

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

## MINUTES

Council Chamber

May 20, 2019

**CONVENE:** 9:02 a.m.

**PRESENT:** Councilmember Michael J. Molina, Chair  
Councilmember Keani N.W. Rawlins-Fernandez, Vice-Chair  
Councilmember Riki Hokama (left at 3:09 p.m.)  
Councilmember Tasha Kama  
Councilmember Kelly T. King (left at 5:05 p.m.)  
Councilmember Tamara Paltin  
Councilmember Shane M. Sinenci  
Councilmember Yuki Lei K. Sugimura

**EXCUSED:** Councilmember Alice L. Lee

**STAFF:** David Raatz, Supervising Legislative Attorney  
Kasie Apo Takayama, Legislative Analyst  
Leslee Matthews, Legislative Attorney  
Pauline Martins, Committee Secretary

*In the gallery:*

John Rapacz, Legislative Attorney  
Wesley Crile, Legislative Analyst  
Julie Reed, Legislative Analyst

Don Atay, Executive Assistant to Councilmember Sinenci  
Gina Flammer, Executive Assistant to Councilmember Sinenci  
Sarah Pajimola, Executive Assistant to Councilmember Rawlins-Fernandez  
Kate Griffiths, Executive Assistant to Councilmember King  
Lois Whitney, Executive Assistant to Councilmember Kama

Zhantell Lindo, Council Aide, Molokai Council Office (via telephone conference bridge)  
Mavis Medeiros, Council Aide, Hana Council Office (via telephone conference bridge)

**ADMIN.:** Edward S. Kushi, Jr., First Deputy Corporation Counsel, Department of the Corporation Counsel

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

Richelle Thomson, Deputy Corporation Counsel, Department of  
the Corporation Counsel  
Eric Nakagawa, Director of Environmental Management

**OTHERS:** David Henkin, Earthjustice  
Juan Rivera  
Travis Liggett  
Hans Krock  
James Kumagai  
Rob Weltman, Sierra Club  
Hannah Bernard (*read partial written testimony from Wendy Wiltse*)  
Kyle Ginoza  
Peter Davis  
Christopher Fishkin  
Albert Hahn  
Robin Knox  
Albert Perez  
Sam Small  
Rhiannon Chandler-Iao  
Plus (9) other people

**PRESS:** *Akaku Maui Community Television, Inc.*  
*Susan Halas, Maui Time*

---

**GET-26 HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-  
00198 SOM BMK, U.S. SUPREME COURT DOCKET 18-260 (CC 19-178)**

CHAIR MOLINA: ... (*gavel*)... The Governance, Ethics, and Transparency Committee meeting for Monday, May 20, 2019 is now in session. Good morning, Members. Good morning. Let's go right down the line. Good morning, Mr. Sinenci.

COUNCILMEMBER SINENCI: Good morning, Chair.

CHAIR MOLINA: Good morning. Good morning, Madam Chair.

COUNCILMEMBER KING: Aloha, good morning, Chair. I would also like to recognize and welcome the presence of Dale Hahn from Senator Brian Schatz's Office. Thank you for being here.

CHAIR MOLINA: Thank you for attending, Ms. Hahn. Member Lee is excused today. Committee Vice-Chair Rawlins-Fernandez, good morning.

VICE-CHAIR RAWLINS-FERNANDEZ: Aloha kakahiaka, Chair.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Aloha. Good morning, Councilmember Hokama.

COUNCILMEMBER HOKAMA: Good morning, Chairman.

CHAIR MOLINA: Good morning. Good morning, Member Paltin.

COUNCILMEMBER PALTIN: Aloha kakahiaka, Chair.

CHAIR MOLINA: Aloha. Good morning, Councilmember Sugimura.

COUNCILMEMBER SUGIMURA: Good morning.

CHAIR MOLINA: Good morning. And good Member...good morning, Member Kama.

COUNCILMEMBER KAMA: Aloha kakahiaka, Chair.

CHAIR MOLINA: Alright, thank you very much. Forgive me, Members, it's a Monday, so the mind might be a bit cloudy coming off of the weekend. But thank you all for being here. Members of the public, this is normally not a meeting week for the Council. So, the Chair would like to extend his appreciation to all of you. This is a non-meeting week. So, thank you very much for being here for this very important item that we have here this morning. Members, of course as you know we have one item on the agenda, but a very big item. But before that, we're going to do public testimony. But before I do that, I'd like to introduce Committee Staff, our Analyst Kasie Takayama Apo, and ably assisted by our Secretary Pauline Martins, and also, we have Council Services Director, Mr. David Raatz, and Staff Analyst, Ms. Leslee \_\_\_\_\_. And we have from Corporation Counsel we have Mr. Ed Kushi as well in the gallery. So, with that being said, we do have at this point nine members of the public signed up to testify. Chair would like to go over the ground rules with all of you who plan to testify. You'll be given three minutes to testify. At the two-and-a-half-minute mark you will see a yellow light indicating to you, you have 30 seconds to conclude your testimony. And once you see the red light, that's the indication that you need to finish your testimony. And please state your full name for the record, and if you're representing any particular organization, and if you are a registered lobbyist, you need to inform the Committee Staff and the Chair of that as well. So, with that being said, I would like to start first with our first testifier here in the Chambers. Juan Rivera, followed by Travis Liggett.

**... BEGIN PUBLIC TESTIMONY ...**

MR. RIVERA: Good morning.

CHAIR MOLINA: Good morning.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. RIVERA: My name is Juan Rivera. I am a resident of Wailuku. I've been on Maui since 2004. I work as a project manager for the Wastewater Reclamation Division. However, I am here today as a private citizen in my capacity as a professional engineer with over 30 years of experience in industrial facility design. Also, full disclosure, I am a member of the Sierra Club too. The County of Maui's facing pressure to eliminate injection wells in favors of alternatives that are perceived to have a lesser impact on the environment. These perceptions envision a green environment where all the waste must be eliminated at any cost. And why not, we all deserve a clean environment where all living things can thrive. I think we can agree on that. And there's also a well-documented body of evidence that suggests, you know, that shows that unchecked pollution can be disastrous. But this vision of a green environment often lacks a basic understanding of the limit of the science and the engineering that is needed to accomplish it. In the case of the Lahaina injection well, there are some public perceptions out there that are the demonstrably false, and I will go through a couple of them. The first one is that the injection wells are being used to dispose of sewage, and this is a gross mischaracterization of their use, which completely ignores the systems of the wastewater facility, which is there solely to turn the sewage into effluent that meets already stringent DOH and EPA discharge requirements. No sewage goes into the injection wells, and to say so, it is simply wrong. Another perception is that there are already available green and clean solutions just waiting out there to be used. The fact is that there is no simple, or even a green solution to eliminating the wells. And I would strongly discourage everyone to fall into the trap of the one-size-fits-all solution. Just because something works in California, or works in Nevada, or works on the east coast doesn't mean it's going to work here. Every environment is different. So, water reuse, again, is a popular alternative. But we cannot reuse all the water all the time. It is not possible because users don't use reuse water during rain events, they don't irrigate and that makes water disposal necessary. There are other alternatives, but I'm going to jump back to the end. The County will be wise to look into the true environmental impact of green solutions before committing to them. Otherwise, settling this case would be a profoundly misguided decision. The wells are effective, cheap, and may not as be as bad for the environment as their alternatives, as all these alternatives are costly and come with environmental costs of their own. Looking at the...may I?

CHAIR MOLINA: Sorry, Mr. Rivera, your time is over --

MR. RIVERA: Yeah, thank you, sir.

CHAIR MOLINA: --your testimony. If you could standby for a second, Committee Members, do you have any questions or a need to clarify Mr. Rivera's testimony? Councilmember Paltin?

COUNCILMEMBER PALTIN: Thank you, Chair. Thank you, Mr. Rivera, for coming this morning. I just was wondering about one of the statements that you made that people don't irrigate when it's raining.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. RIVERA: That is correct. I mean, the reuse water.

COUNCILMEMBER PALTIN: What is that based on? What is that information based on?

MR. RIVERA: We have done the studies. There are engineering studies. And it's a simple fact that in rainy season, we have an excess of water that needs to be disposed of because people, you know, we, the water is being produced at the plant continuously. However, there's not enough storage to store all the water while, during the rainy season.

COUNCILMEMBER PALTIN: Okay. I just was clarifying 'cause sometimes I see guys with their sprinklers on full in the rain upper west side, plenty times.

MR. RIVERA: Well, that's up to the individual users.

COUNCILMEMBER PALTIN: Yeah.

MR. RIVERA: So, 'cause we don't have any \_\_\_\_\_ system of our own.

COUNCILMEMBER PALTIN: And then, specifically though, you're in favor of reusing the water and not putting it in the injection wells when it's an available way to dispose of it?

MR. RIVERA: There is already existing infrastructure for water reuse and should be used. That investment has already been made. However, any reuse water expansion or other solutions that could be implemented like land treatment, or direct potable reuse, they're expensive, and they come with an environmental cost of their own.

COUNCILMEMBER PALTIN: I just was, my only question was that you're in favor of reuse when it's available?

MR. RIVERA: I do, yeah.

COUNCILMEMBER PALTIN: Okay. Thank you.

CHAIR MOLINA: Alright, thank you very much, Member Paltin. Committee Members...Member Sugimura?

COUNCILMEMBER SUGIMURA: Thank you. Thank you for being here. And you're an employee then, of --

MR. RIVERA: Yes, I am, ma'am.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SUGIMURA: --this facility? Do you have a lot of regulations that you're, that the County needs to follow through the underground injection program regulated by the State Drinking Act?

MR. RIVERA: Ma'am, I'm not familiar with those regulations. I'm in the construction side, not in the planning and permitting side.

COUNCILMEMBER SUGIMURA: So, I'll save that for the Director. Thank you very much for being here.

MR. RIVERA: You're welcome. Thank you, mahalo.

CHAIR MOLINA: Thank you very much, Councilmember Sugimura. Committee Vice-Chair Rawlins-Fernandez? I'm sorry, Mr. Rivera? Mr. Rivera, sorry, could we bring you back? You're a very popular man this morning.

MR. RIVERA: Thank you.

VICE-CHAIR RAWLINS-FERNANDEZ: Aloha, Mr. Rivera.

MR. RIVERA: Yes.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for your oral testimony and for your written testimony.

MR. RIVERA: Thank you, madam.

VICE-CHAIR RAWLINS-FERNANDEZ: I had a question regarding your warning on other green disposal systems that may have a more detrimental effect than the status quo, which is the injection wells. What other green disposal systems are you referring to in your statement?

MR. RIVERA: Well, let's take it from the top, direct potable reuse, for example, it will require a major investment in infrastructure, which, you know, construction of new facilities and the technologies that are new are expensive inherently. And you may be able to build the systems. But the environmental benefit that you get per dollar you're spending is going to be small compared to a solution that I proposed in my written testimony, which is to sewer the areas that are currently unsewered for example, Wahikuli, Waiehu, Maui Meadows, Waikapu. So, those areas are all on cesspools and the septic tanks are leaching into the environment that I would say, I dare say about ten times the concentration that comes out of the treatment plant. Sewer in those areas will definitely reduce the amount of solids going into the environment as opposed to investing...at a much lower cost than trying to apply advanced treatment technologies.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for your explanation. So, just to be clear, you're warning of the detrimental, more detrimental effects is more related to the economic arguments?

MR. RIVERA: Not economic but also environmental as well because construction of new facilities, you know, in required a lot fuel and for example, if you would build a 100 percent reuse water system, you will have to pump the water continuously to, you know, whatever elevation you need it. And those pumps use a lot of electricity. So, you would be, for the price, I mean, for the price of just saving a little bit of whatever is going into the wells right now, you are burning a lot of fuel to pump the water uphill all the time so it can be reused.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. So, the assumption is that we would use more fossil fuel and that's the more detrimental effect of the, to the environment?

MR. RIVERA: What I'm saying is, we need to do all the science before we commit because I warn that there could be consequences that the public have not envisioned yet.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for your testimony.

MR. RIVERA: Thank you.

CHAIR MOLINA: Okay. Thank you, Member Rawlins-Fernandez. Chairman King?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

COUNCILMEMBER KING: Thank you, Chair. Just a follow-up, thank you for being here, Mr. Rivera. So, the County in our current budget, or our budget for Fiscal Year 2020, we put \$13 million into money to expand the reuse, the Lahaina injection well site. Are you telling us that that may be a waste of money?

MR. RIVERA: No, I'm not saying that reuse is a waste of money. And the money's committed, and we have a, again, existing infrastructure that can be tied in. The same can be said for the Kihei system which we are expanding, it's been expanded, I shouldn't say we 'cause I'm not speaking for the Department, I'm speaking as a private citizen, but I have this knowledge. But no, I don't believe it's a waste of money.

COUNCILMEMBER KING: Okay. So, you think that it's worthwhile to spend that money on expanding the reuse system?

MR. RIVERA: Yes, because --

COUNCILMEMBER KING: Even though we're going uphill?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. RIVERA: --although there, yeah, you will still have to pump it uphill. But I just want to warn you that even if we achieve 100 percent reuse, there will still be times when systems such as wells will be required to take care of the excess water when people are not irrigating, or if something goes wrong at the plant and all of a sudden we cannot sell reuse water, or R-1 cannot be sold.

COUNCILMEMBER KING: Okay. Fair enough, I just want to make sure that we're not wasting \$13 million because supposedly those projects have been thought out. And I know they were very well supported by the Mayor.

MR. RIVERA: Yeah, and they'll continue is my understanding.

COUNCILMEMBER KING: Okay. Thank you.

CHAIR MOLINA: Okay. Thank you, Chairman King. Member Sinenci?

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you, Mr. Rivera, for being here. You did mention something about the Waikapu cesspools. You mentioned that there were ten times more than an injection well? Can you explain?

MR. RIVERA: Well, no in general, in general what it means is that a cesspool provides a minimal treatment and the concentration of solids that that will come out of the effluent is about probably ten times higher than the concentration of solids, suspended solids in wastewater treatment plant effluent.

COUNCILMEMBER SINENCI: Will the injection well effluent be pressurized?

MR. RIVERA: No, it works by gravity.

COUNCILMEMBER SINENCI: By gravity?

MR. RIVERA: So, going back to the issue of the pumps, pumping water uphill versus letting gravity do the work.

COUNCILMEMBER SINENCI: Okay. Thank you.

CHAIR MOLINA: Alright, thank you, Member Sinenci. Members, no other need to clarify Mr. Rivera's testimony? Thank you very much, sir, for sharing with us.

MR. RIVERA: Mahalo.

CHAIR MOLINA: Thank you. Next to testify we have Mr. Travis Liggett who will also be testifying on GET item 26. And Mr. Liggett is, testifying on behalf of Reef Power LLC and he'll be followed by Hans Krock.



# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. LIGGETT: Good morning. Aloha, my name is Travis Liggett. I'm a former NASA engineer, and I'm currently Principle Engineer for the Environmental Regulatory Director of the Maui Ocean Center. But I'm appearing before you, representing my small Maui company called Reef Power. I am testifying to encourage the Council to accept the injection well settlement and abandon the Supreme Court appeal because there is a solution. Please consider the three-part plan I have developed as an alternative to wastewater injection wells. Step one, implement conventional treatment upgrades such as enhanced nutrient removal as recommended to the County Council by Steve Parabicoli in November 2018. Two, polish the wastewater to very low nutrient levels using freshwater limu, Native Hawaiian algae, in an algal turf scrubber. The algal turf scrubber is a natural regenerative system that grows native algae by the acre to consume pollutants in the wastewater stream. Step three, achieve 100 percent reuse in a short timescale by irrigating with polished wastewater, a multi-acre forest that is planted with Native Hawaiian trees such as ohia, and sandalwood, and vetiver next to the wastewater facility. That way, you don't have to add infrastructure, wait on customers, or pump very far. What's great timing is that there is a U.S. Department of Energy funding opportunity open right now that could pay to demonstrate key elements of my plan. I am collaborating with researchers from the Smithsonian Institution and Sandia, a national lab, and a private company called HydroMentia that builds turf scrubbers. They are keen on testing turf scrubbers in Hawaii and we believe that with the County's partnership, we can win this grant to demonstrate the limu solution to injection wells. But time is of the essence. The first submission calling for a project summary, including naming partners is due June 3. To that end, I have a meeting scheduled next Tuesday, May 28, with Tyson Miyake, the Mayor's Deputy Managing Director, and Makalea Ane, the Environmental Coordinator. With the swift cooperation of the Mayor's Office, we can partner in this first grant application deadline on June 3 and easily meet the final proposal deadline in July to win this Department of Energy grant and demonstrate a native limu-based alternative to injection. Please settle the lawsuit now and innovate instead of appealing. Mahalo for your attention and have a nice day.

CHAIR MOLINA: Thank you very much, Mr. Liggett. Committee Members, any need to clarify Mr. Liggett's testimony? Committee Vice-Chair Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Mr. Liggett. Mahalo for your testimony. I just, I think your idea is great. Do you know if the turf scrubbers have been implemented elsewhere and if it's been successful?

MR. LIGGETT: Yes, they've been implemented in many states, primarily in Florida where they've done up to multi acre test projects. There's also been a system in Texas that took the waste from a fish farm and cleaned it up and fed it back into the fish farm. So, this is a well-established technology. But these researches from these national labs are looking for what they say is a killer app of this technology. It's sort of been developing for a couple decades. But it really needs to find that right application to

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

shine. And they really want to get into Hawaii because of our awesome growing season.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, and you said that the grant is a State grant?

MR. LIGGETT: Department of Energy Federal grant and --

VICE-CHAIR RAWLINS-FERNANDEZ: Federal grant?

MR. LIGGETT: --it works on cost matching. So, the County could do something like offer free lease of land or some employee hours and cost match to I think 20 percent versus 80 percent for the Federal government.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo. Mahalo, Chair.

CHAIR MOLINA: Okay. Thank you, Member Rawlins-Fernandez. Members, any other need to clarify the, Mr. Liggett's testimony? Chairman King?

COUNCILMEMBER KING: Thank you. Thank you, Chair. So, thank you for coming here. And your idea for a turf scrubber, is that similar to what Maalaea is doing with the oysters?

MR. LIGGETT: It is similar. However, turf scrubbers have much better demonstrated nutrient removal.

COUNCILMEMBER KING: Okay.

MR. LIGGETT: And also, with turf scrubbers, the biomass grows and absorbs the pollutants and then you remove the biomass. With the oysters, the biomass and the pollution is staying in the harbor.

COUNCILMEMBER KING: Right.

MR. LIGGETT: So, you're not actually removing it. And they also have to be cleaned. So, when they're cleaned, they actually release limu which pollutes the water. So, the oysters have I would say mixed results.

COUNCILMEMBER KING: Okay. And do you have support from the Department of Energy in your preliminary discussions with them?

MR. LIGGETT: I'm still discussing with the Sandia National Lab folks. We actually have a meeting this week.

COUNCILMEMBER KING: Oh, you're working with Sandia. Okay.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. LIGGETT: And we just found out about the grant application. We're just scrambling to get that first submission.

COUNCILMEMBER KING: Okay. That's great. You might want to go over and have a conversation with Senator Schatz's Office over here.

MR. LIGGETT: Oh yeah.

COUNCILMEMBER KING: Thank you. Thank you, Chair.

CHAIR MOLINA: Okay. Thank you, Chairman King. Okay. Member Sinenci, followed by Member Kama.

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you, Mr. Liggett. Can you repeat the phase one of your program again?

MR. LIGGETT: Step one would be to implement conventional treatment upgrades. And what that means is bring our existing facilities up to par to current technology. Now, when I talk to people and show them our data on nutrient concentrations, they ask why aren't you using the best technology, you're Hawaii, you have this pristine reputation, you're using kind of outdated technology. So, the first step is to improve the wastewater facility as it exists to improve the quality of the effluent as an input to the algae.

COUNCILMEMBER SINENCI: Okay. Thank you. Thank you, Chair.

CHAIR MOLINA: Thank you, Member Sinenci. Member Kama?

COUNCILMEMBER KAMA: Thank you, Chair. Are you able to eat the limu after it does its job?

MR. LIGGETT: Theoretically, but I think the ick factor of it growing on human wastewater would probably eliminate that possibility. At least I probably wouldn't eat it. But there are other applications of the turf scrubber that we're looking at elsewhere on the island on saltwater limu that that could work for. I can't really discuss it, it's under a nondisclosure.

COUNCILMEMBER KAMA: I just want to understand that you're going to take a food source to be able to do this, that's all.

MR. LIGGETT: Well, okay, I think I understand your question. Limu is not just ocean algae that you can eat. It's actually a wider definition that is any moisture loving plant. So, the limu I'm talking about actually grows in freshwater streams because wastewater is freshwater. And what we do with the limu, thank you for asking, is we take that biomass and compost it. And we use that compost in the native forests. So, you're

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

actually taking the biomass and using it in your sediment controlling and moisture absorbing forest.

CHAIR MOLINA: Okay. Thank you, Member Kama, certainly a good question with regards to the limu after, yeah, can be consumed. Members, any other need to clarify Mr. Liggett's testimony? Member Paltin?

COUNCILMEMBER PALTIN: Oh, thanks. Thanks for that question, it made a lot more sense. So, the freshwater that comes out of it, are you using that in the forest too?

MR. LIGGETT: Yeah, so, we take the existing wastewater facility, we improve it, we feed that water to the limu which improves it to almost ocean background levels of nutrients. And then, we irrigate the forest which we don't have to put in new piping, we don't have to pay to pump it, we don't have to find new customers. The County has control over the flow of reuse water, and it always goes into the forest. And the forest has other benefits. It absorbs water, reduces runoff to the ocean, and it might even, if you get enough of it, decrease the temperature in Kihei.

COUNCILMEMBER PALTIN: Okay. Thanks.

MR. LIGGETT: Does that make sense?

COUNCILMEMBER PALTIN: Just, how does the water get from there to the forest?

MR. LIGGETT: So, we pump it from the wastewater facility to the algae, which is a few acres, and then through piping we pump it...oh drip irrigation is maybe what you're asking? So, we literally irrigate the whole forest. So, instead of a golf course, you grow a Native Hawaiian forest.

COUNCILMEMBER PALTIN: Okay. Cool. Thanks.

CHAIR MOLINA: Okay. Thank you, Member Paltin. Members, any other need to clarify Mr. Liggett's testimony? Committee Vice-Chair Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Real quick, thank you, Chair. Did you submit written testimony?

MR. LIGGETT: I did.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. Great.

MR. LIGGETT: Yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: I'll find it. Thank you. Thanks, Chair.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Alright, thank you. Anyway, I guess no other need to clarify.

COUNCILMEMBER HOKAMA: Chair?

CHAIR MOLINA: Oh sorry, Member Hokama?

COUNCILMEMBER HOKAMA: One last questions, please?

CHAIR MOLINA: Proceed.

COUNCILMEMBER HOKAMA: So, what you share with us on this system can meet water quality standards?

MR. LIGGETT: Can you get a permit, is that what you're asking?

COUNCILMEMBER HOKAMA: Can you meet the standards?

MR. LIGGETT: Well, I am, this is exactly what I work on at the Ocean Center is securing their NPDES permit. And in the name is National Pollutant Discharge Elimination. So, the way you get a permit is to eliminate the discharge and not need a permit. So, stop injecting basically. So, then you don't need a permit.

COUNCILMEMBER HOKAMA: Then you can meet the standards?

MR. LIGGETT: Yeah.

COUNCILMEMBER HOKAMA: Interesting.

MR. LIGGETT: So, you can argue that the groundwater reaches the ocean. But I don't think anyone's going to sue you because they think highly polished wastewater going into a forest a mile away from the ocean is reaching the ocean. So, I think that you're safe if you basically don't inject. And again, if you're controlling the flow, you can water when it's raining. It's your forest, you can do whatever you want with it.

COUNCILMEMBER HOKAMA: Thank you, Chairman.

CHAIR MOLINA: Thank you, Member Hokama. Seeing no other need to clarify Mr. Liggett's testimony, thank you very much for sharing.

COUNCILMEMBER SUGIMURA: Chair, could I?

CHAIR MOLINA: Oh, I'm sorry. Ms. Sugimura?

COUNCILMEMBER SUGIMURA: Mr. Liggett? Sorry about that. I was going to ask about if you had submitted written testimony. So, I'll look for that too.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. LIGGETT: Yeah, I have my one page, and then about 30 slides.

COUNCILMEMBER SUGIMURA: Okay. Just wondering, so, you do all of this for the Maui Ocean Center. Is that who you work for?

MR. LIGGETT: I'm Principal Engineer for Robin Knox, who is the Regulatory Director. And our task is to secure their discharge permit into the future.

COUNCILMEMBER SUGIMURA: So, you do not have an NDPS [sic] permit?

MR. LIGGETT: Yes, we do.

COUNCILMEMBER SUGIMURA: You said you don't need one.

MR. LIGGETT: Yes, we do. We discharge directly into the harbor.

COUNCILMEMBER SUGIMURA: You do.

MR. LIGGETT: Yes.

COUNCILMEMBER SUGIMURA: Discharge directly into the harbor? And so, you're highly regulated? So, this idea is separate from what you're doing?

MR. LIGGETT: This idea is separate from my day job which is at the Ocean Center. This is kind of my independent study, my passion through my private company.

COUNCILMEMBER SUGIMURA: So, do you have any idea how much this would cost, your idea?

MR. LIGGETT: I think end to end less than \$10 million. So, the price of a really nice home in Wailea you can fix the problem. But that's a guess.

COUNCILMEMBER SUGIMURA: For all of Lahaina, you're saying all of Lahaina you can fix this for \$10 million?

MR. LIGGETT: I'm not going to, well, I'm on record for that, Member. But what the pilot will do is allow us to study what level of nutrient removal we could achieve with Native Hawaiian limu and using that data we can scale the large system and cost it out. So, it depends on how well our algae performs on our wastewater. And it's never been done on Hawaiian algae. So, it would be something totally new.

COUNCILMEMBER SUGIMURA: Brand new idea.

MR. LIGGETT: Yeah.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SUGIMURA: Thank you.

CHAIR MOLINA: Alright --

COUNCILMEMBER KAMA: Chair?

CHAIR MOLINA: --thank you, Member Sugimura.

COUNCILMEMBER KAMA: One last question?

CHAIR MOLINA: Member Kama?

COUNCILMEMBER KAMA: What is the cost for an NDEPS [sic] permit?

MR. LIGGETT: That depends on the difficulty in obtaining it. So, I really don't know the answer to that question. I've only really worked on one case, which is the Ocean Center, and, you know, I can't really discuss the cost of that.

COUNCILMEMBER KAMA: Thank you. Thank you, Chair.

CHAIR MOLINA: Okay. Thank you, Member Kama. Alright, thank you very much for your testimony, Mr. Liggett.

MR. LIGGETT: Aloha.

CHAIR MOLINA: Members, we're on our third testifier. Boy, we've been given a good workout for our first two testifiers. So, testifiers, be prepared to get asked questions by this Committee. And I appreciate the inquiries, Members. We have Mr. Hans Krock, who will be testifying on GET-26. And upon the completion of Mr. Krock's testimony, Chair would like to reach out to our sister offices in Molokai, Lanai, and Hana.

MR. KROCK: Thank you.

CHAIR MOLINA: Good morning.

MR. KROCK: My name is Hans Krock. I'm a professor emeritus at the University of Hawaii. I've been in Hawaii since 1972 and I, among other things I wrote to Hawaii State Water Quality Standards. So, all the numbers you see there, they came from me, along with my colleague, Jimmy Kumagai over there. So, this question here of the problem with the injection wells and the effect on the wastewater, on the coral, is particularly important because the entire objection to that injection is that it detrimentally affects the coral due to the nutrient, specifically nitrogen. And we have done studies on that particular thing in Hawaii at several locations, but principally directly related to this

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

question is we did more than ten years of study at the Hawaii Kai outfall. It's a shallow outfall, it directly impinges on a coral area and in that case from both primary and secondary sewage over the years. So, this is a very thorough study. And in fact, all of the data that we got over there was the basis for determining the water quality standards for the State of Hawaii, and incidentally also for American Samoa. So, what we found there was that it's a complex system out there. It's not just does the nitrogen affect the coral. And what we found, basically, is that there's an enhancement of the growth of the system, the algae, the limu tends to grow, and also, the coral grows. In other words, the nitrogen is not detrimental to the coral. And so, doing treatment processes and whatnot to eliminate the effect of the injection on the coral is just a waste of money. And so, that's the basic conclusion. We've gotten a letter that...okay, well, that's it.

CHAIR MOLINA: Okay. Thank you very much, Professor Krock. Committee Members, any need to clarify Professor Krock's testimony? Councilmember Sinenci?

COUNCILMEMBER SINENCI: Thank you, Professor Krock, for being here.

MR. KROCK: Yeah.

COUNCILMEMBER SINENCI: I just had a question about your studies about the corals. Were your studies at zones of mixing or at the end of pipe?

MR. KROCK: It extended, the water quality we measured it all over the place. So, what we found was that up to the end of pipe all the way out, the coral grew faster than in the control area. In the control area, the typical Pocillopora meandrina grew at 2.5 centimeters a year in the control area, and near the outfall, it grew 3.5. So, it grew faster. And what the thing that I didn't get to is that there's a competition between coral and limu. And the complex thing is that there are urchins involved. And if urchins come and eat the limu, then that's a plus for the coral because then there's no more competition. And those urchins are maintained in the area by micro algae growing on the surface. And so, when we were studying that, there was in fact a limu problem, and then, later on the urchins came and maintained it, and for the last 40 years, there has been no limu problem and there's been abundant coral in the area even though they are exposed to nitrogen in large quantities, so.

COUNCILMEMBER SINENCI: Thank you. Thank you, Chair.

CHAIR MOLINA: Thank you, Member Sinenci. Committee Members, any need to clarify Professor Krock's testimony? Councilmember Sugimura?

COUNCILMEMBER SUGIMURA: Thank you, Chair. Thank you very much for being here. So, you're an expert in the field, I guess, from your description. And I think you were one of the, you sent us that letter --



**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. KROCK: Yes.

COUNCILMEMBER SUGIMURA: --on May 16<sup>th</sup>, along with James Kumagai, yourself, and Victor Moreland I believe. So, I was just wondering, what is your opinion about the Supreme Court, whether we should go to the, based upon the knowledge you have, what is your, what do you think about whether the County should go into the Supreme Court for a decision, and what is the impact of the Ninth Circuit Court?

MR. KROCK: Well, as far as the proposal that nutrients be restricted to save the coral, it's a nonstarter as far as I'm concerned. So, it's a useless thing. Nutrients are very important if the receiving water is semi-enclosed and there's a resident \_\_\_\_\_, Kaneohe Bay for instance, Hilo Bay, but not an open coastal area.

COUNCILMEMBER SUGIMURA: Thank you.

CHAIR MOLINA: Okay. Thank you --

COUNCILMEMBER SUGIMURA: I guess you have no opinion on that then, thank you.

MR. KROCK: Well, in other words, don't change the water quality standards is what I'm saying, you know --

COUNCILMEMBER SUGIMURA: Okay. That's your...

MR. KROCK: --which is what they're trying to do. Okay.

COUNCILMEMBER SUGIMURA: So, that's your expertise area, thank you.

CHAIR MOLINA: Alright. Thank you, Member Sugimura. Member Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Mr. Clark, mahalo for your testimony. Your response to Member Sugimura seems to slightly contradict the recommendations that you provided in your written testimony. Your written testimony seemed to recommend moving away from injection wells, you know, reuse recycled water elsewhere, alternates to injection to use wells one and two instead of three and four which were the two wells that the traceability study showed the dye coming out from. So, I'm just trying to get a better understanding of what you, how your response to the Member Sugimura versus what was submitted in writing.

MR. KROCK: Yeah, well, as a general observation, if you inject or you dispose on land it's going to go into the ocean, you know. There's no other place for it to go. And so, by going through the surface of the earth and through the material rather than say a lava tube or something going directly, you then change the discharge. It is a positive development to go through soil or sand because although the nitrogen goes through, the phosphorus does not. And in fact, the limiting nutrient in the ocean around here

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

is phosphorus and not nitrogen. And so, if you go through a lava tube, the phosphorus goes into the ocean. So, that's a potential problem. And, but if you go in an injection well that doesn't immediately go out through a lava tube, then you remove the phosphorus and for instance, the entire coastline of Kona has no surface runoff because it's young geologically. And so, all of the runoff goes, there isn't any runoff, but it goes into the ground, the groundwater discharges, and all the phosphorus is removed. So, the entire coastline of Kona is nitrogen coming out and no problem of excess growth of any kind, you know. So, it matters in the detail of whether this well goes directly out or that well doesn't. But the general idea of injection is a good one in case of removal. Alternatively, if you have to discharge some other way through an outfall for instance, then that creates a whole bunch of other problems because then you have a direct discharge without any benefit of going through the ground.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for your response, Mr. Clark. So, part of the argument is that the permits that the Lahaina injection, the Lahaina Wastewater Reclamation facility secured previously, historically, which was governed by the Safe Drinking Water Act, the Underground Injection Control Permit, it allows for higher levels of nutrients like nitrate and copper because humans can handle those levels, those higher levels. But marine life cannot live in those types of levels that humans can. Is that, was that part of your study?

MR. KROCK: Nitrate, at the levels that we're talking about here, the whole thing I was talking about here is that nitrates at the level we're talking about is not detrimental to the local environment. Things like copper, is that what you mentioned, metal copper?

VICE-CHAIR RAWLINS-FERNANDEZ: Yes, that was one of them.

MR. KROCK: Yeah, copper is detrimental to photosynthesis. So, yeah, that would be a -no, you know, depending on the levels, yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: Right, so, the UIC permit allows for much higher levels than an NPDES would allow.

MR. KROCK: I see, yeah. I didn't know that detail, no.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. Mahalo, Mr. Clark.

MR. KROCK: Yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

CHAIR MOLINA: Okay. Alright, thank you, Member Rawlins-Fernandez. Members, any other need to clarify Professor Krock's testimony?

COUNCILMEMBER KAMA: Chair?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: I'm sorry, Member Kama, followed by Chairman King.

COUNCILMEMBER KAMA: So, did I understand you correctly when you said that as the wastewater goes through the earth and it starts to disseminate down, that a process takes place that actually cleans --

MR. KROCK: Yes.

COUNCILMEMBER KAMA: --that wastewater? So, that by the time it actually gets to the ocean, it's cleaned?

MR. KROCK: Yes, it cleans the phosphorus out and it basically filters particulate matter. So, for instance, bacteria, viruses, and whatnot get removed by that process.

COUNCILMEMBER KAMA: Thank you. Thank you, Chair.

CHAIR MOLINA: Thank you, Member Kama. Chairman King?

COUNCILMEMBER KING: Thank you, Chair. Thank you for being here, Dr. Krock. So, I'm just wondering why if injection well, I know there's different opinions on it, we'll probably hear the other opinion. But if they're so beneficial, why did the Department of Health ban them?

MR. KROCK: Injection wells for very large flows, for instance if you tried to do it with Sand Island outfall, you just simply don't have the capability of absorbing that much water in a relatively small area.

COUNCILMEMBER KING: Okay. So, that would be the same as Lahaina? So, we've been told that basically that our State Department of Health has said no more injection wells. And so, we are dealing with, you know, I'm personally dealing with in my district in Maalaea, looking at potential replacements because they know they won't be able to continue after several years with the injection wells because of the detrimental effect.

MR. KROCK: Yeah, there's just so much capacity, yeah.

COUNCILMEMBER KING: Right. Okay. Thank you.

CHAIR MOLINA: Okay. Thank you very much, Chairman King. Members, any other need to clarify Professor Krock's testimony? Seeing none, thank you very much, Professor. And please, I would like to talk to you afterwards to see if any one of us could get a one credit for a water study course from University of Hawaii after all of this education. But thank you very much, sir. It's certainly been an education. Okay.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

Let's go out to Molokai. Ms. Lindo, do we have any testifiers out in Molokai for GET item 26?

MS. LINDO: Good morning, Chair. This is Zhan at the Molokai District Office and there are no testifiers.

CHAIR MOLINA: Okay. Mahalo. Let's go out to Hana, and Ms. Oliveira Medeiros, good morning, do we have any testifiers from Hana?

MS. MEDEIROS: Good morning, Chair. This is Mavis Oliveira Medeiros from the Hana Office and there is nobody here waiting to testify.

CHAIR MOLINA: Okay. Mahalo. And my understanding is out in Lanai the Lanai Office is closed this morning, am I correct staff?

UNIDENTIFIED SPEAKER: Yes, Chair.

CHAIR MOLINA: Okay. We'll see if, until further notice if there may be a testifier or two from Lanai. In the meantime, let's go back to testimony here in Wailuku. We have Mr. James Kumagai to testify on GET item 26, to be followed by Rob Weltman.

MR. KUMAGAI: Thank you, Mr. Chairman --

CHAIR MOLINA: Good morning.

MR. KUMAGAI: --Members of the Committee. I'm James Kumagai. I don't represent anybody in particular and I submitted testimony earlier with co-authors Professor Hans Krock and Victor Moreland. Dr. Krock and I were at the Cal, Berkeley together during the hay day of all the riots and all that, you know, during the start of. I guess all the debate regarding the passage, the Federal law that we're talking about. So, we're quite experienced from that standpoint. But I'd like to leave, I leave a lot of things since I put a lot of things in the written testimony. But I would like to add some things about injection wells and go on about the nitrogen and add something different because I feel it plays a role, or at least gives some reason for dealing with the issue of should we go ahead with the Supreme Court hearing or not. First of all, injection wells, it's been used, and I think we explained it, I think others have also. But first of all, one of our recommendations is keep that option open, keep it open. There are different ways that you...and in the national basis there's over 1,000 or so injection wells around. But I'd like to point out the experience with Orange County, California that's been going on for half a century or more. Orange County, about almost half a century ago used the injection wells injecting sewage effluent to create a hydraulic barrier to keep the seawater out of the intruding in their potable water aquifer. They used that as a basis for creating a hydraulic barrier to preserve their drinking water aquifer source. They were injecting sewage effluent, treated of course, the amount that injected of course goes out to push the seawater, part of it goes to,

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

into the potable water. So, what they were doing at that time was an indirect potable water reuse and the number was about 17 percent. But anyway, that's injection wells. There are different ways of using it. I'm saying keep that option open for Maui. There are a lot of things that you got a future to contend with, you got water quality issues to contend with. Injection wells can play a role, just point that out. But other than that, as far as nutrients just one more thing there's just about, anyway, this is it. Okay. If you have any questions I'll be...

CHAIR MOLINA: Okay. Thank you, Mr. Kumagai. Committee Members, clarification of Mr. Kumagai's testimony? Councilmember Sinenci?

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you, Mr. Kumagai, for being here. You mentioned that a one-size-fits-all model wouldn't work. Can you explain as far as one size fits all?

MR. KUMAGAI: Okay. As far as that goes, you say, well, if you run into a problem with injection wells in a particular location, for example, you pumping in maybe 100 MGD on a short place that you're going to run into problems because the freshwater is basically coming out. But just because in that kind of situation that is no good, doesn't mean you're going to ban the whole thing. There are instances where the smaller flows, different situations, or for a different purpose as in the, like I pointed out the Orange County system, very critical was seawater, in...from a seawater intrusion standpoint to deal with that issue. It's not a disposal, per se, but they trying to save a drinking water aquifer in that particular place by using sewage effluent as a barrier creation. So, there are different purposes, different functions, and injection wells can serve all these different kinds of, it takes, you know, evaluation, analysis, and a decision from an engineering standpoint to see what is cost effective. That's why I'm saying that.

COUNCILMEMBER SINENCI: Okay. One more question, Chair. And then you mentioned nitrates, can you explain, you know, nitrates in the effluent, does that have any traces of like medications that people take or, you know, including steroids or does, is that part of nitrates?

MR. KUMAGAI: Well, it's what's in the water. Nitrates are one I think receiving a lot of attention, you know, nutrients and so on. And there are other things that come out. And I think right now for the future, yeah, future consideration, drinking water as well as, you know, the ecological impact is what is called the emerging contaminants. Now, what we have always believed going through chemicals that is synthesized in nature will always be degraded in nature. They've been, we've been around four-and-a-half billion years as far as nature is concerned. So, if organic matter is synthesized by nature, we can be pretty sure if that survived all up these years that it can be degraded. The synthesized organic matter is the ones, and a lot of it do not degrade except for very long periods. Those the ones that persist in the environment, persist not only in the environment in our bodies and so on, permeates the whole

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

biosphere, that don't degrade except for thousands of years or hundreds of years. Those are the ones we're concerned about.

COUNCILMEMBER SINENCI: Can you...

MR. KUMAGAI: So, right now, you know, so far, a lot of things are very low concentrations. And EPA and everybody is saying well, it's not to the point where we really in an acute situation, we got to do something except certain ones, DDT they banned, you know, certain kinds of chemicals. So, in this whole category is what I'm saying, something that we need to watch for and look at whatever is happening and be able to deal with it and not be surprised by it or basically, you know, run into a situation, a crisis situation. So, that's why I'm saying there are certain things that we got to keep watching. And I'm not saying it's a problem now, but there could be a situation. But when it comes to planning and preparing for the future, those are things we got to watch.

COUNCILMEMBER SINENCI: Would you be talking about pesticides and fertilizers, those types of synthetic chemicals?

MR. KUMAGAI: Yes, you know, that kind of thing has been around. The personal care products is more what has been coming out. I think more and more attention, the personal care products, cosmetics, et cetera, et cetera. So, those are the things I'm saying that, as far as the pesticides issue, I think a lot of the issues have been defined, talked about, and some things we have come to a conclusion of what we do about it. The personal care products is something new that hasn't been addressed as much and hasn't received as much attention maybe. But it's something we got to watch.

COUNCILMEMBER SINENCI: Okay. Thank you.

CHAIR MOLINA: Okay. Councilmember Sinenci. Councilmember Sugimura, followed by Councilmember Paltin?

COUNCILMEMBER SUGIMURA: Thank you. Thank you, Chair. So, Dr. Kumagai, good to see you here. I will say that I met you many years ago as the Democratic Party Chair, right? You were part of the State Democratic Party? So, nice to see you here before us in your professional, with your professional expertise. So, I want to ask you, with what you sent with written testimony, you and Dr. Krock, I was just wondering, do you think that the County of Maui should go to the Supreme Court?

MR. KUMAGAI: Yes. I really believe that. And if I may just go on and say what else, you know, I'm kind of --

COUNCILMEMBER SUGIMURA: Please, please.

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

MR. KUMAGAI: --why I'm saying that also. In addition to dealing with...for someone that looked at and had dealt with from an academic standpoint, from a research standpoint, the basis for coming up with a statute, you know, in the '60s there's been a lot of changes in science, there's the Vietnam War, et cetera, et cetera, the environmental laws came about in the '60s. Now, at the end of the '69s you have, 1969, the country put a man on the moon. And in between then, there's been the confirmation of the Big Bang Theory or, you know, the beginning of the universe, et cetera, et cetera, double helix, you know, DNA, et cetera. So, there's been a lot of the things that are on the molecular level, particle basis in dealing with the environment. What has come out also is the whole bit about nanotechnology and so on. Well, we're dealing with the environment, they've been doing it since ancient times. More and more, now we're looking at it from a molecular particle basis what the environment is. So, as far as dealing with the chemical aspects of it, we have the laws, we went point sources, nonpoint sources, all the emissions. And there's also come up with things like dealing with seawater intrusion, changes with, in the natural systems that affect quality of drinking water, affecting people, health, and so on. So, the Federal law has been very comprehensive, actually more than injection wells, point sources, and so on. So, the question I think in the debate that's been going on, the legislative history for it, trying to get Congress to deal with it have just some uniform simple way to deal with the whole thing. And it hasn't been simply coming out. So, basically, we end up with bureaucracy dealing with one part of it all the way and screwed things up for the other guys and so on. Okay. Let me point out one thing and let me bring up another thing, because of the comprehensiveness, maybe Senator Muskie, one of the leaders of, they say what the bill also is promoting is the promotion of the environmental ethic. The whole notion of the mindset of how we look at it, how we're approaching it. Now, it just so happens in that period, late '60s in the early '70s, locally, right after Statehood in the '60s construction and so on, a lot of things happening after Statehood. But the environmental movement that was being argued about, being put together, and I'll just point out a person who used to be the Senator and then the, with the House on Ecology and Environment, Kenneth Brown, what he was promoting at that time was his whole notion or concept of malama, to care, care for. Federal law is based on water, you know, air, solid waste, and so on. You got standards on drinking water, standards on air quality, et cetera, et cetera. As far as the malama concept, the environment, we're talking about the land, people, spirit, something more than that, than just the details of air, water, solid waste, and so on, land, people, spirit. And what about all that, how does it relate to all the bureaucracy as far the...

CHAIR MOLINA: I'm sorry, Mr. Kumagai, I apologize, I think you've answered Member Sugimura's question about the, whether we should go to the Supreme Court or not. Yeah, but thank you, I appreciate the, your comments.

MR. KUMAGAI: Okay. I want to make one more point. May I?

CHAIR MOLINA: Briefly, sir.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. KUMAGAI: Okay. I'll be brief. Once I get carried away with it. What happened out of all this when I talk about the ethic malama and so on, Lanai City about the late '80s was having problems with cesspool failures. I was with the Health Department Deputy Director back then earlier, trying to send notice of violations, get the people to clean up. They couldn't, the people couldn't by themselves. What did it take? And let me put it that way, to, in order to clean up the whole issue of cesspools it took the Federal, State, County, Castle and Cooke, ILWU, as far as the money and everybody to come out and bring it all together. So, by the time the decision was made when the senior, I guess Council Chair Hokama at that time got together with Mayor Hannibal Tavares, within one year from the time decision was made to go, to get the money, planning, design, pipes in the ground in one calendar year. What did it take to do that? It took everybody.

CHAIR MOLINA: Okay. Thank you, Mr. Kumagai.

MR. KUMAGAI: One thing about that.

CHAIR MOLINA: Thank you.

MR. KUMAGAI: Okay.

CHAIR MOLINA: Member Sugimura, thank you. Oh, Mr. Kumagai, hang on, hang on, Mr. Kumagai, we get another Councilmember has a question for you, sorry. You're in demand, sir. Councilmember Paltin?

COUNCILMEMBER PALTIN: Thank you, Chair. Thank you, Mr. Kumagai, for being here and the work you do on the water qualities. My question was, I wasn't really aware that personal care products was such an emerging concern, like are you talking about like those little bath bead things in the soap, like the micro beads or something, is that?

MR. KUMAGAI: No, not particularly, it's just the chemicals that are, you know, surviving into the, from the sewage into the environment, the drinking water source and so on.

COUNCILMEMBER PALTIN: You said it was like an emerging concern though? Like what is the new part about personal care products that's an emerging concern?

MR. KUMAGAI: Well, it's more the polymers, the synthetic polymers that are associated with it that, you know, get into the sewage, survive the treatment system, and then get out into the environment one way or the other. Now, it's somewhat similar to the ABS, you know, the soap before, the detergent, the ABS, it used to survive the treatment getting to suds all over.

COUNCILMEMBER PALTIN: Yeah.



# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

MR. KUMAGAI: The chemical companies say you got to go with ozonation. So, what it is, is that these chemicals are getting into the drinking water sources, the environment, or basically permeating the environment, you know, entire biosphere.

COUNCILMEMBER PALTIN: And so, every time it's a new emerging concern, how come the Federal doesn't comprehensive for folks to stop putting --

MR. KUMAGAI: Well, they are looking.

COUNCILMEMBER PALTIN: --chemicals in...

MR. KUMAGAI: There are people watching that. They're saying it's still low enough. In some instances, I think I don't know if there's somebody saying no, there should be some control on what exactly you get out into the commercial products.

COUNCILMEMBER PALTIN: Yeah, why would you put it out there if it's causing such a problem and it's an emerging thing?

MR. KUMAGAI: Well, it's not, they're saying it's a concern. If something stays in the environment, lasts for thousands of years, and like in DDT, nobody . . . *(inaudible)* . . . it just accumulates in the body fat.

COUNCILMEMBER PALTIN: Yeah, that's a concern.

MR. KUMAGAI: If it's going to be in the body, it's called what they call xenobiotic. It's not supposed to be there. If it's there, then the question is what is it going to be doing later on? So, if it's going to be, you know, into the body and stays there, you're going to be start worrying about it.

COUNCILMEMBER PALTIN: Thank you.

CHAIR MOLINA: Okay. Thank you, Mr. Kumagai. You answered Member Paltin's questions.

MR. KUMAGAI: Yeah.

CHAIR MOLINA: Committee Vice-Chair Rawlins-Fernandez? Mr. Kumagai, sorry.

MR. KUMAGAI: Oh, I'm sorry.

VICE-CHAIR RAWLINS-FERNANDEZ: You can't run away yet.

CHAIR MOLINA: You're a very popular individual this morning.

MR. KUMAGAI: I'm sorry, I should be kicked off the podium. I get carried away; I do. My apologies. Okay.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Proceed, Member Rawlins-Fernandez.

MR. KUMAGAI: Yes?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Mr. Kumagai. Mahalo for your testimony. So, in your response to Member Sugimura's question about whether you would recommend the County pursuing its case to the Supreme Court you said yes. And in that same response, you talked about malama aina and, you know, taking care of the spiritual health and the health and safety of people and the environment. So, do you think that in like continuing to inject the effluent into the ocean is malama aina?

MR. KUMAGAI: Well, when we inject this effluent into the ocean, it depends how it's done and where. Naturally it's going in, everything is recycled, the water is, you know, for billions of years have been the same water, you know, kind of, basically it's a recycled situation in a broad sense, hydrologically. So, what we do as human beings and how we do it in technology depends on where, and how much, and so on. So, there's a way to do it so that it conforms with what we say nature knows best. We know basically it's a space, time, energy thing. So, there's a way to do it in order to not create that kind of problems. And we know what kind of situations occur where we do have problems. So, from that standpoint, I'm saying that there's a time and place for it, there's a way to do it. It's not a one size fits all kind of thing. That's my suggestion.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for your response. So, basically, you know, going to the Supreme Court and getting a favorable ruling for the County would allow the continuation of status quo of what we're doing. And so, is your response then that it is malama aina?

MR. KUMAGAI: . . . *(inaudible)* . . .

CHAIR MOLINA: Hang on, hang on. Okay. Go ahead, Mr. Kumagai. You may answer now.

MR. KUMAGAI: The status quo, I'm not saying the status quo is okay either, or I'm not saying that, you know, whatever you're doing to continue doing. Now, in terms of what was intended, you know, I'm from Lahaina, I grew up in, you know, some 84 years ago kind of thing, Lahainaluna grad. I've been around so I know what was intended, what I'm saying, intended. And what Maui is doing now is not the same. There are things, you know, basically, there's a way to do it, we think, you know, the way to manage the environment that way. So, I'm not, status quo I'm not sure what you mean by that. But if, but if I think it is, I'm saying no, you got to do something more.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. So...

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. KUMAGAI: But all I'm saying is that, you know, the way it is, you got to get Supreme Court in there to get everything back on track from my standpoint. It's my opinion at this point.

CHAIR MOLINA: Okay.

MR. KUMAGAI: From after all these years...

CHAIR MOLINA: Okay. Mr. Kumagai, you've made your point. Hang on yeah, hang on, hang on --

MR. KUMAGAI: I'm sorry.

CHAIR MOLINA: --she still has a follow-up question. No, no, no, you're doing great.

VICE-CHAIR RAWLINS-FERNANDEZ: Can't run away yet.

CHAIR MOLINA: Ms. Rawlins-Fernandez, you have another question?

VICE-CHAIR RAWLINS-FERNANDEZ: Don't run away. No, I just, so, I just wanted to clarify that what we're doing is trying to improve from the status quo of what we're doing --

MR. KUMAGAI: Yes.

VICE-CHAIR RAWLINS-FERNANDEZ: --and not to allow for the courts to say, yeah, continue what you doing. So, instead of focusing our time, energy, and money on going to the Supreme Court, you're saying that we need to improve our systems anyway. So, why not just settle and move forward?

CHAIR MOLINA: Mr. Kumagai, up to you if you want to answer.

MR. KUMAGAI: I'm not so sure that, well, I feel that there's certain things that need to be done. To go back as far as the whole ethic, the malama aina, et cetera, I, if we just, I don't know if it's even there now. That has to be there. And because we had Federal dollars and everything take care of something like Lanai, you know, cesspools, that it can happen under the Federal law as it was. It took people that recognized, at least Region 9 people there were. There were people saying step one, two, three, \_\_\_\_\_, they were saying they can do it. The staff said that, not the bosses or anything. So, people that cared essentially found a way to do it. Now, that has to still be there in order to get the Federal system involved with it. We can be on our own. But what I'm suggesting is every bit counts, every bit helps as far as who can get. Don't leave the Feds out of it. But make sure they come in and respect, you know, our aloha aina, malama aina and so on, instead of taking it their way. Anyway, that's...

CHAIR MOLINA: Okay. Thank you, Mr. Kumagai.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Mr. Kumagai.

CHAIR MOLINA: Ms. Rawlins, that's it?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

CHAIR MOLINA: Okay. I'm sorry, Mr. Kumagai, hang one, we get one more question from Chairman King.

MR. KUMAGAI: Oh, I'm sorry. I thought I'm being kicked out.

COUNCILMEMBER KING: Well, I, no, thank you for being here. I know it's difficult questions. But I just wanted to clarify. It sounded like you were saying there should not be standards for water, clean water? Or are you against having standards for clean water?

MR. KUMAGAI: The standards, no I'm not saying the --

COUNCILMEMBER KING: You were sort of saying standards --

MR. KUMAGAI: --standards, the status quo, yeah.

COUNCILMEMBER KING: --against the people and spirit.

MR. KUMAGAI: I'm saying you got to be doing more.

COUNCILMEMBER KING: Okay. We gotta be doing more. Okay.

MR. KUMAGAI: Yeah.

COUNCILMEMBER KING: I just, and then, are you aware at the, I know 'cause you were involved in the Democratic Party, are you aware that the Maui Democratic Party unanimously passed a resolution asking this Council to settle this court case and not take it to the Supreme Court but to focus on solutions? So, we have that in our testimony as a unanimous position of the Maui County Democrats.

MR. KUMAGAI: Well, without knowing all the details now, yeah, of course, I was Chairman of the Party, a three-term chairman back then. But, you know, at this point in time, I wasn't aware of just what the situation was or just what it is without knowing any more of the details. But as it stands right now, we'll disagree with that.

COUNCILMEMBER KING: You would disagree with the --

MR. KUMAGAI: I disagree with it.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER KING: --party? Okay. Thank you.

MR. KUMAGAI: I strongly feel on the basis of what I've lived through all these years, that you should go ahead and press that issue and get that thing back on track.

CHAIR MOLINA: Okay. Thank you, Mr. Kumagai.

MR. KUMAGAI: And all I'm doing that is get the Feds involved backing us up, too, not get off...

CHAIR MOLINA: Alright, thank you, Mr. Kumagai. Members, any other...sorry, Mr. Kumagai, hang on, yeah, hang on, hang on.

COUNCILMEMBER SUGIMURA: Mr. Kumagai?

CHAIR MOLINA: We don't want to let you go.

MR. KUMAGAI: I thought I was being kicked off.

CHAIR MOLINA: Councilmember Sugimura?

COUNCILMEMBER SUGIMURA: So, Dr. Kumagai, just so you know that Democratic Party, Maui County Democratic, I don't know if it was a convention, there were 46 votes. So, it wasn't a very large group. But the, I was just wondering, based upon your knowledge then, do you think that the County of Maui should be subjected to the National Pollutant Discharge Elimination System, DPDES [sic] system, which is regulated by the Clean Water Act? Do you think that?

MR. KUMAGAI: That should not be?

COUNCILMEMBER SUGIMURA: Should they, or should they not be?

MR. KUMAGAI: Well, I think it's part of the system already. It's how you can regulate that system, or how you can set it up. Now, one thing about, you know, let me respond to that NPDES. It has become a bureaucracy that has a life of its own. It can't do anything; it's not supposed to be that way. There are a lot of other parts in the section in the statute that says that they have an input as far as how decisions are made on that. Sure, NPDES is a regulatory basis, a regulatory tool.

COUNCILMEMBER SUGIMURA: Tool.

MR. KUMAGAI: But as far as the criteria in being objective, et cetera, it comes from other parts of the section in the statute also. That should be, right now it can't.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SUGIMURA: Right, that's a problem.

MR. KUMAGAI: You know, as somebody going through...it has a life of its own, it's a bureaucracy. Pardon my saying so. I don't mind, I'm getting working up over this.

CHAIR MOLINA: Okay. Thank you.

MR. KUMAGAI: After going through and arguing with the...

CHAIR MOLINA: Alright, thank you, Mr. Kumagai.

COUNCILMEMBER SUGIMURA: Thank you.

CHAIR MOLINA: Any other questions? Okay. Seeing no other need to clarify your testimony, now you may leave, Mr. Kumagai.

MR. KUMAGAI: Okay. Thank you.

CHAIR MOLINA: And we thank you very much for your manao, sir.

MR. KUMAGAI: Thank you so much.

CHAIR MOLINA: It's much, appreciated, doctor. Okay. Next to testify we have on GET item 26 is Mr. Rob Weltman, and thank you very much, Mr. Weltman, for your patience.

MR. WELTMAN: Aloha mai kakou. . . .*(Spoke in Hawaiian)*. . . Chair Molina, Members of the GET Committee, my name is Rob Weltman and I'm here today speaking for Sierra Club Maui. I'm sad that you have inherited a situation where you're having to spend time and money, and the reputation of Maui doing something which you would actually prefer to do the exact opposite of. You don't want Maui to be known in years to come as, oh, that's the place where they felt they needed to be able to release treated effluent into the ocean through injection wells, and they took it all the way to the Supreme Court so that polluters all around the country could dump water into the ground near the ocean and get away with it. That's not what you want, and that's not what we want. We all want Maui to be known now and, in the future, as, oh Maui, that's the place where they do everything to protect the health and safety of the ocean and the coral reefs. No oxybenzone sunscreen, no one-time plastics, no toxic runoff, and no wastewater effluents into the ocean. The lawyers have worked hard to come up with a settlement that lets us all spend our time where our heart tells us we should be doing. I urge you to move forward with this settlement so that the Council, and Councils to come, can focus on protecting the coral reefs, the creatures that live in them, and all of us who depend on them. Aloha, and thank you for your time.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Okay. Thank you very much, Mr. Weltman. Committee Members, any need to clarify Mr. Weltman's testimony? Chairman King?

COUNCILMEMBER KING: Thank you, Chair. Thank you for being here, Mr. Weltman. So, you're representing the Sierra Club?

MR. WELTMAN: Yes.

COUNCILMEMBER KING: We just heard from a previous testifier that we should get the Feds involved in this. In your opinion, what is the position of the Feds today under our current administration as far as the environment goes?

MR. WELTMAN: We believe very strongly that the Clean Water Act requires that you not release effluents into the ocean without a permit. That's the whole purpose of the NPDES system. And it was not designed so that oh, I could just dig a hole next to the ocean and do it anyway. It makes no sense at all to us, and we believe that the Federal position is clear on this and there's no need to take it to the Supreme Court, and the only outcome there could possibly be...there are two possible outcomes, one is that they state which is already known, which I just said, or the other outcome is that they decide to weaken the Clean Water Act and say, okay, it only applies if you directly empty things into the ocean. So, we believe that the Federal position is clear, and that we don't need any further clarification on that. And furthermore, we don't need further clarification because we know what needs to be done and we should do that.

COUNCILMEMBER KING: Okay.

MR. WELTMAN: I just wanted to add, if I may, one comment. The, an earlier speaker said that nutrients and nitrates into the water do not negatively affect the coral reefs. But I have in front of me a study done by the USGS for this particular area, the Kahekili coastline, Kahekili Beach, in 2017, and it says among other things, we show that sustained nutrient rich, lower pH submarine groundwater discharging on to near shore coral reefs off West Maui lowers the pH of seawater and exposes corals to nitrate concentrations 50 times higher than ambient. Rates of coral calcification are substantially decreased and rates of bioerosion are orders of magnitude higher than those observed in coral cores collected in the Pacific under equivalent low pH conditions but living in oligotrophic waters. So, I believe that for our specific space, our specific case of the Lahaina coastline, we have very clear scientific evidence.

COUNCILMEMBER KING: Okay. Thank you. And do you have, are you working at all with Department of Health on its position on local injection wells?

MR. WELTMAN: I can't speak to that directly as far as this case goes, no.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER KING: Okay. I was just looking at their underground injection control program and just wondered if you had any direct conversations with Department of Health regarding this.

MR. WELTMAN: I have not had, but as I understand, we are in complete alignment with the Department of Health that anything that allows abnormal levels of nutrients to reach the ocean directly or indirectly is something that we can't support, and they can't support.

COUNCILMEMBER KING: Okay. Thank you.

CHAIR MOLINA: Okay. Thank you, Chairman King. Councilmember Sugimura?

COUNCILMEMBER SUGIMURA: Thank you, Chair. So, didn't the EPA just release a statement saying that the discharge into groundwater is not covered by the Clean Water Act, do you know that?

MR. WELTMAN: There was a statement, yes, very recently.

COUNCILMEMBER SUGIMURA: Thank you, confirms.

CHAIR MOLINA: Thank you, Councilmember Sugimura. Councilmember Sinenci, followed by Committee Vice-Chair Rawlins-Fernandez.

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you, Mr. Weltman, for being here. So, I guess there's an overwhelming belief that we'll be banning injection wells? Can you speak to that? Like people think that...I know we cannot have any more injection wells, but, I mean, if, is this, this is just permitting, it's about the permitting or...

MR. WELTMAN: The permitting is about whether or not you're allowed to release abnormal levels of nutrients and other things into the ocean without a permit. So, obviously, if you have a permit, you can release things into the ocean. The permit defines what you're allowed to do. As we heard in the earlier testimony, the Ocean Center has such a permit because the need to bring in water and release it back into the ocean after using it for the aquariums. So, yes, a permit can be acquired. What this case is about is not whether or not to shut down injection wells. This case is about, do you need a permit to inject water through an injection well into the ocean.

COUNCILMEMBER SINENCI: Okay. Thank you.

CHAIR MOLINA: Okay. Thank you, Councilmember Sinenci. Councilmember Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. . . .*(speaking Hawaiian)*. . . You cited a study, what is the study that you cited?



# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. WELTMAN: It's called, Vulnerability of Coral Reefs in Bioerosion from Land-Based Sources of Pollution, published in the Journal of Geophysical Research in, I think it's October 2017.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for that. And so, the Clean Water Act, the NPDES permit does not govern the groundwater, so, it doesn't go into the groundwater, but is it your understanding that what the Ninth Circuit Court said is that the groundwater was just a conduit to ocean?

MR. WELTMAN: Exactly, yes.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo.

CHAIR MOLINA: Okay. Thank you, Member Rawlins-Fernandez. Any other need to clarify Mr. Weltman's testimony? Seeing none, thank you for sharing, Mr. Weltman.

MR. WELTMAN: Thank you.

CHAIR MOLINA: Next to testify on GET item 26, we have Hannah Bernard, to be followed by Kyle Ginoza. Good morning, Ms. Bernard.

MS. BERNARD: Aloha kakou, Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and esteemed Councilmembers. Thank you so much for the opportunity to testify this morning. I actually will be presenting testimony on behalf of Hawaii Wildlife Fund, which I'm the Director of, and Dr. Wendy Wiltse, former Region 9 EPA scientist for 32 years, 24 of those here on Maui, and Oahu. So, what I'd like to do is read the salient points of her testimony first, which I believe you all have. But I'd like it...to read. She asked me to read this into the record because of her deep involvement over the years in this issue. So, now, Wendy Wiltse is the president of Oahu Waterkeepers' Board of Directors working for clean water in Hawaii, and I'm going to read fast. She supports the very doable proposed settlement of this lawsuit. She has followed this issue with great interest for 26 years through many Maui County Administrations, and she says it's time to stop fighting and using hyperbole to scare people about projected implications of NPDES. It's time to work on the solutions to managing Maui's wastewater and ways that protect the reefs and coastal waters. Speculations are being made about the ramifications of an NPDES permit for our treatment plants. She's going to address three of these issues, an appropriate NPDES permit can be developed for our injection wells at Lahaina and EPA offered help. EPA has offered multiple times just like the professors referred to, EPA is offering help and is willing to help several times to the Department of Health to repair NPDES permits. There is much recent and relevant data available because of all the scientific studies that have been done out there in our waters where the receiving waters for the injectate, this data will be used to inform calculations of assimilative capacity and zones of mixing. All of these data will be helpful in drafting an appropriate NPDES permit. The second issue

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

she wants to address is the UIC program. These permits cannot, as was pointed out earlier, and exemplified by Keani Rawlins' questions, adequately address concerns about coastal water quality, they don't protect the marine life. The poor water quality, algal blooms and degradation of corals reported by scientists at Kahekili have all occurred under existing UIC permit regulations. So, the UIC permits currently lack adequate protection for Maui's coastal waters. In fact, public concern over former nuisance algal blooms in West Maui led the EPA to propose stricter nitrate limits in previous draft versions of the UIC permit. Maui County challenged that, and they were taken away. And third, she's saying the NPDES permits will not, our case will not lead to permits being required for cesspools. They have another process that they're being managed by. They are not being required for individual homes that use onsite wastewater systems. So, this is another concern that we've been hearing from people is completely unfounded. And finally, in conclusion, as the Director of Hawaii Wildlife Fund, I'd like to support the resolution that Chair King has on the table for settlement and modify the Corporation Counsel's. Thank you.

CHAIR MOLINA: Okay. Thank you, Ms. Bernard. Members, any need to clarify Ms. Bernard's testimony? Chairman King?

COUNCILMEMBER KING: Thank you. Thank you for being here and I know you didn't have time to read Dr. Wiltse's testimony. But I just wanted to clarify the last statement that you made about the modification because the resolution that came with the settlement was actually not my resolution. It was, it came from Corp. Counsel. And so, the part that you wanted us to amend is the section that...

MS. BERNARD: Yeah, yeah, so, your resolution earlier, I wanted that to be accepted. And then, the Corp. Counsel's section on Page 4 under Number 2, Richelle Thomson's resolution where she specifically inserted the language that, under Item 2, that authorizes the Mayor to execute and release a settlement agreement on behalf of the County. I think, my personal humble opinion is that you should strike out, under such terms and conditions as may be imposed and agreed to by the Corporation Counsel. I just personally feel like it's questionable, that the Corporation Counsel should have any input into a settlement agreement that has been reached by the clients and the County.

COUNCILMEMBER KING: Right, okay, thank you. The difference between policymaking and the position of being legal advisor.

MS. BERNARD: Correct.

COUNCILMEMBER KING: Okay.

MS. BERNARD: It's governance issue.

COUNCILMEMBER KING: Thank you.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Alright, thank you, Chairman King. Member Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Ms. Bernard. Mahalo for being here.

MS. BERNARD: Aloha.

VICE-CHAIR RAWLINS-FERNANDEZ: So, in your testimony and Ms. Wiltse's, you mentioned onsite wastewater systems such as cesspools and septic systems are regulated as Class V UIC wells in different significant ways from the Class I municipal waste disposal injection wells at the Lahaina Wastewater Facility. So, is it your understanding that the Ninth Circuit Court decision would have an impact on cesspools and septic systems?

MS. BERNARD: It's my understanding that it will not, that we're talking about apples and oranges here. We're talking about a system that was designed in the Lahaina Treatment Plant for the water to be accessing the groundwater, to hit the aquifer to be used as a conduit to reach the ocean versus cesspools, which were never designed with the sole intent of reaching the ocean. They're completely different and the, also the point is that EPA has, and others have many more important issues to address rather than going after individual homeowners for something like this.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo. Do cesspools and septic tanks require NPDES permit?

MS. BERNARD: So, under this, the type of permit that the injection wells have, the Lahaina injection well permit, they do not, no.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo.

MS. BERNARD: Absolutely not.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

CHAIR MOLINA: Okay. Thank you, Member Rawlins-Fernandez? Councilmember Sugimura?

COUNCILMEMBER SUGIMURA: Thank you, thank you for being here. So, the NPDES permit for the injection well would be for injection wells, it wouldn't be for individual homeowners which is a completely different class, is that what you're saying?

MS. BERNARD: So, the...exactly, I think as you know --

COUNCILMEMBER SUGIMURA: So, it's different?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MS. BERNARD: --cesspools are going to be, they're going to be phased out in 30 years.

COUNCILMEMBER SUGIMURA: Twenty-fifty.

MS. BERNARD: They're trying to get off of that. Twenty-fifty, so, we're talking about a system that we recognize is out of date and we need to change. But it's a completely different situation.

COUNCILMEMBER SUGIMURA: Yeah, it's direct flow without purification as injection wells then purify the water, that's my question. Thank you.

MS. BERNARD: The volume is very different, of course.

COUNCILMEMBER SUGIMURA: Thank you.

MS. BERNARD: A really different volume.

CHAIR MOLINA: Okay. Thank you, Ms. Bernard. Members, any other need to clarify Ms. Bernard's testimony? Seeing none, thank you very much for sharing.

MS. BERNARD: Thank you so much.

CHAIR MOLINA: Next to testify on GET item 26, we have Kyle Ginoza, to be followed by Peter Davis.

MR. GINOZA: Good morning, my name is Kyle Ginoza, and I was formerly the County of Maui Director of Environmental Management from 2011 to 2015. I'm testifying today as a private citizen expressing my personal views. To be clear, I'm against the settlement with Earthjustice, and would like to see the County of Maui go forward with the appeal to the U.S. Supreme Court. This lawsuit was brought by Earthjustice in an attempt to expand the Federal Clean Water Act to groundwater discharges, which Congress did not intend. The County of Maui has 18 total injection wells on Maui and Molokai. Each of these wells is being operated in compliance with State UIC permits that will not be enough. The Ninth Circuit test will also mean that cesspools, septic systems, and recycled water storage like that in Kaanapali Golf Course and green infrastructure projects may require NPDES permits or be in violation of the law. Withdrawing the case means that the County will hand over control to the Ninth Circuit, and the court's decision will greatly dictate how the County will spend taxpayer funds. The burdens of compliance will fall to the County and be passed on to taxpayers and sewer rate payers. It should not be overlooked that these increased taxes and fees are often the hardest to bear by those in the lower socioeconomic scale. The Clean Water Act is a strict liability issue with maximum civil penalties of over \$50,000 per source for a five-year statute of limitation, meaning it's going to be exorbitant. This resolution you are about to contemplate will undoubtedly define the

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

Council. Should the County settle, there is no viable alternative to the injection wells that would be cost effective, or expedient. In my opinion, the only alternative is ocean outfalls, since no other option will be able to accommodate the large wet weather flows from rain events. Implementing an outfall at each treatment facility is a daunting task, since there are many technical impediments to resolve, many people are against outfalls, and would be in the neighborhood of \$200 million plus. In the almost five years that I headed the Department, I spent hundreds of hours trying to defend against the elimination of injection wells because I firmly believe that an ocean outfall is neither a better solution, nor worth the financial strain to the general public. I can't imagine the public outcry that will result when residents are forced to cough up hundreds, if not thousands of dollars more per year in taxes and fees. I gave you my full testimony. But let me just kind of sum up. So, I see that development, future development will be very expensive because of the permitting that we'd have to go through as private citizens and the public. Letting the Supreme Court decide this matter does not desecrate the Clean Water Act as I've heard some mentioned. Please don't succumb to the fear tactics being employed. And I implore you to listen to County technical and legal advisors. Thank you.

CHAIR MOLINA: Okay. Thank you, Mr. Ginoza. Committee Members, any need to clarify Mr. Ginoza's testimony? Is there a need? Seeing none, thank you for your sharing, Mr. Ginoza.

MR. GINOZA: Thank you.

CHAIR MOLINA: Next to testify on item GET-26 we have Peter Davis, to be followed by David Henkin.

MR. DAVIS: Good morning, Chairman and Councilmembers.

CHAIR MOLINA: Good morning.

MR. DAVIS: My name is Peter Davis, I'm a resident of Kihei. Against my better judgment, but in the interest of complete transparency I will reveal that I am an attorney. I am licensed to appear and practice before the U.S. Supreme Court. I'm here to urge you today not to settle this case at this time, at least if that settlement involves withdrawing the appeal. If you're interested in doing partial settlements on specific issues, I'm fine with that. But this is too important a case to withdraw the appeal at this point in time. Let's put this in perspective. The U.S. Supreme Court gets on average about 8,000 applications for appeals per year. On average, they accept 80 of the 8,000, and they chose this one. That gives you an idea of just how important the Supreme Court thinks it is to answer the one question that is pending in this case. This is not a question of picking cases by lottery or drawing straws. They sit down, and they sat down over a year ago and began reviewing all the 8,000 petitions and they came up with this case as one of the most important where there's a conflict currently, a cloud hanging over the country because some Federal appellate courts

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

have ruled one way, some have ruled the other way, it has to be answered and they chose this case as the vehicle to answer that question. It is too important to take away from them, the chance to answer the question 'cause the rest of the Country, not just Maui, needs to have an answer. To show you just how important and universal this problem is, take a look at the organizations and the entities that have jumped into this case now that the Supreme Court has agreed to hear it. I'm going to leave you with a partial list of the entities that have appeared with amicus briefs in this case, Chamber of Commerce of the United States has filed a brief, National Association of Clean Water Agencies, United States Senate has filed a brief, United States Solicitor General, the National Conference of State Legislatures, the National Groundwater Association, Pacific Legal Foundation, Florida Water Environmental Association, the State of West Virginia, 17 other States, the Governors of Kentucky and Mississippi, and a Federal, just last week a brief from the Federal Water Quality Coalition. The entire nation is looking at this case, jumping in, offering their opinions to the Supreme Court. It has to get answered. If you withdraw this appeal, then there is no answer perhaps for years because the Supreme Court can't just put another party in and say, okay, we'll take this case next year. You have to wait for a perfect case to come up with this issue, work its way through the appellate courts, and within that window of doing an appeal. That may not happen for years and this could be, this cloud of uncertainty could be hanging over the entire country for years if you take this action. I urge you do not engage in any settlement that requires withdrawing the appeal, partial settlement's fine, but not a complete one. Thank you.

CHAIR MOLINA: Thank you very much, Mr. Davis. And before I turn matters over to the Committee to clarify your testimony, help me define in layperson's terms amicus briefs. You mentioned all of the entities that have, you know, submitted these amicus briefs. So, just for the viewing public and those who may not be up to par in the legal terminology.

MR. DAVIS: I'd be glad to, yes. The parties to the lawsuit, the plaintiff and the defendants filed their briefs. If someone else wants to get in the game and has other opinions they want to share with the court and maybe influence the outcome of the decision, they filed what's called an amicus brief. Amicus means friend, amicus curiae, friend of the court.

CHAIR MOLINA: Okay. Thank you very much for that clarification. Committee Members, any need to clarify Mr. Davis' testimony? Councilmember Paltin?

COUNCILMEMBER PALTIN: Thank you for being here. Thank you, Chair. I was wondering if you could also define partial settlement.

MR. DAVIS: Yes, you can enter into a binding settlement of specific issues on an appeal and say, you know, regardless of what the court does, we will agree to do this, win, lose or draw. Okay. You can enter into partial settlements. On the other, and in a similar fashion, this concern about, of ruling in favor of the County of Maui, meaning the

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

injection wells stay, you don't have to be under a court order to do something to do it. The County of Maui can take all kinds of remedial actions if they choose to. You know, I'm just saying a complete settlement of this case that involves withdrawing the appeal does a disservice to the rest of the country. And you should weigh that responsibility very heavily.

COUNCILMEMBER PALTIN: Isn't what we're doing accepting the settlement though?

MR. DAVIS: I don't know what the terms of the \_\_\_ settlement are. I've not been made privy to any of that. But if it involves, if it's a complete settlement that involves in any way withdrawing the appeal, then you're shirking the responsibility to the rest of the country and leaving a question hanging over the rest of the country for years until an appropriate case becomes available for the Supreme Court to go back and address this again. I urge you not to do that.

CHAIR MOLINA: Okay. Alright, thank you very much, Member Paltin. Member King, followed by Member Sinenci, and Member Sugimura.

COUNCILMEMBER KING: Thank you for being here, Mr. Davis. Are you aware that we, that a previous Council did do a partial settlement and we're still in this situation where we have not settled, we have not taken the actions that were agreed to in that settlement?

MR. DAVIS: No, I'm not aware of that.

COUNCILMEMBER KING: Okay. So, that's where we're at with the partial settlement.

MR. DAVIS: Oh, I don't know which...

COUNCILMEMBER KING: And I think the problem is trying to get around having to do the actual settlement is the issue and that's what the Supreme Court case could do. It could allow Maui County to say we don't have to do those things and neither does the rest of the country.

MR. DAVIS: The ruling, well, it's tangential to the overall impact of the Clean Water Act. But my point is that a ruling in favor of the County by the Supreme Court would mean you were not mandated to do what the Ninth Circuit said you were supposed to do.

COUNCILMEMBER KING: Right, correct.

MR. DAVIS: that doesn't prevent you from going ahead and doing it. If this is something that should be done, you can do that.

COUNCILMEMBER KING: Right, but we had it for, partial settlement, and we haven't done anything. So --

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. DAVIS: Well...

COUNCILMEMBER KING: --you know, that's where we are today.

MR. DAVIS: Yeah, but I don't, that to me doesn't impact on the overall concept of whether you...

CHAIR MOLINA: Okay. Thank you very much, Member King. Member Sinenci, question for Mr. Davis?

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you, Mr. Davis, for being here. So, this amicus briefs from different parts of the country, you know, we're, I'm, at least I'm not privy to all of the different cases or what pertains to other parts of the country. And so, do you feel that, you know, having this one decision would cover all many different types of situations throughout the county? I mean, I'm privy to the, to Maui's case. But when everybody else is chiming in about their personal cases, what do you think about having those, you know, that variety of differences throughout the County...the country?

MR. DAVIS: I think it's a terrible situation to be in and we are in that situation now. You have the Ninth Circuit that's ruled A, you had other circuits that ruled B. There's a mismatch and there are entities and there are agencies that need to know what are the rules, is it A, or is it B? We don't know how to enforce it, should we be enforcing? You know, there needs to be clarity, and the Supreme Court chose this case specifically because they know there needs to be clarity. The country needs an answer, is it A or B? And if you withdraw your appeal, you're depriving the court of answering the question and I think that's terribly irresponsible.

COUNCILMEMBER SINENCI: Follow-up? You think the Supreme Court at its present state would be able to do that, I guess, you know, for our particular situation?

MR. DAVIS: I'm not sure I understand your question.

COUNCILMEMBER SINENCI: I guess, maybe just the makeup of the Supreme Court at this point versus prior Supreme Court judges and the overall makeup.

MR. DAVIS: You know, the current tenure of the court is not something I considered in bringing this argument to you because how they rule, I'm not too concerned with how they rule, frankly. What I'm concerned about is the mismatch of the law right now where various parts of the country have no basis for understanding what they should or shouldn't do or must or must not do. We need for the Supreme Court to answer the question. And if it's answered in a way that people don't like, then the Legislature can amend the Clean Water Act to back, to impose new things in it. But the one thing that should not persist is various jurisdictions at the Federal level having different answers to the same question.



**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SINENCI: Thank you. Thank you, Chair.

CHAIR MOLINA: Okay. Thank you, Member Sinenci. Councilmember Sugimura?

COUNCILMEMBER SUGIMURA: Thank you. You answered my question so, very good, I'm glad you're an attorney.

MR. DAVIS: Thank you.

COUNCILMEMBER SUGIMURA: Thank you.

COUNCILMEMBER KAMA: Chair?

CHAIR MOLINA: Okay. Thank you. Councilmember Kama?

COUNCILMEMBER KAMA: Thank you. So, my question is, what is the question that we want the Supreme Court to answer?

MR. DAVIS: Okay. The briefs that...when the County filed its appeal, they raised certain issues and the Supreme Court, having already, you know, the justices have already talked about this case, they've had conferences at least three times already and they said we will answer only one question. The issue they will answer is "whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source such as groundwater." That is the question that they're going to answer. That's the only question they're going to answer.

COUNCILMEMBER KAMA: Thank you, Chair. Thank you.

CHAIR MOLINA: Okay. Thank you, Member Kama. Members, any other need to clarify Mr. Davis' testimony? Member Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Mr. Davis, mahalo for your testimony. So, I looked at a lot of the amicus briefs that were submitted and it looked like a lot of those are doing their own polluting in their parts of the world and I think the timing right now for this to go to the Supreme Court is really dangerous because it's Trump's court. And Trump is no friend of the aina. And so, you mentioned in your response to Member Sinenci that if the Supreme Court rules something that's unfavorable to most people that Congress can go ahead and fix that. Doesn't Congress have the power right now to clarify this law?

MR. DAVIS: They could amend the Clean Water Act with specific recitals in an amendment, answering the question. So, I believe Congress could clarify. But...

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, mahalo, Chair.

MR. DAVIS: Thank you.

CHAIR MOLINA: Alright, thank you very much, Member Rawlins-Fernandez. Seeing no other need to clarify Mr. Davis' testimony I want to thank you, sir, for your input. Members, it's about 10:40, it's typically our break time. We have roughly five other individuals that have signed up. What is the pleasure of the body, recess or would you like to continue with testimony? Okay. I see the break sign coming from some of the Members. Alright, Members, we will take a recess. Let's return to the Chambers at 10:50 a.m. The GET meeting for May 20, 2019 is in recess. . . .(gavel). . .

**RECESS: 10:40 a.m.**

**RECONVENE: 10:58 a.m.**

CHAIR MOLINA: . . .(gavel). . . The GET meeting for Monday, May 20, 2019 is now back in session. Members, we last left off on the testimonial phase and we have signed up to testify on GET item number 26, David Henkin, to be followed by Christopher Fishkin. And, Members, for your information, Mr. Henkin will be doing a presentation once we get into that phase later on this meeting as an FYI for you.

MR. HENKIN: Good morning, Chair, Members of the Committee. I appreciate this opportunity to give a little testimony in advance of my presentation. I'll focus on some slightly different things in this testimony. And I assure you my presentation will be larger than this laptop that is sitting next to me. But there was some things that came up earlier and if I can get them on the big screen I will. First, Madam Vice-Chair, I just want to mention that the scientific study that Rob Weltman mentioned is Prouty 2017, it's attached to my testimony. There's been a lot of conversation this morning about whether or not the County's facility needs a Clean Water Act permit. I want to make clear that a Clean Water Act permit as its name suggests is a regulation on a particular activity, it's a permit. It's not a prohibition. It just is meant to make sure that if the County uses injection wells as a way to dispose of the wastewater, that the receiving water, so the ocean waters won't be harmed. So, it's like a building permit. The County doesn't prohibit building, but we do prohibit people from building any which way. We want to make sure that they're doing it the right way. And there was an earlier testifier who was talking about the water quality standards in the ocean. And we're fortunate here because the Department of Health has been doing water quality testing precisely at the locations in the ocean where the wastewater from the Lahaina facility enters the ocean. And so, we have many years of data. And again, I apologize for the small, I don't know if anyone can see it, but if you can see red, red means in violation of the standard. And over three years of data that we got through the lawsuit from 2012 to 2014, you had consistent violations of phosphorous, so, the previous testifier, Professor Krock was talking about the danger of phosphorous. Every single measurement of phosphorous was in the red. So, they all violated the

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

State water quality standards for the ocean to protect our corals and marine environment. Over here you have total nitrogen. I believe it was about 54 percent of the measurements violated total nitrogen. And this is nitrate and nitrite nitrogen pollution, and that was about two-thirds. And so, I'd be happy...the yellow you can ignore, that was Department of Health's highlighting. But the problem here is, we have consistent violations of water quality standards. And the reason that we need the Clean Water Act permit is to make sure we protect the ocean. If the injection wells can meet the standards, then they can be used. But I've heard we have a different permit, an Underground Injection Control permit, and that's like saying I have a driver's license, I don't need a building permit. They do different things, they focus on different things that are different standards, and the data show the County is violating the water quality standards. Thank you.

CHAIR MOLINA: Okay. Thank you, Mr. Henkin. Members, any need to clarify Mr. Henkin's testimony? And as I restated earlier, if you do have questions, you have the option of waiting until Mr. Henkin's formal presentation which will take place most likely after lunch. Okay. Member Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair, quick question. Aloha, Mr. Henkin, mahalo for being here and your testimony. So, in regards to what you testified here with the water quality standards, do some of your data that you're showing that it's, the nitrates are well above what the standards should be, the phosphorous, was that also while the County had a UIC permit?

MR. HENKIN: Absolutely, the County has had UIC permits and has complied with the terms of those permits for many, many years. These data were gathered while they had the UIC permit in effect. No one ever claimed they ever violated them. But as Dr. Wendy Wiltse from formerly of the EPA testified, and I attached her testimony to my testimony, the standards for, the UIC permit is part of a Safe Drinking Water Act program. So, the standards to protect our drinking water are different levels than the standards to protect our ocean waters and other State waters. And so, in the State regulations they provide for different standards. And so, when you're dealing with the injection wells, these may very well meet the Safe Drinking Water Standards having these levels of phosphorus and nitrogen. But having this level of nutrients is causing harm to the reef as that study from 2017. Again, we're not talking about, it's not my data. This is Department of Health data, the study from 2017 was done by...it was peer reviewed, it was published, it was a U.S. Geological Survey and other scientists who all determined that the combination of the high level of nutrients coming out of the Lahaina injection wells were literally eroding the reef from the inside. And during this entire period, the County was complying with the terms of the UIC permits.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, one quick follow-up and last question? So, with the UIC permit, the County wasn't able to protect the near-shore water?

MR. HENKIN: Absolutely correct.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo.

CHAIR MOLINA: Okay. Thank you, Member Rawlins-Fernandez. Members, any other need to clarify Mr. Henkin's testimony? Seeing none, thank you, Mr. Henkin, and we'll see you a little bit later.

MR. HENKIN: Thank you.

CHAIR MOLINA: Next to testify on GET-26 we have Christopher Fishkin, followed by Albert Hahn. Christopher Fishkin? Okay. I guess he's presently not in the Chambers. Okay. Let's move on to the next testifier who signed up after Mr. Fishkin, Albert Hahn? He'll be testifying on GET-26.

MR. HAHN: Hi, my name is Albert Hahn. Thanks for hearing me today. I'm the Recycled Water Coordinator for the County of Maui. But I come to you on my own time to urge you to delay your decision. I'm actually in favor of you pursuing it with the Supreme Court. But at this time, I feel like you folks...I spoke with some of you prior and I don't feel like some of you fully understand the issues, yeah. And I think, no, I'm trying not to offend anybody, but I think you've been misguided a little bit by Earthjustice and the Sierra Club about the laws and the impact the settlement will have on the people of Maui. But I'm here to mainly share my experience with you as the Recycled Water Coordinator for the County of Maui. So, this coming fall I'm going to host a group of planners from around the State touring our Kihei facility. The title of our tour is called, Everything You Never Wanted to Know About Doodoo Water, No Kai Oi, See How Maui Does It Better, tour Maui's Kihei plant that recycles 50 percent of wastewater. Hear about the 25 years it took us to get to this point, and what it will take us to move past the 50 percent threshold. Join us to learn our dirty little secrets. Now, am I describing the same Maui as the Sierra Club and Earthjustice? It sounds like two, I mean, me, it sounds like we're talking about two different things, yeah? I tell other people, you know, we developed a system here that I'm proud of as a County employee. I almost brag about it and I say other people should model it. So, for example, the Big Island, they call us and they're like, how did you guys start your recycled water program? You know, and even Honolulu we're light years past Honolulu, yeah? But we're being described as environmental criminals, you know. It's something, and I've all, you know, no offense to everybody, but I heard people say we're not doing anything about it today. I'll tell you that every year we put millions of dollars into expanding recycled water. Sometimes politics gets involved that slows us down. We were supposed to expand Lahaina, for example, years ago. But, you know, petty politics got in the way, yeah, bureaucracy. But, you know, so, Eassie Miller, our Chief 25 years ago, he began the recycled water program for the County. And this decision had a large, it has a large financial impact on the people of Maui. It's, you know, if you're looking at it from a financial standpoint it's not like, well, how much, what's our return on investment? We made these decisions with no Sierra Club, with no, even the EPA, no Earthjustice. Nobody was lording it over our heads. We made

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

those decisions ourselves because it was the best thing for the people of Maui and at a financial cost, yeah? So, I, you know, I just got a little hot under the collar when people are like oh, you guys don't do anything. You guys are environmental criminals, you're breaking the law. You know, I'm proud, it's I don't think my kids are proud of me for being a wastewater worker, but I am a proud wastewater worker.

CHAIR MOLINA: Okay. Thank you, Mr. Hahn. Members, any need to clarify Mr. Hahn's testimony? Seeing none, Mr. Hahn, just for the record, how long have you been a County employee and in the Wastewater Division?

MR. HAHN: In November it'll be eight years.

CHAIR MOLINA: Alright, thank you. Oh, I'm sorry, you have a question for you. Member Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo Chair. Aloha, Mr. Hahn, mahalo for your testimony and mahalo for all you do for the County and for the residents of Maui County. I just wanted to find out, so, you said you're hearing people say that we're not doing anything about it. Is that coming from Councilmembers saying that we're not doing anything about it because...

MR. HAHN: I think someone said it this morning, one of the Councilmembers.

VICE-CHAIR RAWLINS-FERNANDEZ: Because, I mean, just in this Budget alone --

MR. HAHN: We're not moving...

VICE-CHAIR RAWLINS-FERNANDEZ: --we put \$13 million into upgrading the system.

MR. HAHN: I'll, I mean, you can read it back on the record, but I think it was in the context of the Federal government not forcing us, or excuse me, a partial settlement with somebody who had sued us in the past and we have done nothing to do, nothing to move forward environmentally after that settlement, after that partial settlement.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. I guess I understood it differently, like we just, we didn't do enough and that's why we're still where we're at now.

MR. HAHN: Well, that's why I took offense to it, because they said we didn't do anything, and all these projects in the future are in your hands. We don't need the Federal government to tell us what to do. You know, we're all residents of Maui. Our community is small. You know, we don't need Earthjustice to lord it over our heads saying, you know what, if we're not happy, 'cause I was reading on *Maui News*...

CHAIR MOLINA: Mr. Hahn, I think you've answered Member Rawlins'. Thank you. Thank you.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HAHN: She was still nodding, so.

CHAIR MOLINA: Okay. Alright, thank you. Moving on, Council Chair King has a question for you.

VICE-CHAIR RAWLINS-FERNANDEZ: Yeah, I was just wanted to agree with what you, with your statement that absolutely, we have the power to do more and that's what we did in this Budget, even with the other wastewater facilities, that we put more funding so that we can really upgrade to continue to, you know, have proud workers like yourself. I want to do my part to make sure that, you know, I'm taking care of our County workers that are on the frontline working hard. So, mahalo, and mahalo, Chair.

CHAIR MOLINA: Alright, thank you, Member Rawlins-Fernandez. Chairman King and followed by Councilmember Sinenci and Sugimura.

COUNCILMEMBER KING: Thank you, thank you for testifying. I do think you got it wrong because I was the one that made that statement. We have this settlement. We have not addressed that settlement. The conditions in that settlement are still hanging over us and that's what I was talking about, not the fact that we haven't done anything in Maui County. Certainly, in some aspects we've been going backwards because our previous Mayor almost took recycling totally off the table. I don't know if you recall that. But I don't, that statement was not directed at anybody. But I also wanted to say that I hope that you understand that just because someone disagrees with you doesn't mean they don't understand. There are different perspectives. And I agree with you, we don't need the Federal government. We can address aloha aina here at the County. And that's the difference in perspective I think is that your desire to go ahead and let the Federal government tell us what we need to do, which also affects all the other municipalities across the country when some of us feel that we need to address our issues here. And that's why we funded that \$13 million project and there's another one simultaneous that's \$6 million I think over several years. So, the agreement is that we do need to move ahead and do these things. And we do...I don't understand why you think there's not an appreciation because that's why we talk to folks in Wastewater. I've been talking to people in Wastewater and Solid Waste for the last couple of weeks regarding the Budget. But the statement was definitely referring to that previous settlement. And have you seen the previous settlement that was...

MR. HAHN: I've only seen what's published in *The Maui News*.

COUNCILMEMBER KING: Okay.

MR. HAHN: But let me apologize if I misunderstood. But the other thing is that, you know, it's not only the Federal government. We don't need the Federal government to move past our standards. We also don't need Earthjustice to say...you know, why are we

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

looking at for their approval of Earthjustice? You know, you have the people that you need the approval of.

COUNCILMEMBER KING: Right.

MR. HAHN: You don't need Earthjustice's approval.

COUNCILMEMBER KING: Well, we...

MR. HAHN: 'Cause part of the settlement is that they will provide oversight over us, yeah?

COUNCILMEMBER KING: I don't think so, but...

CHAIR MOLINA: Okay. Chairman King, do you have another question for Mr. Hahn?

COUNCILMEMBER KING: Yeah, no, I mean, we're actually addressing the concerns of hundreds of people that we've been sitting here going through testimony. So, you know, it's not just our County government, it's not just Earthjustice, it's not just the Sierra Club. It's everybody, they're all part of our community. So, we all have to make these decisions together.

CHAIR MOLINA: Okay. Alright, thank you, Chairman King. Councilmember Sinenci, followed by Councilmember Sugimura.

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you, Mr. Hahn, for being here. I just wanted to respond to, you said that we were misguided, I guess, about some things. And I just wanted to, I mean, I've, I spent all night reading the Ninth Circuit Court, the Fourth Circuit Court, and the summary judgment from the State. So, I mean, am I misguided by reading, you know, the court's decisions on this matter?

MR. HAHN: I mean, personally, I think so. And I hope you don't take offense to it. I'm not, I don't mean to offer offense.

COUNCILMEMBER SINENCI: Okay.

MR. HAHN: I think that opposing counsel, you know, Earthjustice has done a wonderful job at marketing. You know, what irritates me is that County of Maui it doesn't, aren't in the paper more often clarifying our position, yeah? So, you know, I understand that they come and do these presentations, they have done presentations for you folks, yeah already and they're trying to get us to agree. So, for example, it was your office I actually met with and they were surprised to, when I provided them the publication from the EPA that clarified the injection well, that injection wells weren't covered under the Clean Water Act. They were surprised to see it. That's a prime example of not being informed and misguided. You know, in my opinion, Earthjustice is going to

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

lose, and now they're trying to, you know, make a back-alley deal with you, with our money. So, that's what I meant by misguided.

COUNCILMEMBER SINENCI: Chair, one comment? I think the Department of Environmental Management will be presenting to us later today.

MR. HAHN: So, why wasn't that done prior? I mean, why is this ordinance being proposed prior to meeting with...

CHAIR MOLINA: Mr. Hahn, thank you for your comments.

COUNCILMEMBER SINENCI: It's been agendized today.

CHAIR MOLINA: We have one more question for you from Councilmember Sugimura.

COUNCILMEMBER SUGIMURA: Yeah, thank you, Mr. Hahn, for being here. Thank you for your passion for your job, it's amazing. I wanted to ask you, your opening statement that you have this tour that you're doing. So, in, what is it part of, and can we sign up?

MR. HAHN: Yeah, it's a planning, I'm not sure --

COUNCILMEMBER SUGIMURA: Oh, conference.

MR. HAHN: --it's an organization of planners.

COUNCILMEMBER SUGIMURA: The Statewide?

MR. HAHN: So...yeah, it's Statewide.

COUNCILMEMBER SUGIMURA: HCP or, oh, you're part of the...

MR. HAHN: Not me, they asked me to do a tour for them.

COUNCILMEMBER SUGIMURA: Right. Thank you. So, we'll sign up. Thank you.

CHAIR MOLINA: Thank you, Member Sugimura. And on that subject before I recognize Member Rawlins-Fernandez, Mr. Hahn, so, you regularly, the Department allows these tours for the public to come and see what's being done?

MR. HAHN: Absolutely, they're open to the public, even, this is strange, but I've even had people from out of state, I've taken people on tours from out of state. I don't know who wants, in their right mind wants a tour for their children to see our wastewater facilities, but they sign up.



**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Oh good, that's certainly a very hot issue for sure. You can sign me up. I definitely would like to look; see how you operate. Okay. We have Member Rawlins-Fernandez.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. You can sign me up too. Real quick, so, in your response to Member Sinenci, or was it Chair King, that you said that, you know, we're, we should be obligated to the people, we should be responsible to hearing from them. Did you know that we received over 100 pieces of unduplicated testimony from our residents urging us, strongly urging us to settle? And this is our residents.

MR. HAHN: Actually, I was talk, I think I said that, I meant to, or if I mean, what I meant to say was that you should be talking to Environmental Management. You know, you should be talking to the boots on the ground that work in the Wastewater every day for, 'cause we're supposed to be the experts, yeah, not, I mean, I don't know, maybe David Henkin has a Grade IV Operator permit, I have no idea, Grade IV, that's actually physically working with the doodoo water. But, you know, we're the experts at doodoo water. I mean, it's surprising to me that it's taken this long for you folks to reach out to Environmental Management prior to offering up this bill and to settle, yeah? But in regards to the people, that's only 100 people. How many people are there on Maui?

VICE-CHAIR RAWLINS-FERNANDEZ: It's over 300, and each testimony generally represents at least 30 people.

MR. HAHN: And how many letters have you received from, you know, from folks like me?

CHAIR MOLINA: Mr. Hahn, sorry, Members ask the questions.

MR. HAHN: Okay. Sorry.

CHAIR MOLINA: But I appreciate your passion, sir. Member Rawlins-Fernandez, any other questions to clarify Mr. Hahn's testimony?

VICE-CHAIR RAWLINS-FERNANDEZ: So, do you have expertise on coral life, marine life, is that also your expertise? Because I know like some of the studies that was presented to us was that type of studies and not just how to process human sewage.

MR. HAHN: Yeah, no, that's not my expertise. I'll let whoever else testify in those regards.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. Mahalo. Mahalo, Chair.

CHAIR MOLINA: Thank you, Member Rawlins-Fernandez. As ironic, tomorrow I think Land Use Chair Paltin has a meeting in West Maui. So, don't be surprised if you get a last-minute call from any one of us to drop in. So, anyway, just an FYI. Alright, seeing no other need to clarify Mr. Hahn's testimony, I want to thank you for your input, Mr. Hahn.

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HAHN: Thank you.

CHAIR MOLINA: Thank you. Next to testify on GET item 26, we have Robin Knox, followed by Mr. Albert Perez.

MS. KNOX: Aloha Councilmembers, aloha, Chair. I want to introduce my expertise with a little of bit of focus for you. I'd like to ask you to realize that all of my colleagues, very esteemed colleagues have spoken before have their own area of expertise which includes, some of them had water quality, some of them wastewater treatment. I think I might be the only one who has both of those areas of expertise and that is kind of the crux of the issue is how those two things meet up. For more than 30 years, the main point of my job has been to answer two questions, one, is it in compliance with the Clean Water Act, and two, how clean is clean? How clean does the wastewater have to be in order to support attainment of the State water quality standards out in the ocean. So, that's my expertise. What I want you to know is although there's been a lot of discussion about whether or not the injection wells do harm, I think there is plenty evidence that the injection wells on Maui are doing harm. But the real question is not whether they do harm, but whether a permit's required. The Clean Water Act National Pollutant Discharge Elimination System permit prevents harm by limiting pollutants to levels that support attainment of water quality standards and that's an obligation the County has with or without that permit because it's in State law, and it's in the State Constitution under the heading of public trust. So, Maui County is causing these violations. But the Clean Water Act NPDES permits also offer protection not just for the water quality and to protect the uses like recreation and aquatic life like fisheries and coral, but it also protects the County from certain environmental liabilities because we're going to let, if we have a permit, we're going to let DOH and EPA decide who, how much, how clean is clean and the schedule for getting there 'cause they won't expect it overnight. They're very reasonable on compliance schedules. So, people haven't said enough good things about what the program would bring to us. It would bring a process, a method and procedures by which to figure this out and people with expertise in doing that like myself. The complexity of these problems really does require that expertise and making use of everything that's been learned in more than 30 years of Clean Water Act history. I think we may be on 40 or 50 years now. Lastly, I am Executive Director of Aquanimity Now, which is a nonprofit that offers technical services and education to government, nonprofit groups, the public in general. And I would like to offer myself as a resource to this Committee, and to anyone else in County government who would like to talk about it. And I would like you to know too, that Meghan Dailer and I went to Department of Environmental Management before our paper was ever published in 2010. So, there's been lots of talk. It's time for action.

CHAIR MOLINA: Okay. Thank you very much, Ms. Knox. Committee Members, any need to clarify Ms. Knox's testimony? Vice-Chair Rawlins Fernandez?

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

VICE-CHAIR RAWLINS-FERNANDEZ: Quick question, mahalo, Chair. Aloha, Ms. Knox, mahalo for being here.

MS. KNOX: Thank you.

VICE-CHAIR RAWLINS-FERNANDEZ: The paper that you're referring to, what is the paper that you're referring to?

MS. KNOX: Dailer et al 2010 was one of the earlier papers done on the Lahaina injection wells. It also looked island-wide and found that coral damage and algal blooms had a proximal relationship to injection wells. So, we found more devastation of coral and more algae blooms there and we didn't find it in other places where there weren't injection wells. We also found a tracer in '15 that tells us where it's coming from, and it was telling us that it was coming from, the more, the higher the N15 it means the more that the microbes have chewed on the waste. So, the higher the level of treatment, the higher the N15 will get. And so, it's easy to tell Lahaina injection well N15 from background from fertilizers or even from maybe a lower level of treatment like the minimum treatment. And the County's right when they say that they do a lot. You know, I really respect Wastewater Treatment Operations and people that do that. Maui County does better than the minimum. But under an NPDES permit, you have to pass the test of what can the water take and let the water guide, the water quality guide what we're allowed to discharge or not. And also, reuse is not pollution control. Reuse is redistributing the pollution in a more diffuse form, which actually makes it harder to treat, and harder to manage or regulate. So, there needs to be treatment first, and then reuse. And the best way to do that is not put the cart before the horse. Get the permit that tells you what is your treatment goal, then design your treatment, then do your reuse. That's the order that things should go in.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, and what is the name of your paper?

MS. KNOX: It's got a long title. It was in Marine Pollution Bulletin, Dailer, et al 2010 and its Use of N15 Stable Isotope Tracers to Determine Anthropogenic Inputs of Nitrogen, something on the Island of Maui, or something to that effect. It's really long.

VICE-CHAIR RAWLINS-FERNANDEZ: It's, so, is that the study that's referred to as like the traceability study, the tracer study?

MS. KNOX: Actually, later tracer studies were done with dye. They conclusively confirmed what our study said. Our study was the one cited by EPA when they issued a Clean Water Act 308 order to the County that said, we believe you're in violation of the Clean Water Act based on the evidence presented in this study. And in the footnote in that order, it has the title of our paper.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Ms. Knox. Mahalo Chair.

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Okay. Thank you, Member Rawlins-Fernandez. Chairman King?

COUNCILMEMBER KING: Thank you, Chair. Thank you for being here, Ms. Knox, and for your expertise on water quality. I think this is kind of the missing link is, you know, the water quality that we're looking for, not necessarily what we're doing at wastewater which we know we're doing some good things, or not necessarily just what people are seeing in the reef, although we are seeing some horrifying reef death near shore. But, you know, one of the things I've been hearing and I've been, and my staff has been looking for the actual, I don't know if it's a State legislation piece or if it's administrative rules by Department of Health, is there a study, or is there a piece of legislation wherein they have stated that injection wells will no longer be approved at some point?

MS. KNOX: There has been recent activity with the Department of Health on injection wells. I haven't been following that closely. But it has been from the standpoint of the UIC program and the injection well and the Safe Drinking Water Protection Program, not from the Clean Water Act.

COUNCILMEMBER KING: Right.

MS. KNOX: Yeah.

COUNCILMEMBER KING: Oh no, I've seen, and I have that, I have the information on the UIC program. But I'm just having a hard time pinpointing. And I've been hearing from the folks in Maalaea Village that they know they're not going to be allowed to, the use of injection wells per the Department of Health. I haven't been able to actually find that definitive statement.

MS. KNOX: I don't know if I've seen that exact statement. I did personally hear the Department of Health head of Wastewater, Sina Pruder say injection wells are frowned upon and don't count on being able to get the permit. They are at secondary treatment, by the way, so the County of Maui has a better-quality effluent. But because it's so large of a discharge, it actually has more mass, about ten times more mass of pollutants from one of the County wells than what you would get from Maalaea. And earlier, someone was wondering about the difference between Safe Drinking Water Act standards and Clean Water Act standards and the protectiveness. The Clean Water Act standards are 1,250 times more stringent for nitrate, as an example, than the Drinking Water standards.

COUNCILMEMBER KING: Okay. And then, earlier we heard that nitrates are not an issue on the near shore reef or marine life. Is that true?

MS. KNOX: I have no evidence that that's true. I also think that there's, it's something that needs more research to say exactly what nitrate's doing because nitrate is kind of at the end of the nitrogen cycle and some of the other forms of nitrogen that are in

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

wastewater may actually cause more damage. The reason the nitrates get called out, it's the most stringent one, and it is, it's like, I call it algae chow. It's like liquid fertilizer. You have nitrates in your fertilizers you put on your plants, so plants have that same response. I don't think anyone's done pollutant-specific studies and I think that is an important point that in the conversations today you keep hearing kind of interchangeable discussions of pollutants. Each one's different and it's very site specific, whether something is harmful or not and that's the whole premise of the Clean Water Act is you do a site-specific assessment for a permit and you determine what would be harmful at that site, with that receiving water, with those receptor animals, with that, you know, like we don't have a lot of heavy industry. So, maybe copper's not an issue for us but nutrients likely are from what we've seen.

COUNCILMEMBER KING: Okay. Thank you. And then, just one more follow-up, Chair, if I may? So, the study that was done, or the recommendations that were made in the report by Steve Parabolicoli who used to run one of the wastewater treatment facilities, the first step, I think it was a four-part recommendation, and the first part was biological nutrient removal. And was that, was the goal of that to be able to allow us to keep injecting because we were removing the effluent from the water before we injected it? 'Cause that was one of the provisos that we got into the Budget for the wastewater treatment facility was for them to hire a consultant to start looking at that biological nutrient removal.

MS. KNOX: I think it's clear that we need biological nutrient removal. It's being implemented all over the country. When, and we may need even more polishing after that because of the sensitivity of coral reefs to nitrates. But again, these are the kind of things that could be researched under the auspices of an NPDES permit. It's quite common to negotiate a compliance schedule that allows time to get studies done to answer these questions. And so, you know, that would be what would likely happen under a permit. Or even if we don't have the permit, that's what needs to be done. It would just be more guided if we had a permit.

COUNCILMEMBER KING: So, if we did, I guess I don't know if you can answer this. But, you know, my, I guess my goal of trying to get you to answer this is to find out if we do that biological nutrient removal on a larger scale, then does that make it okay to use injection wells?

MS. KNOX: We don't know the answer to that until we look at the other constituents of the wastewater. There are those emerging constituents of concern, which are very difficult to get a handle on 'cause each one's a different complex organic chemical and, you know, there's whole, what's called whole effluent toxicity because effluent is very complex. It has a lot of chemicals in it. Sometimes you can't control just on a chemical-specific basis and you have to look at, is the whole effluent toxic? And that's something that hasn't really even been looked at. And that could be causing some of the problems that we're seeing on the reef it's just the sheer toxicity.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER KING: Okay.

MS. KNOX: So, it's, you know, the well itself is just a conveyance. It's what are we putting down it? Is it too much freshwater? Is the pH too low, or the nutrients too high, are there toxic chemicals in it? You know, these are all the questions that would be answered if you did an NPDES permit, or if you modeled a control strategy after an NPDES permit.

COUNCILMEMBER KING: Okay. So, we, in your opinion we would be allowed to get the permit while researching, doing this kind of work?

MS. KNOX: Oh yes, definitely.

COUNCILMEMBER KING: Okay. Okay.

MS. KNOX: Definitely, and you would have that permit shield, that liability coverage once you're under that permit as long as you comply with it and as long as you had full disclosure in your permit application of what you're discharging.

COUNCILMEMBER KING: Okay. Thank you.

MS. KNOX: You're welcome.

CHAIR MOLINA: Okay. Thank you, Chair King. Members, any other need to clarify Ms. Knox's testimony? Seeing none, thank you very much, Ms. Knox.

MS. KNOX: Thank you.

CHAIR MOLINA: Net to testify on GET item 26 we have Albert Perez, to be followed by Rhiannon Chandler.

MR. PEREZ: Aloha, Chair Molina. Albert Perez, aloha, Councilmembers. I'm with the Maui Tomorrow Foundation, and we are, we would like to recommend that the County accept the latest settlement offer from Earthjustice. Maui County has been stubbornly avoiding action to correct the problem for years, preferring to fight this out in court. And if the County persists in avoiding the settlement, we'll join the likes of the American Petroleum Institute which is not the kind of reputation that I think we want to have. If the County is successful in its current effort, the weakening of the Clean Water Act will forever be known as County of Maui versus Hawaii Wildlife and that is something we want, it would be hugely embarrassing, and I wouldn't be surprised that that would lead to some boycotts that would add economic damage to the environmental damage that we're already seeing. I wanted to address the earlier implication from a testifier that injection wells could be a good thing to help protect our groundwater aquifer. Injection of sewage effluent into our aquifer is not a natural condition and we should've learned by now that in a natural system we can't engineer

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

our way out of problems, all problems without causing other unanticipated impacts and we've already seen that in terms of the effects on our reefs that I have personally observed since 1990. The coral reef offshore is now a desert compared to what it used to be. Our public water supply is limited in Lahaina and we need to recognize that. But there are other solutions besides continuing to inject treated effluent when we know it's going out into the ocean. We can stop issuing building permits for anything other than truly affordable housing on the west side. We can use water-efficient fixtures and landscaping to reduce existing water use in the area. We can reduce stream diversions and restore native forests up mauka, both of which would increase groundwater recharge. Outfalls are not the only alternative to injection wells. There are modern upland wastewater disposal options that reduce the possibility of contaminating the underlying aquifer when compared to injection wells. I just want to caution you that the language in the proposed resolution that's been forwarded to you to authorize settlement from Corp. Counsel, it authorizes Corp. Counsel to impose its own conditions on the settlement. Maybe it's a typo, maybe they meant to say the County Council should be able to impose their own decisions. But I would recommend that instead of saying conditions may be imposed and agreed to by the Corporation Counsel, that you change that to by the County Council. And I urge you to settle this case and get on with the work of undoing the damage that has been done by the Lahaina injection wells for many, many years. Mahalo.

CHAIR MOLINA: Thank you, Mr. Perez. Committee Members, questions for Mr. Perez or to clarify his testimony? Seeing...oh, Member Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Quick one, mahalo, Chair. Aloha, Mr. Perez, mahalo for your testimony. When you said that we would be joining the likes of the petroleum industry or, what did you mean by that?

MR. PEREZ: There are many, many organizations that have submitted amicus curiae, friend of the court briefs. And that is one of the ones that's listed. So, I don't know, they use injection wells for things that we would be a part of supporting. My understanding is they use injection wells for things like fracking that contaminate groundwater all around the country. So, by us stepping forward and saying here, Supreme Court, with two conservative justices recently appointed by the Trump Administration, by us stepping forward and saying here, go ahead and decide on this, we'd be offering them the chance to support activities like that on behalf of the members of the American Petroleum Institute. And I would rather see if a case has to go forward, let it not be us.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Mr. Perez. Mahalo, Chair.

CHAIR MOLINA: Thank you, Member Rawlins-Fernandez. Committee Members, any other need to clarify Mr. Perez's testimony? Seeing none, thank you very much for your thoughts. Members, I did state that Ms. Rhiannon Chandler would be the next testifier. However, there's been a request from Mr. Small to testify before you. Is that

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

alright, Ms. Chandler? Okay. Thank you. Okay. We have a, our next testifier is Sam Small. He'll be testifying on GET-26, and then to be followed by Ms. Rhiannon Chandler. Thank you.

MR. SMALL: Good morning, Chair. Good morning, Council. It's always, it's an honor to be participating in the democratic process. Ms. Rawlins-Fernandez I think had it spot on, this is not a litigation issue. This should be legislative, and the House and the Senate of the United States has the power to deal with this particular issue immediately and as the public wants done, not through litigation. And it's indicative of how much litigation has become the heart and soul of what controls Maui County. The lawyers are controlling Maui County, not you, not even the Mayor, and that's evidenced by this ordinance. Number two, be it resolved that it hereby authorizes the Mayor to execute a release of settlement on behalf of the County in this case under such terms and conditions as may be imposed and agreed to by the Corporation Counsel. They're seeking to usurp your authority. They want to say what's right and what's wrong and they only know litigation. It paralyzes every aspect of the County; it paralyzes every aspect of a citizen's ability to interact with the County because as soon as we voice any kind of opposition to what Corp. Counsel does, we get a gag order, you're told not to speak to us, they manufacture false arguments about oh, there's future litigation that's going to come. Someone if we do this is going to sue us. Corp. Counsel, the dinosaurs of Corp. Counsel, I beg you to remove them. Number three here, authorizes the Director of Finance to satisfy the settlement of this case under such terms and conditions as may be imposed and agreed to by the Corporation Counsel. Finance, that's you, you are in control of the finance. So, they've got two things. They want to usurp control from the Mayor, and Corp. Counsel wants to usurp control from you. How is that even remotely reasonable or perhaps even legal? In what planet does a lawyer get to supersede the desires of their client? You don't work for Corp. Counsel. We didn't elect Corp. Counsel. Corp. Counsel works for you and you have to stand up as a body against these people and this is your opportunity. You'll have an opportunity, you know, coming up for the Director of Corp. Counsel. There needs to be a house cleaning and this ordinance is absolute evidence of their intention to override your authority. Thank you for your time and consideration.

CHAIR MOLINA: Thank you, Mr. Small. Members, any need to clarify Mr. Small's testimony? Thank you very much, Sam. Next to testify we have Rhiannon Chandler, and I believe Ms. Chandler's the last person to have signed up, is signed up at this point. If there is anyone else in the gallery that would like to sign up for testimony on GET-26, please do so as soon as possible. Good morning, Ms. Chandler.

MS. CHANDLER-IAO: Good morning. Aloha and good morning, Chair, Vice-Chair, and Councilmembers. Mahalo for your service to our community. My name is Rhiannon Chandler-Iao, and I'm the Executive Director of Waterkeepers Hawaiian Islands. But many of you know me as Rae from my nonprofit work on Maui. I'm sure you knew when you ran for office that you're going to be making big decisions for Maui County. But today you are making big decisions for the entire nation and everything that is



# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

underneath the Clean Water Act, which includes U.S. Territories. The Clean Water Act was enacted for fishable, swimmable, drinkable water. I'd like to refer to the testimony of Dr. Wendy Wiltse. She's my Board President. She has over 30 years of experience in the EPA. She has almost 25 years of experience just with the Lahaina Wastewater Facility and she recommends settling this case based on everything that she knows, both at the law and the science. The Maui Democratic Party unanimously passed a resolution urging this body to settle this case. And I would ask you to take that seriously. I know there was a comment earlier about how many people attended. Regardless, it was a unanimous decision by the Democratic Party. So, I would say as Democrats, if anybody here is Democrats, will you please, please acknowledge that we are not Trump supporters. We are not here for the Trump court. We are not here to do the bidding of the polluters that wish that this case would be taken all the way to the Supreme Court so that they would have the authority, the right, honestly, the right under the law to cite to County of Maui versus Hawaii Wildlife Fund for their continued endless pollution. And you know that's why they want this case. You know that's why the Trump court had asked for this case to come up so that they can resolve the law. I know that we all believe that the Supreme Court is the supreme authority. But even me, who went to law school and is now an attorney, I do not today believe that the Supreme Court is the supreme authority on this issue. I believe that they know what they want to do, which is to facilitate economic growth. We are the aloha State. We are not here to facilitate economic growth for the entire nation. We're here to protect our people. We are here to protect our environment. Today, you have been shown that there is harm, there is harm under the existing system. Now, many people have offered testimony about what injection wells do to the environment, what would recycled water look like, what does cesspools have to do with all of this. Truthfully, injection wells are the mechanism we have today. This is not about whether we can use or not use injection wells. This is about whether or not we can get a permit, an NPDES permit is required when you're going to dispose of a pollutant into waters of the U.S. It's been proven that the pollutants travel through groundwater into waters of the U.S. So, we're not asking you to overhaul the entire wastewater system. We're asking that you get the permit that's required for this disposal because our unwillingness to ask for this permit and get it is leading us all the way up to the Supreme Court. So, because we're not willing to get a simple permit for our wastewater facility, we're now going to make an example for the entire country that this type of pollution is okay. May I continue? Thank you.

CHAIR MOLINA: Okay, briefly.

MR. CHANDLER-IAO: Yes. So, I wish I had the ability to vote today. I wish that my vote mattered but it doesn't. I applaud everyone who's running on this candidacy of aloha aina. We are here because you are here. We are here because you are here to vote for us, for our environment, and I thank you all for being here today. Mahalo.

CHAIR MOLINA: Okay. Thank you very much, Rae. Members, any need to clarify Ms. Chandler's testimony? Chairman King?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER KING: I have a question. Thank you, Chair. Thanks so much for being here. I think, did you come from Oahu --

MR. CHANDLER-IAO: I did.

COUNCILMEMBER KING: --to be here? I really appreciate that --

MR. CHANDLER-IAO: Thank you.

COUNCILMEMBER KING: --and your level of expertise and your involvement in Waterkeepers Alliance. So, you know, I think you laid it out really clearly what we're actually talking about here. And it, and a lot of the details that have come forward are not really the issue of the day.

MR. CHANDLER-IAO: Yeah.

COUNCILMEMBER KING: What other, I mean, how is this being addressed because I think your organization is Statewide, so how is this being addressed by other municipalities in Hawaii, the other counties?

MR. CHANDLER-IAO: Well, so, I know that there's some concerns about in particular waste, recycled wastewater and how it would be affected by this. And I think that the law, in the Ninth Circuit's opinion, it refers to something called fairly traceable. So, there's been concerns about oh, what are the effects of cesspool owners? Or what are the effects to recycled water agencies? Basically, my position is that recycled water is the most responsible use of wastewater on the land. And thank you to this County for advancing that infrastructure as you go and the commitments that you've made. If you can fairly trace, and really that would require scientific studies, if you could fairly trace a cesspool, you know, that's leaking, then there could potentially be liability. But fairly traceable, that would mean somebody would, you know, invest tons of money into a scientific study for one homeowner's cesspool. I mean, and then DOH would then have to enforce it in order for it to have any teeth. And so, DOH is under the, you know, understanding that the homeowners are struggling just to upgrade their existing cesspools by 2050. So, they would not be the enforcement agent that would come down really hard on these individual homeowners. We have to keep it in the context of who is the enforcement body, and would they take action. Recycled water agencies have filed amicus briefs. You know, I'm really worried about amicus briefs, they're perception of who they're coming from or the numbers of them could mean something. Really, you know, there's a lot of money to be made in this Supreme Court case by the people who are, you know, stand to benefit from polluting without, you know, permits or oversight. And so, there's going to be a lot of arguments. They're going to sound a little credible. But to be honest, do you think that our country is going to cut off recycled water? Because the only alternative to recycled water treatment on the land, which is very responsible, would be to take that recycled

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

water and put it into the water, to discharge it into the water. That's the only alternative, land or water. So, if you're going to put it into the water, that's exactly what we don't want. You know, so, I think that if you look at what's being argued as oh, you're going to cut off the legs for recycled water, that's not a viable argument because in turn, we would put it back into the water. That's not what's going to happen. We're not going to cut the legs off the most responsible way of...

COUNCILMEMBER KING: Okay. And then, just one other question, Chair? So, another thing that has, I've seen in some testimony is the EPA could decide to fine people with cesspools. And, you know, I'm looking at an EPA program which, where they actually are, they have a Clean Water State Revolving Fund to actually fund conversions of cesspools.

MR. CHANDLER-IAO: Exactly.

COUNCILMEMBER KING: So, why would they do that?

MR. CHANDLER-IAO: Exactly.

COUNCILMEMBER KING: Why is that even an issue?

MR. CHANDLER-IAO: Well, and then what's funny is that so there is a lot of focus on upgrading cesspools right now. And the law that was passed by 2050, there's some prioritization and it already says that we prioritize areas that are close to the water, that are near-shore cesspools. Those are probably the ones that would have a direct connection or some kind of traceable standard. The ones that are way up mauka, those are the ones that like the scientists who presented earlier, you know, there's some denitrification as it moves through the soil, the mauka cesspools are way less impactful towards the environment than the ones that are close to the ocean. So, if somebody is saying, you know, what are the, what's the liability for cesspools, cesspools are actually untreated waste, right? So, if there's a near-shore cesspool that's, and for example, EPA really went after the group cesspools, the ones that treat like maybe 20 homes that are aggregated or like a small hotel or something like that, they had to upgrade immediately because they know the impacts to near-shore water are almost certain, whereas, you know, this new idea of Clean Water Act liability attaches automatically to all cesspool owners, it's just not true, not under the way the Ninth Circuit opinion is written because it has a fairly traceable standard. You'd have to trace it, honestly, in order for the liability to attach.

COUNCILMEMBER KING: Okay. Thank you for making that clear. Thank you, Chair.

MR. CHANDLER-IAO: Yeah, thank you so much.

CHAIR MOLINA: Okay. Thank you, Chairman. Members, any other need to clarify Ms. Chandler's testimony? I see Member Rawlins-Fernandez.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo Chair. Aloha . . . *(inaudible)* . . .

MR. CHANDLER-IAO: Aloha.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for being here and for providing testimony. So, we received testimony from the State Department of Health sounding kind of nervous about issuing an NPDES permit for the injection wells. Do you see it as a problem?

MR. CHANDLER-IAO: So, the State Department of Health sounded kind of nervous that they might have to do the work related to the NPDES permit?

VICE-CHAIR RAWLINS-FERNANDEZ: Yeah.

MR. CHANDLER-IAO: I'm so sorry that that's the case. So, really, you know, I don't know what to say about that, Councilmember. Our Department of Health is the Department of Health. They are in charge of protecting our health and safety. I think that the NPDES permit is required when, you know, there's a discharge into the ocean. I think that this body has already put in so many progressive plans towards upgrading the system that I think that, you know, securing a piece of paper to authorize the permit, sounds like getting a permit's the easiest way to go forward 'cause you keep the wells, but you're allowed to, right? So, I think that that means that there needs to be a clear channel of communication between the County and DOH to work through this process. I'm sorry it's going to require work. But we're going to have to go through it together in order to get to the other side 'cause inevitably, we want to be able to continue, not business as usual, I would say business as better than usual, but we know the County has to keep running. We have to keep the wells, we have to permit them in order for these things to move forward and then, phase them out with wastewater reuse, it's great, yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, and one last question, Chair? So, I heard a previous testifier mention that the EPA is also willing to work with the Department of Health and the County to get this NPDES permit secured, is that true?

MR. CHANDLER-IAO: Well, actually, you know, I haven't personally spoke with the EPA myself about this issue. But I think that, you know, locally so, Hawaii right, EPA, then Federal EPA, right, so, locally I would encourage conversations between the County and the EPA, and the County and DOH 'cause even if the DOH is very burdened with, you know, the permit writing, and I know they're understaffed, right? So, there's real concerns. So, how can we strengthen them either from help on our side, the County side, or help from the EPA to get through this process. Because as it was pointed out earlier, the UIC permit, it's just not adequate for this type of disposal mechanism. It wasn't designed for that purpose. It's for drinking water. It makes sense that it's not, you know, adequate. But I think if we can work towards the best

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

possible permit, it's probably going to come in collaboration with multiple agencies and I think what a great time to have this conversation, yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo. Mahalo, Chair.

CHAIR MOLINA: Thank you, Member Rawlins-Fernandez. Any other need to clarify Ms. Chandler's testimony? Seeing none, thank you very much for your testimony, Rae.

MR. CHANDLER-IAO: Thank you for all you do, aloha.

CHAIR MOLINA: Okay. Thank you, I appreciate your comments. Staff, has there been any other sign-ups for testimony today for our item GET-26?

UNIDENTIFIED SPEAKER: Chair, there is no one else signed up in the Chamber to testify.

CHAIR MOLINA: Okay. Do we have any requests as well from our sister offices in Molokai, Lanai, and Hana at this point? None so far? Okay. Members, you heard it. If there are no objections, the Chair will close public testimony on GET item 26.

COUNCILMEMBERS VOICED NO OBJECTIONS.

**. . . END OF PUBLIC TESTIMONY . . .**

CHAIR MOLINA: Okay. So, ordered. Members, it is close to our break time. The Chair's intent is to come back after the lunch hour. We'll have a panel discussion with the plaintiffs and the County of Maui, and the Chair will be allotting roughly 15 minutes or so for each side to give their statements. And at that point we'll begin the question and answer investigatory process. So, with that being said, Members, it is six minutes until the hour of noon. Let's return to the Chambers at 1:30 p.m. The GET meeting for May 20, 2019 is now in recess until 1:30 p.m. . . .(gavel). . .

**RECESS:            11:54 a.m.**

**RECONVENE:      1:35 p.m.**

CHAIR MOLINA: . . .(gavel). . . The GET meeting for May 20, 2019 is now back in session. Members, it is 1:35 p.m. Thank you for that break. We're now at the informational phase of today's meeting. And in case those who are wondering, now, Hawaii Wildlife Fund is the plaintiff in a lawsuit against the County of Maui. And normally in Committee meetings you typically don't have the plaintiffs involved directly in a Committee meeting. However, it was the Chair's feeling that because of the significance of this case and the mere fact that the Committee Members, all of us,

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

need to get up to speed on this longstanding issue, it was the Chair's opinion that we should hear from the other side as well. This is certainly a very big and important community issue. So, not only for us, but also for members of the general public as well, including those who are watching our proceedings today. So, how we will proceed forward is we will have a presentation done by Mr. David Henkin of Earthjustice, roughly a 15-minute presentation. When Mr. Henkin is done with his presentation, then I will allow you to go ahead and ask your questions. And we will go again with the time clock format the we had used during the GET confirmation process, seven-minute round, followed by a three-minute round. And if necessary, a third and final follow-up round of questions for the presenters. So, is everybody clear on how we will proceed today? Okay. So, noted, and then once we are done with Mr. Henkin, then we will have the County of Maui do their presentation and follow the same question-and answer-routine. With that being said, I shall turn matters over to Mr. Henkin from the Earthjustice to do the presentation for us. Henkin, I'm sorry, Henkin, not Henkins, sorry, sir.

MR. HENKIN: Oh, that's fine.

## **. . . BEGIN PRESENTATION . . .**

MR. HENKIN: Aloha, thank you very much, Chair, Members of the Committee. I appreciate this opportunity to talk to you today about the Lahaina case and hopefully a path forward where we can work together to try and solve the issues facing the County. I will be around for the duration. Don't worry, I'm not going anywhere. So, really, my only purpose for being here is to answer any questions or concerns that you all may have. So, I would like to give a little background. And I am an attorney with Earthjustice. I've been with the Honolulu office of Earthjustice since 1995. The office has been there a little bit longer than I have. We just celebrated our 30<sup>th</sup> anniversary. And we are an environmental law firm. So, we represent clients who really, you know, while I'm speaking here today to you, I'm doing it on behalf of the clients and the clients in the case are all Maui-based groups. So, Maui residents, Maui taxpayers, folks involved in the community, the Hawaii Wildlife Fund, the Maui group of the Sierra Club, Surfrider Foundation, including its Maui group, and West Maui Preservation Association. And Earthjustice has been working with these groups long before we ever set foot in the courthouse. As I'll get into shortly, during the 1990s and into the early 2000s, folks started having concerns about what was happening to the marine life on the west side of Maui, and in particular, in the vicinity of Kahekili Beach Park. And so, here we have, I'm sure you're all very familiar with this, but the Lahaina Wastewater Reclamation Facility is located very close to the shoreline, and it's just a little bit to the north of the Kahekili Beach Park. Folks who, families who have lived for generations in the area know that reef well, know that it has historically been a very productive, pristine reef environment. Following...so, the Lahaina facility, I think to be fair, was an effort by the County to do better. Prior to the building of the facility in the 1980s there was not a good way of disposing of the increasing amounts of treated wastewater from all of the residents and businesses on the West Maui

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

coastline. And so, the facility was built in an effort to try and manage that. Unfortunately, after it went into operation, increasingly we saw changes on the reef. So, you went from a healthy reef environment increasingly to areas of the reef being converted to this. So, this is an example of where the reef has undergone a phase shift from a healthy coral reef to turf algae, which dominates the reef and prevents it to be a productive ecosystem. In the early 2000s, these are some images that may be familiar to you. So, you would have these outbreaks of algae along the West Maui coast. This is also off Kahekili, the first one was 2001, the next one is 2003. And increasingly, people were suspicious that, you know, what had changed that would cause such a thing? What would change to cause harm to such a large portion of the reef that was formerly healthy? Scientists started taking a look at this. And so, the information I'm going to present, I am not a scientist, the information I am going to present has to do with some of the scientific studies, the peer-reviewed scientific studies that were done. And so, you had organizations like the U.S. Geological Survey that did investigations. I believe the first report came out in 2007. This is a report from 2009. And they started investigating to try and figure out what was the sources of the damage to the reef? And what they used; in this report you'll see these little red boxes. Those are very high levels of, Robin Knox referred to Nitrogen 15, but for those like me, who are not scientifically inclined, that's just a fingerprint of highly treated wastewater. That's just a, it's a way that you can use, look at the type of testing and the results you're getting and know that you have highly-treated wastewater of the type that you would have from the Lahaina Reclamation Facility, unlike fertilizer, unlike cesspools and things that are not as highly treated, you would get this Nitrogen 15 fingerprint. And so, the red areas are the very high readings, the yellow also elevated readings, and then the blue areas further to the north are more normal readings. And so, using this Nitrogen 15 and other things that the U.S. Geological Survey called inherent tracers, so, things that tell you that what you're finding in the ocean is coming from the wastewater treatment facility, things that are inherent to wastewater that's treated at a facility like flame retardants from children's clothing and things like that, things like pharmaceuticals that are fingerprints of human waste. And so, they started using these tools and what you'll see is they start figuring out that from the injection wells, which are up at the top of that sort of red loop, the wastewater seemed to be heading in a southwesterly direction and coming out at elevated levels near offshore of Kahekili Beach Park. You had other studies, we heard earlier today about a study by Meghan Dailer, a research at University of Hawaii in 2010 that Robin Knox assisted with. This is another study in 2011 that used this fingerprint, this type of fingerprint of highly-treated wastewater to confirm in the water the plume off of Kahekili Beach. And then, they did additional investigations, again, these are all peer-reviewed scientific studies. These are not folks at I hired, or anyone hired. These are folks who are doing original research in the scientific literature. And they found that the highest levels of this signature for treated wastewater anywhere in the scientific literature was found right off of Kahekili Beach Park. EPA then stepped in and was so concerned about what was happening on the reef, and to be clear, none of this presentation so far, and really for the rest of it is likely to be about the law. I'm not really going to be focusing on which laws were broken, weren't broken, were

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

satisfied, weren't satisfied. This has to do with just what's happening in our marine environment and what we can do about it. So, EPA was concerned. They wanted to find out more. You've heard reference to a letter that was sent to the County saying we suspect that your wastewater facility is contributing pollution into the ocean and if they were doing that, they need to comply with the Clean Water Act. That was the position of EPA going back to since the Clean Water Act was first enacted under Republican and Democratic administrations. So, EPA decided to invest in trying to figure out what was going on at the ocean from Kahekili. So, this is a researcher literally pouring tracer dye into one of the injection wells at the Lahaina facility because while the USGS and University of Hawaii scientists had tried to look for these signs, these fingerprints. EPA said well, let's just follow the trail. And so, they poured the dye into the injection well. And then, folks went down to the areas. You can see this kind of little fuzziness coming up out of the reef. There's a little, it looks like a straw, that's called a piezometer that's used to take water quality samples at the little areas in the reef where the wastewater comes up. And you can see the brackish water making it murky and that's where USGS, that's where the UH researchers thought that the wastewater was coming into the reef. They thought it was from the Lahaina facilities. So, that's where they were looking to see if this tracer dye could be detected. Now, the type of dye that they used, it's called a fluorescein dye and the reason they use it is because in very, very, very, very low concentrations, ones that can't be seen with the human eye, you can use detection equipment and you can detect, you know, so many parts per billion, or trillion, or whatever it is coming out of the reef so that you can know if the dye that was placed into the injection well is coming out on the reef. Well, much to their surprise, this is a video taken by Meghan Dailer, one of the researchers who also participated in this study and so, you can see this green Kool-Aid coming up out of the reef. It was in such high concentration coming from the Lahaina facility from the injection well that you didn't need a special detector to be able to see it. You could see it with the naked human eye. This is again, a video from Meghan Dailer, totally un-retouched. It's just what it looked like. And this gave extraordinarily valuable information. It laid to rest any doubts about whether the wastewater injection wells three and four made their way to the reef. It clearly did. It told us how long it took, 84 days. You were able to do which, you know, is very fast in terms of things moving through the groundwater. We were able to figure out what concentration, like what percent of the groundwater that's naturally, you know, there is some groundwater naturally coming up through these seeps. But what they found is that 62 percent of what was coming out of these seeps was Lahaina wastewater. So, it wasn't natural at all, conditions at all. It was vastly augmenting it. So, one of the things that came out in the course of the trial, the analysis that was done by one of the County's experts was that one out of every seven gallons of groundwater entering along a two-mile length of shoreline was due to the Lahaina facility. So, one out of every seven gallons. But actually, in these dead zones near the seeps, like I say, it was over 60 percent was due to the Lahaina injection well. So, very concentrated. What the EPA study confirmed is what, you know, people had known all along which was if you use injection wells, so, those red lines going down, and they drilled the injection wells when they built the facility so they would go down into the aquifer. This is not a



# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

situation like a cesspool or a septic tank where you have eventually some wastewater percolating down through the soil and after it's cleansed, and after all of those natural processes it eventually gets to groundwater. The purpose of the facility was to relatively efficiently get rid of wastewater, millions of gallons a day. So, in recent years it's been an average of 3 to 5 million gallons per day. You can't do that by percolating down through the soil. You need to drill until you get down into the aquifer itself, which is what this shows. It goes down into the aquifer. And everyone knew when the County built the facility that the groundwater would then carry it into the ocean. What I think the County was hoping, and like I said, I think when this facility was built, the hope was to improve on the situation. I think the hope was it would go into the groundwater and it would sort of diffusely go into the deep ocean and dilution is a solution to pollution, and out of sight, out of mind, and it's all good. Unfortunately, and I want to emphasize, I don't think anyone ever could've imagined that this would be the case. Unfortunately, it doesn't go into the deep ocean. Here's another picture. This is from a report that was prepared together with one of the tracer dye study scientists. And so, you see the injection wells, the two green ones are wells three and four that they put the tracer dye in. That red cone, or that red parabola, whatever, shows you where the effluent plume is going down towards Kahekili Beach and then, you see a couple of boxes offshore. Those are called the north and south seep areas. Those are, you saw the diver looking at that little straw coming out? Well, that's how close to shore it is. In fact, this is how close to shore it is. We're talking 5, well, 15 feet, so, 5 meters to about 25 meters, 75 feet offshore. And that is just bad luck for everyone, it's unfortunate. Because if it did go into the deep ocean, it might not be causing, you know, much of a problem. But because it goes directly into the reef flat, directly where there are corals struggling to survive, it is a problem. And this is what I was trying to show folks on my laptop over there. So, I added it to the PowerPoint. These are actual measurements that the Department of Health did through one of those little straw-like piezometers. So, these are at the seep. These are not our measurements, our experts' measurements. We had nothing to do with this. This is from the Department of Health. And they were measuring for different types of pollution. On the far right is total phosphorus. So, that's what Professor Krock was saying is a particular concern of his for the reef. In the middle is total nitrogen, which other scientists like the testimony, or the scientific peer-reviewed study that I attached to my testimony from 2017 U.S. Geological Survey and others saying that it's the nutrient...that it's the nitrogen that is a big problem. Whoever you believe, they're all in the red. And what...I highlighted these, what the red means is that these are all in exceedance of the Clean Water Act standards for open ocean waters where this is going in. Same thing for the nitrates over on the far left. And we have two years of data from the Department of Health. I could, I'm happy to provide the Committee with all the data that they provided to us from 2012 to 2014 during the lawsuit in the trial court. And 100 percent of the phosphorus was in the red, 100 percent was in violation of those standards and of the nitrogen it was over 50 percent of the time the nitrates it was two-thirds of the time.

CHAIR MOLINA: How much more do you have, basically?

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HENKIN: About five minutes. Is that okay?

CHAIR MOLINA: Members, any objection to another five minutes? Okay. Proceed, Dave.

MR. HENKIN: So, the concern that we have is that when it's coming up out of the reef, these nutrients are feeding the algae that with due respect to some of the earlier testifiers, have been overwhelming the reef. They spread out and they are converting a hard-coral reef ecosystem into this turf algae system. And again, don't take our word for it. This is a graph that was prepared by the Hawaii Division of Aquatic Resources, measuring at Kahekili between 1994 until 2006; 1994, after the injection wells were already causing harm, you had 55 percent coral cover, by 2006 it was 33 percent, and the harm continues. So, this is the study that I attached to my testimony from 2017 due to the nutrients plus all that huge amount of freshwater coming in. Everyone knows you do not see reef where streams go into the ocean. Just freshwater alone, pure drinking water alone will kill the reef because it's too acidic. So, the double whammy of the acid and the nutrients is literally eating the reef apart. That's why they say rates of bioerosion eating away at the reef orders of magnitude higher than you would in waters that are just acidic. You throw in the nutrients and this is again a peer-reviewed study, it came out a year and a half ago. With respect to the, so, the main thing I want to focus on in conclusion is what we view as the path forward. We have never wanted to be in court. We worked with our clients for four years from 2008 until 2012, worked with two Mayoral Administrations to see if we could get the County to start committing to addressing the injection well problem that the scientists had identified. It was only in 2012 after four years of effort when prior Administrations were not responsive that we went to court. When we went to court in 2012, we got a favorable ruling from the District Court, the Trial Court, that indicated that we were likely to win. Rather than want to just, you know, ride on to victory, the County said let's talk settlement. And we put the case on hold for a year and a half because really, you know, at the end of the day it's not about the Clean Water Act, the Safe Drinking Water Act, the whatever. There's a problem that needs to be addressed and we have always wanted to work with the County on that. So, the settlement that you have that was conveyed to you by Corporation Counsel, one of the features is starting to make investments in the wastewater reuse process. This is a graphic that comes from County sources, I think in 2012 you had a very good study about options for increasing reuse. We support that. We'd like to see more golf courses watered, landscaping watered. If you want to water a native forest that someone else had suggested, that's wonderful. Let's just try and divert the excess water out of the reef and put it to beneficial use. The other thing is, again, we never wanted to take the County to court in the first place. We've never been after any civil penalties. The settlement offer is as long as the County is making good-faith efforts to try and get the permit and then comply with the permit, and again, this is a permit, it doesn't say you cannot use injection wells ever. It just says if you're going to use the injection wells, make sure you're not in the red when we measure what's hitting the ocean. Make sure that we adjust that. And as Robin Knox mentioned, there can be a process of

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

adjusting it over time. Once you have the permit no one can sue you because you're working on the problem, and that's all that our clients want, our Maui-based clients want. That's all that the EPA or this Department of Health would ever want. So, we will not take, I promise, I'm here today and we'll put it in writing, and we put it in writing, we will not be back in court as long as we're working together on this, which is what we want. So, there will also be no future litigation as long as, over the Lahaina injection wells if you're doing what this Council and this Mayoral Administration seems committed to doing, which is investing in Maui, you know, we don't want to invest in penalties to the Treasury. We want to invest in Maui and fixing this problem. We were then asked well, okay, you're going to drop this lawsuit but then you're going to sue us about the other injection wells. No, no, I assure you, I, you know, I can't look you eye in the eye and do that. No, as long as the County is working on solving these problems, we have no interest, and never had any interest in taking you to court. Again, our clients live here, it's their taxpayer dollars. They're residents here. They just want to focus on that thing. For people using the recycled water, we don't want to take them to court. We want people to use the recycled water. So, as long as people are watering responsibly, there's not going to be a problem with excess water getting up on to the reef. And the County attorneys felt very strongly that the County should not admit that it caused any harm to the environment. And so, we are not insisting that the County admit that it did anything wrong ever. We would like to focus on solving the problem. And my last comment, I guess, was raised by a previous testifier, which is, the first part of the draft resolution makes sense to us, which is you, the Council, should determine the terms of any settlement. I'm not telling you what those terms should be, but the Council should decide it. We find it unusual that the draft resolution would have the Corporation Counsel imposing additional terms. I'm not familiar with that. I just would say, our recommendation to work productively together would be for you the Council to tell us what you'd like to do to resolve this case and then for us to work together. 'Cause we'd like to see less of this and more of this. Thank you for your time.

**. . . END PRESENTATION . . .**

CHAIR MOLINA: Okay. Thank you very much, Mr. Henkin. Alright, Members, we'll proceed now with our question-and-answer phase. We'll start first, again, with the seven-minute round. And, Mr. Henkin, I'd like to also, if you do have other resource personnel that could possibly help answer some of the questions that may be posed by the Committee Members, please feel free to invite them from the gallery to help you answer any questions.

MR. HENKIN: Thank you.

CHAIR MOLINA: Okay. We'll start first with Member Kama. You're on the clock.

COUNCILMEMBER KAMA: Thank you, Chair. So, my first question is, you said that as long as we comply with the permit, what permit are you talking about?

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HENKIN: It's a Clean Water Act permit. And so, in 2015, the Maui groups and the County reached an agreement that even while the County was appealing, it would make good-faith efforts to get a permit. And as I testified at the April 23<sup>rd</sup> Council meeting, the County did submit an application, but they were told by the Department of Health that all the information that they needed to complete the application had not yet been provided. And so, as I understand it, as we sit here today, the County has not yet completed its application. So, we'd encourage the County to complete the application with the information. And then, we would very much like to partner with you and the rest of the County to get Department of Health to issue the permit. You've seen the testimony from Wendy Wiltse who was at EPA for over two decades here in Hawaii. EPA has offered to Department of Health if they need help formulating a permit. EPA is happy to help. I attached to my testimony a sample of a permit that EPA issued to a very similar wastewater treatment facility in Washington State where they used infiltration basins and the pollutants get into a nearby river. And what you do is you control what's going to the infiltration basins to make sure it doesn't pollute the river.

COUNCILMEMBER KAMA: Thank you. So, my next question is...oh, okay. Do you want me to do all seven minutes now?

CHAIR MOLINA: Go ahead.

COUNCILMEMBER KAMA: Okay. So, right now, what regulations do we have in place for our County right now? What regulations are we using currently, if not the Clean Water Act?

MR. HENKIN: Currently, the County has permits under the Federal Safe Drinking Water Act and also the State equivalent of the Safe Drinking Water Act. So, these are Underground Injection Control permits that both State and Federal law focus on what needs to be done to protect sources of drinking water. They do not focus on what needs to be done to protect the ocean. And as Wendy Wiltse points out in her testimony, the standards for the ocean are much more protective because coral, for example, is very sensitive to these types of nutrients, which is why when I showed you the slide, when Department of Health is measuring the pollution as it comes up out of the reef, it's violating the Clean Water Act Standards even though the County has been complying with the Safe Drinking Water Act standards.

COUNCILMEMBER KAMA: So, what, then what role does the National Pollution Discharge Elimination System play in this whole thing?

MR. HENKIN: Okay. So, that long sentence is a Clean Water Act permit. So, the National Pollution Discharge Elimination System permit is a Clean Water Act permit. And that's the permit that we're hoping that the County will work with Department of

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

Health to secure, because that would make the, that would allow the County to meet the standards that will protect the ocean.

COUNCILMEMBER KAMA: So, do you know what the cost is for a permit such as that?

MR. HENKIN: Well, it's hard to say what sort of changes would need to be made. I think that because of the situation, you would have to have, you know, a permit where you're working towards meeting the standards. So, you'll make some changes on the injection well side and hopefully by increasing reuse you'll be decreasing the amount of stuff going into the wells in the first place, you'll make some adjustments, if that doesn't result in meeting water quality, then you'll make some more adjustments. But at the end of the day, the most important thing, that's why I didn't want to focus so much on the law as on what's happening, if you don't meet the water quality standards you're going to continue to see damage to the ocean environment, which is not good for the people of Maui.

COUNCILMEMBER KAMA: Thank you, Chair.

CHAIR MOLINA: Okay. Thank you, Member Kama. Member Sugimura, you have the floor.

COUNCILMEMBER SUGIMURA: Thank you. Nice to see you here.

MR. HENKIN: Aloha.

COUNCILMEMBER SUGIMURA: Thank you for the presentation. Do you think an ocean outfall is a better disposal method than an injection well? What is your opinion?

MR. HENKIN: I actually, I think the best disposal method, well first of all, I think to the extent that the County can beneficial reuse of the water and not dispose of it into the ocean in any way, that's the best all around. We know that in West Maui there are limitations on freshwater resources, and I think, I watched the Friday hearing in which, I'm sorry, the gentleman who's now wants to be in charge of DEM, he said...

COUNCILMEMBER SUGIMURA: Mr. Nakagawa?

MR. HENKIN: Thank you, Mr. Nakagawa, he said, you know, all water is valuable, and we need to reuse the water. So, I guess the best solution in my view is to reuse the water but recognizing that you may not have uses for all of the water. As between an injection well and a deep ocean outfall or other means of disposal, I don't actually have an opinion. It's really just a question of which one can meet the water quality standards. If you had a hydrology in this situation, if you injected into the well and it went really far offshore and it didn't come up until miles out and miles deep, no one would necessarily be concerned about whether you had a permit or didn't have a permit. The problem is just bad luck, which is that this particular injection well goes into an aquifer that comes in within 15 feet of the shoreline, and that's a problem.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SUGIMURA: In your opening testimony you said that you have many clients. Who are they?

MR. HENKIN: Oh, well, we represent four groups.

COUNCILMEMBER SUGIMURA: We know the groups, right, 'cause they were in the lawsuit.

MR. HENKIN: Yeah, yeah.

COUNCILMEMBER SUGIMURA: So, who are, who are these other people? You say you represent many people. So, who are they and how many people are they?

MR. HENKIN: Oh, no, no, no. I was, no, I just meant to say that I, that I don't represent, I'm not here representing Earthjustice. We're a law firm, we represent clients, and the clients are the four groups who are listed in the lawsuit.

COUNCILMEMBER SUGIMURA: So, in...

MR. HENKIN: Those are the people who I owe a duty to speak on their behalf.

COUNCILMEMBER SUGIMURA: So, part of the settlement is the promise that you will not sue us if we settle, right? So, there are other, many, many people who can sue us. So, what do you have to say about that?

MR. HENKIN: Well, I think that the reality of the situation is that, I mean, someone can only sue you if they have standing, right? So, they'd have to have some, they'd have to be affected in some way. We represent the major environmental groups on Maui who have been concerned about this issue for I think over 12 years. I can't speak for what others would do. But in terms of our clients, they're, they've, it's not just, you know, you don't have to believe what I have to say. Don't believe what I say, see what we've done. So, we spent four years trying to talk to previous Mayoral Administrations and Councils. Then when we went to court and we were winning, I guess if it's, as far as I'm concerned, no one wins here unless we work together. You know, what happens in court is not winning. What happens in the water, now that's winning. So, once the judge said yeah, we're likely to agree with you guys and the County said let's talk settlement, that's what we did for 18 months. We didn't try and...so, we have no interest in suing is what I'm saying. We have an interest in solving the problem.

COUNCILMEMBER SUGIMURA: As we do.

MR. HENKIN: Wonderful, I'm pleased.

COUNCILMEMBER SUGIMURA: Good. What are our options that you see?

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HENKIN: Well, I think the option, I mean, the best option, the best path forward that we can see is working together to try and solve the problem, not continuing with the litigation. It's never been our desire to be in court on this issue. I think that, you know, you could talk about what the interests of folks outside of this room and outside of the County are with respect to that. But there's really nothing in it for the County. If the County is committed to addressing these issues and working on a long-term solution that'll be best for the people of the County, I think that's where we should all focus our energy.

COUNCILMEMBER SUGIMURA: And the options that are available, water runs downhill, right? So, our Hawaiian ahupuaa system, it's natural, so, what is your solution that you think we should do to avoid any water ever hitting the ocean, or the groundwater, through the groundwater.

MR. HENKIN: Well, I'm not sure that there's a solution that ends up with no water ever hitting the ocean. The hope is that you manage the wastewater in a way that whatever does get to the ocean will not harm the ocean. And so, as I mentioned before, I think maximizing the beneficial reuse to meet the freshwater needs of the County, and then, working to make sure that whatever systems are in place need to be in place at the wastewater facility to make sure that it meets the water quality standards that were set to protect the marine environment. And, you know, there are, I mean, we've heard, there's a number of creative people here that have suggested watering Native Hawaiian forests, have suggested scrubbing with native algae's, have suggested doing a bunch of things. I think, you know, folks with good ideas abound. At the end of the day, what we're most concerned about is just making sure that the ultimate destination of the water doesn't harm the ocean.

COUNCILMEMBER SUGIMURA: So, the County of Maui, is there a 600, there's, we have a, not, this is not our only injection well. So, you're saying that if this gets settled, you will not sue the County of Maui for any of our other injection wells that we have?

MR. HENKIN: Yeah, so, what we've put forward, and really, you know, this is something that we put in writing because it makes people feel better to see it in writing. At the end of the day, I think that the first thing you should look at is what have we been doing, you know, you know, look at my actions rather than my words. And the actions are trying to work with the County for many, many years before we got to court and even when we went to court, always focusing on solutions. So, that's the same thing for this injection well, other injection wells. There's no benefit to our Maui clients to having the County pay penalties to the U.S. Treasury. We want investment in Maui to solve the problems. And again, I didn't want to focus so much on Clean Water Act versus this, versus that. It's, you know, where there are problems with wastewater disposal that are harming the near-shore environment, we should work together to try and fix them.

COUNCILMEMBER SUGIMURA: Thank you.

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Thank you, Member Sugimura. Councilmember Paltin?

COUNCILMEMBER PALTIN: Thank you, Chair. Thank you for being here today and your work on this matters. So, I was wondering if there is any injection wells in the country with NPDES permits.

MR. HENKIN: I'm not specifically familiar with injection wells. But there are many permits out there that deal with pollution that reaches what are called, waters of the United States, so whether it's an ocean, a stream, a river, or a lake, via groundwater. Attached to my testimony is a permit that EPA put together for a wastewater treatment facility in Washington State, as I mentioned that.

COUNCILMEMBER PALTIN: The infiltration basin?

MR. HENKIN: That's rapid infiltration basins. EPA has also issued permits for other type of industrial activities where the pollution gets into the waters via groundwater. And so, this is something that, you know, permits have been written for. I know in the State of Colorado, they dealt with like a sugar beet processing plant that had some wastewater lagoons that it was getting into the nearby river and they wrote a permit on that. And so...

COUNCILMEMBER PALTIN: So, they kind of individualize the permit for the situation?

MR. HENKIN: Yeah, I mean, when you're dealing with a large source of pollution like the Lahaina facility, you really want to do a specialized, you want to...one size doesn't fit all. You need to figure out what your situation is. Again, if you had gotten lucky and the aquifer went out into the deep ocean where there are no corals and where maybe it's just a sandy bottom. And if it's spread out then, you know, that would be easy. Unfortunately, the hydrology of this particular facility in this particular location has worked to, you know, the disadvantage of the marine environment, which makes it something that needs addressing through an individualized permit.

COUNCILMEMBER PALTIN: So, if guys say that, if we need a NPDES permit for injection wells, then, they think that it would also cause it to need a permit, NPDES permit for cesspools? Is that, they're not already addressing the issue with the 2050 cesspool phase out? So, they would like put an additional thing onto that 2050 thing is the fear?

MR. HENKIN: Well, I can't speak to what the fear is, you know, I've heard concerns about cesspools. And the fact of the matter is that, you know, that is, you know, we're sort of talking apples and oranges here. The injection wells were designed to go directly into the groundwater underneath the facility to get rid of, I think the design capacity, and if there's someone from Wastewater can correct me, but I think the design capacity is 9 million gallons per day currently. And the actual discharge is 3 to 5



# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

million gallons per day. Now, that would be a big cesspool. You couldn't do that. I mean, cesspools are designed to filter waste through the soil so that they get cleaned as they go through the soil. It's just a totally different situation. And so, the State's already committed to phasing them out. There was, I think it was Robin that testified earlier that there may be some revolving funds available if there's a cesspool in a particularly bad location to try and help them upgrade it before that. And at the end of the day, I think that if we're concerned about protecting our ocean water quality, that should be the focus of the County's efforts. In the unlikely event that there's a cesspool that is a big problem, that one could say, yeah, you know, it's that cesspool. Then we should just fix that one and not worry about whether they need a permit, not need a permit. Let's just, I mean, hold a bake sale and buy 'em a septic system.

COUNCILMEMBER PALTIN: So, say we get a permit for the injection well and then we work towards water reuse and we find out that the R-1 water being reused at the golf course is coming out onto the ocean. We're covered because we got the NPDES permit to do water reuse in that way.

MR. HENKIN: So, the issue about whether the folks who use the R-1 water are going to have, is that what you're getting at, or...

COUNCILMEMBER PALTIN: Like if we get the permit --

MR. HENKIN: Right.

COUNCILMEMBER PALTIN: --to continue using the injection wells but we're working towards reuse which is kind of like maybe a condition of having the permit or something? Is that...

MR. HENKIN: Well, I think, I mean, you know, ultimately, from the Department of Health's perspective, and from EPA's perspective, they're just going to want to make sure whatever use you make of the injection wells, what ends up in the ocean from the injection well is going to meet the water quality standards. There's this other issue of well, what happens if, you know, someone uses the recycled water on their golf course, or their landscaping, or what have you. Well, unlike an injection well where you're trying to dispose of millions of gallons through the groundwater to get rid of it, when you water a golf course, when you water landscaping, you're trying to apply that amount of water that once you account for evaporation, so that goes up into the air, and then you just want to water it enough so the plant stays alive. You don't water it to turn your golf course into some sort of a bog or something. So, I think that, you know, the concern that all of a sudden, this large volume of water is going to get down into the groundwater and be a problem is not a real situation. I mean, the folks who are using the water, they're paying for it. So, presumably they'll just use what they need.

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

COUNCILMEMBER PALTIN: 'Cause you're spraying it over a large surface area rather than cramming it down a little tube at 3 to 5 million gallons into that tube, or well three and four?

MR. HENKIN: Yeah.

COUNCILMEMBER PALTIN: Okay. Thank you.

CHAIR MOLINA: Okay. Thank you very much, Member Paltin. I see Member Hokama . . . *(inaudible)* . . . Mr. Hokama, would you like to, pass for now? Okay. We'll move on to Committee Vice-Chair Rawlins-Fernandez. You're up.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Okay. Mahalo for your presentation, Mr. Henkin. Okay. Earlier, one of the testifiers said that in the settlement, as part of the settlement, that Earthjustice, or Sierra Club, or the plaintiffs, or your clients would be, would have oversight over the County. But I looked through the settlement and I didn't see that. Would you be able to comment on that?

MR. HENKIN: Sure, that, I was sorry that that gentleman had that concern. No, the settlement does not say that at all. And it's hard for me to even figure out how one could read the settlement. Now, I think what he was referring to, is something that was in the settlement that was reached in 2015. So, in 2015, we were in a situation in the trial court where the court had already ruled that the County was violating the law. And the next phase of any Clean Water Act case after someone's found to be in violation of the law is how much money should they pay in fines? And as mentioned, we have no interest in having the County pay a dime in fines because we represent Maui taxpayers and residents who want money spent locally to fix problems. So, we approached the County and we said, let's not go through this expensive trial on penalties. We don't want penalties. Let's agree about what type of initial efforts the County's going to make to invest in fixing the problem. And so, the response that we got was, well, the County wants to appeal. They don't think that, you know, they don't agree that the Clean Water Act regulates this. We said, okay, you, we can't stop you from appealing. So, if you, you have a right to appeal. So, the first thing that the agreement says is the County may, it doesn't have to, and I want to be very clear, we've never urged the County to appeal. But we couldn't stop you or your predecessors, and they wanted to, and they did. But what we agreed on is if the County ever stopped appealing, and we resolved the case as the Council is now considering doing, what would happen? And what we agreed was that the County would, instead of paying penalties to the Treasury, would invest in a minimum of \$2½ million in wastewater reuse projects of the type that the County itself had developed and identified as high priorities. And so, I think the provision that the gentleman was concerned about is, what it said is, the County, not us, the County would put together information for us about the type of reuse projects it wants to do that would meet the purpose that was set out in the settlement, which is increasing reuse. And they would say here, we want to build this project, or these two projects and they're worth at least

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

\$2½ million. And then what the settlement says is, we would then review that, and as long as it met the purposes that we had agreed to, which is increasing reuse, we would say, okay, great. And it just says we won't withhold our agreement unreasonably. We won't...so, I guess that's what he thought that we were going to tell you what to do. It's actually, the County would tell us what it wants to do. And as long as it meets that purpose, which is increasing reuse, then that's that.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for that explanation. I wanted to quickly go over the eight provisions of the settlement. So, the first provision is that both the County and the clients of Earthjustice would drop the pending appeal, or the County would drop its pending appeal.

MR. HENKIN: Correct.

VICE-CHAIR RAWLINS-FERNANDEZ: The second is that the County would make good efforts to secure an NPDES permit. Part two of the second provision is that we would fund and implement one or more projects located in West Maui to be valued at 2.5 million. And we allocated 15 million. So, we would've already satisfied that part of provision two, yeah?

MR. HENKIN: As long as...so, paragraph two is all of the provisions that were already in that agreement that was entered in 2015 and signed by the judge. And so, with respect to the 2½ million, we haven't yet received information from DEM about exactly what the 13 million would go towards. But as long as the purpose is to divert treated wastewater from the injection wells for reuse, then yeah, then it would be more than enough, yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo. And provision three of the second paragraph is \$100,000 penalty, and that's something that would be required for the EPA to secure the approval?

MR. HENKIN: Yeah, that was required to get the approval in 2015 from the EPA because once, 'cause we weren't able to work it out before we got that far in the lawsuit. So, when you want to settle a lawsuit, the EPA needs to approve it, and they have the settlement policy that says there has to be at least a little bit of money that goes to the Federal Treasury, which is why we kept it as low as we could.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo. Okay. And then, number three, the third paragraph is new information from the last time we received testimony from you and that each party would bear its own cost of litigation. So, previously, we learned that the County may be liable for \$1 million in attorney's fees for Earthjustice, and that's no longer the case?

MR. HENKIN: Let me clarify that. So, each party would bear its own cost of litigation for everything that's happened and is happening before the U.S. Supreme Court. But the

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

County had already agreed to reimburse the plaintiffs for their fees for the trial court and the court of appeals. And this would not change that. So, basically, paragraphs two and three don't change anything about the prior agreements between the parties.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. Okay. And then, the fourth paragraph is that the County would reduce its reliance on the injection wells in Lahaina, increase beneficial use, and secure and comply with the terms of an NPDES permit. And number five would be to, the County would make good-faith efforts to reduce its reliance in injection wells to dispose of treated wastewater at its other wastewater treatment facilities?

MR. HENKIN: To clarify, Madam Vice-Chair...

VICE-CHAIR RAWLINS-FERNANDEZ: Please go ahead.

MR. HENKIN: So, four and five were assurances that the County asked of us that if you're making good-faith efforts to reduce the reliance on the injection wells, are we going to take you back to court the day after we settle this? And we said of course not, as I mentioned to you. So, this doesn't actually impose any duty on the County. It's just our putting in writing what we assured the County, which is that we're, we really do want to work with you on this. And then we were asked, well, are we going to sue you tomorrow about the other injection wells, and that's what paragraph five is. So, it's saying no, no, of course not, as long as the County is moving forward in the spirit that it now is, then, you know, we're thrilled to be working with the County. So, neither four or five imposes any duty on the County. It's actually meant to just give you a reassurance that we're really serious about being good partners.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Mr. Henkin. Mahalo, Chair.

CHAIR MOLINA: Thank you, Member Rawlins, and the next round you can complete that line of questioning if you choose to do so.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

CHAIR MOLINA: Thank you. Chairman King, you're on the clock.

COUNCILMEMBER KING: Okay. Thank you, Chair. I actually saw this presentation when it was given to the community at large a week or so ago. But I have some other questions for Mr. Henkin. The first one is, I know you've been meeting, you've had several meetings with the Mayor to date on this issue. And so, can you share with us what his position is on the settlement, what he has told you?

MR. HENKIN: Well, sure, I met with the Mayor, I actually met personally with the Mayor just on one occasion on May 8<sup>th</sup>. Isaac Moriwake, who's our managing attorney who's here, met with him previously. He emphasized at that May 8<sup>th</sup> meeting that he wanted

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

me to tell anyone who would listen that he is committed to finding solutions on this and he would like to resolve the litigation.

COUNCILMEMBER KING: Okay. The Mayor told you that?

MR. HENKIN: He did.

COUNCILMEMBER KING: Okay. Great, that's good to know since he's not in town. Another question I had was, that wasn't already answered by Ms. Keani Rawlins-Fernandez's questions, she had a real good line of questioning, but did you do any solicitation for amicus briefs for enjoinder on your side?

MR. HENKIN: So, you know, Earthjustice as, we've sort of specialized tasks. So, that's not my personal task. But yes, Earthjustice, we've reached out to other folks to file, to see if they're planning on filing amicus briefs in the case.

COUNCILMEMBER KING: Okay. And are they?

MR. HENKIN: I believe people are.

COUNCILMEMBER KING: Okay.

MR. HENKIN: You know, it's actually a little bit early to say. The deadline for them to do that would not be until July.

COUNCILMEMBER KING: Okay. And then, did the County of Maui reach out to the folks that have enjoined on the County's side that you know of?

MR. HENKIN: I would ask that of Corporation Counsel.

COUNCILMEMBER KING: Oh, okay. That would've come from Corporation Counsel.

MR. HENKIN: Yeah.

COUNCILMEMBER KING: Okay. Yeah, I'm just as curious about that because of the level that, and I think it was characterized in a testimony that the U.S. Senate had enjoined the brief. But when I looked at it and I actually got the information, it wasn't the full U.S. Senate, it was 18 Republican Senators, so.

MR. HENKIN: Yeah, actually, I apologize, I was hoping to make that clarification during my earlier testimony. I think it was 16 was my count.

COUNCILMEMBER KING: Oh, 16. Okay.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HENKIN: But in any event, yeah, it wasn't on behalf of the Senate. It was individual Senators. And as you mentioned, they're all Republican Senators.

COUNCILMEMBER KING: Right, and I wanted to clarify that, I guess Mr. Hahn had to leave but because she was here representing Senator Schatz who was hoping that we would settle. But I was curious about why there's so many, there's so many of people like that that are willing to put their names on something. Because when I talked to the congressional delegation who was leaning towards testifying for settlement, they kind of pulled out and they said they were advised that since we're in litigation, they should not make those statements. But clearly, that's not applying to all U.S. Senators because we have several that have put their names on it. And so, is there a reason why, I mean, the same thing happened with Speaker Saiki's Office. They had actually contacted me about four months ago and were upset and wondering why we're going ahead with this litigation and why we don't just solve the problem. And when I talked to them about this meeting coming up, Chair, they said well, we would send a letter in, but we've been advised to not get involved because there's litigation. So, why is it that one side is worried about, you know, about getting involved for litigation, but you've got all these people on the other side that are just happy to jump in?

MR. HENKIN: I'm sorry, Madam Chair, I can't speak for them as to why they're doing that.

COUNCILMEMBER KING: Okay.

MR. HENKIN: Or why the delegation felt it could not submit a letter of support.

COUNCILMEMBER KING: Okay. I just wondered if there was some legal reason that you knew 'cause that seems to be what I'm getting from people. But I think that's all the questioning I have this round, Chair. Thank you.

CHAIR MOLINA: Okay. Thank you very much, Chairman. Mr. Sinenci?

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you, Mr. Henkin, for your presentation. Just a couple simple questions. Do you know how long we've been injecting effluent at the Lahaina wastewater site?

MR. HENKIN: Yeah, so, the first two injection wells went online in 1982. And then, they were joined by two additional wells I believe in 1985.

COUNCILMEMBER SINENCI: And then, prior, do you know what we did with the effluent prior to those dates?

MR. HENKIN: That predates my knowledge. And I guess what, the only thing I want to say to that is, I think that Maui County and the people working with Maui County were trying to make this situation better than it had been before. And if everyone had a little better luck and the injection wells didn't end up day-lighting so close to shore, it

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

might've been a very good way of doing things. Unfortunately, you know, as we've learned, it's been causing a lot of damage to the near-shore areas and, you know, so, I think it's just unfortunate 'cause I think that people are trying to make the situation better.

COUNCILMEMBER SINENCI: Okay. And do you know if they knew at that time that it would eventually, the effluent would reach the ocean?

MR. HENKIN: Oh, well, that's without question. So, before they built the facility, they did an Environmental Impact Statement and there were public hearings that were held on the Environmental Impact Statement. And the County's consultant I believe was asked where the wastewater would go. And he said well, it will end up in the ocean. But as mentioned, I don't think anyone at that time had any way of knowing that it would end up 15 feet from shore coming up through the reef. I think they were hoping that it would go far away out of sight, out of mind and never cause any harm. So, but the design of the facility was to dispose of the wastewater in the ocean via the groundwater.

COUNCILMEMBER SINENCI: Okay. Do you know if they had any other alternatives during this time, or over these years?

MR. HENKIN: Yeah, well in the Environmental Impact Statement I believe that they looked at the option of doing a deep-ocean outfall, which is what some of the other counties have done. And I'm not sure why they chose between the options. But they ended up deciding to go with the injection wells.

COUNCILMEMBER SINENCI: Okay. Thank you. Thank you, Chair.

CHAIR MOLINA: Thank you, Mr. Sinenci. Mr. Henkin just first let me start off with the, you've been advocating for Earthjustice and your clients for the increased use of R-1 water. But wouldn't this use of this same recycled water on land, which is close to the ocean would also be subject to the Ninth Circuit's, I guess their fairly traceable tests, doctrine or statement? Would this apply? And would also this, using this recycled water users also be subjected to the NPDES permits as well?

MR. HENKIN: So, the Ninth Circuit test, I mean, it lays out a test, and then, it's quite clear from what the court of appeals said, as well as the trial court, it's going to really depend on the individual facts. So, the tests that they laid out was, is the discharge from what's called a point source? So, the Clean Water Act defines what is a point source. It includes a pipe. So, then maybe that's the easiest, you know, the one that first comes to mind, it's a pipe with something coming out of it. It also includes in the definition a well, so, like the injection wells. So, in the case with the County, no one, there was no disagreement that the injection wells are point sources. So, the first part of the test is satisfied, is it point source? The second part of the test is, is it traceable, is the pollution that gets into a water of the United States? So, in this case the ocean,

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

it could be a stream, a river. Is it traceable back to the point source? And I think that, you know, there's no question with the injection wells that the answer to that is yes. We had even before we did the tracer dye study, we knew the answer was yes. But once we had the tracer dye study, that was no longer a point of disagreement. So, and then the last thing is whether the amount of pollution getting into the water is more than, the legal term is de minimis, but basically manini, right, nothing, you know. And so, as far as people who are using the recycled water, the first question is, is it coming out of a point source? And I don't know how they're using the water, and I don't know, you know, so, that's going to depend on the facts. But let's assume that it is, that it's out of a pipe and it's coming out. The fairly traceable test is very demanding, you know. So, as mentioned, in response to another question, if someone's irrigating, they're not going to want to create a stream of water flowing into the ocean. That would be pretty obvious that it's from there going to the ocean. They're going to want to water their plants and the, between evaporation and between the plants taking up the water, that's how much you're going to want to water. So, it would have to be a pretty unusual extreme situation where someone would be so overwatering with R-1 water that they could even get in the universe of satisfying the Ninth Circuit's test. If they did, then I think, particularly since they're paying for that water, they'd probably want to adjust their usage so they would cut back on it. And under, you know, we've made clear in our settlement offer that we want to encourage reuse. So, we're not going to go after someone who's helping to solve the problem. If they made a mistake and they're overwatering that much then, you know, we would let them know. And even if someone else, you know, wants to call them out on it, under the Clean Water Act, they need to give them advanced notice. They need to give them at least two months advance notice. So, again, that irrigator can ratchet back if that's a problem. At the end of the day also, and this gets lost in the discussion a lot, no one is, no one, you know, Earthjustice, our clients, the EPA, Department of Health, no one wants to go after anyone who's doing their best to comply with the law, it's the scofflaw, or the situation that's just gone out of, you know, out of control. And so, I think all working together, I mean, that's a way to address these issues and fine tune it. But certainly, putting that water to beneficial use instead of injecting it, that is something we feel strongly as the most responsible way to go forward.

CHAIR MOLINA: Okay. Thank you. And my next question is, in your research looking at other coastal communities, any communities that you can, that comes to mind that's experienced this same issue with injection wells and going into the degradation of the reefs? Any communities that come to mind at this point that's going through a similar situation like Maui?

MR. HENKIN: Not situations that I'm aware of with the use of injection wells and degradation of the reef that are going through this.

CHAIR MOLINA: Okay. In terms of the percentage of what you believe is that's causing the majority of the reef degradation and algae bloom, how much of, if you were to base it on a percentage, is coming from the injection wells versus suntan lotion and all other



# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

chemicals that go in the water? Like I think in testimony we heard today about cosmetics that could potentially be a factor?

MR. HENKIN: I guess a few different ways of answering that. I think that there's no question, and this isn't, I'm not a scientist, but there's no question from the scientists that the addition of nutrients from the injection well is a big part of the problem. That's why I attached to my testimony that peer-reviewed study that came out in 2017 that said, if you look at other reefs around the world that are also in situations where they are acidic water, so, low pH water, like freshwater is an acidic water, and you compare them to the Maui reefs you have orders of magnitude of damage higher in the Maui reefs because you also have the high nutrients coming in. Naturally, the waters around Hawaii and our tropical seas are low in nutrients. So, it's only with man, you know, human-induced activity that we get the high levels of nutrients. So, those are certainly contributing to it. That said, you'll note that in paragraph seven of the settlement agreement, or the settlement proposal, we acknowledge there are other sources of harm to the reef worldwide and locally. But controlling the input of wastewater from the Lahaina facility is something that we can do. Some of the stuff like what other countries and cities and states, how much fossil fuels they put in the air, we can't do anything about, ocean acidification, we can't do anything about. This is something we can do something about. And if you just look at this image here, this is from another portion of Kahekili reef. So, it's being exposed to global warming and ocean acidification, and suntan lotion, and all the rest of it. The difference about this part of the reef is, this is not directly affected by the, where the injection is coming in, this area is. And so, we've got a perfect comparison here that there are many sources of harm to reef and this is something we can do something about.

CHAIR MOLINA: Okay. Thank you. Alright, Members, next round of questions, a three-minute round. Member Kama, you have the floor.

COUNCILMEMBER KAMA: Thank you, Chair. So, you know, in your discussion with our Chair you talked about the beneficial, there might be other beneficial uses instead of injecting. So, could you continue to elaborate on that? What would be the, are the beneficial uses other than injecting?

MR. HENKIN: Well, I think right now, you know, West Maui is an area where particularly not during the rainy season people need to be able to irrigate, whether it's for commercial use like golf courses and resort landscaping or agriculture. There are other potentially beneficial uses of the recycled water. In some parts of the country they reuse, they use recycled water to help flush their toilets. You don't need drinking water to flush your toilet. There are other ways that you can, you know, increase your reuse. But in terms of the ones that can be applied immediately, it would be expanding, so this is, these were projects that were identified by the County previously that I think there's now the political will to start funding. But these are three projects that were identified by the County in 2012 I believe. These would increase the reuse of recycled water by half-a-million gallons per day, which is not 100 percent of the problem, but it's a great

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

step in the right direction. And that's by meeting existing needs for freshwater so that we're not over pumping the groundwaters, so we're not diverting natural streams and taking from them. We're just using a resource that we're already paying money to create, which is this R-1 water. So, I've heard other proposals, this is from 2012. I've talked to folks locally who want to see about bringing water to DHHL lands and increasing the amount of use and that's right next to where the Lahaina facility is. And so, you know, taking advantage of those opportunities.

COUNCILMEMBER KAMA: So, earlier this morning we heard a testifier talk about the minimal amounts of phosphorus and nitrates that actually go into the ocean and how some of that can be prevented. So, how do you measure what is, what we would determine to be minimal amounts of trace?

MR. HENKIN: Well, that gentleman was talking about a study that he did off of Hawaii Kai. And I can't, on Oahu, and I can't really speak to that, and a different facility, I think Hawaii Kai has a deep-ocean outfall. It does not have injection wells. These are some of the data from the Department of Health measuring directly as the Lahaina wastewater enters the ocean. And those red levels are because they're in exceedance of the standard that the Department of Health has set. And I guess, I wasn't there, but I guess Professor Krock said that his research informed these ocean standards, specifically to protect the coral and the other sensitive marine animals. And every measurement that was made over these three-year period by Department of Health, and they did it on many, many days, and you'll see the north seep and the south seep, I didn't highlight the ones at the control sites. Those are not where the seeps are. All of them are in excess of the values for phosphorus, and over half of them for nitrogen. So, that's why we have different standards. The Safe Drinking Water Act allows pollutants up here because it doesn't hurt us when we drink it. But the Clean Water Act has a special amount set for the ocean environment that in some cases is more protective because they're more sensitive than we are.

COUNCILMEMBER KAMA: Thank you. Thank you, Chair.

CHAIR MOLINA: Thank you, Member Kama. Councilmember Sugimura?

COUNCILMEMBER SUGIMURA: I guess this will be short. I was just curious, I would like to hear your statement, about a month ago, the EPA filed its own brief supporting arguments that the, or released a major new interpretative statement, which you probably know what I'm going to say, concluding that any pollution that travels through groundwater is exempt from Federal permitting system no matter where it ends up.

MR. HENKIN: Yeah, that was really interesting. It was not entirely unexpected from the Trump EPA. They took a position, it's a legal position, not a scientific position. So, nothing they said, you know, they didn't say that there's no damage to the reef at Kahekili from groundwater, you know, carrying pollutants from the Lahaina facility

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

into the reef. But they did stake out a new legal position that categorically, any discharge that reaches the water via groundwater, they don't think violates the Clean Water Act. This is a position that the Trump EPA has taken. Now, the Obama, under Obama, the EPA filed a brief in support of the plaintiffs and agreed that that was a Clean Water Act problem. I guess more importantly, it's not just the Obama EPA, they, that's been the position of EPA since the Clean Water Act was first passed in the 1970s. So, EPA's been issuing permits for discharges via groundwater that get into the oceans, rivers, and lakes since the late 1970s. I've attached permits from EPA to my testimony. So, it's true that that's now, you know, so, not a big surprise, the Trump EPA will not be zealously enforcing the Clean Water Act in these situations. And now, I should say technically, they also said their statement does not apply in Hawaii and it doesn't apply anywhere in the Ninth Circuit, or in the Fourth Circuit. They recognize those courts disagreed with them. And so, that EPA statement actually does not apply here at all. So, in the Ninth Circuit, which includes the western United States including Hawaii and all the way out to Guam, the EPA still would enforce in this situation even under that statement that was issued last month.

COUNCILMEMBER SUGIMURA: There's currently a Federal court ruling saying we are in violation of the Clean Water Act --

MR. HENKIN: Yes.

COUNCILMEMBER SUGIMURA: --is that correct? If we settle with you, that doesn't go away. But we will stop EPA and Department of Justice from taking, enforcing action against Maui County, is that correct?

MR. HENKIN: I'm not sure, so, EPA has never brought an enforcement action against Maui County over this issue. So, I'm...

COUNCILMEMBER SUGIMURA: Even with Trump's statement, or with the EPA current statement?

MR. HENKIN: Yeah, I mean, so...

COUNCILMEMBER SUGIMURA: If you are an attorney, would you recommend to us that we get clarity from the Supreme Court?

MR. HENKIN: Well, there's been a lot of talk about clarity. There's actually no lack of clarity. The trial court ruled that the County was violating the Clean Water Act. And the Court of Appeals unanimously ruled that the County was violating the Clean Water Act. I guess the question is, we don't know, as we sit here today, if the Supreme Court would agree or disagree. I guess the purpose in my presentation was to say, let's just work together and focus on fixing the problem. There's no lack of clarity. In the Ninth Circuit, under the law of the Ninth Circuit and the EPA statement which says it doesn't apply in Hawaii, you're currently in violation of the Clean Water Act.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SUGIMURA: So, the testifier, that attorney --

MR. HENKIN: Yeah.

COUNCILMEMBER SUGIMURA: --I don't have his name --

MR. HENKIN: Yeah.

COUNCILMEMBER SUGIMURA: --he said that there has been, there's a problem when you have one court ruling against another court and that the Supreme Court decision is important to get clarity. And I was just trying to get your opinion on what you may think about that. There seems to be \_\_\_\_, yeah, conflicting laws, right, so...

MR. HENKIN: That's not...

COUNCILMEMBER SUGIMURA: --it would be good for our Congress to put clarity on this situation and I think a step forward is to get Supreme Court to let us know where this is all going to get clarity.

MR. HENKIN: Well, certainly, as he also testified, no matter what the County does here, of course Congress can weigh in anytime it wants to if it feels that there's been a mistake made in terms of interpreting the law. It's actually not that unusual to have different courts have different answers to a legal question. The court, the Supreme Court sometimes let's that...it's called percolate and then get to it some other time, and sometimes they don't, this time they didn't. But, you know, again, I don't think that there's a lack of clarity about the law as it applies to Maui County in the Ninth Circuit, even under the EPA statement.

COUNCILMEMBER SUGIMURA: We would then be able to get the NPDES permit if there was, you know, if it was clear. But that's all. Thank you. Thank you, Chair.

CHAIR MOLINA: Alright, thank you very much, Member Sugimura. Member Paltin?

COUNCILMEMBER PALTIN: Thanks, Chair. We don't have any responsibility to any other place other than Maui County, right?

MR. HENKIN: Well, I guess that's ultimately up to the Council to decide. But I would assume your kuleana is Maui County.

COUNCILMEMBER PALTIN: Okay. Just checking. Thanks, I'm good.

CHAIR MOLINA: Alright, thank you, Member Paltin. Member Rawlins-Fernandez?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. I would like to finish off my line of questioning from my first round. But I, I'm going to jump into something else first. I just wanted to make a, get some clarification. Okay. So, in the last question there was an implication that we would need to get a ruling from the Supreme Court before we can get an NPDES permit.

MR. HENKIN: Oh, I'm sorry if that was the...

VICE-CHAIR RAWLINS-FERNANDEZ: Not your response.

MR. HENKIN: Oh.

VICE-CHAIR RAWLINS-FERNANDEZ: It was a question to you.

MR. HENKIN: Yeah, that's certainly not the case, no, no. The...no.

VICE-CHAIR RAWLINS-FERNANDEZ: We can get an NPDES permit right now if we wanted to?

MR. HENKIN: I think the best way to ensure clarity, the quickest is actually to no longer pursue the Supreme Court action. I mean...

VICE-CHAIR RAWLINS-FERNANDEZ: I agree. Okay. So, I just wanted to make that very clear that we don't need to go to the Supreme Court --

MR. HENKIN: Absolutely not.

VICE-CHAIR RAWLINS-FERNANDEZ: --to get an NPDES permit.

MR. HENKIN: Absolutely not. And I guess the other thing I want to say related to that, and I think it should not be lost in the discussion, to date, Maui County has not yet completed its application. So, once the data is given to Department of Health, we will be first in line right by your side to say, Department of Health, application's complete, let's give them a permit. And but because that's outside of our control and your control, in our settlement way say as long as you're doing what you can to get a permit, then we will not in any way try and bring the County back to court. We just want to work with you on solving it.

VICE-CHAIR RAWLINS-FERNANDEZ: Right, so, we could settle and get an NPDES permit?

MR. HENKIN: Absolutely.

VICE-CHAIR RAWLINS-FERNANDEZ: Part of the settlement would require us to get an NPDES permit?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HENKIN: Well, actually the settlement in 2015 required you to try and get the permit even while appealing. So, that's already in effect now.

VICE-CHAIR RAWLINS-FERNANDEZ: From the 2015 settlement --

MR. HENKIN: Yes.

VICE-CHAIR RAWLINS-FERNANDEZ: --that we agreed to?

MR. HENKIN: Yes.

VICE-CHAIR RAWLINS-FERNANDEZ: That we would make good-faith efforts to get it?

MR. HENKIN: Absolutely.

VICE-CHAIR RAWLINS-FERNANDEZ: Thank you. Okay. So, I wanted to touch upon this fear that's been being spread about homeowners being fined over \$50,000 for having cesspools and septic systems. So, I'm going to read really quickly the definition, the legal definition of nonpoint source pollution. Such pollution arises from many dispersed activities over large areas is not traceable to any single discrete source. And due to its diffuse nature, it is very difficult to regulate through individual permits. And that's part of what differentiates injection wells and cesspools and septic systems. Is that correct?

MR. HENKIN: Yes, and so, I was saying in response to a question from Chair Molina that the fairly traceable standard is a really hard standard. You can see from the slides that I showed here, even with the injection wells, where you've got a pipe going down and there's millions of gallons per day, we had ten years of scientific studies to document that. When you're talking about cesspools, I mean, when people raise concerns and fears, I think it's important to ask them to point you to examples where this has ever happened anywhere in the United States that some homeowner with a cesspool or a septic tank has been fined, has any, I mean, it just doesn't happen, and yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: Right, and that's also part of the fear that the amicus briefs have, you know, submitted. One such is from West Virginia, 19 other states, and the governors of Kentucky and Mississippi where it states that millions of homes' septic systems, mine sites, catch basins, oil and natural gas wells, and other water treatment plants nationwide emit releases into groundwater that may eventually migrate to the waters of the U.S. The septic systems and cesspools are not easy to be traced, especially if it's a four-person household. Let's say they use the bathroom, they flush the toilet ten times a day each, and let's say it's one of those old toilets that have like five-gallon flushes. So, that would be about 200 gallons a day versus 3 to 5 million gallons that go into the injection well from one wastewater facility.

MR. HENKIN: Yeah, it's apples and oranges.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. And just to clarify, homeowners would not be required to get an NPDES permit, is that correct?

MR. HENKIN: I see no reason to think that people with a cesspool, or a leach field, or whatever are going to need a permit, no.

VICE-CHAIR RAWLINS-FERNANDEZ: Right, and so, part of this injection well case is that if the County did have an NPDES permit, then we wouldn't be here because in order to violate the Clean Water Act, you would have to have failed to obtain an NPDES permit and discharge pollutant into navigable waters from a point source. And that's not what cesspools are. And they don't require a permit. So, like you said, it's apples and oranges. Our residents do not have to fear getting \$50,000 fines.

MR. HENKIN: I would challenge those who are raising those types of fears to point to where that's ever happened anywhere.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. Mahalo. Okay. I think I will, I think I beat that dead horse enough, yeah? Okay. I hope that it's very clear to, you know, those watching at home that this is not a valid concern for them. And, you know, if there are septic tanks and cesspools that could be traceable, then perhaps they should not be cesspools anymore.

MR. HENKIN: Yeah, I second that. As I said, I think in those rare circumstances where, again, putting whatever the law and the regulations aside, if a cesspool is causing harm to the ocean, then we should just try and fix it.

VICE-CHAIR RAWLINS-FERNANDEZ: I agree. Mahalo.

CHAIR MOLINA: Okay. Thank you very much, Member Rawlins-Fernandez. Chairman King?

COUNCILMEMBER KING: Thank you, Chair. So, I guess to follow up on the NPDES permit, where we're at, you've seen where our application is at and I saw you know it's not been completed. But in your estimation, how difficult is it, would it be to complete, and, you know, what kind of funding are we talking about to complete it?

MR. HENKIN: You mean to finish the application?

COUNCILMEMBER KING: Right.

MR. HENKIN: I'm not sure why the County has not completed the application. Originally, the Department of Health, and this is all attached to my testimony, all the correspondence, originally the Department of Health asked for that information I believe by sometime in mid-2016. And then, the County asked for a six-month

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

extension, and then a yearlong extension, and then another yearlong extension. The last extension that's in, and my access to this is going on to the Department of Health permitting website, so, the last correspondence was at the end of 2017, asking for an extension to the end of 2018. But I have, there's no indication that it was ever completed. I really frankly don't know why the County has not provided all the information requested.

COUNCILMEMBER KING: Okay. So, any estimation on, I mean, how difficult it would be to complete that? How much, does it cost a lot of money?

MR. HENKIN: I didn't see anything in the County's request for extensions saying that it was difficult to provide the information or that it would be too expensive, just that they felt that they needed some additional time.

COUNCILMEMBER KING: Okay. So, are we out of compliance with the good-faith effort since we kind of dropped the ball after 2018? Or are we still in that extension period?

MR. HENKIN: Well, the, no, well, a little unclear as to whether or not the Department of Health granted the extension to the end of 2018. As far as the good-faith issue, I mean, we are very encouraged by the spirit that has, that the County has been showing with the new Council and the new Mayor. As indicated in my presentation, we really just want to look forward to trying to solve this problem together, rather than getting into an issue of whether someone dropped the ball.

COUNCILMEMBER KING: Well, I just want to find, figure out what, how difficult it would be to complete it, you know, and just pick up the ball and complete the application so we can go forward.

MR. HENKIN: Yeah, I think that one of the issues that the County has always said, well we don't know where the outfall, we don't know where it's entering the ocean. And I'm not sure I understand that given the scientific information where you had the tracer dye coming up through these very precise locations. The tracer dye study, again, was done independently. It was done by EPA and UH researchers. And they found that they could recover the tracer dye in these very limited areas. And I guess if there's anyone from the County, that's where it's entering the ocean. I don't think there's any scientific dispute about it. So, hopefully they can wrap up the application and get it going.

COUNCILMEMBER KING: Okay. Thank you. And, Chair, if I can, my last question, is it, can you just outline the dangers of going forward with this appeal and if we win, because given the, where the Trump Supreme Court is at today?

MR. HENKIN: Well...

COUNCILMEMBER KING: The likelihood of us winning this case.



# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. HENKIN: Well, you know, obviously there are a lot of people, and you've heard from some of them, who would like to have the County pursue this case. I don't think that they want the County to pursue the case for purposes of the County, but for other polluting industries across the country. So, I'm, you know, the risk, I mean, I think that if, I think if the County were to win in the Supreme Court, everyone would lose. You know, we feel very strongly that the Clean Water Act is quite clear. And again, in my presentation I didn't want to get into the weeds of legally who's right, who's wrong, what have you. We feel that we have a very strong case. But if the court were to disagree with us, that would mean that any polluter who wants to design their discharges of pollution so that it travels down instead of out into the ocean, it goes down and across through the groundwater, would be free to pollute our rivers, lakes, and oceans without any regulation under the Clean Water Act. There are other cases elsewhere in the country that this would affect in a very negative way. There's a case involving a pipeline, so, not too surprisingly the oil industry is lined up in support of the County and its appeal. So, there's a pipeline spill that happened in South Carolina, and instead of the pipeline being on the surface and the oil running off into the tributaries of the Savannah River that way, it broke underground. And so, it went a thousand feet underground through the groundwater into tributaries of the Savannah River. That was almost 400,000 gallons of petroleum that was spilled. And the pipeline company's defense, like the County's here, is that doesn't violate the Clean Water Act because it didn't go over the surface directly into the water, it went under the groundwater. I pointed, there have been EPA permits regulating concentrated animal feed lot manure lagoons and regulating their discharge because all of the nutrients from the manure lagoons that are unlined go down into the groundwater and get into the rivers and streams and pollute them. The EPA would no longer be able to regulate them that way. States use the permitting provisions of the Clean Water Act to do the same thing, I mentioned Colorado, a sugar beet processing plant. There are coal mine operations that would go unregulated. It would be a nightmare for clean water protection if the County were to win.

COUNCILMEMBER KING: Okay. Yeah, no, I remember a case, the case in Guam when they went in and I think it was the same kind of animal waste that was going into the rivers. There was an epidemic of leptospirosis. So, the EPA had to go in there and regulate some of these pig farms. There was something like 800 on the island. So, those kinds of things would no longer be able to regulate. We would just be dealing with the fallout, which is basically people dying of leptospirosis.

MR. HENKIN: Yeah, I'm not familiar with that particular case. But as mentioned, up until the Trump EPA last month, for 40 years, the EPA has consistently said that if you're polluting our nation's water through groundwater, you need a permit so you can be regulated to avoid the types of terrible problems we've been talking about.

COUNCILMEMBER KING: Okay. Thank you. Thank you, Chair.

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Okay. Thank you, Chairman King. Councilmember Sinenci?

COUNCILMEMBER SINENCI: Thank you, Chair. I just had a couple questions. Clarification to Ms. Rawlins-Fernandez's questioning, so, according to the Ninth Circuit Court ruling, cesspools was not included in that ruling?

MR. HENKIN: Well, the Ninth Circuit didn't specifically address cesspools. They articulated a test. And so, the big part of the test, and you know, each person, I know there have been a lot of thoughts given to cesspools, and so, just think about the situation here. In order to fall within the Ninth Circuit test, it would have to be fairly traceable, like you find pollution in the ocean, and you can trace it back to this cesspool, that would be a minimum thing that you would have to do, to fall within the Ninth Circuit's test. And in the situations that I'm familiar with cesspools, they're like Vice-Chair said, situations where you know there's some pollution, but it's so diffuse you don't know exactly who's causing the problem, you don't know what the, how, you know, what the hydrology in the area is, what the geology, you just know you have an issue, and that is non-point source pollution. In the unlikely event that you could trace it to a particular cesspool, I guess, you know, what I've been trying to urge is, let's fix that cesspool, 'cause who wants to be polluting the ocean? And no one's going to go after some family, there's just, you know, happens to have a cesspool that's been around. We're just going to all pitch together and fix that problem. We don't need to change the Clean Water Act nationally to deal with a local problem by helping each other out.

COUNCILMEMBER SINENCI: Okay. Thank you. My next question was for the tracer dye study. Do you know if the County accepted that study during the process, the litigation process?

MR. HENKIN: Well, you have representatives from the Corporation Counsel and your outside counsel --

COUNCILMEMBER SINENCI: I can ask them.

MR. HENKIN: --so, I'm going to do my best to answer that. But you should also ask them. So, it was, there was no dispute that the tracer study showed that if you put stuff into wells three and four, it gets into the ocean. There was some disagreement about how to interpret some of these data. So, as I read the tracer dye study, they were, there's some weird...there's lawyers and there's scientists, right? So, sometimes we don't all speak the same language. So, the scientists said that only about 10 percent of the wastewater was traceable to specific seeps, you know, little springs, and they said 90 percent was diffuse flow. The lawyers say that's like 90 percent of it's diffused. But what they meant by that was within these little magenta circles, those are the seep areas. And within the seep areas, there are individual seeps that they put straws in, and they took measurements. So, they found 10 percent out of those individual straws, and the 90 percent was within those areas. So, 100 percent was within those. That's how I read it. I'm happy to share the report with you and highlighted section

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

and you can interpret it, and the County's lawyers might have a different reading. But no one disagreed that there's a connection between the injection wells and the near-shore areas off of Kahekili beach.

COUNCILMEMBER SINENCI: Okay. Thank you. One more question, during the proceedings, did the Department of Health ever present reports of increased bacteria levels or staph infections in beachgoers?

MR. HENKIN: When you're saying, during the proceedings --

COUNCILMEMBER SINENCI: Was that part of the --

MR. HENKIN: --do you mean during the case?

COUNCILMEMBER SINENCI: --the case, yeah?

MR. HENKIN: It was not part of the case. Department of Health was not a party and they didn't appear in the case. So, they didn't say anything one way or another in the case.

COUNCILMEMBER SINENCI: Last question, Chair?

CHAIR MOLINA: Proceed.

COUNCILMEMBER SINENCI: So, one of the testifiers, Mr. Kumagai, said that there were synthetic organic matter like polymers. Do you know if any areas regulate polymers?

MR. HENKIN: Well, the Clean Water Act very broadly regulates any type of pollution. And its definition of pollution is about as broad as anything that you can think of. It includes freshwater if it's entering the ocean water because that changes the chemical makeup of the ocean water such that, as I mentioned, if you had a river full of fresh drinking water, you could put a straw in and drink out of it and it's so delicious, if it goes into the ocean, it's going to kill that reef because freshwater's too acidic. So, that's all included within the definition of pollutant under the Clean Water Act. So, the Clean Water Act would regulate any of those things getting into our ocean water. Yeah.

COUNCILMEMBER SINENCI: Alright, thank you. Thank you, Chair. That's all.

CHAIR MOLINA: Thank you very much, Mr. Sinenci. Well, Members, I believe unless there are any last final questions for Mr. Henkin, I do want to thank you, it's somewhat awkward, I got to admit as part of an entity that's being sued, you as the plaintiff, we do thank you nonetheless for providing information to this Committee. And when the time comes, this Committee will certainly have had a, a gamut of information on both sides that I believe will help in making fully informed decisions. And I guess as I had mentioned earlier, if you're going to be here for the duration, so, in the event at a later

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

point today if the Committee needs clarification as far as the plaintiff's point of view, you'll be here to answer questions for us?

MR. HENKIN: Well, Mr. Chair, I very much appreciate this opportunity. This is something that I wish that we had this opportunity years ago, much earlier to have this type of dialogue and discussion. So, I very much appreciate it. And yes, although technically the County's the defendant, and we're the plaintiffs, remember, I represent County residents and again, we would love and embrace the opportunity to work with the County to move forward together.

CHAIR MOLINA: Okay. Thank you very much.

MR. HENKIN: Mahalo for the opportunity.

CHAIR MOLINA: Thank you. Members, about eight minutes after the hour of three o'clock. You look like you need some nutrients to get you going for the rest of the day, that includes the Chair. So, what we'll do, Members, we'll go ahead and take a recess and then we'll have the, right after when we come back from recess, we'll have the County and the Department's position on this matter. So, we'll recess this GET meeting until 3:20, Members. Meeting in recess. . . .(gavel). . .

**RECESS: 3:09 p.m.**

**RECONVENE: 3:27 p.m.**

CHAIR MOLINA: . . .(gavel). . . .is now back in Session. It's 27 minutes after the hour of 3:00 p.m. Thank you very much, Members, for that very important recess. It certainly helped reenergize your Chair for this final phase today. We have now from the County of Maui to do their presentation as it relates to GET item 26. In case some folks that may have forgotten, which is the litigation matter involving the Hawaii Wildlife Fund, et al. versus County of Maui Civil Number 12-00198. We have Mr. Nakagawa, the newly confirmed Director of the Environmental Management Department --

MR. NAKAGAWA: Aloha, Chair.

CHAIR MOLINA: --congratulations once again.

MR. NAKAGAWA: Thank you.

CHAIR MOLINA: He will do for us a presentation and to be followed by a brief short presentation from our Corporation Counsel, Ms. Richelle Thomson. So, Mr. Nakagawa, you have the floor.

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

## **. . . BEGIN PRESENTATION . . .**

MR. NAKAGAWA: Alright, aloha and good afternoon, Chair and Members. So, today I'm here to present to us what it would mean that as a County if we withdraw our case from the U.S. Supreme Court. I have met with some of you already, and I thank you for that opportunity. Many of you guys had questions. And today it's my goal to bring clarity to this issue, answer some of those questions, and help you all make a well-informed decision that are based on facts and not fear. So, first I'd like to say that, you know, we the Department of Environmental Management fight pollution every day. We take raw wastewater, which is right there in this bottle, so don't touch it, and clean it just short of drinking water. The Department of Health and EPA are the experts, you know, they have the scientists, they have the doctors, the PhD's who define what pollution is. And we comply with them every year. So, the decision before us is not about the County being unregulated. It is about which is the permitting, what is the correct permitting process for our injection wells 'cause that's what defines how clean the water is. So, when we start from the beginning is, you know, pre-1970s Maui County discharged raw wastewater into the ocean by ocean outfall. You know, after the Clean Water Act was established, other counties treated their wastewater and continued using outfalls. However, Maui County decided to, you know, go a more progressive route at that time and decided to use reuse and utilize injection wells as its backup. From the 1970s, as you can see from here, EPA gave us that money to build our facilities. And both the State Department of Health, as well as the EPA have regulated the use of our injection wells by UIC permit, which is an Underground Injection Control permit under the Safe Drinking Water Act that we comply with every year. You know, this is a bottle of, right here, of our R-1 water that we discharge into our injection wells, and the same waters that we sell to our customers. R-1 is treated to the highest level just short of drinking water. So, it's pretty straightforward. So, where was the confusion, you guys asked, right? Well, the Ninth Circuit Court's decision basically in layman's terms says any discharge into groundwater that eventually reaches the ocean should have an NPDES permit, and the UIC permit isn't enough. So, what did that mean? So, let's take a little look at the Clean Water Act NPDES program regulates things like outfalls and other end-of-pipe discharges into the ocean. So, basically you have some type of facility or whatever it might be, and everything from point A ends up going through a pipe and ends up in the ocean. One hundred percent coming from that place is through the pipes and into that ocean. Nothing can be added to it and nothing is leaving it, it's all coming out of that, right at the end of the pipe. So, this law is designed to address point source discharges, pretty simple. Okay. So, other State and Federal laws such as the Safe Drinking Water Act and other types of management and control statutes regulate non-point source pollution such as surface runoff, surface water runoff, and groundwater. So, in our case, we have a facility that has injection wells. We have both the State and Federal Safe Drinking Water Act permits for our Lahaina facility under that UIC program. Studies have shown that this groundwater, this is on the bottom, mixed with our recycled water, as well as other multiple inputs from mauka to makai, eventually reaches the ocean over a two-mile stretch of coastline. So, that is on that side. So,

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

other types of discharges, regulated discharges to groundwater are cesspools and septic tanks. The liquids migrate through the ground, ends up in groundwater, right, and that's regulated on that side. Other types of stuff that we have is R-1 irrigation systems and that's also on that, regulated through that Safe Drinking Water side. And we also have other green infrastructure which is drainage basins that collects runoff when it rains, and you guys all see it on the side of the road that percolates through the ground entering groundwater. So, this is where I guess it gets kind of confusing, I guess, for some people is that so by requiring an NPDES permit for our Lahaina injection wells, the Ninth Circuit Court's decision is pretty much erasing this clear line and bringing it over to the Clean Water Act side, right? So, it's erasing this clear line between the two permitting programs and expanding the NPDES permitting program to include these other types of systems. This is what some of those, you guys asked me, and this is what some of those written testimonies are referring to, when they talk about regulatory uncertainty because it's not, it hasn't been precedent in the past years and wanting that clarity that only the U.S. Supreme Court can give because the NPDES program was never designed to regulate these types of discharges. And the reason is, is first, like the example in the beginning, you know 100 percent of your effluent, or some type of discharge comes from that one source and exit into the ocean. Under this, these type of discharges through groundwater, you have all types of discharges from mauka to makai, right, that are for...and so, in that final product that comes out into the ocean, who's responsible for that, and there's numerous types of discharges that migrate through the ground into the groundwater and out to the ocean. So, what does this mean for the County and Maui? If an NPDES permit, well an NPDES permit would not only be required for our Lahaina injection wells, but for all injection wells throughout our County, we have 18 of them, cesspools, septic tank systems, R-1 recycled water use along coastlines, as well as other green infrastructure such as stormwater catchment basins. This is just a slide of all the rest throughout the State, yeah. So, this is a map from the Department of Health's website showing all the cesspools on Maui. As you can see, there's thousands of them along the coastline. This is one also from in Molokai, and this is only the cesspools, right? This is not even the septic tank systems yet. You know, Maalaea has 24 injection wells that they're trying to upgrade. You know, we also have R-1 systems along the coastline such as Kalama Park, Waipuilani Park, and all along Kaanapali. This is the very same recycled water that if not used on land, is disposed of the excess into our UIC injection wells. So, this is why professionals in our industry from across the nation have submitted those written testimonies to encourage us to continue our case to the U.S. Supreme Court level, to make a decision, once and for all, should there be this clear line between the two permitting processes or not, and because of the unintended consequences it does bring. And for us, you know, we also need clarity. The reason we need clarity is because the past couple of years we have been researching alternatives to divert 100 percent from injection wells such as land application treatments, direct potable reuse, and as a last resort, deep-ocean outfalls. However, if we decide to settle and withdraw this case, the first two options may not be possible because we still need injection wells as a backup during the wet seasons as well as getting rid of the brine if we choose to go direct potable reuse leaving us with the only

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

option that nobody wants, which is deep-ocean outfalls. So, as you can see, the costs are very expensive which will devote a significant amount of resources towards compliance and take away resources from funding and implementing all of the creative solutions this body wants to do. If we choose not to settle now and let the U.S. Supreme Court process continue, we will continue to expand our recycled water programs, like this Administration and this body wants to do, possibly try to do some type of land application treatment, or some type of direct potable reuse with the injection wells as our backup. This leaves control with the County and not scrambling to react and comply with the Ninth Circuit's new application of the Clean Water Act. So, once again, you know, we the Department of Environmental Management fight pollution every day. We take raw wastewater and we clean it to the highest level just short of drinking. Some of the written testimonies are saying that, you know, this is kind of gutting the Clean Water Act. But I think that's untrue. This decision is just really expanding the reach of the Clean Water Act. If left alone, the NPDES program will continue as is. And to say that this won't impact other infrastructure, you know, I believe is false because according to the written testimony from Jeffrey Porter in Massachusetts, it's already happening over there on that, in the east coast. So, I hope this brought a little clarity to you all, answer some of you guys' questions, and to the written testimonies, and Richelle will be able to tell you about the aspects this case will bring to the County if we decide to withdraw from the U.S. Supreme Court. Mahalo.

**... END PRESENTATION ...**

CHAIR MOLINA: Okay. Thank you, Mr. Nakagawa. Members, I'll ask Ms. Thomson to go ahead and give her remarks, and then after she's done then we'll begin the Q&A phase. Ms. Thomson?

MS. THOMSON: Thank you, Chair Molina and Members. My name is Richelle Thomson, Deputy Corporation Counsel, and I've been involved with this case since before it was brought, so, basically, I came to the County in 2011 and this case began starting that year and was eventually filed in 2012, so, I have a long history with it. I wanted to kind of put some of these things that you've heard today into some context. One of the things is, there is no rush that this body has to take action on these settlement proposals or withdrawing the case from the Supreme Court. The earliest that the Supreme Court can hear this matter is October. The existing 2015 settlement agreement is in place, and this agreement was based on both parties agreeing that either party could appeal on up. You know, had the County not, had the County been successful or prevailed at the Ninth Circuit, it very may well have been Earthjustice wanting to appeal that decision. But that 2015 settlement agreement was based specifically on the parties being able to appeal up to the Supreme Court if necessary because this is such an important expansion of the Clean Water Act and it affects so many entities here on Maui. So, not just the County with 7, we have...sorry, 18 total injection wells. So, not just the County's injections wells, but the water reuse program, septic, cesspools, you know, Eric showed a picture of the condos at Maalaea.

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

Those would all, if we withdraw our case from the U.S. Supreme Court, every single injection well we have is considered a point source under the Ninth Circuit's theory. So, are all of those injection wells in Maalaea, and there has already been a case filed that cites the Maui County case for its foundation against septic systems. And this is not a large capacity, it's a, you know, fairly small sized condominium complex that has a septic system and it's being sued under the very same theory that the Ninth Circuit ruling is based upon. Let me just, so, I have a couple of slides. In your packets today, they were passed out some color pictures, and these are pictures from 2014. These are taken of the reef outside of Kahekili, and the County hired experts to look at the reef, not only in the area where the seeps were found, but all along that coastline and farther out so that we would know, is the County's recycled water impacting the reef. And, you know, those expert reports are in Granicus in full. So, I would invite you to, you know, please do look through those. So, you know, getting kind of back to what we're doing today, you know, although the plaintiffs in this case have promised that they won't sue us, and they have said, oh, we're not going to be looking over your shoulder. But actually, those provisions in that settlement proposal that were read to you today, they're the ones that decide are you pursuing things quick enough, not quick enough, diligently enough. And so, we would be, you know, in jeopardy of being enforced against, not only by them, but by any other citizen group that decided that they wanted to sue us on, you know, the Kihei facility, the one over here in Kahului, or Molokai. You know, just so that we're very clear on this, as long as the Ninth Circuit's ruling stands, and as long as the County operates its facilities without NPDES permits, the County is in violation of the Clean Water Act. The fact that the County has permit applications on file with DOH does not protect us from enforcement or citizen suits. Just as a side note to answer the question about whether or not our applications are complete, so, those, as part of our response to this lawsuit, we did file for an NPDES permit for the Lahaina facility in 2012, and for all of the rest of the facilities in 2015. Those permit applications are still pending at DOH. One of the things that the permit applications require is for you to identify using GPS, the exact location that your discharge enters into the ocean. When it enters into the groundwater over a two-mile stretch, you know, close into shore and probably farther out, identifying those precise locations where the discharge occurs is probably impossible. It's one of those, the reasons that Department of Health and our meetings with them has not taken action on these permits. It's a square peg, round hole permit. It should, you know, as the Director of the Department of Health has recently said in his statement, which is attached to testimony submitted by Michael Spalding, the UIC permit program is the program that applies to injection wells. The NPDES program applies to deep-ocean outfalls. As far as maximum civil penalties, and I'm not saying this to, you know, to try to elicit fear, this is what the statute says, it's a strict liability statute, the Clean Water Act is, so, it doesn't matter whether you know about the law or not, you're guilty. The maximum civil penalties are \$53,484 per day. Skip this one, I did some math, which math is not my strong suit, but even I could do this. So, the example, you know, Lahaina's 4 injection wells, 4 wells, times \$53,484 per day, times, and the Clean Water Act has a 5-year statute of limitations, so going back 5 years, \$390 million and change. Kahului has 8 injection wells, do the math on



# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

that, it's \$780 million. That's money that, you know, could be allocated by this body for many different uses. And, you know, that's within your kuleana. So, going forward, having the clarity from the U.S. Supreme Court allows this County to make sure that it's operating within the law. That's what our goal is, is to operate within the law. If the Supreme Court says you need an NPDES permit, the Clean Water Act applies to groundwater discharges, that's what we'll have to do. If it says it doesn't, it doesn't mean that we would, you know, not, you know, and Eric can speak to this, it doesn't mean that we wouldn't do projects that benefit the County. It doesn't mean that we can't choose to move away from injection wells. It means that we would be able to do it not with a regulatory gun to our head. So, those are my comments. Thank you.

CHAIR MOLINA: Okay. Thank you very much, Ms. Thomson. Alright, Members, we'll go ahead and start this round of questioning for the Department and Corporation Counsel. And just as an FYI, it seems like we're going to recess until next, this coming Thursday. At that point, we will likely go into executive session. And if you have some questions that Corp. Counsel may deem sensitive today, those questions can be asked in executive session. So, but Chair would like to just take the first privilege, please start the clock on myself. First for Mr. Nakagawa, wow, those two bottles of water are certainly eye opening. I dare not to ask you, what's in the grapefruit colored bottle. But anyway, it's certainly much appreciated to have that visual display for us. With regards to the graph that you showed the amount of cesspools, can you just basically tell us, summarize which communities on Maui island alone have the most cesspools. I would dare to guess maybe Makawao, Upcountry area, a good concentration of it in Hana possibly?

MR. NAKAGAWA: So, sorry about that...

CHAIR MOLINA: And I ask this question only because it's been a topic that's been brought up as it relates to the proposed settlement.

MR. NAKAGAWA: Right, so, my understanding, Upcountry has 7,800, and I think Ms. Sugimura can probably answer to that. Pretty much every place else, Wahikuli, Maui Meadows, Hana, Kaupo, I mean, any place that...I think there's Hawaiian Homes along Waiehu, portions of that looks like Haiku. I mean, these are the places that really have those cesspools or septic tank systems right, outside of the municipal wastewater.

CHAIR MOLINA: And how many cesspools estimate just on the coastal side alone, how many residents?

MR. NAKAGAWA: Well, if it's, this is that estimate for 12,000 for Maui, if it's 7,800, then that's 4,200.

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Forty-two hundred of that 12,000 are along the coastlines of the island alone? Okay. And what's the other question I had, the, you know, what are the alternatives besides injection wells? You know, we heard a testifier this morning present a proposal to us that could be done, I guess, as the pilot project for \$10 million. Any thoughts from the Department aside from injection wells? And we did hear another testifier say keep that option for injection wells open as well, any thoughts?

MR. NAKAGAWA: Yeah, so, he referred to this treatment system that, from Steve Parabicoli I believe, and we are actually talking to Steve Parabicoli, his group I think is called Organica. And basically, they use plant-based type of treatment to help polish the water to make it clean. But I think the key was when--sorry, okay, sorry--when I think it was Hokama, Member Hokama asked him about the effluent, he basically said to divert 100 percent. So, really, it's, that Organica, or that plant-based type of treatment, it's just another type of treatment, it's just a green treatment. It's no different than what we do now with our equipment. And so, it doesn't really pertain to what this case is about because as I believe Mr. Henkin said, even if it's groundwater and if it contaminates the water, it still doesn't meet water quality standards.

CHAIR MOLINA: Thank you for that information. Ms. Thomson, just one question for you. You had mentioned about, I know the proposed settlement, the plaintiff has agreed that they would not, I guess, file litigation against us should we agree to it. Could you elaborate a little bit more about the potential for us, our exposure should certain entities decide not to sue us, but who else is out there that potentially could go after the County on this same topic?

MS. THOMSON: Thank you, Chair, for that question. Basically, it would be wide open. So, you know, this suit is specific to the Lahaina facility. But there would be nothing preventing anyone, including the regulators, so, if the Ninth Circuit decision stands, the regulators are also bound by that. So, we could face an enforcement action from DOH, or from any citizen groups that are not happy with the operation of those facilities. And Eric can speak to what would it take in terms of years to switch to a different option, even an ocean outfall, which would be the most certain option to move toward from a regulatory standpoint. It may not be the preferred alternative from an environmental standpoint, but an ocean outfall is from a regulatory standpoint the most certain.

CHAIR MOLINA: Okay. And one last thing, I believe the State Department of Health Director, Mr. Anderson, I read a copy of an excerpt of a phone conversation. It seems like they want some type of guidance with regards to enforcement based on the Ninth Circuit Court ruling. So, how does this affect that if the County decides to settle?

MS. THOMSON: Thank you, Chair. You know, I don't want to speak for the Department of Health, but they would be bound by the Ninth Circuit's decision just like we would be. So, they would, that would be the law of the land, and the Ninth Circuit's test says

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

that if you can trace pollutants from the source from point A into the ocean, point B, it doesn't matter how they get there, and they have to get there in more than as Mr. Henkin said, more than a manini amount. So, that's a very, it's a difficult test to live under. If the Ninth's Circuit's test wasn't so vague and broad, perhaps the County would not have chosen to appeal. But, as one of the reasons that we had to appeal, because it's so difficult and it closes and, you know, encloses so many other sources, including our recycled water program that I think we've spent \$40 million to date putting in. And that's just the CIP portion, so, very broad.

CHAIR MOLINA: Mr. Kushi, you have something to add?

MR. KUSHI: Yeah, Mr. Chair, if I may, by the way, I'm one of the dinosaurs in the Corp. Counsel, but being that, I need to say this. As far as the question who else is out there that may sue us. You've had testimony from Maui Tomorrow. They're not part of this case. Bet your bottom dollar they're looking at it. And Mr. Henkin and Moriwake represent I believe four entities, and I trust them at their word that, you know, they won't do any more litigation. But my understanding was citizen lawsuit is that you don't have to be a nonprofit activist type of organization. Your neighbor can sue you, your friendly neighbor that, you know, doesn't want you to build a property with a cesspool on the ocean. That comes within that purview.

CHAIR MOLINA: Okay. Thank you very much, Mr. Kushi. Thank you, Ms. Thomson. Okay. The Chair will go out to East Maui's representative, Mr. Sinenci, you're on the clock.

COUNCILMEMBER SINENCI: Thank you, Chair. Thank you. Thank you for that presentation. So, I just had some clarification questions. So, Ms. Thomson, you said something about we have 18 injection wells in Maui County and that the Department has written 18 permit applications for each one of them. However, they were still at the Department of Health, is that correct?

MS. THOMSON: Yes, so, we have, just Maui County, so, to back it up a little bit, in the State of Hawaii, there's 6,000 injection wells of the same class, the class five injection wells. Those are the same type of UIC wells that the County has. The County has 18 wells, so four wells in Lahaina, eight in Kahului, three in Kihei, and three on Molokai. All of these are permitted currently under the Safe Drinking Water Act UIC program. We filed permit applications for the facilities, so not for each well, but for the facilities. And like I was saying on the permit applications they ask you to specifically identify by GPS where in the ocean your discharge is occurring, and that's one of the things that is stymieing both the County and the regulators.

COUNCILMEMBER SINENCI: Okay. Thank you. Now, you did mention that the case is specific to the Lahaina wastewater plant, and so, where is the connection with this case, I guess setting, would it be setting precedence for the other injection wells, is that what you're saying?

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MS. THOMSON: Yes, exactly. So, the Ninth Circuit, their decision would apply across Maui County, so, to all of the other facilities, also to, you know, private entities, to the State, and the entire Ninth Circuit which those states are basically all up and down the west coast of the U.S. mainland.

COUNCILMEMBER SINENCI: And that would, all the amicus briefs that we've been receiving, so, those, that would also affect those counties as well?

MS. THOMSON: Yes, it would.

COUNCILMEMBER SINENCI: Okay. Last question, Chair. And so, during the last line of questioning we asked Mr. Henkin about the cesspools being part of this, the Ninth Circuit Court and he said no, that cesspools wasn't part of the Ninth Circuit Court ruling. Can you speak to that?

MS. THOMSON: Yes, you know, and honestly it was discouraging to hear him say, so, if a cesspool is a problem, we'll just, this is a quote, we'll just hold a bake sale and buy them a septic system. You know, that might work, and it might not, but in the meantime, the person that owns either a cesspool or a septic system, because both discharge to the ground, to the groundwater, you know, and if they're in proximity to the ocean, out to the ocean, Eric has information from Department of Health and EPA on how they view cesspools, we're both on the Cesspool Working Group, we're a little bit on the different side, I'm on the legal side and he's on financing.

MR. NAKAGAWA: Thank you, Chair. I think we also need to kind of, once again that's why I kind of brought out these bottles and we spend hundreds of million dollars building our facilities and cleaning it, once again, to this high level just short of drinking water. So, I don't think any of us are really denying that once again, mauka to makai we all know growing up, water flows down to the ocean. And even you said it, you know, there's no way of stopping that water. So, whether it's injection wells as I showed you on my screen that goes into the water, or whether it's cesspool or septic tanks, leach fields, which is septic tank systems, they all migrate. And I actually, I think I don't know, right, if you look at this, I'm part of the Cesspool Working Group, if you look at this document from Asaya, is that how you say this name, Asia Yeary from the EPA Region 9, this is the whole push of getting rid of cesspools, right? But if you read on the second page, it tells you exactly that Hawaii has 88,000 cesspools and they deposit approximately 53 million gallons of raw sewage, so not our clean highest, you know, before drinking water into the groundwater. This is directly into the groundwater every day. So, for, you know, I don't know from just from an engineering standpoint, I mean, that just tells me it's going in the groundwater and eventually reaches the ocean. So, how, I'm not too sure how he can distinguish saying that it would not be applicable, right? From an engineering standpoint, I mean, that is the exact same situation that we are in as far as the injection wells and our facilities, yeah.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SINENCI: Okay. Thank you. One more question, Chair? Of all the 18 injection wells, is there any like evidence very similar to the Lahaina wastewater site? Are there other issues like this one at the other sites?

MR. NAKAGAWA: I'm not quite, can you clarify?

COUNCILMEMBER SINENCI: I mean, there's definitely, no court case on any of the other, just this one yeah?

MS. THOMSON: So, there is a case pending regarding the Kihei facility that was filed actually prior to this case being filed. And it has been on hold. I believe one of the reasons is to see how this case ends up turning out. But there is a case regarding the Kihei facility. It's brought under State law versus Federal law. The Lahaina facility is a Federal law case. Let me, this is kind of related to that though. We do not have, there's a lot of information about the Lahaina facility, the tracer study, and, you know, and other work that's been done out there. So, I think that facility, it's much more known, you know, where along the two-mile stretch of coast that the discharge comes out. The other facilities, we don't have that information. You know, they're all coastal, so presumably yes it does enter the ocean at some point. But we don't know exactly where.

COUNCILMEMBER SINENCI: Okay. Thank you. Thank you, Chair.

CHAIR MOLINA: Okay. Thank you, Mr. Sinenci. Councilmember Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Mahalo for your presentation, Mr. Nakagawa and Ms. Thomson. Mr. Nakagawa, are you an attorney?

MR. NAKAGAWA: Chair, no.

VICE-CHAIR RAWLINS-FERNANDEZ: Then why are you making legal arguments?

MR. NAKAGAWA: Yes, Chair. I don't think I'm making legal; I'm just telling the engineering aspects on how wastewater and water flows, hydrology, that's my trade, engineering.

VICE-CHAIR RAWLINS-FERNANDEZ: These are legal arguments that you're making. These are not engineering arguments that you're making.

MS. THOMSON: If I could address that question. While the department directors may be engineers or have other professional degrees, they have to operate a highly regulated sector of the County's facility. So, they have to know what the laws are that they are operating under.

CHAIR MOLINA: Mr. Director?

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. NAKAGAWA: And, Chair, I guess, I don't know if that's interpreted as, all I did was show this is what the permitting process is, what we abide by, and this is the other permitting process in which that permitting process is. And I don't think, or that was a legal, it's just whatever permitting process, and we have to comply with our permitting process.

VICE-CHAIR RAWLINS-FERNANDEZ: On Friday I asked you if you were going to be making alarmist statements in your presentation because you are the Director and I found your presentation to be very alarmist. The Ninth Circuit decision stated that we hold the County liable under the Clean Water Act because one, the County discharged pollutants from a point source, two, the pollutants are fairly traceable from the point source to a navigable waters such as the discharge in the functional equivalent of a discharge into the navigable water, and three, the pollutant levels reaching navigable waters are more than de minimis. To violate the Clean Water Act, one would have to have failed to obtain an NPDES permit, discharge a pollutant and any addition of pollutant into navigable waters from a point source. The court found that the groundwater was a conduit. The groundwater was point source under the Clean Water Act and that the groundwater led to navigable water, which was the ocean. So, you're saying that these judges got it wrong, and the Council should instead believe your argument?

CHAIR MOLINA: Mr. Director, or Corporation Counsel?

MS. THOMSON: Thanks. So, I don't think that we are saying that they got it wrong. What we're saying is that we need clarity from the U.S. Supreme Court because the test developed by the Ninth Circuit, and before the Ninth Circuit, the Hawaii District Court, those, both of those courts developed brand new tests for Clean Water Act liability. The Hawaii District Court developed a conduit theory test, which even in that court's order, it said this is a brand-new test for Clean Water Act liability. The Ninth Circuit Court of Appeals did not take up, didn't confirm, you know, on the basis of the Hawaii District Court's decision. It created another new test, fairly traceable from point A to the ocean or other water body, and it arrives in that water in more than a miniscule fashion. So, those tests, and the reason that we appealed is that the Ninth Circuit test is incredibly difficult to know are you in or are you out unless you do very expensive tracer dye studies like were done in Lahaina, and...

VICE-CHAIR RAWLINS-FERNANDEZ: Exactly, and so, to that point that you just made, for someone to sue a homeowner with a cesspool or a septic tank, because a traceability study is really expensive you just said, yeah, and so, for these owners to feel like now they're going to be jeopardized in a situation where they may be penalized like \$50,000 or more. But you just said that a traceability study is required to prove that a cesspool is a point source polluting into navigable waters. Who's going to pay for that traceability study to prove that these cesspools, the 12,000 cesspools on Maui is a point source via traceability?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: Yes, sir, maybe I can help that out. So, I'm part of the Cesspool Working Group. I told you guys before, I'm trying to find solutions to help this County to address that.

VICE-CHAIR RAWLINS-FERNANDEZ: I have a little bit time left.

MR. NAKAGAWA: So, they already presented studies to us showing that there are impacts to near shore...

VICE-CHAIR RAWLINS-FERNANDEZ: Individual cesspool?

MR. NAKAGAWA: They have...

VICE-CHAIR RAWLINS-FERNANDEZ: In order to penalize a homeowner, an individual, you have to trace that individual cesspool to a seep in the ocean. And you're confident that you could, one cesspool to a seep in the ocean?

MR. NAKAGAWA: So, once again, they have shown that. And if you look at our case, injection wells one, two, three, and four, they only had found seeps, or tracer studies from three and four. One and two they couldn't find. They used hydraulic modeling for that. And Department...

VICE-CHAIR RAWLINS-FERNANDEZ: The County conceded though; the County conceded that there was seeps and that pollutants were going into the ocean via wells one and two.

CHAIR MOLINA: Okay. Mr. Director, you can respond and we'll go on to our next Member for questions. Go ahead, you can respond to Ms. Rawlins' last question.

VICE-CHAIR RAWLINS-FERNANDEZ: That wasn't a question.

CHAIR MOLINA: Oh, okay. Alright, okay, with that being said, thank you, Ms. Rawlins-Fernandez, and we've got another round of line of questions you can ask. We'll go back to Council Chair King.

COUNCILMEMBER KING: Thank you, Chair. I was waiting up there so I wouldn't get in the back of Mr. Sinenci. But I had to take an important phone call on a deadline. So, let's see, I was hoping to ask questions after the first presentation 'cause I have to go back and remember which was which. But yeah, I think I thought we had established that cesspools were not part of this injection well lawsuit. So, I'm a little disappointed that we're moving forward and talking about this. But the Director said something about we would still need injection wells and that the first two, you gave three options, you said the first two options would not be available to us. However, we heard from the

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

attorney for Earthjustice that the NPDES program and permit does not prevent us from using injection wells. It just gives us guidelines for how we would have to clean up the water in order to do that. So, and it also doesn't immediately expect us to have our clean water system in place. It gives us the opportunity to be working on it, as long as we're making a good-faith effort, we can get that permit and we can go ahead. So, why would you make the statement that having that permit would eliminate any options?

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: Thank you for, Chair King, for that question. So, I think we need to make clear, and he couldn't answer, there are zero NPDES permits for injection wells across the nation. And the reason why you cannot, once again, I can go back to the slide, the reason why it does not fit this program is because you cannot tell what you are discharging into that groundwater when it goes to the ocean. There's many different contributory factors which means, that if they were to give us a permit, the Department of Health, they would have to be right at the point of discharge. If it's right at the point of discharge underneath our facilities, there is pretty much, it's technologically and infeasible to meet those water quality standards. So, basically trying to give you a little number is the water quality standards for nitrates is five micrograms per liter. Technology only, can only treat it down to 3,000...

COUNCILMEMBER KING: Wait, you're not even answering my question. Let me repeat my question because I remember it stated that as long as we're, and we had a water expert up here saying the same thing, as long as we're making a good-faith effort, we could get an NPDES permit. As long as we were working on the system to clean up our water, and you did make the statement that that program was not designed to regulate cesspools. You never...you didn't make the statement that it was not designed to, for injection wells, but if they weren't intending to give us an NPDES permit for the injection well situation, why would they not have just rejected it? I mean, they've got it sitting over there pending. We heard that we didn't have a complete application, they need some more information. So, if they didn't intend to, why would that even be part of the original settlement?

MS. THOMSON: The Department of Health has conveyed to us on various times that they are waiting for the court's decision before moving forward. That's one of the things that's, you know, we all need the clarity, you know, do we have to figure out how to try to permit this under the NPDES program or not? If we do, it's extremely difficult as, you know, Eric can explain this much better than I can. But the NPDES program was not intended to apply to UIC wells.

COUNCILMEMBER KING: Okay. But do they have a statement to that extent? Because we're getting so much conflicting information, and I do believe that this is supposed to be, you know, a legal issue. But we have not seen, I haven't seen anything from the Department of Health that says that that program doesn't apply to injection wells.



# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

And it's hard when you make the statement that there has never been, you know, a permit for an injection well. I mean, ever across the United States, I'm not sure how you know that. But it would be good to show us that information if you have it.

MS. THOMSON: Well, the absence of information is difficult to show. But based on our research over the course of, like I said this, last week it's been going on for almost eight years, we have looked at this issue incredibly in such detail that you can't imagine because we were always preparing that if, you know, if the Ninth Circuit decision was the one we have to live with, if the U.S. Supreme Court did not take up this question, you know, to look at on a national level, what were we going to do? We weren't just sitting around idly saying, you know, gosh, we'll just deal with it if and when. We've been looking at this really carefully for eight years.

COUNCILMEMBER KING: I understand that. But in the whole time that I've been looking at it, which has been about five years 'cause I first had looked at this, I saw what you guys were doing from a citizen's point of view and I didn't understand back then, back in 2011, 2012 why we weren't just making a move to fix the problem instead of waiting for a lawsuit to happen. But in all that time I never once heard that this NPDES program doesn't apply to injection wells. The first time I heard it was out of the Director's mouth. So, I just, I'd like to see that information if it's true because it feels like things keep coming up to bat away reasons why we should be looking for a solution instead of going to court. And we need to have that information codified somewhere if it's true.

CHAIR MOLINA: Ms. Thomson?

MS. THOMSON: I completely agree with you. And that is the basis for this lawsuit. So, Earthjustice brought this lawsuit to ask the court to make the legal determination that an NPDES permit is required for UIC wells, for injection wells. So, you're correct, you know, and that's what this lawsuit has been trying to determine all along. And it's an expansion of the Clean Water Act to a program that it did not cover before this time.

COUNCILMEMBER KING: Okay. Well, I don't know about expanding it, I thought it was just interpreting what the Clean Water Act meant. But so, if we go to court and we win, we're basically retracting the Clean Water Act to, you know, I have some that I distributed, some information from just last month from beaches in Kihei and beaches in Kanaha that reached over their limit of, and they were cleared by the Department of Health Clean Water Branch, unsafe to swim in because of their high levels of enterococci bacteria exceeding the appropriate levels. So, if we go ahead with this appeal and we win the appeal, this will allow us to not have to worry about these levels because they don't mean anything to us? I mean, aren't we still going to have to address this as a public health problem?

CHAIR MOLINA: Mr. Director, or Ms. Thomson?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. NAKAGAWA: Well, I speak to it as far as the Department and implementation of projects is really, once again, this is all about a permitting thing, right? What we decide, us as a body, as an administration, we already set that with our budget, right? If we want to continue on with our expanding reuse, I mean, this body can do that and we've shown that in our Fiscal Year 2020 Budget, right? We committed to reuse projects in Kihei as well as Lahaina. So, that doesn't remove, once again, that doesn't remove our ability to choose all of that stuff. This is about just protecting what's good for us as a County, as well as for the residents of Maui County and just trying to make sure that when you guys vote on this, everybody has their eyes wide open and that you guys do it for \_\_\_\_, yeah?

COUNCILMEMBER KING: But, that, yeah --

CHAIR MOLINA: Member King, sorry --

COUNCILMEMBER KING: --I understand that, I still didn't have my question answered.

CHAIR MOLINA: Okay. We can ask that same question come the next round. Thank you for your patience. Member Paltin, you have the floor.

COUNCILMEMBER PALTIN: Thank you, Chair. Thank you for being here today. If it's possible, if it's a yes or no answer can we say yes or no or, 'cause my clock's already running. True or false, we can be sued at anytime, anywhere, for anything. You just got to have the money right, to get to the place to sue?

MS. THOMSON: Yes.

COUNCILMEMBER PALTIN: Okay. And then, yes or no, have you guys ever tried to file a complaint with the Department of Health or the EPA about a violation of the Clean Water Act as a person, like just as a person?

MS. THOMSON: I haven't.

MR. NAKAGAWA: No.

COUNCILMEMBER PALTIN: Are you aware of how many DOH or EPA inspectors reside or work on Maui County?

MR. NAKAGAWA: No.

COUNCILMEMBER PALTIN: No for both of you? Okay. I did try to...

MR. NAKAGAWA: Sorry, Member Paltin, I only know of one, Roland Tejano.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER PALTIN: Okay. I tried to file a Clean Water Act violation, it's like, it's very extremely difficult. I was wondering, you know, in your discussions with the DOH about filing the NPDES permit and where the GPS of the seeps coming out doesn't match the form that you're given. Who in the DOH have you talked to about that problem, like name wise?

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: Yes, staff is the one who filled out that permitting process with their staff members.

COUNCILMEMBER PALTIN: So, you as the Director of Environmental Management never did talk to anyone in the Department of Health about the difficulties that we're having in filling out the forms that they have?

MR. NAKAGAWA: Yes, Chair. I have been in those meetings. They talk about similar stuff as far as determining where those are.

COUNCILMEMBER PALTIN: But you never spoke to anyone whose name you know about the difficulties we're having about filling out these forms?

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: Yes, Chair. I did have a meeting last month with the Department of Health, and they are still trying to figure out if we withdraw our case, what does that even look like, because once again, there's none, yeah?

COUNCILMEMBER PALTIN: Can you provide the guy's name that you had the conversation with or the meeting with?

CHAIR MOLINA: Mr. Director, do you have that information?

MR. NAKAGAWA: I just talked to the, the branch Chief, which is Alec Wong.

COUNCILMEMBER PALTIN: Okay. And my question is, and I don't know if you guys can answer it, but so they're having a hard time with allowing us to complete this form because we probably cannot say that, you know, a GPS area of a, like a certain parameters, like from here to here there's seeps, from here to here like put it in a box, it has to be a specific pinpoint is what you're saying is the problem, the GPS point?

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: I think in general it's not only that. But it's like what I was talking about, that who's responsible for what in groundwater? Everybody contributes to that

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

groundwater. And so, when you try to trace back who's responsible for what, all the way from mauka to makai, that's the problem, right?

MS. THOMSON: I just wanted to add, that the EPA and Department of Health have been involved with the Lahaina facility but all of the facilities, but especially Lahaina, going back almost 40 years now. And, you know, at no time during that whole period has either agency said you need an NPDES permit. The EPA did say that in a comment to our UIC permit back in 2015. So, that's the only time that either agency has said that. And of course, you know, that the EPA has changed its position on that.

COUNCILMEMBER PALTIN: Based on emerging evidence that, based on...

MS. THOMSON: Well, that's the, you know, I don't know, I wasn't at the EPA, you know, to find out why they changed their position. But that April 2019 position statement, we provided it to you.

COUNCILMEMBER PALTIN: So, I mean, for me, representing a bunch of people, the issue isn't so much legal, or the rest of the country is what's going on in Lahaina where I live and what's, how it's affecting the reefs. And I think, you know, if the DOH or the EPA is having a hard enough time to determine the specific source of the injection wells, which are to the volume of 3 to 5 million gallons a day, then, and my own personal experience with the DOH and the EPA responding to Clean Water Act complaints, there's no way that they're going to be going after 12,000 cesspools, like they just don't have the capacity to do that. So, to even imply it is like kind of crazy to me because, I mean, they can't even respond to Maui when you call them about like obvious things like, you know, you see somebody draining their fish pool into the ocean or draining it right into a storm drain. Like they don't come out, they don't do nothing. So, I mean, to say that the EPA or the DOH is going to respond to 12,000, 60,000, 6,000 stuff is like kind of crazy to me 'cause I know their capacity, they can't even come fly over to Maui for anything barely.

MS. THOMSON: Just a quick response on that one. You know, the EPA and Department of Health, neither brought an enforcement action against the County saying that we needed an NPDES permit. That was a citizen's suit brought. So, citizens can be much more active and proactive than enforcement agencies can be. As far as whether or not somebody would face a citizen's suit or some kind of action from a regulatory agency, I don't think anybody can promise that they won't. All we can say is that if you have a source that you can trace from point A to point B, under the Ninth Circuit's test, that means that you're in violation of the Clean Water Act. And it's, you know, it's all of our responsibility to comply with the law. Also, if you were going to sell your property and you had that situation on your property, you have to disclose it to any potential buyer or that buyer can come back and bring an action against you privately.

COUNCILMEMBER PALTIN: Same like you have to disclose that your house was built on iwi or something like that.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Okay. Thank you, Member Paltin. Member Sugimura?

COUNCILMEMBER SUGIMURA: Thank you, Chair. Thank you very much for the presentation, Director, and for the information that the Ninth Circuit Court ruling is what's upon us, and so, what we did was we appealed, correct? And according to that ruling if it stands, were to stand, it would expose County taxpayers, private business, and others to possible criminal and civil lawsuits. So, in the case of the cesspools since we're talking about the cesspools, if the Ninth Circuit Court opinion stands, my neighbor, I have a cesspool at my house, but my neighbor could sue me, right? I mean, this exposes me to liabilities if there's no decision.

CHAIR MOLINA: Ms. Thomson?

MS. THOMSON: So, if your property was located in the vicinity of the ocean or another waterway that drained into the ocean, like a river, like Iao River, Iao Stream, then potentially yes, you know, and as far as whether you can trace it from point A to point B, you can do it with dye tracer studies, you can also do it with computer modeling.

COUNCILMEMBER SUGIMURA: So, I would, if I was subjected to a lawsuit personally as a resident from my neighbor, let's say, then, I would have to perform these tests that the, that are being asked for, the County is being asked to do, is that correct?

MS. THOMSON: So, if you were sued, one of the things that you could do is try to prove that your septic or cesspool was not connected. So, then you would have to do those tests to prove that it was not connected.

COUNCILMEMBER SUGIMURA: So, if we took this to the Supreme Court and had a decision made, according to my notes that the UIC, Underground Injection Program is regulated by the State Drinking Water Act, which is what we are right now, and that in general, states regulate groundwater, is that correct?

MS. THOMSON: That's correct.

COUNCILMEMBER SUGIMURA: And the Feds control permitting of pollution from point source to Federal waterways, which in this case is the ocean?

MS. THOMSON: So, the NPDES program is a, it's under a Federal law, the Federal Clean Water Act, and that the EPA can delegate permitting to the states. And the State of Hawaii is one of the states that has the authority to issue NPDES permits.

COUNCILMEMBER SUGIMURA: And they haven't?

MS. THOMSON: They do. They have the authority; they have not issued any NPDES permits for UIC wells.

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

COUNCILMEMBER SUGIMURA: So, the Department of Health, according to Bruce Anderson's written testimony, well, written verbatim attached minutes, or whatever it was to Michael Spalding, he said that that is not the role of, or he's waiting for the Supreme Court decision and he encouraged us to take steps to get a decision.

MS. THOMSON: Yes, that's correct.

COUNCILMEMBER SUGIMURA: And I guess earlier I had said that the reason why we don't have a NPDES permit is because it's regulated by the, well, which is regulated by the Clean Water Act and we would not be able to get it until we went to the Supreme Court. So, I apologize if some of the Members thought that I said only way to get it, well, I guess the only way to get it is through Supreme Court decisions 'cause nobody's taking a position. I just wondered personally, because, you know, I wondered if, what happens if, could you be sued, could your directors be sued under this also?

MS. THOMSON: So, the Clean Water Act does have a criminal penalty provision for knowing or negligent violation of the act. So, you can be sued civilly for fines, and you can bring a criminal action against, you know, usually our directors are named in lawsuits brought against the County, it's usually County of Maui and it's, you know, Eric Nakagawa as Director of Environmental Management.

COUNCILMEMBER SUGIMURA: Okay. And one last question, thank you. So, if we decide to settle, okay, so, let's say tomorrow we decide to settle, we go through whatever. What would happen to the injection wells, or what is the ramification of that versus taking it to get a decision at the Supreme Court?

MS. THOMSON: I can handle the legal part, and then, Eric can handle the, what's going to happen from the operational side. From the legal standpoint, the County would be in immediate violation of the Federal Clean Water Act and we would be exposed to additional suits either by other citizen groups, or the Department of Health or the EPA that would be charged with enforcing that law.

CHAIR MOLINA: Mr. Director, any comments?

MR. NAKAGAWA: If we decide to settle, I guess we would immediately start, or continue talking with the Department of Health and I'd be coming up here asking for hundreds of millions of dollars, like I said over there, to try to address this issue as fast as I can. Because it's my understanding from Corporation Counsel is, we immediately become in violation, which means the longer we go, the longer we're exposed right? And so, it's only my, I guess, role to make sure that we as a County limit that liabilities, right? And then...yeah.

COUNCILMEMBER SUGIMURA: Okay. Thank you.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Thank you, Councilmember Sugimura. Councilmember Kama?

COUNCILMEMBER KAMA: Thank you, Chair. So, what kind of NPDES permit did we apply for?

MR. NAKAGAWA: Yeah sure, so, the NPDES, National Pollutant Discharge Elimination System permit is just, it's a, I guess a normal NPDES permit regulated by the Department of Health for all of our facilities, which is Wailuku, Kihei, Lahaina, and Kaunakakai.

COUNCILMEMBER KAMA: So, is that an individual permit? Or would that be considered a general permit?

CHAIR MOLINA: Proceed, Mr. Director.

MR. NAKAGAWA: So, basically those are individual permits, I guess, per all those different sites, yeah.

COUNCILMEMBER KAMA: Okay. So, that being said, my understanding is, and you can correct me if I'm wrong, that we can't decide if the UIC is where we could actually do what we do, or is it NPDES, that's the question that we want to ask, correct?

CHAIR MOLINA: Corporation Counsel?

MS. THOMSON: So, what we're asking the U.S. Supreme Court, and the question that the U.S. Supreme Court has taken is whether discharges to groundwater that eventually reach they call it, a navigable waters, in this case the ocean, whether that requires a Clean Water Act NPDES permit or not.

COUNCILMEMBER KAMA: So, was that a yes or no?

MS. THOMSON: Yes.

COUNCILMEMBER KAMA: Thank you. Thank you, Chair.

CHAIR MOLINA: Okay. Thank you, Member Kama. Chair will yield this round of, my privilege for this last round of questioning. I'll recognize Mr. Sinenci from Hana, if you have any additional questions for either Ms. Thomson or Mr. Nakagawa.

COUNCILMEMBER SINENCI: Yeah, thank you, Chair, just a couple easy ones, I guess. Does the Safe Drinking Water Act regulate effluent going into the ocean, to anyone?

MS. THOMSON: The Safe Drinking Water Act is, you know, as the title is said, regulates discharges into potential groundwater sources.

# **GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER SINENCI: Okay. Thank you. And so, does the County agree with the studies that show that the seepage into the ocean is, you know, endangering reefs? Is that the County's stance?

MS. THOMSON: You know, I am not a scientist. I have had the privilege to look in depth at the studies that have been done and that have been brought out in the lawsuit. There are many, many different constituents that harm the near-shore waters. So, you know, ocean acidification and coral bleaching events, whether or not the recycled water is harming the ocean and ocean life, the studies that we had done do not show that the recycled water has a negative impact on coral growth. The seeps are located in an area near shore as Mr. Henkin said, and that's not where the coral is primarily growing. The coral is farther out, you know, where the waves aren't very active. And the studies that we had done looked, they're quite in depth, we have a map if anybody's interested. But they looked at on the ocean floor, so, where the water, where the freshwater groundwater comes out, so taking measurements there, in the middle of the water column, and then up at the surface. And what they found is that, you know, when the groundwater exits from the ocean floor, it mixes immediately with the ocean water. So, it does dilute very, very quickly. And in terms of the studies that we are privy to, it didn't conclude that there was harm to the coral life.

COUNCILMEMBER SINENCI: My next question, how much are we reclaiming at the Lahaina reclamation center?

MR. NAKAGAWA: Yes, Chair.

COUNCILMEMBER SINENCI: Or the plant.

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: Thank you. We actually treat 100 percent of our water to R-1 quality.

COUNCILMEMBER SINENCI: Okay. And then again, just to reiterate, so, there is no process of tracing individual cesspools, cesspool flow into the ocean, correct? I mean --

CHAIR MOLINA: Mr. Director?

COUNCILMEMBER SINENCI: --the site, the dye, tracer dye study? Is there --

MR. NAKAGAWA: I'm sorry, what was the question again?

COUNCILMEMBER SINENCI: --is, I guess, I'll rephrase, is there a process besides the, for tracing individual cesspools into the ocean?

MR. NAKAGAWA: Yeah, Chair?



**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CHAIR MOLINA: Proceed, Mr. Director.

MR. NAKAGAWA: Yeah, that's, you can always do a dye study, I mean, a dye test, or the hydraulic modeling. That's how basically the same way they did for the injection wells.

COUNCILMEMBER SINENCI: Okay. Thank you.

MR. KUSHI: Mr. Chair?

COUNCILMEMBER SINENCI: Oh, go ahead.

CHAIR MOLINA: Okay. Mr. Kushi?

COUNCILMEMBER SINENCI: Mr. Kushi?

MR. KUSHI: Mr. Chair, if I may, to clarify, Mr. Sinenci. Not yet, there's no studies for cesspools or septic tanks yet. What we're saying is, if the Ninth Circuit Court opinion stands, this may apply to cesspools and septic tanks nationwide. In fact, you have correspondence from some condo group in Massachusetts that has a private septic tank, and they're being sued over this. So, it's happening already. What we're saying is, the map that, over there, you know, Upcountry is highly unlikely because there's no navigable waters around there. On the coastal areas, you know, I wouldn't doubt somebody does a study. But we're saying as far as the Ninth Circuit opinion leaves that door open for that.

COUNCILMEMBER SINENCI: Thank you. One last comment or question, so you know, I'm, we talked about just, you know, this is for the Lahaina injection well. But I'm concerned about the precedence that our County will be setting for other cases, or other different types of permits that the, that you can apply for up on the mainland, say for instance, fracking, would it, would this case ultimately affect other classes of permits like fracking on the mainland?

MS. THOMSON: I'm going to qualify this by saying that I'm in no way an expert on like oil and gas recovery of law. But I believe that the Clean Water Act does have certain exemptions for energy production. I'd need to look into that more to give you a better answer on that. I think what you're getting at though is, you know, kind of this statement that's been going around in the public that the County would be, you know, the poster child for gutting the Clean Water Act. And I just want the body to remember that this lawsuit was brought against the County, and it was with the purpose of expanding the Clean Water Act to where it did not go before. So, in terms of gutting the Clean Water Act, the County can't gut something that, you know, that didn't exist before. The Clean Water Act will be there as it has been.

COUNCILMEMBER SINENCI: Okay.

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

MR. KUSHI: Mr. Chair?

CHAIR MOLINA: Mr. Kushi?

MR. KUSHI: Just to clarify again, I'm not sure about fracking injection wells 'cause I'm not up on that. But in terms of the same kind of wells that is subject to this litigation, in the State of Hawaii you have over 6,000 just in this State. Nationwide, according to the amicus briefs, you have 650,000 wells similar in the same situation that we are. And all of these wells are now going to be governed by the Clean Water Act.

COUNCILMEMBER SINENCI: Okay. Thank you. Thank you, Chair.

CHAIR MOLINA: Thank you, Mr. Sinenci. Before I recognize Chair King, I have just one question for the Department. Members, I'm referring back to Mr. Henkin's presentation. He showed a graph stated, due to Lahaina injection wells rates of bioerosion orders of magnitude higher, and there was a graph that showed from 1995 to 2000 or so 55 percent, then it was 33 percent to 2005. So, Mr. Nakagawa, where are we at this point in terms of bioerosion using the current process you have with the injection wells and treatment process? Have we slowed the bioerosion process, or simply put, are things getting better or not as it relates to the reefs? Have we slowed down the runaway train, so to speak?

MR. NAKAGAWA: Right, so, I believe Richelle can answer that 'cause there's a, actually a study that she quoted with all the pictures for the coral.

CHAIR MOLINA: Yeah, if that could be elaborated on a little bit more.

MS. THOMSON: Thank you, Chair. So, what I would like to invite the Members to do is please do look over the studies by Eric Hochberg and Steve Dollar, and they are in Granicus. I provided a list of what the files are. They're down toward the end of the files that are labeled zip. I think it's maybe 22 through the end. One of the things that, you know, and this isn't at all related to the lawsuit, but Kahekili is a herbivores fishery management area. And that was established in 2009. And the study, and the ongoing maintenance of that project, basically it's protecting that reef area and that fish on that reef area so that the herbivore fish, the like parrot fish and others can thrive and grow to larger sizes. And one of the slides that Mr. Henkin showed in his presentation was this decline in coral coverage. Well, that and his, what he showed ended in 2005 or '06. The data from, you know, from the time the fisheries management area was put on that area to present has shown that fish biomass is increasing, and things are generally in a better condition. So, that's, like I said, it's not related to this lawsuit. But it's good information about that specific area.

CHAIR MOLINA: Alright, thank you, Ms. Thomson. Chair King, you have the floor.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER KING: Okay. Let's see, I'm kind of following up on some of the other, just a quick yes or no, the County already acknowledged the point source pollution by accepting the previous settlement, yes or no, I mean we signed on to.

MS. THOMSON: No.

COUNCILMEMBER KING: So, we didn't acknowledge it, but we agreed to do something about it?

MS. THOMSON: I'm sorry, I don't understand the question.

COUNCILMEMBER KING: Well, we accept, the previous Council signed a settlement where we agreed that we were accepting this information, we were going to go forward with finding a solution, and at the same, and then the County went and appealed. But wasn't that the acceptance of the point source study?

MS. THOMSON: No.

COUNCILMEMBER KING: So, we didn't accept the point source study, but we...

MS. THOMSON: I'm not...

COUNCILMEMBER KING: We didn't accept the Ninth Circuit opinion.

MS. THOMSON: We appealed it.

COUNCILMEMBER KING: Okay. So, we didn't...why did we sign, why did the previous Council sign on to the settlement, the original 2014 settlement?

MS. THOMSON: So, in 2015 --

COUNCILMEMBER KING: Or '15.

MS. THOMSON: --this followed the ruling, there were two rulings on summary judgment, three rulings actually, from the Hawaii District Court. At the end of that process, rather than going to trial, because the court had already found liability, rather than going to trial on the penalty phase, Earthjustice and Mr. Henkin confirmed that Earthjustice approached the County and we were both in agreement on the terms of the 2015 settlement agreement and in that agreement either party could appeal. So...

COUNCILMEMBER KING: Right, but wasn't it acknowledged that we did have a problem that we had to fix?

MS. THOMSON: That was not part of that settlement agreement.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER KING: Okay. So, there was basically, I don't even know why we signed that settlement if we didn't think we had a problem. But also, the studies that you, I mean, we're looking at U.S. Government studies that say, that show the point source. And my understanding is that this study that Mr. Dollar did was paid for by the County aside from the U.S., the official study?

MS. THOMSON: Yes.

COUNCILMEMBER KING: The County paid for that study? Okay. So, it was serving the County. And then, the other question I have is somebody brought up earlier that if you got sued, if you had a cesspool and your neighbor sued you, you'd have to do a trace study. But I don't think that's the way it works. I think if somebody tries to sue you for that, they have to do the study and show the source going into the ocean. You don't have to do the study because you're assumed innocent until proven guilty. Isn't that the way it works? Can someone force you to do a tracer study?

MS. THOMSON: If you don't want to...so, if in the hypothetical situation that you have a, you know, I think the best answer to that is actually not a hypothetical. So, I'd really encourage all of the Members to look at the amicus brief that was filed by Wychmere Beach Club.

COUNCILMEMBER KING: I don't want to; I just want your answer on that. What's the legal opinion on that if you get sued, are you required to prove your innocence, or does someone else have to prove that that you're guilty?

MR. KUSHI: Mr. Chair?

CHAIR MOLINA: Mr. Kushi?

MR. KUSHI: Madam Chair King, at this point, the best answer is we don't know because the Ninth Circuit opinion has not been clarified.

COUNCILMEMBER KING: Okay. But you answered the previous...

MR. KUSHI: It has not been promulgated.

COUNCILMEMBER KING: You answered one of the previous questions, yes, someone would have, it would force them to do --

MR. KUSHI: Correct.

COUNCILMEMBER KING: --a tracer study.

MR. KUSHI: Correct.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER KING: I don't think that's true. If someone sues me --

MR. KUSHI: The Ninth Circuit said as long as...

COUNCILMEMBER KING: --I'm not required to do that study.

CHAIR MOLINA: Mr. Kushi, go ahead and respond.

MR. KUSHI: Responding to your question now, we don't know, because the Ninth Circuit opinion has not been clarified, it has not been codified, there's no regulations backing that up. So, we don't know at this point.

COUNCILMEMBER KING: Okay. But the answer given earlier was yes, you would, you said, somebody, Ms. Thomson, said she knew, and she said yes you would be required to do that tracer study.

MR. KUSHI: That would be an element of the litigation.

MS. THOMSON: Part of the Ninth Circuit's test is fairly traceable. And so, if you were sued saying that your property had a septic or a cesspool and that pollution from that septic system was making its way to the ocean, one of the ways that you would defend against that lawsuit is you would try to prove that your septic system was not connected. One of the ways to prove that would be to do a dye tracer study, or to have computer modeling done.

COUNCILMEMBER KING: Okay. But you're using up my time. So, my point is, that why would you even do that? Why is it even up to you to prove something that someone else is charging you with, because when the plaintiff sued the County, they were referring to a study that was done by the U.S. Government, and the County then went out and tried to disprove it by paying somebody to do a study that showed that that wasn't true. So, it wasn't something that was the onus originally on the County until the County decided they didn't like the study that was out there.

CHAIR MOLINA: Ms. Thomson?

MS. THOMSON: Thank you, Chair. There was really never any dispute that the recycled water from the Lahaina facility eventually made its way to the coastline. That was part of the original Environmental Impact Statement. So, that fact was always known. What this case is, was brought to do is to say that your, the County's Safe Drinking Water Act permit was not enough, you also needed a Clean Water Act permit. It's an expansion of the Clean Water Act to groundwater discharges. And that's the question that the Supreme Court has taken up.

COUNCILMEMBER KING: I understand that, you repeated that three times but you're not answering my question. My question is the fact that the person who's being sued is

# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

not required, because the whole hysteria is anybody could sue you and then you're required to do this expensive tracer study. But my information from the attorneys I've talked to is that you can't be required to do that. The person who sues you has to do that to prove it, and then take you to court. I think we're getting a, I'm getting a circular answer, Chair. So, I'll end there.

CHAIR MOLINA: Corporation Counsel, are you able to respond? Have you completed your response to Chair King's inquiry?

MS. THOMSON: Thank you. So, if the Ninth Circuit's decision stands, the fairly traceable, more than de minimis, there is going to be future litigation or rule making done by the agencies to figure out what that means. Right now, it's pretty broad and vague. We know what it means in the Maui County circumstance. But we wouldn't know what it meant to like say an individual homeowner.

COUNCILMEMBER KING: Okay. Then, let's not be that alarmist and tell them that you're going to be required to do tracer studies please.

CHAIR MOLINA: Okay. Thank you, Chair King. Member Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Okay. Okay. Yes or no, does liability automatically attach to a homeowner with a cesspool or a septic, if there's no enforcement does it automatically attach to an individual?

MS. THOMSON: If that situation is in violation of the Clean Water Act under the Ninth Circuit's test, then yes.

VICE-CHAIR RAWLINS-FERNANDEZ: It automatically attaches?

MS. THOMSON: Yes.

VICE-CHAIR RAWLINS-FERNANDEZ: So, then, enforcement action would be required?

MS. THOMSON: Let me give you an analogy. So, the speed limit is 40 and you choose to drive 60. You're in violation of the law, even if there's no policemen around.

VICE-CHAIR RAWLINS-FERNANDEZ: So, in order to be fined, enforcement action would have to take place? Someone would have to enforce, a police officer would have to see you speeding, pull you over, and cite you?

MS. THOMSON: Well, as citizens we all have the obligation to follow the law. And as a government entity, we have the obligation to follow the law.

VICE-CHAIR RAWLINS-FERNANDEZ: You're not answering my question. Enforcement would have to take place in order for a penalty for an individual to be fined, yes or no?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MS. THOMSON: Either enforcement by an agency or a civil suit, by way of a citizen's suit like the County was sued. So, yes, some action, you know, it wouldn't just start paying a fine on your own.

VICE-CHAIR RAWLINS-FERNANDEZ: Thank you. So, would a government entity enforce when they know that we already have this law banning cesspools by 2050, then we're going to be converting?

MS. THOMSON: I don't know.

VICE-CHAIR RAWLINS-FERNANDEZ: Thank you. A government entity or an individual bringing a citizen's suit would have to prove scientific connection to prove traceability under this standard, and that burden of proof would be on that citizen, is that true?

MS. THOMSON: I believe we've gone over that...

VICE-CHAIR RAWLINS-FERNANDEZ: Yes or no.

MS. THOMSON: Yes, that's part of what the enforcement, or the civil suit would be proving or disproving that fact.

VICE-CHAIR RAWLINS-FERNANDEZ: So, in order for a traceability study by an entity or a citizen's suit, they would have to get on to your property, into your cesspool or septic tank, and put in tracer dye?

MS. THOMSON: That's one way of doing it.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo. And as we discussed, the Department of Health does not have the capacity or the interest as a priority to go to each individual property owner to ask permission to get onto the property to prove that the individual cesspool or septic tank will prove traceability to the ocean?

MS. THOMSON: So, maybe we can answer this in a bit of a broader context. So, we've both mentioned that, separately, Eric and I are on the Cesspool Working Group. It's a State law that we have to close our cesspools and they are, the Department of Health is working with --

VICE-CHAIR RAWLINS-FERNANDEZ: Right.

MS. THOMSON: --you know, the community to try to do this.

VICE-CHAIR RAWLINS-FERNANDEZ: Right, we're working on it. Okay.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MS. THOMSON: As far as coastal septic and cesspools, with this new, it'd be a new court, you know, the Ninth Circuit's ruling, I don't know what they would do with that or how they would try to implement that, and whether the timelines would be much accelerated. But I would assume so, I would defer that to the Department of Health.

VICE-CHAIR RAWLINS-FERNANDEZ: Doesn't it cost a lot of money to bring suit against someone and come up, and bear the burden of proof, doesn't it cost a lot money?

MS. THOMSON: Well, you don't have to hire an attorney. You can sue somebody on your own. So, it would...

VICE-CHAIR RAWLINS-FERNANDEZ: And that still costs money.

MS. THOMSON: The court fees are not extremely high, and you can get a waiver if you are low income.

VICE-CHAIR RAWLINS-FERNANDEZ: Didn't it take 84 days, almost three months for the tracer dye to get from the Lahaina Wastewater Reclamation Facility to the ocean?

MS. THOMSON: Yes.

VICE-CHAIR RAWLINS-FERNANDEZ: So, how long would you suppose that a Councilmember from Upcountry's effluent or sewage from her cesspool would take to get to the ocean from Upcountry?

MS. THOMSON: I don't know.

VICE-CHAIR RAWLINS-FERNANDEZ: A lot longer than 84 days is going to be my guess. The study that you referred to, the Dollar study, wasn't that conducted in Maalaea?

MS. THOMSON: He's done work in Maalaea and in other areas of Maui. But specifically, as related to the 2014 study that I mentioned, no, that was done at Kahekili.

VICE-CHAIR RAWLINS-FERNANDEZ: So, would you agree that before this case was taken up, that there was a very clear line to what the Clean Water Act and the Federal Safe Drinking Water Act governed?

MS. THOMSON: Yes.

VICE-CHAIR RAWLINS-FERNANDEZ: I would disagree. Mahalo, Chair.

CHAIR MOLINA: Okay. Thank you, Member Rawlins-Fernandez, Member Paltin?

COUNCILMEMBER PALTIN: Thank you, Chair. I'm very familiar with the Kahekili Herbivores Fishery Management area. And, you know, I recall when Liz Foote and



# GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

May 20, 2019

---

those guys were trying to stop fishermen from catching herbivores in that area, and because of the algae bloom and whatnot, and I'm glad it ended up working out that the herbivores are eating the algal blooms. But I remember at the time, like asking them how come they're picking on the fishermen not to be allowed to catch herbivores in that area anymore because the fishermen didn't cause the problem. And I asked them like, you know, why don't you go after the source of the problem. And so, they said that they were and they're pursuing this lawsuit. And so, it kind of brings us to where we are today. To me, the environment is like our economy. So much of the tourists come because of the environment, we get our recreation from the environment, we get our food source from the environment. And to me, if the near-shore cesspools or septic tanks are contaminating the near-shore environment, then I don't see anything wrong with phasing them out. It's something that needs to be done. And, you know, from a lot of the folks that testified this morning, they referred to it more as an economic issue than a health or an environmental issue when it is really all three or more. And, you know, I think as a society if we're really focused on the problems, we have the resources to find the solutions. But, you know, we spending 12 million out in Lahaina to fix the injection wells. But at the same time, we spending \$340 million to build a house to, for rental cars? You know, and I don't think the problem is with the courts or anything like that. It's with us as people living over here and our priorities on what we're going to spend our money on. And we're building this rental car house for \$340 million for the tourist, but somehow, I think the tourist would rather come to Maui and swim in clean water than have a house for their rental car. So, I was wondering if you could speak to those economics.

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: If I...thank you, Member Paltin. If I understand your question correctly, that 340 million, it's a State DOT project. So, we, I mean, I think you're trying to compare like, so, we wouldn't have access to that money in order to spend that. So, hopefully that kind of cleared that up. And then, the, as far as us expanding reuse, I think the whole point of this presentation was we can still do all those great things that you want to do and, you know, I told you in my confirmation I'm a proponent for doing more reuse because it's a resource. What this thing is doing is almost, is basically expanding that Clean Water Act, so, which is basically, like kind of what I told you before is if you do that, most likely we can't use the injection wells because it wouldn't meet that water quality standard. Therefore, we need a different, but we, when we do recycled water, we still need a backup, remember, 'cause when it's raining. So, if that's the case, and that's kind of why I brought it up is really now, if I need a backup for my recycled water system, my only option is that deep-ocean outfall.

COUNCILMEMBER PALTIN: I would disagree. I would say there's another option to work with the Department of Health to try and get the NPDES permit. Is that not another option as well?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

MR. NAKAGAWA: Oh yes, Chair. Oh yeah, you definitely can work with them and try to get it. What I'm saying is, the water quality standards that they are held by is too stringent.

COUNCILMEMBER PALTIN: The NPDES permits? And the State oversees the Department of Health and the Department of Transportation. So, it's all the State and they can decide where they want to spend their money?

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: I'm not with the State, so, but yes, they, I mean, they divvy up their money just like I assume the same as us when we divvy up our money, yeah.

COUNCILMEMBER PALTIN: Thanks.

CHAIR MOLINA: Okay. Thank you, Member Paltin. Councilmember Sugimura?

COUNCILMEMBER SUGIMURA: I was just wondering, through this process, this is a continuation of my previous questions, is what are the penalties that we would be open to, or subjected to?

CHAIR MOLINA: Ms. Thomson?

MS. THOMSON: So, currently, the Clean Water Act maximum penalties are \$53,484 per day, per source.

COUNCILMEMBER SUGIMURA: Oh, that was that...

MS. THOMSON: Yeah, and the Ninth Circuit's decision confirmed what the lower courts said that each well is considered a separate source.

COUNCILMEMBER SUGIMURA: Thank you.

CHAIR MOLINA: Thank you, Member Sugimura. Councilmember Kama?

COUNCILMEMBER KAMA: No questions, Chair. Thank you.

CHAIR MOLINA: Alright, thank you very much. Members, we have reached that hour. I think, well, Chair had shared with some of you prior to this meeting the intention to end by 4:30 today. We've gone a little bit above that. Chair's intention as I stated earlier is to recess this meeting. It's been a very long day. We've been saturated with a lot of information from both sides. So, my reason for the recess is to give you a few days to digest all of this so we can make a fully informed decision hopefully by this Thursday. So, the recess date the Chair is proposing, if there are no objections, will be Thursday, this Thursday, May 23 10:00 a.m. Any objections to the recess date?

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

Ten a.m. Mr. Kushi. So, again, Members, is that okay with everybody, a little bit later start? And I know Member Rawlins-Fernandez will be flying in from Molokai, so give her a little bit of time, that little extra hour to, you know, reenergize, or get energized --

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

CHAIR MOLINA: --like the rest of us.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair, I really appreciate that.

CHAIR MOLINA: No problem.

VICE-CHAIR RAWLINS-FERNANDEZ: I'll be here.

CHAIR MOLINA: Thank you. Members, here is, does that work? Can I confirm your attendance for that day? Okay. And I believe Member Hokama, before he left, did indicate he would be here as well. And I want to give you guys time to freshen up because we do have another Committee meeting tomorrow. Member Paltin, can you share with us your Committee meeting for tomorrow?

COUNCILMEMBER PALTIN: Oh yes, thank you very much. We got Planning and Sustainable Land Use and I want to thank everybody for making themselves available during an off week and also making the trek out to Lahaina. I know the road was closed for a little while today. So, hopefully it won't be closed at all tomorrow. I believe we're meeting 1:45 at the property 266 Dickenson Street. And the request from the applicant is that you enter the property with a right-hand turn only, enter and exit right-hand turn only because of the size. And so, then, it would help to turn down I think Papalaua or something, and then come up Dickenson mauka, and then turn right into the property. We'll also be visiting Kahana Sunset at about 2:45, and we'll be meeting at five o'clock at the Kaunoa Senior Center on Lahainaluna Road, and we'll only be, the meeting itself will only be on the Dickenson property. The Kahana site visit is just 'cause you guys making the drive all the way out Lahaina, might as well check it out for a later time.

CHAIR MOLINA: Okay. Thank you very much, Member Paltin. So, 1:45 site being Dickenson Street, and 2:45 p.m. at what street again?

COUNCILMEMBER PALTIN: Kahana Sunset --

CHAIR MOLINA: Kahana Sunset?

COUNCILMEMBER PALTIN: --yeah, on the lower road.

CHAIR MOLINA: And then, the meeting itself at 5:00 p.m. at the Kaunoa Senior Center? Sometimes people refer to it as the West Maui Senior Center.

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

COUNCILMEMBER PALTIN: Yeah, West Maui Senior Center, right on Lahainaluna Road, across from the condemned Pioneer building.

CHAIR MOLINA: Okay. Great, thank you very much for that information. So, Members, rest up in your off week. So, please do your best to do your other responsibilities with your constituents. And again, we certainly appreciate your efforts to be here and address many of these concerns. And some people say this is a part-time job, yeah, but we're all doing this in the best interests of the people of Maui County. So, with that being said, I want to thank Staff, the Administration, and everyone else who attended here, to our plaintiffs as well, thank you for being a part of this. So, the --

VICE-CHAIR RAWLINS-FERNANDEZ: Chair?

CHAIR MOLINA: --meeting for...yes, Ms. Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: I also want to thank you and commend you on a job well done today.

CHAIR MOLINA: You're too kind.

VICE-CHAIR RAWLINS-FERNANDEZ: Thank you so much.

CHAIR MOLINA: All of you make my job easy. So, thank you, thank you. So, Members, this meeting will be in recess until this Thursday, May 23<sup>rd</sup>, GET of May 20<sup>th</sup> in recess till Thursday May 23<sup>rd</sup> 10:00 a.m. Meeting in recess. . . .(gavel). . .

**RECESS: 5:05 p.m.**

APPROVED BY:



MICHAEL J. MOLINA, Chair  
Governance, Ethics, and Transparency  
Committee

get:min:190520:mt

Transcribed by: Marie L. Tesoro

**GOVERNANCE, ETHICS, AND TRANSPARENCY  
COMMITTEE**

**Council of the County of Maui**

**May 20, 2019**

---

CERTIFICATE

I, Marie Tesoro, hereby certify that the foregoing represents to the best of my ability, a true and correct transcript of the proceedings. I further certify that I am not in any way concerned with the cause.

DATED the 13<sup>th</sup> day of June 2019, in Wailuku, Hawaii

A handwritten signature in black ink, appearing to read "Marie Tesoro", is written over a horizontal line.

Marie Tesoro