge Elimination System (NPDES) Permit effluent requirements that are yet to be created by the Department of Health. The result of having an NPDES permit for the injection wells is expected to have minimal if any at all positive impact on the nearshore waters. These monies could be better spent expanding the County's recycle water program and armoring their installed wastewater conveyance infrastructure that convey wastewater to the WWRF and mitigate more impactful issues like raw wastewater spills.

Research and scientific studies should serve as the basis in determining the appropriate action, if any, in investigating and assessing the impacts from secondary effluent discharge into injection wells. Results derived from these research studies would better define how we expend our funding resources to protect our island environment for generations to come. We should be listening and understanding the message conveyed by our scientific community leaders to guide us in making appropriate decisions that will impact our community for generations to come. Recognized Hawai'i born and based scientists have investigated the fate of injection well and sewer outfall discharges into our groundwater and oceans and its impact on Hawai'i's environment. Their findings, as shared with the Maui County Council and other municipal agencies, **does not support** the settlement of the lawsuit. Scientific data shows no negative impact on our nearshore waters and groundwater caused by injection well discharge. These individuals are true Keiki O Ka Aina and have great love for Hawai'i and our pristine environment. They have nothing to gain professionally or personally from taking the position they have shared with you. They used their expertise, experience, and professional knowledge to openly evaluate the issue at hand. If we can't trust our Hawai'i based experts, then who do we trust?

The Clean Water Act (CWA) has guided the Country in protecting its precious water resources from 1972 through 2019. In addition to the CWA, the US Environmental Protection Agency (USEPA) and State regulatory agencies across the country have implemented the Underground Injection Control (UIC)

program to protect our potable water aquifers. The UIC program regulates the use of injection wells for the disposal of secondary treated wastewater effluent and other industrial discharges. One of the key factors of this UIC program is the prohibition of discharge into a potable water aquifer.

The County of Maui (COM) **has not violated the CWA** with the use of injection wells for disposal of Lahaina WWRF effluent. The pending US Supreme Court hearing should not conclude in settlement. Instead, the US Supreme Court hearing should proceed, so that its decision can protect the COM and State of Hawai'i and correct with precedence the incorrect claims by USEPA, that the COM has been in violation of the CWA with use of the effluent injection wells. The confidence of the US Supreme Court ending with this decision is based on scientific data that has been collected over the past 20 years across Hawai'i. Settlement of the lawsuit and perceived violation of the CWA will have a catastrophic and negative impact not just for Lahaina WWRF, but across Hawai'i and across the Country as all other facilities with injection wells will be exposed to the settlement precedence if the COM hearing is withdrawn. The concern of industrial facilities further contaminating our groundwater supplies can be managed through the UIC program both at the State and USEPA. We cannot let this incorrectly perceived concern direct how we manage our island environment. This issue is not a Red or Blue issue as some have stated. We are focused on our island State and do not see politics playing into the decision.

The COM has complied with all regulatory requirements through the UIC program. The COM has renewed their UIC permits as required every five (5) years without concern from the State of Hawai'i Department of Health (DOH) or USEPA that the COM was violating the Clean Water Act. The USEPA has been well informed of COM's use of injection wells from the 1970's. As a matter of fact, in the 1990's, the USEPA interceded in the process of reissuing UIC permits for the Lahaina WWRF by requiring a Federal UIC permit as a way to tighten the effluent quality discharged through the injection wells. Public meetings were held by USEPA during this process, and the collaboration resulted in Lahaina WWRF being the first WWRF to be issued a Federal UIC permit in addition to a State DOH UIC permit. The USEPA Federal UIC permit included Nitrogen limits that the Lahaina WWRF was required to meet and has met since the issuance of that permit. This USEPA Federal UIC permit was the first and only permit issued in Hawai'i. The regulatory mechanism to manage and permit injection wells instituted by the regulatory agencies across the country is this US EPA UIC Permit program. Regulatory mechanisms to manage and control the use of injection wells are already in place through the State and US EPA UIC program is not a CWA issue. The US EPA UIC program is the regulatory mechanism that regulatory agencies utilize to define effluent requirements for injection wells.

The use of injection wells for secondary effluent disposal throughout the State of Hawai'i has been an ongoing practice from the early 1970's. Coastal development condominium projects in unsewered areas (no municipal wastewater system) of Hawai'i use injection wells for the disposal of their wastewater facility effluent. On Maui a good example of this ongoing practice is the Ma'alaea community where each condominium and commercial development has at least two (2) injection wells for disposal of its treated wastewater. These injection wells have been permitted and regulated by the State DOH. On a grander scale, municipal wastewater treatment plants and resorts on Kaua'i, Maui, Moloka'i, O'ahu, and Hawai'i island rely on injection wells for the disposal of secondary treated effluent and the proposed settlement

agreement will have potential major implications to these wastewater facilities with no expected benefit. For Maui, the conscious decision was made when the COM wastewater facilities were designed and constructed using Clean Water Act grant funding to utilize injection wells for treatment plant effluent disposal, instead of deep ocean outfalls. The COM has led the State of Hawai'i in recognizing the value of its precious water resource and has implemented a comprehensive recycle water program using the high quality recycle water for the irrigation of open space, parks, commercial landscaping, and resort properties. The continued use of injection wells for effluent disposal is integral to the system and required to provide an alternative effluent disposal method during heavy rain events or malfunction of an operations process unit. Other types of infrastructure such as cesspools, septic tanks, or reuse systems in coastal areas will be exposed to lawsuits as a result of lawsuit settlement. Interesting enough this potential settlement would also implicate Traditional and Cultural practices as the waters discharge for Lo'i patches will probably require an NPDES permit triggering the requirement to treat before discharging to a stream, river or waterway. The outcome and resulting effects of this ruling will be far reaching. the focus to enhance our nearshore waters should be placed on challenges that are beneficial to the community, for example, implementing stormwater best management practices and the expansion of R-1 quality recycled water programs across our state. The benefits of these focuses will have positive far reaching benefits which will be compromised and negatively impacted by a settlement.

We offer the following key points for the County Council to consider during your decision-making.

- USEPA and DOH have a regulatory and enforcement mechanism in place to permit and regulate injection well discharges. Another regulatory permit does not provide any benefit but create more bureaucracy for all parties.
- COM is **Proactive** in managing and expanding their Recycle Water Program. The progress of the program is limited by funding provided and available customers.
- COM has met and continue to meet its effluent quality total nitrogen limit of 10 mg/L for effluent discharged into the Lahaina WWRF injection wells. It should be noted that this total nitrogen limit is typical for ocean and bay dischargers.
- USEPA has indicated that all effluent discharges to groundwater that will ultimately reach a surface water could be subject to the NPDES permit program. One can expect that all discharges to an injection well, cesspool or storm dry wells will reach surface waters in Hawai'i. This action will bring no value to the Citizens of Maui.
- The implication of this case should it be settled will be far reaching and require capital dollar investments that will provide no environment or other benefit to the Maui County citizens.
- Lastly, the issue in front of Maui County is not a Red or Blue issue. The issue is how can we expand the County's water reuse program to better utilize this valuable water resource.

Please feel free to contact us with any questions or clarification of our statements.

K | Kennedy Jenks

get.committee@mauicounty.us
GET - 26 - Hawai'i Wildlife v. County of Maui
30 August 2019

Page 4

Mahalo,
Kennedy/Jenks Consultants, Inc.



Benjamin Rasa
Operations Manager



Eassie Miller
Client Director

GET Committee

From: leahreinhardt40@everyactioncustom.com on behalf of Leah Reinhardt
<leahreinhardt40@everyactioncustom.com>
Sent: Monday, September 02, 2019 1:53 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is Leah Reinhardt___ and I am a resident of _maui____. I care about this issue because I love and care for our home so deeply, and because the ocean waters are a source of life in every sense of the word. There's a whole world underwater that most people don't see, and because of that, they don't realize the harm they're contributing to. Simultaneously, we're polluting such a huge water source that we need to prevent and counterbalance the crazy global warming that we're witnessing every day. The reefs are dying at alarming rates, and there are so many precious eco systems that are dying as a result of all the human pollution. The more we care for Mother Nature, the more we preserve our lives and the lives to come in future generations.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Leah Reinhardt
Haiku, HI 96708

leahreinhardt40@gmail.com

GET Committee

From: stuart@everyactioncustom.com on behalf of Stuart Karlan
<stuart@everyactioncustom.com>
Sent: Monday, September 02, 2019 1:40 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

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However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

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Sincerely,
Stuart Karlan
2752 Kauhale St Kihei, HI 96753-9632
stuart@well.com

GET Committee

From: maurganas@everyactioncustom.com on behalf of Maurgana Stiastry
<maurganas@everyactioncustom.com>
Sent: Monday, September 02, 2019 12:57 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is __Maurgana Stiastry__ and I am a resident of _Maui,HI____. I care about this issue because __I really care about clean water for us and the Sea Life. Water is LIFE__.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

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Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Maurgana Stiastry
104 A Ike Dr Makawao, HI 96768-9716
maurganas@gmail.com

GET Committee

From: bestb002@everyactioncustom.com on behalf of Bobbie Best <bestb002@everyactioncustom.com>
Sent: Monday, September 02, 2019 12:13 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

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Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Bobbie Best
Wailuku, HI 96793
bestb002@hawaii.rr.com

GET Committee

From: Mike Trotto <mikeyinmaui@aol.com>
Sent: Monday, September 02, 2019 12:02 PM
To: GET Committee
Subject: RE: Hawaii Wildlife Fund, Et. Al. v. County of Maui

Aloha Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and Members of the Committee.

My name is Michael Trotto and I'm a resident of Kihei, Maui. Thank you for allowing me to submit this testimony today. I believe that this case has more to do with Hawaii's sovereignty than the Clean Water Act. The subject injection wells that are at issue were properly permitted under Hawaii's Safe Drinking Water Act,(SDWA). As such, the SDWA bestowed upon Hawaii the primary authority to set the proper water quality standards for these injection wells. Please keep in mind, the Hawaii standards under the SDWA are much more stringent than the Federal Standards. When this case eventually went to the 9th Circuit Court of Appeals, Hawaii really took a bad hit. The decision of the 9th Circuit essentially stripped Hawaii's enforcement authority over our own injection wells and our groundwater resources and handed it over to the Federal Government and the EPA. The case going before the United States Supreme Court is about this permitting and enforcement authority. Our best hope is for the Supreme Court to agree with the County of Maui and allow Hawaii to retain its authority over our groundwater under the SDWA. Again, thank you Chair Molina and members of the Governance, Ethics, and Transparency Committee.

Respectfully,

Michael Trotto
125 Alahele Place
Kihei, HI 967853
808-281-9829
Email: mikeyinmaui@aol.com

GET Committee

From: HSPE Maui <hspemaui@gmail.com>
Sent: Monday, September 02, 2019 11:39 AM
To: GET Committee; Mike J. Molina
Subject: Re: Hawaii Wildlife Fund et al. v. County of Maui, GET-26
Attachments: 20190830 GET Committee.pdf

The original file attachment with the HSPE Maui Chapter's testimony may not have made it through in the original email. Please see the attached file again and the testimony in text form below, in case that's easier to read. Please let us know if you need anything else. Mahalo.

The Maui Chapter of the Hawaii Society of Professional Engineers is writing you today asking you to NOT settle in the current Hawaii Wildlife v. County of Maui case. Please allow the proceedings to get to the US Supreme Court and allow the highest court of the land to provide an adequate answer. Please find our testimony attached. Mahalo for your consideration

DATE: August 30, 2019
TO: The Honorable County Council of the County of Maui
SUBJECT: Hawaii Wildlife Fund et al. v. County of Maui, GET-26

Honorable Council,

The Maui Chapter of the Hawaii Society of Professional Engineers is writing you today to urge you NOT to withdraw from the injection well lawsuit(s) against the County. Settling the case will not benefit the County or its constituents.

Communities and government agencies from ACROSS the United States are eagerly awaiting a final ruling from the Supreme Court in order to better understand HOW to uphold the Clean Water Act and the Safe Drinking Water Act, and which systems require an NPDES permit.

Maui residents, whether engineers or of other professions, are not aiming to pollute our water (groundwater or ocean). The engineering community is working to help the County find reasonable solutions to address the issues raised by the injection wells. Of the available options, ocean outfalls are not preferred due to their impact to the environment during both construction and use. Another disposal alternative would be land treatment system. However, without clarity from the higher courts, it is hard to estimate which specific disposal system would be legal and which may suffer from future litigation. The existing court definitions do not clearly identify which disposal systems require an NPDES. Without an answer from the higher courts, the County may invest in new wastewater disposal systems which may later be found controversial and again be subject to litigation.

NPDES permits may also be required for individual cesspool systems. While off the record DOH may have stated that they would not enforce the rules on individual home owners, the EPA is ultimately the deciding

agency. If the legal case is settled before reaching the Supreme Court, the EPA has indicated that they would have to uphold the current court decision in all cases, including residential cesspools. The state of Hawaii has approximately 88,000 cesspools in operation and the impact of upgrading all cesspools to homeowners throughout the islands would add up to billions of dollars.

As part of the engineering licensing exam, we have vowed to do our best to protect the health and safety of the public. The public will not benefit from settling in these cases. Without a clear path forward, a lot of money and time will be wasted on solutions that may later be interpreted as inadequate. Taxpayers may see their taxes spent on an insufficient transition away from the injection wells currently used at all five of the County's wastewater treatment reclamation facilities.

Regardless of how the Courts rule, please continue to support the appeal of the lawsuit in order to provide the Nation with the clarity needed to move forward in order to better protect our waters. *By water all things find life.*

Sincerely,

Troy Ching, P.E., Maui Chapter President
Hawaii Society of Professional Engineers

2019-2020 Maui Chapter Officers

President: Troy Ching
Vice President: Eric Takamine
Secretary: Mikki Klee
Treasurer: Irina Constantinescu

On Fri, Aug 30, 2019 at 8:00 AM HSPE Maui <hspemaui@gmail.com> wrote:
Honorable Committee Chair Mike Molina and Members of the Governance, Ethics, and Transparency Committee,

The Maui Chapter of the Hawaii Society of Professional Engineers is writing you today asking you to NOT settle in the current Hawaii Wildlife v. County of Maui case. Please allow the proceedings to get to the US Supreme Court and allow the highest court of the land to provide an adequate answer.

Please find our testimony attached. Mahalo for your consideration,

The Maui Chapter of HSPE

2019-2020 Maui Chapter Officers

President: Troy Ching
Vice President: Eric Takamine
Secretary: Mikki Klee
Treasurer: Irina Constantinescu

DATE: August 30, 2019
TO: The Honorable County Council of the County of Maui
SUBJECT: Hawaii Wildlife Fund et al. v. County of Maui, GET-26

Honorable Council,

The Maui Chapter of the Hawaii Society of Professional Engineers is writing you today to urge you NOT to withdraw from the injection well lawsuit(s) against the County. Settling the case will not benefit the County or its constituents.

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Sincerely,



Troy Ching, P.E., Maui Chapter President
Hawaii Society of Professional Engineers

GET Committee

From: sd3@everyactioncustom.com on behalf of Susan Douglas <sd3@everyactioncustom.com>
Sent: Monday, September 02, 2019 11:38 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is Susan Douglas and I am a resident of Kihei. I care about this issue because I swim almost every day in the ocean. It's the healthiest thing I do, and I do a lot as a health coach. As a snorkeler, I'm so sad the reefs and fish degraded.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Susan Douglas
84 A Iliwai Loop Kihei, HI 96753-7101
sd3@hawaii.rr.com

GET Committee

From: HSPE State Society <hawaiispe@gmail.com>
Sent: Monday, September 02, 2019 11:29 AM
To: GET Committee
Cc: Mike J. Molina
Subject: Re: GET-26 Hawaii Wildlife Fund, Et Al. v. County of Maui

We do not believe our previous email's attachment was distributed to GET committee, so we are including the text below.

August 29, 2019

Honorable Michael J. Molina, Chair
County of Maui - Governance, Ethics, and Transparency Committee
200 South High Street, 8th Floor
Wailuku, Maui, Hawaii 96793

Dear Chair Molina:

Subject: HAWAII WILDLIFE FUND, ET AL. v. COUNTY OF MAUI (GET-26)

The Hawaii Society of Professional Engineers is opposed to accepting the settlement offered by the plaintiffs. We recommend the County of Maui continue to the United States Supreme Court hearing for the following reasons.

1. Injection wells could still have use: Reuse of effluent for irrigation is an alternate to injection well disposal. The effluent in Lahaina is already treated to R-1 quality recycled water and reused in Kaanapali. However, during wet weather when irrigation water would not be used, injection wells could be needed and used for disposal. The reduced flow quantity into the injection well when used sparingly would be a significant change from current operations.
2. No other full disposal method in place: Where will the effluent go? It is premature to accept the removal of injection wells as a disposal method when there is no clear favored replacement. This issue is compounded when considering the other County-operated injection wells and wastewater reclamation facilities. A favorable ruling could limit or prevent future lawsuits at the locations other than Lahaina.
3. Single-family homes at risk: Being that Maui County is an island community, the majority of homes are in close proximity to the ocean. Thousands of homes and condominiums utilize cesspools and septic systems to dispose of effluent and sewage into the ground. This could be interpreted as a violation of the Clean Water Act.
4. Clarity of Clean Water Act: The U.S. Supreme Court has agreed to hear the case because there are different interpretations of the Clean Water Act by enforcement agencies and lower courts. Let the Supreme Court rule on this case to provide clarity and consistency.

We are encouraged with the Plaintiffs desire to work productively together to find a solution. We need to work together towards a healthy ecosystem regardless of the outcome of the court case. However, we are concerned with the implications of the current Clean Water Act, last updated in 1987, applying to subsurface water disposal. We recommend that the settlement be rejected.

Thank you for your consideration.

Michael E. Silva, PE, LS, LEED AP
Hawaii Delegate to the National Society of Professional Engineers

On Fri, Aug 30, 2019 at 8:43 AM HSPE State Society <hawaiispe@gmail.com> wrote:

Dear Chair Molina,

Please refer to the attached for your consideration.

Sincerely,

Mike Silva

Hawaii Society of Professional Engineers

GET Committee

From: Jason Economou <jason@ramaui.com>
Sent: Monday, September 02, 2019 11:08 AM
To: GET Committee
Subject: Realtors Association of Maui Testimony regarding Lahaina Injection Well Case
Attachments: GAD Testimony Regarding Lahaina Injection Well Case (2).pdf; GAD Testimony Regarding Lahaina Injection Well Case.docx

Hello,

It has been brought to my attention that my testimony from August 30th was not included with other testimony to members, but instead the email it was attached to was printed and included. Please correct this error. For the sake of clarity, I am attaching word and PDF versions of my testimony, and the following is the text:

August 30, 2019

Councilmember Mike Molina, Chair
Governance, Ethics, and Transparency Committee
200 South High Street, 8th Floor
Wailuku, Hawaii 96793

RE: Hawaii Wildlife Fund, Et. Al. v. County of Maui, Civil 12-00198
SOM BMK, U.S. Supreme Court Docket 18-260 (GET-26)

Aloha Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and Members of the Committee:

My name is Jason Economou, and I am submitting this testimony on behalf of the REALTORS Association of Maui and its more than 1,700 licensed, professional REALTORS regarding the settlement of the above referenced case and withdrawal of the appeal to the Supreme Court of the United States.

In the interest of the environment and in the interest of Hawaii's sovereignty over its groundwater, the Council should allow this case to be heard by the Supreme Court of the United States. The question being considered by the Court deals directly with Hawaii's authority over its drinking water. The specific issue the Court will address is: "Whether the Clean Water Act requires a permit when pollutants originate from a point source, but are conveyed to navigable waters by a nonpoint source, such as groundwater." This is a question of permitting authority over drinking water, and permitting requirements. It does relate to the environment, but settling the case and withdrawing the appeal will actually diminish Hawaii's ability to regulate its waters.

As you are aware, the County uses injection wells to dispose of excess water that has been treated to standards that are just below potable drinking water, but suitable for reuse in landscaping and other functions. The injection wells (or Underground Injection Control Programs) pump the treated water into bedrock, and the water filters through the bedrock into the groundwater. Groundwater is a primary source of drinking water, and is regulated under the Safe Drinking Water Act.

There is a Federal Safe Drinking Water Act and a corresponding State Safe Drinking Water Act (SDWA). The Federal SDWA requires the EPA to set maximum contaminant levels for drinking

water and discharges into drinking water, but gives primary enforcement authority to the states, and allows the states to set more stringent standards than the Federal standards. Pursuant to the SDWA, the County of Maui was required to obtain a permit from the State in order to operate its injection wells, and was required to comply with water quality standards set by the State for any discharges into the ground water. The County obtained the permits necessary and was remained in compliance with regulatory standards.

The Clean Water Act is different from the Safe Drinking Water Act. The Clean Water Act gives the federal government primary enforcement authority over navigable waterways and surface waters, which supersedes state authority. This authority is exercised by the EPA's implementation of pollution control programs, and regulations on the discharge of pollutants from any "point source" into navigable waters. The EPA's National Pollutant Discharge Elimination System (NPDES) permit program defines a "point source" as "discrete conveyances such as pipes or man-made ditches," but NPDES permits are generally not required if there is no discharge directly into a waterway or surface waters. The County of Maui was told by the EPA that they did not need an NPDES permit for its injection wells, and was not afforded an opportunity to get one.

In 2012, a lawsuit was brought against the County alleging that disposal of excess recycled water into Lahaina's four injection wells was violating the Clean Water Act. The lawsuit was based on a tracer dye study, which tracked dye injected into two of the four wells that was detected approximately three months later around a collection of freshwater seeps in the near-shore area. Peak detection of the dye occurred approximately eight months after injection, with a total transit time of four years. Modeling later determined that the recycled water mixes with groundwater and enters the ocean along a two-mile stretch of coastline. Based on this evidence, the Plaintiffs successfully argued that the County's injection wells were not in compliance with Federal law because the recycled water is getting into the Ocean, which requires the County to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act. The County appealed this decision and it ultimately made its way to the 9th Circuit Court of Appeals.

The 9th Circuit Court of Appeals determined that the County's injection wells required a NPDES permit because the recycled water enters groundwater through a "point sources" (i.e., the wells) and then migrates to the ocean, and more than a de minimis amount of pollutants in the ocean is "fairly traceable" to the County's recycled water. This is an interpretation of the Clean Water Act and the NPDES permitting requirements that runs against the intent and plain language of the Clean Water Act and EPA regulations. Also, it has some major implications as to Hawaii's sovereignty over its groundwater, and potential liability for a lot of individuals and entities throughout the country.

The 9th Circuit's ruling essentially gutted the Safe Drinking Water Act as it applies to Hawaii's groundwater by giving permitting authority over the injection wells to the Federal government under the Clean Water Act. Where Hawaii had primary enforcement authority over discharges into our groundwater under the SDWA, the 9th Circuit's decision handed that authority over to the Federal EPA. If the issue really is that the quality of the water being discharged into our groundwater is not good enough, and that it is causing algal bloom and killing the reef, we should have lobbied for the State to increase the standards. Instead, that power has now been handed to the Federal EPA and we need to hope that they care about Hawaii's drinking water as much as we do. This case is more about Hawaii's sovereignty over its groundwater than anything else, but that is being ignored. Also, even if we expand the water reuse program and stop using injection wells, that water is still going to enter the ocean and withdrawing the appeal won't address that issue.

Another big problem is that the NPDES permitting system is designed for discharges that come from a "point source." The 9th Circuit's opinion disregarded the "point source" requirement by inventing the "fairly traceable" connection from the wells to the groundwater to the ocean, but that is vague and novel interpretation of the CWA. From a legal theory perspective I get what the court is saying, but from a complex permitting standpoint the NPDES structure won't work. That means either the County can't get a permit and will have to build ocean outfalls to meet the CWA point source requirement, or the EPA creates a new permitting process and has sole discretion over the quality of water discharged into our groundwater from here on out. For a little more detail on this point there was a great opinion by John List in the Maui News that was published on Friday, August 23rd ([9th Circuit's ruling expands the scope of Clean Water Act | News, Sports, Jobs - Maui News](#)).

If the case goes before the Supreme Court, it is highly unlikely the Court will be able to "gut the Clean Water Act" in any way like the 9th Circuit was able to gut the Safe Drinking Water Act already. The issue presented before the Court is: "Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." This is a question of permitting authority. Trump already has the power to gut the Clean Water Act by having the EPA roll back standards for discharges into navigable waters. He can have the EPA roll back safe drinking water standards, but the SDWA gives the state primary authority over injection well discharges, which would have allowed us to protect our residents. At this point, the best way to protect the quality of our drinking water and our reef is to hope the Supreme Court rules that the States maintain permitting authority under the SDWA. Otherwise the maximum contaminant levels get set by "Trump's EPA."

In addition to all those issues, there is the liability aspect of this whole thing. If the appeal is withdrawn now, it essentially leaves the law saying: "Yes, a Clean Water Act permit IS required when pollutants originate from a point source but are conveyed to navigable waters by nonpoint sources such as groundwater." Therefore, anyone with a septic tank or cesspool in the area could face liability if they do not obtain an NPDES permit under the CWA. I know a lot of folks have been saying that the state will not enforce this against anyone, but that is irrelevant because CWA liability can arise through civil suits like the one brought by the Hawaii Wildlife Fund in the present instance. Also, the government can always enforce laws, even after they promise not to.

Another disturbing thing to consider is that under the Federal Rules of Civil Procedure, class action lawsuits work for both plaintiffs and defendants. What I mean by that is that a plaintiff can bring a suit against an entire class of defendants if they meet certain criteria. What would happen if a concerned individual brought a suit against a defendant class of "all property owners with individual wastewater systems located above the Lahaina Aquifer"? These individual systems are identifiable point sources of contamination that go into groundwater that has a known hydrologic connection to the ocean. Would these property owners need NPDES permits under the 9th Circuit's standard? Even if a court determined that those property owners did not require NPDES permits, how much will they have spent in legal fees to get to that point? Would a REALTOR need to disclose this as a potential liability when selling a house now? Would developers be willing to file for NPDES permits for new projects? This might seem farfetched, but these are real questions that will need answers. Lawsuits based on the 9th Circuit's legal theory are already popping up around the country, and we will see more here.

Finally, I am concerned that people are being manipulated by propaganda. The emails going out from the Sierra Club hardly even mention that there is an actual legal dispute and legitimate questions over the interpretation of federal law. They don't mention the history of this case, the effects of this

case on the CWA and SDWA, the issues surrounding state sovereignty over groundwater, or even the actual question before the Supreme Court. Instead, they have some compelling graphics and they say that you are either with the environmentalists or you are with Trump and the worst polluters. This is the type of identity politics everyone warns against. They fail to mention that a lot of reputable groups have sided with the County: National Association of Clean Water Agencies, National Conference of State Legislatures, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, Association of California Water Agencies, National Water Resources Association, National Association of Home Builders, Pacific Legal Foundation, Federal Water Quality Coalition, and others. Instead, the propaganda draws a line in the sand and tells people to choose a side.

As someone who cares about the environment and Hawaii's sovereignty over its groundwater, and who wants to avoid an avalanche of unnecessary and costly litigation for our residents and my REALTORS, I strongly advise you not to withdraw the County's appeal before the Supreme Court. There is a legitimate question of federal law that needs to be resolved, and the 9th Circuit's ruling needs clarification at the very least. The worst option of Hawaii is to withdraw the appeal.

Mahalo,

Jason A. Economou
Government Affairs Director

Jason A. Economou
Government Affairs Director
Realtors Association of Maui

441 Ala Makani Place
Kahului, HI 96732

Office: (808) 243-8585
Mobile: (808) 308-9015

GET Committee

From: Jason Economou <jason@ramaui.com>
Sent: Monday, September 02, 2019 11:08 AM
To: GET Committee
Subject: Realtors Association of Maui Testimony regarding Lahaina Injection Well Case
Attachments: GAD Testimony Regarding Lahaina Injection Well Case (2).pdf; GAD Testimony Regarding Lahaina Injection Well Case.docx

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August 30, 2019

Councilmember Mike Molina, Chair
Governance, Ethics, and Transparency Committee
200 South High Street, 8th Floor
Wailuku, Hawaii 96793

RE: Hawaii Wildlife Fund, Et. Al. v. County of Maui, Civil 12-00198
SOM BMK, U.S. Supreme Court Docket 18-260 (GET-26)

Aloha Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and Members of the Committee:

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Mahalo,

Jason A. Economou
Government Affairs Director

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Jason A. Economou
Government Affairs Director
Realtors Association of Maui

441 Ala Makani Place
Kahului, HI 96732

Office: (808) 243-8585
Mobile: (808) 308-9015



Jason A. Economou
Government Affairs Director

441 Ala Makani Pl • Kahului, HI 96732
phone 808-243-8585 • fax 808-873-8585
jason@ramauai.com • www.ramaui.com

August 30, 2019

Councilmember Mike Molina, Chair
Governance, Ethics, and Transparency Committee
200 South High Street, 8th Floor
Wailuku, Hawaii 96793

**RE: Hawaii Wildlife Fund, Et. Al. v. County of Maui, Civil 12-00198 SOM BMK, U.S.
Supreme Court Docket 18-260 (GET-26)**

Aloha Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and Members of the Committee:

My name is Jason Economou, and I am submitting this testimony on behalf of the REALTORS Association of Maui and its more than 1,700 licensed, professional REALTORS regarding the settlement of the above referenced case and withdrawal of the appeal to the Supreme Court of the United States.

In the interest of the environment and in the interest of Hawaii's sovereignty over its groundwater, the Council should allow this case to be heard by the Supreme Court of the United States. The question being considered by the Court deals directly with Hawaii's authority over its drinking water. The specific issue the Court will address is: "Whether the Clean Water Act requires a permit when pollutants originate from a point source, but are conveyed to navigable waters by a nonpoint source, such as groundwater." This is a question of permitting authority over drinking water, and permitting requirements. It does relate to the environment, but settling the case and withdrawing the appeal will actually diminish Hawaii's ability to regulate its waters.

As you are aware, the County uses injection wells to dispose of excess water that has been treated to standards that are just below potable drinking water, but suitable for reuse in landscaping and other functions. The injection wells (or Underground Injection Control Programs) pump the treated water into bedrock, and the water filters through the bedrock into the groundwater. Groundwater is a primary source of drinking water, and is regulated under the Safe Drinking Water Act.

There is a Federal Safe Drinking Water Act and a corresponding State Safe Drinking Water Act (SDWA). The Federal SDWA requires the EPA to set maximum contaminant levels for drinking water and discharges into drinking water, but gives primary enforcement authority to the states, and allows the states to set more stringent standards than the Federal standards. Pursuant to the SDWA, the County of Maui was required to obtain a permit from the State in order to operate its injection wells, and was required to comply with water quality standards set by the State for any discharges into the ground water. The County obtained the permits necessary and was remained in compliance with regulatory standards.

The Clean Water Act is different from the Safe Drinking Water Act. The Clean Water Act gives the federal government primary enforcement authority over navigable waterways and surface waters, which supersedes state authority. This authority is exercised by the EPA's implementation of pollution control programs, and regulations on the discharge of pollutants from any "point source" into navigable

waters. The EPA's National Pollutant Discharge Elimination System (NPDES) permit program defines a "point source" as "discrete conveyances such as pipes or man-made ditches," but NPDES permits are generally not required if there is no discharge directly into a waterway or surface waters. The County of Maui was told by the EPA that they did not need an NPDES permit for its injection wells, and was not afforded an opportunity to get one.

In 2012, a lawsuit was brought against the County alleging that disposal of excess recycled water into Lahaina's four injection wells was violating the Clean Water Act. The lawsuit was based on a tracer dye study, which tracked dye injected into two of the four wells that was detected approximately three months later around a collection of freshwater seeps in the near-shore area. Peak detection of the dye occurred approximately eight months after injection, with a total transit time of four years. Modeling later determined that the recycled water mixes with groundwater and enters the ocean along a two-mile stretch of coastline. Based on this evidence, the Plaintiffs successfully argued that the County's injection wells were not in compliance with Federal law because the recycled water is getting into the Ocean, which requires the County to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act. The County appealed this decision and it ultimately made its way to the 9th Circuit Court of Appeals.

The 9th Circuit Court of Appeals determined that the County's injection wells required a NPDES permit because the recycled water enters groundwater through a "point sources" (i.e., the wells) and then migrates to the ocean, and more than a de minimis amount of pollutants in the ocean is "fairly traceable" to the County's recycled water. This is an interpretation of the Clean Water Act and the NPDES permitting requirements that runs against the intent and plain language of the Clean Water Act and EPA regulations. Also, it has some major implications as to Hawaii's sovereignty over its groundwater, and potential liability for a lot of individuals and entities throughout the country.

The 9th Circuit's ruling essentially gutted the Safe Drinking Water Act as it applies to Hawaii's groundwater by giving permitting authority over the injection wells to the Federal government under the Clean Water Act. Where Hawaii had primary enforcement authority over discharges into our groundwater under the SDWA, the 9th Circuit's decision handed that authority over to the Federal EPA. If the issue really is that the quality of the water being discharged into our groundwater is not good enough, and that it is causing algal bloom and killing the reef, we should have lobbied for the State to increase the standards. Instead, that power has now been handed to the Federal EPA and we need to hope that they care about Hawaii's drinking water as much as we do. This case is more about Hawaii's sovereignty over its groundwater than anything else, but that is being ignored. Also, even if we expand the water reuse program and stop using injection wells, that water is still going to enter the ocean and withdrawing the appeal won't address that issue.

Another big problem is that the NPDES permitting system is designed for discharges that come from a "point source." The 9th Circuit's opinion disregarded the "point source" requirement by inventing the "fairly traceable" connection from the wells to the groundwater to the ocean, but that is vague and novel interpretation of the CWA. From a legal theory perspective I get what the court is saying, but from a complex permitting standpoint the NPDES structure won't work. That means either the County can't get a permit and will have to build ocean outfalls to meet the CWA point source requirement, or the EPA creates a new permitting process and has sole discretion over the quality of water discharged into our

groundwater from here on out. For a little more detail on this point there was a great opinion by John List in the Maui News that was published on Friday, August 23rd ([9th Circuit's ruling expands the scope of Clean Water Act | News, Sports, Jobs - Maui News](#)).

If the case goes before the Supreme Court, it is highly unlikely the Court will be able to "gut the Clean Water Act" in any way like the 9th Circuit was able to gut the Safe Drinking Water Act already. The issue presented before the Court is: "Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." This is a question of permitting authority. Trump already has the power to gut the Clean Water Act by having the EPA roll back standards for discharges into navigable waters. He can have the EPA roll back safe drinking water standards, but the SDWA gives the state primary authority over injection well discharges, which would have allowed us to protect our residents. At this point, the best way to protect the quality of our drinking water and our reef is to hope the Supreme Court rules that the States maintain permitting authority under the SDWA. Otherwise the maximum contaminant levels get set by "Trump's EPA."

In addition to all those issues, there is the liability aspect of this whole thing. If the appeal is withdrawn now, it essentially leaves the law saying: "Yes, a Clean Water Act permit IS required when pollutants originate from a point source but are conveyed to navigable waters by nonpoint sources such as groundwater." Therefore, anyone with a septic tank or cesspool in the area could face liability if they do not obtain an NPDES permit under the CWA. I know a lot of folks have been saying that the state will not enforce this against anyone, but that is irrelevant because CWA liability can arise through civil suits like the one brought by the Hawaii Wildlife Fund in the present instance. Also, the government can always enforce laws, even after they promise not to.

Another disturbing thing to consider is that under the Federal Rules of Civil Procedure, class action lawsuits work for both plaintiffs and defendants. What I mean by that is that a plaintiff can bring a suit against an entire class of defendants if they meet certain criteria. What would happen if a concerned individual brought a suit against a defendant class of "all property owners with individual wastewater systems located above the Lahaina Aquifer"? These individual systems are identifiable point sources of contamination that go into groundwater that has a known hydrologic connection to the ocean. Would these property owners need NPDES permits under the 9th Circuit's standard? Even if a court determined that those property owners did not require NPDES permits, how much will they have spent in legal fees to get to that point? Would a REALTOR need to disclose this as a potential liability when selling a house now? Would developers be willing to file for NPDES permits for new projects? This might seem farfetched, but these are real questions that will need answers. Lawsuits based on the 9th Circuit's legal theory are already popping up around the country, and we will see more here.

Finally, I am concerned that people are being manipulated by propaganda. The emails going out from the Sierra Club hardly even mention that there is an actual legal dispute and legitimate questions over the interpretation of federal law. They don't mention the history of this case, the effects of this case on the CWA and SDWA, the issues surrounding state sovereignty over groundwater, or even the actual question before the Supreme Court. Instead, they have some compelling graphics and they say that you are either with the environmentalists or you are with Trump and the worst polluters. This is the type of identity politics everyone warns against. They fail to mention that a lot of reputable groups have sided

with the County: National Association of Clean Water Agencies, National Conference of State Legislatures, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, Association of California Water Agencies, National Water Resources Association, National Association of Home Builders, Pacific Legal Foundation, Federal Water Quality Coalition, and others. Instead, the propaganda draws a line in the sand and tells people to choose a side.

As someone who cares about the environment and Hawaii's sovereignty over its groundwater, and who wants to avoid an avalanche of unnecessary and costly litigation for our residents and my REALTORS, I strongly advise you not to withdraw the County's appeal before the Supreme Court. There is a legitimate question of federal law that needs to be resolved, and the 9th Circuit's ruling needs clarification at the very least. The worst option of Hawaii is to withdraw the appeal.

Mahalo,

Jason A. Economou
Government Affairs Director



Jason A. Economou
Government Affairs Director

441 Ala Makani Pl • Kahului, HI 96732
phone 808-243-8585 • fax 808-873-8585
jason@ramau.com • www.ramaui.com

August 30, 2019

Councilmember Mike Molina, Chair
Governance, Ethics, and Transparency Committee
200 South High Street, 8th Floor
Wailuku, Hawaii 96793

RE: Hawaii Wildlife Fund, Et. Al. v. County of Maui, Civil 12-00198 SOM BMK, U.S. Supreme Court Docket 18-260 (GET-26)

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with the County: National Association of Clean Water Agencies, National Conference of State Legislatures, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, Association of California Water Agencies, National Water Resources Association, National Association of Home Builders, Pacific Legal Foundation, Federal Water Quality Coalition, and others. Instead, the propaganda draws a line in the sand and tells people to choose a side.

As someone who cares about the environment and Hawaii's sovereignty over its groundwater, and who wants to avoid an avalanche of unnecessary and costly litigation for our residents and my REALTORS, I strongly advise you not to withdraw the County's appeal before the Supreme Court. There is a legitimate question of federal law that needs to be resolved, and the 9th Circuit's ruling needs clarification at the very least. The worst option of Hawaii is to withdraw the appeal.

Mahalo,

Jason A. Economou
Government Affairs Director

GET Committee

From: tabatha@everyactioncustom.com on behalf of Tabatha Noel
<tabatha@everyactioncustom.com>
Sent: Monday, September 02, 2019 11:04 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is Tabatha Noel and I am a resident of Lahaina. I care about this issue because protection of our waters is essential to support life on earth. As lawmakers you are entrusted with the responsible stewardship of our common resources that are meant to sustain and nurture us all. I urge you to uphold the sacred trust your constituents have placed upon you to make the right choice for now and our future generations.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Tabatha Noel
41 Hua Nui Way Lahaina, HI 96761-8348
tabatha@hawaii.rr.com

GET Committee

From: Susan DeLoria <Susan.DeLoria.225584239@p2a.co>
Sent: Monday, September 02, 2019 10:15 AM
To: GET Committee
Subject: RE: 9/3/19 GET meeting; GET-26: It's time to make the pono choice and withdraw the attack against th

Dear Maui County GET Committee,

Hi, my name is Susan DeLoria and I live in Lahaina, Hawaii. I am submitting this testimony for the September 3, 2019 committee meeting on item GET-26 (settlement in Hawai'i Wildlife Fund, et al., v. County of Maui).

As a resident of Hawai'i, I urge you to withdraw the appeal to the Supreme Court, focus on solutions for wastewater pollution, and stop the damage to priceless ocean and reef resources. The county should invest in Maui's future by building the necessary infrastructure to reuse the Lahaina facility's treated wastewater for irrigation, which is a true "win-win" solution. In contrast, destroying the law to advance the county's "right to pollute" the ocean is a "lose-lose" for both the county and the people.

We need Maui County's elected representatives to show leadership and turn this situation around. It's time to stop the reckless attack on the law and focus on building a responsible wastewater system of the future at the Lahaina facility.

We don't want Maui to do the dirty work with the Trump administration for our nation's worst polluters by dismantling the nation's bedrock clean water law.

We need your help before Maui County goes down in history as the champion for water pollution in the United States. Please, create a lasting, positive legacy by focusing on the solutions for this pollution problem and upholding—not destroying—the legal protections of clean water for Maui, Hawai'i, and the entire nation.

Regards,
Susan DeLoria
620 Kai Hele Ku St.
Lahaina, HI 96761

GET Committee

From: pitcaith@everyactioncustom.com on behalf of Ann Pitcaithley
<pitcaith@everyactioncustom.com>
Sent: Monday, September 02, 2019 8:52 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Ann Pitcaithley
326 Maka Hou Loop Wailuku, HI 96793-3515 pitcaith@gmail.com

GET Committee

From: oceanlife808@everyactioncustom.com on behalf of Jennifer Starr <oceanlife808@everyactioncustom.com>
Sent: Monday, September 02, 2019 8:44 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is __Jennifer Starr__ and I am a resident of Lahaina _____. I care about this issue because protecting our ocean and coral reefs should be one of the most top priorities on our island. I am horrified to think that our sewage is being partially filtered and pumped into our ocean daily. At this stage on our island and the planet environmental issues should always be addressed with the idea that we will be leaving a better planet for our children. The county council members need to understand the gravity of this situation and taking this to the US Supreme Court is a waste of our tax payers dollars and a shame that you cannot concede that what is being done to our ocean and coral reefs is wrong. Be the change our planet needs, stop the madness, support our ocean, support your island, be PONO for our children sake! I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

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Sincerely,
Jennifer Starr
Lahaina, HI 96761

oceanlife808@hawaii.rr.com

GET Committee

From: infofordenise@everyactioncustom.com on behalf of Denise Boisvert
<infofordenise@everyactioncustom.com>
Sent: Monday, September 02, 2019 8:38 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is Denise Boisvert and I am a resident of Honolulu.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

I care about this issue because it ultimately could gut the federal Clean Water Act, and set a precedent against all other environmental accomplishments.

Please be on the right side of history.

Sincerely,
Denise Boisvert
Honolulu, HI 96815
infofordenise@yahoo.com

GET Committee

From: hawaiiicondo@everyactioncustom.com on behalf of Kim Jorgensen
<hawaiiicondo@everyactioncustom.com>
Sent: Monday, September 02, 2019 8:31 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is Kim Jorgensen and I am a resident of Honolulu. I care about this issue because Water is Life.

I am writing in SUPPORT of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

It is not too late to make the right decision. Please think of the future.

Sincerely,
Kim Jorgensen
Honolulu, HI 96815
hawaiiicondo@yahoo.com

GET Committee

From: seahcriss@everyactioncustom.com on behalf of Seah Criss
<seahcriss@everyactioncustom.com>
Sent: Monday, September 02, 2019 8:23 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _Seah Criss___ and I am a resident of Kihei____. I care about this issue because ___I see reefs dying less fish in the sea and know the pollution levels are highly dangerous___.

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However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Seah Criss
3109 Mapu Pl Kihei, HI 96753-9424
seahcriss@gmail.com

GET Committee

From: naniolson@everyactioncustom.com on behalf of Nani Olson
<naniolson@everyactioncustom.com>
Sent: Monday, September 02, 2019 8:22 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

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Sincerely,
Nani Olson
267 Keonekai Rd Kihei, HI 96753-8544
naniolson@gmail.com

GET Committee

From: bobchapman@everyactioncustom.com on behalf of robert chapman
<bobchapman@everyactioncustom.com>
Sent: Monday, September 02, 2019 8:15 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is Robert chapman and I am a resident of Maui. I care about this issue because kill the reefs, kill the tourist industry.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

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Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
robert chapman
3515 Hookipa Pl Kihei, HI 96753-9217
bobchapman@hawaii.rr.com

GET Committee

From: ammas2feet@everyactioncustom.com on behalf of Kalyani Lynn
<mmas2feet@everyactioncustom.com>
Sent: Monday, September 02, 2019 7:32 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

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However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Sincerely,
Kalyani Lynn
Kihei, HI 96753
mmas2feet@gmail.com

GET Committee

From: Ann Walker <Ann.Walker.225571567@p2a.co>
Sent: Monday, September 02, 2019 7:12 AM
To: GET Committee
Subject: RE: 9/3/19 GET meeting; GET-26: It's time to make the pono choice and withdraw the attack against th

Dear Maui County GET Committee,

Hi, my name is Ann Walker and I live in Makawao, Hawaii. I am submitting this testimony for the September 3, 2019 committee meeting on item GET-26 (settlement in Hawai'i Wildlife Fund, et al., v. County of Maui).

This is completely unacceptable

As a resident of Hawai'i, I urge you to withdraw the appeal to the Supreme Court, focus on solutions for wastewater pollution, and stop the damage to priceless ocean and reef resources. The county should invest in Maui's future by building the necessary infrastructure to reuse the Lahaina facility's treated wastewater for irrigation, which is a true "win-win" solution. In contrast, destroying the law to advance the county's "right to pollute" the ocean is a "lose-lose" for both the county and the people.

We need Maui County's elected representatives to show leadership and turn this situation around. It's time to stop the reckless attack on the law and focus on building a responsible wastewater system of the future at the Lahaina facility.

We don't want Maui to do the dirty work with the Trump administration for our nation's worst polluters by dismantling the nation's bedrock clean water law.

We need your help before Maui County goes down in history as the champion for water pollution in the United States. Please, create a lasting, positive legacy by focusing on the solutions for this pollution problem and upholding—not destroying—the legal protections of clean water for Maui, Hawai'i, and the entire nation.

Regards,
Ann Walker
2660 Iolani St
Makawao, HI 96768

GET Committee

From: manaulu@everyactioncustom.com on behalf of don cooke
<manaulu@everyactioncustom.com>
Sent: Monday, September 02, 2019 12:10 AM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

My name is _____ and I am a resident of _____. I care about this issue because _____.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

However, if the County continues its appeal, it threatens to gut the federal Clean Water Act. If the County wins the case at the Supreme Court, polluters across the United States would be free to contaminate water bodies as long as they release their waste from a pipe just short of the waters' edge or into the ground. The Trump Administration and industrial polluters like pipeline companies, the oil and gas industry, manufacturers, coal-burning utilities, and mining associations are all hoping that you will continue the appeal. As elected officials, I hope you will do the right thing, not for the Trump Administration and industrial polluters, but for public trust waters and present and future generations in Maui and all of Hawai'i.

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Sincerely,
don cooke
Kaneohe, HI 96744
manaulu@hotmail.com

GET Committee

From: Mahesh Cleveland <mclelland@earthjustice.org>
Sent: Monday, September 02, 2019 9:00 AM
To: GET Committee
Cc: Mike J. Molina; Keani N. Rawlins; Riki Hokama; Tasha A. Kama; Kelly King; Alice L. Lee; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura
Subject: Testimony re: GET-26
Attachments: 2019-9-3 Earthjustice Testimony GET-26.pdf

Aloha e Chair, Vice Chair, and Committee Members:

Thank you for your attention to this timely and important issue. Attached is Earthjustice's written testimony with attachments. We look forward to an opportunity to offer further comments or answer questions from Committee Members at the GET meeting on Tuesday.

Mahalo,

Mahesh Cleveland
Associate Attorney
Earthjustice
850 Richards St., Suite 400
Honolulu, HI 96813
T: 808-599-2436
F: 808-521-6841
www.earthjustice.org

He ali'i ka 'āina, he kauwā ke kanaka.
The land is a chief, humanity its servant.



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EARTHJUSTICE

TESTIMONY REGARDING GET-26
HAWAII WILDLIFE, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK,
U.S. SUPREME COURT DOCKET 18-260

Governance, Ethics, and Transparency Committee Meeting
September 3, 2019
9:00 a.m.

Aloha Chair Molina, Vice-Chair Rawlins-Fernandez, and Members of the GET Committee:

Earthjustice offers the following testimony in **SUPPORT** of settling *Hawai'i Wildlife Fund, et al. v. County of Maui* and withdrawing the County's appeal to the U.S. Supreme Court.¹

For decades, Maui community members have urged the County to address the pollution of the ocean and reef environment offshore of Kahekili Beach Park by the Lahaina Wastewater Reclamation Facility ("LWRF"). After years of unsuccessful negotiations to encourage the County to take action, Maui community groups Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation, and the West Maui Preservation Association brought this legal action. The District Court in Hawai'i, and then the Ninth Circuit Court of Appeals, ruled repeatedly that the Clean Water Act ("CWA") requires a National Pollutant Discharge Elimination System ("NPDES") permit for the LWRF's pollution of the ocean via groundwater. Before the Ninth Circuit, the United States filed a brief opposing the County based on the Environmental Protection Agency's "longstanding and consistent" position that the CWA applies to such pollution by the LWRF. The only thing that has changed since then is that the Trump Administration has taken over and waged its all-out war against the environment, and the County is now leading the charge with its appeal.

Contrary to the false spin by County administration officials in collaboration with the Trump Administration, the court rulings in this case have not "expanded" the CWA; rather it is the County and Trump administrations that are trying to open a massive loophole in the CWA. To support this inexcusable attack against the nation's cornerstone legal protection of clean water, the supporters of the County's appeal are compelled to resort to dishonest scare tactics. In this testimony, we refute the two main deceptions regarding (1) private cesspools and septic systems, and (2) NPDES permitting of the LWRF. First, pollution from private cesspools and septic systems is already strictly regulated, which the court rulings in this case do not change; second, NPDES permitting for facilities like the LWRF is neither unprecedented nor impractical, but rather has already occurred for decades.

¹ We previously submitted testimony for the May 20 hearing, which we incorporate here and attach for ease of reference.

I. REQUIRING NPDES PERMITTING FOR THE LWRF WILL NOT CREATE NEW BURDENS FOR PRIVATE CESSPOOLS OR SEPTIC SYSTEMS

The court rulings in this case regarding the LWRF do not impose any new requirements on private cesspools and septic systems. As explained below, under both federal and state laws, cesspools and septic systems are *already* strictly regulated and are certainly *not* allowed to pollute the ocean. The court rulings in this case add nothing new to these restrictions.

All the fearmongering over this issue misses the point that the EPA *already* requires NPDES permitting for any septic system or cesspool that actually discharges pollutants to surface waters. EPA, *Management Handbook for Septic/Decentralized Systems* 22 (Dec. 2005).² As former EPA heads from prior administrations pointed out in their amicus brief to the Supreme Court, the Ninth Circuit merely affirmed the *status quo* of EPA regulating pollution under the CWA. EPA Administrators' Br. at 21. The Trump EPA's recent reversal of position contradicts the "longstanding" practice of "requir[ing] a NPDES permit for any septic system that discharges pollutants to surface waters." *Id.*

Furthermore, the Hawai'i State Department of Health ("DOH") *already* has regulatory authority over cesspools and septic systems beyond the basic pollution control requirements of the CWA. Under state law, DOH is empowered to "control all management practices for domestic sewage, sewage sludge, and recycled water, *whether or not the practices cause water pollution.*" Haw. Rev. Stat. § 342D-4 (emphasis added). Furthermore, DOH regulations require that "[a]ny . . . new source of pollution or an increased source of pollution shall, in its initial project design and subsequent construction, provide the highest and best degree of waste treatment practicable under existing technology." Haw. Admin. R. § 11-55-02(b). State law now requires replacement of all cesspools with septic systems by 2050, Haw. Rev. Stat. § 342D-72(a), and places a moratorium on all unpermitted private or public discharges of treated or raw sewage to state waters by the end of 2026, *id.* § 342D-50.5(a).

The DOH, which is the lead authority in implementing the CWA in Hawai'i, has already made clear that it has no plans to require NPDES permits for private cesspools and septic systems. Moreover, even if it were inclined to permit such sources under the NPDES program, DOH could simply issue a *general permit* that provides conditions for compliance, but does not require individualized application and review. DOH already administers several NPDES general

² See <https://nepis.epa.gov/Exe/ZyPDF.cgi/20017K2G.PDF?Dockey=20017K2G.PDF>.

permits³ addressing, for example, leaking underground storage tanks,⁴ well-drilling activities,⁵ and unintentional discharges from recycled water systems.⁶ Likewise, DOH has the discretion to issue one general permit covering all discharges from private cesspools and septic tanks. Any homeowner concerned that their private waste system is in violation of the Clean Water Act or state clean water laws would simply file a notice of intent to comply with the terms of the general permit.⁷

It should be noted that the Ninth Circuit's ruling that the pollution must be "fairly traceable" and the "functional equivalent of a direct discharge" actually *limits* the potential that an individual cesspool or septic system would be subject to the CWA because any pollution would need to be traced directly back to an individual source. The cesspool/septic tank fearmongers raise only speculation and no actual examples of such a case. And in any event, if such a case of direct pollution does exist, both common sense and the law dictate that such pollution should not occur and should be fixed.

In short, the idea that upholding the CWA's prohibition on pollution of waterways via groundwater will spawn an onslaught of NPDES permitting requirements for individual homes is absurd on its face, and the Councilmembers should not buy into such shameless scare tactics. Two counties that filed a brief to the Supreme Court summarized the cesspool/septic tank issue clearly:

The takeaway is that well-maintained septic tanks *should not release* pollutants into the navigable waters, and poorly designed or neglected systems should be and *already are subject to regulation and remediation under both the CWA and State laws*—with no problems arising from such common-sense requirements.

Anderson County, SC and Decatur County, TN Br. at 13 (emphasis added).

³ See <https://health.hawaii.gov/cwb/permitting/general-permits/>.

⁴ <https://health.hawaii.gov/cwb/files/2018/08/11-55-App-D-A.pdf>.

⁵ <https://health.hawaii.gov/cwb/files/2018/08/11-55-App-I-A.pdf>.

⁶ <https://health.hawaii.gov/cwb/files/2019/02/11-55-App-JA.pdf>.

⁷ See H.A.R. § 11-55-34.08.

II. NPDES PERMITTING FOR POLLUTION VIA GROUNDWATER IS NOT IMPRACTICABLE, BUT RATHER HAS ALREADY OCCURRED FOR DECADES

The other scare tactic that has been raised is that NPDES permitting under the CWA is unprecedented and practically impossible in cases like the LWRF where the pollution reaches surface water through the ground. This is also false.

To dispel these concerns, please refer, for example, to the brief of the United States to the Ninth Circuit, as well as the amicus briefs to the Supreme Court by former EPA Administrators and regulatory officials under both Republican and Democratic administrations. Before the Ninth Circuit, the United States opposed the County's attack against the CWA. On the NPDES permit issue, the United States explained:

Any fears about the implications of point-source discharges . . . through groundwater . . . being subject to NPDES-permit requirements are unwarranted. EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities.

United States' 9th Cir. Br. at 29-30 (emphasis added) (citing examples of such permits). Indeed, the Obama EPA had offered to help the County and state DOH with complying with the NPDES permit requirements. The only change since then is that the Trump Administration has taken over and has allied with the County in arguing that the best way to deal with NPDES permitting is to eliminate it entirely.

The briefs from the former EPA heads and officials similarly confirm that "[EPA] has long issued NPDES permits for discharges of pollutants similar to those at issue here." EPA Administrators' Br. at 3. For reference, please see attached the relevant section of the brief from former EPA officials, which details many examples of such permits and explains that "Regulating Discharges that Pass through Groundwater is Administratively Feasible." Such permitting is "not [o]verly [b]urdensome"; on the contrary, "likely "thousands" of such permits have already been issued and implemented for "decades." EPA Officials' Br. at 24, 20-21.

These briefs also provide examples of NPDES permits that have already been issued for wastewater treatment facilities that discharge to surface waters indirectly through groundwater. These include, e.g., EPA's permits for the Taholah Village Wastewater

Treatment Plan in Washington,⁸ and the Neopit Wastewater Treatment Facility in Wisconsin.⁹ Likewise, the State of Oregon's Department of Environmental Quality established guidance in 2007 requiring NPDES permits for municipal wastewater facilities discharging to surface water via groundwater, explaining that "the appropriate permit to use for this type of system is an NPDES permit *because the indirect discharge by design will reach surface water.*" *Id.* at 1.¹⁰ Such NPDES permits are functionally equivalent to and indistinguishable from the permit that Maui County can and should diligently obtain for the LWRF.

Indeed, as all these briefs point out, the County's appeal, if successful, would eliminate *already existing permits* not only for wastewater treatment plants, but also chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities. *See United States' 9th Cir. Br.* at 30. The bottom line is that NPDES permitting for operations like the LWRF is demonstrably *not* impossible, unfeasible, or burdensome, but in fact *already occurs*. The County should also diligently obtain such a permit, instead of trying to nullify all such permits across the nation.

Mahalo for this opportunity to submit testimony. We stand ready to answer any further questions the Councilmembers may have on this or other issues. For the sake of clean water in Maui, Hawai'i state, and the nation, we urge the Council to show leadership and do the right thing in this case: reject the scare tactics, end the alliance with the Trump Administration, and withdraw its ill-advised appeal.

Aloha 'Āina,



Mahesh Cleveland
Isaac Moriwake
EARTHJUSTICE

⁸ See <https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-final-permit-2015.pdf>

⁹ See https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fmlprmt09_22_2016_0.pdf.

¹⁰ <https://www.oregon.gov/deq/Filtered%20Library/IMDindirectdischarge.pdf>

ATTACHMENT 1



TESTIMONY REGARDING GET-26
HAWAII WILDLIFE, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK,
U.S. SUPREME COURT DOCKET 18-260,
AND REGARDING COMMUNICATION NO. 19-178
RESOLUTION “REQUIRING SETTLEMENT OFFERS IN HAWAII WILDLIFE, ET AL.
V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT,
TO BE TRANSMITTED TO THE COUNCIL FOR APPROVAL OR DISAPPROVAL”

Governance, Ethics and Transparency Committee Meeting
May 20, 2019
9:00 a.m.

Good morning Chair Molina, Vice-Chair Rawlins-Fernandez, and members of the GET Committee:

My name is David Lane Henkin, I am an attorney with Earthjustice, and I represented the plaintiffs in *Hawai'i Wildlife Fund, et al., v. County of Maui* in the proceedings before the federal district court and on appeal to the Ninth Circuit Court of Appeals. I continue to represent these Maui community groups—Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association (“the Community Groups”)—in the current proceedings before the U.S. Supreme Court.

We very much appreciate that the newly elected Maui County Council is taking up the question whether it is in the best interests of the County and its residents to continue litigating the *Hawai'i Wildlife Fund* case. I offer this testimony in the hopes of providing you with information that will be helpful to your deliberations.

As a threshold matter, we encourage the Council to adopt the resolution attached to CC-19-178, “Requiring Settlement Offers in *Hawaii Wildlife Fund, et al. v. County of Maui*, Relating to the Clean Water Act, to be Transmitted to the Council for Approval or Disapproval.” Adopting this resolution would not require the Council to settle the case. Rather, it would simply ensure the Council has the opportunity to do so, should it deem settlement to be in the best interests of the County. This should not be a controversial proposition.

Should the Council wish to settle the case, we can assure you that the Community Groups would work cooperatively with the County of Maui to address the challenges posed by the injection wells at the Lahaina Wastewater Reclamation Facility (“LWRF”) and the County’s other facilities using injection wells. As discussed in greater detail below, 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,

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

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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.

I. NEITHER EARTHJUSTICE NOR ANY OF THE PLAINTIFFS HAVE ANY INTEREST IN HAVING THE COUNTY PAY CIVIL PENALTIES; RATHER, WE JUST WANT THE COUNTY TO ADDRESS THE PROBLEM

In the past, some have expressed concerns that, if the County does not continue the litigation over the LWRF injection wells, the County will be subjected to hundreds of millions of dollars in fines for continued operation of its various wastewater treatment facilities. Please rest assured that the Community Groups have no interest in having the County subjected to civil penalties for its Clean Water Act violations. The memberships of all four Community Groups are made up of Maui taxpayers. They do not want their tax dollars sent to the U.S. Treasury in the form of penalties. Rather, they want the County to invest their tax dollars to fund projects to put treated wastewater to beneficial reuse (and, in the process, to help alleviate the County's chronic shortages of fresh water), rather than injecting that wastewater, where it ends up on the reef.

You don't have to take my word for it, because the record is very clear on this point. For four years before we headed to court, Earthjustice and our community clients tried to convince the County to address concerns about harm to the marine environment from the operation of the LWRF injection wells and to take steps to increase reuse of the facility's treated wastewater. In November 2011, after more than three years without making any headway, we sent the County the required notice of intent to sue under the Clean Water Act. Even then, we tried to get the County to commit to addressing the problems posed by the LWRF injection wells without going to court, waiting nearly ten months (rather than the 60 days required by law) before filing suit.

After we got to court and the court rejected the County's motion to dismiss our case, we welcomed the County's suggestion that the parties attempt to find a mutually acceptable settlement that would avoid the need to spend time and money on litigation, agreeing to put our case on hold for nearly a year and a half while the parties negotiated. All of our settlement proposals focused on identifying feasible projects to reuse treated wastewater from the LWRF. It was only when the County refused to fund any of those projects that we returned to active litigation.

After the district court ruled in our favor, holding that the County was violating the Clean Water Act, we again focused on trying to convince the County to fund wastewater reuse projects, not on seeking penalties. The settlement agreement we reached in September 2015 reflects that focus, with the agreement calling for the County to invest at least \$2.5 million on wastewater reuse.

The September 2015 settlement does oblige the County to pay \$100,000 in the form of a monetary penalty, but that is only because the Clean Water Act settlement policy requires at least a nominal fine as part of any settlement, not because we wanted to impose a fine. Please bear in mind that the settlement resolved over eight years of nearly daily Clean Water Act violations at each of four injection wells. The penalty in the settlement represents a fine of only a few dollars per violation, which is truly nominal.

The bottom line is that all the Community Groups want is for the County to invest in projects addressing the environmental concerns posed by the County's injection wells, not pay fines to the U.S. Treasury. This is reflected in the latest settlement communication attached to the May 10, 2019 correspondence from the Department of the Corporation Counsel (dated April 26, 2019, with May 9, 2019 edits), which (1) asks the County to make the previously agreed-upon investment in infrastructure to increase reuse of R-1 water from the LWRF (paragraph 2) and (2) provides assurances that the Community Groups will not bring litigation seeking any penalties based on the County's use of injection wells at the LWRF or other facilities as long as the County is making good faith efforts to address the concerns that use of injection wells raise (paragraphs 4 and 5).

II. THE SETTLEMENT DOES NOT REQUIRE THE COUNTY TO PURSUE THIS APPEAL

In the past, some County leaders have suggested that the September 2015 settlement requires the County to pursue appeals. That is simply not the case. The settlement preserves the County's right to appeal the district court's rulings, but it does not *oblige* the County to do so. Thus, in urging the Council to settle the case, we are not "attempting to re-write the deal," as the County's special counsel would have it. Testimony of Colleen Doyle (Hunton Andrews Kurth) at 4 (May 16, 2019).¹ It is entirely up to you, the Council, to decide whether it is in the best interests of the County and its residents to continue to pursue this appeal, which threatens the County's national reputation as a champion of environmental quality and stewardship, or whether it is best to settle and focus on finding solutions to the problems posed by the injection wells.

¹ As mentioned, it has always been our desire that the parties focus on finding solutions to environmental harm caused by using the LWRF injection wells, not on endless litigation. We have never urged the County to pursue appeals, as the County's special counsel suggests. *Id.*

III. THE HAWAII DEPARTMENT OF HEALTH IS NOT REFUSING TO PROCESS THE COUNTY'S APPLICATION FOR A CLEAN WATER ACT PERMIT

In the past, County representatives have claimed the Hawai'i Department of Health (HDOH) refuses to issue a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act for the LWRF injection wells or even to process the County's permit application. This is untrue.

While the County's Department of Environmental Management did submit an application for an NPDES permit, HDOH made clear more than three years ago that the County's application was so deficient, lacking the most basic information, that HDOH could not process it. *See* 2/25/16 HDOH Letter (attached). HDOH identified a long list of missing, "required information" and set a deadline of May 31, 2016 for the County to provide it. *Id.* at 4.

Rather than comply with HDOH's information requests in a timely fashion, the County's Department of Environmental Management has asked for extension after extension of the deadline. *See* 5/16/16 DEM Letter (attached); 10/27/16 DEM Letter (attached). Most recently, the Department of Environmental Management asked for yet another extension, this time until the end of 2018. *See* 11/29/17 DEM Letter (attached); 12/5/17 DEM Letter (attached). Based on the information available on the HDOH permitting website, it appears that the County has yet to provide all of the information required to complete its application.

The County cannot fault HDOH for failing to take action on the County's NPDES permit application when the County has failed to provide all of the information HDOH identified over three years ago as essential to review of the County's application.

Once the County finalizes its permit application, we will work with you to encourage HDOH to process the application promptly. Moreover, as specified in our settlement letter (paragraph 4), as long as the County is making good faith efforts to secure a permit for the LWRF injection wells, we will not seek penalties for the lack of such a permit.

IV. THE COUNTY CAN SECURE CLEAN WATER ACT PERMIT COVERAGE FOR INJECTION WELL DISCHARGES

Another major theme of past Council discussions is that it is allegedly impossible to secure an NPDES permit for the LWRF injection wells because, supposedly, no one knows how to design a permit for discharges via groundwater to navigable waters like the Pacific Ocean off Kahekili Beach. That is also untrue. The Environmental Protection Agency ("EPA") has issued such permits. *See, e.g.,* EPA, NPDES Permit #WA0023434 Fact Sheet (discussing permit for rapid infiltration basins at wastewater treatment plant that discharge to river via groundwater)

(attached). Moreover, as recently retired EPA employee Wendy Wiltse confirms in her testimony to this committee, EPA has offered repeatedly to assist HDOH and the County to develop a legally adequate permit for the LWRF injections wells. Testimony of Wendy Wiltse at 2 (May 16, 2019) (attached).

The bottom line is that NPDES permits can be developed and issued to address discharges to navigable waters via hydrologically connected groundwater. The County is not, as many have alleged, in an impossible situation.

V. PEOPLE WHO IRRIGATE WITH RECYCLED WATER FROM THE LAHAINA FACILITY WILL NOT BE SUBJECT TO CIVIL PENALTIES

Some County representatives have claimed that, unless the County fights to overturn the Ninth Circuit's decision, businesses and others who irrigate with recycled water from the LWRF will be subjected to civil penalties for Clean Water Act violations, creating obstacles to increasing reuse of treated wastewater. This concern lacks any basis.

When businesses and other consumers irrigate their landscaping and golf courses, they are careful to use only as much water as is needed to soak into the root zone so their grass and other plants will stay alive. After all, they are paying for the water they use. Thus, there is no reason to believe that consumers of the LWRF's recycled water would overwater their landscaping and golf courses so as to turn their properties into bogs, with a stream of excess irrigation water flowing into the ocean through the ground. There is simply no parallel with the LWRF injection wells, which were intentionally designed to dispose of millions of gallons of treated wastewater each day into the ocean via groundwater.

In the unlikely event that a business accidentally overwatered, such that large quantities of excess recycled water reached the ocean via groundwater, that business would have ample opportunity to correct the problem. The Clean Water Act requires 60-days advance, written notice before any citizen suit can be brought. The purpose of that notice requirement is to give people the chance to come into compliance, without any prospect for being subjected to penalties. Again, consumers of LWRF recycled water would have every incentive not to overwater—not just to avoid any pollution, but to also not to waste money paying for that water.

Finally, it bears emphasizing that Earthjustice and our community clients are deeply committed to increasing the amount of LWRF wastewater that is recycled, rather than injected. *That has been the sole focus of our advocacy for more than a decade.* We simply have no possible interest in creating any disincentive for business and others to use treated wastewater to meet their irrigation needs. To lay to rest any possible concerns, our latest settlement communication

makes clear the Community Groups will not sue any end user of recycled water from the LWRF that is irrigating responsibly.

VI. CONTINUING WITH BUSINESS AS USUAL AT THE LWRF IS DESTROYING THE REEF AT KAHEKILI

It is common in settlements for parties to reach agreement on the best path forward without necessarily agreeing on all the facts related to the case. For example, in this case, the County and the Community Groups entered into a settlement in 2015 regarding the proper remedy “without any admission of fact.” 2015 Settlement at 3. Similarly, to resolve the pending appeal to the Supreme Court, the County would not have to acknowledge that the LWRF injection wells have an adverse effect on the nearshore marine environment. *See* Settlement Letter (dated April 26, 2019, with May 9, 2019 edits) at ¶ 7.

That said, we think it important that you know that every independent, peer-reviewed scientific study has concluded that the LWRF injection wells are harming the coral reef offshore of Kahekili Beach Park. In 2102, researchers from University of Hawai‘i found that algae samples grown over freshwater seeps in Kahekili’s nearshore waters contained the highest values of nitrogen associated with wastewater treatment facilities ($\delta^{15}\text{N}$) ever reported in the scientific literature (Dailer *et al.* 2012) (attached). Most recently, researchers at the U.S. Geological Survey, University of Hawai‘i, Woods Hole Oceanographic Institution, and State of Hawai‘i Division of Aquatic Resources published a peer-reviewed study confirming that discharges from the LWRF injection wells are literally eating the reef from the inside, contributing to rates of bioerosion that are orders of magnitude higher than one would otherwise expect (Prouty, et al., 2017) (attached).

As the testimony from former EPA staffer Wendy Wiltse makes clear, regulation under the state and federal underground injection control (UIC) program is entirely inadequate to protect Kahekili’s fragile coral reefs from continued destruction. If it were, the existing UIC permits, which have been in effect for decades, would have brought an end to the harm to the reef at Kahekili. They have not.

VII. CONCLUSION

I hope this information is helpful to this Council in refocusing on the available and necessary solutions in this case, rather than on counterproductive litigation. Earthjustice and its community clients would welcome the opportunity to work with the Council to find solutions to the challenges posed by the County’s injection wells. I can be reached via email at dhenkin@earthjustice.org or via telephone at 808-599-2436, ext. 6614.

ATTACHMENT 2

No. 18-260

IN THE
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAI'I WILDLIFE FUND, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF *AMICI CURIAE* FORMER EPA
OFFICIALS IN SUPPORT OF RESPONDENTS**

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funded evaluation of the potential development and implementation of an authorized NPDES program by the Lummi Nation also included similar guidance.²⁴

C. EPA and the States Have Issued Many NPDES Permits that Address Discharges that Pass through Groundwater to Jurisdictional Surface Waters

Most importantly, both EPA and authorized states have in fact regulated—and continue to regulate—point source discharges that enter navigable waters via groundwater in both individual and general NPDES permits. The existence of these permits, some of which date back almost three decades, demonstrates both that the decision of the Court of Appeals represents the regulatory status quo and—as will be discussed in more detail below—that the regulation of such discharges is administratively feasible.

EPA has issued many such permits itself. For example, at various times EPA has issued general permits that address discharges through hydrologically-connected groundwater for CAFOs in Idaho, New Mexico, Louisiana, New Mexico, Oklahoma, and

discharges to ground water are exempt from the permitting requirements, unless there is a hydrological connection between the ground water and a nearby surface waterbody.”).

²⁴ Lummi Natural Resources Dep’t, *Evaluation Report on the Development and Implementation of a Lummi Nation NPDES Program* 16–17 (2005), https://www.lummi-nsn.gov/userfiles/83_NPDES%20Delegation%20ReportFINAL.pdf.

Texas, and on tribal lands in New Mexico and Oklahoma.²⁵ It has also issued individual permits that address such discharges to wastewater treatment plants,²⁶ mines,²⁷ and an oil field fluids treatment

²⁵ EPA Region 10, Authorization to Discharge Under the National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations, No. IDG010000, Part III.D.1 (p. 30) (Mar. 29, 2012), <https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-idaho-cafo-gp-id010000-final-permit-2012.pdf>; EPA Region 6, National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges from Concentrated Animal Feeding Operations (CAFOs) in New Mexico, No. NMG010000, at Part II.A.2(b)(vi) (pp. 3–4 of Part II) (July 14, 2016), <https://www.env.nm.gov/wp-content/uploads/2017/07/NMG010000-CAFO-NM-20160901.pdf>; National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7631 (Feb. 8, 1993).

²⁶ EPA Region 10, Authorization to Discharge Under the National Pollutant Discharge Elimination System, Taholah Village Wastewater Treatment Plant, No. WA0023434 (June 4, 2015), <https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-final-permit-2015.pdf> [hereinafter “Taholah Permit”]; EPA Region 5, Authorization to Discharge Under the National Pollutant Discharge Elimination System, Neopit Wastewater Treatment Facility, No. WI-0073059-2 (Sept. 22, 2016), https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf [hereinafter “Neopit Permit”].

²⁷ EPA Region 6, Authorization to Discharge Under the National Pollutant Discharge Elimination System, Questa Mine, No. NM0022306, at Part II.D (Sept. 30, 2013), <https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf>; EPA Region 6, Fact Sheet, Molycorp, Inc., NPDES Permit No. NM0022306, at 4-6 (May 16, 2006), <http://clinics.law.harvard.edu/environment/files/2019/07/Molycorp-Fact-Sheet.pdf> [hereinafter “Molycorp Fact Sheet”].

and disposal facility.²⁸ As recently as last year, EPA issued a draft individual permit for a CAFO in New Hampshire that:

requires the permittee to document that no direct hydrologic connection exists between the contained wastewater and surface waters of the United States. Where the permittee cannot document that no direct hydrologic connection exists, the ponds, lagoons and basins of the containment facilities must have a liner which will prevent the potential contamination of surface waters.”²⁹

This permit tracks EPA’s guidance that “requirements might address, for example, the use of liners in areas where there is the potential to discharge to groundwater that has a direct hydrologic connection to waters of the U.S.”³⁰

Similarly, many states with authorized NPDES programs have issued draft or final permits that

²⁸ EPA Region 6, Statement of Basis, US Liquids of Louisiana, Ltd., NPDES Permit No. LA0068420 (May 9, 1997), <http://clinics.law.harvard.edu/environment/files/2019/07/US-Liquids-of-Louisiana-Statement-of-Basis.pdf>; see Molycorp Fact Sheet, *supra* note 27, at 7 (mentioning final US Liquids of Louisiana, Ltd. permit from 1999 as an example of a permit that “address[es] discharges having the potential to flow into ground water which is hydrologically connected to surface waters”).

²⁹ EPA Region 1, Fact Sheet, Forbes Farm Partnership, Inc., NPDES Permit No. NH0023540, at 30 (2018), <https://www.epa.gov/sites/production/files/2018-04/documents/draftnh0023540permit.pdf>.

³⁰ 2012 CAFO Manual, *supra* note 18, at 5-17; see *id.* O-25.

address discharges that pass through hydrologically-connected groundwater. These permits include CAFO general permits issued by Oklahoma, Tennessee, and Texas,³¹ California's 2014 General Permit for Storm Water Discharges Associated with Industrial Activities,³² Colorado's General Permit for Discharges from Sand and Gravel Mining and Processing,³³ as well as draft or final individual permits from Arizona,³⁴ Colorado,³⁵ Minnesota,³⁶ and Mon-

³¹ Tex. Comm'n on Env'tl. Quality, General Permit to Discharge Wastes, TPDES General Permit No. TXG920000, at 33–36 (July 10, 2014), <https://www.tceq.texas.gov/assets/public/permitting/wastewater/general/txg920000.pdf>; Tenn. Dep't of Env't & Conservation, General State Operating Permit for Concentrated Animal Feeding Operations, No. SOPC00000, at 12–13 (Aug. 1, 2015), https://www.tn.gov/content/dam/tn/environment/water/documents/permit_water_sopc00000_pmt.pdf; Oklahoma Dep't of Agric., Food, & Forestry, Agriculture Pollutant Discharge Elimination System (AgPDES) General Permit for Discharge from Concentrated Animal Feeding Operations (CAFOs) in Oklahoma, AgPDES Permit No. OKG010000, at II-4, III-10-11 (Mar. 30, 2017), <https://www.oda.state.ok.us/aems/Oklaho-ma%20AgPDES%20CAFO%20General%20Permit%20OKG01000%202017-2022.pdf>.

³² Cal. State Water Resources Control Board, NPDES General Permit For Storm Water Discharges Associated With Industrial Activities, Order NPDES No. CAS000001, Fact Sheet at 72 (Apr. 1, 2014), https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0057_dwq_rev_mar2015.pdf [hereinafter "California Storm Water Permit"].

³³ Colo. Dep't of Public Health & Env't, Colorado Discharge Permit System (CDPS) Fact Sheet to Permit Number COG5000000, at 12 (Oct. 13, 2016), https://www.colorado.gov/pacific/sites/default/files/WQ_PER_COG500000_FS_1.pdf.

³⁴ Ariz. Dep't of Env'tl. Quality, Draft Fact Sheet, Arizona Pollu-

tana.³⁷ Cumulatively, these permits represent decades of experience, current practice, and—given the

tion Discharge Elimination System (AZPDES) Permit No. AZ0026174, at 3 (July 14, 2017), http://static.azdeq.gov/pn/fs_azpdes_alpine.pdf [hereinafter “Alpine Fact Sheet”].

³⁵ Authorization to Discharge under the Colorado Discharge Permit System (Jan. 26, 2012); Colorado Discharge Permit System (CDPS) Fact Sheet to Permit Number CO0041351, Western Sugar Cooperative, Fort Morgan Facility (Jan. 26, 2012) [hereinafter “Western Sugar Cooperative Fact Sheet”]. Both documents can be downloaded from <https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record?q=containerEx:32656>.

³⁶ Minn. Pollution Control Agency, National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Permit Program Fact Sheet, Permit No. MN0071013, at 62 (Jan. 31, 2018), <https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-51gg.pdf>; *see also* Letter from Kevin M. Pierard, Chief NPDES Programs Branch, EPA Region 5, to Ann Foss, Metallic Mining Sector Director, Minnesota Pollution Control Agency, at 2 (Nov. 3, 2016), https://www.ee-news.net/assets/2019/01/16/document_daily_01.pdf (“EPA’s position as explained above is consistent with EPA’s past interpretation that the CWA applies to discharges of pollutants from a point source to waters of the United States, including those made through a ground water hydrologic connection.”).

³⁷ Mont. Dep’t of Env’tl. Quality, Authorization to Discharge Under the Montana Pollutant Discharge Elimination System, Permit No. MT0021849, at 3 (Jan. 11, 2014), <http://deq.mt.gov/Portals/112/Water/WPB/MPDES/Majors/MT0021849PER.pdf> [hereinafter “City of Sidney Permit”]; Tintina Montana, Inc., Integrated Discharge Permit Application Narrative Black Butte Copper Project Meagher County, Montana, at 3-1 (Dec. 11, 2017), <https://deq.mt.gov/Portals/112/Land/Hardrock/Documents/TintinaMines/R17%20Permit%20Application%20Narrative.pdf>.

broad applicability of the general permits cited above—the likely regulation of thousands of facilities.³⁸

II. Regulating Discharges that Pass through Groundwater is Administratively Feasible

An examination of the NPDES permits issued by EPA and the States that address discharges through hydrologically-connected groundwater demonstrates the feasibility of regulating such discharges. Agencies have well-established tools for determining when discharges necessitating a NPDES permit occur, establishing discharge limits, and identifying monitoring locations to ensure compliance. In addition, the requirements imposed under such permits are not overly burdensome on EPA, states, or regulated parties.

A. It is Feasible to Determine when a Facility Needs a NPDES Permit for Discharges that Pass through Groundwater

As EPA has explained, “[t]he determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an

³⁸ EPA has also brought at least one enforcement action against an entity that EPA alleged was violating the CWA by discharging pollutants to navigable waters via groundwater without a NPDES permit. *See* Notice of Lodging of Consent Decree Pursuant to the Clean Water Act; ConAgra, Inc., 63 Fed. Reg. 55,409 (Oct. 15, 1998) (explaining that a consent decree terminating an EPA enforcement action addresses “violations of the CWA . . . including . . . unauthorized discharges of pollutants to surface waters via . . . hydrologically connected groundwater”).

NPDES permit is a factual inquiry, like all point source determinations.” 66 Fed. Reg. at 3017. Such determinations are manageable both for agencies and dischargers.

In many cases, it will be readily apparent to the operator of a facility that its operations will lead to discharges to surface waters. For example, “[i]n the absence of appropriate precautions, the on-site impoundments” where coal-fired power plants located adjacent to navigable waters dispose of coal ash “obviously pose significant risks of leaks that contaminate navigable waters by traveling through groundwater.”³⁹

Even when the existence of a discharge is not so obvious, there are standard tools and sources of information that agencies and permittees can use. In the preamble to its 2001 proposed CAFO regulations, EPA identified several sources that could help regulated entities in determining whether their discharges to groundwater had a direct hydrologic connection to jurisdictional surface waters. These include proximity to surface waters; whether the discharge occurs in sensitive geologic or hydrogeologic settings, such as “karst, fractured bedrock or other shallow/unconsolidated aquifers;” and United States Geological Survey (USGS) maps of Hydrologic Landscape Regions (HLRs). 66 Fed. Reg. at 3018-20.

³⁹ Comment of Attorneys General of Maryland, California, Massachusetts, Oregon, and Vermont on Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water (EPA-HQ-OW-2018-0063; FRL-9973-41-OW), at 8 (May 21, 2018).

Moreover, a standard requirement in NPDES general permits for facilities with disposal ponds, such as CAFOs, is that the permittee either install a liner around the pond or demonstrate the lack of a hydrologic connection between the pond and surface waters.⁴⁰ For example, Oklahoma's CAFO general permit requires a certification from an engineer that "leakage will not migrate to a surface water."⁴¹ The certification must include "maps showing ground water flow paths, or that the leakage enters a confined environment" as well as "information on the hydraulic conductivity and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter."⁴² Neither the County nor its *amici* have suggested that the requirement to make such determinations, which are likely in force for thousands of facilities around the country, are unmanageable.

⁴⁰ See 2012 CAFO Manual, *supra* note 18, at O-25 to O-26 (providing EPA guidance on liner requirements).

⁴¹ Oklahoma Dep't of Agric., Food, & Forestry, AgPDES Permit No. OKG010000, *supra* note 31, at III-11.

⁴² *Id.* Other general permits including a similar requirement to document a lack of hydrological connection include EPA Region 6's 1993 CAFO general permit, 58 Fed. Reg. at 7631; California Storm Water Permit, *supra* note 32, at 72-73; EPA Region 10's 2012 general permit for CAFOs in Idaho, Authorization to Discharge Under the National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations, No. IDG010000, *supra* note 25; Texas's 2014 CAFO general permit, Tex. Comm'n on Env'tl. Quality, TPDES General Permit No. TXG920000, *supra* note 31, at 33-36; and Tennessee's 2015 CAFO general permit, Tenn. Dep't of Env't & Conservation, General State Operating Permit for Concentrated Animal Feeding Operations, No. SOPC00000, *supra* note 31, at 12-13.

B. NPDES Permitting Requirements for Discharges that Pass through Groundwater are not Overly Burdensome

Existing NPDES permits demonstrate the range of permitting strategies and requirements that can be applied to discharges that pass through groundwater. These methods include absolute prohibitions on discharges from certain locations, pre-treatment requirements, interception wells to remove contaminated water for treatment, and numeric effluent limitations that can be enforced at various locations, including downgradient monitoring wells. All of these requirements have successfully been incorporated into NPDES for many years, demonstrating the feasibility of these approaches.

A number of permits include complete prohibitions on discharges from particular locations. As mentioned above, it is common for CAFO general permits to specify that ponds, pits, or lagoons operated by the permittee be properly lined to prevent the migration of pollutants into groundwater. Thus a CAFO general permit issued in 1993 by EPA Region 6 required that permittees install a liner in all wastewater retention ponds, lagoons, and basins, unless the permittee could demonstrate that “no significant hydrologic connection exists between the contained wastewater and surface waters of the United States.”⁴³

⁴³ 58 Fed. Reg. at 7631; see sources cited in footnote 42, *supra*. Another permit with a similar requirement is EPA Region 6’s 1999 NPDES permit for the US Liquids of Louisiana oil field liquids treatment and disposal facility. According to the 1997 Statement of Basis for the permit, the facility “dewater[s] the

Another option for discharges from a disposal pond or similar structure is to require pre-treatment of the wastewater before it enters the pond. For example, the Arizona Department of Environmental Quality has issued a draft permit for the Alpine Sanitary District. The District treats its wastewater by disposing of it in “three lined lagoons which provide primary and secondary treatment through sedimentation and anaerobic digestion.”⁴⁴ When these ponds do not have sufficient capacity, the permit authorizes the “discharge of excess effluent from Pond #3 to Pond #4, which will serve as an unlined infiltration/evaporation basin.”⁴⁵ However,

[d]ue to the shallow depth to groundwater, the close proximity of Pond # 4 to the San Francisco River, and Pond # 4 being in the 100 year flood plain, ADEQ considers the hydrologic connectivity of infiltration from Pond #4 to the San Francisco River as discharge to a water of the US.⁴⁶

fluids in large treatment cells, store[s] the solids, and inject[s] the associated water and storm water.” EPA Region 6, Statement of Basis, US Liquids of Louisiana, Ltd., NPDES Permit No. LA0068420, *supra* note 28, at 3. EPA indicated that “[t]he permittee will be required to prove that there is no hydrologic connection between the treatment cells and surface waters. If they are unable to prove such a connection does not exist, they will be required to install liners in the treatment cells.” *Id.* at 4.

⁴⁴ Alpine Fact Sheet, *supra* note 34, at 2.

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

Thus, to ensure that these discharges do not exceed applicable effluent limitations, the draft permit requires that “[e]ffluent from Pond #3 will be pumped to a disinfection system to be chlorinated and dechlorinated prior to being discharged to Pond #4” and that “phosphorus reduction will be achieved by applying ferric chloride to Pond #3 prior to discharging.”⁴⁷

Another approach is to require that the permittee intercept and remove contaminated water by means of pumping before it enters surface waters. For example, the 2006 NPDES permit for the Chevron Questa Mine in New Mexico (formerly owned by MolyCorp Inc.) required that the facility operate a “seepage interception system” including extraction wells in order to prevent the discharge of pollutants to the Red River through groundwater.⁴⁸ EPA reissued the permit in 2013, retaining this requirement.⁴⁹ The Response to Comments for the 2013 permit explained that the permit imposed controls on

⁴⁷ *Id.* at 2. Similarly, the permit for the City of Sidney Wastewater Treatment Facility in Montana requires ultraviolet disinfection before wastewater is discharged into infiltration/percolation cells, from which it is discharged through groundwater into the Yellowstone River. City of Sidney Permit, *supra* note 37, at 3.

⁴⁸ EPA Region 6, Authorization to Discharge under the National Pollutant Discharge Elimination System, Permit No. NM0022306, at II-1 (Aug. 29, 2006), <https://semspub.epa.gov/work/06/619835.pdf>.

⁴⁹ EPA Region 6, Authorization to Discharge under the National Pollutant Discharge Elimination System, Permit No. NM0022306, at II-2 (Sept. 30, 2013), <https://www.env.nm.gov/sqwb/NPDES/Permits/NM0022306-Chevron-Questa.pdf>.

seepage because “EPA has the jurisdiction under the CWA to regulate or eliminate seepage which reaches the waters of the US through hydrologic connection.”⁵⁰ The fact sheet for the 2006 permit describes how the permittee “installed interception wells to capture the plume from the tailings pond.”⁵¹ EPA concluded that because “the ground water plume from the tailings ponds is successfully captured by” the permittee, “no additional permit requirements are proposed.”⁵²

In addition, some permits incorporate numeric effluent limitations. Thus the permit for the Western Sugar Cooperative sugar beet processing facility, issued by the Colorado Department of Public Health and Environment in 2012, requires that discharges into unlined disposal ponds meet numeric limits for oil and grease, pH, *E. coli*, ammonia, sulfide, chloride, temperature, and electrical conductivity.⁵³ Similarly, the draft Alpine Sanitary District permit described above includes numerical limits on, among

⁵⁰ EPA Region 6, NPDES Permit No. NM0022306 – Response to Comments 18 (Sept. 30, 2013), <https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf>.

⁵¹ Molycorp Fact Sheet, *supra* note 27, at 4.

⁵² *Id.* The Fact Sheet cites several other NPDES permits that included similar requirements. *Id.* at 6-7 (citing NPDES permits AZ0022705 (1999), AZ0020389 (2000), and AZ0020516 (2000)).

⁵³ Western Sugar Cooperative Fact Sheet, *supra* note 35, at 18-23.

other things, chlorine, *E. coli*, and pH for discharges into the unlined infiltration/evaporation basin.⁵⁴

Permits can require monitoring of compliance either with numeric limitations or with discharge prohibitions at various locations. For example, the 2016 NPDES permit for the Neopit Wastewater Treatment Facility operated by the Menominee Tribal Utilities in Wisconsin applies to a facility that discharges wastewater from a settling pond to seepage cells. From the seepage cells, the effluent passes through groundwater before reaching Tourtillotte Creek, a water of the United States.⁵⁵ The permit requires that the facility take effluent samples from the settling pond (before effluent enters the seepage cells) as well as samples from downgradient monitoring wells.⁵⁶ Similarly, the 2015 permit for the Taholah Village Wastewater Treatment Plant requires monitoring of effluent before it enters rapid infiltration basins as well as monitoring of the receiving water—the Quinault River.⁵⁷ Colorado’s permit for the Western Sugar Cooperative sugar beet processing facility treats unlined ponds as a point source and requires samples from the ponds as dis-

⁵⁴ Alpine Fact Sheet, *supra* note 34, at 8-10; *see also* Neopit Permit, *supra* note 26, at I-4 (describing limits for biological oxygen demand, total dissolved solids, chloride, nitrogen, nitrite, and nitrate); City of Sidney Permit, *supra* note 37, at 4 (containing numerical limits on biological oxygen demand, total suspended solids, pH, nitrogen, and phosphorus).

⁵⁵ Neopit Permit, *supra* note 26, at I-1.

⁵⁶ *Id.* at I-4, I-6.

⁵⁷ Taholah Permit, *supra* note 26, at 6-9.

charge monitoring.⁵⁸ In deciding on this monitoring strategy, the agency considered other compliance monitoring points, including monitoring wells and lysimeters, further demonstrating the variety of approaches available to permit writers.

These permits demonstrate the range of options available to address discharges that enter surface waters by passing through groundwater. It is feasible for agencies to identify when such discharges occur, to develop either numeric limits or other permit provisions to address them, and to monitor the permittee's compliance with the permit's requirements.

III. Reversal of the Court of Appeals Would Disrupt Existing Protections against Significant Harms that are not Addressed by Other Statutes

A ruling that discharges which reach surface waters by passing through groundwater are exempt from the NPDES program would disrupt the regulatory status quo and leave a significant gap in protection. Several of the County's *amici* suggest that NPDES permitting of such discharges is unnecessary and duplicative. *See, e.g.*, EEI Br. 32-40; KMEP Br. 20-26; NACWA Br. 29-37. As Respondents explain, however, these other laws are not adequate substitutes for the CWA's protections. Resp. Br. 49-52. For example, RCRA is aimed at the disposal of "hazardous" waste, but does not address many of the conventional pollutants such as pH, biological oxygen

⁵⁸ Western Sugar Cooperative Fact Sheet, *supra* note 35, at 6, 30.

demand, and total suspended solids regulated by the NPDES permits described above. In addition, the SDWA and state groundwater protection laws are aimed at avoiding harm to groundwater (in the case of the SDWA, to underground drinking water sources in particular) rather than harm to surface waters. These statutes therefore do not provide a reason to ignore the plain text of the CWA. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014) (“When two statutes complement each other, it would show disrespect for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.”).⁵⁹

⁵⁹ Ironically, however, state groundwater protection laws—while not a substitute for the CWA’s protections—do rebut Petitioner and EPA’s arguments that NPDES permitting of discharges that pass through groundwater is impractical. Many of the tools included in the state groundwater protection laws that they tout are similar to the very aspects of NPDES permitting that they claim are unmanageable. For example, a number of states prohibit unpermitted discharges of pollutants into groundwater. West Virginia Br. 21-24. Moreover, some states prohibit groundwater discharges that adversely affect surface water quality or cause violations of surface water quality standards. See, e.g., Ariz. Admin. Code R18-11-405.B; Fla. Admin. Code r. 62-520.-310(2); 314 Mass. Code Regs. 5.09(1). Permits that comply with these requirements raise many of the same practical concerns—such as the need to develop modeling or other methods to “account for how effluent changes physical and chemically between the point source” and the receiving water, NACWA Br. 19, or the permittee’s inability to “control changes to its effluent quality between the outfall and entry into” the designated receiving water, *id.* at 20—that are potentially implicated by NPDES permits for discharges that pass through groundwater.

To be clear—none of this is to suggest that such laws are a

Overturning the decision of the Court of Appeals would cause significant regulatory disruption. The number of dischargers who would be affected by the elimination of these existing NPDES permit protections is likely in the thousands. Many of the permits identified above are general permits, which therefore apply to large numbers of sources. NPDES general permits currently in effect that directly address discharges that pass through groundwater include CAFO general permits in Idaho, New Mexico, Oklahoma, Tennessee, and Texas.⁶⁰ They also include California's General Permit for Storm Water Discharges Associated with Industrial Activities and Colorado's General Permit for Discharges from Sand and Gravel Mining and Processing.⁶¹

In addition, discharges that pass through groundwater to surface waters can cause significant harms. For example, discharges from CAFOs can cause nitrate pollution, harmful algal blooms, and transmission of disease-causing microorganisms.⁶²

substitute for the CWA's protections. They do not address the same harms and they do not provide nationwide protection. But they do provide additional evidence—on top of the examples from the NPDES permits discussed above—of the feasibility of using permits to address the impacts to surface waters of discharges that pass through groundwater.

⁶⁰ See sources cited in footnotes 25 & 31, *supra*.

⁶¹ See sources cited in footnotes 32–33, *supra*.

⁶² See, e.g., JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 *Envtl. Health Persp.* 308 (2007); U.S. Fish & Wildlife Service & EPA Region 6, *Environmental Contaminants Associated with a Swine Concentrated Animal Feeding Operation and Implica-*

These discharges are not infrequent. EPA noted in its response to comments on the 2009 New Mexico CAFO General Permit that “[s]ince the issuance of the 1993 permit, EPA has observed that *many liners leak and discharge to groundwater which eventually discharges to surface water*, via a hydrologic connection.”⁶³ In 2004, EPA completed a *Risk Assessment Evaluation for Concentrated Animal Feeding Operations*, which noted that “[n]utrients, pathogenic organisms, hormones and metals may easily reach waterbodies” from, among other pathways, “groundwater flow.”⁶⁴ The same report observed that “groundwater flow is the primary contributor of nitrate to surface water from agriculture.”⁶⁵

Mines are another important source of discharges through groundwater. A 1993 letter prepared by EPA Region 8 discusses the agency’s evaluation of how “pollutants from some mining sites are moving

tions for McMurtrey National Wildlife Refuge 7-19 (2004), <https://ecos.fws.gov/ServCat/DownloadFile/21670?Reference=23151>.

⁶³ Response to Comments on the Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges from Concentrated Animal Feeding Operations (CAFOs) in New Mexico (NMG010000), at 21 (2009) (emphasis added), <http://clinics.law.harvard.edu/environment/files/2019/07/NM-CAFO-General-Permit-Response-to-Comments.pdf>.

⁶⁴ EPA, *Risk Assessment Evaluation for Concentrated Animal Feeding Operations* 4 (2004), <https://nepis.epa.gov/Exe/ZyPDF.cgi/901V0100.PDF?Dockkey=901V0100.PDF>.

⁶⁵ *Id.* at 25.

into the ground water and then into nearby surface water” and how these discharges either were not authorized by the mines’ NPDES permits or that the mines had claimed to be non-discharging and therefore did not have permits.⁶⁶ These discharges were causing “serious water quality problems at some mines.”⁶⁷ To address these harms, the letter concluded, “facilities are now being required to obtain NPDES permits covering all outfalls including ground water discharges determined to be hydrologically connected to surface water.”⁶⁸

NPDES permit writers have continued to rely on this conclusion. Thirteen years later, the NPDES fact sheet for the Questa mine cited this letter in support of regulating discharges via groundwater.⁶⁹ And as EPA’s hard rock mining framework observes, “[r]eleases of pollutants . . . indirectly via ground water that has a hydrological connection to surface water” are a potential environmental impact to surface water from mining.⁷⁰

⁶⁶ Letter from Max H. Dodson, Director, Water Management Division, EPA Region 8, to Dan Fraser, Chief, Water Quality Bureau, Montana Department of Health & Environmental Sciences, *NPDES Permit Issues Hard Rock Mines*, at 2 (Dec. 22, 1993), http://www.sec.nv.gov/appeal_docs/epa_letter_cwa_122293.pdf.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Molycorp Fact Sheet, *supra* note 27, at 6-7.

⁷⁰ EPA Office of Water, *EPA’s National Hardrock Mining Framework*, at B-3 (1997), https://www.epa.gov/sites/production/files/2015-10/documents/hardrock_mining_framework_0.pdf. EPA has been issuing NPDES permits to mines that address

Because of their need for cooling water, coal-fired power plants—and their associated coal ash impoundments—are typically located next to rivers or other navigable waters. These impoundments, such as those at issue in *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018), are sources of arsenic, chromium, selenium, lead, and other heavy metals.⁷¹ These toxic pollutants leak from unlined impoundments into shallow groundwater, and from there, into adjacent surface waters.⁷²

In short, the existing regime, under which discharges through hydrologically-connected groundwater are regulated under the NPDES program, is needed to address serious threats to water quality that are not dealt with by other statutes. A decision reversing the Court of Appeals would disrupt the implementation of these NPDES permits, create a

their discharges that pass through groundwater for decades, yet there is no evidence that this practice has harmed the mining industry.

⁷¹ EPA, EPA-600/R-09/151, *Characterization of Coal Combustion Residues from Electric Utilities – Leaching and Characterization Data Hazardous and Solid Waste Management System* (2009), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P1007JBD.PDF?Dockey=P1007JBD.PDF>; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302, 21,456–57 (Apr. 17, 2015).

⁷² Jennifer S. Harkness et al., *Evidence for Coal Ash Ponds Leaking in the Southeastern United States*, 50 *Envtl. Sci. & Technology* 6583, 6591 (2016) (“[T]he results presented in this study suggest significant releases of coal ash impacted water to the environment.”).

significant loophole, and put the water bodies protected by these permits—and the people who depend upon them—at risk.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,
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Counsel for Amici Curiae

July 19, 2019

GET Committee

From: afonarow@everyactioncustom.com on behalf of Amy Fonarow
<afonarow@everyactioncustom.com>
Sent: Monday, September 02, 2019 10:54 PM
To: GET Committee
Subject: Testimony in SUPPORT of resolution CC-19-178 re: settling the Lahaina Injection Wells lawsuit

Dear Maui County GET Committee,

Aloha Maui County Councilmembers,

My name is Amy Fonarow, and I am a resident and voter of Kihei who works as a naturalist at the Maui Ocean Center aquarium.

I care about this issue because I am concerned that taking the Lahaina Injection Well case to the Supreme Court could lead to more polluted waters around Maui and the rest of the U.S. All living things need clean water to live healthy lives, and I'm all for healthy lives.

I am writing in support of Maui County settling the Lahaina Injection Well case (HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT).

Both the Hawai'i district court and Ninth Circuit appeals court have already ruled that the County must get a permit under the Clean Water Act to continue discharging treated wastewater into the groundwater via the Lahaina injection wells. I ask the County to withdraw its appeal and work with state and community stakeholders to modernize the treatment facility and invest in water reuse solutions.

Settling the case would end a detrimental challenge against the Clean Water Act and allow the County to avoid further penalties as long as it diligently works toward solutions. The Department of Health has already made clear that private cesspools and septic tanks would not need to get NPDES permits, so there is no risk to individual homeowners.

Maui County has a history of being leaders in environmental protection, and you can uphold this reputation and continue this legacy by withdrawing the appeal. Please help to uphold the Clean Water Act and protect Maui's reefs, which not only provide many economic benefits, but hold cultural and environmental significance for all of Hawai'i. I ask you to support the settlement of the Lahaina Injection Wells case and withdrawal of the appeal.

Thank you for your consideration of my request.

Sincerely,
Amy Fonarow

Sincerely,
Amy Fonarow
851 S Kihei Rd Apt B105 Kihei, HI 96753-6023 afonarow@yahoo.com

GET Committee

From: Scott Rollins <scott.rollins.59@gmail.com>
Sent: Monday, September 02, 2019 11:05 PM
To: GET Committee; Kelly King; Keani N. Rawlins; Tasha A. Kama; Riki Hokama; Alice L. Lee; Mike J. Molina; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura
Subject: Hawaii Wildlife v. County, GET-26
Attachments: 2019.09.03 SRR Testimony.pdf

Aloha, Please accept for consideration the attached written testimony on the subject case.

Mahalo, Scott Rollins

September 2, 2019

Councilmember Mike Molina, Chair
Governance, Ethics, and Transparency Committee
200 South High Street, 8th Floor
Wailuku, Hawaii 96793

**SUBJECT: Hawaii Wildlife Fund, Et. Al. v. County of Maui, Civil 12-00198 SOM BMK,
U.S. Supreme Court Docket 18-260 (GET-26)**

Aloha Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and Members of the Committee:

My name is Scott Rollins, I've been a registered civil engineer for 35 years, I've worked for the County for nearly 21 years. I am the current acting chief of the Maui County DEM Wastewater Reclamation Division.

Like a large percentage of our staff, I love the ocean and what it has to offer. I surf in it, swim in it, boat in it and snorkel. I'm as much of an environmentalist as any of you. That is exactly why our division does this job of cleaning up the mixture of water, waste, chemicals, detergents and other nasty stuff that everyone just sends down the drain and forgets about. We are not the polluters some would like you to think, we all work hard every day to be environmental stewards for the people of this County.

The Hawaii Wildlife, et al., v. County of Maui case has come down to one primary question: Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. Different courts in different jurisdictions have differing judgements. That is why we are here now. That is all the Supreme Court has said it will rule on. We should all feel fortunate that the Supreme Court has chosen to hear this case to lend clarity on one of the landmark pieces of legislation ever passed in our Country.

You need to remember that the Supreme Court decision has nothing to do with perceived harm to the environment, whether we should grow our recycled water program or what standards need to be met in a discharge. It is about the type of permit, or permits that we will operate under in the future. The plaintiff's are already getting what they claim they wanted to achieve as both the Mayor and you, the Council, have approved projects to expand reuse in Lahaina. The fact that they are attempting to renege on the agreement with the County that we retain the right to appeal this case to the Supreme Court is appalling to me. They could ask, that would be fine, but this misleading political PR campaign is an embarrassing deviation to our legal process.

This county-wide reuse expansion mandate is going to cost sewer rate payers a substantial amount of money over the next few years. I expect sewer rates to double once again within ten years (like with the Consent Decree) if we want to achieve our goals (unless tax money is also sent our way to assist.) If we have to get an NPDES permit due to a settlement, or even if upheld by the Supreme Court, that doubling may be required within six years down the road in efforts to meet requirements. We take this job seriously. Yes reuse expansion has crawled along the last few years, but I think you would agree that that was a better choice than letting our sewer infrastructure suffer and dealing with raw sewage spills on our roadways and our ocean.

A lot is being said about the interpretation of the Clean Water Act and who this will effect (cesspool owners, septic owners, infiltration basin owners, R-1 near the ocean, land application of excess R-1, SAT

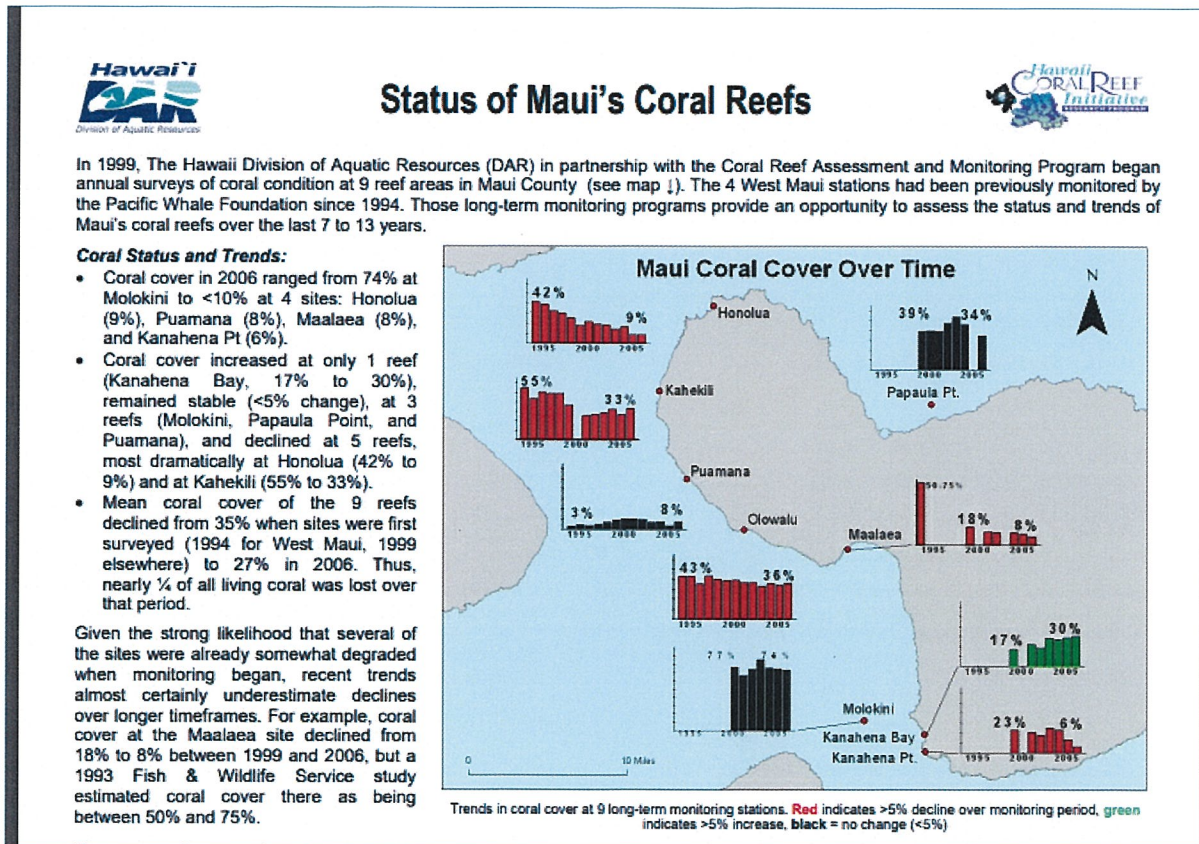
basins for effluent disposal instead of injection wells etc.) I think we are in this together, anyone discharging to groundwater should be treated the same and get a required permit no exceptions.

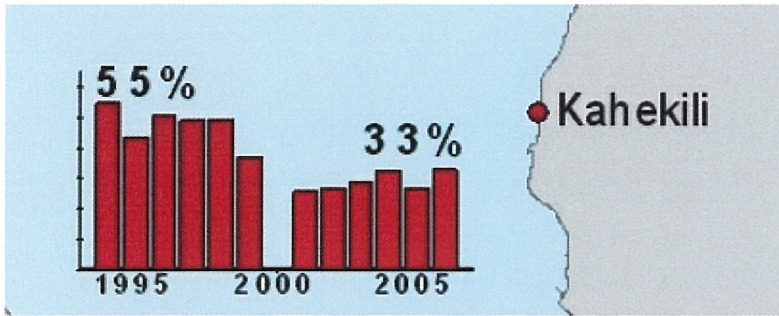
Instead of reiterating what other coworkers, our corporation counsel and the other engineering/environmental consultants here to support going to the supreme court will say, I want to cover a few items that have been overlooked, misrepresented or maybe you haven't considered.

I dislike misinformation, omitted information and jumping to conclusions. I believe everyone should discover data and information on their own, make their own decisions, and just don't believe what they are told and be led down the path. Let's run through some of the things we've seen over the last few months:

Coral coverage

This DAR publication has been a popular showpiece used by our plaintiffs. Taken at face value it might alarm the casual reader. The red graph for Kahekili shows a great decrease in the coral cover during the time period shown.





Obviously, something devastating happened in the 1999 to 2000 time period to reduce the percentage coverage (runoff, El Nino, bleaching, some or all??). Similar drops occurred at other sites on the island as well during this time frame. It's curious to point to the injection wells as they

had been in use since the early 80's. Can they really be the cause? Wait this data stops at 2006. Flash forward with more recent data from this 2015 report by DAR...

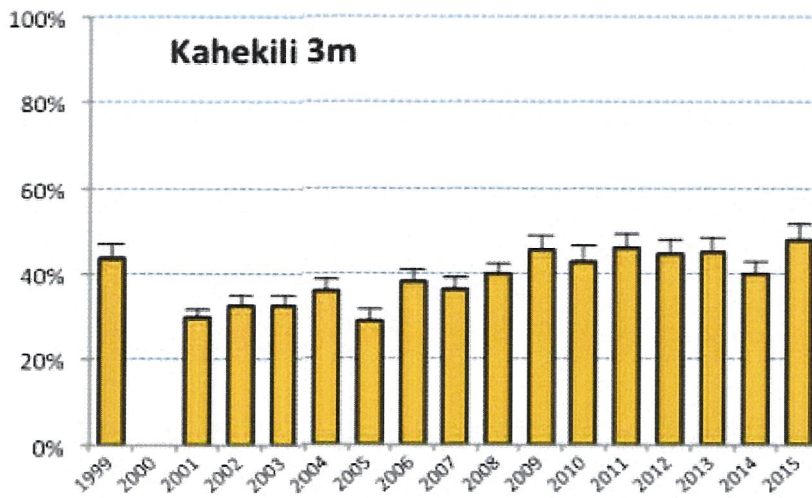
DAR
Hawaii Division of Aquatic Resources

Maui and Lanai Monitoring Report

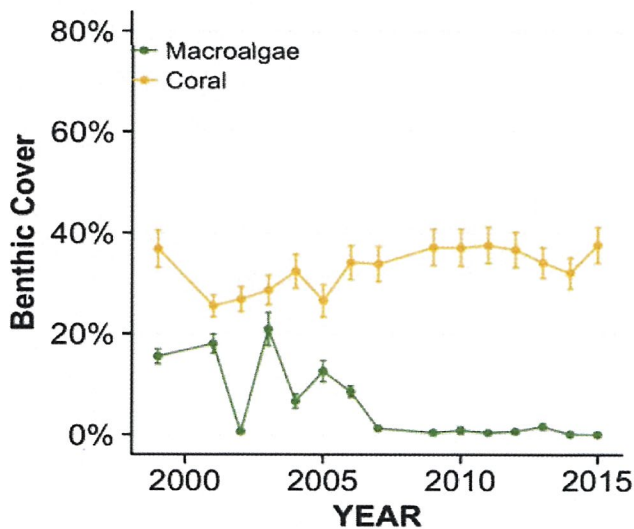
December 2015
(Includes monitoring data from 1998-2015)

**Department of Land and Natural Resources
Division of Aquatic Resources, Maui Office
130 Mahalani Street
Wailuku, HI 96768**

[https://dlnr.hawaii.gov/dar/files/2016/07/Maui Mon Report.pdf](https://dlnr.hawaii.gov/dar/files/2016/07/Maui_Mon_Report.pdf)



Amazing how ten more years of data puts another slant on the condition of the reef at this location, showing it at its highest level. Ask yourself, did the injection wells change in operation? No. What caused this?



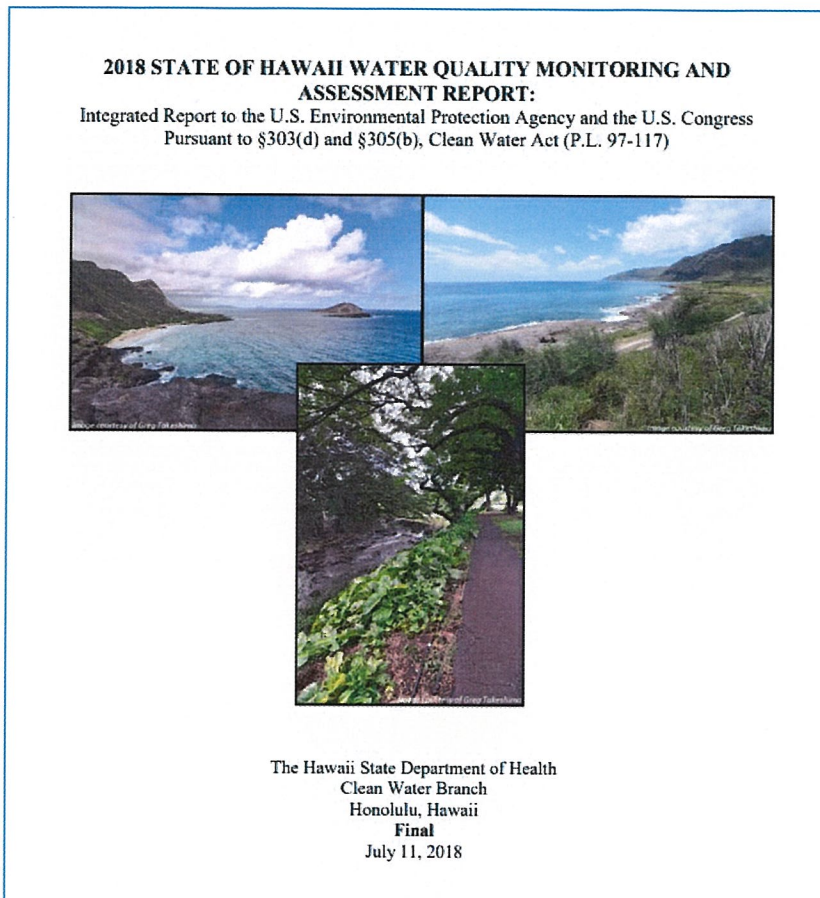
Another graph from this report showing coral at a high in the 17-year period, macro algae at a low. The DLNR has done a great job in getting the herbivore population growing again and look at the results. Can you truly say the injection wells are causing harm based on this data? No. Why don't plaintiffs show these graphs?

The main thing I want to point out is data has been omitted from presentations, it has been manipulated, and you should research, read and form your own independent opinion.

Hawaii Water Quality Monitoring and Assessment Report:

This report from the State DOH is rarely cited by anyone but is an important statewide condition assessment:

<https://health.hawaii.gov/cwb/files/2018/09/Final-2018-State-of-Hawaii-Water-Quality-Monitoring-Assessment-Report.pdf>



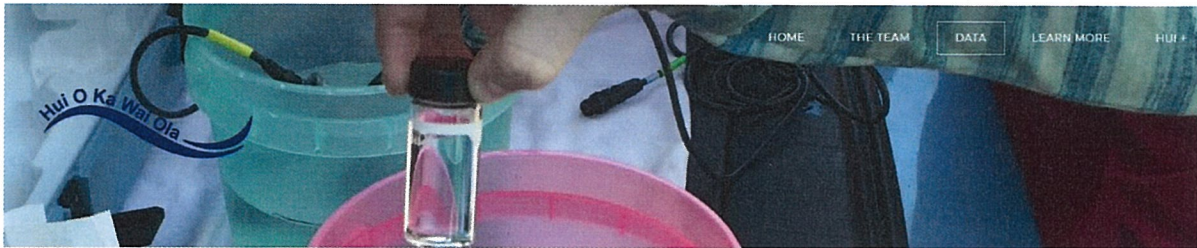
It shows that Kahekili Beach (where the seeps are located) attains the ocean water quality standards for Total Nitrogen, Total Phosphorus, NH₄, Chlorophyll a and Enterococcus. (Note that Kahekili is only one of two sites that were not impaired for Total Nitrogen while 25 locations were.)

The site is impaired for two constituents, (1) Nitrate-Nitrite, but so are 39 of 39 sites in Maui watersheds island wide and (2) Turbidity. Similarly, 91 of 91 sites are impaired island wide

*Watershed Assessment Unit with Individual Water Bodies	Water Body ID	Water Body Type	Wet/Dry Criteria	Enterococcus	TN	NO ₃ +NO ₂	NH ₄	TP	Turbidity	Chl <i>a</i>	Other Pollutants	Category	TMDL Priority
*Kihei Coast-Mokulele	HIW00042	C	Dry	-	N	N	-	-	N	N		3,5	L
WAHIKULI WATERSHED	TBD	C	Wet	A	A	N	A	A	N	A		2,5	M
*Hanaka'o'o Beach Co. Park	HI797917	C	Wet	N	A	N	N	A	N	A		2,5	M
*Kaanapali (Kahekili Beach)	HI643627	C	Wet	A	A	N	A	A	N	A		2,5	M
*Kaanapali (Sheraton Kaanapali Shoreline)	HIW00022	C	Wet	A	A	N	N	A	N	A		2,5	M

To me this says something else is going on to affect the ocean, but you make up your own mind – do your own research.

Here is a good website for third party data: The Hui O Ka Wai Ola.com site. Interesting data and great graphs, makes it simple to get a birds eye look of quality vs. the standards at 39 different sites around Maui. The State DOH data website is good as well.



Explore Maui's Water Quality

<https://www.huiokawaiola.com>

Seep test data:

Have you ever seen the actual data? Analyzed it? Or just believe what you were told? It is fascinating. One thing that jumped out is that during the first year of seep testing the geometric mean of Total Nitrogen (TN) was about 91 micro grams/l - A remarkable 98 % reduction from the input at the injection wells (which was approximately 6000 micro grams/l). This showed that the earth is an excellent additional level of treatment for our R-1 water. The additional 86 days to 4 years of travel time for water to reach the ocean is valuable to the process, allowing naturally occurring de-nitrifiers in the soil to do their work. This was somewhat discouraging to the testers who learned that excessive nitrogen may not be the issue they touted for years.

EPA issues what type of permit?

Changing gears a bit, in the early nineties there were some algae blooms in west Maui. Tetra Tech did a radioactive dye test to see if treated wastewater had reached the ocean. The results were inconclusive, they may have had two positive id's, but it couldn't be confirmed. We look back on it now and might think they were looking in too deep of water. That may be true, but with the study, the EPA, the enforcers of the Clean Water Act, decided to give us a permit, **not** an NPDES permit mind you, but a federal Underground Injection Control Permit (UIC). A pretty clear indication that the NPDES program does not cover this type of discharge to groundwater. When coupled with their recent statement, I think it is very clear this type of discharge does not need an NPDES Permit. DOH agrees, all our colleagues and environmental engineering consultants we've conferred with agree. In my opinion the current 9th circuit ruling is stuffing a square peg into a round hole confusing the agencies that administer the program, and

in the process taking away Hawaii's right (and the other states in the 9th circuit) to regulate our groundwater through more applicable programs like the UIC process.

Future

If for some irrational reason it is decided that this case be settled, or if we go to the supreme court (like I whole heartedly believe we should) and do not receive a favorable judgement what could really happen? DOH isn't sure. Meetings with them thus far point to the them requiring ocean water quality at the injection well input. This would be impossible to achieve rendering the wells unusable without violations. We are required to have a 100% backup method for disposal so I believe our only reasonable alternative would be to build an outfall at great expense. We know that with our water quality we would easily meet a properly applied NPDES permit for outfall discharge. Do you want people to say that Maui has turned to this form of disposal? Or maybe we should write regulations for the state and return treated water to the drinking water supply?

Reuse is a great use of this resource, but remember, we **cannot** put out of spec water into a reuse system when we have a plant upset or when equipment or basins are out of service for maintenance. It needs to go somewhere. We can't pump water to users or do land application during winter rainstorms, while higher than normal flows will still enter the plant. It needs to go somewhere. We need an alternative with workable conditions. Injection wells with modified UIC permit requirements have been discussed with DOH and are workable for all sides.

In the end this leads us back to money. If we need an NPDES, an outfall is estimated to cost at least \$130 million. Multiply that by four treatment plants. Where does that money come from? Certainly not the plaintiffs. It will end up as bill to rate payers and taxpayers. To us and our children.

We owe it to our citizens to get this right. We need to have highly trained and experienced judges interpret the law. I urge you to think carefully, form your own opinion and support our appeal to the Supreme Court.

Mahalo,



Scott R. Rollins