

REQUEST FOR LEGAL SERVICES

Date: November 28, 2023
From: Tom Cook, Chair
Water and Infrastructure Committee


TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Caleb P. Rowe, Esq.

Subject: PROPOSED CD1 VERSION OF BILL 120 (2023), RELATING TO THE ISSUANCE OF A MANAGEMENT RIGHT-OF-ENTRY FOR THE LAHAINA WILDFIRE DISPOSITION PROJECT (WAI-15)

Background Data: Please see revised bill. Please submit your response to wai.committee@mauicounty.us with a reference to WAI-15.

Work Requested: ☒ FOR APPROVAL AS TO FORM AND LEGALITY
☐ OTHER:

Requestor's signature  Tom Cook, Chair	Contact Person <u>Jarret Pascual or Richard E. Mitchell</u> (Telephone Extension: <u>7141 or 7662, respectively</u>)
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☐ ROUTINE (WITHIN 15 WORKING DAYS) ☐ RUSH (WITHIN 5 WORKING DAYS)
☐ PRIORITY (WITHIN 10 WORKING DAYS) ☐ URGENT (WITHIN 3 WORKING DAYS)

☒ SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): December 6, 2023
REASON: For posting on the December 15, 2023, Council agenda

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO:	ASSIGNMENT NO.	BY:
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TO REQUESTOR: ☐ APPROVED ☐ DISAPPROVED ☐ OTHER (SEE COMMENTS BELOW)
☐ RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

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

DEPARTMENT OF THE CORPORATION COUNSEL

Date _____

By _____
(Rev. 7/03)

wai:ltr:015acc01:jpp

Attachment

ORDINANCE NO. _____

BILL NO. 120, CD1 (2023)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF
THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL
AGREEMENT WITH THE STATE OF HAWAII, DEPARTMENT OF
LAND AND NATURAL RESOURCES, REGARDING THE
ISSUANCE OF A MANAGEMENT RIGHT-OF-ENTRY
FOR THE LAHAINA WILDFIRE FINAL DISPOSITION PROJECT

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Purpose. The County of Maui (“County”) has requested and received a management right-of-entry to the parcels, identified as tax map key numbers (2) 4-8-003:007 and (2) 4-8-003:008 (portion), located in Olowalu, Maui, Hawaii, to allow for wildfire debris landfill and ancillary purposes.

The State of Hawaii Board of Land and Natural Resources, at its meeting of October 27, 2023, granted the County a management right-of-entry permit and a copy of the terms of the agreement is attached and incorporated as Exhibit “1” (“Agreement”).

Section 2.20.020, Maui County Code, provides that unless authorized by ordinance, the Mayor must not enter into any intergovernmental agreement or any amendment that places a financial obligation on the County or any department or agency. Additionally, paragraphs 6 and 10 of the Agreement requires the County to defend, indemnify, and hold harmless the State of Hawaii, Department of Land and Natural Resources, for actions related to the Agreement.

SECTION 2. Authorization. The Council of the County of Maui authorizes the Mayor or his authorized representative to execute the Agreement, attached

as Exhibit “1,” and all other necessary documents relating to it, and any amendments.

SECTION 3. Effective date. This Ordinance takes effect on approval.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

wai:misc:015abill01:jpp

INTRODUCED BY:

A handwritten signature in cursive script, appearing to read "Alice L. Lee", written over a horizontal line.

ALICE L. LEE

Upon the request of the Mayor.

EXHIBIT "1"

JOSH GREEN, M.D.
GOVERNOR | KE KUA'ĀINA

SYLVIA LIUKE
LIEUTENANT GOVERNOR | KA HOPE KUA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P O BOX 821
HONOLULU, HAWAII 96809

October 30, 2023

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
LAURA H.E. KAAKUA
FIRST DEPUTY
M. KALEO MANUEL
DEPUTY DIRECTOR - WATER
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES
ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

PSF 23MD-109 & 110
ROE 4574

IMMEDIATE MANAGEMENT RIGHT-OF- ENTRY PERMIT

Mr. Shayne Agawa, Director
Department of Environmental Management
County of Maui
2200 Main Street
Wailuku, HI 96793

Attention: Sage Kiyonaga and Michael Kehano, DEM Solid Waste Division

Dear Mr. Agawa,

SUBJECT: Issuance of Immediate Management Right-of-Entry to County of Maui for the Lahaina Wildfire Final Disposition Project; Olowalu, Maui, Tax Map Key No. (2) 4-8-003:007 and portion of 008 (Parcel 8).

We are pleased to advise you that on Friday, October 27, 2023, under agenda items D-9 and D-10, the Board of Land and Natural Resources approved the Issuance of an Immediate Right-of-Entry Permit to the County of Maui (APPLICANT) for wildfire debris landfill and ancillary purposes.

The APPLICANT, is hereby granted a right-of-entry permit to utilize the subject lands that include all of parcel 007 consisting of 52 acres and a 0.7-acre portion of parcel 008 further identified in the attached exhibit subject to the following terms and conditions:

1. This right-of-entry shall be effective upon APPLICANT's execution of this Board-approved immediate management right-of-entry permit (ROE) and shall expire in one year or upon execution of the set-aside of government lands by Governor's Executive Order for the Proposed Lahaina Wildfire Final Disposition Project site, whichever shall first occur. The Chairperson is authorized to continue the ROE for additional one-year periods for good cause shown.
2. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall procure, at their own cost and expense, and maintain during the entire period of this right-of-entry, from an

insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not less than "A- VIII" or other comparable and equivalent industry rating, a policy or policies of general liability insurance or its equivalent, in an amount of at least \$1,000,000 for each occurrence and \$2,000,000 aggregate, and with coverage terms acceptable to the Chairperson of the Board of Land and Natural Resources (Board). The policy or policies of insurance shall name the State of Hawaii as an additional insured and a copy shall be filed with the State of Hawaii, Department of Land and Natural Resources (Department). The insurance shall cover the entire premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the premises in the use or control of APPLICANT, its consultants, contractors and/or persons acting for or on its behalf. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall furnish the Department with a certificate(s) showing the policy(s) to be initially in force, keep certificate(s) on deposit during the entire period and furnish a like certificate(s) upon each renewal of the policy(s). This insurance shall not be cancelled, limited to scope of coverage, or nonrenewed until written notice has been given to the Department. The Department shall retain the right at any time to review the coverage, form, and amount of the insurance required. If, in the opinion of the Department, the insurance provisions in this right-of-entry do not provide adequate protection for the Department, the Department may require APPLICANT, its consultants, contractors and/or persons acting for or on its behalf to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Department's requirements shall be reasonable but be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The Department shall notify APPLICANT, its consultants, contractors and/or persons acting for or on its behalf in writing of changes in the insurance requirements and APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall deposit copies of acceptable insurance policy(s) or certificate(s) thereof, with the Department incorporating the changes within receipt of the notice. The procuring of the required policy(s) of insurance shall not be construed to limit APPLICANT, its consultants, contractors and/or persons acting for or on its behalf, liability under this right-of-entry nor to release or relieve APPLICANT, its consultants, contractors and/or persons acting for or on its behalf of the indemnification provisions and requirements of this right-of-entry. Notwithstanding the policy(s) of insurance, APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall be obligated for the full and total amount of any damage, injury, or loss caused by APPLICANT, its consultants, contractors and/or persons acting for or on its behalf negligence or neglect connected with this right-of-entry.

3. At all times herein, APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall keep the right-of-entry area or premises in a strictly clean, sanitary and orderly condition.
4. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall be responsible for cleaning and restoring the area or premises to its original condition or a condition satisfactory to the Department upon completion of the day's event. All trash shall be removed from the area or premises.

5. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the right-of-entry area or premises, now in force or which may be in force.
6. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall indemnify, defend, and hold the State of Hawaii, Department of Land and Natural Resources harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: (1) any act or omission on the part of APPLICANT, its consultants, contractors and/or persons acting for or on its behalf relating to the use, occupancy, maintenance, or enjoyment of the right-of-entry area or premises by APPLICANT, its consultants, contractors and/or persons acting for or on its behalf; (2) any failure on the part of APPLICANT, its consultants, contractors and/or persons acting for or on its behalf to maintain the right-of-entry area or premises and areas adjacent thereto in the use and control of APPLICANT, its consultants, contractors and/or persons acting for or on its behalf, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of APPLICANT, its consultants, contractors and/or persons acting for or on its behalf to maintain the area or premises in a safe condition; and (3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the non-observance or non-performance by APPLICANT, its consultants, contractors and/or persons acting for or on its behalf, of any of the terms, covenants, and conditions of this right-of-entry or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.
7. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf will be responsible for providing security for the right-of-entry area or premises during this event.
8. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall supply to Land Division a name and local telephone number of the contact person who can be reached at any time around the clock during this event.
9. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the right-of-entry area or premises any such materials except to use in the ordinary course of business of the APPLICANT, its consultants, contractors and/or persons acting for or on its behalf, and then only after written notice is given to the Department of the identity of such materials and upon the Department's consent which consent may be withheld at the Department's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by APPLICANT, its consultants, contractors and/or persons acting for or on its behalf, then the APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall be responsible for the cost thereof. In addition, APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall execute affidavits, representations and the like from time to time at the Department's request concerning the best knowledge and belief of APPLICANT, its consultants, contractors and/or

persons acting for or on its behalf, regarding the presence of hazardous materials on the right-of-entry area or premises placed or released by APPLICANT, its consultants, contractors and/or persons acting for or on its behalf.

10. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf agree to indemnify, defend and hold the State of Hawaii, Department of Land and Natural Resources harmless, from any damages and claims resulting from the release of hazardous materials on the right-of-entry area or premises occurring while APPLICANT, its consultants, contractors and/or persons acting for or on its behalf is/are in possession, or elsewhere if caused by APPLICANT, its consultants, contractors and/or persons acting for or on its behalf. These covenants shall survive the expiration or earlier termination of this right-of-entry.

For purposes of this right-of-entry, "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

11. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf in the exercise of this right-of-entry shall use appropriate precautions and measures to minimize inconveniences to surrounding residents, landowners, and the public in general.
12. All costs associated with the construction within the right-of-entry area or premises shall be the sole responsibility of the APPLICANT, its consultants, contractors and/or persons acting for or on its behalf.
13. APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall maintain and employ debris, pollution and contamination control measures, safeguards and techniques to prevent debris, pollution or contamination to the ocean waters, streams or waterways resulting from APPLICANT, its consultants, contractors and/or persons acting for or on its behalf use, maintenance, repair and operation of the right-of-entry area or premises, and shall take immediate corrective action in the event of such pollution or contamination to immediately remove the cause of such pollution or contamination, and shall immediately clean the right-of-entry area or premises and its surrounding waters of such pollutant or contaminant and restore to the Department's satisfaction the areas affected by such pollution or contamination, all at APPLICANT, its consultants, contractors and/or persons acting for or on its behalf own cost and expense.
14. In the event any unanticipated sites or remains such as bone or charcoal deposits, human burials, rock or coral alignments, pavings or walls are encountered the APPLICANT, its consultants, contractors and/or persons acting for or on its behalf shall stop work and contact the State Historic Preservations Division in Kapolei at (808) 692-8015 immediately.
15. In the event any historic properties or burial sites, as defined in section 6E-2, Hawaii Revised Statutes, are found on the premises, the APPLICANT and its agents, employees and

representatives shall immediately stop all land utilization or work or both and contact the Historic Preservation Office in compliance with chapter 6E, Hawaii Revised Statutes.

16. The parties acknowledge that reference made to persons acting for or on APPLICANT's behalf in paragraphs 2 (insurance requirement), 6 (indemnification), and 10 (indemnification, hazardous materials) of this document, does not include public officers and employees.
17. All disputes or questions arising under this right-of-entry shall be referred to the Chairperson of the Board of Land and Natural Resources for a determination and resolution of the dispute or question. The Chairperson's decision shall be final and binding on the parties herein.
18. This right-of-entry is revocable and terminable at any-time for any reason in the sole and absolute discretion of the Chairperson.
19. This right-of-entry or any rights hereunder shall not be sold, assigned, conveyed, leased, let, mortgaged, or otherwise transferred or disposed.
20. The Department of Land and Natural Resources reserves the right to impose additional, but responsible terms and conditions as it deems necessary while this right-of-entry is in force.

Should you have no objections to the above-mentioned items, kindly sign in the space provided below and submit copy of signed concurrence to the DLNR Maui Land Division Office. If you have any questions, please feel free to contact Daniel Ornellas, District Land Agent at (808) 984-8117.

Sincerely,



Dawn N. S. Chang
Chairperson

[Handwritten initials: DD, K, KM, RT]

We CONCUR:



Mr. Shayne Agawa, Director
Department of Environmental Management

Date: _____

Cc: Board Member Canto
Maui DOCARE
Maui DOFAW
MECO
Central / District Files