

GOVERNANCE, ETHICS, AND TRANSPARENCY COMMITTEE

Council of the County of Maui

MINUTES

Online Only via BlueJeans Link

July 7, 2020

CONVENE: 9:01 a.m.

PRESENT: Councilmember Michael J. Molina, Chair
Councilmember Keani N.W. Rawlins-Fernandez, Vice-Chair
Councilmember Riki Hokama (left at 11:58 p.m.)
Councilmember Tasha Kama
Councilmember Kelly T. King (excused from 11:58 a.m. to 12:01 p.m.)
Councilmember Alice L. Lee
Councilmember Tamara Paltin
Councilmember Shane M. Sinenci
Councilmember Yuki Lei K. Sugimura

STAFF: Shelly Espeleta, Legislative Analyst
David Raatz, Supervising Legislative Attorney
James Forrest, Legislative Attorney
Richard Mitchell, Legislative Attorney
Kasie Apo Takayama, Legislative Analyst
Pauline Martins, Committee Secretary
Jean Pokipala, Council Services Assistant Clerk

Kate Griffiths, Executive Assistant to Councilmember King
Evan Dust, Executive Assistant to Councilmember Kama
Sarah Pajimola, Executive Assistant to Councilmember
Rawlins-Fernandez

ADMIN.: Gary Murai, Deputy Corporation Counsel, Department of the
Corporation Counsel
Moana Lutey, Corporation Counsel, Department of the Corporation
Counsel
Richelle Thomson, First Deputy Corporation Counsel, Department
of the Corporation Counsel
Brian Bilberry, Deputy Corporation Counsel, Department of the
Corporation Counsel
Caleb Rowe, Deputy Corporation Counsel, Department of the
Corporation Counsel
Eric Nakagawa, Director, Department of Environmental
Management
Shayne Agawa, Deputy Director, Department of Environmental
Management

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Scott Rollins, Wastewater Reclamation Division Chief, Department
of Environmental Management
Rowena Dagdag-Andaya, Director, Department of Public Works
John Jakubczak, Assistant Chief of Uniform Services, Department
of Police

OTHERS: Hannah Bernard, Hawaii Wildlife Fund
Rick Markham
Lance Collins, Attorney
Rob Weltman, Sierra Club of Maui
Ui Tanigawa Lum
David Henkin, Attorney
Bill Frampton
Plus (2) other people

PRESS: *Akaku Maui Community Television, Inc.*

CHAIR MOLINA: . . . *(gavel)* . . . The GET Committee meeting for Tuesday, July 7th, has now come to order. I'm the Committee Chair Mike Molina. It's now time to do a roll call. Let's find out who's here with us. Let's start off first with our Council Chair, Alice Lee. Good morning.

COUNCILMEMBER LEE: Mr. Chair, I will give you a hello from the Philippines, the Visayan language, maayong buntag.

CHAIR MOLINA: Maayong buntag back to you --

COUNCILMEMBER LEE: Yes.

CHAIR MOLINA: --as well. Mahalo, Chair Lee. And let's go out and find out what's happening in the neighborhood of Kahului. Member Kama, good morning.

COUNCILMEMBER KAMA: Aloha kakahiaka, Chair, and it is still a beautiful day in the neighborhood of Kahului.

CHAIR MOLINA: All right. Right on. Right on. And let's go out to our wonderful and beautiful Napili and check out our Councilmember Tamara Paltin. Good morning.

COUNCILMEMBER PALTIN: Aloha kakahiaka, good morning. I'm coming live and direct from the Old Lahaina Center in Lahaina Town.

CHAIR MOLINA: All right. It sounds good. And let's go all the way out to East Maui and see how Member Sinenci is doing. Good morning.

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COUNCILMEMBER SINENCI: Aloha kakahiaka kākou, mai Maui hikina. Nice to see everybody.

CHAIR MOLINA: All right. Good morning, Mr. Sinenci. Let's travel up the beautiful slopes of Haleakalā and see how Councilmember Sugimura is doing. Good morning.

COUNCILMEMBER SUGIMURA: Good morning. Your neighbor is in Wailuku Town. I'm looking at Ka'ahumanu Church, and I love that historic church, and we need to help it, Members.

CHAIR MOLINA: Oh.

COUNCILMEMBER SUGIMURA: Yes.

CHAIR MOLINA: All right.

COUNCILMEMBER SUGIMURA: But anyway, good morning. Nice to see all of you. It's good to be in the building.

CHAIR MOLINA: All right. Good morning to you. And let's go down to the south side and see how Councilmember King is doing. Good morning.

COUNCILMEMBER KING: Aloha kakahiaka, Chair, mai North Kihei, and no rain this morning, which is a pretty safe thing to say 90 percent of the time here.

CHAIR MOLINA: All right. Fantastic. Good morning. And good morning to you, Mr. Hokama, our representative from Lana'i.

COUNCILMEMBER HOKAMA: Thank you, Chairman. We would say mensore in our language. Thank you.

CHAIR MOLINA: All right. Mensore. Sounds good to me. And let's go check out our wonderful, friendly Vice-Chair from Moloka'i, Member Rawlins-Fernandez. Good morning.

VICE-CHAIR RAWLINS-FERNANDEZ: Maayong buntag, aloha kakahiaka from your friendly Councilmember from Moloka'i nui ahina. Ah, the Friendly Isle. Aloha.

CHAIR MOLINA: All right. Aloha and good morning to you. Okay, Members, very good. Well, we've got a somewhat ambitious agenda, as always, here in the GET Committee. But as always, I have complete confidence in everyone's ability to get the people's work done, so let's get ready and get going. But first, I'd like to introduce a few other participants in our proceedings this morning. From Corp. Counsel, we'll have our Ms. Richelle Thomson, Mr. Brian Bilberry, Mr. Caleb Rowe, and Mr. Gary Murai. And from the Department of Public Works, joining us later, will be Director Rowena Dagdag-Andaya, Director Eric Nakagawa from the Department of Environmental Management, and from

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the Police Department, John Jakubczak, from...who is the Assistant Chief. And of course, last but not least, we have our wonderful, hard-working staff, Committee Secretary Pauline Martins; Support Staff Jean Pokipala; Legislative Analysts, Shelly Espeleta and Kasie Apo Takayama; along with Legislative Attorney James Forrest. So let's start our proceedings off with public testimony. Just a few quick, little ground rules. Testifiers wanting to provide video testimony, make sure you are aware that you can join us via the BlueJeans link at the link number 551273481 as noted on the agenda. Or if you feel like you'd prefer to call in, call the number 1-408-915-6290 and enter the number that I just mentioned to you. And the Committee intends to keep the same link and phone number for future GET meetings for the ease and convenience of the Members and the public. And of course, written testimony is highly encouraged by sending your comments to get.committee@mauicounty.us. We're going to be limiting testimony to three minutes today, and when testifying, please state your first and last name. And if you're testifying on behalf of an organization or if you are a paid lobbyist, please inform the Committee of that. And please be mindful, don't use the chat during this meeting, okay? It shouldn't be used for...to provide testimony or chat with other testifiers. So while the others are testifying, please be aware and be courteous by turning off your video and muting your microphone while waiting for your turn to testify. And of course, if you don't want to testify, you can always view this meeting via Akaku Channel 53. Okay. And always, please be patient with us, in case we run into any technical issues during the meeting. So with that being said, I'd like to ask Ms. Espeleta to announce our first testifier. Go ahead, Ms. Espeleta.

MS. ESPELETA: Thank you, Mr. Chair. Your first testifier is Ms. Hannah Bernard from the Hawaii Wildlife Fund, testifying on GET-26, followed by Mr. Rick Markham, who signed in under GET-10 for that same item.

... BEGIN PUBLIC TESTIMONY ...

CHAIR MOLINA: Thank you. Good morning, Ms. Bernard.

MS. BERNARD: Good morning. Aloha kakahiaka. Can you hear me?

CHAIR MOLINA: Coming in loud and clear.

MS. BERNARD: Oh, good. Thank you so much for the opportunity to testify. Once again, my name is Hannah Bernard, and I'm the Executive Director of Hawaii Wildlife Fund. I hope that you will allow our attorney in this case, David Henkin, to also present to you on the status of our case because just hearing from Corporation Counsel, we believe, is going to be a little bit distorted. Unfortunately, it seems to us that there's been a fundamental choice to misrepresent the Supreme Court's decision and/or willfully misrepresent it, and so there are several quotes I have submitted to you in written testimony already from Corporation Counsel that would seek to appear to seek to confuse whether the ruling was in the Plaintiff's favor, our favor, or not, which it was. And so, once again, we want to be sure that you're hearing from our attorney so that

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you're hearing the actual truth of the ruling. And I gave a couple of examples in my testimony about some of the distortion I believe is happening. And then also I'd like to respectfully request that you, please...to have no executive session to discuss the terms of what is going to be shared with you with Corporation Counsel and keep it in the public eye. I understand that one of the items on this agenda is the settlement offer that was provided to us by Mayor Victorino on May 30th that we soundly rejected and that I would want to be sure and know if your Counsel received this...a copy of this offer and our subsequent counteroffer, which the County rejected. And then if, indeed, that's something that you could let us know your perspective on when you share that with us, whether you've seen that or not, and in public. We would like to just make sure that that is not something behind closed doors, particularly because this particular issue, the settlement agreement that was just offered to us recently after the Court's decision... the U.S. Supreme Court's decision, that is in public domain. And in fact, it was the subject of part of a webinar that was public, and it's a nationally broadcast event by the Environmental Law Institute on June 12th. They actually discussed this offer that was proposed to us, and the esteemed representatives on this webinar, including Environmental Law Professor Richard Lazarus from Harvard School of Law, and John Cruden, a former Assistant Attorney General from the Department of Justice's Environmental and Natural Resources Division actually burst into laughter...derisive laughter at what the County offered as a result of the ruling in our favor in this case. So my...so my third concern is my understanding is that the County is seeking additional testing from an expert who may end up --

...timer sounds...

MS. BERNARD: --...(inaudible)... charge we're talking about close to a million dollars.

MS. ESPELETA: Three minutes.

CHAIR MOLINA: Okay. I thank...

MS. BERNARD: That would be something I hope you would not approve. So thank you for your time. Mahalo.

CHAIR MOLINA: Okay. Thank you very much, Ms. Bernard, for your testimony. Members, any need to clarify Ms. Bernard's testimony? Okay, we have Member King. Proceed, Member King.

COUNCILMEMBER KING: Thank you, Chair. Aloha, Ms. Bernard. Thank you.

MS. BERNARD: Aloha.

COUNCILMEMBER KING: And just a couple of questions. One is, what was the date that you made your counteroffer? Because I have not personally not seen it. I don't know about other Councilmembers, but do you know what the date that you presented that...

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MS. BERNARD: The date that we gave back our...well, I know we received it on May 30th, and on June 9th, we rejected it. June 9.

COUNCILMEMBER KING: Okay, but then you made a counteroffer settlement agreement?

MS. BERNARD: Um-hum.

COUNCILMEMBER KING: Which is probably what should...

MS. BERNARD: I mean, yes, on June 9th.

COUNCILMEMBER KING: Oh, you made that on June 9th. Okay.

MS. BERNARD: Um-hum. According to my notes. And I'm hoping that you'll confirm that with our attorney. But that's according to my notes.

COUNCILMEMBER KING: Okay. And then I just wanted to clarify that I heard you right, that you are requesting to not have this in executive session, as one of your ...*(inaudible)*...

MS. BERNARD: I...I think it would not serve the public. I think it would be a real tragedy if you folks retreat into executive session over this particular issue.

COUNCILMEMBER KING: Thank you.

MS. BERNARD: A big public concern.

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

CHAIR MOLINA: All right. Thank you, Member King. Committee Vice-Chair Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Ms. Bernard. Mahalo for your testimony. So right at the end of your testimony, you were talking about additional testing, and I couldn't really hear you because the alarm was going. What were you saying?

MS. BERNARD: So it's our understanding that Corporation Counsel has decided that we need to have additional testing in our case from an outside expert, a scientific firm, that will evaluate whether there is a functional equivalent to the pollution that's occurring which has already been determined in the court previously. So it's a...it's a very complex array of tests that they propose on doing to expand on and add to the body of evidence that we've already obtained, as you know, with a dozen scientific studies including one published last year in the journal Nature. So what they're asking to do is additional expert testing on our case to see if, indeed, there really is a functional equivalent here.

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VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Ms. Bernard. And so that...that's like the trace testing that was already conducted?

MS. BERNARD: Exactly. The trace...the dye study was essentially the absolute, final word on, indeed, there is a connection. And in fact, the fact that these injection wells were designed to receive our wastewater, that's what they were designed to do, and then to transmit it to the ocean. It's ludicrous that we would spend one more dime on any kind of study to determine is it really happening? Or how bad is the problem out there, anyway? That's what they're proposing.

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

MS. BERNARD: Mahalo you.

CHAIR MOLINA: Okay. All right. Thank you, Committee Vice-Chair Rawlins-Fernandez. Members? Any other questions or need to clarify Ms. Bernard's testimony? Okay, seeing none. Thank you very...you know what? I have one quick question --

COUNCILMEMBER SUGIMURA: Mike, I have a question.

CHAIR MOLINA: --Ms. Bernard, okay, before I recognize Member Sugimura and Member Paltin. Ms. Bernard, you mentioned the offer. Are you comfortable with sharing what that offer was? Because it's news to a lot of us that an offer was made by Corporation Counsel. So are you at liberty to share that information with us, or maybe best that we consult with your attorney, at least just to verify --

MS. BERNARD: Yes.

CHAIR MOLINA: --from them what was made?

MS. BERNARD: Yes. I think it would be best if you can check with our attorney on that, honestly. And also, I would have to look it up. I do have it. I just would have to pull it up. It's...it's on my computer.

CHAIR MOLINA: Okay.

MS. BERNARD: It's not in front of me. But yes, I absolutely...I just can't strongly enough encourage you to hear it from our attorney, since you're hearing from the County attorneys. It really is important to have our attorney involved. Thank you.

CHAIR MOLINA: All right. Thank you very much, Ms. Bernard. Member Sugimura, followed by Member Paltin.

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COUNCILMEMBER SUGIMURA: So thank you very much for being here. And I'm not an attorney, and I've never taken anything to court or had your experience, Ms. Bernard, but for testing to be done again, and for...to gather more factual data, is that unusual when you go to court?

MS. BERNARD: In...in our case, it would...it would be. In our case, it would be absolutely unnecessary.

COUNCILMEMBER SUGIMURA: No, unusual. Is it unusual that --

MS. BERNARD: Oh, that I --

COUNCILMEMBER SUGIMURA: --you gather data to...

MS. BERNARD: --I...I don't know about that particular term. I don't know about in all cases, but in our case, it would be absolutely unnecessary.

COUNCILMEMBER SUGIMURA: Because you think that the previous data is enough, but yet our County...

MS. BERNARD: I...I know that our...the District Court ruled that we already have a functional equivalent. We already have the information. I know that.

COUNCILMEMBER SUGIMURA: So Supreme Court --

MS. BERNARD: That's in the record.

COUNCILMEMBER SUGIMURA: --so Supreme Court is sending this back to the Ninth Circuit Court of Appeals, so we're going to have another day in court, if you will. So thank you. I understand what's happening.

MS. BERNARD: It...it...it's in...it's in circuit...it's actually in our District Court that it...it's in the District Court right now.

CHAIR MOLINA: Ms. King. All right. Thank you very much, Member Sugimura. Member Paltin?

COUNCILMEMBER PALTIN: Thank you, Chair. Thank you, Ms. Bernard for the long haul that you've been in on, on this. I just was wanting to clarify that this whole...everything, this court case and the settlement, it's not saying that we're not ever going to be able to inject wastewater; it's saying that we need a permit in order to do it. And that --

MS. BERNARD: Yes.

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COUNCILMEMBER PALTIN: --the State's position or the County's position is that we've never had a permit for doing this before, and so it's, like, impossible or something, and that you folks are saying, well, you know, there's these parameters, and it's possible, and it can be done. Just trying to clarify.

MS. BERNARD: Pretty much what you said hits the nail on the head. And in fact, there have been permits...NPDES permits have been issued for other situations. It's not impossible, and it's just a question of the process, doing it.

COUNCILMEMBER PALTIN: So all this about injection wells, and it's...it's basically about a permit and can we get a permit and can we modify the process so that the permit...okay, because I think, you know, out in...there's a lot of confusion about all of this. And I just wanted to bring it back to what we're talking about a little bit, just make sure I'm on the right track. Thank you.

MS. BERNARD: Thank you. Mahalo.

CHAIR MOLINA: Okay. Thank you, Member Paltin. I saw Member Kama, you have a question or a need to clarify Ms. Bernard's testimony?

COUNCILMEMBER KAMA: Yes. Just a couple of things. You mentioned in your testimony the purpose of the injection wells. Can you reiterate that, please? Or what did you mean by that?

MS. BERNARD: The injection wells were designed to receive our wastewater with the knowledge that the water...that the wastewater would eventually make its way to the ocean.

COUNCILMEMBER KAMA: Okay.

MS. BERNARD: That's in the public record.

COUNCILMEMBER KAMA: Okay. And then...and then you also said that, in your conversation with Member Paltin, that the NPDES permit is a permit that allows you to actually put wastewater into the ocean. Is that correct?

MS. BERNARD: I...I believe you're paraphrasing what we just said.

COUNCILMEMBER KAMA: Just I'm trying to...I'm trying to clarify what you're actually saying.

MS. BERNARD: Um-hum. Um-hum. Yes, so the NPDES permit would allow for mitigation and management and monitoring of...of the health of the reef and would cause us to do a better job of managing our wastewater. That, coupled with reuse, which we're moving toward and is the appropriate repository.

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COUNCILMEMBER KAMA: So that's the purpose of the NPDES permit is to --

MS. BERNARD: Is to --

COUNCILMEMBER KAMA: --allow all those things.

MS. BERNARD: --is to manage pollutants and mitigate and monitor the environment, essentially. And I'm not a lawyer. I'm not...I'm just giving you my understanding.

COUNCILMEMBER KAMA: Right. And I think that's what we're all trying to do, is get to a place of where I'm understanding what you're understanding, and you're understanding what I'm understanding, and that maybe we'll never ever get to that same space, but at least we can get closer to that space than we were before. And that's all I'm trying to do in asking the question because I may have other things in my head that tell me other things. So I think about, as a permit that allows us to put wastewater into the ocean. The County didn't have a permit because we're looking for clarification. Other people have a permit, so that tells me that that means it's okay for them to put stuff into the ocean, and they're not even...I mean, at least we clean our waste before we dump it. Other people don't. They just outfall. It's just pure outfall. And I just want to make sure we get to a place where we can take care of what needs to be taken care of. Maybe on opposite sides today, but we got to work together to make sure we're on the side of righteous and we're on the side of clean government, clean environment, and happy people, and happy souls. So thank you very much.

MS. BERNARD: Thank you. And I encourage you to ask these questions of our attorney.

CHAIR MOLINA: Okay. Thank you, Member Kama. Okay, so anyone else that has a need to clarify Ms. Bernard's statements? Okay, Committee Vice-Chair Rawlins-Fernandez.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Really quickly, I'm looking at the testifier list, and I don't see Ms. Bernard's attorney. So I was just wondering because she's referenced several times now us asking their attorney questions. So I just wanted to, before she leaves, find out if he is coming before us to testify today?

MS. BERNARD: Yes. He...he wanted to testify and intends to testify unless there's another type of presentation he gives. And the reason that he's not signed up is he is being delayed because of a delivery of a vehicle, and so he's...he's running late, but yes, I...I understand that he's working hard to get to a place where he can be on.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. So if he has a smartphone, he can also connect to BlueJeans via his smartphone online if...if, you know, if he's not making it to a location. We've received testimony from people in their cars.

MS. BERNARD: Okay.

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VICE-CHAIR RAWLINS-FERNANDEZ: Yeah, okay.

MS. BERNARD: Thank you.

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

CHAIR MOLINA: Thank you, Member Rawlins-Fernandez. That's a good question to ask. All right, seeing no one else raising their hands to ask Ms. Bernard any questions, we'll thank Ms. Bernard for her testimony. Thank you.

MS. BERNARD: Thank you.

CHAIR MOLINA: Ms. Espeleta, please move on to our next testifier.

MS. ESPELETA: Mr. Chair, your next testifier is Mr. Rick Markham for GET-11(10)--he signed in under GET-10--followed by Mr. Lance Collins.

CHAIR MOLINA: Okay. Good morning, Mr. Markham.

MR. RICK MARKHAM: Hey, good morning GET Committee. Hey, you handsome buggah, you looking good with that haircut. I'm gonna leave my... I want to leave my hat on so I don't scare anybody. No haircut for a while here. Anyway, I just wanted to say thank you, everyone, for taking the time out. And I just...just a quick note to, again, say thanks for considering the settlement of my matters, and I truly appreciate all of your guys' time, especially during this, you know, unprecedented, challenging financial time that we're having in our lives. It's definitely been a struggle, and you know, it's...this has been an absolute...I don't know, just an absolute challenge...I don't know, challenging disruption of my life, and for my family and myself and businesses. And I just want to make it right, and you know, put it behind me. And I've learned quite a bit from it, and I'm here. I'm here for my community and I'm here to answer any questions that you guys might have as a resource for my attorney in executive session. The attorney is Chuck Choi, and yeah. Again, thank you so much, you guys, for taking the time. I'll keep it short and be respectful of your time.

CHAIR MOLINA: Okay. Thank you very much, Mr. Markham. And I appreciate the comments about my new do, I guess you want to call it, or lack thereof. Anyway, Members, any need to clarify Mr. Markham's testimony? Seeing none, thank you very much for being here, Mr. Markham.

MR. MARKHAM: All right. Take care, you guys. Have a beautiful day.

CHAIR MOLINA: Aloha. Ms. Espeleta, please continue with our next testifier.

MS. ESPELETA: Mr. Chair, your next testifier is Mr. Lance Collins, if he could identify the item or items he is planning to testify on, followed by Mr. Rob Weltman.

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CHAIR MOLINA: Good morning, Mr. Collins.

MR. COLLINS: Hello, aloha. Good morning. Sorry, I'm not used to using this. I actually hadn't intended to sign up to testify. I was just going to watch, but I'm happy to provide a little bit of my thoughts. Let me...I'm trying to figure out how to turn the video on.

COUNCILMEMBER PALTIN: There's a little camera button, and you just click on it.

MR. COLLINS: Can you see me now? I don't see me.

COUNCILMEMBER PALTIN: Yeah. Yeah, I can see you.

CHAIR MOLINA: We see you.

COUNCILMEMBER KAMA: Yes, we see you.

MR. COLLINS: Okay. I don't see myself. So I would be testifying on GET-26, and I guess I'm... I was just going to watch, but yeah, I...I think from...in my view, it is very unusual when a case is remanded from an appellate court back to a trial court to engage in extensive discovery when the...basically, the general merits of the case have been decided by the appellate court. Usually, you only see a case basically start over from the beginning and conduct lots of extensive and expensive discovery when the appellate court has only dealt with a procedural issue, either with the trial court's procedures or something like that. But in this case, there was extensive discovery that occurred, and all of the sides had, you know, an opportunity and they took it to get lots of information. And I think if you read the Supreme Court's opinion carefully, when it's talking about evaluating all of these factors, and they're only citing some of the factors, they're referring to other cases. They say "other cases". I don't think that it was...I mean, I...I think the Supreme Court--and this is just my view personally--I think they were giving the County of Maui the opportunity to resolve this by saving face. And I think that...I think it's an error to believe that because the Supreme Court didn't basically terminate the lawsuit at its level, that it was inviting the County to spend lots of money to try to convince the District Court and the Ninth Circuit that they were wrong. I really do...do feel that if...if you read the opinion, the Supreme Court, I think was giving the County of Maui a way to end the litigation in a way that everybody could feel good, or at least not feel bad. And I don't think that was an invitation to basically start over from scratch. And I think, as was cited by Ms. Bernard, all of the national attorneys--not just people who are, you know, represent environmentalists, but also people who represent industry, you know, I think the general feeling is that everybody is surprised at how aggressive the County has decided to continue to fight this.

...(timer sounds)...

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MR. COLLINS: So I think that's all I have to say. So if you have questions, I'm happy to answer them, I...but that's...I wasn't going to testify, but that's...that's my feeling.

CHAIR MOLINA: Okay. Thank you very much for your testimony, Mr. Collins. Members, is there a need to clarify Mr. Collins's testimony? I see Councilmember Sinenci.

COUNCILMEMBER SINENCI: Mahalo, Chair. And mahalo, Mr. Collins, for your testimony today. I just had a clarification. So from the Supreme...the U.S. Supreme Court, it's been sent down to...back to the Hawaii Supreme Court? Or Hawaii District Court?

MR. COLLINS: The Federal District Court. Well, it was sent back to the Ninth Circuit, and the Ninth Circuit sent it back to the District Court.

COUNCILMEMBER SINENCI: Was there any reason why the Ninth Circuit kind of just bypassed it and sent it back to the District Court?

MR. COLLINS: That's...that's typically...typically what happens, yeah, in this type of a case.

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

CHAIR MOLINA: Thank you, Mr. Sinenci. Member Paltin?

COUNCILMEMBER PALTIN: Thank you, Chair. Thank you, Mr. Collins for being here and for testifying. My question is...my clarifying question is, when you said that you think it's an error inviting the County to spend lots of money to convince the District Court they're wrong, the alternative to that would be to work with the State to acquire an NPDES permit. Like, what is the alternative to spending lots of money to convince the District Court they're wrong that you would suggest?

MR. COLLINS: Well, I think the...the County has made some nominal efforts towards reuse, but yeah, I think the crux of it is that the...at some point, the County's going to have to get a permit, and you can either do it by starting now, or you can spend a lot of money on experts to try to convince the District Court that they were...that she was wrong and then have to get a permit. So yeah, you know, it seems that you're...the County is...it would be very surprising if the County doesn't end up having to get a permit. So the question is, is the money you spend on all of these experts, which is going to be at least a million dollars from what was proposed to the District Court a couple weeks ago, is that worth basically delaying the inevitable? And that's, of course, what you folks are elected to do, so you would know best.

COUNCILMEMBER PALTIN: And then, are you...what you're saying about spending money on experts, what are the experts supposed to be providing for us in exchange for all that money?

MR. COLLINS: Well, this I'm... I'm not as --

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COUNCILMEMBER HOKAMA: Wait, point of order.

MR. COLLINS: --familiar with.

CHAIR MOLINA: Mr. Hokama, your point?

COUNCILMEMBER HOKAMA: That this should be part of the items discussion. This is beyond clarifying his testimony, Chairman.

COUNCILMEMBER PALTIN: I was clarifying what he said about spending a lot of money. I don't know what we're getting for all that money he was saying that we're going to be spending.

CHAIR MOLINA: Okay. Ms. Paltin, the Chair will allow the question to go forward, and Mr. Collins, if you can briefly touch upon that, since it was in your testimony, just sort...just to clarify --

MR. COLLINS: Sure, I don't want to waste --

CHAIR MOLINA: --that to Ms. Paltin.

MR. COLLINS: --everybody's time, so let me pull up what I'm...it was a filing that was filed with the District Court, and it was a bunch of pages. And it's quite extensive. Some of it seems to be duplicative of stuff that has already been done, and there's...yeah, there's...it was a memo from E-PUR Safe Water to [sic] All to Brian Bilberry, Richelle Thomson, and Colleen Doyle, prepared by John Lambie.

COUNCILMEMBER PALTIN: Oh, I...I did see that testimony, thank you.

MR. COLLINS: Yeah, so that's...that's...it's that document that I'm...I'm referring to, and I...as far as I understand, I think the minimum...if all of the things he's proposing would be done, the minimum would be a million or more dollars. And if it's not, then it's not really clear what exactly he really intends to...is proposing to really do.

COUNCILMEMBER PALTIN: Okay. Thank you. I did read that document. I'll relook it over.

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

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Mr. Collins. Mahalo for agreeing to testify. I understand that you weren't planning to, but your name got called in, so you volunteered testimony, which I think was really helpful because the previous testifier was not an attorney and you are. And I think in your testimony, you provided an explanation...a high-level explanation of the process and procedural...and

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procedures that courts follow. So as you explained, the Supreme Court remanded this case, not as an invitation for the District Court or the County to prove it wrong in its decision. It made its decision; that's its final decision on the merits. And so we're not trying to...so the County shouldn't be relitigating the...the merits of the case because it's already been decided, and we're...as you said, we're delaying the inevitable from 2012 or before 2012, where we...we should have just gotten a permit back then. So --

MR. COLLINS: So if I...if I could just sort of clarify.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay.

MR. COLLINS: So what the Supreme Court did was it said that the Ninth Circuit and the District Court had applied, basically, a test that was too broad generally, and instead, they should use functional...the functional equivalent test that they provided. The District Court and the Ninth Circuit, in their opinions, both said that the Lahaina Wastewater Treatment Facility is the functional equivalent of a direct discharge. So although they didn't apply the test because it didn't exist, they both decided that the...so it's...it's.. it's...so there was a decision on the merits; it went up...the wrong test was applied. And so what generally the District Court would do is reapply the test to the facts. And what my understanding the County is proposing is to do a whole bunch of additional discovery to try to provide additional facts to show that it's not a functional equivalent of a direct discharge. And so that's just to clarify. My understanding is that that's what's going on, is to try to disprove or...or change the District Court's view that it's a direct discharge...a functional equivalent of a direct discharge.

VICE-CHAIR RAWLINS-FERNANDEZ: Right. And for those who don't understand what discovery is, could you use an example of what discovery is?

MR. COLLINS: So most people experience...that are in a lawsuit that experience discovery is each party will ask the other party questions or they'll hire an expert to investigate something. And so in this case, that's what is being proposed is that this expert--what's his name, Lumbie [sic]? I'm sorry; I closed it--John Lambie would do some testing and some modeling and some data collection to then present to the...the court. And so discovery is just a way of basically fact gathering, and generally it involves experts.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo for that clarification on your testimony, Mr. Collins, and mahalo again for your testimony. Mahalo, Chair.

CHAIR MOLINA: Okay. Mahalo, Committee Vice-Chair Rawlins-Fernandez. Member King?

COUNCILMEMBER KING: Thank you, Chair. Thanks for being here, Lance. It's good to see you, and thank you for stepping up to testify because I think you're...being an environmental attorney especially, that you're familiar with these types of cases. And so I just wanted to clarify, because you mentioned that, you know, we could either get the...just start the test now or we could spend millions of dollars and then do the test

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because we're going to need a permit. Is that...is that what I'm hearing from you? Is there any scenario of anything the Court could come back with that would save us the money from doing the...the permit...from getting a permit? I mean, if we're going to spend a million dollars on these tests, is the...do you see a...a pathway to actually avoiding the permit process, and is that more than a million dollars to get that permit?

MR. COLLINS: So I think, if I understand your question correctly, I, in my own view, believe it's highly doubtful that the District Court is going to find that the Lahaina Wastewater Treatment Facility is not a functional equivalent of a direct discharge. I think the...how everything went down at the Supreme Court and so forth, that...it just...it...it's...it's highly, highly doubtful. And it is possible that the Department of Health is going to require the County to do some additional studies in order to create the permit. And so I don't know that it's the stuff that's being proposed to convince the District Court that it's not a direct...it's not a functional equivalent of a direct discharge, but I...I...I think for litigation purposes, it seems highly doubtful that whatever this data collection and analysis is, is going to change the fundamental facts in this case. They'll refine it, but I don't think that that's...I mean, the factors that the Supreme Court listed, they said in the opinion that when these are applied to other cases, the courts can determine whether or not there's a functional equivalent of a direct discharge. I think in this case, that's not...I don't think that they were implying that this case, that didn't apply. They rejected the County's arguments, unequivocally, as being unreasonable.

COUNCILMEMBER KING: Okay. And then the second and last question I have for you is, in your opinion, did the Supreme Court order new...new tests, new functional equivalent tests to be done?

MR. COLLINS: The Supreme Court did not order that at all. And again, I...I think if you look at the context, you know, you folks had accepted a settlement agreement, but then it was not...the Mayor did not sign the necessary paperwork. And although that isn't really a formal factor, you know, I think courts generally want parties to...to resolve their disputes in a way that everybody can move forward. And so I do really feel that the Supreme Court was giving the County the opportunity to basically resolve this issue in a way where everybody can move forward and feel good about that everybody has ownership in the decision. I...I...I just don't see anything in the opinion that suggests that they were inviting the County to, by this, start over from the beginning.

COUNCILMEMBER KING: Okay. Thank you. Appreciate it. Appreciate you being here.

CHAIR MOLINA: Okay. Thank you very much, Member King. All right, Members. I'd like to move on, if you don't have any other need to clarify Mr. Collins' testimony, for our next testifier. Thanks again, Mr. Collins, for giving your thoughts on this matter. Ms. Espeleta.

MR. COLLINS: Thank you.

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CHAIR MOLINA: Thank you. Ms. Espeleta, please continue.

MS. ESPELETA: Mr. Chair, your next testifier is Mr. Rob Weltman, followed by Ui Tanigawa Lum. And if each could identify the item or items that they wish to testify on, whether they're a lobbyist, and any organization that you represent. Mr. Rob Weltman.

CHAIR MOLINA: All right. Good...good morning, Mr. Weltman. Mr. Weltman, could you unmute yourself? We can see you, but we can't hear you.

MS. ESPELETA: Mr. Weltman appears to be unmuted. He may need to unmute himself on his end.

CHAIR MOLINA: Yeah. Mr. Weltman, if you could unmute yourself on your end?

VICE-CHAIR RAWLINS-FERNANDEZ: Chair, it looks like he is unmuted on his end as well. He may need to restart his device because it looks like it's not operating correctly.

CHAIR MOLINA: All right. Mr. Weltman, would you consider restarting, and we can come back to you once you're back online? We'll go to the next testifier, and once you're back online, we'll...we'll go back to you. Okay?

All right. We'll proceed in that fashion. So Ms. Espeleta, please announce our next testifier after Mr. Weltman, and once Mr. Weltman is back online, we'll go back to him.

MS. ESPELETA: Thank you, Mr. Chair. I believe your next testifier may have dropped off the line, Ui Tanigawa Lum. I don't see her on the call any longer. So moving ahead with the individual signed in as C.S., initials C.S. Please identify the item or items you wish to testify on, whether you are a lobbyist, and any organization that you're representing.

CHAIR MOLINA: Okay. Testifier C.S., please proceed with your testimony. Hello, testifier C.S. Are you there? Okay, seems we don't have any type of communication going on right now. Ms. Espeleta, is there another testifier after testifier C.S.?

MS. ESPELETA: Mr. Chair, I...I do see an individual that signed in with the last four digits of a phone number, 0136. 0136, please identify yourself and the items you wish to testify on.

CHAIR MOLINA: Okay, Testifier 0136, please proceed with your testimony and identify yourself.

MR. HENKIN: Chair. Hello? Can you hear me?

CHAIR MOLINA: We can hear you fine.

MR. HENKIN: You can hear me?

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CHAIR MOLINA: Yep.

MR. HENKIN: Oh, I'm so excited. This is David Henkin from Earthjustice. I apologize, Chair. I am struggling with your technology as I am out of the office and have limited connectivity. Sorry about that.

CHAIR MOLINA: Go ahead, Mr. Henkin, proceed with your testimony.

MR. HENKIN: Okay. Well, I submitted some written testimony for the Committee's consideration. Basically, the main points to that testimony are that it is quite clear that the Supreme Court squarely rejected the County's position that discharges that reach the ocean via groundwater are exempt from the Clean Water Act permitting program. So that was just...that was the position that the Mayor and Corporation Counsel were urging to the Supreme Court. They squarely rejected that. They said that, you know, that would basically make a mockery of the Clean Water Act, to allow polluters to evade and have a roadmap for evasion by using groundwater as a conduit to take pollution to the ocean, which is exactly the design of the Lahaina injection wells. They were intentionally designed to use groundwater as a sewer to convey treated wastewater into the ocean. It is not a storage facility, it's a disposal facility, and it gets rid of millions of gallons of wastewater every day. So it is true that the Supreme Court sent the case back to the lower courts to apply that clarification, which is that discharges via groundwater are not exempt. I heard snippets of prior testimony. I agree completely. You know, this is going to be a decision initially for the District Court Judge who already ruled against the County on many occasions on this particular issue, finding that their discharges are the functional equivalent of a direct discharge. So the, you know, the thought that the Court is going to come out differently on remand, you know, is highly, highly unlikely. And, you know, it's...we feel that it's time for the County to really focus on solutions here, rather than spending more taxpayer dollars in litigation. So I provided, attached to my testimony, the additional research that Corporation Counsel represented to the District Court needs to be done, and you know, at the end of the day, it's a common sense determination whether discharging this pollution into the ocean through the groundwater is just like discharging it through a pipe. And you don't need millions of dollars of studies to realize that there is a lot of pollution going into the ocean, and in fact, EPA already did us a big favor by funding a tracer dye study that conclusively established that. We would urge the Council and the County to work with the Plaintiffs on solutions to the damage to the reef, rather than spending more taxpayer money on litigation that, frankly, you know, you always need to assess your litigation risk. And as Ms. Bernard testified, independent experts --

...(timer sounds)...

MR. HENKIN: --have looked at the situation and concluded that the County --

MS. ESPELETA: Three minutes.

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MR. HENKIN: --does not have a high likelihood of prevailing. I'll answer any questions the Committee may have.

CHAIR MOLINA: Okay. Thank you very much, Mr. Henkins [sic]. Members, before I open up the floor for clarification purposes, Mr. Henkins [sic] does represent the Plaintiff, and I would ask that any clarification questions be framed as such to just his testimony and not try to stray. And also, I would also like to ask you to consider having Mr. Henkins [sic] potentially as a resource when we do get to the item if you have further questions, so I'll throw at you either option now. If you have a pressing need to ask a question now, keep it brief. Otherwise, Chair, with the approval of this body, would recommend that Mr. Henkins [sic] be used as a resource to clarify any issues, because we've suddenly found out that there was...well, from the side of the Plaintiff, that there was a settlement offer proposed by the County, which is news to me. I don't know if it's news to you, but it's certainly news to me. So all right. Is there any questions for now for Mr. Henkins [sic]? Again, Members, keep it brief, because I do have a big agenda and I'd like to complete it. Okay? All right. And be very straight to the point with your questions. I saw Member Paltin with her hand up, followed by Member King.

COUNCILMEMBER PALTIN: Thank you, Chair. Thank you, Mr. Henkin, for your testimony. My clarifying question is when you said spending more taxpayer money in litigation, so the alternative to doing that is to just work with the Plaintiffs and the State on getting a NPDES permit?

MR. HENKIN: That's absolutely correct. I don't think that any independent observer would look at this situation with a facility that was intentionally designed to dispose of pollution into the ocean and conclude that the end of this...the story ends only one way, which is the County is going to need to get a Clean Water Act permit and figure out how to comply with it. And the sooner the County focuses on...its resources on that task, rather than trying to hold back the tide, that's going to be in the best interests of all of the folks...all the taxpayers in Maui County, including our clients.

COUNCILMEMBER PALTIN: So if we work on that, there's no need to go back to court with litigation?

MR. HENKIN: That's absolutely...well, it's absolutely correct. So we already resolved...in 2015, we entered into a settlement agreement with the County that was approved by the Court that says that the County, once they've stopped wanting to fight this in court, what they're going to have to do is get the permit and invest in reuse, which is something this Council and the Mayor have already said that they want to do. So that shouldn't be imposing anything more burden than what you all said that you want to do, and there is a very nominal, because it's required under the Clean Water Act, fine to the U.S. Treasury, but really, the bulk of everyone's time and money is going to be spent on addressing the problems from these injection wells and...and protecting the ocean quality. I just want to be clear. A permit under the Clean Water Act does allow some

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pollution to enter the ocean. But the purpose of having the permit--it's not just a piece of paper--it makes sure that any pollution that does enter the ocean isn't going to destroy the reef off Kahekili at Hā'enanui. It's going to make sure that the ocean is healthy and clean, which is in everyone's interests. So it's not just a piece of paper; it's actually a process to make sure that any discharges that do happen under the permit are not going to damage the environment as we've seen the type of damage over the last decade plus.

COUNCILMEMBER PALTIN: Thank you. That was just my question. Thank you, Chair.

CHAIR MOLINA: Thank you Member Paltin. Member King?

COUNCILMEMBER KING: Thank you, Chair. Just real briefly because I know Mr. Henkin will be...I support having him come back as a resource when we get to this item. So thank you for that. But I also want to ask you, Mr. Henkin, are you...are you supporting...we heard from Ms. Bernard that you would like...that the...your clients would like this to be discussed in open session, rather than executive session. So is that your request as well?

MR. HENKIN: Yes. I would second that request. This is a matter of great importance to all the people of Maui County, and...and there's really nothing that needs to be discussed behind closed doors about that.

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

CHAIR MOLINA: Thank you Member King. Members, any other need to clarify Mr. Henkin's testimony? I believe I saw Member Sinenci, followed by Member Sugimura.

COUNCILMEMBER SINENCI: Thank you, Chair. I just had a question for Mr. Henkins [sic]. Do you know that prior to, you know, dumping it into the ocean, did the Lahaina Wastewater facility use it for agriculture prior to the dumping? Do you know that?

MR. HENKIN: I'm sorry, someone was talking to me, Member Sinenci. Could you just repeat that? I apologize.

COUNCILMEMBER SINENCI: I was just...I was just asking if you...if you were aware if the Lahaina Wastewater Treatment facility used the wastewater for agriculture prior to dumping it into the ocean?

MR. HENKIN: Well, the original intent...the original intent --

COUNCILMEMBER SINENCI: For groundwater, excuse me.

MR. HENKIN: --of the design of the...yeah.

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COUNCILMEMBER SINENCI: Go ahead.

MR. HENKIN: The original intent of the design of the facility, the original intent of the design of the facility was to be a backup with most of the treated wastewater going to feed sugarcane when that was still in production, a very thirsty crop. And so in the early years, there was very little use of the injection wells. It was just as a backup when the cane couldn't take all of the wastewater. So it's with the decline of sugar production in West Maui that increasingly the injection wells became the primary means of disposal. And that's when we started seeing the algal blooms along the coast there and the real damage to the reef. So, you know, ideally, we would go back to a situation in which the primary use for the R-1 water is irrigation reuse, and only as a backup system would you use the injection wells, again, with any pollution that gets out onto the reef being permitted to make sure that the level of nutrients and other pollutants is not going to destroy the reef.

COUNCILMEMBER SINENCI: Thank you. Thank you, Mr. Henkins [sic]. Thank you, Chair.

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

COUNCILMEMBER SUGIMURA: ...*(inaudible)*...

CHAIR MOLINA: Member Sugimura, you had your hand up? Go ahead.

COUNCILMEMBER SUGIMURA: Thank you.

CHAIR MOLINA: You have a need to clarify Mr. Henkin's testimony?

COUNCILMEMBER SUGIMURA: Thank you very much. Mr. Henkins [sic], thanks for being here. And I just am curious, then, just by keeping up with, you know, various decisions of the Supreme Court, they make a decision, and it's usually their decision. So why, then, did the Supreme Court send this back to the lower courts? If it's done and done the way that you're saying from the Supreme Court, I mean, why didn't they just say this is my decision and it's...that's it. I mean, why is it back to the lower courts?

MR. HENKIN: That's an excellent...an excellent question, and I...I think I heard a snippet of Mr. Collins's testimony that I think correctly speaks to that. So the Supreme Court is not actually all that interested in individual cases. It's...it does not accept review in a case because it really cares about the outcome in that particular case. Rather, it takes cases to resolve general issues of...of law, to make sure that there is uniform application of that law across the country. At the time that it accepted this case for review, it also had another case in front of it involving a pipeline spill, an accidental spill in South Carolina that presented the same issue because that petroleum was reaching the Savannah River and its tributaries via groundwater. There are a number of other cases in the pipeline--forgive the pun--in the Federal courts. And so the Supreme Court...it's really important to realize, they did not reverse the Ninth Circuit. Right? They did not

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reverse it. They didn't say the Ninth Circuit was wrong in concluding that you're...that the County's pollution via groundwater could violate the Clean Water Act. Instead, they didn't like the test as it was articulated by the Ninth Circuit.

COUNCILMEMBER SUGIMURA: Mr. Henkins [sic]?

MR. HENKIN: They were concerned it might reach...they were concerned it might reach...

COUNCILMEMBER SUGIMURA: So Mr. Henkins [sic]?

MR. HENKIN: Yes?

COUNCILMEMBER SUGIMURA: The next...okay. So I got that.

MR. HENKIN: So well, they took the test --

COUNCILMEMBER SUGIMURA: But so that...

MR. HENKIN: --if I may, to cut to the chase, so basically, they vacated the Ninth Circuit and they left it to the lower courts to work it out because, you know, ultimately they're not that concerned about the result in this case. But what they made clear was pollution via groundwater violates the Clean Water Act if it's basically functionally the same as disposing it directly into the ocean.

COUNCILMEMBER SUGIMURA: So therefore --

MR. HENKIN: And that's what we have happening.

COUNCILMEMBER SUGIMURA: --so therefore, Mr. Henkins [sic], can the County get our NPDES permit today?

MR. HENKIN: The County can and should be working with the Department of Health to get an NPDES permit ...(inaudible)...

COUNCILMEMBER SUGIMURA: We asked...we've asked before. We've asked before, Mr. Henkin, before we went to Supreme Court. We were never able to get it, and Department of Health was not able to issue it for whatever reason. And so...so you're saying that by this decision from the Supreme Court and where we are today, that we could get the NPDES permit from the Department of Health today?

MR. HENKIN: Well, nothing happens today, Councilmember. However --

COUNCILMEMBER SUGIMURA: But however --

MR. HENKIN: --the...the answer to --

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COUNCILMEMBER SUGIMURA: --however many months...however many months it would take --

MR. HENKIN: --the answer to your question --

COUNCILMEMBER SUGIMURA: However many months...

MR. HENKIN: --I believe it's...

CHAIR MOLINA: Member Sugimura, Member Sugimura, excuse me. Point of order, both of you. Member Sugimura, I respectfully ask that you let Mr. Henkins [sic] respond --

COUNCILMEMBER SUGIMURA: Well, I, I...

CHAIR MOLINA: --to your question. Excuse me. Let him finish, and then I'll open the floor up to you. Mr. Henkins [sic], please continue before the interruption. Or continue after when that interruption occurred by me. Follow through.

MR. HENKIN: Thank you, Chair. The short answer is, the County has never completed its permit application. The Department of Health asked for additional data, and the County has never provided it.

COUNCILMEMBER SUGIMURA: Thank you.

MR. HENKIN: So it's unreasonable for the County to wonder why it doesn't have a permit when it has not completed its application.

CHAIR MOLINA: Thank you, Mr. Henkin. Member Sugimura, any need to --

COUNCILMEMBER SUGIMURA: Thank you.

CHAIR MOLINA: --clarify Mr. Henkin's testimony?

COUNCILMEMBER SUGIMURA: Mr. Henkins [sic], if I was rude to you, I apologize. But I got my answer, and I was just trying to go on to my next question. So thank you for your response, and I guess you're going to be here as a...a resource when we talk about it. Thank you. No more.

MR. HENKIN: Oh, well, thank you. Thank you. Thank you, I appreciate it.

CHAIR MOLINA: Okay. Thank you very much, Members. Members, let's go ahead and move on to our next testifier, because we will have Mr. Henkins [sic] available to us when we do get to the item if you have any further questions. Ms. Espeleta, is Mr. Weltman back online for us --

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MS. ESPELETA: Yes.

CHAIR MOLINA: --to give testimony?

MS. ESPELETA: Yes, Mr. Chair. I do see him on the call. He is muted on his end, as well as his video. Oh, there he is.

CHAIR MOLINA: Okay. Good morning, Mr. Weltman.

MR. WELTMAN: Aloha mai kākou. (*Speaking Japanese*) (*Speaking Hawaiian*) Oloa ka Weltman ko'u inoa ...(inaudible)... o ka hui Sierra Club of Maui. Good morning, Committee Members and Chair, and I'm Rob Weltman of the Sierra Club. And of course, I would support moving to resolve this, rather than fighting the acquisition of an NPDES permit. I just wanted to say two things very, very briefly, and these are obviously from a layman's perspective, and I'm not an attorney in any way, but just my interpretation of the things that went down and those things that Lance and David said. There are two things that...the case of the Supreme Court, in my opinion, and the County was about two things. One was, does...does an indirect discharge into the ocean count against the Clean Water Act? And secondly, where the County says it does not. And then the County says well, if it does, then...then...the Clean Water...then an NPDES permit is also required for cesspools and for anything any...any discharge anywhere in...in Maui. And so the Supreme Court said...and the District Court only addressed the first one of those. The District Court and the Circuit Court, they said an indirect discharge is the same as a direct discharge, but they didn't address the second one. Supreme Court addressed both, and that's why it sent... that's why it sent back to the Circuit Court and the District Court. It said indirect discharge counts just like a direct discharge, so you have to have an NPDES permit, and...but it also addressed the second one, that no, you do not need an NPDES permit for a remote cesspool somewhere else on the island. They're...they're not the same thing. So it asked that the District Court and the Circuit Court to resolve that, make that clear. That's...that's my interpretation of what happened with the Supreme Court. The second one, and this is something that David Henkins [sic] went over, but I just want to reinforce, an NPDES permit is not a permit to do whatever you want, just say either you have a permit or you don't have a permit. I have a permit, okay. I'll just let it all go into the ocean. An NPDES permit...the purpose of that is to make sure you don't cause damage. And so it will specify limits on nutrients and will specify how you measure those and how you report on those to make sure that what you're doing is not damaging. We have, like the Maui Ocean Center who has a permit like that because they release...they recirculate...they release a lot of water into the ocean continuously, and so they have to have a permit that says how much can be in that, what they need to do, how they're measuring it, how they're following up. So I think both of those things have been clarified. Mahalo.

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CHAIR MOLINA: Okay. Thank you very much for your testimony, Mr. Weltman. Members, any need to clarify Mr. Weltman's testimony? Seeing none, thank you for your testimony, Rob.

MR. WELTMAN: Mahalo.

CHAIR MOLINA: Mahalo. Ms. Espeleta, please continue with our testimony...or testifiers.

MS. ESPELETA: Mr. Chair, unless the individual signed in as C.S. would like to testify, there are no other testifiers signed up.

CHAIR MOLINA: Okay, individual C.S., if you're there, this is your last opportunity to testify. Going once, twice, three times. Okay. Based on the comments from Ms. Espeleta with regards to no other testifiers, Chair is going to ask for your consideration of closing testimony for our agenda items today. Any objections? Okay. Seeing no objections. Ms. Espeleta, have we also received written testimony on our agenda items today?

MS. ESPELETA: Yes, Mr. Chair. We have received written testimony.

CHAIR MOLINA: Okay. Any objections to receiving written testimony on our agenda items?

COUNCILMEMBERS VOICED NO OBJECTIONS.

CHAIR MOLINA: Okay. Stating no objections. Okay. Very good, Members.

. . . END OF PUBLIC TESTIMONY . . .

CHAIR MOLINA: All righty, Members. Okay, please allow the Chair to proceed in the fashion with our agenda today. As you know, the first agenda item, which is GET-26 related to the Hawaii Wildlife Fund v. County of Maui, it is a status update. There's no legislative action we will be taking, other than consideration to file the communication. Okay? So any discussion of a proposed settlement, there is none. It's not agendized, so I want to make that real clear, okay? Now, I'm going to ask Corporation Counsel, if there are no objections, to walk us through the next four settlement proposals, just briefly touch upon it, and tell us if executive session is required for those. Okay. Moving on to GET Item 11(10), that is the County of Maui v. Rick Markham, if Corporation Counsel can just briefly touch upon it. Well, I think many of us are aware of it. Just tell us straight if we're going to require executive sessions for that. I believe, Mr. Bilberry? Mr. Bilberry or Corporation Counsel?

MR. BILBERRY: Yeah. Yeah. Can you hear us? Can you hear us now?

COUNCILMEMBER KAMA: Yep.

CHAIR MOLINA: We can hear you fine.

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MR. BILBERRY: Yeah, I think it's going to require a brief executive session, only because I have a settlement offer that I need to communicate to you and...and give you my evaluation.

CHAIR MOLINA: Okay. Thank you very much.

MR. BILBERRY: It...it'll be very...be very brief.

CHAIR MOLINA: Okay. Thank you. Moving on to GET Item 11(22), that is the...

UNIDENTIFIED SPEAKER: ...(inaudible)...

CHAIR MOLINA: I'm sorry, is...Corporation Counsel, you have a clarification?

MR. BILBERRY: No, no. We're good. Please go ahead. Move on.

CHAIR MOLINA: Okay. Thank you. All right. The next item, GET Item 11(22), which is the Bacon Universal settlement authorization. I believe Mr. Rowe is the attorney. Is there a requirement for executive session on that matter?

MR. ROWE: There shouldn't be, Your Honor...or Chair, sorry.

CHAIR MOLINA: Thank you. Thank you for the undeserved promotion, that's for sure. But I appreciate that. Okay. So no executive session required for that. Okay, very good. And then the next item, which is GET-11(31), which is the Alyssa Toth settlement authorization claim. Will there be a need for executive session for that matter?

MR. ROWE: Yes, Chair, but it should be fairly brief. It involved a personal injury, is...is the only reason, so we are going to have to discuss a little bit of medical issues.

CHAIR MOLINA: Okay. Thank you. And finally, the last item on the agenda, GET Item 11(37) Perlita Casino settlement authorization. Will there be a need for executive session?

MR. ROWE: No. No.

CHAIR MOLINA: Okay. No need for executive session on that item. Okay.

UNIDENTIFIED SPEAKER: ...(inaudible)...

CHAIR MOLINA: All right. Members...I'm sorry, Corp. Counsel, you have something else to add on the Perlita Casino case?

MR. ROWE: No.

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CHAIR MOLINA: Okay. All right. Thank you. Okay, Members, this is how the Chair would like to proceed. Being that we have two items that do not require executive session, I would like to get...take some action on the items that do not require executive session first before we consider the other matters, if there's no objections.

COUNCILMEMBERS VOICED NO OBJECTIONS.

CHAIR MOLINA: Okay. Hearing none? Okay. Yes, Member King?

COUNCILMEMBER KING: Yeah, just a question. What were those two items, because you were...were you skipping over item number GET-26?

CHAIR MOLINA: No, no, no. I...I basically touched upon that. We've, you know, I stated what it's about. There's no legislative...formal legislative action with a settlement proposal. It's just an update.

COUNCILMEMBER KING: Right.

CHAIR MOLINA: And the other consideration would be to file that communication, but --

COUNCILMEMBER KING: Right, but you didn't --

CHAIR MOLINA: --so we're not there yet.

COUNCILMEMBER KING: Yeah, no, you didn't say anything as far as regarding executive session then.

CHAIR MOLINA: Oh. Yes, yes, yes. Okay. Well, I was going to make that...ask that question when we get there. So I'd just like to take care of the other business first. Some of the other business first, and we will go back to GET-11(26) [sic] and we'll ask that question of Corporation Counsel. But ultimately, executive session will be a decision of this body, and you will need two-thirds votes to go into executive session.

**GET-11(22) LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: BACON
UNIVERSAL CO., INC.; CLAIM 30192754170-0001) (CC 19-29)**

CHAIR MOLINA: Okay. Let's get back to GET Item 11(22), the Bacon Universal Claim. Mr. Rowe, if you'd give us...touch upon it briefly?

MR. ROWE: Thank you, Chair. This loss occurred on December 28...or December 24th, 2018 at the Central Maui Landfill in Pu'unene. The County had rented a Komatsu dozer from Bacon Universal. While the...a County worker was operating the bulldozer, it...it flipped over onto its side, and the engine sustained damage, and the pumps froze. We called in Bacon Universal who performed a trouble...trouble call, but they were unable to get the dozer running again. They did have to bring it back to their facility, and they did a

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repair estimate, and determined that the cost of the repair was going to be \$114,266.04. The County submitted these repair estimates that were provided by the Plaintiff to Property Damage Appraisers of Honolulu on July 1st, 2019, and Property Appraiser...or Property Damage Appraisers found that the estimates were reasonable, based on the damage that had occurred. The total replacement cost for the dozer was going to be \$165,000, thus it was considered repairable, rather than trying to replace it. Someone from the Solid Waste Division of the Department of Public...or Environmental Management confirmed that the operator was using the dozer on a slope and hit a pocket where the ground was not sufficiently compacted, and that's what caused it to...to move. The dozer was not operable after this occurred because fluids in the engine had gotten mixed up, and it appeared to be internal within the engine. The County believes that it is liable for this and further, pursuant to the renter agreement that we signed with them, the renter...the rentee assures...assumes all responsibility for damage to the equipment and agrees to pay the full cost of repairs. Therefore, we believe that we are...we are accountable for paying for this, so we recommend settling this for \$121,181.88. This includes the cost of both the trouble call to have them come and look at it at \$6,915.84 and the cost to repair the dozer, which is \$114,266.04.

CHAIR MOLINA: Okay. All right. Thank you very much, Mr. Rowe, for that overview. And again, the Department that I guess has responsibility with this claim, was that Environmental Management or Public Works?

MR. ROWE: It's DEM.

CHAIR MOLINA: Mr. Rowe?

MR. ROWE: Environmental Management.

CHAIR MOLINA: Okay. So I believe we have...if Mr. Nakagawa's available, or a representative. Members or Mr. Nakagawa, do you have anything else to add into? Otherwise, I'll ask you just to stay on as a resource in the event Members have questions.

MR. NAKAGAWA: Hi, Chair.

CHAIR MOLINA: Is Mr. Nakagawa there? Okay. There you go.

MR. NAKAGAWA: Good morning, Chair.

CHAIR MOLINA: Morning. Do you have anything else to add into this, or would you prefer just to wait for any questions from the Members?

MR. NAKAGAWA: No, he did a good summary. So I can wait for whatever questions the Members have.

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CHAIR MOLINA: Okay. Thank you, Mr. Director. All right, Members, the floor is open for questions to either Mr. Rowe or Mr. Nakagawa. Member Kama?

COUNCILMEMBER KAMA: Thank you, Chair. I'm just curious. How is the driver of the bulldozer?

CHAIR MOLINA: Mr. Rowe or Director Nakagawa?

MR. NAKAGAWA: Chair, yeah, this is Eric. Yeah, so the driver did get a little bumped and bruised, but he's okay.

COUNCILMEMBER KAMA: Okay. Thank you, Chair. Thank you, Mr. Nakagawa.

CHAIR MOLINA: Okay. Thank you, Member Kama. Member Sinenci, followed by Committee Vice-Chair Rawlins-Fernandez.

COUNCILMEMBER SINENCI: Okay, Chair. I'm just curious. Does the County have, I guess, insurance for this type of thing to cover these costs?

CHAIR MOLINA: Mr. Rowe?

MR. ROWE: Yes. The County is self-insured up to \$500,000, so we don't have independent insurance to cover things like this. And the renter agreement didn't require us to get any additional insurance.

COUNCILMEMBER SINENCI: Okay. Thank you.

CHAIR MOLINA: Okay. Thank you, Mr. Sinenci. Committee Vice-Chair Rawlins-Fernandez, followed by Member Paltin and Member Hokama.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. Aloha, Director Nakagawa. I wanted to dovetail off of Pro-Temp Kama's question about Mr. Poaipuni, yeah. He was the driver. So is he back to work? You said that he got bumped and bruised.

MR. NAKAGAWA: Yeah, Chair. Yeah, so he's...I believe he's back to work already. This happened a while ago, so it's just...it's a long process in order to get the payment processed through. But yeah, so everybody's all good.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. And then a follow-up to that. I don't know if it can be answered in open session, but were we responsible for any medical bills on his end? I don't know if bumped and bruised meant going to the doctor and getting that...

CHAIR MOLINA: Mr. Director?

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MR. NAKAGAWA: Yeah, Chair. Oh, I'll just kind of summary [sic] real quick. I can check if we had any. But typically, what happens on these type of cases, if it's...if it's in work and they require any type of medical attention or like, time off, it's just a Workman's Comp claim. And basically, they're compensated for...they're not paying anything out of pocket. And that goes through an entire Workman's Comp process that the County already has established. So he definitely didn't have to pay anything out of pocket, and if he did, it would have been reimbursed through that Workman's Comp compensation program and then Rowe can...can expand on that.

MR. ROWE: And I'm not aware of a comp claim having been submitted on this particular incident.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. Mahalo for that response. And then my last question is regarding the rental of this type of heavy equipment. Is that something that DEM does often? Do we rent from Bacon Universal frequently, and is this type of equipment something that we would, as a County, rather purchase, and you know, have our own, instead of renting?

MR. NAKAGAWA: Yeah, so as far as on this renting, it was an actual, I guess, my understanding kind of not really a fluke, but basically, our piece of equipment had to go into the shop. So we had to rent a piece of equipment in order to get the work done. So basically it was kind of like...I kind of asked the same question. Like, does this normally happen? And Solaway (sic) says, like, yeah, these things...I mean, it was kind of a out of left park, kind of once in a lifetime. And unfortunately, it hit a soft pocket, and it...it just turned on its side. The only reason why we really sent it to Risk Management, we just felt that the dollar amount was a little excessive, so we wanted...we didn't want to just settle something and pay for that because it was to me...to us it seemed a little excessive. So what we did is...because when you go through the claims process, we have somebody who's hired to actually look into it and determine whether or not that's a reasonable price or not. So that's really the only why...reason why it kind of went through this bigger process than us really just compensating the...Bacon.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Director Nakagawa. Sorry. Last question with the soft pocket as you mentioned, is that something that's just unavoidable, or is that something that we can do a better job at mitigating?

MR. NAKAGAWA: As far as soft pockets generate, I know certain...so trash, in general, like real quick, decomposes, right, over time and it starts to settle. So a lot of things decomposes at a different rate. And generally, we...we know what we're doing, like I said, and we kind of understand what's going on. And unfortunately, I guess, Mother Nature, I guess you want to call it, I don't know what it is, created a soft pocket there. So typically, I haven't heard any case that, you know, that's happened before with this. But I can definitely look into it and let you know if...if there's anything else we can do.

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VICE-CHAIR RAWLINS-FERNANDEZ: Okay. Mahalo Director. I guess that's another reason to move toward not burying our solid waste anymore, yeah? Mahalo, Director. Mahalo, Chair.

CHAIR MOLINA: Okay. Mahalo, Committee Vice-Chair Rawlins-Fernandez. Member Paltin, followed by Member Hokama.

COUNCILMEMBER PALTIN: Thank you. A lot of my questions already got asked. I just have a couple outstanding ones. What is being done so that this doesn't happen in the future? Like, are they always being tapped down before going on now with the piece of machinery? First question.

CHAIR MOLINA: Mr. Director or Mr. Rowe?

MR. NAKAGAWA: Yeah, Chair, so operationally, I mean, once again, we...our guys are well trained. They go through a training process. Compaction, I guess you want to call it, of trash is...is a standard thing. And unfortunately, it seems to have been a fluke, like I said earlier. And on top of that, it was just a rental piece of equipment, right. So it kind of compounded. But as far as compacting our trash and that kind of stuff, our guys are well...know what they're doing and they follow all the standard protocols by ...(inaudible)... accident, I guess.

COUNCILMEMBER PALTIN: Lucky thing is there was no serious injury or loss of life. Just wondering on your testing procedures, would something like this trigger drug tests or anything like this?

MR. NAKAGAWA: Chair. Yeah, so --

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: --I mean, as far as...yeah, and as far as drug tests, I mean, I think we're pretty all aware, UPW, how we do have random drug tests and that kind of stuff. As far as if it's more of a because we had an accident and then the individual should be drug tested, that kind of stuff, I'm not too sure what that protocol would be, and if either personnel or counsel want to chime in, like...that's not really kind of how, like...

COUNCILMEMBER PALTIN: I guess...maybe you could...because you're the Director, so you're like the supervisor of all these employees, so maybe... what would trigger a drug test. You know, I mean, if a car accident, if there was any kind of accident. You know, we had previous employees lose limbs when this type of thing happened, and so you know, it's...it's a very serious issue not just because of the money involved in the rental equipment, but the safety of our County employees, that I think us as a Council take very seriously that we don't want to have any loss of life, loss of limbs, loss of...any kind of injury to our workers. And what are we doing to prevent that, you know?

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MR. NAKAGAWA: Yeah, so to me, with all of that training, all of the safety protocols that we do on a yearly, annually, and quarterly basis, that's the safety training. I think I may have misunderstood your question and that because there was an accident, we should do a drug test, meaning...I mean, to me, that insinuates that, oh, you might have been under the influence while you was operating the piece of equipment. So that's kind of where I was coming from is kind of like I don't know...I've never heard of that being a reason to send somebody and do drug tests. So I can definitely look into it. I don't know. Drug tests are pretty standard protocol we've worked out with the unions, as you are well aware, and so as far as random drug tests, all that, it's really a scheduled thing we don't participate. It's names that are generated on a list and given to us, and then we let the person know that they...that they can't call in sick, you know, if they are doing drugs or whatever. Yeah, so --

CHAIR MOLINA: I think...Mr. Nakagawa --

MR. NAKAGAWA: --but I think it's a bigger --

CHAIR MOLINA: --I think you answered Member Paltin's question. Quite sure.

COUNCILMEMBER PALTIN: Okay.

CHAIR MOLINA: Okay. Member Paltin...sorry, I've got to move you guys along --

MR. NAKAGAWA: Yeah, yeah, yeah, yeah.

CHAIR MOLINA: --a little bit because we've got others. But thank you. Member Paltin, anything else for Mr. Nakagawa?

COUNCILMEMBER PALTIN: No, that was my two questions. Thank you.

CHAIR MOLINA: Okay. Thank you. All right. Mr. Hokama followed by Ms. King.

COUNCILMEMBER HOKAMA: Chairman, yeah, thank you, and I appreciate the previous questions. I think the one I wanted to follow up from Ms. Rawlins-Fernandez. The rental, Director, I just was curious, is it similar to the equipment...the County-owned equipment that was in the repair shop? I was...whereby the operator is, you know, using a rental equipment that is very similar or alike to what the County equipment was? The familiarity and operation of equipment is not an issue because that's what we use anyway?

MR. NAKAGAWA: Yes, Chair. Yes, Member Hokama, yes, that would be correct.

COUNCILMEMBER HOKAMA: Okay, okay, because I was wondering if our equipment didn't have a roof, and the rental had the roof, we understand center of gravity, yeah. And so we understand that could have been a difference, and that's why, I think, part of our

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questions about risk management, safety protocol, we take seriously, because I would agree with Ms. Paltin, we're concerned about our employees' safety. But I can tell you this, it's not that far long ago, because I still recall where our operator ran over a resident in the landfill and we had a fatality. Okay, it happens. Okay, we had fatalities. So my...my thing was, whatever's appropriate, I agree with you. Collective bargaining has taken care of the drug test question so far, so I'm...I'm okay with that. But my next question is, have you made adjustments? Because you just told us of one thing that leads to a degree of concern. The compaction and the ground that your people are working on is ever changing because of your...rate of the composed...composition, right, Director. So have you made adjustments on your operations to even give yourself a better safety factor for your operators in these situations?

CHAIR MOLINA: Mr. Director?

MR. NAKAGAWA: Yeah, Chair. Yeah, Mr. Hokama. Yeah, that's a great question, and I think every operation...every incident...for those of you who don't know, whenever we have these incidents that happen, they fill out a report. Part of that report states what happened, why it happened, and after that, it always states on what could have done differently or what can we do in the future to prevent it. So that is all part of the process in which we have these things. So I don't have the exact report in front of me, so I can't really exactly tell you how we adjusted our protocols, how we adjusted our standard operating procedures, but I can tell you that it's a standard process that we go through.

COUNCILMEMBER PALTIN: The report is ...(inaudible)... and it just says compact the...it's...we have it in our computers.

CHAIR MOLINA: Hello? Is that your response? Mr. Hokama, anything else for Mr. Nakagawa?

COUNCILMEMBER HOKAMA: No. Other than that, I think they do a pretty good job operationally. So thank you very much, Chairman.

CHAIR MOLINA: Okay, thank you, Mr. Hokama. Member King?

COUNCILMEMBER KING: Thank you, Chair. I just wanted to follow up on an earlier question about drug testing because...and I was shocked to hear that Director Nakagawa had never heard of drug testing for accidents before because in industry it's automatic. If you have any kind of accident with a vehicle or with any kind of industrial equipment, most of the insurance companies make you drug test your employees. It's not random. It's not considered random. It's a direct result of an accident. So I just wanted to find out from Mr. Nakagawa, is that something that the union has bargained away is the right to know...to do that testing? It's not an accusation. It's a safety measure.

CHAIR MOLINA: Mr. Director?

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MR. NAKAGAWA: Yes, thank you. So I think, for me, and when I speak of I don't understand, I mean, or I have never heard of, meaning we've had a handful of accidents that were resulted from...or not accidents but some type of vehicle or equipment accidents. And as far as I know, we've never done a drug test because they were in an accident. I understand that in the industry standard or to operate a vehicle or heavy equipment that other people, maybe it's a normal process. But the County does...either you...it's a union thing or it's a random, it's a protocol, or there's a reasonable suspicion from supervisors that somebody for some reason has symptoms or signs that they're under the influence, and then we can do some type of...or send them for drug testing. So as far as I'm just trying to address, you know, her...Member King's question of that it's a standard protocol that you do that. I'm not aware of it. And so if...and if there is one, then great; I'm more than willing to implement that policy.

COUNCILMEMBER KING: Okay, well, I'm just curious 'cause as Director, that's probably one of the first things that you should be aware of, of whether that is standard or not. And I'm just telling you as somebody who owns a company where we do have drivers and we do have a lot of technology, process technology, industrial equipment, that it's standard, if there's an accident, to do drug testing because you're worried about the safety of...you want to make sure it's not an operator issue because there are other people that are vulnerable to being near those kinds of operations. So it's not an accusation; it's just an automatic thing that the insurance company makes us do, and that's something that, as Director, I think you should probably be aware of for the Department, whether or not that's required or is it something that, you know, has been bargained away, the...that protocol.

CHAIR MOLINA: Director?

MR. NAKAGAWA: That...oh, if there was a question, yeah, I guess I am aware like private side, they do that, and...

COUNCILMEMBER KING: But you're not aware of the County's responsibility for that?

MR. NAKAGAWA: Right. I've...once again, I've...all the accidents that I've had and dealt with there was never a mandatory drug test. And so if...once again if Personnel...I'll inquire with Personnel and as well as Corporation Counsel and if they feel that that's necessary and to...for public health and safety, I'm more than willing to...I'm not accusing again, either. I...

COUNCILMEMBER KING: Yeah, it's not an accusation; it's just a standard protocol. So I'm just curious as to if you can...maybe, Chair, maybe you can make that request of...to get a response from the Department so that they can look into it and find out if their Department is required...what they're required to do. Thank you.

CHAIR MOLINA: Okay, certainly. Chair will instruct Staff to draft a request for that information to the Department. Okay. All right, so seeing no other need for questions

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for either Mr. Nakagawa or Mr. Rowe, Chair will then ask for a motion to support the proposed resolution entitled "Authorizing Settlement of the Bacon Universal Claim." Is there a motion on the floor?

COUNCILMEMBER LEE: So moved.

COUNCILMEMBER KAMA: Second.

COUNCILMEMBER HOKAMA: Second.

CHAIR MOLINA: Okay. Okay, who announced the move? Was that the motion...

COUNCILMEMBER LEE: That's me.

CHAIR MOLINA: Oh okay, sorry, I didn't see your hand go up. Okay, motion made by Chairman Lee, seconded by Member...we'll give it to Member Hokama. Okay. Any discussion? Seeing none, all those in favor, signify by saying "aye" or raise your hands.

COUNCILMEMBERS VOICED AYE.

CHAIR MOLINA: All those opposed.

**VOTE: AYES: Chair Molina, Vice-Chair Rawlins-Fernandez,
 Councilmembers Hokama, Kama, King, Lee,
 Paltin, Sinenci, and Sugimura.**

NOES: None.

ABSTAIN: None.

ABSENT: None.

EXC.: None.

MOTION CARRIED.

ACTION: ADOPTION OF RESOLUTION.

CHAIR MOLINA: Okay, Chair will mark it unanimous, nine "ayes", zero opposition. All right, thank you very much. This matter will advance to the full Council.

**GET-11(37) LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: PERLITA
CASINO; CLAIM 30193234263-0001) (CC 19-29)**

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CHAIR MOLINA: Okay, Members, going to our next agenda item for...that did not require open...executive session, that is GET Item 11(37), the Perlita Casino claim. I'd like to ask Mr. Rowe to again give us a brief...again brief overview of this matter, and then the Chair will open up the floor to any questions. Mr. Rowe?

MR. ROWE: A sewage...this loss involved a sewage leak that occurred at the claimant's residence at 237 West Papa Avenue. On July 17, 2019, renters of the property noticed that two of the bathrooms were clogged and that sewer water had started piling out of the toilet and the tub. Eventually, the water had overflowed so much that it went into three bedrooms; the living room, the kitchen, and two bathrooms. This was a rental property that was located in the basement of the property. The claimants called two contractors, JC Contracting and Kahului Carpet, to do mitigation repairs. They removed flooring in the living room, the kitchen, the bathrooms, and installed laminate, and then also replaced ceramic tiles in the bathrooms. They also removed baseboards, bottom kitchen cabinets, and the vanity, installed two new bathtubs, new cabinets, and that sort of thing. They also needed to replace the doors and the closets in all three bedrooms. The total invoice from JC Contracting was \$55,128.70. They also went through Kahului Carpet which helped them dry out and treat the inside of the baseboards and the floors with...treated it for bacteria and also helped remove and dispose of the furniture in the bathrooms and the bedrooms. Their invoice totaled \$19,678.28. So the total work of remediation was \$74,806.96, or 98 cents, sorry. In addition, the renters that were living in the basement were reimbursed \$3,000 for two months of worth of rent while these replacements were being done. There was also an increased electrical bill of \$118.79. We reviewed several months of electric bills and did note that there was an increase for the month that the remediation was being done due to the use of a humidifier. There was also the need to buy new furniture. Initially, the old furniture had last been bought about six years ago. The total invoice for new furniture, which is also included in the packet that was presented, was \$21,278.98. We did refer to the Department of Environmental Management who confirmed that the backup was due to a blockage in the main line on the County side. Several other neighbors in the same neighborhood had also experienced some backups; however, there was no flooding in theirs because they do not have underground basements, so the situation wasn't quite the same. We did...well, I should state that the claimant submitted a claim to their insurance company, but that claim was denied on the basis that backed up sewage was not covered under their policy. We did refer this claim and the invoices, as well as the pictures, to...our third-party adjuster has a special division that looks at betterment and depreciation to try and determine how much the County would actually be responsible for these costs. And depreciation means basically when they replace things, their old furniture wasn't as valuable, and so we would get a benefit from that. Also, betterment meaning their, you know, we...their bathrooms were fixed, their kitchen was fixed, and we get a benefit...they received a benefit because it was in better shape than it was when we left [sic] it. So using their formulas, they determined that the actual cash value for the claims, for the structural claims was \$58,955.78, and that's compared to the \$74,806.98 invoices that we got. We also looked at the value of

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furniture that was lost, including the depreciation of it being bought for 16 [sic] years ago and determined that that was approximately \$14,320.13. So including those two figures, the increase in the cost of electricity, and the loss of rental income of \$3,000, we came up with a total of \$76,394.70, and that's the amount that the claimant's agreed to settle this claim for.

CHAIR MOLINA: Okay, thank you very much, Mr. Rowe. Members, questions for Mr. Rowe? Okay, Member Paltin, followed by Member Hokama.

COUNCILMEMBER PALTIN: Thank you, Chair. My question is just that is, was everything legally permitted? Was the underground basement legal and was the rental legal? Like an accessory dwelling unit or something like that, was it all legal, zoned, everything?

CHAIR MOLINA: Mr. Rowe? And also we have, I'm sorry, we got Director Nakagawa as well if he would like to add into that question from you, Mister...Member Paltin. First, Mr. Rowe.

MR. ROWE: Yes, we did look at it, and it was a legal basement.

COUNCILMEMBER PALTIN: Okay, thank you.

CHAIR MOLINA: Okay, thank you very much.

COUNCILMEMBER PALTIN: In the...

CHAIR MOLINA: Mister...oh, go ahead, Member Paltin.

COUNCILMEMBER PALTIN: You just said it was legal basement; was it a legal rental, as well?

MR. ROWE: I believe so, yes.

COUNCILMEMBER PALTIN: Okay.

CHAIR MOLINA: Okay, thank you, Member Paltin. Mr. Hokama?

COUNCILMEMBER HOKAMA: Yeah, Chairman, thank you. I just wanted to follow up with Ms. Paltin. That was my only thing, Director, if Planning verified, this is, was a permitted whatever they had regarding their rental space? Everything was properly permitted by the County for whatever improvements or construction was required for this bathrooms?

CHAIR MOLINA: Mr. Director?

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MR. NAKAGAWA: Oh, yeah. So that's what we are looking into with Public Works is just making sure that the basement was legal, that's all. We're doing some investigation for this.

COUNCILMEMBER HOKAMA: Yeah, no, I appreciate that because until we get this kind of things we know there's a lot of construction that goes unpermitted, yeah, in our County. I mean, we're no different from any other county, so we understand we have a degree of unpermitted work that is done. And unfortunately, the homeowner is going to get it in his insurance adjustments and whatnot. But for us, you know, I just want to make sure that we make the property owner or homeowner do the appropriate adjustments per Code to...for future safety requirements as well as connectivity to our system. Thank you.

CHAIR MOLINA: Thank you, Mr. Hokama. Seeing no other questions for either Mr. Rowe or Mr. Nakagawa...oh, okay, I see Committee Vice-Chair Rawlins-Fernandez with a question. Proceed.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. I'll make it quick to be mindful of your agenda. So really quickly, I...what kind of mitigation measures have been taken after this?

CHAIR MOLINA: Mr. Rowe or Director Nakagawa?

MR. NAKAGAWA: I can answer some of that, Chair. So this was a kind of unusual case for us. It's not a problem area for us. So what we did was we did do some structural damage analysis which came out negative. It's...it looks okay. There was a slight sag in a couple areas of the sewer line, but nothing out of the ordinary. And so we do...the only reason why, you know, kind of following up on Member Hokama's question, we were looking into whether or not the basement was built permitted-wise because as you can imagine, like, we...every subdivision builds sewer lines at a certain depth. And so what we realized with this one, and whereas, you know, we didn't get all the facts yet; we're kind of still looking into it...is just that the...when you build a basement, that means it's lower, right, closer to our sewer line. And so it seems really unusual that we have a non-problem area and then we're having backups now. That doesn't take away anything from this one particular case. I...there was damage, and according to us, there was grease backup. So...but going forward as far as Member Keani Rawlins' [sic] question is, we're trying to figure out, okay, so how do you mitigate that, and because now, all of sudden, they're so close to that sewer line. And so we're still trying to figure out, like, doing our investigation how do you mitigate it again.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Director Nakagawa. After the investigation, will you please provide our GET Committee a report on that mitigation?

MR. NAKAGAWA: Yes, will do.

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

CHAIR MOLINA: Okay, mahalo, Committee Vice-Chair Rawlins-Fernandez. Member King?

COUNCILMEMBER KING: Thank you, Chair. I have a question for Mr. Rowe. Since we're being asked to approve the settlement, I'm assuming, today, and the investigation seems to be ongoing as far as the legality of the basement and potential permits that might have been required. It sound like Mr. Nakagawa said they were still investigating. So what happens if they investigate and they find out it's not legal and we've already settled it with these numbers?

CHAIR MOLINA: Mr. Rowe?

MR. ROWE: Yes, thank you, Ms. King. The issue is, I believe, that if anything, that might potentially affect their ability to rent out the property. But the fact of the matter is that they still had a loss that's due to what the County did. The...we could potentially, if it turns out that it was...it wasn't properly permitted, we could go through the route of permit enforcement, zoning enforcement to try, and you know, possibly recover some of that amount. But we still ultimately...we're responsible for damage that did occur.

COUNCILMEMBER KING: Okay.

MR. ROWE: I believe that what Mr. Nakagawa was referring to is whether or not something about the basement specifically exacerbated that, the situation which we, I think we kind of gauged what the result was, which is why other properties weren't flooded. But ultimately, you know, it was our responsibility that there was a backup. They did incur a loss, and if there is an issue with any sort of permitting, that would probably be a different venue that would be going through someone else.

COUNCILMEMBER KING: Okay. I just wanted to make sure because, you know, this is going to affect future cases too, so if there's other, you know, structures like that that are...if there's a legality question, then there's a liability, I just want to be clear on where we're going in the future. So the bottom line is it's the County's responsibility for the backup?

MR. ROWE: Correct.

COUNCILMEMBER KING: Okay. Thank you.

MR. ROWE: That's how we looked at it.

COUNCILMEMBER KING: Thank you, Chair.

CHAIR MOLINA: Okay, thank you, Member King. Members, any other questions for Mr. Rowe before the Chair offers a recommendation? Okay, seeing none, the Chair will recommend approval of the proposed resolution entitled Authorizing Settlement of the

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Perlita Casino matter and with the aforementioned claim number attached there. So Chair will entertain a motion.

COUNCILMEMBER LEE: So moved.

COUNCILMEMBER KAMA: Second.

CHAIR MOLINA: Okay. Moved by Chair Lee, seconded by Member Kama. Members, any discussion? And again, the proposed settlement amount is \$76,394.70. Okay, seeing no further discussion, Chair will call for the vote. All those in favor, signify by saying "aye" and raising your hands.

COUNCILMEMBERS VOICED AYE.

CHAIR MOLINA: All those opposed.

**VOTE: AYES: Chair Molina, Vice-Chair Rawlins-Fernandez,
 Councilmembers Hokama, Kama, King, Lee,
 Paltin, Sinenci, and Sugimura.**

NOES: None.

ABSTAIN: None.

ABSENT: None.

EXC.: None.

MOTION CARRIED.

ACTION: ADOPTION OF REVISED RESOLUTION.

CHAIR MOLINA: Okay, Chair will mark it unanimous, nine "ayes" with zero opposition. This matter will move on to the full Council. Thank you very much, Mr. Rowe. All right, Members. Okay, let's get back to our agenda. I know some of you may be requesting a break for personal reasons, and that is certainly justifiable.

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: Getting back to our first item on the agenda which is GET Item 26. Let me ask for the record for...a question for Corporation Counsel. As it states on the agenda, there is no...it's just a status update, and the only action is the consideration of filing

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the communications for I believe this matter. Ms. Thomson, so just to verify that, so there is no action, no proposed settlement you want this body to consider. Am I correct?

MS. THOMSON: I think what would be best is if we provide a status update, you know, that includes the remand from the Supreme Court and where things stand at the Hawaii District Court and some of the communications that we've had both through the court itself and then also with the Department of Health.

CHAIR MOLINA: Okay.

MS. THOMSON: So we can cover all of those aspects today.

CHAIR MOLINA: In open session?

MS. THOMSON: Yes.

CHAIR MOLINA: Okay. And then the...it was noted that the County submitted a settlement but was rejected by the plaintiffs. And was the counterproposal by the plaintiff accepted or rejected by the County?

MS. THOMSON: Neither; it's being considered. But several things have happened during the month of June, you know, one of which is the remand to the Hawaii District Court, and that court ordering additional discovery in terms of fleshing out the details of the Supreme Court's test. And, you know, throughout that, separately, both DEM and our office has been in touch with and working with the Department of Health and the State AG's Office. So one of the things that has happened at the District Court level is that they have ordered settlement discussions. So that will be, you know, commencing fairly soon.

CHAIR MOLINA: Okay, and thank you. Again, I ask these questions because, you know, we've heard from the plaintiff, and the Members want and I also want the plaintiff as a resource, so this is sort of why I'm asking for this consideration of having the plaintiff be able to answer some clarifying questions or issues that are out there. So...and of course the body can make a decision as to whether we go into executive session on this matter or not. Okay. All right, Members, so this is what we have here. It's...do you want a brief recess? We'll start the discussion off in open session first, and again, I'm sorry to have to limit your time. This is a status update and again no legislative action to...as far as I'm concerned and what...and verified by Ms. Thomson as far as this Committee considering today. So basically, how I'm going to run it is three minutes, one round, that's it, and then we'll see how it goes from there. And then, of course, if there is a need for executive session, then the Chair will certainly entertain that consideration. So let me --

COUNCILMEMBER KING: Chair?

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CHAIR MOLINA: --start first...yes, Member King?

COUNCILMEMBER KING: Did you say earlier that you were going to ask the attorney, David Henkins [sic], to do a brief presentation as well?

CHAIR MOLINA: I don't think we're going to have time for a brief presentation. I'd just like him there as a resource to answer any questions you may have at this point.

COUNCILMEMBER KING: Okay. So the three minutes covers questions from, to Corp. Counsel --

CHAIR MOLINA: You...

COUNCILMEMBER KING: --and to David Henkins [sic]?

CHAIR MOLINA: Yeah. And well, we'll play it by ear, but let's just go. Do the best you can. Again, I'll ask the plaintiff, as well as the Corporation Counsel, in open session be as brief as you can. If it's just a yes or no answer, please do it that way without giving a long dissertation out of consideration for the time we have left in Committee today unfortunately. Otherwise, Members, I'll...I'd hate to have to ask you to come back for another recess meeting, and we do have back-to-back committee weeks due to the need of the Chambers because of the Clerk's Office, so we had to make adjustments to that. And I've got another big agenda coming up on July 14 as well. So anyway, just some food for thought. All right, we'll start off first, we'll start with my Committee Vice-Chair. Is...Mr. Henkins [sic], are you online right now?

COUNCILMEMBER KING: Oh, are we...we're not taking a break then?

CHAIR MOLINA: Oh. Okay, well, what's the pleasure of the body? Do you want to take a break first, short break --

COUNCILMEMBER KAMA: Break.

COUNCILMEMBER PALTIN: Break.

CHAIR MOLINA: --and then come back and then come back into open session?

COUNCILMEMBER KAMA: Yeah, break.

CHAIR MOLINA: All right. Okay, Members, let's do this, let's take a ten-minute break, and we'll come back into open session for GET Item 26. So GET Committee meeting for July 7 is now in recess. . . . (gavel) . . .

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RECESS: 10:46 a.m.

RECONVENE: 11:02 a.m.

CHAIR MOLINA: . . . *(gavel)* . . . The GET Committee meeting for Tuesday, July 7th is now back in session. Thank you for that much-needed break, Members. We left off on GET Item 26, which is the Hawaii Wildlife Relief Fund matter with the County. So as I stated earlier, we'll start the line of questions in open session, and if there is a need for executive session, the Chair will certainly be open for that. All right, first, again, as I stated the parameters early, three minutes. Again, try and get in as much as you can in this round, and if it's necessary to get a follow-up, we'll try and address it as best as we can. But again, just as a reminder, Members, I have two other matters on the agenda that I would like to get addressed, if possible, and those two matters will require executive session. So just as an FYI. And we do have a 1:30 meeting with Mr. Sinenci's Committee, so I would like to try and avoid as much cutting into your lunchbreak as much as possible if we do have to go beyond 12 o'clock. Okay? All right, here we go. We'll start off with Committee Vice-Chair Rawlins-Fernandez. Please go ahead and open up with your line of question either for Mr. Henkins *[sic]* or Corporation Counsel.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. I thought that I understood your proposed format for this portion of the meeting would be to receive the status update from Corporation Counsel and then, from there, if we have questions on the status update which was...they said that would be done in open session then we would ask them questions based on that update. Is...was that not what you mentioned?

CHAIR MOLINA: And maybe I guess I did, but I'm thinking if we could...you want to just bypass that and just go right into the Q&A? I can do it that way if that's the preference of the body. Let Corporation Counsel give opening remarks and then Q&A. I think we heard a lot from Mr. Henkins early on with the Q&A in testimony. So if that is an option you'd like to prefer, we'll go Corporation Counsel give opening remarks with their version of the update and then proceed with questions. We can do that. Is that --

VICE-CHAIR RAWLINS-FERNANDEZ: Yeah.

CHAIR MOLINA: --would you prefer that approach, Members? Okay, I see a lot of heads nodding. Okay, Corporation Counsel, I guess, Ms. Thomson or Mr. Bilberry, go ahead and give us your opening with regards to the update on what happened at the Supreme Court.

MS. THOMSON: Thank you, Chair, and thank you, Members. So in April, the Supreme Court issued its decision. It reversed and remanded to the Ninth Circuit. What that means is that it took the decision away. Basically, we're back to square one in terms of the court process. So the Ninth Circuit remanded to the Hawaii District Court with instructions also to apply the U.S. Supreme Court's multifactor test. At the Hawaii District Court, just in the last I think probably ten days or so, we received an order from the District

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Court magistrate judge ordering additional fact-finding discovery. So that's going to occur over the next four to six months. And the purpose for that discovery is that the Supreme Court's test is not the same test that was used by either of the lower courts. Even though there may be information in the record that does feed into those, the tests, the Supreme Court's test, that there are additional factors that are site-specific. And one of the things I think to keep in mind is that it's been misportrayed in the news, and I'm not going to comment on the reasons for that, but the Supreme Court did not issue a win or lose order. What it did was issue exactly what we had been looking for all along which is clarity in this area of the law. And the reason we need clarity is not only for Lahaina but for the other wastewater treatment plants and other sources that may be covered by this new interpretation of the Clean Water Act. So in terms of the County's position, we got exactly what we wanted from the Supreme Court. So if you remember, last year there was a lot of hammering and fearmongering about going to the Supreme Court, and it was gutting the Clean Water Act and it was aligning ourself with the Trump Administration and all of that rhetoric. Well, I just want you to keep in mind that what we were telling you then is the same thing that we're telling you now. We're not trying to fearmonger; we're trying to assist the County in applying the law as it's written and also as it's interpreted through the courts. So that's basically where we are right now. I won't go into the details of the Supreme Court's test unless you would like me to. Thank you.

CHAIR MOLINA: Okay, thank you very much, Ms. Thomson. At this point, I'd just like to open it up, you know, the line of questioning for the Members, and then if Members want to have specific questions about the Supreme Court, they can include that in their line of questioning. Okay, Committee Vice-Chair Rawlins-Fernandez, you have the first turn, three minutes.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay, mahalo, Chair. I guess I'll...so I don't feel like that was a complete update because after the SCOTUS announced its ruling, Corporation Counsel then took further action in sending a settlement offer to the plaintiffs that we were not informed of and then received a counteroffer from the plaintiffs that we again were not informed of. So I think the status update is incomplete. Mr. Henkins [sic] or...

MR. HENKIN: Yes. I'm here. Am I visible and audible?

VICE-CHAIR RAWLINS-FERNANDEZ: Yes. So my understanding of the court's decision was not that it was reversed; it was just remanded. But the status update that we just received, Ms. Thomson said that it, the decision of the Ninth Circuit Court was reversed.

MR. HENKIN: Yeah, that's actually a very important distinction. You don't need to take my word for it; it's in the opinion itself. They did not reverse the Ninth Circuit. What they did was vacated, and the distinction is as follows: they did not...they actually fundamentally disagreed with the County. They rejected the County's position that because the discharges from the injection wells go via groundwater, the Clean Water Act

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has nothing to say about it. So when Ms. Thomson says the County got what it asked for, that's not true. The County asked the Supreme Court to rule that discharges via groundwater are exempt from the Clean Water Act, and the Supreme Court in a six-three majority--and I hope you all can appreciate that with this court, six justices weighing down is very decisive--said no, that would destroy the Clean Water Act. It would be a road map for evasion. So as long as a discharge via groundwater is functionally the same as a pipe going into the water, you need a permit. So they did not reverse the Ninth Circuit, but they didn't like the formulation of the test, so they vacated that, and they said take another look at it, lower courts. As I mentioned before, that's because the Supreme Court really doesn't care about the outcome in this specific case; they care about the principle of law. Now that they've articulated it, it goes back down now to the District Court, and the District Judge already ruled against the County applying a very similar test. This will be, as Ms. Thomson correctly said, a fact-specific inquiry, and when you have fact-specific inquiries, the decision of the trial judge...the District Court judge is given...or is given deference, so only if she said something completely irrational could she be reversed on appeal. And so, you know, that's the very high hurdle that the County is facing. And so that's what's happening as far as the remand from the Supreme Court.

VICE-CHAIR RAWLINS-FERNANDEZ: Mr. Henkin, mahalo for your response to that question. So the test went from fairly traceable to functional equivalent, which kind of limited the test from what it was before. Fairly traceable was too broad, as you explained in your testimony. And so would we need different facts in order to apply these facts to the new test of functional equivalency?

MR. HENKIN: No. The first thing I want to clarify is that the District Court applied a functional equivalence test. The Ninth Circuit then changed that to fairly traceable, which concerned some of the justices as being too broad. So it's actually back to the District Court to apply the same test. The second thing that was inaccurate that Ms. Thomson said, the court did not order the parties to do more discovery. Rather, the court asked the parties do you need to do more discovery? We said no. The County said yes. And the court said--it's on the transcript--in an abundance of caution, we will allow the County to do more discovery. The County actually asked for leave to do discovery that might take years. The court said no, we're not going to do that, but we'll give you four months. And so the County's additional investigation needs to be completed by the end of October, but it was not a requirement of the court. And the last thing I'll say in answer to your question is the Supreme Court laid out very --

...timer sounds...

CHAIR MOLINA: Mr. Henkin, you've got, you know, 30 seconds to finish your thought, his response.

MR. HENKIN: The Supreme Court looked at various factors that might be relevant in any case. It didn't say that you have to produce evidence on all of them. It said that the two that

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were most important are time and distance, and because of the tracer dye study, we know conclusively answers to those. We don't need more discovery. The court did not order it.

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

CHAIR MOLINA: Okay, mahalo, Committee Vice-Chair Rawlins-Fernandez. Let's go to Member Sinenci.

COUNCILMEMBER SINENCI: Thank you, Chair. Yeah, so Ms. Thomson mentioned or fact-specific inquiry. So how much would this inquiry cost the County? Is this the new...

MR. HENKIN: Is that a question to me?

CHAIR MOLINA: Ms. Thomson, I believe that question was directed to you.

MR. BILBERRY: Yeah, okay. We thought it was directed to Mr. Henkin.

MR. HENKIN: No.

CHAIR MOLINA: Okay.

MR. BILBERRY: I can tell you I've heard at least two people today say a million dollars. That assertion is ludicrous. I don't know where that came from, but I'd certainly ask Mr. Henkin to produce the name of the expert who said it's going to cost a million dollars to do the discovery that we've asked for. I'd also --

COUNCILMEMBER SINENCI: How much?

MR. BILBERRY: --be interested in seeing any written documents supporting that absurd estimate. So in any event, we are currently working with a consultant to get estimates. Not...going to be a fraction of what's been stated at a million dollars. So I can tell you that.

CHAIR MOLINA: Okay.

COUNCILMEMBER SINENCI: So is there a number, Mr. Bilberry?

MR. BILBERRY: As of today, there is not. But I can tell you we're probably looking at somewhere between 100,000 to \$250,000.

COUNCILMEMBER SINENCI: Okay, thank you, Mr. Bilberry. And then, I guess, you know, and this has gone way before my tenure here on the Council, but I was just wondering, you know, with all the different cases from the Hawaii Supreme Court to the Ninth

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District court to the SCOTUS and now back, is there a number of how much the County has spent on the Lahaina injection well case total?

CHAIR MOLINA: Ms. Thomson or Mr. Bilberry?

MS. THOMSON: Sure. In terms of special counsel fees, I believe that the number is 4 point ...I believe it's 4.3 million is what has been authorized by Council to date. There has been discovery, you know, in the earlier court process, that Hawaii District Court Round One we'll call it. There was extensive discovery at that point, and where it was targeted was toward the then-current case law in the 2012 timeframe. So there was a lot of discovery that involved offshore water quality testing and things like that, which is not part of the current Supreme Court's test. So one thing just to add on to what Mr. Bilberry...

CHAIR MOLINA: Ms. Thomson, I think you've answered Mr. Sinenci's last question. Mr. Sinenci, you have another question?

MS. THOMSON: Okay.

COUNCILMEMBER SINENCI: Just clarification on Ms. Thomson. You mentioned the 4 million; was the 4 million just for special counsel to SCOTUS? My question was, I mean, I guess just the total amount of going to all the different court levels, how much the County has paid since the inception, I guess, of this case.

MS. THOMSON: That's been the total amount appropriated for the entire process.

COUNCILMEMBER SINENCI: Okay, thank you, Chair.

CHAIR MOLINA: Okay, thank you, Mr. Sinenci. Let's go to Chairman Lee.

COUNCILMEMBER LEE: Just want to check, so do we have an application before the Department of Health for the permit? The NPS...

CHAIR MOLINA: Corporation --

COUNCILMEMBER LEE: The NPDES --

CHAIR MOLINA: --Corporation --

COUNCILMEMBER LEE: --permit.

CHAIR MOLINA: --okay, question for Corporation Counsel or I believe --

COUNCILMEMBER LEE: Yes --

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CHAIR MOLINA: --I'm sure --

COUNCILMEMBER LEE: --from Corporation Counsel.

CHAIR MOLINA: --Mr. Nakagawa is here. Corporation Counsel, proceed with a response.

MS. THOMSON: Thank you, Chair.

COUNCILMEMBER LEE: Unless they want to defer to Director Nakagawa.

MS. THOMSON: We have Wastewater Division Chief Scott Rollins here, but the answer to that is yes, we have filed in 2012 an NPDES permit application with the Department of Health and have, you know, continued communication and working with the Department of Health since that time and, in fact, you know, up until this week, in fact, yesterday. So the Department of Health has been, you know, this is a new area of law. The Clean Water Act permitting has not been applied in this situation before so, you know, we do need to work together with the Department of Health both in the Lahaina situation and then others to see how we're gonna...

COUNCILMEMBER LEE: Okay, thank you. Thank you, Richelle. I'd like to turn my question now to Scott Rollins. Hi, Scott. So how long more do you think DOH is going to take before they make a decision? And what is the status of the permit right now?

MR. ROLLINS: Thank you, Councilmember Lee. We actually have a web meeting scheduled here later this week to discuss that further with them. They're in conversations. It's Safe Drinking Water Branch and the Clean Water Branch we're meeting with. I cannot say what their timeline is, but we've been having several conversations over the last few months, over how reuse can be expanded, et cetera. So I expect it's going to pick up some speed here in the near future. Does that answer your question?

COUNCILMEMBER LEE: Yeah. I'm really glad to hear that there's some progress because really, fighting attorneys, you know, is not that helpful. What's helpful are the facts, and the facts are that we are waiting for the DOH to make a determination. And hopefully they won't keep us waiting any, you know, it's been what, eight years. So anyway, is there anything else you want to add to this ongoing saga, Scott? I mean, is there something the Council needs to be, you know, monitoring or aware of?

MR. ROLLINS: Well, I just want you to know we did submit the NPDES permit. They asked for additional data; we submitted additional data and asking more questions about how the data should be submitted. They are reviewing that, and with our meeting since that point, they have acknowledged that it's in their court where we go now from there.

COUNCILMEMBER LEE: Okay.

MR. ROLLINS: So --

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COUNCILMEMBER LEE: Thank you, Scott.

MR. ROLLINS: --yeah, we're still waiting --

COUNCILMEMBER LEE: Thank you, Mr. Chair.

MR. ROLLINS: --for direction.

COUNCILMEMBER LEE: Thank you.

CHAIR MOLINA: Okay, thank you, Chairman Lee. Go to Member Hokama. Mr. Hokama?

COUNCILMEMBER HOKAMA: Chairman, thank you for my opportunity, Chairman. So for Corporation Counsel, thank you for your comments. I think I've got longevity on this lawsuit; 20 years I've been on Council, listening from day one basically. So I have very strong positions on this issue from the start to where we are today, Chairman. My question for Corp. Counsel is in your discussions with the plaintiffs, Earthjustice, and I appreciate the role they play for our community, where are you getting your parameters of discussion since I would have hoped you would have touched base with this Committee to get a sense of how we view the Supreme Court ruling and how we feel we should move forward to deal with wastewater and improve our overall operations requirements for our community? So, Ms. Thomson?

MS. THOMSON: Thank you. And that's exactly why we do appreciate the opportunity to be here today, you know, and to also provide any additional information that we can to collectively or individually, so we're happy to meet at your convenience. In terms of...in terms of moving forward, so we, you know, just have the Supreme Court's test as of late April. So both the Department, and you know, the Department of Health are looking at the factors of the test, not only in light of Lahaina but the...we have other NPDES permits pending for the other three wastewater treatment facilities. So, you know, from my point of view, and it's been this way from the inception of the lawsuit, the regulators and the regulated entities, so the County and the Department of Health, now that we have the Supreme Court's test, my opinion would be that we should be working directly with the regulators. You know, yes, we can continue through the court process and have the court make a decision. Once it has sufficient facts in the record, it can make the decision. But there is always the opportunity to withdraw this case from the court's purview, and you know, let the State regulators decide that question. So, you know, then that is something...

COUNCILMEMBER HOKAMA: We're, you know, the County is also a regulator of sort; we're part of the regulatory system and scheme. So I expect the County to do its appropriate requirements and actions as a regulator. You know, my...real quickly, Chairman. I just ask that you inform the...this Committee Chair and its Members because I don't like to

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be told about potential settlements when we haven't set parameters of settlement yet as far as after the court ruling. So thank you very much, Chairman; appreciate it.

CHAIR MOLINA: Thank you, Mr. Hokama, so noted. Okay, let's go to Member King.

COUNCILMEMBER KING: Thank you, Chair. Yeah, really we're getting various opinions about this case and whether it actually was a win/lose. But I'm disappointed to hear that Corp. Counsel saying they got clarity and yet we're back in court. If we had clarity, we wouldn't need to be back in court, we would...still wouldn't have these outstanding questions. So apparently there's not clarity on all sides about what happened. And my question about...oh, I have a couple questions I'll try to get through quickly. But...so for the 250,000 estimate that Mr. Bilberry says they expect...the County expects to spend on retesting, what...would that need to be approved by the Council? Or where is that money coming from?

CHAIR MOLINA: Mr. Bilberry?

MS. LUTEY: Thank you, Chair. Actually, it's Moana. That's part of our litigation expenses, so it would come from our litigation account.

COUNCILMEMBER KING: So which litigation account? Because my understanding was that the account for special counsel was expended in full, so what other account are you talking about?

MS. LUTEY: This is not for our special counsel because we do not have authority to use that, but we have funding. I don't know what the account number would be; I'd need to ask Lisa. But in that account it's how we fund things like depositions, discovery, and so forth in all of our cases.

COUNCILMEMBER KING: Okay. And then, so going back to court, I mean, I think we heard the 4.3 million for special counsel. That is in addition to our own resources and your time as Corp. Counsel and I guess you took...there was an entourage of a dozen people or so that went to D.C. for the Supreme Court case. But...so for going back to court, we're not using special counsel; it's you folks in Corp. Counsel that are going back to court for the Mayor? Ms. Lutey?

MS. LUTEY: We are not paying our...special counsel is not funded, so the primary work is being done by those you see in front of you today.

COUNCILMEMBER KING: Okay. So that's being directed by you. And then at what point, were you going to be obligated to bring any counteroffer? You know, I know you made a settlement offer, and I'm assuming that came from the Administration since the Council knew nothing about it, and then there was a counteroffer. So at what point, were we going to be informed about those...the offer and the counteroffer and having input?

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CHAIR MOLINA: Ms. Lutey?

MS. THOMSON: In terms of settlement, you know, posturing or discussions, those would best be handled in executive session, but I can tell you that broadly what our position is, is as we've stated earlier.

. . . *(timer sounds)* . . .

MS. THOMSON: I'll wait till that goes away. So as I stated earlier, that working directly with the regulators, the Department of Health to apply the Supreme Court's test would require...almost certainly would require a similar type of fact-finding and facts in the record as, you know...

COUNCILMEMBER KING: That wasn't my question. Ms. Thomson, the question was at what point, were you going to bring the settlement and the counteroffer to the Council?

MS. THOMSON: Well, if Mr. Henkin wants to make his offer public, that's up to his client.

COUNCILMEMBER KING: He would. He said he would. He said he doesn't require executive session.

MS. THOMSON: We can do that in executive session. But the last offer that Earthjustice made the public...

CHAIR MOLINA: Okay, Ms. Thomson, thank you for that response. I need...we need to move on to the next Member and so we can...if there's a...

COUNCILMEMBER KING: Mr. Chair, could we get a request from either Corp. Counsel or Mr. Henkin--maybe Mr. Henkin would be a better source--to get a copy of the counterproposal from Hawaii Wildlife Fund for all Councilmembers?

CHAIR MOLINA: Chair will consider that request. Thank you. Okay, thank you, Member King. Let's go on to Member Sugimura.

VICE-CHAIR RAWLINS-FERNANDEZ: Chair, point of information. Chair?

CHAIR MOLINA: Yes. Yes, Ms. Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Really quickly. Point of information. So what Ms. Thomson just said as far as, like, it needing to be in executive session, the offer and the counteroffer, it's been released into public domain and it's no longer protected by the attorney-client privilege, so we should be able to receive that information in open session. Mahalo, Chair.

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CHAIR MOLINA: Okay, thank you. That's good to know. Okay, Member Sugimura?

COUNCILMEMBER SUGIMURA: Thank you. So Corp. Counsel, I guess have you been working, then, with Department of Health? I know we heard from Scott, so the Department has. Has Corp. Counsel been working with Department of Health also?

MS. THOMSON: Yes, we have. In fact, we had a...the last conversation was yesterday, and the Department of Health has requested permission to participate in the settlement discussions that have been ordered by the Hawaii District Court before Magistrate Judge Kurren. And Judge Kurren was involved in 2012 when the original settlement negotiations which, you know, took--I think it...I think some of you might be able to remember--it took about a year and a half, but ultimately we did arrive at a settlement agreement in 2015. So that, you know, that settlement agreement, of course, is still in place.

COUNCILMEMBER SUGIMURA: Okay. But we're not any closer getting our NPDES permit. We're trying then; is that what the purpose of those meetings?

MS. THOMSON: Yeah. So that's the purpose of the meetings both, you know, and there's the legal side that also separately...and the Department is meeting directly with, you know, the State regulators, Clean Water Branch, Safe Drinking Water Branch, you know, in a very cohesive fashion to be able to, you know, gather the information that we all need to apply the test to not only Lahaina but to other circumstances.

COUNCILMEMBER SUGIMURA: So the additional factfinding, I guess, is that test. Is it...is it just or warranted for this case or other matters like this?

MS. THOMSON: I think one of the things--and I mention this in my memo to you, to all of you upon receiving the Supreme Court's order--is that it would have been nice to have a more bright line, you know, test where you are in or out. But what the Supreme Court did was say here are the general parameters. There's a minimum of a seven-factor test and it's going to be fact-specific. So each scenario is going to need its own fact-finding, basically, to put into the test to have the regulators make a decision on whether permitting is warranted in an individual situation. So yes, while the test isn't like, you know, a bright line, what it is, is very clear instruction that I think is going to serve us well going forward. The investigation, the expense of the investigation and the fact-finding, that's necessary regardless of whether it's in a court setting or in the permitting setting.

COUNCILMEMBER SUGIMURA: Okay. Thank you.

CHAIR MOLINA: Okay, thank you, Member Sugimura. Before I recognize Member Paltin, just a quick follow-up, so...to Ms. Thomson. So what is the current legal status of the suit, Ms. Thomson? So where are we?

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MS. THOMSON: So we are...as you know, the Supreme Court vacated and remanded with instruction to apply its test. They vacated and remanded to the Ninth Circuit Court of Appeals which in turn remanded it to the Hawaii District Court. So we're back at the Hawaii District Court, and the magistrate judge assigned to this case did order and approve additional discovery. And just to clarify something, we never asked for discovery to take two years.

CHAIR MOLINA: Okay.

MS. THOMSON: What we're anticipating is gathering information needed to put into the test to come out with a --

CHAIR MOLINA: Okay.

MS. THOMSON: --solid decision.

CHAIR MOLINA: Okay, thank you for that clarification when you mentioned the judge allowed for discovery. Okay, thank you. Member Paltin, thanks for your patience; you have the floor.

COUNCILMEMBER PALTIN: Thank you, Chair. And my expertise on this goes back for, you know, over a decade. I was part of the DIRE Coalition, and you know, when the Federal EPA came to Lahaina as well under...before the Tavares Administration took office. And more than that, you know, my children are of Lahaina; they swim in the water of Hā'enanui. My family eats from the waters. For 18 years of my life I was in the water every other day and so, you know, this is personal to us in Lahaina. We see right now without all the tourists the difference in the ocean conditions in especially West Maui. And I think, you know, in general, the public is fed up. Like tell me right now the truth, is the permit process on hold because of the ongoing court process? Somebody tell the truth.

MS. THOMSON: No, it's ongoing.

COUNCILMEMBER PALTIN: Mr. Henkin, would you concur with that?

MR. HENKIN: No, we wouldn't. I think Department of Health has been putting this on the backburner while it made its way up the Supreme Court, and as long as the County wants to drag it out in court, I think the Department of Health is only too happy not to do its kuleana and address this problem.

COUNCILMEMBER PALTIN: And let me just say to go from a million dollars to \$250,000 in the middle of a pandemic is insulting. Brahe, we got people that don't have any money coming in and you're saying, oh, it won't be a million dollars, it'll only be 250,000. It'll be this or that. No clarity, none of that cesspool thing like, oh, it's going to affect cesspools, it's going to affect septic tanks. Like, that was the fearmongering we heard,

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and nothing, nothing about that. I don't have any more questions because I can't trust the answers that you're giving. I'm just very disgusted with all this lawyer [sic] stuff. And this is our ocean here in Lahaina.

MR. BILBERRY: Yeah, Chair, I just need to point out that that million dollar number came from Mr. Henkin, and we don't know where he got it. So...

CHAIR MOLINA: Okay. Mr. Bilberry, I think Member Paltin is satisfied with the response.

COUNCILMEMBER PALTIN: Yeah.

CHAIR MOLINA: Member Paltin, no further questions?

COUNCILMEMBER PALTIN: Nope.

CHAIR MOLINA: Okay. All right, thank you. All right, let's move on to Member Kama. Questions for Corp. Counsel or Mr. Henkin?

COUNCILMEMBER KAMA: Chair, I do not have any questions for either/or. I have heard all morning the testimony...the testifiers. I have heard a little bit about what Corp. Counsel had to say. I've heard all of what all of my colleagues have said. And I am...pretty much know where I am in my head and in my heart, and I'm just praying. And I will tell you I believe that, that I'm just praying that we'll come to some resolution without being adversaries to each other. But like I told Ms. Bernard this morning that I'm just hoping that those that are too far left or too far right that we'll just maybe take one step in the middle and go from there. Thank you, Chair.

CHAIR MOLINA: Okay, thank you, Member Kama. I have a question for Corp. Counsel and Mr. Henkin can chime in as well on this as...where this talk about where the Department of Health is on this and their involvement. My question relates to the Supreme Court. They mentioned that the EPA can provide administrative guidance in numerous ways. One, has the EPA provided guidance? And if not, why haven't we sought out their guidance? And if they have provided guidance, what is that guidance? So I'll pass it to Corp. Counsel first, and then if Mr. Henkin has something to add, I'll allow him. Corp. Counsel?

MS. THOMSON: Thank you, Chair. So the EPA could provide guidance through rulemaking or through issuing guidance and they have not done so yet. And I'm not aware of, you know, any plan to do that. I haven't seen anything coming out of the EPA yet. I assume that they will so at some point, but these are things that they normally just come up with very quickly.

CHAIR MOLINA: Okay, thank you, Ms. Thomson. Mr. Henkin, anything to add to that question that I asked?

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MR. HENKIN: Yeah. I think that we don't, you know, the EPA did weigh in on this case twice. The first time was in front of the Ninth Circuit. The EPA filed a friend-of-the-court brief telling the Ninth Circuit that it agreed that the County needs a Clean Water Act permit, and in expressing that view, it said that it was doing that consistent with about 30 or 40 years of consistent EPA interpretation under every administration, Republican and Democratic, going back to the beginning of the Clean Water Act. Now, this new administration came in, and they reversed course. And I think the Council is aware of this administration's environmental record. They reversed course. The Supreme Court completely ignored them, blew off their reversal of course because it was so out of touch. There was a friend-of-the-court brief filed by three former EPA administrators, both Democratic and Republican, supporting the plaintiff, saying this facility needs a permit and discharges via groundwater need a permit. So I don't know if or when EPA will weigh in yet again. I think this administration has a lot on its plate, so I'm not sure if they have any interest further in getting involved here, but we heard from 40 years of EPA experience that these are precisely the types of discharges that need a permit.

CHAIR MOLINA: Okay, thank you. Okay, my next question before my time runs out, the Supreme Court also noted that the permitting requirement, as it applies to a discharge of pollutants that, you know, reaches the so-called navigable waters after going through groundwater and if that is discharged is the functional equivalent of a direct discharge from a point of source. So how do you define functional equivalent, and is that easily tested, Corp. Counsel? Based on what the Supreme Court says. Your thoughts?

MS. THOMSON: So how do I define functional equivalent?

CHAIR MOLINA: Uh-huh.

MS. THOMSON: So the factors...and I won't go into depth on this, but the factors that the Supreme Court says that either a court or a regulating entity needs to apply transit time; the distance traveled; the nature of the material through which the pollutant travels; the extent to which the pollutant is diluted or chemically changed as it travels; the amount of the pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, in terms of what goes in, how much, and where does it come out; the manner by or area in which the pollutant enters the navigable waters; and the degree to which the pollution at the point it enters the water body has maintained its specific identity. So we do have some information in the lower court's record. We have the tracer dye study, which is valuable information that adds to, you know, especially some of the other factors that the Supreme Court has set out. So how it's...the...how does the recycled water, how is it chemically altered as it goes through the groundwater and mixes with the other sources underneath the subsurface. We know that it takes a minimum of almost 90 days to begin to be seen offshore. It takes...the trailing edge is four years. So if you put a gallon of recycled water in a well, the gallon starts to show up at about, you know, three months, but it takes an entire four years in order to complete.

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CHAIR MOLINA: Okay.

MS. THOMSON: So the court is gonna look at all those factors and plug the facts into each part of the test. Then at the end of the day the court is going to have to decide does all of that add up, all of that data add up to the same thing as having a pipe that goes from your well or your source out into the ocean in our case.

CHAIR MOLINA: Okay.

MS. THOMSON: Is it the same thing?

CHAIR MOLINA: Great. And this is, of course, under...as long as we, you know, continue to further this case. And what District Court again is this in right now for the request for discovery? Yeah, go ahead, you can answer that real quick in one short answer.

MS. THOMSON: It's the Hawaii District Court.

CHAIR MOLINA: Hawaii District Court, okay. All right, Members, I know I mentioned to you one round. I'm awaiting a response.

**GET-11(31) LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: ALYSSA TOTH;
CLAIM 30166871707-0003) (CC 19-29)**

CHAIR MOLINA: We do have one of our agenda items, I believe the Toth matter. I've been made aware potentially that we can defer this matter. I do have another Committee meeting of course like the rest of you. My next GET meeting is July 14, so I'm considering deferring that matter, and we could just address one matter after the completion of this. So at this point, any objections to deferring GET Item--let me just make sure I get my GET item number straight--GET Item 11(31).

COUNCILMEMBER SUGIMURA: No objections.

CHAIR MOLINA: Any objections to deferring to that?

COUNCILMEMBERS VOICED NO OBJECTIONS.

ACTION: DEFER PENDING FURTHER DISCUSSION.

CHAIR MOLINA: Okay, good.

**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)**

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CHAIR MOLINA: All right. Okay, Members, anybody have one last question for either of our...Corp. Counsel or Mr. Henkins [sic]? We had a little bit time left for that. Make it brief, straight, and to the point, and of course, the response as well, to our respective attorneys. Member King?

COUNCILMEMBER KING: Chair, thank you so much. I'm, my question is about the functional equivalent of a direct discharge, and we've heard two differing opinions on what that is. But I want to ask Corp. Counsel and then ask Mr. Henkin to comment on this, why they added in their brief the word "new" before the quote, because functional equivalent of a direct discharge is in quotes. The word "new" functional equivalent was added by Corp. Counsel in their report to us. So where is that in the...I mean, I'm just...I don't see anywhere in the court ruling where it directs us to do new testing. And so I just wanted to ask Corp. Counsel if you can direct us to the exact page of the court ruling where it says that Maui County needs to do new testing?

CHAIR MOLINA: Corp. Counsel?

MS. THOMSON: Are you...we'll need to clarify, are you speaking of the U.S. Supreme Court's order or the Hawaii District Court order?

COUNCILMEMBER KING: Whatever you were speaking of in your April 24th letter, because I have a letter from you to the Council, from Corp. Counsel to us that says on page 2 that the court, "what the court did is send the case back to the Ninth Circuit with instructions to apply the Supreme Court's new functional equivalent of a direct discharge." But the word "new" is not in quotes so that was added I'm assuming by you as the author of this letter. And I haven't heard anything...any...I haven't seen any proof that the Supreme Court...I've heard that you've been saying this that the Supreme Court ordered us to do new tests, but I haven't see anything in the ruling that says that.

MS. THOMSON: Thank you for the question. Let me just clarify, so the words "functional equivalent" were used by the lower court; however, the Supreme Court declined to adopt either the Hawaii District Court interpretation or the Ninth Circuit Court interpretation as, you know, a Clean Water Act liability under the circumstance. What the Supreme Court did and what I'm trying to point out is that they developed a seven-part minimum, you know, they said these are not exclusive, but they're a seven-part minimum new test for determining whether an indirect discharge that goes through another medium, whether it be groundwater or something else, whether that is the equivalent, the same as a direct pipe into an ocean, lake, river, et cetera.

COUNCILMEMBER KING: Okay. So it's not necessarily a direction to do a new testing, and maybe, Mr. Henkin, can you just comment on that?

MR. HENKIN: Yeah, the Supreme Court didn't say you have to look at all seven factors. It didn't say anything of the sort. It said there are a number of factors...there's an infinite

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number of factors that might be relevant; here are some of them. They did make clear that the two that would control almost every case is time--how long it takes to get to the ocean--and distance traveled. And the tracer dye study tells us the time is 84 days, the distance traveled is half a mile. Now, the Supreme Court, in its opinion, says if you're a few feet from the gates and goal posts, if you're a few feet from the water's edge and it goes in very quickly, you definitely need a permit. If you're 50 miles away and it takes years and years and years and years and years...somewhere in the opinion they talk about 250 years to get to the ocean, you might not need a permit. Well, I think it doesn't take, you know, lawyers can make things complicated, but just common sense here, this facility was designed to dispose of millions of gallons of wastewater every day. It's a disposal facility. So if that's not the functional equivalent of the deep ocean outfall, which is what this was done to replace, I don't know what is. And I leave it to just common sense for you to see how the test is satisfied.

COUNCILMEMBER KING: Okay. I appreciate that, and I appreciate, Chair, because I do agree that it's common sense. I went to the Ridge to Reef event last year, and I dove on that reef, and I saw the water bubbling up from the ground, and I saw the dead reef. It's the first time I've ever deliberately gone to see a dead reef. And so I don't even know what this whole fight is about. I'm just almost as frustrated as Member Paltin, but she lives there and swims there a lot, so I can't say I'm just as...but I've been following this case for about ten years as well, as a citizen, and wondering why previous Councils got us into this mess where we've spent \$4.3 million and now we're back in District Court. So anyway, thank you for that. I appreciate it, and I hope we get some response from Corp. Counsel on what these settlement agreements are that are out there and counterproposals.

CHAIR MOLINA: Okay, thank you very much, Member King. All right, seeing no other questions, Chair's going to just...okay, very briefly, Members. I think we have Member Kama, followed by Committee Vice-Chair Fernandez.

COUNCILMEMBER KAMA: No questions, Chair. Thank you very, very much.

CHAIR MOLINA: Oh, I'm sorry, I thought you had mentioned you wanted to ask a question. Committee Vice-Chair Rawlins-Fernandez, one question.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. I first have a request of you, and then I have a question. My request of you is regarding the incompleteness of Corporation Counsel's status update. As I mentioned in my first comments, they stopped at the...they concluded at the decision of the Supreme...U.S. Supreme Court and didn't elaborate further after, and there have been actions taken. Corp. Counsel did send Earthjustice and its attorneys a settlement offer. We don't know under whose direction that was sent. And then they received a counteroffer from Earthjustice and its clients. So I would like to receive that in open session because it's no longer protected by the attorney-client privilege since it was transmitted to Earthjustice, and Earthjustice waived any, you know, confidentiality in making public their counterproposal.

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CHAIR MOLINA: Chair will honor that request.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

CHAIR MOLINA: Okay. And your question that you had?

VICE-CHAIR RAWLINS-FERNANDEZ: And my question I guess would be for Mr. Rollins.

CHAIR MOLINA: Mr. Rollins, yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: With the...yeah, mahalo, Chair. So the question is regarding, right now during this pandemic, my understanding is, you know, I mean, we've already accommodated or projected shortfalls for the Lahaina Wastewater Treatment Facility. I'll be taking this up in my Committee tomorrow, actually, but how much less sewage have we been processing at the Lahaina Wastewater Facility, and has there been a large amount being injected into the groundwater as a result, or you know, is there less as a result?

MR. ROLLINS: Thank you for the question. Yes, over the last two months, our flows in Lahaina have reduced from 4 million gallons a day to about 2½ million gallons a day. Reuse has been growing a little bit in the last few months as it's gotten a little warmer, so we've been injecting probably an average of a million gallons a day over the last two months.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay.

MR. ROLLINS: And reuse has been about 1½ million.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay. So reuse 1½ million, processing and injecting 1 million, and that is due to the occupancy rates of the hotels and the resorts to zero, close to zero, so that's been the impact of tourists to our economy. And then, I don't know at what point, Chair, you would like to ask Corporation Counsel to complete their status update for the Council?

CHAIR MOLINA: Sure.

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

CHAIR MOLINA: Yeah. Okay.

VICE-CHAIR RAWLINS-FERNANDEZ: Okay.

CHAIR MOLINA: All right.

VICE-CHAIR RAWLINS-FERNANDEZ: Ms. Thomson?

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CHAIR MOLINA: Thank you. Chair's going to end discussion on this, and we'll exercise Chair's privilege to ask the last question of this matter. I guess, well, related to Member Rawlins' [sic] question, and a simple one to add on to that question. Who gave the directive to propose a settlement to Earthjustice at this point? The most recent proposal. Corp. Counsel, are you at liberty to share that with us in open session? Or is that something you require executive session? I mean, I can take an educated guess. I mean, we know who your boss is, right, but just for the record, if you would like to say it in open session or not, I'll leave it to you.

MS. THOMSON: Well, you know, in general, settlement is always on the table. You know, we have always wanted to pursue settlement. So yes, the settlement proposal that was rejected by Earthjustice was a proposal by the Administration, and it was broadly based on as I said before, on working with the State regulators in taking this out of the court's purview and working with the State regulators to apply the test that we have from the Supreme Court. The...like I said, that was rejected, but the counterproposal, I do not know that it has been released publicly. We have not released it publicly, but if you would like to discuss it, I'm fully able to discuss that in executive session. So I can go into more detail on that in executive session if you would like.

CHAIR MOLINA: Well, looking at our time parameters today, I'm not going to have time for that. So I just wanted to know who gave you guys the order. So you said the Administration, so the Mayor; am I correct? He has the final say. Even though I guess the standard protocol is any type of proposed settlement would have to come to the Council first, but based on what I'm hearing, the proposed settlement that you guys made to Earthjustice bypassed that process of informing the Council or asking for the Council's permission, if you will.

MS. THOMSON: Any settlement offers that involve any type of monetary component would be subject to Council approval, and that settlement proposal did have a caveat that we may need to seek Council approval. So I can confirm that it was not a blanket, you know, settling this without any of your input. Like I said, it was rejected. I can tell you the specifics of the offer and more detail in executive session, but any component that requires Council approval would absolutely be brought before you.

CHAIR MOLINA: Okay, thank you.

VICE-CHAIR RAWLINS-FERNANDEZ: Chair?

CHAIR MOLINA: All right, Members...yes, Ms. Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair. So not only did Mr. Henkins [sic] from Earthjustice say that their counteroffer is...has been made public, but the Corporation Counsel also has a duty to bring any proposals, settlement offers to Council. So for

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them to deny giving us a status update on that portion, as you requested, Chair, I think is not right and they should provide that update as you requested, Chair.

CHAIR MOLINA: Yeah. Okay, thank you for that, Member Rawlins-Fernandez. Well, I'll certainly bring this matter back to Committee for future discussion, see where we're at, get another update, so. All right, thank you very much, Members. So with that being said, I know a lot has been talked about and some matters that have been revealed to us, for some of us for the first time, but enough said. Chair's recommendation for this is to defer this matter. Any objections?

COUNCILMEMBERS VOICED NO OBJECTIONS.

ACTION: DEFER PENDING FURTHER DISCUSSION.

CHAIR MOLINA: Okay, so ordered.

VICE-CHAIR RAWLINS-FERNANDEZ: I have an objection, Chair.

CHAIR MOLINA: Okay. Yes, Ms. Rawlins-Fernandez?

VICE-CHAIR RAWLINS-FERNANDEZ: Chair, they...their...Corporation Counsel is supposed to inform us of the counterproposal that they received. That's part of their professional duty, and I think we're allowing to them to abdicate their responsibility to Council in presenting that counteroffer that they received.

CHAIR MOLINA: Well, we'll make that request in writing.

VICE-CHAIR RAWLINS-FERNANDEZ: I would be supportive of deferring, of course, but --

CHAIR MOLINA: Yeah.

VICE-CHAIR RAWLINS-FERNANDEZ: --I think that publicly should be presented to us.

CHAIR MOLINA: Okay. All right, well, I'm going to ask Corporation Counsel to respond in writing with that counterproposal from Earthjustice, so that way everything is memorialized in record. And when we do have a future meeting, it can be brought up for discussion. Okay, but your objections are noted, Member Rawlins-Fernandez. Thank you.

VICE-CHAIR RAWLINS-FERNANDEZ: Mahalo, Chair.

CHAIR MOLINA: Mahalo.

MS. THOMSON: Chair?

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CHAIR MOLINA: Okay, Members, the matter has been deferred. Let's go on to our last matter.

MR. BILBERRY: Chair, Ms. Thomson has something for you.

CHAIR MOLINA: No, I'm ending discussion today on this matter, Corporation Counsel. Thank you. We'll get that information from you later because I don't want to prolong this discussion. We're under some time constraints today, and I've got another matter that I'd like to address.

**GET-11(10) LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: COUNTY OF
MAUI V. RICK MARKHAM, ET AL.; CIVIL 17-1-0393(2)) (CC 19-29)**

CHAIR MOLINA: So anyway, all right, moving on to our last item...

COUNCILMEMBER KING: Mike, you're muted again. You're muted.

CHAIR MOLINA: My apologies, Members. I've been informed I muted myself. Of course, some people would like that too, I'm sure.

VICE-CHAIR RAWLINS-FERNANDEZ: Chair, I think you're frozen. Okay. As the Committee Vice-Chair, I think we'll take a brief recess until we hear back from our Chair and connection can be reestablished. Members, any objections?

CHAIR MOLINA: Case...

VICE-CHAIR RAWLINS-FERNANDEZ: Oh.

COUNCILMEMBER KING: Oh, is he back?

VICE-CHAIR RAWLINS-FERNANDEZ: Chair? Chair Molina? Okay, we'll take a brief recess. Okay, it's 11:57 on July 7th, and the GET meeting will be in recess at the call of the Chair. Okay. Okay, in recess. . . . *(gavel)* . . .

RECESS: 11:57 a.m.

RECONVENE: 11:59 a.m.

CHAIR MOLINA: . . . *(gavel)* . . . The GET Committee meeting for July 7, 2020, is now back in session. Thank you, Members, for that unanticipated technical interruption. I'd like to thank my Committee Vice-Chair Rawlins-Fernandez for quickly stepping up and recessing the meeting to allow the Chairman to come back into play here. So this is why we always announce at the start of the meeting, please be aware of any technical difficulties that could occur. So all right, I better get going with this last item. Of course, the Rick Markham matter. Members, again, as I, when I left off I'm going to entertain a

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motion to go into executive session in accordance with Section 92-5(a)(4), Hawaii Revised Statutes, to consult with legal counsel on questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee. Motion is to go into executive session for GET Item 11(10).

VICE-CHAIR RAWLINS-FERNANDEZ: So moved.

CHAIR MOLINA: Okay.

COUNCILMEMBER LEE: Second.

CHAIR MOLINA: Moved by Vice-Chair Rawlins, seconded by Council Chair Lee. Is there any discussion? Seeing none, all those in favor of executive session, signify by saying "aye."

COUNCILMEMBERS VOICED AYE.

CHAIR MOLINA: All those opposed. Okay, thank you. The Chair will mark it, I think...because I don't see everybody, let me make sure that I get the count right. Would that be nine "ayes." Are we missing anyone? One...two...three, I see seven Members.

VICE-CHAIR RAWLINS-FERNANDEZ: Chair, I don't see Member King and Member Hokama.

CHAIR MOLINA: Yes, I agree with you. Well, we'll go for the record seven "ayes" with two excusals, Member King and Member Hokama. Okay, so the motion to go into executive session passes.

**VOTE: AYES: Chair Molina, Vice-Chair Rawlins-Fernandez,
 Councilmembers Kama, Lee, Paltin, Sinenci, and
 Sugimura.**

NOES: None.

ABSTAIN: None.

ABSENT: None.

EXC.: Councilmembers Hokama and King.

MOTION CARRIED.

**ACTION: APPROVE; RECESS open meeting and CONVENE
 executive meeting.**

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MOTION CARRIED.

ACTION: ADOPTION OF REVISED RESOLUTION.

CHAIR MOLINA: Okay, seeing no opposition, we have eight “ayes” with one excusal, Mr. Hokama, and no “noes.” The measure passes along to the full Council. Okay, Members, I believe that completes our business for today. Thank you. Thank you all very much for your hard work, Staff, Administration, everybody included. We have a 1:30 EACP meeting under the leadership of Mr. Sinenci coming up, so go ahead, have a quick and enjoyable lunch, and we’ll see you back at 1:30. All right, the...excuse me, Staff, anything the Chair needs to be made aware of before we adjourn this meeting?

MS. ESPELETA: Nothing further, Mr. Chair.

CHAIR MOLINA: Okay, thank you very much, Ms. Espeleta. The GET committee meeting for Tuesday, July 7, 2020, is now adjourned. . . . (*gavel*) . . .

ADJOURN: 12:22 p.m.

APPROVED:

Michael J. Molina

MICHAEL J. MOLINA, Chair
Governance, Ethics, and Transparency
Committee

get:min:200707:ds;kr

Transcribed by: Kaliko Reed
and Daniel Schoenbeck

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CERTIFICATE

I, Kaliko Reed, 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 18 day of July, 2020, in Kula, Hawai'i

A handwritten signature in cursive script, appearing to read 'K. Reed', is written over a horizontal line.

Kaliko Reed

I, Daniel Schoenbeck, 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 18 day of July, 2020, in Kula, Hawai'i

A handwritten signature in cursive script, appearing to read 'Daniel Schoenbeck', is written over a horizontal line.

Daniel Schoenbeck