

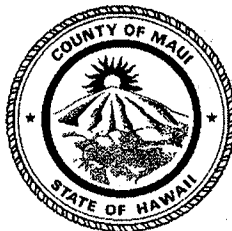
GET-26

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Mayor

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COUNTY OF MAUI

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May 2, 2019

T O: Mike Molina, Chair
Governance, Ethics, and Transparency Committee

F R O M: Richelle M. Thomson, Deputy Corporation Counsel *RThomson*

SUBJECT: **GET-26** Hawaii Wildlife Fund et al., v. County of Maui, Docket No. 18-260, Supreme Court of the United States (PRL-1(20))

This memo is to provide notification to the GET Committee that a settlement proposal/revision has been received by this office in the above-identified matter.

The terms of the proposal are consistent with the prior settlement authority approved by the County Council pursuant to Resolution 15-75 and Resolution 15-107, and which resulted in the attached Settlement Agreement and Order, which was lodged by the Hawaii District Court on September 24, 2015.

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Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAI'I

HAWAI'I WILDLIFE FUND, a)	CIVIL NO. 12-00198 SOM BMK
Hawai'i non-profit corporation,)	
SIERRA CLUB - MAUI GROUP, a)	SETTLEMENT AGREEMENT AND
non-profit corporation, SURFRIDER)	[PROPOSED] ORDER RE:
FOUNDATION, a non-profit)	REMEDIES; EXHIBIT A;
corporation, and WEST MAUI)	CERTIFICATE OF SERVICE
PRESERVATION ASSOCIATION, a)	
Hawai'i non-profit corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
COUNTY OF MAUI,)	
)	
Defendant.)	

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

SETTLEMENT AGREEMENT AND [PROPOSED] ORDER RE: REMEDIES

WHEREAS, on April 16, 2012, Plaintiffs Hawai‘i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation, and West Maui Preservation Association (collectively, “Plaintiffs”) filed a Complaint against Defendant County of Maui (“Defendant”), since amended, alleging violations of section 301(a) of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), and Haw. Rev. Stat. § 342D-50(a) associated with the discharge into the nearshore ocean waters of West Maui of wastewater from injection wells operated by Defendant at the Lahaina Wastewater Reclamation Facility (“LWRF”), which is located at 3300 Honoapi‘ilani Highway, Lahaina, Hawai‘i 96761;

WHEREAS, Defendant maintains it has authorization under State and federal Safe Drinking Water Act permits for its four underground injection control wells that allows Defendant to discharge treated wastewater to groundwater that has a hydrological connection to navigable waters;

WHEREAS, on May 30, 2014 and January 23, 2015, the Court found that Defendant’s discharges of treated wastewater from each of the LWRF injection wells without a National Pollutant Discharge Elimination System (“NPDES”) permit violate the CWA;

WHEREAS, on June 25, 2015, the Court held Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required;

WHEREAS, Plaintiffs and Defendant (collectively, “the Parties”) have agreed to enter into this Settlement Agreement and Order Re: Remedies (“Agreement”), without any admission of fact or law; and

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the remaining issues related to remedies without protracted litigation;

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PLAINTIFFS AND DEFENDANT, AND THE COURT ORDERS AS FOLLOWS:

1. This Agreement resolves all remaining issues in the remedies phase of the above-captioned lawsuit. The effective date (“Effective Date”) of this Agreement is the date the Agreement is entered by the Court.

DEFENDANT’S RESERVATION OF RIGHT TO APPEAL

2. By entering into this Agreement, Defendant does not admit liability. The Parties agree Defendant reserves the right to appeal any and all rulings of this Court other than the entry of this Agreement, including the Court’s rulings on liability and fair notice.

3. Appeals may be made to the Court of Appeals for the Ninth Circuit and the Supreme Court.

4. Defendant's obligations under Paragraph 8 shall be triggered by this Court's entry of this Agreement. Defendant's obligations under Paragraphs 9 through 13 herein are triggered by a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required. For purposes of this Agreement, the phrase "Final Judgment" is defined as in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(G).

5. In the event of a remand, the Parties agree that the remedies provided for in this Agreement control and are binding, that no additional remedies shall be assessed and that this Agreement and the remedies provided herein resolve all remaining issues regarding the remedy phase of the above-captioned lawsuit. Notwithstanding the foregoing, neither Party waives its right to litigate any remanded issue(s), including a liability determination as to any well or a ruling on fair notice.

LIMITATION ON FUTURE ACTIONS PENDING APPEAL

6. From the date of execution of this Agreement through Final Judgment, Plaintiffs shall not bring any claim in any State or federal court against

Defendant seeking additional civil penalties or injunctive or declaratory relief for alleged violations under State or federal law based on the lack of an NPDES permit for the LWRF's injection wells.

7. No penalties shall accrue or otherwise be imposed in this action from the Effective Date through the Final Judgment.

NPDES PERMIT

8. Defendant shall make good faith efforts to secure and comply with the terms of an NPDES permit for the LWRF injection wells. Such good faith efforts shall include, but not be limited to, cooperating in good faith with the Hawai'i Department of Health to secure an NPDES permit, including providing additional information when requested. Defendant's obligations under this paragraph as to any well shall cease only in the event of a Final Judgment that discharges of treated wastewater from that well without an NPDES permit do not violate the CWA.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

9. In the event of a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required, Defendant shall fund and implement one or more projects located in West Maui, to be valued at a minimum

of Two Million Five Hundred Thousand Dollars (\$2.5 million), the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui. Examples of projects that would further this purpose include, but are not limited to, expansion of the R-1 distribution system for the LWRF's treated wastewater and indirect or direct potable reuse. Projects under this Agreement shall not include projects already required to be implemented by third parties.

10. No later than thirty (30) days following the Final Judgment as provided for in Paragraphs 4 and 9, the Parties shall meet and confer (in-person not required) in a good faith effort to reach agreement on one or more projects that further the purpose set forth in Paragraph 9, which agreement shall not be unreasonably withheld. If the Parties are unable to reach agreement within sixty (60) days of the Final Judgment as provided for in Paragraphs 4 and 9, Defendant shall, within ninety (90) days thereafter, instead pay a penalty of Two Million Five Hundred Thousand Dollars (\$2.5 million) to the U.S. Treasury. If the Parties reach agreement on one or more projects that do not meet the Two Million Five Hundred Thousand Dollars (\$2.5 million) value threshold, the balance shall be paid to the U.S. Treasury (for example, if a mutually agreed-upon project is valued at \$1.5 million, with no agreement as to other projects, Defendant would submit a \$1.0 million penalty payment to the U.S. Treasury).

11. No later than two (2) years following a Final Judgment as provided for in Paragraphs 4 and 9, Defendant shall complete the design of the project(s) agreed upon pursuant to Paragraph 10. Defendant shall complete the construction of those project(s) no later than five (5) years of the Final Judgment.

12. Defendant shall provide notification to Plaintiffs in accordance with Paragraph 27 when design of the project(s) is complete and when construction is complete.

CIVIL PENALTIES

13. In the event of a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required, Defendant shall pay a penalty in the amount of One Hundred Thousand Dollars (\$100,000.00) to the U.S. Treasury within ninety (90) days of the Final Judgment.

DELAY IN PERFORMANCE AND STIPULATED PENALTIES

14. Unless excused due to a Force Majeure event as defined below, Defendant shall be liable for Stipulated Penalties for each day it fails to comply with any of its obligations under Paragraph 11, as follows:

- a. \$250 per day for the first 15 days;

- b. \$500 per day for days 16 to 60; and
- c. \$1,000 per day for days 61 and beyond.

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

- a. Plaintiffs may seek Stipulated Penalties under this Section by making a written demand. Plaintiffs shall send notice to Defendant in accordance with Paragraph 27 that Plaintiffs intend to seek Stipulated Penalties and stating the basis for Plaintiffs' demand.
- b. If Defendant disputes Plaintiffs' demand for Stipulated Penalties, the Parties shall meet and confer (in-person not required) in a good faith effort to resolve the dispute. If the Parties are unable to resolve their dispute within ten (10) days after receipt of the written notice, Plaintiffs may submit the dispute to the Court for resolution. Stipulated Penalties shall continue to accrue during the Court's resolution of any dispute, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

- i. If Plaintiffs prevail in whole or in part in a Court action regarding Stipulated Penalties, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within thirty (30) days of receiving the Court's decision or order, except as provided in subparagraph ii., below. Defendant shall also pay Plaintiffs' costs of litigation (including reasonable attorneys' fees).
- ii. If any party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) days of receiving the final appellate court decision. If Plaintiffs prevail in whole or in part in an appeal regarding Stipulated Penalties, Defendant shall also pay Plaintiffs' costs of litigation (including reasonable attorneys' fees).
- c. If Defendant does not dispute Plaintiffs' demand for Stipulated Penalties, within thirty (30) days of service of the written demand, Defendant shall pay the Stipulated Penalty set forth in Plaintiffs' demand.

- d. Defendant shall pay any Stipulated Penalties by certified check or cashier's check in the amount due, payable to: Hawai'i Department of Health, Environmental Response Revolving Fund and provide timely proof of payment to Plaintiffs in accordance with Paragraph 27.

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

FORCE MAJEURE

17. A "Force Majeure event" is any event beyond the control of Defendant, Defendant's employees, consultants or contractors, or any entity controlled by Defendant, that delays or prevents the performance of any obligation under this Agreement despite Defendant's best efforts to fulfill the requirements of the Agreement and includes, but is not limited to, acts of God or war. "Best efforts" includes anticipating any potential Force Majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize to the greatest extent possible any resulting delay in fulfillment of the requirements of the Agreement. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Agreement.

18. If and to the extent Defendant is prevented from performing any of its obligations under Paragraph 11 by a Force Majeure event, while Defendant is so prevented, Defendant shall be relieved of its obligations to perform and pay Stipulated Penalties, but shall make its best efforts to continue to perform its obligations under this Agreement as far as reasonably practicable.

19. If and to the extent Defendant suffers a delay in performing as a result of a Force Majeure event, Defendant shall be entitled to a reasonable extension of time to complete performance.

20. Defendants shall provide timely notice orally or by electronic transmission as soon as practicable, after the time Defendant first knew of, or by the exercise of due diligence, should have known of, a claimed Force Majeure event.

21. Defendant shall also provide notice to Plaintiffs in accordance with Paragraph 27 within seven (7) business days of the time Defendant first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state the nature and duration of the Force Majeure event, its cause(s), the anticipated delay of performance of any obligation(s) under Paragraph 11, a schedule for carrying out those obligations, and Defendant's rationale for attributing the delay to a Force Majeure event.

22. If Defendant provides notice of a claimed Force Majeure event in accordance with Paragraphs 20 and 21, Plaintiffs shall, within a period not to exceed twenty (20) days from the date of Defendant's notice of the event, provide a response to Defendant in accordance with Paragraph 27 about whether Plaintiffs agree that a Force Majeure event has occurred. Plaintiffs "agree that a Force Majeure event has occurred" when they agree with Defendant in writing as to both the nature and duration of the event.

23. If Plaintiffs fail to provide a written response to Defendant within the twenty (20) day period provided for in Paragraph 22, Plaintiffs will have been deemed to agree with Defendant's determination that a Force Majeure event has occurred.

24. If Defendant provides notice of a claimed Force Majeure event in accordance with this Agreement and:

- a. Plaintiffs timely agree that a Force Majeure event has occurred as provided in Paragraph 22, the Parties may agree to extend the time for Defendant to come into compliance with the Agreement by making the appropriate modification via stipulation pursuant to Paragraph 32; or
- b. Plaintiffs do not agree that a Force Majeure event has occurred or fail to timely provide the response pursuant to Paragraph 22,

Defendant may, within thirty (30) days of receipt of written notice of the disagreement or the deadline for Plaintiffs' response, file a written motion with the Court seeking an extension of time to perform. If Defendant does not file a motion within that time frame, Defendant waives its claim that a Force Majeure event has occurred.

25. To prevail on any written motion under Paragraph 24(b), Defendant bears the burden of proving, by clear and convincing evidence, that any claimed Force Majeure event is a Force Majeure event, that Defendant gave the notice required by this Agreement, that the Force Majeure event caused any delay in Defendant's performance of any obligation under Paragraph 11 that Defendant claims was attributable to that event, and that Defendant exercised best efforts to avoid or minimize any delay caused by the event.

26. When Plaintiffs agree or the Court rules that a Force Majeure event has occurred that delays performance of an obligation under Paragraph 11, Defendant shall not be liable for Stipulated Penalties for the time period of the delay caused by the Force Majeure event.

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ADDRESSES FOR NOTICES, SUBMISSIONS, OTHER COMMUNICATIONS

27. Unless otherwise specified herein, whenever notifications, submissions, and/or communications are required by this Agreement, they shall be in writing, and be addressed and sent via U.S. Mail or electronic mail as follows:

To Plaintiffs, via Plaintiffs' attorney of record:

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

To Defendant, via Defendant's attorney of record:

Patrick K. Wong
Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawai'i 96793
Phone: (808) 270-7740
Email: pat.wong@co.maui.hi.us and corpoun@co.maui.hi.us

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

ATTORNEYS' FEES AND COSTS

29. Within thirty (30) days of the Effective Date, the Parties will meet and confer (in-person not required) in a good faith effort to reach agreement as to the amount of Plaintiffs' costs of litigation (including reasonable attorneys' and expert

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

30. Defendant shall not be required to pay Plaintiffs' attorneys' fees and costs until ninety (90) days following Final Judgment. During any appeals period, interest on any award of attorneys' fees and costs shall be calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until ninety (90) days following Final Judgment.

ENFORCEMENT OF THIS AGREEMENT

31. This Court has jurisdiction to enforce the terms of this Agreement. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

32. This Agreement may be modified by the Court upon good cause shown by written stipulation between the Parties filed with and approved by the Court.

33. In the event that either Party seeks to enforce the terms of this Agreement, including any of the deadlines for any action set forth herein, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either Party believes that the other Party has failed to comply with any term or

condition of this Agreement, the Party raising the dispute, or seeking enforcement, shall provide the other Party with written notice of the claim. The Parties agree that they will meet and confer (in-person not required) at the earliest possible time in a good faith effort to resolve the claim before bringing any matter to the Court. If the Parties are unable to resolve the claim within ten (10) days after the notice, either Party may bring the claim to the Court.

ENTRY OF AGREEMENT

34. Upon the Government's confirmation of no objection to, or no action on, this Agreement within forty-five (45) days of receipt of this Agreement pursuant to 40 C.F.R. § 135.5, the Court shall enter this Agreement and enter judgment in this action. The Parties shall not withdraw their consent to this Agreement during the period of Governmental review of this Agreement without further notice; provided, however that either Party has the right to withdraw its consent to this Agreement if, prior to entry, the Court changes or the Government objects to any term or provision of this Agreement.

EPA FOIA DOCUMENTS


35. Plaintiffs agree that all EPA FOIA documents obtained by the County in response to a May 2, 2014, FOIA request that were submitted to the Court are authentic and that Plaintiffs will not challenge the authenticity of the documents.

A listing of all EPA FOIA documents that were submitted to the Court is attached hereto and incorporated herein as Exhibit A.

AUTHORIZATION TO SIGN

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

COUNTY OF MAUI
200 South High Street
Wailuku, Maui, Hawai'i 96793

By: 
ALAN M. ARAKAWA
Its Mayor


9/24/15
DATE

EARTHJUSTICE
DAVID L. HENKIN
SUMMER KUPAU-ODO
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813

By: /s/ David L. Henkin
DAVID L. HENKIN
Attorneys for Plaintiffs Hawai'i Wildlife
Fund, Sierra Club – Maui Group,
Surfrider Foundation, and
West Maui Preservation Association

9/24/15
DATE

APPROVED AS TO FORM AND LEGALITY

By: 
RICHELLE M. THOMSON
Deputy Corporation Counsel
Attorney for Defendant
County of Maui

9/24/2015
DATE

DATED: _____

SUSAN OKI MOLLWAY
UNITED STATES CHIEF DISTRICT JUDGE

Hawai'i Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM-BMK
(D. Haw.); SETTLEMENT AGREEMENT AND [PROPOSED] ORDER RE:
REMEDIES; EXHIBIT A