May 15, 2024

MEMO TO: Tasha Kama, Chair
Housing and Land Use Committee

F R O M: David Raatz, Director of Council Services DR

SUBJECT: **BILL 71 (2024), AMENDING SECTION 19.30A.050, MAUI COUNTY CODE, RELATING TO THE SIZE OF FARM DWELLINGS IN THE AGRICULTURAL DISTRICT** (HLU-30)

Introduction

The Committee faces a challenging and important policy decision with this item. But I wanted to take a moment to advise you that I do not see serious legal issues. I understand a possible takings concern has been raised.

Background on takings

Under the U.S. Constitution, the government must provide "just compensation" when it takes possession of property. A "classic taking" of property occurs through an eminent domain or condemnation action, when the government goes to court to receive legal title based on an agreement to compensate the property owner with a cash payment of the property's fair-market value.

A regulatory taking, or inverse condemnation, occurs when a land-use policy is so similar to a classic taking that the government must pay just compensation to satisfy the Constitution. By the attached correspondence dated June 30, 2021, the OCS legal team provided an overview of the legal framework for regulatory takings and provided this advice:

"Whenever consideration is given to an assertion that a Council action may result in a regulatory taking, we respectfully suggest time be given to this analysis."

The OCS legal team has given time to analyze the assertion that amending the Comprehensive Zoning Ordinance by limiting the cumulative size of two farm dwellings to 5,000 square feet—as proposed in the Amendment Summary Form listed on the May 15, 2024, HLU Committee agenda—may result in a regulatory taking.

A regulatory taking can be found under one of three legal theories. The *per se* theories of *Loretto* (physical invasion of property) and *Lucas* (loss of all economic use of property) would not apply to Bill 71's posted ASF. So, the third and final available theory, *Penn Central*, must be analyzed.

The *Penn Central* factors

The most important *Penn Central* case—based on its recency, analytical depth, and binding effect in Hawai'i—is *Bridge Aina Le',a, LLC v. Land Use Comm'n, 950 F.3d 610 (9th Cir. 2020).* In that opinion the U.S. Court of Appeals for the Ninth Circuit held that the Land Use Commission's reclassification of land from Urban to Agriculture was not a taking under *Penn Central.* The Ninth Circuit laid out the three factors under the fact-specific *Penn Central* theory before applying them to the LUC's action:

> *Penn Central* requires that we consider: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." 438 U.S. at 124, 98 S.Ct. 2646. Our consideration of these factors aims "to determine whether a regulatory action is functionally equivalent to the classic taking." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc) (internal quotation marks omitted).

The Ninth Circuit found that the first factor—economic impact—weighed against a taking because the property's value had only diminished by about 17 percent of its value. The court cited *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018), an opinion stating that "we have observed that diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking" and that no court "'has found a taking where diminution in value was less than 50 percent.'" (quoting *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011)).

So, a near-catastrophic loss in value is needed for a plaintiff to satisfy the first factor.

The court then applied the second factor, the regulation's interference with investment-backed expectations, noting that the assessment is "objective" and based on "reasonable," rather than "starry eyed," expectations. The relevant context is "the regulatory environment," the court said, citing a number of other opinions and offering this quote:

"[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end[.]" *Concrete Pipe & Prods.*, 508 U.S. at 645, 113 S.Ct. 2264 (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 3 L.Ed.2d 132 (1958))." 950 F.3d at 634.

The court found that the landowner was aware of the LUC's possible reversion, making expectations of massive, ongoing profits unreasonable. Thus, the second *Penn Central* factor also favored the LUC.

The third and final factor—the character of the governmental action—also tended to show there was no regulatory taking. The Ninth Circuit said courts must evaluate whether the governmental action "amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." 950 F.3d at 635-36 (citations omitted). The Ninth Circuit also said that "we recognize that government action that singles out a landowner from similarly situated landowners raises the specter of a taking." 950 F.3d at 636 (citations omitted). Even the though the reversion was not a generally applicable land-use policy, the court found the LUC's action was focused on promoting the common good because it was part of a "generally applicable scheme." *Id.*

The U.S. Supreme Court declined to review the Ninth Circuit's opinion, which provoked Justice Clarence Thomas to comment on the high bar to bring successful takings claims: "If there is no such thing as a regulatory taking, we should say so." *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731, 732, 209 L. Ed. 2d 163 (2021) (Thomas, J., dissenting from denial of cert.).

The *Penn Central* factors, as elucidated by the Ninth Circuit in *Bridge Aina Le'a, LLC,* were applied by U.S. District Court Judge Percy Anderson of California on April 26, 2024, in *1210 Cacique St., LLC v. City of Santa Barbara, et al.*, 2024 WL 2037143 (C.D. Cal. Apr. 26, 2024).

Judge Anderson had little apparent trouble in finding a generally applicable mobile-home ordinance was not a regulatory taking.

He found the property owner failed on the first factor of economic impact, despite alleging a 92.5% diminution in property value, illustrating the challenges plaintiffs face on this factor.

On the second factor of investment-backed expectations, Judge Anderson found the mobile-home owner should have known that new regulations were possible:

- "This factor must consider the extent to which the challenged regulation departs from or extends beyond past or conceivable future regulatory developments." 2024 WL 2037143, *4 (citation omitted).

- "Those who buy into a regulated field such as the mobile home park industry cannot object when regulation is later imposed." *Id.* (citation omitted).

- "The expectation that a property will be continually unencumbered by government regulation is unreasonable." *Id.* (citation omitted).

- "Simply put, when buying a piece of property, one cannot reasonably expect that property to be free of government regulation such as zoning . . ." *Id.* (citation omitted).

Applying the third *Penn Central* factor, character of the governmental action, Judge Anderson found the ordinance was more akin to a promotion of the public good than a physical invasion based on its general applicability.

Applying the *Penn Central* factors to Bill 71's posted ASF

A landowner challenging Bill 71's posted ASF, if enacted as an ordinance, would have difficulty in making plausible arguments under any of the three *Penn Central* factors for a regulatory taking.

First, the limitation on the size of farm dwellings would not have a major economic impact on any property owner. The ordinance would not require any existing activity to cease or any existing structure to be limited on any property. A diminution of any property's value of the drastic degree required by precedent—at least 50 percent—is hard to envision.

Second, Bill 71's posted ASF, if enacted, would be a routine zoning ordinance of the type that all Agricultural-zoned landowners should expect to be subjected to. The regulatory environment is replete with policies favoring farming over residential uses of Agricultural-zoned property, including in the State Constitution, State statutes, County Charter, County General Plan, and County Code. Objective, reasonable expectations would not include a view that farm-dwelling sizes would never be limited beyond the County Code's existing provisions. The policy would be similar to Section 21-5.250(b), Revised Ordinances of Honolulu, "Farm dwellings," which states: "Each farm dwelling and any accessory uses shall be contained within an area not to exceed 5,000 square feet of the lot."

The foreseeable nature of this type of legislation is illustrated in the Wyoming Supreme Court's description of a similar zoning ordinance:

> Teton County chose to address the broad range of concerns and problems it faced with burgeoning development, in an area of unique natural beauty and the availability of only a very limited amount of privately-owned land, by adopting a comprehensive planning and zoning ordinance. All parties to this litigation agree that Teton County is unique in many ways and certainly is one of only a handful of areas on earth with such an abundance of natural amenities. Teton County chose as one tool in its arsenal of weapons to prevent the destruction of those natural amenities a limitation on the square footage of new homes to 8,000 square feet of habitable space. It might have opted for 5,000 square feet or it might have chosen 15,000 square feet, but it picked 8,000. A limitation of some sort is, without need of further justification, rational.

Bd. of Cnty. Comm'rs of Teton Cnty. v. Crow, 265 P.3d 720, 730 (Wyo. 2003).

The third *Penn Central* factor, the character of the governmental action, raises the question of whether the legislation is promoting the public good or singling out a landowner. Like almost any generally applicable zoning ordinance, Bill 71's posted ASF is not targeted at any property or any property owner. All amendments to Chapter 19.30A, Maui County Code, "Agricultural District," are presumed to further the objectives listed in the chapter's lengthy purpose clause, which are all expressions of "the public good." Bill 71's posted ASF may be considered in line with this excerpt from the purpose clause at Section 19.30A.010(B)(3):

"Discourage developing or subdividing lands within the agricultural district for residential uses, thereby preserving agricultural lands and allowing proper planning of land use and infrastructure development."

I hope this information is helpful. If you have any questions, please let me know. I can be reached at ext. 7664.

hlu:ltr:030a01:dr

Attachment

June 30, 2021

MEMO TO: Members of the Council

F R O M: James Forrest, Legislative Attorney JBF
Richard E. Mitchell, Legislative Attorney R. E. Mitchell
David Raatz, Supervising Legislative Attorney DMR

SUBJECT: **LEGAL NEWS REPORT FOR SECOND QUARTER OF CALENDAR YEAR 2021** (PAF 21-009)

This report provides legal news from the second quarter of 2021.

Water Commission issues ruling on Nā Wai ʻEhā

On June 29, 2021, the State Commission on Water Resource Management issued a Decision and Order establishing water-permit allocations for Nā Wai ʻEhā—encompassing the Island of Maui's "Four Great Waters" of Waiheʻe, Waiehu, Wailuku, and Waikapū. According to the Executive Summary, the Water Commission's allocations further the following principles:

- honor past mediated settlements and Supreme Court rulings;
- establish stream flows required to offer a higher degree of habitat protection; and
- provide sufficient divertible flow to meet public trust and other reasonable uses.

The 406-page Decision and Order, the 16-page Executive Summary, and a four-page press release are on the Water Commission's website:

https://dlnr.hawaii.gov/cwrm/newsevents/cch/cch-ma15-01/#info

We will review the Decision and Order and advise chairs of relevant committees on the Decision and Order's relevance to any pending or future legislation.

Law granting "right to take access" to private property is a physical taking

On June 23, 2021, the U.S. Supreme Court in Cedar Point Nursery v. Hassid held by a 6-3 vote that a State of California regulation granting union organizers a "right to take access" on private property for up to three hours a day, 120 days per year, was a physical taking requiring just compensation under the Constitution.

As noted in a blog post by the State and Local Law Center, which submitted a brief on behalf of the National Association of Counties in the case, state and municipal officials routinely access private property on government business. Thus, the opinion may have a broad reach. In his dissent, Justice Stephen Breyer noted, though, that the sole remedy for takings is just compensation—the payment of money equal to the value of the property loss—rather than an invalidation of the underlying regulation or law. In many instances, the just compensation for officials' routine access to private property will be negligible.

State Supreme Court to review validity of counties' deployment of officers to another county

As noted in our last report, the State Intermediate Court of Appeals on January 27, 2021, validated the deployment of police officers from the County of Maui and the City and County of Honolulu to Hawai'i County in Flores v. Ballard. On June 22, 2021, the Supreme Court of Hawai'i decided to take the case on further appeal.

U.S. Supreme Court issues ruling on religious freedom and discrimination

The State and Local Law Center provided this summary of Fulton v. City of Philadelphia, decided on June 17, 2021:

> The U.S. Supreme Court held unanimously in *Fulton v. Philadelphia* that the City of Philadelphia violated the First Amendment when it refused to contract with Catholic Social Service (CSS) to certify foster care families because CSS refuses to work with same-sex couples.

> Philadelphia contracts with CSS, and over 20 other agencies, to certify foster care families. When the city discovered that CSS wouldn't certify same-sex couples because of its religious beliefs, the city refused to continue contracting with CSS. The city noted CSS violated the non-discrimination clause in its foster care contract. CSS sued the city claiming its refusal to work with CSS violated the Free Exercise and Free Speech Clauses of the First Amendment.
>
> Chief Justice Roberts, writing for the Court, concluded that the city violated CSS's free exercise of religion rights. He noted that in Employment Division, Department of Human Resources of Oregon v. Smith (1990), the Court held that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." In other words, neutral and generally applicable laws are generally constitutional even if they burden religion. But, the Court held, Smith didn't apply in this case because the city's non-discrimination clause allowed for exceptions, meaning it wasn't generally applicable.

We will keep this ruling in mind when advising committee chairs on Council actions that may trigger possible claims under the Free Exercise or Free Speech Clauses.

State law requires findings of General Plan consistency for SMA permits

On June 16, 2021, the Supreme Court of Hawai'i held the Maui Planning Commission violated State law when it failed to make a finding of General Plan consistency before issuing a Special Management Area permit for Kahoma Village, a housing project in West Maui approved by the Council under Chapter 201H, Hawaii Revised Statutes. The County argued that the Council's adoption of Resolution 14-14, which exempted the project from the General Plan, meant the Commission was not required to find the project consistent with the General Plan. But in Protect and Preserve Kahoma Ahupua'a Association v. Maui Planning Commission, the Supreme Court held that the resolution did not exempt the project from Section 205A-26(2)(C), Hawaii Revised Statutes, which establishes General Plan consistency as a prerequisite for SMA permits.

The Supreme Court also held that the Coastal Zone Management Law (HRS Chapter 205A) is an environmental law. Therefore, it is beyond the Council's authority to exempt its provisions when approving projects under Chapter 201H.

In addition, the Supreme Court held that the Commission should have allowed the plaintiffs to proceed with a contested case because they were asserting their constitutional right to a clean and healthful environment.

The opinion is online:

https://tinyurl.com/KahomaVillageCase

Federal court reiterates regulatory takings framework

In our report for the first quarter of 2020, we provided a flow chart to analyze questions about regulatory takings, which occasionally arise for land-use matters, based on Bridge Aina Le'a, LLC v. State of Hawaii Land Use Commission by the U.S. Court of Appeals for the 9th Circuit. On June 15, 2021, a U.S. District Court in Arizona provided additional analysis from Bridge Aina Le'a, under the heading "Regulatory Takings Framework," which we summarize below. The language is taken directly from the court's opinion in Bennett v. City of Kingman, with legal citations and quotation marks deleted to improve readability.

> Two types of regulatory action—Loretto and Lucas takings—are *per se* takings.
>
> - To constitute a Loretto taking, the government must require an owner to suffer a permanent physical invasion of his or her property.
>
> - A Lucas taking occurs when a regulation completely deprives an owner of all economically beneficial use of his or her property. Lucas takings are relatively rare and confined to the extraordinary circumstance when no productive or economically beneficial use of land is permitted.

In addition to the two types of *per se* regulatory takings, the Supreme Court has recognized a third category of regulatory takings, known as Penn Central takings.

- Under Penn Central, courts consider three factors:
  (1) the economic impact of the regulation on the claimant
  (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and
  (3) the character of the governmental action.

- The first and second Penn Central factors are the primary factors. The consideration of these factors aims to determine whether a regulatory action is functionally equivalent to the classic taking.

- Under the first Penn Central factor, courts compare the value that has been taken from the property with the value that remains in the property. Put differently, the economic impact of a government action is determined by comparing the total value of the affected property before and after the government action. This comparison aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain.

Whenever consideration is given to an assertion that a Council action may result in a regulatory taking, we respectfully suggest time be given to this analysis.

Federal court considering summary judgment motions in Lahaina injection wells case

On June 9, 2021, the parties in Hawaii Wildlife Fund v. County of Maui—the case on the Clean Water Act's applicability to Lahaina Wastewater Reclamation Facility injection wells—filed documents in support of their respective summary judgment motions with the United States District Court in Honolulu. In the attached order dated May 26, 2021, Judge Susan Oki Mollway summarized the applicable standard established by the U.S. Supreme Court and stated:

> The present motions therefore turn on whether the LWRF's discharge of treated wastewater into its injection wells that then makes its way to the Pacific Ocean is the "functional equivalent of a direct discharge" from the LWRF into the Pacific Ocean.

A settlement conference on June 9, 2021, was unsuccessful. Unless one of the summary judgment motions is granted, the trial will start on September 8, 2021.

If you have any questions, please contact Forrest (ext. 7137), Remi (ext. 7662), or David at (ext. 7664).

paf:dmr:21-009b

Attachment

cc: Director of Council Services
County Clerk
OCS Research Section

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAWAI`I WILDLIFE FUND, a Hawaii non-profit corporation; SIERRA CLUB-MAUI GROUP, a non-profit corporation; SURFRIDER FOUNDATION, a non-profit corporation; and WEST MAUI PRESERVATION ASSOCIATION, a Hawaii non-profit corporation, Plaintiffs, vs. COUNTY OF MAUI, Defendant.	CIVIL NO. 12-00198 SOM/KJM ORDER REGARDING COUNTER MOTIONS FOR SUMMARY JUDGMENT

ORDER REGARDING COUNTER MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Hawaii Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association move for summary judgment, arguing that the undisputed evidence demonstrates that the County has violated the Clean Water Act by discharging effluent, without a National Pollutant Discharge Elimination System ("NPDES") permit, at four injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). Defendant County of Maui also moves for summary judgment, arguing that Plaintiffs lack admissible evidence of such a violation.

In adjudicating these motions, this court is guided by the Supreme Court's holding that the Clean Water Act requires an NPDES "permit when there is a direct discharge from a point

source into navigable waters or when there is the functional equivalent of a direct discharge." *Hawaii Wildlife Fund, et al. v. County of Maui*, 140 S. Ct. 1462, 1476 (2020). The Supreme Court provided examples of when there would be and when there would not be a "functional equivalent of a direct discharge," explaining that time and distance are important:

> Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.

140 S. Ct. at 1476.

To provide guidance with respect to factual situations that fall between the two examples, the court stated:

> factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

Id., 140 S. Ct. at 1476-77.

There appears to be no dispute that LWRF is a "point source" or that the Pacific Ocean is a "navigable water." *See id.* at 1478, Kavanaugh, J., concurring ("No one disputes that pollutants originated at Maui's wastewater facility (a point source), and no one disputes that the pollutants ended up in the Pacific Ocean (a navigable water)."). The present motions therefore turn on whether the LWRF's discharge of treated wastewater into its injection wells that then makes its way to the Pacific Ocean is the "functional equivalent of a direct discharge" from the LWRF into the Pacific Ocean. *Id.*

To aid the court in deciding these motions, the parties shall file answers to the following questions, using 25 words or less for each answer, no later than June 9, 2021. If a party does not know or cannot provide the exact answer to a question, the party shall provide the most accurate answer it can in light of the record currently before the court. Answers should directly respond to the questions, rather than viewing the questions as inviting discussion of related matters. This court will hold the parties to their answers.

In answering each question, the parties shall provide the title or name of material relied on, along with the ECF No. and the PageID # of evidence currently in the record that supports each answer. Parties are invited to provide record citations to every piece of evidence in the record supporting any

fact. Parties shall not cite anything not currently in the record. Parties shall then attach a copy of the cited evidence with the record citation (existing ECF No. and PageID #) visible and legible under a corresponding tab (that is, not obscured at the top of the page). The record evidence shall be tabbed with the tab label corresponding to the question number. Only the relevant page(s) cited (preferably limited to two pages per citation) should be attached.

A Word version of the attached questions will be emailed to the parties so that they may use such space as is necessary to provide record citations.

Question	**Answer in 25 words or less**	**Title of material**	**ECF No. and PageID #**
1. Transit time: 1a. What is the minimum documented time (in days) for treated wastewater to move from LWRF Wells 3 and 4 to the Pacific Ocean?			
1b. How long does it take before more than half of the treated wastewater injected into LWRF Wells 3 and 4 on a particular day reaches the Pacific Ocean?			
1c. What is the minimum time that it takes for treated wastewater to move from LWRF Wells 1 and 2 to the Pacific Ocean?			
1d. How long does it take before more than half of the treated wastewater injected into LWRF Wells 1 and 2 on a particular day reaches the Pacific Ocean?			

1e. Jean E. Moran, Ph.D., opines that the time required for effluent from Wells 1 and 2 to reach the nearshore ocean is similar to that from Wells 3 and 4. *See* Decl. of Jean E. Moran, Ph.D., ECF No. 432-22, PageID # 10561. Is there anything in the record indicating that this opinion is correct or incorrect?			
2. Distance traveled: 2a. What is the minimum distance that treated wastewater flows from LWRF Wells 1, 2, 3, and 4 to the Pacific Ocean?			
2b. What percentage of treated wastewater from the LWRF flows the minimum distance to reach the Pacific Ocean?			
2c. What is the approximate distance traveled by at least half of the wastewater flowing from LWRF Wells 1, 2, 3, and 4 to the Pacific Ocean?			

2d. What percentage of treated wastewater from the LWRF emerges from submarine springs at the North and South Group Seeps?			
2e. Is there any dispute that more than half of the effluent from Wells 3 and 4 emerges at the seeps (even if there is a dispute about how much more than half)?			
2f. What percentage of treated wastewater from the LWRF emerges as diffuse flow in the North and South Group Seep areas?			
2g. What percentage of treated wastewater from the LWRF emerges within 1/2 mile of the North and South Group Seep areas?			
2h. What percentage of treated wastewater from the LWRF emerges within 3/4 mile (straight line) of the LWRF? The percentage should include any percentage listed in the response to 2g.			

2i. What percentage of treated wastewater from the LWRF emerges within within 1 mile (straight line) of the LWRF?			
2j. What percentage of treated wastewater from the LWRF emerges within within 1.5 miles (straight line) of the LWRF?			
2k. What percentage of treated wastewater from the LWRF emerges within within 2 miles (straight line) of the LWRF?			
3. Nature of the material through which the treated wastewater travels: What is the nature of the material through which the treated wastewater travels from the LWRF to the Pacific Ocean?			

4. Dilution or chemical change of pollutant: 4a. To what extent has the treated wastewater been diluted as it travels from the LWRF to the Pacific Ocean?			
4b. Leaving aside any chemical change occurring at the injection wells themselves (e.g., by treatment at the wells), to what extent has the treated wastewater been chemically changed as it travels from the LWRF to the Pacific Ocean? What is the nature of the change?			
5. Amount of pollutant entering the Pacific Ocean: 5a. What is the amount of treated wastewater entering the Pacific Ocean relative to the amount of treated wastewater leaving the LWRF?			

5b. What is the minimum number of gallons of treated wastewater from the LWRF that emerges every day in the nearshore water in and around the North and South Seep groups?			
6. Manner by or areas in which pollutant enters the Pacific Ocean: Describe the manner by or areas in which the treated wastewater from LWRF enters the Pacific Ocean.			
7. Degree pollutant maintains its specific identity: Describe the degree to which the treated wastewater from the LWRF emerging in the Pacific Ocean has maintained its specific identity.			

8. Is there any dispute that there are elevated water temperatures near the North and South Seep locations compared to the nearshore water further north and south of the seeps? If there is no dispute, is there anything in the record indicating that the elevated temperature could have been caused by something other than the treated wastewater finding its way into the Pacific Ocean?			
9. Is there any dispute that dye running through a hypothetical pipe from the LWRF to the Pacific Ocean would take about 90 minutes to go from LWRF to the ocean?			
10. Could surface runoff and reclaimed water used at nearby properties account for some of the chemicals detected in the seeps?			

11. Each party may add no more than two other issues that only that party discusses, but the party's position must be stated in 25 words or less per issue.			

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 26, 2021.

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge