August 23, 2021

MEMO TO: Kelly Takaya King, Chair
Climate Action, Resilience, and Environment Committee

F R O M: James B. Forrest, Legislative Attorney *James Forrest*

David M. Raatz, Jr., Esq., Deputy Director of Council Services
David M. Raatz

SUBJECT: **WETLANDS RESTORATION** (CARE-55)

I. Introduction.

You have asked us to opine whether the Council has the authority under federal law to define "wetlands" in the County Code more broadly than the term is defined in the Clean Water Act and whether a more expansive definition would expose the County to liability under the Clean Water Act. We understand your inquiry is based on your objective to enact an ordinance establishing a program for wetlands restoration and protection. You have further requested that we draft an ordinance for that purpose, assuming the Council has authority.

II. The Clean Water does not preempt local laws for wetlands restoration and projection.

State statutes and municipal ordinances, which we call local laws, can be invalidated in their entirety or as applied to particular circumstances when "preempted" by a federal law under the Supremacy Clause found at Article VI, Clause 2, of the U.S. Constitution. When a local is invalidated, the state or municipality will be enjoined from enforcing the law and may be liable for damages or attorneys' fees.

The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

There three types of federal preemption: express preemption, field preemption, and conflict preemption.

Express preemption exists when a federal statute states that it preempts certain kinds of local laws. An example of express preemption is found in the federal law called Medical Device Amendments of 1976, which states "no State or political subdivision of a State may establish or continue in effect" laws regulating medical devices. Riegel v. Medtronic, Inc., 552 U.S. 312, 316 (2008).

"Field preemption arises when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." Bohmker v. Oregon, 903 F.3d 1029, 1052 (9th Cir. 2018) (citations and internal quotations omitted). For example, a federal law "occupies the field" of regulating land use on federal property, preempting local laws on the same subject. Arizona v. United States, 567 U.S. 387, 401 (2012).

Conflict preemption, also known as obstacle preemption, exists when compliance with a local law would preclude compliance with a federal law or when a local law presents a direct obstacle to the fulfillment of a federal objective. In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation, 959 F.3d 1201, 1212 (9th Cir. 2020) (citing cases finding conflict preemption, such as when local laws conflicted with federal laws on the exercise of foreign affairs and the regulation of maritime vessels).

The Clean Water Act is a federal law, enacted in 1972 and codified in Title 33 of the United States Code, starting at Section 1251. The Clean Water Act's purpose is to minimize the discharge of pollutants into navigable water.

Section 404 of the Clean Water Act establishes a permit program to regulate the discharge of dredged or fill material in "waters of the United States," including "adjacent wetlands."

The Clean Water Act does not define "wetlands." But for nearly half a century, the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency have agreed on the following legally effective definition, published in Title 33 of the Code of Federal Regulations at Section 328.3:

> Wetlands are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The U.S. Supreme Court has held that the Clean Water Act does not preempt local laws on wetlands restoration and protection. Rapanos v. United States, 547 U.S. 715, 737–38 (2006). State and local governments traditionally have legal authority on local land use. Id. at 738 For the Clean Water Act to interfere with that authority—and for any form of federal preemption to exist on local land use—Congress would need to have included "a 'clear and manifest' statement" to that effect. Id. (citation omitted).

Therefore, the Council has the authority under federal law to define "wetlands" in the County Code more broadly than the term is defined in the Clean Water Act, and a more expansive definition would not expose the County to liability under the Clean Water Act.

III. Draft ordinance establishing a program for wetlands restoration and protection is attached.

The Maui County Code does not include the establishment of a program for wetlands restoration and protection.

Chapter 2.80B, Maui County Code, includes a definition of "wetlands" that matches the definition established in the Code of Federal Regulations.

This definition applies only to General Plan ordinances. Various General Plan ordinances include aspirational policies on wetlands restoration and protection.

In the Code of Federal Regulation, "waters of the United States"—the bodies of water subject to the Clean Water Act's jurisdiction and Section 404 permitting—are defined as follows:

> (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
> (2) Tributaries;
> (3) Lakes and ponds, and impoundments of jurisdictional waters; and
> (4) Adjacent wetlands.

The first three categories are navigable waterways. Adjacent wetlands—the only wetlands protected by the Clean Water Act—are wetlands that have a "significant nexus" to a navigable waterway. Sackett v. U.S. Environmental Protection Agency, No. 19-35469, 2021 WL 3611779, at *12 (9th Cir. Aug. 16, 2021); Northern California River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007); Rapanos v. United States, 547 U.S. 715, 779-80 (2006) (Kennedy, J., concurring).

For a Maui County program to restore and protect more wetlands than those covered by the Clean Water Act, a new definition is not necessary. The Maui County program could cover all wetlands, not just those with a significant nexus to a navigable water way.

Not only is it unnecessary to have a new definition, creating a new definition of wetlands could be counterproductive by creating undue confusion. Among the states and municipalities that have established programs to restore and protect wetlands, many define wetlands identically or substantially similar to the federal definition.

The State of Hawai‘i does not have a statute to restore and protect wetlands. But the State's coastal nonpoint pollution control program employs the federal definition. This program is part of the State's Coastal Zone Management Act compliance system, managed by the Office of Planning and, in Maui County, the planning commissions.

"The purpose of a definition is to achieve clarity and consistency without burdensome repetition," according to the State of Hawai`i Legislative Drafting Manual. The Chapter 2.80B definition, which has been used for more than a decade, meets the standard.

After a County wetlands program is established, a more expansive definition could be considered if experience illustrates that it is necessary. The new definition could be the subject of a public-education campaign. But it does not appear worthwhile to devise a new definition before a program is established.

Guidance and justification for a County wetlands programs is provided in General Plan ordinances:

- Countywide Policy Plan, page 46: "Restore and protect . . . wetlands . . ."

- Maui Island Plan, pages 2-31 and 2-32:

  Objective:
  2.3.3 Preserve existing wetlands and improve and restore degraded wetlands.

  Policies:
  2.3.3.a Prohibit the destruction and degradation of existing upland, mid-elevation, and coastal wetlands.
  2.3.3.b Support and fund wetland protection and improvement, and restoration of degraded wetlands.
  2.3.3.c Where applicable, require developers to provide a wetland protection buffer and/or other protective measures around and between development and wetland resources.

  Implementing Actions:
  2.3.3-Action 1 Develop standards for appropriate buffers and/or other protective measures for development near or around wetlands.
  2.3.3-Action 2 Enact ordinances to ensure no net loss of wetlands.
  2.3.3-Action 3 Enforce no net loss of wetlands and improve degraded wetlands.
  2.3.3-Action 4 Assist in the preservation and enhancement of Keālia and Kanahā-Mauoni Ponds; Lā'ie, Kalepolepo, Nu'u, Ukumehame, Olowalu, Launiupoko, and Mākena wetlands; and other wetland areas.

- Lānaʻi Island Community Plan, page 2-12: "Natural landscape features and environment such as . . . wetlands . . . will be protected and restored."

- Molokaʻi Island Community Plan, page 55: "Support the protection and restoration of . . . wetlands . . ."

The National Association of Counties also recommends enactment of wetlands ordinances. Page 6 of the County Wetlands Data Guidebook, published by NACo in 2007, states: "Many wetlands, including isolated non-navigable wetlands, are not protected under federal laws so they fall under the responsibility of local government. County governments are in the best position to protect local wetlands through a variety of tools."

The American Planning Association adopted a policy in 2002 to "support augmenting the protection provided by Section 404 of the Clean Water Act by enacting state legislation or local ordinances as appropriate to:

- Regulate human-controlled activities which cause adverse impacts to wetlands;
- Provide protection for isolated wetlands;
- Strengthen the biological component of the permitting process by recognizing the value of wetlands for wildlife habitat; and
- Provide incentives to encourage landowners to protect existing wetlands."

The APA policy also supported exercising "the option for local protection to exceed that which is required by federal statutes."

The International City/County Management Association has long advocated for wetlands ordinances. A 1997 article published by ICMA, "Protecting Wetlands Is Good Business for Local Governments," urged municipalities to enact ordinances for the "protection and restoration" of wetlands.

We have reviewed wetlands ordinances from other jurisdictions. An overlay zoning district is a common type. "'Overlay district' means an area where certain additional requirements are superimposed upon a base zoning district or underlying district and where the requirements of the base or underlying district may or may not be altered," under Chapter 2.80B. The Countywide Policy Plan, at page 49, provides the following direction to the Council: "Establish alternative land use and overlay zoning designations that recognize and preserve the unique natural and cultural characteristics of each ahupua`a or district."

Considering the guidance of General Plan ordinances and the Council's exclusive authority for zoning, a zoning ordinance would be an appropriate means of restoring and protecting wetlands. For your consideration, we have prepared the attached draft bill, entitled A BILL FOR AN ORDINANCE AMENDING TITLES 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION."

The bill would establish the Wetlands Overlay Zoning District. To help the County identify appropriate properties for Wetlands Overlay designation, the bill would require the Planning Director to map wetlands in Maui County within one year. After a property is designated Wetlands Overlay, the Council could only

approve land-use entitlements for the property if it makes finding that wetlands restoration or protection is not feasible and advisable or that the property owner has agreed to restore or protect wetlands. A similar requirement would be placed on the Director of Public Works for subdivision approval and grading and grubbing permits. The draft bill also lists prohibited uses in the Wetlands Overlay District. The draft bill also would place in the Maui County Code a policy statement establishing a wetlands restoration and protection program, as directed by the General Plan, which could spur further County action in this field.

Please let us know if you have any questions or would like revisions, please let us know. Once you have approved the content of the draft bill, we will prepare a corresponding resolution to transmit the bill to the planning commissions and a transmittal memo to directly refer the legislation to Climate Action, Resilience, and Environment Committee. David can be reached at ext. 7664 and Forrest at ext. 7137.

care:ltr:055a01:dr/jbf

Attachment

cc: Nicole A. Siegel, Legislative Analyst

ORDINANCE NO. _____

BILL NO. _____ (2021)

A BILL FOR AN ORDINANCE AMENDING TITLES 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION

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

SECTION 1. The purpose of this Ordinance is to protect the natural environment, mitigate climate change, and work toward resilience by establishing a program for wetlands restoration and protection in Titles 18, 19, and 20 of the Maui County Code.

SECTION 2. Article II, Title 19, Maui County Code, is amended by adding a new chapter to be appropriately designated and to read as follows:

"**Chapter 19.47**

WETLANDS OVERLAY DISTRICT

Sections:

19.47.010	Establishment.
19.47.020	Policy.
19.47.030	Report on feasibility and advisability of wetlands restoration or protection.
19.47.040	Consideration of report.
19.47.050	Prohibitions.
19.47.060	Mapping.
19.47.070	Clean Water Act and Coastal Zone Management Act.

19.47.010. Establishment. The council may establish wetlands overlay district zoning on any property for the purpose of restoring or protecting a wetland on the property. "Overlay district" and "wetlands" mean the same as defined in section 2.80B.020.

19.47.020. Policy. It is the policy of the County of Maui that wetlands should restored or protected. The council's intent is to restore and protect wetlands beyond what is required by the Clean Water or any State law. All discretionary permits issued by the County must be consistent with this policy.

19.47.030. Report on feasibility and advisability of wetlands restoration or protection. A. The planning director must produce, or cause to be produced, a report on the feasibility and advisability of wetlands restoration or protection on the property prior to approval of any of the following in the wetlands overlay district:

1. Community plan amendment under section 2.80B.110.
2. Subdivision approval under section 18.08.100.
3. Change in zoning under section 19.510.040.
4. Conditional zoning under section 19.510.050.
5. District boundary amendment under chapter 19.68.
6. Special use permit under section 19.510.070.
7. Grading or grubbing permit under chapter 20.08.

B. Any report required by subsection (A) must be shared with the decision-making officer or agency and any advisory agency. The report must include the following:

1. The ability of the wetland to filter harmful toxins, nutrients, and sediment from surface and stormwater runoff.
2. The ability of the wetland to store floodwaters and reduce the magnitude of flood events.
3. The ability of the wetland to provide valuable habitat for a diverse array of flora and fauna, including any existing rare, threatened, or endangered species.
4. The ability of the wetland to maintain surface-water flow during dry periods.
5 The impact of any excessive siltation resulting from surface runoff from construction sites and lack of erosion control on steep slopes.
6. The impact of pollution by garbage, litter, and refuse.
7. The impact of a reduction in the flow of watercourses due to destruction of wetlands.

19.47.040. Consideration of report. A. The decision-making officer or agency on an application referenced in subsection 19.47.030.A must consider any report required by the subsection and the policy in section 19.47.020 in determining

whether to approve, disapprove, approve with modifications, or approve with conditions the application.

B. Any ordinance for an approval referenced in section 19.47.030.A must include the council's finding that either:

1. The property does not include any wetlands for which restoration or protection is feasible or advisable; or

2. The property owner has executed a unilateral agreement, to be recorded with the bureau of conveyances or land court, for adequate wetlands restoration or protection.

19.47.050. Prohibitions. The following are prohibited in the wetlands overlay district:

A. The placement of new structures or impervious surfaces.

B. Excavation or blasting.

C. Dumping, piling, or disposal of refuse, yard debris, or other material.

D. The development of structures and land uses on wetlands that will contribute to the pollution of surface and ground water by sewerage, toxic substances, or sedimentation.

E. The destruction of, or significant changes to, wetlands that provide flood protection, recharge the groundwater supply, and augment stream flow during dry periods and filtration of water flowing into ponds and streams.

19.47.060. Mapping. The planning director must transmit to the planning commissions, council, and director of public works mapping that shows the location of wetlands throughout the County.

19.47.070. Clean Water Act and Coastal Zone Management Act. This chapter is not intended and may not be interpreted to conflict with the Clean Water Act or the Coastal Zone Management or with any agency's authority under those laws."

SECTION 3. Section 18.08.100, Maui County code, is amended to read as follows:

"**18.08.100 Approval.** A. **[**Director's review period.**]**

1. Within thirty days after submission of the preliminary plat of a subdivision to be processed as an affordable housing project, the director **[**shall**]** must review the plan and may **[**give approval of**]** approve the preliminary plat as submitted, or as it may be modified, or **[**may**]** disapprove **[**the same**]** and **[**shall**]** must express **[**the disapproval and**]** the reasons **[**therefor**]** for the disapproval in writing.

2. Within forty-five days after submission of the preliminary plat of a subdivision for a long-term residential development **[**which**]** that is not to be processed as an affordable housing project or after submission of the preliminary plat of a subdivision **[**which**]** that is outside of the scope of subsection 18.08.100.A.1, the director **[**shall**]** must review the plan and may **[**give approval of**]** approve the preliminary plat as submitted, or as it may be modified, or **[**may**]** disapprove **[**the same**]** and **[**shall**]** must express **[**the disapproval and**]** the reasons **[**therefor**]** for the disapproval in writing.

B. The director may also defer consideration of the preliminary plat pending receipt of additional information, in which case the running of time is suspended.

C. Approval of the preliminary plat **[**shall**]** must indicate the director's directive to prepare detailed drawings on the plat submitted, **[**provided**]** as long as there is no change in the plan of subdivision as shown on the preliminary plat and there is full compliance with all requirements of this chapter. The action of the director with reference to any attached documents describing any conditions **[**shall**]** must be noted on two copies of the preliminary plat. One copy **[**shall**]** must be returned to the subdivider and the other retained by the director. At such time the director **[**shall**]** must stamp the two preliminary plats; as follows:

1. "Subdivider authorized to prepare detailed drawings on plat as submitted including corrections noted;"

2. "Recordation with the Bureau of Conveyances, State of Hawaii, or State Department of Taxation, not authorized until approved for recordation at a later date."

D. If no action (approval, disapproval, modification or deferral) is taken by the director within the review period identified in subsection 18.08.100.A, or such longer period as may have been agreed upon in writing, the preliminary plat **[**shall**]** will be **[**deemed**]** automatically approved, and it **[**shall**]** must be the duty of the

director to endorse **[**his**]** approval of the preliminary plat. **[**upon the face thereof. Such**]** The director's approval **[**by the director shall**]** must not exempt the subdivider from compliance with the mandatory requirements of this **[**ordinance**]** chapter.

E. In the wetlands overlay district, the director must consider any report required by subsection 19.47.030.A and the policy in section 19.47.020."

SECTION 4. Section 19.06.010, Maui County Code, is amended to read as follows:

"**19.06.010 Districts designated.** The County **[**shall be**]** is divided into the following use zone districts:

A. Open space districts:
   1. OS-1.
   2. OS-2.
B. Residential districts:
   1. R-1.
   2. R-2.
   3. R-3.
C. R-0 zero lot line residential district.
D. Two-family districts:
   1. D-1.
   2. D-2.
E. Apartment districts:
   1. A-1.
   2. A-2.
F. Hotel districts:
   1. H-1.
   2. H-M.
   3. H-2 and hotel.
G. Business districts:
   1. SBR service.
   2. B-CT country town.
   3. B-1 neighborhood.
   4. B-2 community.
   5. B-3 central.
   6. B-R resort commercial district.
H. Industrial districts:
   1. M-1 light.
   2. M-2 heavy.
   3. M-3 restricted.
I. Park districts:
   1. PK.
   2. GC.

J. Airport district.
K. Agricultural district.
L. Rural districts:
    1. RU-0.5.
    2. RU-1.
    3. RU-2.
    4. RU-5.
    5. RU-10.
    6. County rural.
M. Public/quasi-public districts:
    1. P-1.
    2. P-2.
N. Kihei research and technology park district.
O. Maui research and technology park district.
P. Napili Bay civic improvement district.
Q. Urban reserve district.
R. Interim.
S. Maui County historic districts.
T. Project districts.
U. Wetlands overlay district."

SECTION 5. Section 20.08.080, Maui County Code, is amended to read as follows:

"**20.08.080 Grading and grubbing permit review.** Drainage, engineering slope hazard report, and erosion control plans **[**shall**]** must be submitted to the applicable soil and water conservation **[**district(s)**]** district and to the department of land and natural resources' state historic preservation division for review and comment. Applicants **[**shall**]** must provide information sufficient to enable the reviewing agencies to determine that the proposed work will be in conformance with the most current standards on file at the department of public works of the soil and water conservation **[**district(s)**]** district and will meet the requirements of chapter 6E, Hawaii Revised Statutes, and related administrative rules. Final approval or disapproval **[**shall**]** must be made by the County within ten days after receiving the reviewing agencies' comments. In the wetlands overlay district, the director must consider any report required by subsection 19.47.030.A and the policy in section 19.47.020."

SECTION 6. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 7. This Ordinance takes effect one year after its approval.

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