

GET Committee

From: Mike J. Molina
Sent: Monday, February 4, 2019 3:25 PM
To: GET Committee
Subject: FW: IMPORTANT: Please read before tomorrow's hearing on Patrick Wong confirmation

From: Anthony Ranken <anthony@rankenlaw.com>
Sent: Monday, February 04, 2019 3:12 PM
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Subject: IMPORTANT: Please read before tomorrow's hearing on Patrick Wong confirmation

Dear councilmembers, Last week I promised you that if I found time I would pass on to you the information I have gathered regarding another issue which reflects very poorly on the qualifications of Patrick Wong to serve as corporation counsel. I apologize for this being relatively last minute, but I think the information below is important for you to be aware of in considering Mr. Wong's nomination. You may want to question Mr. Wong about this issue during his confirmation hearing tomorrow.

PAT WONG AND THE SAGA OF THE INJECTION WELLS

The County uses injection wells in its Lahaina sewage treatment plant. Into these wells the County injects sewage effluent that has undergone treatment. But these wells have caused great concern because the County doesn't effectively regulate the quality of the discharged effluent and the effluent remains high in nutrients. These nutrients contaminate the ocean, promote algae blooms, and damage reefs.

It is undeniable that the wells have done damage to the offshore habitat. A tracer study was conducted in 2012 by UH researchers, funded in part by a grant from the EPA. It proved that the injection well water was getting out to the reefs. (In fact the injection well that is used the most is actually a lava tube that leads right out to the ocean!) When the results of the UH/EPA study were released, the citizens groups requested that the County apply for and obtain a National Pollutant Discharge Elimination System (NPDES) permit. The County didn't want to get one because it would require them to either stop using injection wells at the Lahaina plant, or to increase water treatment and inject into the wells a better quality of water, which would cost money. So instead the County got sued by several citizens' environmental organizations. But instead of spending money to address the injection well pollution, the County spent the money on lawyers to oppose and appeal the citizen lawsuit – all for naught. The decisions of all the courts so far have shown that the County's anti-environmental position was wrong from the outset. The courts have held that the Clean Water Act **does** apply, and the County was wrong to fight it. Under Pat Wong's guidance, the County continues to appeal – this time all the way to the United States Supreme Court.

Prior to filing suit, citizens tried to work with the County for a number of years to address the problem of the injection wells. When Pat Wong and Alan Arakawa came into office the citizen groups tried to work with Mr. Wong, backed up by the threat of filing a lawsuit under the federal Clean Water Act. At first it appeared that Mr. Wong was willing to negotiate. He asked for a year to draft a settlement, and the citizens' groups worked with the County on a settlement agreement. Then the week before it was supposed to be signed Pat Wong came back to the citizen groups with the news that there would be no settlement and the County would "take its chances in court."

As promised, the citizen groups sued in federal court under the Clean Water Act. Pat Wong said his office did not have the expertise to handle the case, and thus began the Council's ongoing appropriations for legal fees that have now reached \$4.3 million.

In the Federal District Court in Honolulu, the citizens groups prevailed – the County lost the case and the injection wells were found to be in violation of the Clean Water Act. But instead of coming back to the negotiating table and working with the State Department of Health and the EPA to clean up the effluent from the injection wells and protect the reefs, the County appealed to the Ninth Circuit Court of Appeals in San Francisco. The 9th Circuit Court of Appeals panel ruled against the County. The County appealed again, asking for the full Ninth Circuit Court of Appeals to hear the case. The result came out the same – the County lost a third time. Now they have appealed all the way to the United States Supreme Court.

The takeaway is that the County, instead of complying with environmental laws, has spent millions of dollars of taxpayer funds to keep from having to spend County funds to keep our offshore water clean.

I don't know exactly what was said in the Council's executive session when the decision was made to fight the lawsuit instead of improving the County's sewage treatment system. I don't know for sure to what degree Pat Wong advised or directed the County's initial decision not to settle but to instead spend money on the losing side of a lawsuit. But it seems clear that if Mr. Wong had correctly told the County that the wells were likely to be found in violation of the Clean Water Act, then the County Council would not have authorized spending money to fight the lawsuit. And if he told the County they could prevail in court (as it seems he must have done), then obviously he was wrong and he is responsible not only for bypassing the chance to work with government agencies and citizens to preserve ocean quality and reef health, but also for wasting millions of dollars (and counting) of taxpayer funds.

People say of Mr. Wong that he "sets the tone," not just in the corporation counsel's office but more broadly across the County administration. It is hard to believe that even at the beginning he was on the side of the environment -- the Council would not have ignored his advice. What we definitely know is that as the litigation progressed, Mr. Wong told the County Council that the County should appeal and keep appealing, because if they don't appeal then the U.S. EPA and Hawaii Dept. of Health would start imposing fines immediately and the County will spend a few million dollars on fines.

That information was factually incorrect. Wong has not told the Council the whole truth about the penalties the County would face. He has told them the worst possible scenario in terms of fines, but he has not told them there would be an option just to meet with the DOH and EPA and work on correcting the injection well pollution in exchange for getting the fines waived. In fact the DOH and EPA have no real record of fining municipalities. That is not their modus operandi. What they seek is compliance with the law – they just want municipalities to show that they are making progress. The Council has never gotten that message from Mr. Wong, but if you talk to anyone at DOH or EPA, that's the message that you'll get – that they want to work with the County not punish us.

Instead it seems Wong has told the Council that their only option is to spend millions and millions of dollars on attorney fees, and if they don't continue appealing they will face terrible fines of hundreds of thousands of dollars for each injection well. This has been verified by a just-retired councilman and was essentially verified by statements Mr. Wong himself made during last year's budget process.

I and others do not believe that Mr. Wong has given the Council good advice or told them the whole truth in this matter. If the Council had been given full and accurate information then they would not have resisted the need to correct the injection well problem. They would not have spent millions of taxpayer dollars on fruitless legal battles and appeals when the money could have been applied toward correcting the problem and reducing harm to the environment.

None of the four citizens' environmental organizations that brought the lawsuit ever asked for any money out of it. They just wanted the County to spend more money on treating the water so that it had less nitrates and less phosphates, and to inject less of it into the groundwater and thus into the ocean.

Here are a couple of links you can click on for further information and background:

<https://mauisierraclub.org/category/injection-wells/>

<http://www.mauinews.com/news/local-news/2018/02/county-loses-injection-wells-appeal/>

Thank you for taking the time to inform yourself.

Sincerely,

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