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PLANNING COMMISSION

COUNTY OF MAUI

STATE OF HAWAII

REGULAR MEETING

Held at the Planning Department Conference Room, Kalana
Pakui Building, 250 South High Street, Wailuku, Maui,
Hawaii, commencing at 9:00 a.m., April 27, 2010.

REPORTED BY: Rachelle Primeaux CSR No. 370

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A P P E A R A N C E S

CHAIRMAN:

JONATHAN STARR

COMMISSIONERS:

KENT HIRANAGA
WARD MARFDIN
LORI SABLAS
WARREN SHIBUYA
ORLANDO TAGORDA

CORPORATION COUNSEL:

JAMES GIROUX

AKAKU VIDEOGRAPHER:

KENNY HULTQUIST

1 MAUI COUNTY PLANNING COMMISSION

2 TRANSCRIPT OF PROCEEDINGS

3 * * *

4 CHAIRMAN STARR: Good morning, everyone. Welcome.
5 This is the Maui Planning Commission meeting of April 27th,
6 2010. I would like to welcome everyone and thank everyone
7 who has been able to join us today. We have an interesting
8 agenda, including a contested case, I believe the first one
9 this Commission has handled in at least half a dozen years.
10 And before we proceed with that, we'll have a workshop on
11 contested cases by the counsel for our Commission, Mr. James
12 Giroux. And before we do that, as we always do, we're going
13 to open the floor up for public testimony. However, the
14 contested case is not an item that is subject to public
15 testimony.

16 So, if there is anyone from the public who wants
17 to speak on that, I'm not going to stop you or call you out
18 of order. You will get three minutes; however, I wish to
19 remind you that we're not accepting testimony because public
20 testimony is not part of the record on which the case will
21 be heard. But the public can give comments, and that's the
22 extent that they are related to the contested case item is
23 they would be comments. So, with that in mind, is there any
24 member of the public that would like to give testimony or
25 comments at this time? Please make yourself known. Okay.

1 Not seeing any, that portion of the meeting is now closed.

2 And now I'm going to turn over the floor to the
3 representative of corporation counsel, who is here to serve
4 the Maui Planning Commission, and that is Mr. James Giroux.
5 He staffs this Commission, and he will give a presentation
6 on -- a workshop on contested cases. Mr. Giroux. Thank
7 you.

8 MR. GIROUX: Thank you, Chair. I'm going to make
9 this brief because you guys are going to be baptized with
10 fire after this water. Anyway, this was actually put
11 together earlier as part of your orientation. They felt
12 that I should do this for you, so that before you get
13 started on your first contested case ever, that you should
14 have some framework on this. And so, I'm going to get
15 started. The contested cases, Hawaii Administrative
16 Procedure, and this is under the Hawaii Revised Statute
17 Chapter 91. What is a contested case? A contested case
18 means a proceeding which the legal rights, duties or
19 privileges of specific parties are required by law to be
20 determined after an opportunity for agency hearing.

21 What is required by law? Required by law means
22 that the hearing is required by statute, agency rule or
23 constitutional due process. Maui Planning Commission Rules
24 12-201-39: All proceedings in which action by the
25 Commission will result in a final determination of the legal

1 rights, duties or privileges of a specific party or parties
2 and which is appealable pursuant to Section 91-14 HRS as
3 amended is a contested case.

4 The latest cases that have come down regarding
5 contested cases are the E&J Lounge Operating Company versus
6 Liquor Commission. In that, it was determined that if a
7 public hearing is a contested case, all provisions of HRS
8 Chapter 91 shall apply. It has been determined by the
9 Supreme Court that special management area use permits are
10 contested cases under Mahuiki versus Planning Commission,
11 and State Land Use District Boundary Amendments public
12 hearings are also contested cases under Towne v. Land Use
13 Commission.

14 What are the requirements? Notice. Notice is a
15 requirement. The parties must be able to submit evidence.
16 They must be able to cross-examine and have rebuttal
17 evidence. The party initiating the proceeding shall have
18 the burden of proof, including the burden of producing
19 evidence as well as the burden of persuasion. The degree or
20 quantum of proof shall be a preponderance of the evidence.
21 The decisionmaker shall personally consider the whole record
22 or such portions thereof as may be cited by the parties.

23 Every decision and order adverse to a party must
24 be in writing and accompanied by separate findings of facts
25 and conclusions of law. Those findings of facts and

1 conclusions of law must be served on the parties. And the
2 party that does not prevail shall have the right to judicial
3 review. Judicial review. An administrative agency's
4 findings of fact are reviewable for clear error while its
5 conclusions of law are freely reviewable.

6 An administrative agency's findings of facts will
7 not be set aside on appeal unless they are shown to be
8 clearly erroneous in view of the reliable, probative and
9 substantial evidence on the whole record, or the Appellate
10 Court, upon a thorough examination of the record, is left
11 with a definite and firm conviction that a mistake has been
12 made. As a general rule, an administrative agency's
13 decision within its sphere of expertise is given a
14 presumption of validity. And one who seeks to overturn the
15 agency's decision bears the heavy burden of making a
16 convincing showing that it is invalid because it is unjust
17 and unreasonable in its consequence.

18 Upon review of the record, the Court may affirm
19 the decision of the agency or remand the case with
20 instructions for further proceedings. Or it may reverse or
21 modify the decision and order if the substantial rights of
22 the petitioners may have been prejudiced because of the
23 administrative findings, conclusions, decisions or orders
24 are; one, in violation of the constitutional or statutory
25 provisions, or in excess of the statutory authority or

1 jurisdiction of the agency, or made upon unlawful procedure,
2 or affected by other error of law, or clearly erroneous in
3 view of the reliable, probative and substantial evidence on
4 the whole record, or arbitrary or capricious, or
5 characterized abuse of discretion or clearly unwarranted
6 exercise of the discretion.

7 Things to remember. When dealing with a contested
8 case, you are exercising your adjudicatory function. You
9 must remain impartial and not openly make conclusory remarks
10 until all of the evidence has been received. Your decision
11 must be based on the evidence in the record. Avoid any
12 statements that may be mistaken as an attack on somebody's
13 race, sex, gender or religion. Any questions?

14 CHAIRMAN STARR: Yeah. Commissioner Shibuya,
15 please.

16 COMMISSIONER SHIBUYA: Mr. Giroux, I'm looking at
17 some of the definitions on some of the legal terms. And one
18 of them is severability 12-202-5. Would you mind explaining
19 severability for us?

20 MR. GIROUX: That wasn't in my presentation, was
21 it?

22 COMMISSIONER SHIBUYA: No, it's not. It deals
23 with the invalidating of one provision not being extended to
24 the other parts. It's just that the application of it is
25 specific to that provision. Is that true? 12-202-5.

1 CHAIRMAN STARR: Yeah. Take your time,
2 Mr. Giroux. And give us an elucidation.

3 MR. GIROUX: I'm just going to read this. This is
4 the section that Warren is referring to. "If any provision
5 of these rules or the applications thereof to any person is
6 held invalid, the invalidity shall not affect other
7 provisions or applications of these rules, which can be
8 given effect without the invalid provision or application.
9 To that extent, the provisions of these rules are
10 severable."

11 What that means is that under administrative law,
12 you -- you're given the power to create rules. And the
13 rules are what's in your package, the 12-202, are your
14 rules. However, the law also acknowledges that
15 administrative bodies may go above and beyond their powers
16 within their rules. And this may be done incidentally or
17 without understanding or purposefully. But if somebody
18 challenges that rule, which does, in effect, go beyond your
19 rules, your -- the scope of your authority, then only that
20 rule will be stricken, not your whole -- your whole process
21 doesn't come crumbling down because one rule is outside the
22 scope.

23 And an example of this is your rules affect the
24 205-A, and that you're given that authority underneath the
25 state law via the charter, being that you're the final

1 authority. So, all decisions have to be made under the
2 scope of 205-A.

3 If your rules start incorporating authorities that
4 aren't given to you, let's say you start trying to regulate
5 air navigation in your rules. Only that rule would be
6 stricken. FAA would get all upset that you're trying to,
7 through your administrative rules, trying to regulate how
8 many airplanes can land at the Kahului Airport, permitted.
9 So, only that rule would be stricken. And if you look at
10 state administrative rules, a lot of times, they're open for
11 challenge in that way, too.

12 CHAIRMAN STARR: Does that satisfy you,
13 Commissioner?

14 COMMISSIONER SHIBUYA: Yes. Thank you.

15 CHAIRMAN STARR: I just want to comment regarding
16 our Rules 12-202. There was a new handout today of 12-202,
17 the Rules of the Maui Planning Commission. And the ones
18 that are in our binder are out of date. 12-202 had been --
19 had had some revisions made about a year and a half, two
20 years ago, mostly regarding parts 15 and 17. And we did --
21 had received a handout with those, kind of red-lined those
22 changes. But we never received a copy that was complete.

23 And so, I ask you to make sure that you're looking
24 at the complete and revised 202 as has been handed out to us
25 today and not the one in the binder and then stick it in

1 your binder after the meeting. Mr. Giroux -- oh,
2 Commissioner Marfdin.

3 COMMISSIONER MARFDIN: Is he finished?
4 Mr. Giroux.

5 MR. GIROUX: Any other questions? I'm done.

6 CHAIRMAN STARR: Commissioner Marfdin.

7 COMMISSIONER MARFDIN: I just want to underscore,
8 because these were questions I was going to ask you anyway.
9 And I think you said it on about the second or third slide.
10 One is the burden of proof. The burden of proof is on the
11 Appellant; is that correct?

12 MR. GIROUX: Let's go back to the slide.

13 COMMISSIONER MARFDIN: That's it there.

14 MR. GIROUX: Yeah, the party initiating the
15 proceeding shall have the burden of proof, including the
16 burden of producing evidence, as well as the burden of
17 persuasion. And the degree or quantum of proof shall be by
18 a preponderance of the evidence. And I think that's the
19 last one you're asking about, right?

20 COMMISSIONER MARFDIN: Well, I was asking both.
21 But the preponderance is what, 51 percent or something like
22 that?

23 MR. GIROUX: Well, we've got attorneys in the
24 room, so there's room for argument. What you have to
25 remember is that in the criminal law, you have -- well, the

1 way we used to, like I always say it being on the defense
2 bar, was you have proof beyond all doubt. That's God. He
3 knows it. It's beyond all doubt. As humans, we're not
4 there. So, on criminal law, you would go proof beyond a
5 reasonable doubt. And on the defense bar, we would say
6 that's really high, beyond, you know, a reasonable doubt.
7 You're going to have to jump over a bar. You're going to
8 have to have a lot of evidence to create that.

9 In civil law, the bar drops down a lot. You have
10 clear and convincing evidence. And then you have
11 preponderance of the evidence. So, as arbiters of justice,
12 you're balancing this evidence, and you're saying where does
13 the evidence lie. You know, are you going to be convinced
14 by a preponderance of the evidence? And I think there was
15 other language that I had used in there about how the higher
16 courts will look at the evidence that you look at and decide
17 whether or not you did your job by doing this weighing,
18 balancing test.

19 So, what you do is you start off with a person who
20 is starting this contested case, the person, you know, who
21 needs to say that, you know, whatever decision is made isn't
22 right. That person is going to have to come initially with
23 that burden of proof.

24 CHAIRMAN STARR: Commissioner Tagorda first and
25 then Commissioner Shibuya.

1 COMMISSIONER TAGORDA: I have also a concern about
2 rules in my binder. The Appellees uses some of those
3 chapters, the rules. But when I go into my binder to look
4 at it, it says "reserve". So, can you explain to me what
5 that means?

6 MR. GIROUX: I'm not sure. I can't vouch to what
7 was referred to as far as being reserved or not. All I can
8 say is that if something is reserved under our rules, that's
9 just a place marker to allow for more rules to be made.
10 That's all I can say to that.

11 COMMISSIONER TAGORDA: Yeah, okay. Yeah, I just
12 want to read it myself what was used in those -- in the
13 case, but I'm stuck. I just see it's 12-201 or something.
14 Example is 12-201-99, reserved. So, what should I be doing?

15 MR. GIROUX: Well, I -- I can only assume that the
16 person referred to the wrong section or maybe rules that had
17 been appealed, and they're not referring to the most current
18 rules. But that's just hypothetical. I can't say that's
19 what's actually happened.

20 COMMISSIONER TAGORDA: Thank you, Mr. Chair.

21 CHAIRMAN STARR: Commissioner Shibuya, then
22 Commissioner Marfdin.

23 COMMISSIONER SHIBUYA: Thank you. James, this
24 deals with authority. In part two, special management
25 areas, HRS 205-A-22. In this particular area on authority,

1 we're talking in terms of Planning Commission having the
2 authority to review, approve, deny, modify, add conditions.
3 Can you elaborate on this authority, HRS 205-A-22? The term
4 is authority.

5 MR. GIROUX: 205-A-22 reads, "Authority means the
6 County Planning Commission, except in counties where the
7 County Planning Commission is advisory only, in which case
8 authority means the County Council or such body as the
9 Council may by ordinance designate, the authority may, as
10 appropriate, delegate the responsibility for administering
11 this part."

12 What that does is just it allows flexibility with
13 the counties as far as how they want to establish their
14 decision-making body. In City and County of Honolulu, it's
15 the Council. The Council is the final authority in the SMA.
16 And on Maui, you are the -- per charter, you are the final
17 authority. And in your rules, in your administrative rules,
18 what you've done in certain instances, have delegated
19 certain administrative decisions to the Planning Director.

20 And the Planning Director also is given certain
21 authority to enforce your rules. And that's what that
22 definition is alluding to.

23 COMMISSIONER SHIBUYA: Thank you. It's just part
24 of the definition that I'm leading up to, and that would be
25 the special management area use permit action by authority,

1 which exceeds \$125,000 on such projects. Who has the
2 authority on that?

3 MR. GIROUX: Well, that's all part of your -- your
4 administrative rules. In the SMA, it's pretty complex. As
5 far as us once the department gets an assessment, they do an
6 assessment about how they're going to process that
7 application. And they have to go through the criterias in
8 order to go through whether or not they're going to do the
9 four actions; the exemption, the minor, the emergency and
10 the major. And so, that's up to the director. His initial
11 analysis of an application is reviewed under your rules.

12 COMMISSIONER SHIBUYA: Okay. Thank you.

13 CHAIRMAN STARR: Commissioner Marfdin.

14 COMMISSIONER MARFDIN: I don't know if I'm going
15 to be phrasing this very well or not, but I'll do my best.

16 MR. GIROUX: I'll rephrase it.

17 COMMISSIONER MARFDIN: I guess the Appellant has
18 made lots of claims. I can conceive of coming to the point
19 where some of them we would say, no, they haven't got --
20 gotten the preponderance of the evidence. On some of the
21 other claims, perhaps we might think that they have. If
22 even one claim, we think they have the preponderance of the
23 evidence, then we should vote on their -- on their position?

24 And let me ask a related question from the other
25 side. The county has made many claims. What, if any, of

1 their claims are refuted, what do we do? I guess I'm -- you
2 know, because there are multiple things going on. And I
3 want to make sure if there are four things; A, B, C and D.
4 And we say, well, the Appellant is wrong on A, wrong on B,
5 wrong on C, but D, they've got a real good point, what do we
6 do? And the County has E, F, G and H. And, you know, E, F
7 and G, they were correct on, but H, maybe not so much.

8 And I guess I'm trying to figure out where we are
9 on that kind of an issue.

10 MR. GIROUX: Okay. Like I said, I'm going to
11 rephrase your question. What you need to focus on --
12 because you are going to be dealing with very complex
13 issues, what you need to focus on is the end result. Okay.
14 The end result is at the end of the day, you've got to make
15 a decision, okay. So, you have to know what that decision
16 is. Everything else in the beginning is a buildup to
17 justify why that decision is legal, okay. You're going to
18 be given facts.

19 Those facts have to be substantiated in your mind
20 as being credible, valid facts. You're also going to be
21 given law. And the law has to be consistent with 205-A
22 policies and objectives. So, as you're collecting
23 information through the contested case process, you have to
24 remember at the end of the day, you're going to have to make
25 a decision. And that decision is going to, in this case, be

1 determinative of a decision of a director. And then you're
2 going to have a criteria. What criteria did the director
3 have to make that decision under, okay.

4 Also, at the end of the day, you're going to have
5 to produce a document. Well, you're not going to have to
6 produce it, but there has to be a document, findings of
7 facts, conclusions of law. So, everything going into that
8 document has to substantiate your decision about how you
9 rule in reviewing the decision of the director. Okay. So,
10 as you go down the tier, because you've got to remember what
11 did I say is above us or past us? We have the Circuit
12 Court.

13 They're going to look at your findings of facts,
14 conclusions of law, and they're going to look at the facts
15 using a certain criteria. And then they're going to look at
16 the law. And it's, you know, they're going to make a
17 decision on the law. So, you're going to have to use the
18 best facts with your best understanding of the law to make a
19 decision.

20 COMMISSIONER MARFDIN: And our decision is either
21 to overturn the decision of the Planning Department
22 Director --

23 CHAIRMAN STARR: Commissioner Marfdin, we're still
24 on our workshop portion. So, I'm asking that you hold
25 questions specific to the issue just until we get to that

1 portion.

2 COMMISSIONER MARFDIN: That's fine. That's fine.

3 CHAIRMAN STARR: Commissioner Tagorda.

4 COMMISSIONER TAGORDA: Going back to what I hear
5 from our corporation counsel, I learned that we, the
6 Commissioners, should remain impartial. And we will make
7 our decision based on the evidence presented to us. And the
8 burden of proof is on the Appellees, all the alleged
9 allegations on the contested case; is that right?

10 MR. GIROUX: You mean --

11 COMMISSIONER TAGORDA: The burden of proof.

12 MR. GIROUX: -- the Appellant?

13 COMMISSIONER TAGORDA: The Appellant, I'm sorry,
14 has the burden of proof to convince us or persuade us that
15 those alleged in this contested case are true based on
16 evidence?

17 MR. GIROUX: Right, that the decision was made,
18 and it was either clearly erroneous or outside the scope of
19 the law. You're going to get -- I'm going to let the
20 lawyers give you that criteria.

21 COMMISSIONER TAGORDA: Okay. I'm kind of
22 concerned about the burden of persuasion. I don't know what
23 are the criterias for the lawyer to, you know, convince us
24 that he persuaded the Commissioners. The burden of
25 persuasion, what is that?

1 MR. GIROUX: Well, that's going to -- you've got
2 nine people. You've got nine people that you're going to
3 discuss with each other whether you're impressed or not. If
4 you're not impressed, then when you've made your decision,
5 the Circuit Court would look at your deliberation and look
6 at what you were presented and give you the deference in
7 that you were here to hear and see the evidence.

8 COMMISSIONER TAGORDA: Thank you very much.

9 CHAIRMAN STARR: Commissioner Shibuya.

10 COMMISSIONER SHIBUYA: Hopefully, this will be my
11 last clarification question. In the Hawaii 9 HAPP 377.842,
12 Page 2(d), I'm just going to read it. "Even if the
13 development was shown to have a substantial adverse effect
14 in accordance with the statute, Planning Commission was
15 required under paragraph (2)(a) to determine whether that
16 effect could be practicably minimized."

17 I'm going to ask you the example of practicably
18 minimized. "And when minimized, whether the effect was
19 clearly outweighed by public health, safety and compelling
20 public interest."

21 MR. GIROUX: That's a quote straight out of
22 Topliss, Topliss.

23 COMMISSIONER SHIBUYA: That's correct.

24 MR. GIROUX: And basically, I usually use that
25 when you're looking at an SMA permit, that you're looking at

1 the impact and saying that you want to deny the permit
2 because its impact is substantial. Then the law says you
3 can't stop there. You have to go to the next step and look
4 at how can it be mitigated.

5 And once you look at that mitigation and you say
6 or you see that that mitigation will actually bring it to a
7 level where it's acceptable in light of all of the other
8 circumstances of health, safety, welfare. So, that's kind
9 of a really -- I'm oversimplifying it. But you've got to
10 understand that you can't stop at a denial process just
11 because you've seen substantial impact. You have to then
12 continue to look at the project in light of are there
13 possibilities to reduce.

14 And you guys are very familiar with that, drainage
15 issues where you're saying, hey, nearshore waters, they're
16 being impacted. We're at emergency level here. However, if
17 you expand your drainage capacity, that's going to greatly
18 reduce the -- that impact. That's going to -- that's going
19 to allow for not only the development, but the protection of
20 the nearshore waters.

21 COMMISSIONER SHIBUYA: So, the practicality in
22 this particular case would be our coming up with some
23 reasonable type of remedy, if you will?

24 MR. GIROUX: No, we're dealing with something
25 different. When I started off, I wanted to make it clear

1 that that's the explanation of how you deal with a SMA major
2 permit process. What you're dealing with here is different
3 in the context that you're dealing with a director's review
4 of an application in determining whether or not it's exempt
5 from the SMA rules, meaning that they -- that you would not
6 have to get an SMA major permit.

7 COMMISSIONER SHIBUYA: Okay. Then that position
8 actually is addressed by my earlier question on authority.

9 MR. GIROUX: Yeah, I can see where that -- yeah.

10 COMMISSIONER SHIBUYA: Okay. Thank you.

11 CHAIRMAN STARR: Okay. Members, any additional
12 questions? Well, we'll certainly have more opportunity when
13 we get into the matter at hand. Mr. Giroux, anything to
14 add?

15 MR. GIROUX: I'm done.

16 CHAIRMAN STARR: Okay, good. Thank you very much.
17 We're going to move on to our next agenda item. I'm going
18 to ask Mr. Clayton Yoshida to introduce the item, and then
19 I'm going to ask him to step down from here, since he
20 represents the director. And our staff person on the next
21 item, the contested case, is a planner, Trisha Kapuaala.
22 And so, she will be the person we will be working with as
23 our -- as our planner on this. Mr. Yoshida.

24 MR. YOSHIDA: Thank you, Mr. Chair. Clayton
25 Yoshida, Administrator from Planning Division, Planning

1 Department. I'm here with our Deputy Planning Director,
2 Kathleen Aoki.

3 The item before you is the contested case hearing
4 subject to Chapter 91 HRS, the appeal from the DIRE
5 Coalition and Save Kahului Harbor on the special management
6 area exemption issue to Dave Taylor, Chief of the Wastewater
7 Reclamation Division, Department of Environmental Management
8 for the replacement of two injection wells and appurtenant
9 facilities at the Wailuku-Kahului wastewater reclamation
10 facility at TMK: 3-8-001, Parcel 188, Kahului, Island of
11 Maui. Trisha Kapuaala is the staff planner.

12 CHAIRMAN STARR: Okay. Thank you, Mr. Yoshida.
13 And we'll ask you back after this item is done.
14 Ms. Kapuaala, we'll ask you to take over. And I'm going to
15 ask you at the beginning, I want to -- we'll want to clarify
16 all of the parties involved. I want the Commissioners and
17 any members of the public watching to understand the role
18 that the attorneys, that the members of the department, the
19 other departments, that everyone plays in this.
20 Ms. Kapuaala, it's yours.

21 MS. KAPUAALA: Thank you. Well, first of all, I
22 would just like to focus the Board in on the main core of
23 today's proceeding, that James talked about a decision that
24 you have to make, and the decision is this. We have to find
25 one of these three criteria to be correct, to be true. So,

1 the director's decision, which is the Planning Director, may
2 only be overturned if the substantial rights of the
3 Appellant have been prejudiced because a decision is, A, the
4 decision and order was based on an erroneous finding of
5 fact, material fact, or erroneously applied to the law; two,
6 that the subject decision and order was arbitrary or
7 capricious in its application; or three, that the subject
8 decision and order was a clearly unwarranted abuse of
9 discretion.

10 So, based on the preponderance of evidence that
11 you find to be true, you can find that the director did one
12 of these three things to grant the Appellant's appeal. If
13 you cannot find one of these three criteria to be true, then
14 the favor would be with the County, that the director did
15 not commit error, was not arbitrary and capricious and did
16 not abuse his discretion. So, basically that's it. I can
17 always pull this up. I have the SMA rules as well as your
18 Maui Planning Commission rules ready if you ever need to
19 look at it.

20 I also have the exhibits ready if you ever need to
21 look at it. Here representing the County is Jane Lovell
22 from Deputy Corporation -- Department Corporation Counsel
23 Jane Lovell representing the Planning Director as well as
24 environmental management. Mr. Jeffrey Schwartz is here on
25 behalf of the Appellant representing both DIRE Coalition and

1 Save Kahului Harbor.

2 And we have also Karen Chun, thank you very much,
3 who represents Save Kahului Harbor. Jeff will be
4 representing the both. And environmental staff,
5 environmental management staff is here, the director and the
6 wastewater chief, Mr. Dave Taylor, Cheryl Okuma. Other than
7 that, I will let the Appellant, who has the burden of proof,
8 go up first.

9 CHAIRMAN STARR: Yeah, I'll call the parties, but
10 thank you. And before I call up the Appellant, Mr. James
11 Giroux is corporation counsel, and he represents one entity
12 and one entity only. And that is the Maui County Planning
13 Commission; in this case, the hearings officer. Is that
14 correct, Mr. Giroux?

15 MR. GIROUX: That is correct, Chair. I will be
16 advising you on procedural matters and helping the Chair
17 with any issues that may come up as far as procedure.

18 CHAIRMAN STARR: Okay. And we, the members of the
19 Planning Commission, are the hearings officer. And we will
20 be the decisionmakers. Ms. Kapuaala is -- please give me
21 your correct title. I know you're not a current planner,
22 you're in a separate division.

23 MS. KAPUAALA: Yes, Zoning Administration
24 Enforcement Division, so I'm your support staff today.

25 CHAIRMAN STARR: So, she is our support staff, and

1 she is also not a party to the proceeding, but here to
2 advise us.

3 MS. KAPUAALA: Very impartial, yes. For the
4 department, Mr. Jim Buika is here from the current planning
5 division and can answer questions regarding the SM5 itself.
6 Other than that, the attorneys will be --

7 CHAIRMAN STARR: And we do have the deputy
8 director. You're representing the department, I guess along
9 with Mr. Clayton Yoshida?

10 MS. AOKI: That's correct.

11 CHAIRMAN STARR: And then we have the Appellant.
12 The Appellant is the party that has brought this item before
13 us. And the Appellant is two organizations, which are made
14 up of citizen members, plus other organizations, which are
15 members, and they're both represented I believe by
16 Mr. Jeffrey Schwartz; is that correct, Mr. Schwartz?

17 MR. SCHWARTZ: That's correct.

18 CHAIRMAN STARR: And then we have the County of
19 Maui, which is defending the decision of the Director of
20 Planning to issue an SMA exemption and shoreline setback
21 variance. And the interests, and please correct me if I'm
22 wrong on this, the interests of the Planning Director are
23 allied with the interests of the Department of Environmental
24 Management, the director of which is seated before us. And
25 those interests are represented by corporation counsel in a

1 different division of corporation counsel from Mr. Giroux in
2 the form of Ms. Jane Lovell. Ms. Lovell, do I have that
3 right?

4 MS. LOVELL: Thank you, Chair. More or less. I
5 think just one, I would say one correction. I understand
6 from legal pleadings that have been filed by the Appellants
7 in this action that there is no issue before you in their
8 appeal relating to shoreline setback, so we need to focus on
9 the SMA and whether the director was correct in his decision
10 that this particular project was exempt from the SMA
11 permitting process.

12 Secondly, I'm representing both the Planning
13 Director and the Department of Environmental Management.
14 And I'm able to do that because it's the Department of
15 Environmental Management's project that sought the
16 exemption, and the director granted the exemption, so
17 they're both on the same page, and therefore, I'm
18 representing both.

19 CHAIRMAN STARR: And Mr. Schwartz, we're not --
20 we're just right now defining everyone's purpose, and I do
21 feel it's really important that we're all really clear about
22 what we're doing. And, Mr. Schwartz, please, and I may have
23 made an error. Please help me understand this, and we need
24 a microphone for Mr. Schwartz.

25 MR. SCHWARTZ: Thank you. Thank you,

1 Mr. Chairman. To be clear, I agree with Ms. Lovell --
2 Ms. Lovell that we have waived any complaint or concern
3 about the shoreline setback issue, so that's not in front of
4 us. So, I want to acknowledge that. Also, I want to say,
5 however, that there is a question which is before you on the
6 motion to exclude and so on about whether we have fairly
7 raised concerns beyond the special management area
8 exemption, specifically the exemption from the Hawaii
9 Environmental Policy Act, for the preparation of an
10 environmental assessment and concerns about the legality of
11 the approvals and exemptions in the face of certain Hawaii
12 constitutional statutory and federal statutory requirements
13 as well. I just want to indicate there's an issue there
14 that needs to be addressed at some point.

15 CHAIRMAN STARR: Yes, there has been a motion to
16 exclude evidence provided by the Appellant, and we will
17 address that before we -- I'm going to take just a
18 one-minute recess.

19 (Recess taken.)

20 CHAIRMAN STARR: Okay. The Maui Planning
21 Commission contested case, we're back in order. Before we
22 proceed with opening arguments on the -- on the contested
23 case itself, there was a motion to exclude evidence that was
24 brought by the Appellee; in other words, Ms. Lovell's
25 clients. So, I'm going to ask her to briefly tell us about

1 this, her motion to exclude. Then we'll go to
2 Mr. Schwartz on that. And we're taking it in that order
3 because that motion was brought by Ms. Lovell. Please.

4 MS. LOVELL: Thank you. Aloha and good morning,
5 ladies and gentlemen, Commissioners and Commission Staff.
6 My name is Jane Lovell. I'm a Deputy Corporation Counsel,
7 and as indicated, I represent the Planning Director and the
8 Department of Environmental Management, which was the
9 applicant for the project that is at the bottom of this
10 proceeding.

11 Rule 12-201-57 of the Rules of Practice and
12 Procedure for the Planning Commission allows the hearing
13 officer, and in this case, all of you together are sitting
14 as the hearing officer, to avoid unnecessary or repetitive
15 evidence by limiting the number of witnesses or the time for
16 testimony on any particular issue. And I bring this up
17 because, as I reviewed the very voluminous submissions by
18 the Appellant, I was struck by the number of issues that
19 were raised, which really are not relevant to what we are
20 talking about here.

21 And I think it's very important that we all focus
22 on what the purpose is of today's proceeding and what the
23 purpose was of the director's decision. The director had to
24 determine whether this particular project of the Department
25 of Environmental Management was exempt from the SMA

1 permitting process because it was not a development and did
2 not have the significant impact on the environment or
3 whether it should get an SMA minor or whether it should get
4 an SMA emergency permit or whether it needed to go to a full
5 SMA permit.

6 And the director made the decision that this
7 particular project was not even covered by the SMA, you
8 know, requirements for a permit because it fell under
9 certain exemptions, and the most important of which is when
10 you take, you know, one piece of equipment out and replace
11 it with the same thing on more or less the same spot. Now,
12 when you see the submissions from the Appellant, there are
13 all kinds of issues raised. The Federal Clean Water Act,
14 medical issues, just a very, very broad range of things. In
15 response to our motion, however, the Appellants agreed that
16 this is really a legal issue, that the question is whether
17 the director, in making his decision that this project fell
18 under an exemption, and therefore, did not require an SMA
19 permit of any kind, whether that was appropriate under the
20 three criteria that Trisha Kapuaala presented to you.

21 That being the case, it is our position that we
22 don't need to get into all of these other issues. Because,
23 in essence, the project in front of you is to take two
24 malfunctioning injection wells out of service and replace
25 them with two functioning wells. It is our position that

1 whatever the impact on the environment, whether it's as
2 horrible as the Appellants suggest or whether it's benign as
3 the Department of Environmental Management believes, the
4 impact is no greater when you take out two and put in two in
5 the same place. It's a like-for-like swap, and therefore,
6 it's our strong position that under the rules, you have the
7 opportunity to limit the testimony and limit the argument
8 and limit the documents and all of that that comes in and
9 keep it focused on the issue of whether taking two injection
10 wells out of service, putting two injection wells into
11 service on the same site qualifies for an exemption, that
12 you don't need to get into issues of which type of federal
13 permit is required. You don't need to get into epidemiology
14 or medical issues or anything like that. So, that is the
15 basis of our motion.

16 CHAIRMAN STARR: Thank you very much for your
17 opinion. Mr. Schwartz, please.

18 MR. SCHWARTZ: Thank you, Mr. Chairman and Members
19 of the Commission, staff and members of the public who are
20 present today. I appreciate the opportunity to appear. My
21 name is Jeffrey Schwartz. I'm a former lawyer. I no longer
22 practice law. I want to be clear about that. I no longer
23 am authorized to practice law, and I'm not practicing law at
24 the moment. I'm just representing a group of which I am a
25 part. And I'm authorized to do that for whatever reason

1 they've chosen to have me do it. But to be clear, I will do
2 the best I can under these circumstances.

3 I want to say that we appreciate the opportunity
4 to be here today and actually wish that we didn't have to
5 be. We did not want to bring a adversarial proceeding. We
6 really wanted to have a conversation, and we'll talk about
7 that more later, wanted to have a conversation with the
8 Department of Environmental Management about this decision,
9 which we were never able to get. And that's regrettable
10 from our standpoint. We had hoped that things -- and we
11 made clear in our request for reconsideration that we would
12 be willing to consider dropping this appeal all together if
13 it were possible to have a meeting and discuss things and
14 work out suitable arrangements.

15 That was -- that request was never honored. As to
16 this particular motion, I want to be clear about several
17 things that I think will be helpful. First of all, we
18 are -- our basic contentions are -- we recognize the concern
19 that's been voiced, that this is not an appropriate place
20 for putting on trial the wisdom of using injection well
21 technology. That's an appropriate point, and we agree with
22 that. This is a question of whether or not the decision
23 that was made by the Planning Director was legally erroneous
24 or legally correct. The decision the Planning Director
25 made, however, was broader than just whether or not to

1 exempt the department from the special management area
2 permit requirements.

3 He also decided two other things, one having to do
4 with shoreline setback approval, which we have said we're
5 not going to raise. Okay. So, that's off the table. The
6 other, however, is the exemption from the responsibility
7 that otherwise would be triggered for the preparation of an
8 environmental assessment prior to the completion of this and
9 for the opportunity for the public to comment on that
10 environmental assessment to determine whether or not this
11 proposed action would have a significant environmental
12 effect or not. The Planning Director granted the exemption
13 from the Hawaii Environmental Policy Act. And we, in our
14 appeal, made clear that that was an issue that we were
15 appealing, as well as the special management area exemption.

16 So, those were two different exemptions that we
17 challenged in our appeal documents. And you have those
18 appeal documents in front of you. You can see for yourself
19 the various places where we did that. Mr. Chairman, did you
20 have a question?

21 CHAIRMAN STARR: Yeah, I do want you to stick to
22 the motion to basically dismiss your testimony.

23 MR. SCHWARTZ: Well, part of the argument of
24 the -- of the Appellees in this case is that we raised
25 questions about the environmental effects of the planning --

1 of the -- of the proposed action. And our point is that the
2 environmental effects of the proposed action are relevant
3 because the -- one of the issues is whether or not the
4 proposed action -- whether or not the Planning Director made
5 an error in granting the exemption from the Hawaii
6 Environmental Policy Act, so that there would be a
7 determination whether or not there was a significant
8 environmental effect.

9 And we are saying it's appropriate to raise the
10 question about what the data is that might show the
11 potential environmental effect in order to address that
12 question. That's one piece of the answer. The second is in
13 our appeal, we made it clear as well that this -- this
14 Commission's authority may be limited if it is granting
15 approval for action under local law, which would be
16 prohibited by federal law or state law. And we have cases
17 that we've cited to that effect. That's an issue that we've
18 raised as well. And so, one of the things that we
19 understand that the Council needs to decide is whether or
20 not we have fairly appealed, raised those questions on our
21 appeal. If we have, and much of what we have put into the
22 brief is relevant, but I want to say one other thing I hope
23 will be helpful here. We recognize that this is
24 complicated, and we want to try to make it as simple as we
25 can. And we recognize that it could be, as the -- as the

1 Appellees have warned, could be time-consuming, et cetera.
2 We are prepared to simplify this greatly, and the way we are
3 prepared to do that is to say straight-up we are only going
4 to raise issues of law, not fact.

5 So, the whole issue about preponderance of the
6 evidence goes out the window. We want to submit this case
7 solely on the question of whether or not the department
8 erred in three critical legal -- on three critical legal
9 issues. And one is whether or not it erred in granting the
10 exemption from the special management area permit
11 requirements. The second is whether or not it erred as a
12 matter of law in granting the exemption from the Hawaii
13 Environmental Policy Act requirement for a preparation of an
14 environmental assessment. And the third is whether or not
15 the Planning Director's decision errs failing to take
16 account of various state and federal laws that limit the
17 discretion of the Planning Director to grant approvals for
18 actions which would be violative or inconsistent with those
19 laws or fail to take account appropriately of those laws.

20 Those are the three issues, and they're all issues
21 of law. And as a result, we will not bring witnesses to the
22 table today. We will submit this case solely on the basis
23 of the legal principles for you to decide. That will
24 expedite things and focus on the three issues that we think
25 are in front of you.

1 CHAIRMAN STARR: Okay. Thank you very much.
2 Ms. Lovell, do you want to counter briefly? Once again,
3 we're solely on your motion to dismiss evidence and
4 testimony.

5 MS. LOVELL: Certainly. Thank you. Just the one
6 thing I did want to comment on, and that is the exemption
7 from the Hawaii Environmental Policy Act and its provisions
8 relative to when an environmental assessment or an
9 environmental impact statement must be prepared. I believe
10 the evidence today will show that that exemption was made --
11 in this instance, that exemption determination was made not
12 by the director of planning, but it was made by the director
13 of the Department of Environmental Management. There are
14 certain exemption classes or criteria that each county must
15 put into the environmental council. And I'm prepared to
16 show evidence on that and explain that further.

17 But when a party has a problem with that kind of
18 exemption, the appropriate recourse is to the courts and not
19 to the Planning Commission. I think that's what we saw in
20 the Superferry case. That's how the Superferry case came
21 up. The Department of Transportation in that case exempted
22 various projects at Kahului Harbor from the -- from getting
23 an EIS. And the appeal of that decision went straight to
24 the Circuit Court, and from then on up, to the Supreme
25 Court. So, my view of the law, and, of course, you're free

1 to check this with your lawyer, but my view is that the only
2 thing that you can determine today has to do with the SMA
3 permitting process and not the exemption determination under
4 HEPA.

5 CHAIRMAN STARR: Okay. Thank you. Mr. Schwartz.
6 Then we'll end it.

7 MR. SCHWARTZ: I only want to note that two
8 things. One, the -- we did in our contested case name as
9 one of the parties the Department of Environmental
10 Management, and specifically around this granting of the
11 exemption by self declaration, but we also -- we also have a
12 decision by the Planning Director that that was -- that that
13 was acceptable, appropriate, legally correct. And that is
14 what we are challenging here. The Planning Director's
15 action in his decision in the letter that he sent to Dave
16 Taylor on December 21st saying that the -- saying that the
17 department was exempt from complying with the
18 environmental -- with the -- with the Hawaii Environmental
19 Policy Act.

20 I believe you have the jurisdiction under these
21 circumstances to consider our appeal of that decision by the
22 Planning Director.

23 CHAIRMAN STARR: Okay. Thank you, Mr. Schwartz.
24 Now, Members, you know, this first issue before we get to
25 the opening remarks, basically the Appellant has submitted a

1 lot of evidence and testimony and so on. And, you know, it
2 may be somewhat broad. The Appellees say that all of
3 that -- it should all be dismissed, and that might be a
4 trifle broad, too. The Chair's temptation would be to let
5 that -- let it remain on the record and take it under
6 advisement and proceed.

7 I'm looking if there are any comments from
8 commissioners, or if anyone wants to act specifically on
9 that motion, we can. Or we can just take it under
10 advisement and proceed with the opening. Mr. Giroux.

11 MR. GIROUX: Chair, thank you. I just want to
12 make some broad comments about this type of decision-making.
13 Administrative law wants to encourage, you know, broad,
14 broad discovery and broad review of evidence. However, you
15 have to do a balancing test on if you go too broad, are you
16 going to be interfering with your ability to process the
17 case, or are you going to be obfuscating the issues so far
18 away from the decisions that you have to make, that you're
19 not going to be able to make a clear decision on the matter
20 that you need to be reviewing. On the issue of authority, I
21 just want to remind you that you, again, the authority you
22 have is that you are reviewing a special management area
23 permit.

24 You're not -- you're not reviewing the decisions
25 of the state to issue a sewer permit. You're not reviewing

1 the decisions of the EPA to not enforce the Clean Water Act.
2 You're not reviewing the decision of the Public Works to
3 grant themselves an exemption. You can use those as
4 possible factors. But if you decide one way or the other,
5 this board is not going to start enforcement action for the
6 EPA. You are not going to force the Public Works to do an
7 EIS. You're not going to be doing anything else, but having
8 an effect on whether or not the exemption granted is going
9 to stand or that there's going to have to be an SMA major,
10 okay.

11 So, just to focus on what you do have the power --
12 I'm not saying you cannot look at these things, but you just
13 have to remember that your decision is not going to have the
14 force and effect of law of actually causing other agencies
15 that are not part of this process to have to go back and do
16 other processes. You have the authority to review whether
17 or not an exemption was granted in accordance with 205-A
18 policies and objectives. Now, the evidence that you may
19 look at, again, I said can be as broad as you feel is
20 necessary, that it doesn't obfuscate your ability to make
21 that decision.

22 CHAIRMAN STARR: Commissioner Marfdin.

23 COMMISSIONER MARFDIN: I think I have a question
24 for our corp counsel.

25 CHAIRMAN STARR: Yes.

1 COMMISSIONER MARFDIN: The claim has just been
2 made that it was not the Planning Director that made the
3 decision to exempt -- to accept the exemption from an EA.
4 It was made by the Department of Environmental Management.
5 But if the Planning Director had relied on that exemption in
6 making his decision, would that then be something we should
7 look at to see whether or not the Planning Director erred in
8 the application of the law?

9 MR. GIROUX: You know, I think that's going to be
10 a part of your hearing the evidence. You're going to need
11 to be able to hear the evidence on -- and that becomes a
12 factual issue. You know, did the environmental department,
13 did they, as a fact, I think you're going to have to have
14 that in your record, did they give themselves an exemption.
15 And, you know, that's step one. And then step two is how
16 does the director treat that. So, you can see how that
17 you're going to need that information in order to get to the
18 decision of whether or not something is going to be
19 supportable by law.

20 CHAIRMAN STARR: Okay. Members, are we in
21 agreement to proceed? Commissioner Shibuya.

22 COMMISSIONER SHIBUYA: I would like to have some
23 kind of briefing, Mr. Giroux. In terms of if this body
24 concurs with the Appellee's motion to exclude the irrelevant
25 and cumulative and time-consuming evidence or accepts it,

1 what are the ramifications for either decision? Can you
2 just quickly highlight those or summarize for us?

3 MR. GIROUX: Judicially when you're looking at
4 this type of issue, like I said, the law encourages the
5 administration to err on the broader side. But during the
6 hearing, if you're getting into areas that are just, you
7 know, you just didn't imagine it was going to go that far
8 afield, you can always bring up the -- you know, you can
9 always curtail the evidence. What you can do is you can
10 take -- you can make a decision to take this -- this motion
11 under advisement. The attorney will also have the ability
12 to raise this objection again. They've stated on the record
13 their position, and they can also continue to raise that
14 objection throughout -- throughout the hearing.

15 However, if there is something that you
16 definitively think that is outside the scope of your, you
17 know, your decision-making, this is a good time to bring it
18 to the forefront and just set the ground rules, so that
19 everybody knows what rules they're playing by.

20 CHAIRMAN STARR: Okay. Commissioner Marfdin.

21 COMMISSIONER MARFDIN: I think I just heard our
22 corp counsel say we don't actually have to deal with the
23 Appellant's motion at this time. And I think that's an
24 appropriate thing to do, particularly in view of Appellant's
25 decision not to raise any of the issues of fact. So, the

1 scientific evidence isn't going to come in today. What's
2 happening in Kihei and Lahaina isn't going to come in today.
3 That's happening to algae isn't going to come in today, and
4 that should wipe a lot of the time-consuming stuff off the
5 plate, so we can, as I understand it, just focus on the
6 issues of law.

7 CHAIRMAN STARR: Yeah. Not to not deal with it,
8 but that we just take it under advisement and proceed. And
9 if that's acceptable to the members, we will go on that
10 basis.

11 COMMISSIONER SHIBUYA: Do you need a motion,
12 Chair, to that effect?

13 CHAIRMAN STARR: No. Before we do proceed, I want
14 to ask the court reporter, who is doing the real work,
15 whether we can proceed with arguments, or do you need a
16 break?

17 COURT REPORTER: I'm fine.

18 CHAIRMAN STARR: The Chair's intention is to allow
19 the Appellant to open, and then we'll take our recess before
20 it goes to the Appellee, but I want to be sure that's okay
21 with the Appellee.

22 MS. LOVELL: That's fine. Thank you.

23 CHAIRMAN STARR: So, Mr. Schwartz, I'm going to
24 ask you to make your opening arguments. And we'll take our
25 mid morning recess. And as agreed, you will keep it under a

1 half an hour, and the floor is now yours, Sir.

2 MR. SCHWARTZ: Thank you, Mr. Chairman. And thank
3 you for the opportunity to appear here today. I think that
4 I'm torn a bit, because I had wanted to provide you with a
5 visual aid that I thought would make it easier for you to
6 follow the argument. And I introduced it immediately before
7 this hearing to my colleague, who had reservations about it.
8 I indicated that I did not intend to -- that it's only
9 intended as a statement of what our theory of the case is,
10 not as evidence of the truth of that theory. And yet, there
11 was reservation on the part of my colleague.

12 So, if you still want to object to my handing out
13 the information, the visual aid, I will respect your wishes
14 on that. But I think it would help the Commission to be
15 able to follow the argument.

16 CHAIRMAN STARR: Ms. Lovell.

17 MS. LOVELL: My only concern, Chair, was that
18 having only been able to glance at this document this
19 morning for the first time, it has a lot of law and
20 regulations in it. And I didn't have the chance to go back
21 to the books and pull out each one and determine whether it
22 was correctly stated or not. So, that is my reservation.
23 I'm not making a formal objection, but that is the reason
24 that I -- that it makes me a little uncomfortable not having
25 had an opportunity to see it in time to do that kind of

1 careful check of the legal authorities.

2 CHAIRMAN STARR: Okay. You can look at it during
3 the break. And if you still have concerns, then it will not
4 be handed out. If you feel it's okay, then it will at that
5 time.

6 MS. LOVELL: Okay. Although I might need more
7 than a few minutes because of its bulk.

8 MR. SCHWARTZ: Do I understand it's okay to show
9 this to the Commission or not?

10 CHAIRMAN STARR: No, we're going to wait until
11 after the break and give Ms. Lovell a chance to see it.
12 Please, Mr. Schwartz, one second.

13 COMMISSIONER MARFDIN: I think he wanted to pass
14 it out so we could understand his argument. If he makes his
15 argument, then it won't be relevant. I mean it will have
16 been moot at that point.

17 CHAIRMAN STARR: We have, as I understand it, an
18 objection from the Appellee. I mean what -- you're not
19 really that clear on that it's an objection. Please make
20 yourself clear.

21 MS. LOVELL: My point was that, you know, we had a
22 prehearing conference. We had deadlines for reviewing each
23 other's materials, and my concern is that having not had an
24 opportunity to carefully go through --

25 CHAIRMAN STARR: Please, do you object to it being

1 handed out?

2 MS. LOVELL: I object to it being handed out until
3 such time as I have an opportunity to check its accuracy.

4 CHAIRMAN STARR: Thank you. I'm just looking for
5 clarity. And Mr. Schwartz, please proceed. But we're
6 asking you not to hand it out, because it was not -- there
7 was no opportunity for review.

8 MR. SCHWARTZ: I understand. So, to make our
9 point here, we think this is a -- this is an issue that
10 could have been avoided had we had an opportunity to deal
11 with this in a more practical and collegial way. And
12 unfortunately, we're in this highly legalistic and
13 adversarial forum that's not optimal from our standpoint, or
14 we think from anybody's standpoint, but it is where we are.
15 We asked the Planning Director to reconsider his decision
16 and to facilitate a discussion with the Department of
17 Environmental Management, and the answer was we did not get
18 an answer. We indicated we would be willing to consider
19 dropping the appeal if we could have an open meeting on this
20 topic and come to some kind of a negotiated agreement.

21 Evidently, the Department of Environmental
22 Management said no, because no one from the Department of
23 Environmental Management has ever expressed a willingness to
24 meet with us to talk about this subject. The Department of
25 Environmental Management has treated us like adversaries

1 from the outset, and that's left us no choice but to pursue
2 this appeal. The points we are making in this case concern
3 the legality or illegality of the Planning Director's
4 decision, not the wisdom of ocean disposal of inadequately
5 treated waste through injection wells.

6 The Planning Director and County Counsel have
7 repeatedly said this appeal is not about the wisdom of the
8 use of injection wells, but about the legality of the
9 Planning Director's decision, and we agree with that. The
10 points we'll present today are specifically about why the
11 decision made by the Planning Director was erroneous as a
12 matter of law. To be clear, we are not saying that these
13 new injection wells cannot be built, but there is a lawful
14 way to get them built. And there is an unlawful way or
15 unlawful ways to get them built, and regrettably in our
16 view, the Department of Environmental Management and the
17 Planning Director have chose unlawful ways to do this.

18 There are three main points that we would like to
19 talk about the Planning Director's decision, three respects
20 in which, in our view, the Planning Director erred as a
21 matter of law. First of all, exempting the Department of
22 Environmental Management from special management area permit
23 requirements under Section 22 of HRS 205-A for new
24 construction. And here is the key point. What's happening
25 here is new construction of new wastewater injection wells

1 in new locations in a special management area of the coastal
2 zone. The department is saying this is repair and
3 maintenance of underground utility lines, not construction,
4 and thus, not development in the SMA. We maintain that it
5 is obviously construction and does not fit within the
6 exemption for reasons that are clear from the decision
7 itself, from the language of the decision itself and from
8 the documents that were submitted in support of that
9 decision. So, that's the first point. We think the SMA
10 exemption was improper as a matter of law and should not
11 have been granted. And therefore, the appropriate course of
12 action in our view is for this Commission to reverse that
13 decision, finding that it is an error of a matter of law.

14 Secondly, we believe the Department of
15 Environmental Management was improperly exempted from the
16 duty to prepare a prior environmental assessment under the
17 Hawaii Environmental Policy Act without meeting the
18 requirements for an exemption under HAR 11-200-8. That's
19 Hawaii Administrative Rules, Section 11-200-8. That's the
20 provision under which theoretically the exemption was
21 granted, although it's sort of hard to tell.

22 In our view, that was an error, and again, the
23 decision, which specifically grants that exemption in our
24 view, you have the power to reverse that, and therefore, to
25 call into question the legality of the self declaration of

1 exemption from the department. Third, in our view, it was
2 an error as a matter of law to ignore other applicable
3 requirements of law, including State and Federal Water
4 Pollution Control Act and the Hawaii Constitution's Public
5 Trust Doctrine to conserve and protect all of Hawaii's water
6 resources, which has been held in the Kelly case to apply to
7 counties and apply to all waters of the state.

8 Now, these second points and third points about
9 the failure to follow the law as a matter of procedure and
10 substance with regard to the Environmental Policy Act and
11 the -- and the environmental assessment that we think should
12 have been prepared and related to ignoring other applicable
13 requirements of law where you do have the ability simply to
14 reverse the decision of the Planning Director on the grounds
15 that he, his decision granting those decisions is violative
16 of state and federal law and fails to take account of it.
17 You have the authority to reverse that decision on those
18 grounds, because it is -- under Chapter 91, it is violative
19 of state law and constitutional and federal law and
20 constitutional law. So, you have that authority.

21 But I want to point out something that's very
22 important. Mr. Giroux has said repeatedly on the key issue
23 of the SMA exemption that part of the test for whether or
24 not the SMA exemption was granted is whether or not it was
25 consistent with the policies and objectives of HRS 205-A-2,

1 Section 2. That's a provision that the legislature enacted
2 as part of the Coastal Zone Management Act to make sure that
3 the policy, fundamental policies of the act would be carried
4 out, not just the literal laws, but the overall purpose of
5 the act through these policies and objectives. And those
6 policies and objectives include some very important
7 language.

8 On page -- pardon me a second. Among one of the
9 policies and objectives specifically to use, implement and
10 enforce existing law effectively to the maximum extent
11 possible in management of present and future coastal zone
12 development. That means that carrying out the
13 responsibilities that you have under 205-A necessarily
14 includes consideration of the other laws as well as this
15 law. And that is why even if you conclude, we believe
16 wrongly, that our appeal only somehow applied to the SMA
17 law, you would still have say that 205-A, by its own terms,
18 calls out whether or not there has been -- it's consistent
19 to grant an exemption of these other laws when, in fact,
20 that law requires you to use implement and enforce existing
21 law effectively to the maximum extent possible in managing
22 present and future coastal zone development.

23 That then turns to the question of is this coastal
24 zone development or not. And we'll get to that in just a
25 second. But one of the things we want to do is highlight

1 some important principles in the Coastal Zone Management Act
2 itself. The Coastal Zone Management Act says at the outset
3 that the legislature finds and declares that it's the state
4 policy to preserve, protect, and where possible, restore the
5 natural resources of the coastal zone of Hawaii. That
6 coastal zone is more than the land. It includes the nearby
7 waters. That's why even under the SMA requirements itself,
8 it's appropriate for you to consider whether or not the
9 injection wells have their purpose, effect of -- and of
10 adversely affecting the waters of the -- the waters of
11 Kahului Harbor, Kahului Bay and nearshore waters adjacent to
12 that.

13 That's -- we are asking you to take judicial
14 notice of certain facts, take notice of certain facts, which
15 under your rules, you are authorized to do. And
16 specifically under this Commission's rules, you have broad
17 discretion in the interest of doing substantial justice to
18 take notice of things that are -- that are clear and
19 independently verifiable and basically uncontested. And one
20 of the things that I have not heard any contest for so far
21 is that the State of Hawaii, the Department of Health has
22 made the determination that the waters in 2006, and
23 published this determination in 2006, that those waters
24 exceed applicable water quality standards for three of the
25 contaminants that are included in the wastewaters that are

1 entering the -- that are being discharged into the injection
2 wells, okay.

3 So, we know the waters of Kahului Harbor are, and
4 bay and surrounding waters, are exceeding the standards
5 according to the Department of Health, the applicable health
6 and environmental standards for the wellbeing of those
7 waters. That's one thing we know as a matter of fact. And
8 we've cited to that report in our brief. So, this is
9 consistent with one of the key findings and purposes of the
10 Coastal Zone Management Act itself. We have -- pardon me.

11 It's also important to note the Constitution of
12 the State of Hawaii, because the Constitution governs the
13 laws and responsibilities of the state legislature and the
14 counties. And the Constitution has a provision which says
15 in it Article XI, Section 1, called the so-called Public
16 Trust Doctrine, which says for the benefit of present and
17 future generation, the state and its political subdivisions
18 shall conserve and protect Hawaii's natural beauty and all
19 natural resources, including land, water, air, minerals and
20 energy resources, and shall promote the development and
21 utilization of these resources in a manner consistent with
22 their conservation and furtherance of self-sufficiency with
23 the state. All public natural resources are held in trust
24 by the state for the benefit of the people.

25 That provision says that overwhelmingly the

1 purpose of our laws here is to protect the state's physical
2 spiritual treasures, the beauty, the glory, the fragile
3 source of what makes this state No Ka Oi, our environment
4 and our natural resources. And that we have a
5 responsibility as a matter of the state, the state and its
6 public -- and its subdivisions have a responsibility to
7 conserve these resources for the benefit of future
8 generations and to empower the public to participate in this
9 process of protecting the state's air, water and land. And
10 what's happened in this proceeding is that the public has
11 been excluded. That's excluded from participation, because
12 the public has not been consulted.

13 We are obviously vocal on this topic and have been
14 for sometime. Many of our groups have been. And we have
15 been excluded from the opportunity to participate, as the
16 Environmental Policy Act specifically calls out in its -- in
17 its statement of findings and purposes. Not only have --
18 has that happened, but in addition, as we will show in our
19 case, the -- the environmental assessment on which the
20 County relies for saying, well, this has already been
21 handled previously, the 2001 assessment never looked at the
22 injection wells or the wastewater or any of that. It didn't
23 deal with that question. The environmental policy -- the
24 environmental assessment for the Kahului wastewater
25 treatment plant that did deal with it was in 1990. And

1 that -- that environmental assessment from the County says
2 specifically the purpose of these injection wells is to
3 discharge the wastewater indirectly into the ocean. That's
4 the purpose of it.

5 And the 1990 environmental assessment said that's
6 also the effect of it. It's actually going into the ocean.
7 That's why it's relevant that the state law and federal law
8 prohibits the discharge of pollutants into state and federal
9 waters. The County is asking you to permit, to approve the
10 Planning Director's permission for the County to continue to
11 violate state and federal law. And that is illegal,
12 improper, and you should say no as a matter of law, not
13 policy, although you should also say no as a matter of
14 policy. But as a matter of law, you are required to say no
15 when they ask you to violate the State Constitution, the
16 state law, water pollution control law that we've cited
17 specifically, 342(d) Section 50, specifically has a
18 prohibition on that.

19 And there's a comparable prohibition in 33 USC
20 13(11)(a), which is the federal prohibition on the discharge
21 of pollutants from a point source into the waters of the
22 United States, just as the state law prohibits the discharge
23 of pollutants from a point source into the waters of the
24 state. So, that is why it is relevant, and all you have to
25 do is take notice of the documents of the state -- of the --

1 of the County itself that they have produced in 1990.
2 Furthermore, it's not, as we know from the recent Supreme
3 Court, Hawaii Supreme Court case in the United 5 Local case,
4 the Turtle Bay case, it is not appropriate to rely on a
5 20-year-old environmental assessment to say, well, we've
6 already figured out whether or not there's any significant
7 impact. We did that 20 years ago without looking at what's
8 intervened or what's been learned since then.

9 Like what we've learned since then in 2006 was
10 that the state did an assessment of the waters into which
11 that -- the injection well effluent is going and found that
12 those waters are already exceeding the existing standards.
13 So, we're putting -- this request, this determination, I
14 should say, by the Planning Director to grant exemptions
15 from the Environmental Policy Act and from the SMA law and
16 say you don't have to get a permit and you don't have to
17 look at this, because there's no potential environmental or
18 insignificant environmental consequences, violates state
19 rules, and it violates federal rules and it violates the
20 state that is law and regulation, and it violates the State
21 Constitution.

22 And you have the power to say no and the duty to
23 say no by reversing these decisions. There's more. And
24 that is that the -- as we will show, the County and the
25 Department of Environmental Management and the Planning

1 Director have embraced expansive notions of the exemptions
2 that are involved here that go beyond the literal language
3 and are inconsistent with each other, with the findings of
4 the fact that they've made themselves in this decision, and
5 inconsistent with the list that's been adopted by the -- by
6 this Commission for exemptions. There is specific language
7 in that list that are violated, as you will see, which we
8 will show in greater length.

9 Let me show you what I'm talking about when I say
10 there are errors that are evident from the decision itself.
11 The first thing is the claim is, well, we are just replacing
12 one set of wells with another set of wells, so there can't
13 be any worse environmental impact, right. That's what it
14 says. That's what the Appellees say. But let me read you
15 now from the Appellee's documents. First of all -- from the
16 planning decision, the Planning Director's document. The
17 Planning Director's decision says, "Both existing Wells 1
18 and 2 have been abandoned." That's on page 2, paragraph 3.
19 That's clearly wrong, because later on, that same decision
20 says, "Department of Environmental Management has planned to
21 abandon the two existing Wells 1 and 2 and anticipates doing
22 so."

23 So, it's already an error that they said in an
24 earlier paragraph that they have been abandoned. Then the
25 thing is, if you look in the documents that are submitted by

1 the -- by the Department of Environmental Management in
2 support of their exemption request, it says in Footnote 1
3 from their consultant prepared in September 2009, "Existing
4 Wells 1 and 2 are to remain in service as standby wells."
5 We're not making this up. This comes from their papers,
6 okay.

7 Now, when you get to the question of what is the
8 proposed action exactly, and does it involve construction,
9 well, the document, the Planning Director's decision itself,
10 says two new wells will be -- will be drilled, not at the
11 same place where the existing wells are, but at different
12 places. That drilling and casing of the wells and
13 installing of underground pipe will be required, that
14 locations of the new injection wells will be further mauka
15 from 1 and Number 2. They don't tell us how much further,
16 and it would be interesting to know. But it's not two feet.
17 It's not four feet. It's not six feet. Look at the maps
18 yourselves, and you'll see that it's a great deal more than
19 that. They say new connector pipe will be necessary and
20 will be constructed in the shoreline setback area.

21 They claim this is minor maintenance-oriented
22 work, and yet, it will cost a million dollars to do. They
23 list construction activities that will occur in page 5,
24 paragraph 7, and then say the definition of development,
25 which includes construction, is not applicable because it is

1 something else. It's repair and replacement of utility
2 lines. But this is -- they're not repairing the existing
3 lines. That's not what they're doing. They're building two
4 new wells in new locations and new connector pipe and
5 telling you that they're maybe going to shut down the old
6 ones and maybe not.

7 So, let's get to the bottom of what the
8 inconsistencies are here. They say, the Planning Director
9 and the departments say proposed replacement wells will
10 produce no intensification of use. We're just substituting
11 like kind. Then they say, and this comes from Appellee's
12 Motion to Exclude, total amount of wastewaters disposed
13 every day through the injection wells will remain the same
14 before and after the project. Now, think about that. We're
15 going to ask the County to spend a million dollars, a
16 million dollars of taxpayer money, and we're not going to
17 change one bit how much actually goes through those wells.
18 Well, if those -- if we're not changing how much goes
19 through the wells, why do we need to replace them?
20 Obviously, because we have the potential to put a lot more
21 through the new wells than the old wells that are
22 dysfunctional. Then they say this is equipment
23 installation. But injection wells are not included in Maui
24 County's Class 2, Number 4 equipment list. And utility
25 services in Class 2 and Number 3 excludes where DOH permit

1 is required as here.

2 So, these are the kinds of inconsistencies that
3 make us say this is blatantly unlawful what is proposed to
4 be done. But more than that, more than that. The Planning
5 Director, the key Mr. Giroux correctly pointed out, there's
6 a responsibility on the part of the Planning Director to
7 find that the objectives, that the proposed actions would be
8 consistent with the policies and objectives of 205-A-2, the
9 Coastal Zone Management Act. When you look at that
10 decision, you can see he made one sentence that says they're
11 consistent. But there are two or three pages of policies
12 and objectives that all talk about things like restore,
13 improve, minimize, reduce, things that would make it better,
14 not the same.

15 And yet, there's no discussion of any of that in
16 the Planning Director's decision. So, one must have real
17 questions about whether or not the Planning Director's
18 decision actually considered whether or not the proposed
19 action is consistent with the policies and objectives of the
20 Coastal Zone Management Act. It is argued in response to
21 Mr. Marfdin's question that any error that is significant,
22 any error of law that's made by the -- by the -- by the
23 Planning Director in his decision, that is sufficient by
24 itself to be -- cause you to need to reverse, even if many
25 of the other aspects that you disagree with us, were not

1 errors of law. So, in our view, if you find that one error
2 of law was not harmless, and then you ought to be concerned
3 about it.

4 I want to say one other thing about burden of
5 proof that's very important in this case. Again, let me
6 remind you we're not talking so much about factual issues as
7 we are talking about legal questions. And the -- I want to
8 refer you to two decisions, two opinions, and one Hawaii
9 court case decision. These are opinions from the corporate
10 counsel of Maui County. And these two decisions
11 specifically say that the exemptions -- that exemptions are
12 to be narrowly construed, not broadly construed, so that the
13 policies of the act can be carried out; and secondly, that
14 the burden is on those who seek the benefit of the exemption
15 to improve their eligibility for that.

16 That's -- I can give you specific citations and
17 there's an Attorney General's opinion from the state in 1996
18 that says the same thing, and there's the Russell case from
19 the Hawaii Supreme Court that says the same thing. So, as
20 you look at this, realize that, yes, we have the burden of
21 prevailing in this case on the law. But the legal point is
22 that it's a misconstruction by the Planning Director to
23 assume that whatever the applicant asks for, he will grant.

24 Instead, he has to affirmatively find that they
25 have satisfied the conditions for the exemption and that

1 they've not broadened the exemption in violation of state
2 law, in violation of county ordinance, and in violation --
3 or county rules, and in violation of the federal -- of the
4 federal law and the State Constitution. That's what we
5 claim is at work here.

6 And frankly, you've got two new wells in new
7 places requiring new pipe in the -- in the shoreline
8 management area. And under those circumstances, the very
9 least that's required is an SMA permit. And since it's over
10 a million dollars -- over a million dollars, over \$125,000,
11 a major permit is required, which in turn, requires you
12 to -- should have required the filing of an environmental
13 assessment. We'll go on to show that, in our closing
14 remarks and the documents, you can see themselves are in our
15 briefs, that -- and, most importantly, in the materials
16 submitted by the planning -- by the Planning Director and
17 the Department of Environmental Management themselves.
18 Thank you.

19 CHAIRMAN STARR: All right. Thank you. Order,
20 please. Thank you, Mr. Schwartz. We will return at 5
21 minutes to 11:00, and at that time, we will hear the opening
22 by the Appellee. Thank you, everyone.

23 (Recess taken.)

24 CHAIRMAN STARR: Okay. The Maui Planning
25 Commission meeting of April 27th is back in order. We're

1 currently doing a contested case proceeding. The next
2 speaker is the counsel for the Appellee. That's Jane
3 Lovell, and she has a half an hour to make opening remarks.
4 Ms. Lovell, please, it's yours.

5 MS. LOVELL: Thank you very much, Chair. And I
6 really appreciate the Commission's attention. I know that
7 this is kind of a lengthy and somewhat complex proceeding.
8 But we really appreciate your willingness to serve, in
9 essence, as the judge and jury of this case today. The
10 focus of this contested case needs to be on the Planning
11 Director's decision and on the statutory criteria that
12 governed his decision, his decision that a project that
13 takes two injection wells on the site of the Kahului
14 Wastewater Reclamation Facility out of service and puts in
15 two new ones to replace them on the same site is a
16 development and will have an adverse effect on the
17 environment.

18 His decision was that because this was a
19 replacement project, taking two wells out, putting two wells
20 in all on the same site, in the same facility, that it never
21 arose to the level of requiring any kind of SMA permit.
22 And, of course, in our view, that decision was absolutely
23 correct. In reviewing his decision, you are not to
24 substitute your judgment or what you think you would have
25 thought if you had been in his shoes. Instead, you must be

1 guided by the same criteria that Trisha Kapuaala put on the
2 board for you. And that is in order to overturn his
3 decision, you would have to find that it was based on a
4 clearly erroneous finding of material fact -- and a material
5 fact is a fact that's relevant -- or erroneous application
6 of the law, or that it was arbitrary and capricious or that
7 it was a clearly unwarranted abuse of discretion.

8 And those are pretty steep hurdles to get over in
9 order to overturn his decision. You heard an awful lot of
10 argument this morning from Mr. Schwartz, very legalistic
11 decision of federal laws, of State Constitution, of various
12 sections of regulations and so forth. And in trying to
13 judge what weight to give that, all I can ask is that, A,
14 you focus on the precise facts and issues that are really
15 before you today, and that is whether the Planning Director
16 made his decision appropriately; and B, I think it's also
17 fair to take into account what Mr. Schwartz himself told you
18 this morning, and that is he is not a licensed attorney, not
19 licensed in Hawaii, not licensed in any other jurisdiction.

20 So, while he is, of course, entitled to his
21 opinion about what may be legal or illegal, I think you need
22 to be guided in your determination by licensed lawyers.
23 Now, the question is was this project a development under
24 Section 205-A-22 of the revised statutes? Is it exempt from
25 the SMA rules? Now, it's exempt if the use, activity or

1 operation does not have a cumulative impact or significant
2 environmental or ecological impact within the SMA. The
3 Planning Director's decision was based on a correct
4 understanding of the material facts, but I believe that the
5 Appellants have misunderstood some of those facts.

6 You will hear evidence today from Dave Taylor, who
7 is the wastewater division chief of the Department of
8 Environmental Management. And he will explain to you that
9 replacing two wells that are not functioning properly with
10 two that do will not cause any additional amount of
11 wastewater to be disposed of. He will tell you that the
12 wastewater treatment plant, like all of our wastewater
13 facilities in the County, is very heavily regulated by the
14 Department of Health. He will tell you that we have a
15 permit that tells precisely how much wastewater can be
16 treated, to what level it needs to be treated, and how it
17 needs to be disposed of.

18 But I'll give you a little preview. Basically,
19 every day wastewater from Kahului, from Wailuku, from the
20 whole central Maui area flows down into our sewers and is
21 carried to the plant, the Kahului -- Wailuku-Kahului
22 Reclamation Facility, which I call the Kahului wastewater
23 treatment plant. And every day, that water is treated to
24 certain standards that are determined by the Department of
25 Health. And then once it's treated, it needs to be disposed

1 of in some way. Mr. Taylor will tell you that there are
2 only really three legal and practical ways to dispose of
3 treated wastewater. One way the County could legally do it
4 is to do what they do in Honolulu, and that is to run a big
5 long pipe straight out into the ocean and just discharge our
6 treated wastewater into the ocean.

7 If we did that, we would need a federal permit
8 under the Clean Water Act called the NPDES permit. That's
9 for direct discharges into the ocean. However, the County
10 doesn't want to do that. We don't want to send our treated
11 wastewater out through a pipe into the ocean. The second
12 way is to use injection wells, and Mr. Taylor will tell you
13 that injection wells are used all over the State of Hawaii,
14 heavily regulated by the Department of Health. And in the
15 case of our Kahului plant, on any given day, the wastewater
16 can be disposed of through four wells. But we need
17 basically 100 percent redundancy, so that when it rains, for
18 instance, if you have a very heavy downpour and the holding
19 ponds fill up, you've got to be able to inject that
20 wastewater, that treated wastewater quickly, because the
21 consequence is that if due to heavy rainfall, if there's too
22 much volume of water, and four wells can't handle it all,
23 then the runoff will go into the street, into the ocean,
24 into places that it's not intended to flow into directly.

25 However, it's very important also to realize that

1 the volume of water that goes down the injection wells,
2 whether on any given day the four are in use or six or
3 eight, remains constant. Our plant is permitted to handle
4 only a particular amount of wastewater every day. If we
5 ever exceeded that, we would have to get a new permit, or
6 you know, we would have to get all kinds of new permits.
7 The permit requires eight wells. It doesn't allow us to
8 operate with six. It doesn't allow us to operate with ten.
9 We need eight, and they have to function correctly. If you
10 picture -- for instance, picture a bathtub that holds 100
11 gallons of water. If you pull the plug, 100 gallons of
12 water are going to flow out of that bathtub and down the
13 drain.

14 Now, if your bathtub had eight drains and you
15 pulled eight plugs, that hundred gallons would leave your
16 bathtub faster, but it still would be 100 gallons, and
17 that's what we're talking about here. The water that's
18 treated every day in the wastewater facility is a certain
19 amount, a certain amount of gallons, and that amount of
20 gallons doesn't change, whether you have four injection
21 wells that work well or six or eight. But the State
22 Department of Health has told us we need eight, and so,
23 that's why we need to replace the ones that are not working
24 well with wells that do work well.

25 There was a mention in the opening statement of

1 Mr. Schwartz that all that his groups and members wanted was
2 public input and a public conversation. I believe the
3 evidence will show that when the Appellant DIRE asked for a
4 meeting with the Planning Director, that the Planning
5 Director did meet with them to discuss their concerns. And
6 as this Commission also knows, there was a mediation
7 session, which lasted an entire day. I will not go into
8 precisely who said what and so forth. That's all
9 privileged. But there was a day-long mediation system --
10 day-long mediation session in which all sides, the
11 Department of Environmental Management, Mr. Taylor,
12 Ms. Okuma, the Planning Department and the various people
13 from the Appellants were represented and were able to talk
14 very freely and share ideas with each other.

15 MR. SCHWARTZ: Objection.

16 CHAIRMAN STARR: Mr. Schwartz, you're objecting,
17 and I believe none of the details about the mediation should
18 be brought up before this Commission. So, I request that
19 you not go into anymore detail on this. I know we do not
20 take detail regarding the mediation into our account.

21 MS. LOVELL: Certainly, and I don't intend to
22 reveal anything that was said there, only that it occurred.

23 CHAIRMAN STARR: Please hold on one moment.

24 (Pause.)

25 CHAIRMAN STARR: Mr. Schwartz, a member wants to

1 know if your objection was truly about discussion on the
2 mediation.

3 MR. SCHWARTZ: Yes, it was. It was the inference
4 that was being drawn about that, which were we were not
5 supposed to talk about in this proceeding, as I understood
6 the rules.

7 CHAIRMAN STARR: That is correct. There is not to
8 be discussion on the mediation or any details not to be
9 revealed.

10 MS. LOVELL: Right.

11 CHAIRMAN STARR: So, please do not refer to it in
12 any detail again. Thank you.

13 MS. LOVELL: Certainly, and it was not my intent
14 to reveal any details.

15 CHAIRMAN STARR: Commissioner Hiranaga.

16 COMMISSIONER HIRANAGA: Mr. Chair, just for a
17 point of order. In the future, when there's communication
18 between the Chair and a Commissioner, please have it done
19 over the mic and not whispered on the sidelines.

20 CHAIRMAN STARR: Thank you, Mr. Hiranaga.

21 COMMISSIONER HIRANAGA: Thank you.

22 CHAIRMAN STARR: Please proceed.

23 MS. LOVELL: Furthermore, this project of
24 replacing the injection wells has been public knowledge for
25 a number of years going back even to the previous

1 administration. It has been -- as Mr. Taylor will testify,
2 it has been a specific line item in any number of budgets.
3 It has been discussed on the floor of the Council. It has
4 been discussed in budget hearings for planning the process
5 as well as for funding the project. Those hearings, of
6 course, are televised and available to the public on Akaku.
7 And the budget hearings are open to members of the public.

8 Indeed, members of the public are encouraged and
9 invited to come before the Council and to express their
10 opinions on whether money should be spent for or not spent
11 for a particular process. And all of that has happened over
12 the course of several years. Mr. Taylor will testify that
13 whenever this item came up for budget, it was supported
14 unanimously by the sitting Council members. Now, there's
15 one other legal possibility for how wastewater can be
16 disposed of. I started to say that you can send it straight
17 out into the ocean. We don't want to do that. We can
18 dispose of it in injection wells. That's what we do under
19 our Department of Health permit.

20 A third thing that can be done is that the water,
21 if treated appropriately, can be used for certain irrigation
22 activities, not all of them, but some. And I believe that
23 this is an alternative that many members of the Appellant's
24 organizations wish the County would do more of. These are
25 somewhat complex questions of how this can be accomplished

1 and how quickly and how much it will cost. But certainly,
2 that is an important consideration that the County needs
3 to -- needs to consider, the County officials need to
4 consider, and that they have considered and are working
5 towards. But ultimately, it is not this Commission that
6 decides which of these three alternatives need to be used.

7 That decision needs to be made in the first
8 instance by the State Department of Health, which regulates
9 wastewater treatment, and ultimately by the Maui County
10 Council, which holds the purse strings and tells the
11 Department of Environmental Management how much money they
12 can spend for any particular thing. Mr. Jim Buika of the
13 Planning Department will also testify, and he will tell you
14 how he analyzed all of the different rules and regulations
15 pertaining to this particular application.

16 He will tell you what kind of information was
17 provided initially, what additional information he asked
18 for, and he will take you through step by step how he
19 analyzed it. And he will tell you that, although the
20 ultimate decision was, of course, the director's, that the
21 staff work and the analysis that went into that decision was
22 his. And he will not only explain that, but he will be
23 available for questions on that. At the end of the day, it
24 is my firm belief that you will find, as you must, that the
25 Planning Director did not make any kind of erroneous finding

1 of any material fact, that he did not erroneously apply the
2 law, that his decision was neither arbitrary, nor
3 capricious, and that it was not a clearly unwarranted abuse
4 of discretion.

5 The Appellant has the burden of proof of all of
6 those things to that standard. The Appellant also has the
7 burden of persuading you that all of those errors occurred.
8 And it is our belief that all of the evidence, not just the
9 argument Mr. Schwartz argued about, but the actual evidence
10 coming in through the witnesses, through the documents, that
11 you will uphold the director's decision. Thank you.

12 CHAIRMAN STARR: Thank you, Ms. Lovell. Now,
13 we'll have rebuttal by the two counsels. Following
14 rebuttal, there will be an opportunity for members to ask
15 questions of the counsel.

16 MS. LOVELL: I actually have witnesses.

17 CHAIRMAN STARR: I stand corrected. We're not
18 going to do rebuttal on the opening. We're going to move to
19 witnesses, and then there will be closing and rebuttal. And
20 there will be -- yeah, okay. Commissioners will have an
21 opportunity to ask questions of the two counsels at the time
22 of closing. We're going to move on to presentation of
23 witnesses.

24 Witnesses will be first examined by the counsel
25 bringing the witness. Then there will be cross by the

1 opposing counsel. Then there will be opportunity for
2 Commissioners to ask questions of the witnesses.

3 Mr. Schwartz, for the Appellant, please if you
4 have witnesses, would you like to bring your first witness?

5 MR. SCHWARTZ: Mr. Chairman, we in the interest
6 of --

7 CHAIRMAN STARR: Use the microphone.

8 MR. SCHWARTZ: Mr. Chairman and Members of the
9 Council, in the interest of expedition, we have waived all
10 our witnesses, and we only ask that the -- that the
11 Commission take judicial notice of the appropriate facts
12 that are veritable such as the state, the state's finding
13 that the -- that the harbor and bay and adjacent waters are
14 exceeding, that is in violation.

15 CHAIRMAN STARR: If you don't have witnesses --

16 MR. SCHWARTZ: But we have no witnesses to offer
17 at this time.

18 CHAIRMAN STARR: Thank you.

19 MR. SCHWARTZ: Yeah.

20 CHAIRMAN STARR: You've asked for judicial notice
21 to certain facts. I will ask you to state -- to list those
22 facts so we have them on the record before we proceed.

23 Ms. Lovell, thank you for being patient.

24 MR. SCHWARTZ: We are simply asking you to look at
25 published findings that are official -- or rules or laws.

1 The laws and regulations and legal requirements that are
2 applicable in this case, obviously we are asking you to take
3 a look at that. We are asking to you take a look at the
4 state's determination in 2006. And we've cited to this
5 particular report that the -- that the water quality levels
6 of the receiving waters of the these injection wells are in
7 violation of applicable state standards. And we would call
8 to your attention to memos from the -- which are publicly
9 available memoranda from the Department of Corporation
10 Counsel of the County of Maui; one dated February 22nd from
11 the Corporate Counsel Brian Moto through Kimberly Sloper,
12 Deputy Corporate Counsel to Council Member Bill Medeiros
13 dated February 22nd, 2008; and one also from Mr. Moto to
14 Alice Lee, Director of Department of Housing and Human
15 Concerns dated February 10, 2005, that have applicable
16 principles of law stated that are in opposition to the
17 positions taken by the corporate counsel on behalf of her
18 clients in this particular case.

19 CHAIRMAN STARR: Before we proceed, Mr. Schwartz,
20 those two memos, have they been submitted as part of your
21 evidence?

22 MR. SCHWARTZ: They were not submitted. We did
23 not discover these until yesterday, and we are now offering
24 them for awareness. When I found out about the first one at
25 5:00 yesterday, I notified counsel and the Commission of

1 this. And the second one I found in the wee hours this
2 morning.

3 CHAIRMAN STARR: I --

4 MR. SCHWARTZ: They are public record, public
5 information.

6 CHAIRMAN STARR: Okay. We're going to take a very
7 short recess for the call of the Chair, but first I'm going
8 to ask Ms. Lovell to comment. And then we're going to take
9 a very short recess. I have not received these memos
10 myself. So, please, Ms. Lovell.

11 MS. LOVELL: Thank you, Chair. I did receive a
12 copy of one of the memos, the February 22nd, 2010 memo last
13 night at 5:55 p.m. from Mr. Schwartz. I've read it. In my
14 view, it's completely irrelevant. It deals with a doctor's
15 house in Hana and whether an EA was required when converting
16 the use of the doctor's house in Hana from a residence to a
17 dialysis center and clinic. So, I fail to see the relevance
18 of that one.

19 I was not aware of this February 10th, 2005 memo
20 from Mr. Moto to Alice Lee, but it doesn't sound very
21 relevant. My real concern is that under your Rules of
22 Practice and Procedure, and it's Rule 12-201-69, Evidence,
23 Subsection G, it does allow for official notice to be taken
24 of such matters as may be judicially noticed by the courts
25 of the State of Hawaii. But there are restrictions on this

1 doctrine of so-called official notice for judicial notice,
2 and one restriction is that parties must be afforded the
3 opportunity to contest any such facts.

4 We certainly contest that the state has made any
5 determination that the County is in violation of any water
6 quality standards. There is nothing in the report that was
7 briefly mentioned or referenced by Mr. Schwartz, certainly
8 nothing that was specifically pointed out that indicates any
9 such thing, and we strongly object.

10 CHAIRMAN STARR: Okay. We're going to take a take
11 a very short recess for the call of the Chair, and then
12 you'll have your opportunity, Mr. Schwartz.

13 (Recess taken.)

14 CHAIRMAN STARR: Okay. Our contested case
15 proceeding is back in order. First, I'm going to ask
16 Mr. Schwartz to complete his list, and then we're going to
17 give Ms. Lovell an opportunity to comment on any additional
18 items. And then we'll rule on the admissibility of them.
19 Mr. Schwartz, please, so far, you've given us items one,
20 which is kind of a broad package of prevailing and effective
21 laws and regulations; the second is certain water quality
22 reports; the third is two specific memos, which we've not
23 received yet. Please proceed.

24 MR. SCHWARTZ: Mr. Chairman, I just mentioned that
25 you did receive the same copy of the e-mail last night. The

1 first time I found these memos, I copied you and I copied
2 Ms. -- Trisha as well on this.

3 CHAIRMAN STARR: Mr. Schwartz. I'm going to stop
4 you right there. There is a process for service, and, you
5 know, what any of us might receive in an in mailbox or slid
6 under the door is not part of that, so please proceed with
7 your list.

8 MR. SCHWARTZ: I understand. I discovered this at
9 5:15 last night. So, that's the fastest I could provide the
10 notice under those circumstances. The -- we have no further
11 documents of which we expect you to take judicial notice
12 other than the documents that we've -- are now in -- have --
13 that you have before you that are listed in our brief as
14 statements of verifiable facts, those like cases, case
15 citations and so on. We have nothing other than what we've
16 submitted in our brief, and you are free to make the
17 decisions you want about their relevance and probativeness
18 and so on.

19 CHAIRMAN STARR: Okay. Thank you very much.

20 MR. SCHWARTZ: The only other thing I want to call
21 the attention of the Commission to is your rules, your
22 Commission's rules repeatedly in two different places
23 emphasize the importance of doing substantial justice.
24 Justice as well as efficiency is required. And we ask you
25 to take that into account in considering whether to consider

1 these documents and the weight to give them. Thank you.

2 CHAIRMAN STARR: Thank you, Mr. Schwartz.

3 Ms. Lovell.

4 MS. LOVELL: Thank you. Is it the Chair's wish
5 that we now proceed with our witnesses?

6 CHAIRMAN STARR: Just -- there were just those
7 three items that Appellant asked us to take into cognizance.
8 You've already commented about them.

9 MS. LOVELL: Right. I maintain my objection.

10 CHAIRMAN STARR: Thank you very much. In response
11 to the first one, all applicable laws, that is, of course,
12 what we are taking into account. And I believe we have them
13 all in the -- in the record. The water quality reports are
14 something that I don't believe we have before us. And in
15 the record, we did receive some with the -- with the
16 evidence from the Appellant. And the memos from corp
17 counsel have not been submitted to us as per the discovery
18 process, which was outlined before at a prehearing meeting.
19 And we still haven't received copies of it. So --

20 MR. SCHWARTZ: I would be happy to make them
21 available at this point.

22 CHAIRMAN STARR: Mr. Schwartz, please, you're out
23 of order.

24 MR. SCHWARTZ: I'm sorry.

25 CHAIRMAN STARR: Members, Chair feels that those

1 are at this point inadmissible. If members have a problem
2 with that, I would be happy to discuss that. Commissioner
3 Marfdin.

4 COMMISSIONER MARFDIN: I asked our corp counsel
5 about this, but items for discovery are intended to be fair
6 to both sides. On the other hand, if you just discover
7 something recently, if five minutes before he walked in here
8 he discovered something, it seems to me that if we had
9 copies of it, I would ask corp counsel if it would be
10 appropriate to consider it. It seems to me that out of a
11 sense of fairness, we probably should, but that's not a
12 legal decision.

13 CHAIRMAN STARR: Mr. Giroux.

14 MR. GIROUX: I think what the Chair is saying is
15 he's making a ruling. If there is an objection to that
16 ruling, you know, you can appeal the Chair's decision. But
17 what he's saying is that's how he sees it right now as far
18 as expediency and review. So, I think that's the Chair's
19 position.

20 CHAIRMAN STARR: Yes.

21 Mr. Schwartz.

22 MR. SCHWARTZ: We take exception, for the record,
23 to that decision.

24 CHAIRMAN STARR: Okay. Your exception has been
25 recorded. And I apologize, I wish you had presented it

1 through the proper discovery process.

2 MR. SCHWARTZ: I apologize as well. I found --
3 pardon me.

4 CHAIRMAN STARR: Okay. Let's move along.
5 Commissioner Marfdin.

6 COMMISSIONER MARFDIN: Mr. Chairman, Ms. Lovell,
7 you asked her a question, and then she asked whether it was
8 appropriate for the County to present witnesses. And then
9 you asked her specifically about responding to
10 Mr. Schwartz's statements. I would personally be interested
11 to hear whatever witnesses the County wished to present.

12 CHAIRMAN STARR: Yeah, and I also. That's what
13 we're right about to do.

14 COMMISSIONER MARFDIN: Sorry.

15 CHAIRMAN STARR: So, I would ask the Appellee to
16 present witnesses. After the Appellee is able to -- has --
17 is able to present their witnesses, then there will be an
18 opportunity for cross-examination by the Appellant for each
19 of the witnesses. Please, the name of your first witness?

20 MS. LOVELL: The Appellee calls as its first
21 witness Jim Buika.

22 CHAIRMAN STARR: Mr. Buika, I would like to ask
23 you to go somewhere near a microphone. Why don't you sit
24 down over there and use that microphone. And before you sit
25 down, Mr. Buika, I would like to ask whether you swear or

1 affirm that everything you are about to tell us is the truth
2 and nothing but the truth?

3 MR. BUIKA: Yes, I do.

4 CHAIRMAN STARR: Thank you. And please state your
5 name and your occupation for the record.

6 MR. BUIKA: My name is Jim Buika. And I'm a
7 planner in the Planning Department. I'm the coastal
8 resource planner.

9 CHAIRMAN STARR: Okay. Thank you. Ms. Lovell.

10 MS. LOVELL: Thank you very much.

11 DIRECT EXAMINATION

12 BY MS. LOVELL:

13 Q. Mr. Buika, before we get into the nuts and bolts
14 of your testimony, I would like the Commissioners to learn
15 just a little bit about you, some background about your
16 education and training, although I know that you've been
17 before this body before. Could you just tell us a little
18 bit, first of all, about your education and training?

19 A. I'm a professional geologist for 30 years. I have
20 a master's degree in geology. Again, I've been with the
21 Planning Department for three years. And prior to the
22 Planning Department, I was a -- I've been a planner for 20
23 years prior to that. I'm a hazard mitigation specialist. I
24 worked for the federal government, Federal Emergency
25 Management Agency for 13 years. And I also was part of the

1 Management Team of the Pacific Disaster Center here in Kihei
2 for five years doing international disaster management,
3 hazard mitigation. So, those are my specialties in
4 planning, hazard mitigation.

5 Q. And could you tell us a little bit about just your
6 personal background, things that you like to do for
7 recreation and so forth?

8 A. Well, I'm here on Maui because I love Maui. I am
9 a very strong environmentalist. And what I do for
10 recreation is pretty much is for exercise is I swim in the
11 ocean probably three times a week. I go with my youngest
12 daughter, who is 11 years old. And I love swimming on the
13 various reefs on Maui.

14 Q. Now, I believe that you told us that you had been
15 in the Department of Planning for three years; is that
16 correct?

17 A. Yes, three years.

18 Q. Okay. And are you a shoreline planner?

19 A. Yes.

20 Q. In fact, are you the lead shoreline planner?

21 A. Yes, I am the lead shoreline planner.

22 Q. What does that mean?

23 A. That means I am the lead planner for reviewing
24 special management area permits that are located along the
25 shoreline or have an influence on the coastline. I am a

1 resource for other planners in the department and the
2 public.

3 Q. And in doing that work, are you required to be
4 familiar with certain laws, regulations and guidance
5 documents?

6 A. Yes, I am. The Coastal Zone Management Act, the
7 Special Management Area Rules for the Maui Planning
8 Commission and the Molokai Planning Commission and the
9 shoreline rules for the Maui Planning Commission in
10 particular.

11 Q. Now, as part of your job, do you work on exemption
12 assessments for the SMA?

13 A. Yes, I do. I work on various types of permits
14 including exemptions.

15 Q. And about how many of those do you do in any given
16 year?

17 A. Well, it depends. Some projects are simple. Some
18 are more complex. Probably from looking at permits, I
19 probably look at from between 25 to 40 permits per year over
20 the three years, so I've looked at approximately 100 permits
21 in three years. And many of them are exemptions. Many of
22 them are minors. Some of them are major permits. Some are
23 emergency permits, so I would probably say probably half of
24 them are exemptions, so probably around 50, 50 exempted
25 permits.

1 Q. Okay. And do you always have enough information
2 to go on, or do you need to ask for more at times?

3 A. Do I always have enough information? Very rarely.
4 It's an interactive process with the applicant gaining --
5 reviewing the initial application that comes in and trying
6 to gain more information over time as quickly as possible to
7 put together the information I need to make an informed
8 decision about the impacts of the proposed action on the
9 environment and the special management area and the coastal
10 area.

11 Q. And in the course of your work, do you see all
12 kinds of projects?

13 A. Yes, I see the good, the bad and the ugly. I hate
14 to say it, but, yeah, multi-jurisdictional issues with the
15 state, seawalls, big major permits that I take before the
16 Commission, some things that are -- a lot of things that are
17 violations of the shoreline that are not even permits that I
18 need to deal with with the state, a whole list of those.
19 So, I see a variety of different projects.

20 Q. Now, with respect to the project that's before the
21 Commission to date, what was your role, if any?

22 A. My role was, as the lead planner, to assess the
23 SMA assessment application that was submitted from the
24 Department of Environmental Management and to make a
25 determination from an informed point of view whether the

1 permit was a -- a major SMA permit, a minor SMA permit, an
2 exempted -- exempted from the SMA process or denied for
3 inconsistencies.

4 It certainly was not -- the other option is an
5 emergency permit, which it was not. So, those are the five
6 options.

7 Q. Okay. And what did you do with respect to the
8 application that you received for this project from the
9 Department of Environmental Management?

10 A. I reviewed the application, which is set up in
11 terms of the SMA guidelines and the SMA application
12 procedures and determination process. And I reviewed and
13 with respect to the environmental laws and the Special
14 Management Area Rules for the Maui Planning Commission.

15 Q. How did you go about doing that?

16 A. Again, I considered the Coastal Zone Management
17 Act 205-A, the Special Management Area Rules for the Maui
18 Planning Commission, the shoreline rules for the Maui
19 Planning Commission; and in particular, I followed the
20 assessment and determination procedures under 12-202-12 for
21 assessing the application.

22 Q. So, these kind of applications are set out in a
23 particular rule, and you followed that Rule 12-202-12?

24 A. Yes. And actually, all the Commissioners have it.
25 I mean they have the whole package and the rules and the

1 steps there that I followed, the information that I reviewed
2 to make the determination of an exemption for the Department
3 of Environmental Management.

4 Q. Particularly, what documents did you have to look
5 at when you were making this initial determination?

6 A. Well, I looked at the SMA application, first of
7 all. And I do not believe I had the CH2MHill technical
8 report, so I asked for additional information. I asked for
9 the technical report to review the basis for the requirement
10 for the repair, replacement for the two injection wells. I
11 reviewed that. I asked for the permits, the Department of
12 Health permits, the underground injection control permit.
13 There are two of them that are in your application.

14 One is for the construction of these two wells,
15 and one is for the abandonment of the Injection Well Number
16 1 and Injection Well Number 2, the two specific wells that
17 are going to be abandoned and replaced by the new wells,
18 those two. I looked at the environmental assessment. I
19 asked for the environmental assessment from 2001. I looked
20 at the past permitting history of the wastewater reclamation
21 facility. The last major upgrade was in 2001, and so, I was
22 looking, in particular, for legally permitted structures
23 there. And also, in particular, the reason I looked for
24 that was because I -- because we are drilling wells, we're
25 going into the ground, I was very concerned about the

1 Department of Land and Natural Resources State Historic
2 Preservation Division's ruling on the entire parcel to
3 understand if there would be any impacts to cultural and
4 historic resources.

5 And from that environmental assessment, there was
6 a Chapter 6(e), I forget what they call, letter of, well,
7 exclusion. I know that's not the right term. Letter of no
8 effect. There was a letter of no effect that SHPD, State
9 Historic Preservation Division, had not required any even
10 archeological monitor during the major upgrade in 2001. And
11 also, going back to 1990, there was a -- an archeological
12 inventory assessment done of the entire parcel. It was part
13 of the major airport project for that parcel. So, from that
14 evidence -- so, I looked at that, the EA, in particular,
15 from that point of view to look at if there would be any
16 concern from State Historic Preservation Division.

17 And I concluded, determined that there would not
18 be, because the SHPD did not have a concern in 2001 when
19 they did that major project earlier. So, that was the EA.
20 And then I asked for State Land Use consistency. Since it
21 is a state parcel, it's not a county parcel, I asked if
22 there was -- it's conservation division -- is there a
23 conservation -- Conservation District Use Permit from the
24 state. And there is one from 2002. So, I obtained that
25 document. I also looked at the Maui Shoreline Atlas for

1 erosion rates and various maps for locating the facility
2 relative to the coastline.

3 So, the SMA application, CH2MHill report, the
4 injection well permits, the environmental assessment and the
5 state district use permit were the additional documents that
6 I asked for as part of this permit.

7 Q. Now, when was the application initially submitted?

8 A. The initial application came in, I believe it was
9 July. It's in -- it's on the first page of my report, July
10 14th, 2009. The Department of Planning received Department
11 of Environmental Management's request for the subject SMA
12 and shoreline setback assessment application July 14th,
13 2009.

14 Q. And what did you do after it was submitted July
15 14th, 2009?

16 A. Well, originally, they -- they sent in a -- we
17 have a -- we being the Planning Department -- has a -- has a
18 memorandum of agreement or understanding with the both the
19 Department of Environmental Management and Parks and Rec for
20 very minor types of projects such as, you know, like Parks
21 and Rec, you know, changing out toilets or interior
22 alterations. Because Department of Environmental Management
23 and both Parks and Recreation, because of all the beach
24 parks, we do a lot of manini type of projects that are
25 pretty simple. Instead of having them come in with 30 or 40

1 assessments and costing them money and us time and clogging
2 up the system, we kind of have a policy memorandum exempting
3 some of these very simple things to do.

4 And they had originally submitted it under that
5 policy memorandum, and I rejected that and asked them to
6 complete a full SMA assessment, which came in later. So,
7 they agreed to do that. That was from July, August
8 September, October. October, they came in with the existing
9 SMA permit that you have in front of you now.

10 Q. And once they provided the more detailed
11 application that you required, what did you do?

12 A. I did review the application straightaway from
13 the -- via the SMA rules that you have in front of you. And
14 at that point is when I went back and forth with Department
15 of Environmental Management asking for the various
16 documents. And once the application is complete, the
17 planner's duty is to look at it from a technical point of
18 view, do we need any additional technical information from
19 any other agencies, outside agencies such as Police, Fire,
20 OHA, a long list, SHPD, State Historic Preservation
21 Division. So, there were three things that -- so I looked
22 at it from that perspective.

23 As I told you already, and I won't go through it
24 again, Department of Land and Natural Resources, the State
25 Historic Preservation Division, I decided not to send it to

1 them, because I didn't think there were any -- or I
2 determined that there weren't any cultural or historical
3 impacts. The second was Department of Health, but because
4 it is environmental management, it's injection wells. So,
5 that's when I got the underground injection control permits
6 from Department of Health.

7 So, since the project is already being reviewed,
8 scrutinized under pollution control permits by the
9 Department of Health, I didn't feel that we needed to send
10 it to back to them. Because it was a -- SMA permits are
11 allowed to be reviewed in parallel under other permits such
12 as Department of Health or a building permit or something
13 such as that. And then the other -- the other option was to
14 send it to Public Works to look at drainage, potential
15 drainage and runoff into the ocean from the project. After
16 a site visit, I didn't feel Public Works would have any
17 comments. There really is no drainage. It's -- the entire
18 project is underground.

19 There's a little concrete pad. It's pretty much
20 insignificant drainage impact. So, I didn't send it to
21 them. So, those were the three I looked at, and I didn't
22 send it to any of them. From then, I went through the --
23 the application, and the application is in your packet
24 there. It's a six-page application. And I followed the --
25 the rules. If you wanted to -- I don't know if you want me

1 to get into that, but I guess I could keep to the important
2 part.

3 Q. Let me just say for the record that the ultimate
4 determination letter from the Department of Planning is
5 dated December 21st, 2009. And starting at page 9 of
6 Exhibit 1 submitted by the County, we numbered our exhibits
7 1 through 5 as required during the prehearing conference,
8 and so if any of the Commissioners want to look at the
9 assessment application, it's -- if you go to Exhibit 1 and
10 start at page 9, you have it.

11 CHAIRMAN STARR: There will be opportunity for
12 questions on this.

13 MR. BUIKA: Actually, there was one other concern
14 I had going back to your last question and kind of following
15 on -- well, still continuing of what I did. The one concern
16 I did have, and it's been brought up by the Appellant is
17 public participation. Should this have public meetings?
18 Should it not? And so, it was a concern. I brought it to
19 Dave Taylor, Department of Environmental Management. And
20 Dave told me that this has been -- this project has been in
21 front of Council four years in a row, Council meetings, the
22 budget meetings. From the very study that CH2MHill
23 technical study I think was the first report that was
24 commissioned by the Council had to be funded. And so, over
25 four budget cycles, it has had public participation. Akaku

1 TV, plenty of opportunity for the public to testify for or
2 against or comment on this project.

3 And besides that, Dave Taylor reported to me that
4 the Council unanimously has voted positively to fund this
5 project. So, I determined from those four -- budget four
6 years in a row presenting this project to the Council
7 members and having a unanimous vote from the Council members
8 that represent the public, that it had gone through public
9 scrutiny and met the criteria of the SMA rules on that. And
10 I also had other meetings. I had various meetings back and
11 forth. Because they're on the same floor where I'm located,
12 it was very convenient just to get information that I needed
13 for the project.

14 And I also conducted one site visit prior to any
15 determination on November 25th with Dave Taylor and Joannie
16 Gushiken, project engineer.

17 Q. (By Ms. Lovell) Thank you. Now, did you bring
18 the status of this particular application to the attention
19 of the Planning Commission at any time?

20 A. Yes, I think it -- I'm not sure exactly how the
21 process is, but in the director's report at the end of the
22 Commission meetings, I think the new SMX's that they're
23 initially called are listed. I think one or more of the
24 Commissioners had asked to -- for some upfront information
25 about the injection well project. And at the Commissioner's

1 request and at the Planning Director's request, I wrote up a
2 two-page summary of where I was on the permit. And I think
3 I'm not sure of the exact dates, but I think in the ensuing
4 meeting, we did present that to the Commissioners, a short
5 update of the project.

6 Q. Does December 8th, 2009 sound like about the right
7 date?

8 A. Yes, I think -- I think the Commission had a
9 meeting right before Thanksgiving, the 25th or something
10 like that. And that's when the Commission had asked for it.
11 December 8th was, I do believe, the meeting that we
12 presented information. I think it was on five or six
13 different unfinished permits that the Commission was
14 interested in. This was one of them.

15 Q. Okay. Now, there was a comment during DIRE's
16 opening statement about an exemption decision regarding
17 Chapter 343 of the Hawaii Revised Statutes, also known as
18 the Hawaii Environmental Policy Act. Was there an exemption
19 decision made under Chapter 343?

20 A. Yes, there was. And that's -- that is a
21 requirement under our SMA assessment application. It's page
22 5 of 6 in the actual application where we, the Planning
23 Commission, under the SMA rules requires compliance with
24 Chapter 343 HRS. And that -- that exemption was, I guess it
25 was exempted by the Director of the Department of

1 Environmental Management. And there is a letter, a signed
2 letter in the SMA assessment application package that is
3 signed by Cheryl Okuma on December 7th, I believe.

4 So, they are responsible -- since it's an agency
5 action, they are responsible for reviewing Chapter 343,
6 seeing if there is one of the triggers. There was a
7 trigger. It's the use of county funds. And then this page
8 5 of 6 of our application, you can go through these, there
9 are clear exemptions listed there. And the exemption that
10 they used was replacement or reconstruction of existing
11 structures and facilities where the new structure will be
12 located generally on the same site and will have
13 substantially the same purpose, capacity, density, height
14 and dimensions as the structure replaced.

15 And also, besides the exemption, Department of
16 Environmental Management does do an environmental assessment
17 according to the SMA rules. And that's on page 4 of 6 of
18 the actual application that they submitted, according to the
19 SMA criteria. And they concluded that there would be no
20 substantial environmental impact by replacing one well with
21 one well or no cumulative environmental impact. So, the
22 Department of Environmental Management did what they were
23 required of a government agency that is most knowledgeable
24 about the project. They are required to look at the
25 environmental impacts and to look at the exemptions from the

1 343, Chapter 343 law.

2 Q. And the 343 compliance statement that was just
3 mentioned for the record is found in County's Exhibit 1 at
4 page 13. Now, at some point, did you prepare a report or
5 document for the Planning Director?

6 A. Yes, I did. Once I -- once the -- once I had the
7 exemption information and the completed application that you
8 have in front of you, I reviewed the application and
9 prepared a report for the Director's signature.

10 Q. And was that report of yours accepted by the
11 Director or the Director's representative?

12 A. Yes, it was. It was signed by the Director's
13 representative on December 18th, I believe.

14 Q. And was there a plan on the part of the Planning
15 Department to explain this more fully to the Planning
16 Commission?

17 A. Yes, we had -- of the, I think it was Chairman
18 Starr, had asked to have a discussion about this at the next
19 Planning Commission meeting once it was exempted. And we
20 had -- we had planned on presenting it and discussing it;
21 however, what happened is because we had exempted it and the
22 day before the Planning Commission meeting, January -- I
23 think it was January 25th, I think we had -- I'm not sure if
24 I have my dates right. But January 26th was the Commission
25 meeting, and the 25th we received a petition from -- from

1 the Appellants contesting the exemption.

2 So, because the petition came in the day before,
3 we could not discuss it with the Commission at that point.

4 Q. Now, Mr. Buika, I've marked as Exhibit 1 in this
5 proceeding the letter, the Planning Director's letter to
6 Dave Taylor dated December 21st, 2009 with a number of
7 attachments, including the assessment applications and the
8 exemption applications that you have indicated. And at this
9 time, I offer Exhibit 1 and its attachments in evidence.

10 CHAIRMAN STARR: Okay. Ms. Kapuaala, is that
11 substantially what we've received?

12 MS. KAPUAALA: Yes.

13 CHAIRMAN STARR: Okay. Thank you. That is
14 received.

15 MS. LOVELL: Thank you. And for the record with
16 apologies, Exhibit 1 has 122 pages, but those are the
17 documents that Mr. Buika has testified to he reviewed in
18 connection with this application.

19 CHAIRMAN STARR: Thank you. And I just want to
20 comment to staff next time we do this process, I would like
21 to make sure that evidence submitted is marked who it's
22 submitted by, whether it's the Appellant or the Appellee and
23 what it constitutes, so it's a little clearer when we look
24 at it.

25 MS. KAPUAALA: For your reference, Commissioners,

1 the County's exhibits are marked numerically 1, 2, 3, 4.
2 And the Appellant's exhibits were supposed to be marked
3 alphabetically, but he submitted them as attachments. So,
4 if he does reference any attachment, I'll do my best to
5 bring it up on the Smart Board.

6 CHAIRMAN STARR: Thank you.

7 Q. (By Ms. Lovell) Now, referring to Exhibit 1,
8 which is in evidence, Mr. Buika, that is mainly the
9 Director's letter and all of the attachments, do you always
10 prepare your reports in this format?

11 A. I don't know what you mean by --

12 Q. Let me see if I can make it a better question. To
13 me, at least Exhibit 1, the letter with all of the
14 attachments, seems rather comprehensive. Is that the way
15 you always do your work, or does it vary by project?

16 A. Well, it certainly varies by project. Some of the
17 exemptions get a very short letter. We actually have a form
18 we use that's just one page. This is -- I believe it's
19 eight pages. The reason I did this is because it is the --
20 contained in the body of the approval letter is the
21 environmental assessment. And much of the assessment that I
22 went through, it does cover the Coastal Zone Management Act,
23 the objectives and policies even though I didn't list them
24 like that. I did look at all of them over a two-week
25 period. I pretty much took two weeks of my time to do the

1 analysis and put all this together.

2 So, it is a comprehensive assessment. I knew it
3 was a sensitive project, a very important project, and I
4 wanted to make sure that what I did was documented in the
5 public's view as best as possible. You know, I guess I am a
6 human being, and I do err. But -- and I guess you can
7 scrutinize and pick apart every word that I wrote, but I
8 think, you know, I can -- if there's any issues, I can
9 explain them today.

10 Q. All right. Thank you. I think that's where we'll
11 go next. I would like to talk about some of the conclusions
12 that are listed in the report, which is Exhibit 1 in
13 evidence. And to discuss with you what the basis was, in
14 other words, how you reached those conclusions, which
15 ultimately became the Planning Director's conclusions. And
16 I would like to start with the question why is this
17 particular project determined to be maintenance and repair?

18 A. What we do is if -- behind the decision letter,
19 again, is the SMA application, the six-page SMA application.
20 And actually, it shows you on page 1 of 6, it gives you the
21 guidelines for what the planner is supposed to do. So, when
22 the application is complete, we are to determine whether it
23 is a -- the project is a development or not a development.
24 The CZM, the Coastal Zone Management Act, definition of
25 development is there are four or five of them. Pretty much

1 anything, anything you do, if you grade the ground or you
2 put a nail in a wall or put two boards together, put
3 something on the earth, it's development. However, the
4 state law realizes that -- so everything that is
5 development, there need to be some exemptions that are
6 common, so that they don't -- if you add a bathroom to your
7 house, you don't have to come before the Planning Commission
8 and have a public meeting about that.

9 I'm just giving you an extreme example, but what
10 it does is these exemptions filter out projects that most
11 likely have very little environmental impact and do not need
12 to go through the SMA permit process, or they become exempt.
13 So, those are listed on page 1 of 6, and there are 15 of
14 them. Actually, I think there are 16 now. And so, I
15 determined that it was development initially, but that it
16 does -- that this project does fit one of the exemption
17 classes of repair and maintenance of underground utility
18 lines, including, but not limited to water, sewer, power and
19 telephone and minor appurtenant structures such as
20 pad-mounted transformers and sewer pump stations.

21 So, this exemption list is developed by the Maui
22 Planning Commission. And the reason it's maintenance and
23 repair is because I discussed this this with Department of
24 Environmental Management. The Department of Environmental
25 Management has a maintenance and repair and operations

1 budget. Their capital improvement budget for all of the
2 wastewater facilities all around the islands is
3 multimillion-dollar projects around the islands, and most of
4 the staff, I think they have about 60 staff, most of the
5 staff, some of them manage projects, but many, many of them
6 do maintenance and repair on a daily basis to keep our
7 systems up and operational. And even though we're calling
8 these, you know, we're constructing new wells or we're
9 replacing wells, we're swapping one out for another,
10 maintenance -- maintenance of a wastewater facility is --
11 the purpose of a maintenance program is to keep the facility
12 functioning 100 percent or as close to 100 percent as
13 possible.

14 And so, under maintenance, you have repair
15 programs, and when you repair things, most of the time or
16 many of the times, you replace them. So, giving an example
17 of a house. To maintain my house, at some point, I need to
18 repair my roof. So, when I repair my roof, I need to
19 replace shingles on my roof, so replacing a well or
20 replacing shingles and repairing my roof are part of the
21 maintenance program. So, replacement of parts or
22 functioning components of a wastewater treatment facility I
23 determined was part of the maintenance program. And it does
24 say in here it's minor. I mean it's only a million-dollar
25 project. And they have a lot larger -- when I was talking

1 with DEM, they have many, many larger projects than that. I
2 mean when you think of constructing a house on Maui, there
3 are many million-dollar houses. I don't think we consider
4 those major projects. Those are not that large. So, a
5 million-dollar project of repair and replacement is not that
6 large a project. And it is -- replacing wells is part of a
7 maintenance program. So, that was kind of the reasoning
8 behind the maintenance and repair. It's definitely
9 maintenance.

10 Q. So, you saw this as, in essence, taking two
11 nonfunctioning parts of the wastewater plant and replacing
12 them with the same parts that were functioning?

13 A. Yes. As a scientist with good engineering
14 background, I understand that we're not replacing the exact
15 well location. I mean that would be foolhardy, and it would
16 be extremely expensive to grout out that existing pipe that
17 was not functioning and put it in the same place. So,
18 obviously, all the injection wells are getting close to the
19 ocean because there's been shoreline erosion there. So,
20 Department of Environmental Management have found two
21 locations farther back, a couple-hundred feet farther back,
22 still on the property.

23 So, from a plant location or from a plant
24 perspective of the 18 acres, moving the wells mauka a
25 couple-hundred feet still really is a point source. And it

1 makes sense to put two new wells not right next to the
2 existing wells if you want them to function. So, from an
3 engineering, practical, scientific point of view, you need
4 to move the wells and put in two new wells. So yes, it's a
5 like-for-like swap basically. And that's what the SMA
6 exemptions are looking for, to try to exempt those type of
7 things. Because we do that all the time. We replace things
8 all the time.

9 And if we didn't have these exemptions, we would
10 have many, many, many more projects coming before the
11 Planning Commission that would not need to be here.

12 Q. Now, this exemption for replacing like with like,
13 does that require that the replacement be in exactly the
14 same place as the part that was replaced?

15 A. No, it -- you know, no, it does not. It just
16 needs to be reasonably close.

17 Q. So, generally on the same facility?

18 A. Yes, which it is.

19 Q. And we are talking here the existing footprint of
20 the existing facility?

21 A. Yes.

22 Q. Now, did you determine that the swapping out of
23 injection wells would have any cumulative or additional
24 impact on the environment?

25 A. I determined that the existing wells would not

1 have a significant or cumulative impact. And actually, my
2 main concern was looking at the underground injection
3 control well permits and also the technical report. I
4 understand that both these wells are not primary wells.
5 These are backup wells. These wells, as Counsel Lovell
6 explained at the beginning, these wells are required to --
7 by Department of Health to provide 50 percent of the backup
8 capacity for the wastewater treatment plant. So, right now,
9 the wastewater treatment plant is out of compliance, from my
10 understanding, with the Department of Health permit because
11 we are lacking -- our two wells are not performing up to
12 standards, so we don't have the required capacity, 100
13 percent required backup capacity.

14 So, these two wells -- and in my determination, by
15 not drilling these two wells, we put the environment at
16 extreme jeopardy. We are -- we do not -- Maui County at
17 that plant site does not have the capacity to manage design
18 flow in a large storm. If they happen to take another well
19 off line for maintenance or whatever, we would have very
20 little capacity to manage storm water and wastewater. And
21 what would happen, we would be -- we would be violating many
22 of the objectives and policies of the Coastal Zone
23 Management Act. We would be environmentally harming the
24 marine environment, the coastal ecosystem, recreation areas,
25 for instance, by dumping sewage into the ocean because there

1 was not enough capacity to put them into injection wells.

2 So, the corollary -- I mean that's just one side
3 of it. I haven't really talked about potential cumulative
4 effect. But in my letter, I did, I went through the report
5 step by step. And pretty much my analysis begins on page 5
6 looking at the environmental impacts. Page 5 of the letter,
7 not of the application, but --

8 Q. Exhibit 1, page 5.

9 A. Yeah. And I can go through them. They were all
10 coastal zone management related, that the proposed
11 replacement wells will serve only in the capacity of
12 performing as backup wells to allow the existing wastewater
13 reclamation facility to regain the emergency overflow
14 capacity in terms of existing flow rate. Underlined: There
15 will be no intensification of use caused by this proposal --
16 proposed action, and thus, at minimum, environmental impact.

17 Q. And in writing that, was it your understanding
18 that the purpose of swapping out these wells with better
19 functioning ones would be to permit the facility to come
20 back to its permitted capacity?

21 A. Yes, to be in compliance with the Department of
22 Health underground injection control/pollution control
23 permit, to control pollution so that it would not be
24 jeopardizing our environment.

25 Second, or it's Number 3 there, appropriate best

1 management practices will be practiced during the repairs to
2 safeguard against any construction debris or runoff from
3 entering the ocean and to preserve and protect the natural
4 resources of the coastal zone.

5 Q. And the rest of the things that you took into
6 account are all listed on pages 4 and 5 of Exhibit 1, which
7 are pages 5 and 6 of the letter of December 21st, correct?

8 A. Yeah.

9 Q. Okay.

10 A. Yes, I don't know if you want me to go through
11 them or not, but they are. Each of these is an analysis of
12 the Coastal Zone Management Act demonstrating and
13 determining that there is no significant environmental
14 impact or cumulative environmental impact from this proposed
15 action.

16 Q. Okay. Now, did the Department of Environmental
17 Management do any kind of environmental review?

18 A. Yes, they did. As strange as it may be, they are
19 the Department of Environmental Management, so everything
20 they do is manage the environment. Well, what they did is
21 they did an environmental review under the SMA guidelines
22 that is the -- is in the SMA application, which is page 2 of
23 6 -- oh, no, wait, sorry, I got it wrong. Page 4 of 6, the
24 assessment information, where they answered every one of the
25 SMA -- SMA criteria that our department, as planners, review

1 and analyze and determine.

2 So, going through A through L there on page 4 of 6
3 of the SMA application. So, this is the information that
4 the Department of Environmental Management wrote in here.
5 Plus, behind all of this writing is an environmental
6 assessment according to the SMA rules.

7 Q. And just for the record, that's page 12 of Exhibit
8 1. Now, did you look at various objectives and policies and
9 criteria in doing your report?

10 A. Yes, I did.

11 Q. And --

12 A. Of the Coastal Zone Management Act.

13 Q. Yes. And does the coastal zone management
14 analysis begin on page 5 of the reported letter, which would
15 be Exhibit 1, page 5?

16 A. Yes, and that's what I started reading through. I
17 didn't go through -- there are ten objectives with policies
18 under them in HRS 205-A, Part 2. I didn't formally list
19 every one of them, but I did it through this analysis. The
20 entire analysis, the seven pages is an analysis of the
21 Coastal Zone Management Act. But specifically, Numbers 2
22 through 7 on page 5, and 8 through -- 8 and 9, I guess on
23 page 6.

24 Q. Okay. And was that report intended as a summary
25 of the analysis that you had performed?

1 A. Yes, it was intended that way.

2 Q. Okay. Now, Mr. Buika, you have heard this morning
3 from your colleague, Ms. Kapuaala, that there are certain
4 standards that need to be followed if a Director's decision
5 is to be overturned, that the Director's decision cannot be
6 overturned unless it was based on clearly erroneous findings
7 of material facts or erroneous application of the law or was
8 arbitrary and capricious in its application or was a clearly
9 unwarranted abuse of discretion?

10 Keeping in mind those standards, is it your
11 feeling that the ultimate decision was clearly erroneous?

12 MR. SCHWARTZ: Objection. That requires a
13 conclusion of law.

14 CHAIRMAN STARR: I'm going to sustain that
15 conclusion. The witness was party to creating that which
16 you're asking to overturn.

17 MS. LOVELL: Let me see.

18 CHAIRMAN STARR: Before we proceed, do you have
19 many more questions?

20 MS. LOVELL: No, I have one more question I hope.
21 I hope I can do this in one question.

22 Q. (By Ms. Lovell) Let me try to rephrase my
23 previous question to make it a better question. Have you
24 heard anything today from the Appellants which in any way,
25 shape, or form changes any of the conclusions or

1 recommendations in the letter dated December 21st, 2009,
2 which is Exhibit 1 in evidence?

3 A. No, I have not.

4 Q. Thank you. I have no further questions at this
5 point.

6 CHAIRMAN STARR: Thank you very much. We're going
7 to take a recess for lunch. We'll be back at 1:30 with
8 cross-examination of the same witness. And I thank everyone
9 for their patience.

10 (Lunch recess.)

11 CHAIRMAN STARR: Good afternoon, everyone. The
12 Maui Planning Commission meeting of April 27th is back in
13 order. We're continuing with our contested case where we're
14 about to have cross-examination of the first witness, Jim
15 Buika. I just want to mention we will be adjourning today
16 at 5:00 to not cause humbug for staff. So, hopefully, we
17 will be pau at 5.

18 Anyway, I pass it over to Mr. Schwartz to
19 cross-examine the witness, please. Go ahead, Mr. Schwartz.

20 MR. SCHWARTZ: Thank you, Mr. Chairman.

21 CROSS-EXAMINATION

22 BY MR. SCHWARTZ:

23 Q. And Mr. Buika, I want to start by saying that my
24 job in this is to try to get at a clear understanding for
25 the Commission is the key element, and I'll try to keep my

1 questions to that key elements of your testimony and their
2 significance for the relevant issues in the case. I don't
3 personally enjoy cross-examination, and I respect that -- I
4 want to say that I respect all the people who are involved
5 for the County are trying to do the best job they can.

6 So, these questions are not personal. They're to
7 try to get at what are the real facts and understanding of
8 the situation. And I appreciate the patience. I'll try to
9 move rapidly through this, but a lot of ground was covered
10 this morning in the direct examination. Some of it has to
11 be revisited.

12 So, first of all, can we get a little bit of
13 background about how much water we're talking about that
14 goes into the injection wells and how much effluent goes
15 into the injection wells on a daily basis at Kahului?

16 A. I believe it's under 10 million gallons a day. I
17 think it's 9.7 million gallons per day.

18 Q. And what's its potential maximum capacity when all
19 the injection wells are fully operative?

20 A. I believe it's 19.8 million gallons per day.

21 MS. LOVELL: I just have an objection that the
22 cross-examination exceeds the scope of direct. And I think
23 if we're getting into very technical questions about how the
24 plant operates, Mr. Taylor would be a better witness.

25 CHAIRMAN STARR: I -- we will take that into

1 account, but I will not sustain them because they are
2 relevant to the forms that Mr. Buika has presented us and
3 filled out.

4 MR. BUIKA: The figures are contained in the
5 CH2MHill technical report.

6 Q. (By Mr. Schwartz) And starting with the CH2MHill
7 technical report, that's the 2007 report; is that right?

8 A. Yes.

9 Q. And that report, does it distinguish between
10 rehabilitation on the one hand and replacement on the other
11 of injection wells?

12 A. Yes, it does.

13 Q. And what distinction does it make between the two
14 things?

15 A. Rehabilitation is trying to improve an existing
16 well, improve an existing well's capacity through various
17 interventions. And a replacement well is drilling a new
18 well to -- to take the capacity of a nonperforming well that
19 cannot be rehabilitated via cost effective means.

20 Q. So, is the -- when you say that the -- that this
21 is a replacement exercise, this project calls for
22 replacement of the two wells, did you mean that the
23 replacement, that you were not going to try to fix the two
24 older wells, but you were trying to build new ones?

25 MS. LOVELL: Object to the form of the question.

1 CHAIRMAN STARR: Could you restate the question,
2 please?

3 MR. SCHWARTZ: Sure.

4 Q. (By Mr. Schwartz) You said that this is a
5 replacement project; is that right, in your report?

6 A. Yes, it is characterized as a replacement of two
7 existing wells, yes.

8 Q. And doesn't the report say at several points that
9 it involves construction?

10 A. Yes, it does.

11 Q. And didn't you testify this morning that it would
12 be development; because it's construction, it would be
13 development unless it fits within one of the exemptions?

14 A. Yes.

15 Q. Of 205-A-22?

16 A. Yes.

17 Q. Isn't that right? Okay. So, is there an
18 exemption in 205-A-22 for replacement wells or replacement
19 period?

20 A. The word replacement is not used, but the
21 exemption is Exemption Number 4, which is maintenance and
22 repair, which I explained is replacement is a component.

23 Q. Pardon me, that's not responsive.

24 MS. LOVELL: Please don't interrupt.

25 CHAIRMAN STARR: Please allow him to continue,

1 Mr. Schwartz.

2 MR. BUIKA: Replacement, as I explained earlier,
3 in my determination is to -- is a component of repair and
4 maintenance programs. It is in everything we do.

5 Q. (By Mr. Schwartz) So, your claim is that
6 replacement is the same as repair; is that right, fits
7 within the repair exemption?

8 A. Yes, it does.

9 Q. Are you familiar with the plain language rule?

10 A. I can -- I read about it over and over and over in
11 your 84-page review. And I infer what the plain language
12 rule is. So no, I'm not -- I'm not an expert in the plain
13 language rule.

14 CHAIRMAN STARR: I think that's getting beyond the
15 scope of the expertise.

16 MR. SCHWARTZ: Well, Mr. Chairman, the witness
17 testified he was familiar with the legal standards that
18 apply to the work that's he's an expert in. And one of the
19 legal standards is that a standard of construction that says
20 that the law is to be construed using plain language unless
21 it result in untoward effect, in consequences that were
22 absurd. So, I'm trying to find out both, as to his
23 credibility, is he familiar with this; and secondly, how
24 does it apply in this particular case, how did he apply the
25 plain language rule to the statement of that repair.

1 Replacement counts as repair within the meaning of that --
2 of that exemption.

3 CHAIRMAN STARR: I see Ms. Lovell is standing. Do
4 you have an objection?

5 MS. LOVELL: Yes, I have a couple of legal issues
6 here. First of all, Mr. Buika did not testify that on
7 direct that he was familiar with the so-called plain
8 language -- oh, sorry. The witness did not testify on
9 direct that he was familiar with the so-called plain
10 language rule, that I believe that what Mr. Schwartz is
11 talking about is a rule of statutory construction, which
12 lawyers have to deal with from time to time.

13 Mr. Buika testified that he was familiar with
14 205-A with the rules of this Commission and so forth. I
15 believe it's argumentative and calls for a legal conclusion
16 to debate how a lawyer or judge would construe a particular
17 word.

18 CHAIRMAN STARR: I will ask you to stick to 205 in
19 the rules of the Planning Commission. And my suggestion is
20 you slightly reroute your train of thought here.

21 Q. (By Mr. Schwartz) Let me ask you this, Mr. Buika.
22 You indicated that the reason you think this replacement
23 qualified as a repair is you used an analogy of repairing a
24 roof; isn't that right, this morning?

25 A. Yes.

1 Q. So, if you fix the tiles on a roof, that's to you,
2 you take out the old ones and you put in a new one, that's a
3 replacement that constitutes a repair; is that right?

4 A. And maintenance, yes.

5 Q. And maintenance, okay. Now, in this case, were
6 any of the existing Wells 1 and 2, does the project call for
7 any kind of fixing of those wells?

8 A. The proposed action does not.

9 Q. Does it require new pipe to be laid from the
10 existing waste treatment plant to the location of the new
11 wells?

12 A. Not from the waste treatment plant. There are --
13 it would just be some appurtenant piping that would connect
14 the injection well to the existing main pipeline. I don't
15 know what technically you call it, but the feeder line to
16 the other injection wells. It would intercept it, yes.

17 Q. And how much pipe has to be laid; is it a foot, is
18 it 2 feet, is it 200 feet?

19 A. It's probably I would guesstimate about 350 feet
20 to 400 feet of, yeah, of pipe.

21 Q. And you testified that you regard the proposed
22 project as fairly minor, only a million dollars; is that
23 right?

24 A. Yes.

25 Q. Under the rules of this Commission, if a -- if

1 this clearly were an SMA permit were required for this,
2 would it qualify for a minor exemption if it cost a million
3 dollars or more?

4 A. If it was clearly defined as development, and --

5 Q. Didn't qualify for one of the exemptions.

6 A. -- didn't qualify for one of the exemptions, it
7 would be, yes, it would be a major permit.

8 Q. It would be major, not minor within the meaning of
9 this Commission's rules?

10 A. Right. And if we brought this before the
11 Commission, I've had this happen before, the Commissioners
12 would say why in the world are you bringing this before us.
13 Because I know, because that's what exemptions are for.

14 CHAIRMAN STARR: I have a problem with that.

15 MR. SCHWARTZ: I do, too.

16 CHAIRMAN STARR: I think that's a supposition.

17 And I wish to request that -- in fact, I'll order that to be
18 stricken.

19 MR. SCHWARTZ: Thank you.

20 Q. (By Mr. Schwartz) So, can you cite me another
21 case that in your knowledge either that you've prepared or
22 that any other planning person has prepared where you've
23 declared a replacement to be a repair or maintenance?

24 A. I'm sure I have had them.

25 Q. Just give me one.

1 A. Well, you have to give me a second to think about
2 it, so -- but they're common. They're very, very common.

3 Q. Pick one.

4 A. Every -- when I brought this up to any planner,
5 they immediately said it's repair and, you know, it's repair
6 and replacement, maintenance with all the other planners, so
7 very common.

8 Q. I understand. But give us an example so we can
9 understand what this is like or not like.

10 A. I can't do that right now because I'm just too --
11 I'm not thinking through all of the projects that I've done.

12 Q. If you replace a motor on a plant with another
13 motor, wouldn't that count as the kind of replacement that
14 you're talking about that would represent a repair or
15 maintenance?

16 A. Yes.

17 Q. But in that case, wouldn't it be in the same
18 location where the previous motor was, not 300 feet away
19 with groundbreaking required and new construction?

20 A. That's a supposition. I have no idea where that
21 motor would have to be.

22 Q. So, I'm asking you to give me an example of any
23 other case that you can cite that's ever had 300 feet
24 difference, the location of the repair from the location of
25 the -- or place being repaired or maintained. Can you give

1 my any?

2 A. Not right off the top of my head. I can probably
3 in a few minutes.

4 Q. Then let's move on to some other things. You
5 indicated this was a replacement, but you also in your -- I
6 believe it was your writing, but tell me. Was it your
7 writing? Did you write the sentence that says in the
8 Director's, Planning Director's decision letter to Dave
9 Taylor, did you write that the injection Wells 1 and 2 have
10 been abandoned?

11 A. Yes, I did.

12 Q. Was that accurate?

13 A. No, it was not.

14 Q. So, that was a factual error?

15 A. It was a human error, yes. It was an early -- it
16 was a misunderstanding on my part, yes.

17 Q. Right. Did you see --

18 A. I mean, in effect, they told me, in effect, they
19 were abandoned, they were not being used. So, I just used
20 the word abandoned thinking that they weren't being used, so
21 I used the word very liberally rather than in a legalistic
22 or an engineering point of view from -- in hindsight, that's
23 what happened.

24 Q. You could call it legalistic, or you could call it
25 legal. But one of the questions I have is do you -- it was

1 at least an error, you acknowledge that, right?

2 A. It was -- it was sloppy English.

3 CHAIRMAN STARR: Hold on a second, Mr. Schwartz.
4 And first of all, I want to ask to be clear that you wait
5 until the witness finishes speaking, and then you speak so
6 there's more clarity. Ms. Lovell, was there anything in
7 addition?

8 MS. LOVELL: Yeah, I also just want to ask that
9 there be -- I just wanted there to be no argumentative tone.
10 This is not an opportunity for argument. This is an
11 opportunity for asking questions and getting answers.

12 CHAIRMAN STARR: Okay. Noted. And just, you
13 know, give -- leave a little bit of space, and keep
14 proceeding. Thank you.

15 MR. SCHWARTZ: All right.

16 Q. (By Mr. Schwartz) Did you note in your report to
17 the Planning Director Footnote Number 1 on CH2MHill site
18 plan drawing dated July or September 2009, did you call that
19 to the attention of the Planning Director?

20 A. I'm not exactly clear what you're talking about.

21 Q. In the exhibit.

22 A. Footnote Number 1?

23 Q. In the exhibits, your -- the County's Exhibit
24 Number 1, there is a -- there is a plot, a site plot
25 developed by CH2MHill.

1 MS. LOVELL: Did you give a page number?

2 MR. SCHWARTZ: Just a moment.

3 CHAIRMAN STARR: Take your time. Find the page
4 number.

5 MR. BUIKA: Is it part of the report?

6 MR. SCHWARTZ: It's part of the -- it's not part
7 of the report, but it's part of Exhibit Number 1 that was
8 submitted by the Planning Director and the --

9 CHAIRMAN STARR: Find the page, Mr. Schwartz.

10 MR. SCHWARTZ: -- by the Planning Director and
11 corporate counsel in this particular case.

12 If you look in the packet, I'm sorry, it's not
13 paginated. But if you look immediately after the special
14 management assessment zoning and flood confirmation, which
15 is about four or five pages in, and then go two more pages,
16 you'll see something called site plan Wailuku-Kahului WWRF.
17 And it shows -- and it has five footnotes on it, and it's
18 dated September 4, 2009. This is the document I'm talking
19 about.

20 MS. LOVELL: I believe, for the record, that's
21 page 19 of Exhibit 1.

22 MR. SCHWARTZ: Thank you.

23 CHAIRMAN STARR: Let the record show it's page 19,
24 Exhibit 1.

25 Q. (By Mr. Schwartz) Have you seen this before,

1 Mr. Buika?

2 A. Yes, I have it here in front of me.

3 Q. Did you see Footnote 1?

4 A. Yes.

5 Q. What does Footnote 1 say?

6 A. It says, "Existing IW-1 and IW-2 are to remain in
7 service as standby wells."

8 Q. Did you report that to the Planning Director in
9 your draft reports or verbally?

10 A. No, I did not.

11 Q. And is there a reason? Can you tell us why not?

12 A. Yes, because I had extensive discussions with the
13 Department of Environmental Management as to the fate of
14 IW-1 and IW-2 and that they would be abandoned upon
15 completion of the other wells. And the evidence I have for
16 that is the underground injection control permit for
17 abandonment of IW-1 and IW-2 wells. That is also part of
18 the packet here. So, I inferred that -- and I was directed
19 from Department of Environmental Management that they were
20 planning on capping, sealing, abandoning those two other
21 wells because that is how the UIC permit works is that you
22 cannot have ten wells. You cannot have six wells. You need
23 eight wells

24 And so, to put in the two new wells, you would
25 have to abandon the other two wells, so that was the

1 information I was going on.

2 Q. Did you ask CH2MHill why they put this footnote in
3 there while they were working?

4 A. I didn't. I didn't call them. I didn't ask them.
5 I'm sure it was done for some reason, maybe not -- maybe
6 they didn't have all the technical information or the
7 conversations with Department of Environmental Management
8 that I did have.

9 Q. Does the Planning Department decision, the
10 Planning Director's decision impose as a condition or
11 requirement of the exemption that those wells actually be
12 abandoned?

13 A. Does -- please restate that.

14 Q. Does the Planning Director's decision granting the
15 exemption, SMA exemption, impose as a requirement or
16 condition that in return for this exemption that the wells
17 actually be abandoned, not just that a application be
18 submitted, but that the -- but that they actually do abandon
19 the wells by a specific date?

20 A. No, it doesn't. Because -- because, as an
21 exemption, I am not allowed or the Planning Department is
22 not allowed to impose conditions, because it's not a permit.
23 However, to exempt something, we look at all mitigation
24 actions, and we look at the body of the mitigation actions
25 and make sure that all of -- all of the proper mitigation is

1 done. And as I stated earlier, that the abandonment is part
2 of the pollution control permit that is issued by Department
3 of Health.

4 So, Department of Health has that authority, not
5 the Planning Department, as far as -- which was my
6 determination. So, I'm sure it was going to be
7 accomplished.

8 Q. If they had -- you're sure, that's your judgment
9 about it, but it wasn't a binding requirement. So, here is
10 the question. What --

11 MS. LOVELL: Wait, wait, wait. That misstates
12 testimony.

13 CHAIRMAN STARR: Please begin again, Mr. Schwartz.

14 MR. SCHWARTZ: I'll withdraw that. I'll withdraw
15 that.

16 CHAIRMAN STARR: So it's off the record. It's
17 struck.

18 Q. (By Mr. Schwartz) If an SMA permit had been
19 applied for in this case, you would -- would the Planning
20 Director have had the ability to impose this as a mandatory
21 condition?

22 A. You mean an SMA permit was applied for, an
23 assessment permit was applied for, if there is a -- yes, if
24 it was a major permit, yes, I would have the ability to make
25 that as a condition.

1 Q. Okay. Let's go to the question of consistency
2 with the policies and objectives of 205-A and the Coastal
3 Zone Management Act. Did you -- you testified that you
4 didn't send this recommended proposal for exemption to a
5 series of agencies. Did you send it to the Coastal Zone
6 Management Agency of the state?

7 A. No, we haven't -- we don't send any permits to the
8 Coastal Zone Management Agency of the state, because they
9 stated in a letter several years ago that they do not have
10 the manpower or the capacity to review permits. And Doug
11 Tom, the head of CZM, we have a policy from him directing
12 the Planning Department not to send any permits to him. So,
13 I did not -- we do not routinely send it to him, because
14 they delegate that responsibility to us to interpret through
15 the home rule under the CZM Act to the counties, so that is
16 our responsibility. And it was clearly stated from him.

17 Q. Did you send it to the Office of Environmental
18 Quality Control?

19 A. No, I did not.

20 Q. Did you send it to the Division of Aquatic
21 Resources or DLNR?

22 A. No, I did not.

23 Q. Did you send it to any part of DOH, the Department
24 of Health?

25 A. No, I did not.

1 Q. When you -- you said you spent about, if I recall
2 the testimony correctly this morning, you said you spent
3 about two weeks going over the policies and objectives to
4 make sure that there was consistency; is that right?

5 A. Two weeks, yes, analyzing that the permit, all of
6 the materials.

7 Q. Two weeks on all of the materials, okay. How much
8 time did you spend analyzing consistency with policies and
9 objectives roughly?

10 A. Three days.

11 Q. Roughly, that's fine. So, and did you write up
12 other than what's in this -- in the December 21st memo, did
13 you write up any summary of your conclusions with regard to
14 consistency of the policies and objectives of the Coastal
15 Zone Management Act as a result of that three-day work?

16 A. Not specifically one by one, but I did review
17 every one of the policies and objectives.

18 Q. So, one of the policies and objectives is
19 promoting public participation in the management of the
20 coastal zone; isn't that correct?

21 A. Yes.

22 Q. And what did you conclude about the proposed
23 action and its consistency with promoting public
24 participation in the process?

25 A. I could read it to you in my report, and I will.

1 Q. Well, we all have that. Is there anything more
2 that you can say? You found it consistent --

3 CHAIRMAN STARR: Let him read his response,
4 Mr. Schwartz.

5 MR. BUIKA: It was a concern of mine, as I brought
6 up this morning, and I talked it over with Dave Taylor. And
7 I concluded that it had had substantial public participation
8 and was consistent with the objectives and policies of the
9 Coastal Zone Management Act. And I'll read it to you when I
10 find it here. Number 13 on page 4 of my decision letter at
11 the bottom.

12 MS. LOVELL: It's Exhibit 1, page 4.

13 MR. BUIKA: "The department understands that the
14 subject project has undergone extensive public
15 participation. A total of \$2,675,000 has been allocated to
16 this specific effort by the County Council over the past
17 four fiscal years. Each year, the Wastewater Reclamation
18 Division has explained the purpose and the need for the
19 project in public County Council budget hearings. These
20 hearings are carried out under the state Sunshine Law
21 provisions. In addition, annual budget hearings are well
22 attended by the public, shown entirely on Akaku Community
23 Television and covered in detail by the press.

24 During fiscal year 2010 budget hearings, the
25 County Council was specifically told of the County's

1 intention to construct the two replacement wells. The funds
2 were granted with unanimous approval by County Council. In
3 summary, the effort to replace the failing wells has been
4 pursued with the utmost community awareness and public
5 participation as well as open support of the Maui County
6 elected officials."

7 Q. Was there -- was there any environmental
8 assessment done as part of that process; that is, one that
9 would satisfy the requirements of the Hawaii Environmental
10 Policy Act?

11 A. As part of what requirements? I don't understand
12 what you mean.

13 Q. As part of the public participation process.

14 MS. LOVELL: I believe as phrased, the question
15 calls for a legal conclusion, and it also assumes facts not
16 in evidence.

17 MR. SCHWARTZ: Let me withdraw it and rephrase it.

18 CHAIRMAN STARR: Please.

19 Q. (By Mr. Schwartz) So, the -- was there any
20 opportunity for the public to express concern about the
21 quality of the wastewater going down the injection wells?

22 A. Yes, at every one of the budget hearings.

23 Q. At every one of the budget hearings, there was an
24 opportunity, okay. Would that have been relevant at the
25 budget hearing?

1 A. Yes, any public testimony is relevant at the
2 budget hearing.

3 Q. Okay. Well, let's move on from this point, and
4 we'll -- maybe I can make the -- make it clearer when we get
5 to a different topic. You said that you thought it was a
6 potentially sensitive project early on; is that right?

7 A. Yes.

8 Q. Why did you think it could be sensitive?

9 A. Because it's a coastal zone project.

10 Q. But there are a lot of coastal zone projects that
11 aren't sensitive, you've already testified to that, right?
12 Why was this one sensitive?

13 A. Because it has potential environmental impacts.

14 Q. Because it has potential environmental impacts?

15 A. It could have potential environmental impacts.

16 Q. Isn't that the threshold for determining whether
17 or not an environmental assessment is needed, that it could
18 have environmental impacts?

19 A. No, no, I mean not at all.

20 Q. Not at all? Could you --

21 A. It could have -- because it's near the wetlands,
22 Kahana (sic), Kahana (sic) wetlands, near the harbor,
23 wastewater. And your group, you know, I'm aware of your
24 group and all the issues. I mean I'm not naive.

25 Q. So, politically or publicly sensitive, but also

1 sensitive in terms of the environment; is that right?

2 A. Yes, it potentially can have potential
3 environmental impacts, yes. So, I wanted to make sure my
4 decision was done well, the analysis, and, it was done
5 correctly, so that was why I did it in the way I did.

6 Q. Would you read to us the definition of
7 environmental assessment in the Coastal Zone Management Act?

8 A. Well, if you could point it out to me, I certainly
9 will read it. I don't have it in front of me.

10 CHAIRMAN STARR: Once again, I want to ask you to
11 give each other space to speak with.

12 Q. (By Mr. Schwartz) I will do that and come back to
13 it. But I have -- but I want to ask this question. Given
14 your statement that you took three days and looked at all
15 the objectives and policies, did you see -- of the Coastal
16 Zone Management Act objectives and policies in 205-A-2, did
17 you see any language there that talked about ensuring that
18 the use and development in marine and coastal resources are
19 ecologically and environmentally sound?

20 A. Yes, I expound upon that in my decision letter.
21 And, as I said this morning, without those wells as backup
22 capacity, I do believe that the marine resources could
23 potentially be threatened in terms of environmental impact.
24 They play a mitigation role. The wells play a substantial,
25 important mitigation factor in mitigating potential impacts

1 to the environment. They're very, very important for the
2 environment.

3 Q. And the reason you were concerned is that if the
4 wells went down, the water, the -- what you call the sewage
5 could go into the ocean; is that right?

6 CHAIRMAN STARR: Please hold off.

7 Ms. Lovell.

8 MS. LOVELL: Yes, I object to the term sewage. I
9 think what we're talking about is treated wastewater.

10 MR. SCHWARTZ: Mr. Chairman, that was his term
11 used in his direct testimony. If you check the record, I
12 think you'll see.

13 CHAIRMAN STARR: Let's check the record. Can we
14 take a --

15 MR. SCHWARTZ: I'm willing to rephrase for the
16 moment. I just want to be clear that I didn't make this up.

17 CHAIRMAN STARR: Please, be quiet for a second
18 Mr. Schwartz. I want to ask the reporter. We're going to
19 stop for a second.

20 (Discussion off the record.)

21 CHAIRMAN STARR: We're going back into session,
22 and the preliminary search of the record did not -- did not
23 show that word. But I would like you to rephrase your
24 question.

25 MR. SCHWARTZ: I'll rephrase the question.

1 Q. (By Mr. Schwartz) Your concern, as I understood
2 it, was that the effluent, if it didn't go down the
3 injection wells, could go into the ocean; is that right?

4 A. Well, it potentially could go into the ocean. It
5 potentially could go many places besides down the injection
6 wells. I'm not an expert in where it would go. The
7 Department of Environmental Management would probably be
8 better to answer that. But understanding the role of the
9 wells as backup capacity and strictly as backup capacity, I
10 would assume that it would prevent, without that backup
11 capacity, the effluent would go somewhere else than besides
12 into the ground.

13 Q. So, at least that was a possibility that concerned
14 you, is that right, that it could go into the ocean?

15 A. Yes.

16 Q. Where does the water go when it goes down the
17 injection wells?

18 A. It goes into the -- into the earth.

19 Q. And does it stay there?

20 A. I mean I can't answer that. How can I possibly
21 answer that?

22 Q. Are you familiar -- well, you said you were an
23 expert in coastal zone geology. And we know hydrogeology
24 tells you where water that's up tends to go as opposed to
25 water that's down.

1 CHAIRMAN STARR: Mr. Schwartz, I'm going to stop
2 you from this. You're welcome to ask more questions. Let's
3 keep it at that.

4 Q. (By Mr. Schwartz) Here is the question. Are you
5 familiar with the statement in the 1990 EA for the Kahului
6 plant that says the purpose of the injection wells is to
7 transmit the effluent indirectly to the ocean?

8 A. Yes, I do believe it's in there.

9 Q. Are you familiar with the reports in both the 1990
10 EA and the 2001 EA that says it does, in fact, go into the
11 ocean?

12 A. No, I'm not familiar with those reports.

13 MR. SCHWARTZ: We would like to introduce those
14 reports or ask for judicial notice of the EA reports for
15 2001 and 1990, or we will -- or we will call a rebuttal
16 witness and submit them that way if you would like.

17 MS. LOVELL: Excuse me, were these previously
18 submitted as exhibits? Because if they were, then
19 all Mr. Schwartz has to do is introduce his exhibits.

20 MS. SCHWARTZ: They were.

21 CHAIRMAN STARR: Hold on, Mr. Schwartz.

22 MS. LOVELL: But also, if you've got a report that
23 is lengthy, I mean there needs to be context. There needs
24 to be some kind of sense of what page we're talking about.
25 I mean you can't just -- I mean I think it's very misleading

1 the way that we're going about this.

2 CHAIRMAN STARR: I did see portions of these
3 reports that I believe were submitted by the Appellee, but
4 not in total. So, since the Appellee submitted portions, do
5 you have any problem with they being added in total at this
6 time, Ms. Lovell?

7 MS. LOVELL: Well, again, we had a prehearing
8 conference. We had rules explained of how exhibits were to
9 be offered and marked and so forth. And the problem is that
10 when things come in at the last minute, it doesn't allow
11 people to look them over and check and make sure they're
12 accurate. That's one of the reasons why we exchange things
13 in advance. So, if this is one of Mr. Schwartz's previously
14 marked exhibits, then I don't have any problem with it.

15 If it's one of my previously marked exhibits, I
16 don't have a problem with it. But I do have a problem just
17 pulling one, you know, remark out of a lengthy report and
18 questioning the witness about it without showing it to the
19 witness and having the witness see the context.

20 CHAIRMAN STARR: Okay. Ms. Lovell. Ms. Lovell, I
21 just want to call your attention to Exhibit 1, page 29.
22 That's your own submission.

23 MS. LOVELL: Right. And obviously, that is in
24 evidence. So, if there's something on that page that or,
25 you know, in those pages that Mr. Schwartz wants to refer

1 to, no problem. But I don't know how long the entire thing
2 is that he wants to put in, how much of that is relevant.

3 I do think in fairness to the witness, if there's
4 a particular part of the document that he wants to question
5 the witness about, he should show it to the witness and
6 explain where it comes from. That was my point. And
7 whether or not the entire thing needs to come in, I would
8 want to look at the entire thing and see why he's offering
9 it.

10 CHAIRMAN STARR: Mr. Schwartz, please clarify your
11 request at this time.

12 MR. SCHWARTZ: I will. We are only -- first of
13 all, this is in response to our right to cross-examine and
14 submit rebuttal evidence when this was raised by the -- by
15 the witness for the first time this morning. But we did
16 submit portions of the -- in our brief, portions of the 1990
17 EA. And the Appellees did submit portions, but not the
18 relevant pages for this purpose, of the 2001 EA. And we are
19 only asking that the relevant pages that discuss wastewater
20 injection wells, and pardon me, and their eventual winding
21 up in the ocean be admitted for this purpose.

22 CHAIRMAN STARR: I -- my problem right now is that
23 we don't have -- we don't have this document. And so, it's
24 a little bit difficult to deal with it. Ms. Lovell.

25 MS. LOVELL: Yes. I mean that was one of my

1 concerns, too, Chair. If Mr. Schwartz has a previously
2 marked exhibit that he wants to offer, you know, then we can
3 address that. But I have a little bit of a problem with
4 this loosey-goosey way of going about things. But I don't
5 know what he's talking about.

6 MR. SCHWARTZ: If the Chairman would give me five
7 minutes.

8 CHAIRMAN STARR: We're going to take a short
9 recess.

10 (Recess taken.)

11 CHAIRMAN STARR: Back in session. I -- unless
12 someone can produce this document, in fact, it should have
13 been produced previously.

14 MR. SCHWARTZ: Our Exhibit C on page 9 has the
15 language that I'm talking about was submitted previously.

16 CHAIRMAN STARR: Exhibit C.

17 MR. SCHWARTZ: It's entitled Environmental
18 Assessment and Negative Declaration for the Wailuku-Kahului
19 Wastewater Reclamation Facilities, Additions and
20 Modifications, December 7th, 1990. March 9.

21 CHAIRMAN STARR: I'm going to ask for help from
22 Ms. Kapuaala to locate this.

23 MS. KAPUAALA: I have the document, which is five
24 pages. Is it not in sequential order. Is page 9 say page 3
25 instead? Mr. Schwartz, if you count the page -- page 3.

1 Thank you, Irene.

2 MR. SCHWARTZ: Yes.

3 MS. KAPUAALA: I have page 3 up now.

4 MS. LOVELL: I'm sorry, but I just -- none of the
5 exhibits that I got had A, B, C or D on them. That's my
6 problem. I'm not trying to be an obstructionist here. I
7 just really can't --

8 CHAIRMAN STARR: Ms. Lovell, I agree, and I've
9 already made that point in the beginning. But we're trying
10 to do our best to -- Ms. Kapuaala, is that in this packet?
11 Where is it physically?

12 MS. KAPUAALA: I believe it would be in this
13 packet.

14 CHAIRMAN STARR: In this one here?

15 MS. KAPUAALA: Yes, Commissioners. We apologize
16 for the confusion. It was not submitted as exhibits, but
17 rather as attachments as referenced in their brief.

18 CHAIRMAN STARR: Okay. And how do we find it
19 inside this?

20 MS. KAPUAALA: Let's see. I'm just going to go
21 through it now. Okay. 1, 2, 3, 4, 5, 6. The seventh
22 document, the seventh stapled document in my packet was what
23 they are calling Exhibit C. Hopefully, it's collated the
24 same way.

25 CHAIRMAN STARR: Okay.

1 MS. KAPUAALA: Let me bring it up on the screen.
2 This is page 1. There's a file copy stamp on it, and the
3 heading says Department of Public Works, Wastewater
4 Reclamation Division, County of Maui. What Mr. Schwartz is
5 referring to is page 3 of this five-page document, which he
6 calls page 9, or maybe the fourth, the fourth page. I'm
7 sorry, fourth page.

8 It starts with Project Background, yes. Again,
9 the title of the document is Department of Public Works
10 Wastewater Reclamation Division, County of Maui,
11 Environmental Assessment and Negative Declaration for the
12 Wailuku-Kahului Wastewater Reclamation Facilities, Additions
13 and Modifications dated December 7th, 1990. And again,
14 we're on the fourth page of that stapled document, which is
15 labelled on the bottom as page 9. I have it up on the
16 screen if you would like to continue, Mr. Chair.

17 CHAIRMAN STARR: So, what we're looking at is this
18 page following this heading. And this is not a good
19 situation, but we're trying to do our best. Do all the
20 Commissioners have this?

21 COMMISSIONER FREITAS: Yeah, go ahead.

22 CHAIRMAN STARR: Ms. Lovell.

23 MS. LOVELL: I think so. Mine doesn't say
24 Exhibit C on it, but I think I'm with you.

25 CHAIRMAN STARR: Okay. And I apologize if this is

1 confusing. I wish it were clearer. Mr. Schwartz, I think
2 we're all on the same page here.

3 MR. SCHWARTZ: We apologize as well.
4 Unfortunately, we're not practiced in doing this.

5 CHAIRMAN STARR: I understand. That's why we're
6 trying to give a little leeway.

7 Q. (By Mr. Schwartz) The third paragraph down, the
8 second sentence -- the first sentence says, "Disposal of the
9 treated effluent is by gravity injection into the basal
10 aquifer below the plant site. The purpose of this injection
11 is to transmit the plant effluent indirectly into the ocean.
12 Studies of the fate of the injected effluent are summarized
13 in Appendix D."

14 CHAIRMAN STARR: Okay. What is your question now,
15 please?

16 Q. (By Mr. Schwartz) The question is in light of
17 this data, what is the danger -- what is the additive danger
18 -- in light of this conclusion, what is the additive danger
19 of having wastewater go into the ocean that you foresee
20 that's worse than having it go in every day through the
21 injection wells?

22 CHAIRMAN STARR: Could you simplify your question,
23 please?

24 MR. SCHWARTZ: Yes, I'll try.

25 CHAIRMAN STARR: If you need to do it in several

1 parts, that's fine.

2 MR. SCHWARTZ: I apologize. Let's try and make it
3 simple.

4 Q. (By Mr. Schwartz) So, the -- if this statement is
5 true, does it mean that 10 million gallons of effluent is
6 going into the -- is going into the ocean eventually, 10
7 million gallons per day is put down these wells?

8 A. No, it's not true.

9 Q. What does it mean?

10 A. It means it's going into the ground. Nobody
11 knows. You call it data. That's one line. That's not data
12 by any means. That's the purpose of it. And the purpose of
13 any injection well is quite clear. It's to add filtration
14 to -- to any wastewater before it enters into any
15 environmental condition, whatever it is.

16 Q. It doesn't say that, does it?

17 A. No, but you asked me what it is. So, I mean --

18 Q. Let's move on.

19 A. I'm giving you my understanding of what an
20 injection well is for. Obviously, it's to filter, to add a
21 continual filter to any wastewater.

22 Q. And can you give us any idea about what percentage
23 of the effluent is filtered out into the ground that doesn't
24 make its way into the ocean?

25 A. I have no idea. It always depends on the geology,

1 whether it's sediments, whether it's basalts, whether it's
2 fractured. You know, I mean it would take a lifetime to
3 study the harbor and understand all of that technically.
4 And I can't do it. And I'm representing the Planning
5 Department right now.

6 Q. So, can you tell us what the quality of water is
7 that goes down the injection wells in -- in Kahului now?

8 A. I can tell you what I read. But I would rather --
9 I mean that's a more proper question for Department of
10 Environmental Management. In terms of R1, R2, is that what
11 you mean?

12 Q. Yes.

13 A. It's R2, I believe.

14 Q. And what does R2 water, what is the limit on fecal
15 coliform effluent that's allowed in R2 water?

16 A. It's whatever the limit is according to the
17 Department of Health.

18 Q. Okay. And you're not sure what that is?

19 A. No, I'm not sure what the fecal coliform limits
20 are on that.

21 Q. Are you familiar with the R1 levels?

22 A. No, but I -- in a comparative understanding, I
23 know it's -- I know it's less.

24 Q. Ten times less?

25 A. I've heard you say that over and over again, so I

1 assume it must be true.

2 CHAIRMAN STARR: Mr. Schwartz, it's not his
3 expertise, so please leave that. I believe you all have
4 that in front of you.

5 MR. BUIKA: Again, that's something that you could
6 ask the wastewater engineer rather than the planner.

7 MR. SCHWARTZ: I'll stop, Mr. Chairman. I just
8 want to make the point that the conclusion he reached is
9 that the addition of these two new wells would not have an
10 adverse effect on the environment. And it's relevant what
11 the quality of the water is that's being injected into the
12 wells when -- it's relevant what the quality of the water is
13 and what possible treatment options were available that
14 could have made the water better before the -- before this
15 was permitted or allowed.

16 CHAIRMAN STARR: Okay. It's not a great time to
17 make a statement, Mr. Schwartz.

18 MR. SCHWARTZ: Okay.

19 CHAIRMAN STARR: If you have anymore questions,
20 please, now is the time.

21 MR. SCHWARTZ: I do have more, but out of concern
22 for the patience of the Commission, I will withhold them for
23 the time being with the -- with a request that I be able to
24 ask one or two more, no more than that, before the end of
25 the day.

1 CHAIRMAN STARR: Of this --

2 MR. SCHWARTZ: Of this witness.

3 CHAIRMAN STARR: Of this witness?

4 MR. SCHWARTZ: Yeah.

5 CHAIRMAN STARR: Ms. Lovell, are you going to
6 redirect?

7 MS. LOVELL: I had just one question that I wanted
8 to clear up with this witness. But I really think the time
9 for cross-examination is now. And I think it's kind of
10 irregular to be calling witnesses back. I think
11 Mr. Schwartz should ask all of his questions. I'll do my
12 followup or redirect, and then the Commission can ask its
13 questions. That is our procedure.

14 CHAIRMAN STARR: Mr. Schwartz, why don't you --

15 MR. SCHWARTZ: I'll ask my one or two questions.

16 CHAIRMAN STARR: -- proceed. And we're not trying
17 to limit you. That is not the purpose. But I -- I do feel
18 if you have questions, now is the time.

19 Q. (By Mr. Schwartz) Mr. Buika, one of the policies
20 and objectives that you say this project is consistent with
21 is, in the 205-A-2, is adopting water quality standards and
22 regulating point and nonpoint sources of pollution to
23 protect, and where feasible, restore the recreational value
24 of coastal waters. I'm reading from the actual law itself.
25 Is there --

1 MS. LOVELL: Could you be more specific, please?

2 CHAIRMAN STARR: Yeah.

3 MR. SCHWARTZ: I'm reading from

4 205-A-2(C)(1)(B)(vi).

5 CHAIRMAN STARR: Does everyone have that?

6 MR. BUIKA: Say that again.

7 MR. SCHWARTZ: Adopting water quality standards
8 and regulating point -- I'm sorry, you meant the citation?

9 CHAIRMAN STARR: Yeah, give us the citation again,
10 please.

11 MR. SCHWARTZ: The citation is 205-A-2(C)
12 Policies; (1), recreational resources, and then (B), little
13 four.

14 CHAIRMAN STARR: And we have already taken
15 judicial notice of 205-A, so it is in the record.
16 Ms. Lovell, are you satisfied that this exists?

17 MS. LOVELL: I'm satisfied it exists. But I'm not
18 sure that I've understood what the question is.

19 MR. SCHWARTZ: I haven't asked the question.

20 CHAIRMAN STARR: Okay. He hasn't asked the
21 question yet.

22 MS. LOVELL: That may be why I don't understand
23 the question.

24 CHAIRMAN STARR: Mr. Schwartz, now that we have
25 the --

1 Q. (By Mr. Schwartz) You found it?

2 A. Yes, sir, I'm with you.

3 Q. You've found that the proposed action was
4 consistent with the policies and objectives of 205-A-2. So,
5 can you explain how it is consistent with this particular
6 policy?

7 A. Providing an adequate supply of shoreline parks?

8 Q. No, adopting water quality standards and
9 regulating point and nonpoint sources of pollution to
10 protect, and where feasible, restore the recreational value
11 of coastal waters.

12 A. Yes, it's being completely done by the Department
13 of Health underground injection control permit. It's
14 pollution control, 100 percent pollution control being
15 controlled.

16 Q. And you're saying that the drinking water
17 standards requirements of the Department of Health control
18 pollution to protect the recreational value of coastal
19 waters, is that what you're saying?

20 MS. LOVELL: I object.

21 MR. BUIKA: No, that's not what I'm saying.

22 CHAIRMAN STARR: Yeah, don't put words in his
23 mouth, Mr. Schwartz, please. Ask another question if you
24 wish.

25 Q. (By Mr. Schwartz) Are you saying does the

1 Department of Health drinking water regulation regulate
2 effluent into the ocean?

3 A. Yes, it does.

4 Q. It does. Can you tell me what provision of the
5 permit regulates discharge into the ocean?

6 A. No, I can't. But I'm sure the Department of
7 Environmental Management would be able to tell you.

8 Q. And does it -- is there anything in this project
9 that restores the recreational value of coastal waters?

10 A. Where feasible. The words in there "where
11 feasible, restore the recreational value of coastal waters."
12 This is a well in kind replacement, so there's nothing that
13 really restores, although it provides a -- an environmental
14 mitigation against potentially harmful -- harmful effects of
15 wastewater impacting the water quality standard.

16 Q. Does the drinking water permit for underground
17 injection control regulate storm water runoff discharge?

18 CHAIRMAN STARR: Ms. Lovell. Hold on.

19 MS. LOVELL: I object. That calls for a legal
20 conclusion, and it's beyond the scope of the direct.

21 CHAIRMAN STARR: Let's strike that.

22 MR. SCHWARTZ: Exception.

23 CHAIRMAN STARR: So noted.

24 MR. SCHWARTZ: That's all. Thank you.

25 CHAIRMAN STARR: Okay. Thank you, Mr. Schwartz.

1 Ms. Lovell, redirect.

2 MS. LOVELL: Thank you. Just a brief question or
3 two to clear up a couple of points that I think might be
4 confused in the record.

5 REDIRECT EXAMINATION

6 BY MS. LOVELL:

7 Q. Mr. Buika, you mentioned a well abandonment permit
8 application, and I would like you to look at the exhibit --
9 the County's Exhibit 1 and page 35 of that exhibit, which is
10 the Directors's letter and its attachments, and the record
11 that is a document entitled UIC Abandonment of Registered
12 Injection Well, Department of Health Wastewater Branch. I
13 can show it to you on my copy if that helps.

14 A. No, I looked at them many times. It's just one I
15 have to operate, and the other one is to abandon.

16 CHAIRMAN STARR: Have you got a page number for
17 that?

18 MS. LOVELL: Exhibit 1, page 35.

19 MR. BUIKA: The first of the two.

20 MS. LOVELL: Exhibit 1, page 35. I'm sorry, the
21 exhibits don't have page numbers on the bottom.

22 CHAIRMAN STARR: It says Exhibit 1, page 35.

23 Yeah, this.

24 MS. LOVELL: Yes, thank you.

25 MR. BUIKA: Yes, I have it in front of me.

1 Q. (By Ms. Lovell) Does that document that's found
2 on Exhibit 1, page 35, abandonment permit application, give
3 you some degree of comfort that once the replacement wells
4 were in place, the old ones were going to be abandoned?

5 A. Yes, it did.

6 Q. And was it your understanding from that
7 application that the department had actually applied to the
8 Department of Health and represented to the Department of
9 Health that the injection wells that were being taken out of
10 service would be abandoned as soon as the Department of
11 Health approved the application?

12 A. Yes.

13 Q. I have no further questions.

14 CHAIRMAN STARR: Okay. Thank you. Now, Mr. Buika
15 it is an opportunity for members of the hearings body to ask
16 questions if they wish. So, Commissioner Marfdin.

17 COMMISSIONER MARFDIN: Mr. Buika, the first one I
18 want to ask is you -- the position of the County seems to be
19 that there will be no additional effluent going down that is
20 currently going down; is that correct?

21 MR. BUIKA: Yes.

22 COMMISSIONER MARFDIN: And there's no change in
23 the composition of the effluent going down; is that correct?

24 MR. BUIKA: Yes.

25 COMMISSIONER MARFDIN: So, in terms of day to day,

1 year to year intensification of use or intensification of
2 the environmental impact, there would be no additional
3 impact; is that correct?

4 MR. BUIKA: Yes, that is correct.

5 COMMISSIONER MARFDIN: Was consideration given to
6 the fact that putting in a new well would extend, not the
7 intensification, but the duration of time that effluent
8 would be put into the ground?

9 MR. BUIKA: I mean it's mentioned. It's mentioned
10 in some of the documents, yes. But I mean it gives the
11 plant operational longevity, so it does, yes.

12 COMMISSIONER MARFDIN: And is it possible that
13 before the -- within a few decades that the plant could be
14 abandoned all together with some different mode of dealing
15 with effluent?

16 MR. BUIKA: I assume it's possible.

17 COMMISSIONER MARFDIN: I have some more questions,
18 but I'll let other people get in.

19 CHAIRMAN STARR: Any other members at this time?
20 Commissioner Marfdin, if you have more, now is the time.

21 COMMISSIONER MARFDIN: I do. I just --

22 COMMISSIONER SHIBUYA: No, no, go ahead.

23 COMMISSIONER MARFDIN: I was concerned before your
24 testimony about one thing, and I want to make sure I
25 understand your position. I had been very concerned about

1 the term repair used in one part of the argument and
2 replacement -- replacement and abandonment used in a
3 different part. And I just want to make sure I understood
4 your general argument was where it said repair, it said
5 repair and maintain.

6 And your position is, well, maybe relocation isn't
7 repair, but it is part of maintenance. So, maintenance
8 would have, in the one context could include repair, because
9 it's repair and maintenance, but it's also consistent with
10 replacement and abandonment; is that correct?

11 MR. BUIKA: Yes.

12 COMMISSIONER MARFDIN: I have one more. There was
13 a document that we received from the State of Hawaii
14 Department of Health. It's labelled Exhibit 3, page 1. And
15 -- but let me -- I can just sort of read from it. This was
16 a document dated July 2005 from State Department of Health
17 to Department of Public Works and Waste Management. And it
18 was a request for a permit revisions for the Wailuku-Kahului
19 Wastewater, or WWRF. And in particular, the underground
20 injection control permit.

21 Please note the following changes in the revised
22 pages of the permit. The average and maximum disposal
23 quantity limitations have been revised to 7.9 million and
24 15.8 million gallons per day. Take my word for it that's
25 what it says. I went back and looked at what it had been

1 before this revision. And the maximum -- the average had
2 been 5 million prior to this memo and got up to 7.9 million.

3 The maximum had been at 7.9 and got up to 15.8.
4 So, with the stroke of a pen in 2005, the amount of
5 potential effluent going into the hole somewhat dramatically
6 increased. Will -- what assurance does the people of Maui
7 County have that putting in two additional wells as
8 replacement and abandonment of the other two won't
9 ultimately lead to an increase in the injections of
10 effluent?

11 MR. BUIKA: Well, certainly that question is
12 better to be redirected to the Department of Environmental
13 Management. From what I understand, the -- the wastewater
14 treatment plant manages whatever daily volume it has. As
15 more come -- or on the wastewater treatment system, there's
16 potentially more ways to be treated and potentially more
17 effluent. So, I mean it's not -- it's probably not a fixed
18 number on a daily basis. But it -- it serves the capacity
19 to protect the environment and manage for -- you know, it's
20 a design capacity, but it manages for contingencies for
21 worst case scenarios to protect the environment.

22 So, I -- you know, I'm not a wastewater engineer.
23 I just don't know -- I just don't have enough familiarity
24 with the topic to really give it any justice. So, you know,
25 I think Dave Taylor is the proper one to answer that

1 question.

2 COMMISSIONER MARFDIN: I understand. And it's a
3 question if a witness comes forth from the Department of
4 Environmental Management, I will be asking them in more
5 detail.

6 MR. BUIKA: Yeah, I would think so.

7 CHAIRMAN STARR: Commissioner Shibuya.

8 COMMISSIONER SHIBUYA: Thank you very much, Jim,
9 for taking the lead on this very difficult and trying issue.
10 I just wanted to get your thoughts in terms of how you went
11 through the thought processes to come up with the
12 conclusions you finally came up with. And this deals with
13 the term on 205-A-22, Definitions, under development does
14 not include following. They -- you rest upon repair and
15 maintenance of underground utility lines -- and of course,
16 this is my interpretation versus your interpretation --
17 including, but not limited to, water, sewer, power,
18 telephone, minor appurtenances, structures such as
19 pad-mounted transformers and sewer pump stations.

20 The repair and maintenance of ground utility lines
21 it appears to me is just the transmission lines and has
22 nothing to do with the actual placement of the effluent.
23 This deals with only the delivery, the movement of energy
24 and/or electrical lines or whatever, water lines. That's my
25 take on it. The development now above shows that on, one,

1 placement of, erection of any solid material or gaseous,
2 liquid, solid or thermal waste. And this is more
3 appropriate in my mind as an injection structure or some
4 kind of a structure underground. And that's where it says
5 it would be a development.

6 Then they go on the back side of this definition.
7 And I see special management area use permit. Now, this is
8 what we've been talking about, special management area major
9 type of project versus minor. And it exceeds \$125,000. And
10 in this particular case, it exceeds \$1 million in valuation.
11 How did you come up and come to the conclusion that it is --
12 has no impact or is not a problem? I just want to go
13 through and understand your processes in how you applied
14 this information to your conclusions.

15 MR. BUIKA: There's no intensification of use.
16 There's no change in capacity. The best management
17 practices are being used in the construction of the project.
18 It's a simple replacement of a functioning component of the
19 wastewater facility. There is -- there's no -- there's no
20 change in use. So, if there's -- it's -- so, in my mind,
21 it's like technically nothing is really happening. There's
22 no change in the physical environment or the effluent going
23 down it. It's JUST a -- we've just moved the well from one
24 location to another, and it's serving the same function.
25 So, there is no additional -- certainly there is -- of

1 course, everything man does in development has some impact
2 on the environment, and there is impacts on the environment.
3 But minimizing the impacts is very, very important.

4 And something that also is very important is when
5 we look at the -- at the Coastal Zone Management Act, you
6 know, we've looked at the policies. Mr. Schwartz brought up
7 205-A-2 on all the objectives and policies, the big, long
8 list. Well, there is also a very important other section in
9 here, 205-A-4. Well, let's see what it is. Yeah, 205-A-4,
10 of how, it's very short, and it's about how the
11 implementation of the objectives, policies and guidelines.
12 And what that states is, "In implementing the objectives of
13 the coastal zone management program, the agency shall give
14 full consideration to the ecological, cultural, historic,
15 aesthetic, recreational, scenic and open space values and
16 coastal hazards as well as the needs for economic
17 development."

18 So, it is a balancing act. It is managing
19 development within the -- within the environment. So, the
20 implementation of the objectives and policies and guidelines
21 are to all -- as well is to balance the needs for economic
22 development. And when we develop, we recreate waste. And
23 we're trying to mitigate the impacts of that waste as much
24 as possible. So, that's -- hopefully, that's not too
25 convoluted, and that gives you some of my logic here.

1 COMMISSIONER SHIBUYA: Okay. I just was trying to
2 make an analogy in the regular world. If my car, the engine
3 wore out, then I would have a choice to either try to repair
4 it or replace the whole engine. And that would be my
5 options. Would the same analogy be with the injection
6 wells?

7 MR. BUIKA: Yes.

8 COMMISSIONER SHIBUYA: Then I would say I would
9 also have another option of, well, perhaps my car has served
10 its purpose, and I really need another car. So, that would
11 be a different type of system, would it not?

12 MR. BUIKA: Yes.

13 COMMISSIONER SHIBUYA: Okay. Now, if I were to
14 spend the money on the engine of buying another used engine
15 or brand-new engine to put in, I could use that money to
16 perhaps buy a hybrid car. Would that be a possibility?

17 MR. BUIKA: Yes.

18 COMMISSIONER SHIBUYA: Was that ever a
19 consideration? Or maybe that's not a question that's
20 apropos to you.

21 MR. BUIKA: No, it's probably not apropos to me.
22 It's -- I don't know. Talking about an automobile and a
23 wastewater treatment facility I don't think are scaleable.

24 COMMISSIONER SHIBUYA: I understand. And because
25 I have a problem here that I can put the money in buying an

1 engine to replace in this car, that I could avoid that cost
2 and put that money towards or as an investment of a new car.

3 MR. BUIKA: I think with the wastewater treatment
4 plant, you would be adding three or four or five or six
5 zeroes after the total amount of money. And I'm sure
6 Department of Environmental Management with their capital
7 improvement programs, it's a balancing act.

8 COMMISSIONER SHIBUYA: That's true. It's a choice
9 here.

10 MR. BUIKA: It's a choice, and I'm sure this is a
11 high priority choice.

12 COMMISSIONER SHIBUYA: That's correct. And when
13 you say high priority, it's because the Department of
14 Health, the State Department of Health has required that you
15 have the capacity of eight wells, and if you don't have
16 that, they're going to ding you?

17 MR. BUIKA: Exactly.

18 COMMISSIONER SHIBUYA: Thank you.

19 CHAIRMAN STARR: Okay, Members. If anyone else
20 wishes to question. Commissioner Tagorda, please. Use the
21 mic.

22 COMMISSIONER TAGORDA: Mr. Buika, how are you? I
23 have a question about -- I found a lot of information about
24 the backup well that you mentioned. Now that you are clear
25 that this is not the backup well, it's a replacement well

1 replacing the two old Wells 1 and 2?

2 MR. BUIKA: Yes, but it will serve as a backup
3 well. It's replacing 1 or 2. They have -- they have six --
4 they have six operational wells and two that are, 1 and 2,
5 which would be abandoned. And then they will add in two
6 more wells, two more wells. So, whether they use those as
7 the -- as one of the main primary wells and switch off
8 another one as a backup, there will be -- there will be
9 extra backup wells.

10 So, I think the important point is that these two
11 wells provide a 50 percent increase in backup capacity for
12 the, from what I understand, for the reclamation facility,
13 so it adds backup. The plant is operating now -- even if 1
14 and 2 were not operating, right now the plant is still
15 within design capacity. But it doesn't have as much backup
16 as it needs to have.

17 COMMISSIONER TAGORDA: Okay. On that site, since
18 you kind of want to use the word backup well, on that site,
19 there will be more than eight holes to be drilled including
20 the two replacement well that's going to be drilled inside
21 the site, but it will be a total of ten. Will that
22 additional two holes that the Department of Management will
23 drill doesn't need a permit?

24 MR. BUIKA: No, there will only be two wells
25 drilled. And when the two wells are drilled, the original

1 two wells will be abandoned.

2 COMMISSIONER TAGORDA: So, it's not backup, you're
3 not going to use that two old wells?

4 MR. BUIKA: Right, those two old wells will be
5 taken off line, in essence. And so, those two new wells
6 when they're taken off line will be replaced by the two
7 wells that were --

8 COMMISSIONER TAGORDA: So, it would be a total of
9 eight wells?

10 MR. BUIKA: Yes.

11 COMMISSIONER TAGORDA: Okay. Thank you. And on
12 your statement, you mention about based on an engineering
13 standpoint, this backup, or this replacement well is --
14 should be in proximity of the old wells. But I noticed that
15 one of the wells is 350 feet like you said. Why is it like
16 that?

17 MR. BUIKA: Well, my exact number 350 may be off.
18 But it's towards Amala Place. One is not far from the other
19 one. I mean in my mind or, and from a coastal hazards
20 perspective, moving injection wells away from the shoreline,
21 away from the tsunami zone, away from coastal erosion, which
22 the plant does experience, is a good mitigation action, to
23 move them more mauka on the parcel itself.

24 So, if they were all in a line and that permit
25 came to me, I would -- I would have worked with Department

1 of Environmental Management to say, hey, why can't you move
2 these two wells farther mauka to protect them from the
3 coastal hazards. I do not want them up front near the wave
4 action. I want them farther back. Ideally, I'm sure 25
5 years ago or whatever, I'm sure Department of Environmental
6 Management, knowing what's going on now with the
7 environment, would have rather had all the injection wells
8 farther away mauka of where they are.

9 So, if we can do it piecemeal with these two, I
10 think it's good mitigation. So, in my mind, they're doing
11 the proper thing by moving them as mauka as possible on the
12 lot to protect them from coastal hazards, potential coastal
13 hazards.

14 COMMISSIONER TAGORDA: Okay. Another concern you
15 mentioned, there is four primary wells out of the eight.
16 What are those four primary wells out of the one to eight?

17 MR. BUIKA: What are they?

18 COMMISSIONER TAGORDA: Yes. Which one of them?
19 One and 2 is backup you said, or no? You take that --

20 MR. BUIKA: Three, 4, 5 and 6.

21 COMMISSIONER TAGORDA: Are the primary wells?

22 MR. BUIKA: Are the primary wells.

23 COMMISSIONER TAGORDA: Runs every day and --

24 MR. BUIKA: I'm sure other wells are used also.

25 COMMISSIONER TAGORDA: Did you also -- I think I'm

1 a little bit confused and concerned that this word
2 abandonment might not be abandonment. Because, you know, in
3 one of the CH2 recommendations and analyses, they said that
4 additional well may also be needed at this facility. Am I
5 right?

6 MR. BUIKA: I think that's a better question for
7 Department of Environmental Management. I can't answer
8 that, and -- but I do not think so. I think the -- maybe
9 I'm wrong, but I think they're only allowed eight wells. I
10 don't think they need more than that.

11 COMMISSIONER TAGORDA: Okay. Thank you. Thank
12 you, Mr. Chair.

13 CHAIRMAN STARR: Members. Okay. Mr. Buika, thank
14 you very much for your time and your patience.

15 MR. BUIKA: Okay. Thank you, everyone.

16 CHAIRMAN STARR: Are we okay to proceed, or do we
17 need a break at this time?

18 MS. LOVELL: Chair, would it be possible to have
19 just a two-minute break?

20 CHAIRMAN STARR: Yeah, we're going to take a break
21 until five minutes after 3. And thank everyone for their
22 stamina today.

23 (Recess taken.)

24 CHAIRMAN STARR: Okay. The Maui Planning
25 Commission meeting of April 27th is back in order. We're

1 back to having our witnesses for the contested case called
2 by the counsel for the Appellee. Ms. Lovell.

3 MS. LOVELL. Thank you, Chair. And thank you,
4 everybody, for hanging in there with us. We call as our
5 next, and hopefully last witness, Dave Taylor.

6 CHAIRMAN STARR: Okay. Mr. Taylor, before you sit
7 down, do you swear or affirm to -- that you will tell the
8 truth and nothing but the truth?

9 MR. TAYLOR: Yes, I do.

10 COMMISSIONER STARR: Thank you. Please be seated.

11 DIRECT EXAMINATION

12 BY MS. LOVELL:

13 Q. Okay. Mr. Taylor, can you just briefly tell the
14 Commission about your -- a little bit about your background,
15 your education and training?

16 A. I have a degree in mechanical and environmental
17 engineering from University of California Santa Barbara. I
18 have a master's in degree in civil and structural
19 engineering from the University of California at Berkeley.
20 I am a licensed civil engineer in the State of Hawaii. I
21 have been working for the County of Maui since 1992, most of
22 that time in the wastewater reclamation division as a
23 project engineer or as division chief. And for about a year
24 and a half in there, I was appointed to a position in the
25 managing director's office.

1 Q. Thank you. Before we get into the injection well
2 issue, are you generally familiar with the Kahului Harbor
3 area?

4 A. Yes, I am.

5 Q. And are you generally familiar with the ocean
6 fronting the wastewater reclamation facility in Kahului?

7 A. Yes, I am.

8 Q. Okay. And do you yourself engage in any
9 recreational pursuits in those areas?

10 A. Yes, I do. I've been windsurfing since I was 16
11 years old. And I regularly windsurf in that area.

12 Q. When was the last time that you windsurfed in the
13 vicinity of the wastewater reclamation facility?

14 A. Yesterday afternoon, I was windsurfing at Kanaha
15 Beach Park, and Saturday afternoon, I actually parked my car
16 in the wastewater treatment plant and accessed the beach
17 through the back gate and windsurfed behind the treatment
18 plant on Saturday.

19 Q. And is that something you do regularly?

20 A. Yes, it is.

21 Q. Just a few housekeeping matters before we go on.
22 I would like to identify for the Commission our exhibit,
23 County's Exhibit Number 2, which is the underground
24 injection control Permit Number UM 1398. It's Exhibit 2,
25 and it consists of 18 pages.

1 First of all, Mr. Taylor, are you familiar with
2 that permit?

3 A. Yes, I am.

4 Q. Is it the permit that the plant is currently
5 operating under?

6 A. Yes, it is.

7 Q. Next I would like to identify for the Commission
8 County's Exhibit Number 3, which consists of two letters,
9 one dated July 14th, 2005, and one dated October 16th, 2009.
10 These are from the State of Hawaii Department of Health
11 regarding permit revisions and extensions. Are you familiar
12 with those?

13 A. Yes, I am.

14 Q. And finally, County's Exhibit Number 4 is an
15 aerial photo of the wastewater reclamation facility in
16 Kahului. Are you familiar with that?

17 A. Yes, I am.

18 MS. LOVELL: At this time, Chair Starr, I offer
19 Exhibits 2, 3 and 4 in evidence.

20 CHAIRMAN STARR: Okay. They are accepted as
21 evidence. Thank you.

22 MS. LOVELL: Thank you.

23 Q. (By Ms. Lovell) Mr. Taylor, let's start with some
24 kind of basic concepts. What is wastewater?

25 A. Wastewater is the water that comes from homes,

1 businesses, et cetera, from toilets, showers, bathtubs,
2 washing machines, basically all of the water that leaves
3 human use.

4 Q. And what is an injection well?

5 A. An injection well is a vertical pipe into the
6 ground that fluids can be disposed of through.

7 Q. Are you familiar with how many injection wells are
8 regulated by the Department of Health in the State of
9 Hawaii?

10 A. I read that on some EPA web sites that there was
11 -- as of 1999, there were close to 400 of them. And I just
12 have some knowledge from that when all the schools had to be
13 taken off of large cesspools, they added maybe another
14 hundred or more injection wells to serve those projects.
15 So, there was four or 500, in that neighborhood, maybe more,
16 maybe less.

17 Q. Do you have a sense of how many injection wells
18 are in use in the United States at large?

19 A. According to that same 1999 information I saw from
20 EPA, there were thousands. I think the number was at least
21 650,000.

22 Q. Now, when was the Wailuku-Kahului wastewater
23 reclamation facility built approximately?

24 A. In the mid 1970's.

25 Q. Before the facility was built, how was wastewater

1 handled for Central Maui?

2 A. Most of the wastewater from that area, from
3 Wailuku and Kahului went through the wastewater sewer pipes
4 that are still in use today to a couple of locations, one by
5 the harbor, and one by Y. Hata. And that raw sewage was
6 discharged directly into the ocean.

7 Q. Without any treatment?

8 A. That's correct.

9 Q. Now, are you aware of where the funding came from
10 to build the facility in the first place?

11 A. Most of the funding came in the 1970's through the
12 federal grant program, which came after the 1972 Clean Water
13 Act. EPA basically gave federal grants to build wastewater
14 treatment plants in small communities like ours. So, most
15 of the money, 80 or 90 percent of that money, I think, came
16 from EPA, and I believe most of the rest came from the
17 state.

18 Q. Now, as of today, how many gallons per day of
19 wastewater is treated in the facility on average?

20 A. On average, about 4 million gallons a day. Though
21 the daily flow can go between -- between the low level of
22 maybe around four up to closer to 10 million gallons a day
23 on rainy days in the winter.

24 Q. And there was some question a little earlier from,
25 I believe, Commissioner Marfdin about the restriction or the

1 number of gallons allowed in our permit extension. There's
2 actually a higher number allowed by a permit. Can you
3 explain how that works and what the limitations are on how
4 much we treat every day?

5 A. Sure. The permit is written, not with one number
6 of capacity, but with different numbers for different
7 situations. For example, on average, I believe in a -- the
8 average of the month or the average of the week has to be
9 7.9 million gallons a day. But in any one day, it can be as
10 high as twice that. So, the Department of Health permit
11 takes into account what I was saying that, on some days,
12 it's much higher; on some days, it's much lower.

13 And you have to average things over a longer
14 period of time. But in short duration events, you're
15 allowed to -- you're allowed by permit to go higher.

16 Q. And is it important to have some excess capacity
17 over and above the daily average in the plant?

18 A. We need enough excess capacity to handle these
19 larger events, the rain events where we get more water.
20 Plus, we need extra capacity for when different things
21 aren't working. So essentially, all utilities, whether
22 water, power, wastewater, we kind of look at this worst day
23 that we're designing for. And that's usually a high level
24 of flow with some things broken or out of service.

25 And that usually defines how much extra we need.

1 Q. In any event, it's the Department of Health that
2 tells you how much you can treat at the plant?

3 A. The Department of Health by the underground
4 injection control permit limits the quality and quantity of
5 water that we can dispose of down the wells.

6 Q. And I would like to turn now to what is disposed
7 down the injection wells. Is it sewage?

8 A. No, it's not.

9 Q. What is it?

10 A. It's treated effluent, and let me just explain a
11 little what that is. A lot of people think, maybe because
12 they've been backpacking and they take water from a stream
13 and put iodine tablets in it. People have been in
14 recreational vehicles where there's sewage, and they
15 chemically treat it. So, in those two cases, you've got
16 water mixed with iodine, or you've got sewage mixed with
17 chemicals. That's not how we treat the water.

18 We take the wastewater, which is water mixed with
19 all kinds of human waste, and we take stuff out. We don't
20 add chemicals. It's not sewage with chemicals. It's sewage
21 minus the stuff. So, most of the stuff is taken out. And
22 what's left is treated effluent, which is not sewage with
23 chemicals in it. It's sewage with most of the stuff taken
24 out.

25 Q. Now, the composition of what is disposed of in the

1 injection wells, is that controlled by the Department of
2 Health?

3 A. Yes, both the quantity and the quality by chemical
4 constituents is defined in the underground injection control
5 permit, and that limits what is allowed to be in the water
6 and what quantities.

7 Q. Now, what about the number of injection wells, is
8 that controlled by the Department of Health?

9 A. Number of injection wells as well as the size of
10 the injection wells is also specifically included in the
11 underground injection control permit issued by the
12 Department of Health.

13 Q. There's been some question about whether the
14 County might be able to get along with fewer wells or could
15 we possibly use more wells. Could you explain, please, what
16 the limitations are and what is required in terms of the
17 number of functioning wells we're allowed to have?

18 A. I think a lot of people in the community are used
19 to water wells. There's been a lot of discussion in the
20 community about water wells. And as most people know, as
21 you put more water wells in, you get more water. Wastewater
22 is exactly opposite of water. We don't generate our volume.
23 The volume of wastewater that comes to the plant every day
24 is generated by what people in the community do and how much
25 it rains.

1 So, whether there's one well or six wells or eight
2 wells or 65 wells, the volume of water that comes to that
3 plant has nothing to do with how many wells there are. The
4 number of wells only increases the reliability that will
5 have enough for events, for these peak events. More wells
6 do not mean more water. The amount of water is defined by
7 how much people use their toilets, how much people shower
8 and how much it rains.

9 Q. So, under your permit, are you allowed to operate
10 with only six wells?

11 A. The permit calls for 100 percent backup. So, we
12 currently would -- and the current capacity of the wells
13 would mean that if we took any two out of service, we would
14 not have that 100 percent backup. So we need enough
15 capacity to have 100 percent backup, and so, in this case,
16 only six wells will not give us enough capacity to meet the
17 permit requirements.

18 Q. So, to meet the permit requirements, you need
19 eight functioning wells?

20 A. If we drilled a well and it had some huge
21 capacity, technically we wouldn't need the others. But
22 because all of the wells have a capacity between one and two
23 or three million gallons a day, any of the six we have now
24 will not meet the permit requirements.

25 Q. Now, could you put in 10 or 12 or 15 wells?

1 A. We would not be allowed to do that, because we are
2 limited to eight by the current underground injection
3 control permit.

4 Q. And is that the reason the department at the same
5 time is seeking all the applicable permits for the
6 replacement project is also seeking the Department of
7 Health's permission to abandon the two more poorly
8 functioning wells?

9 A. That is correct. The current underground
10 injection control permit says that we have to request from
11 Department of Health any modifications of the existing
12 wells, so that is the reason we have made that request to
13 them.

14 Q. Now, earlier this morning, there was some
15 discussion by the Appellant about water quality in Kahului
16 Bay and Kahului Harbor. Has the state Department of Health
17 ever found, made any kind of finding that the County's
18 injection wells at the Kahului treatment plant have
19 adversely affected water quality in the Kahului Bay or
20 harbor?

21 A. Not to my knowledge.

22 Q. And you haven't received any notices of violation
23 to that effect?

24 A. No, we have not.

25 Q. Now, generally speaking, what are the options for

1 disposing of treated wastewater?

2 A. Generally speaking, here and everywhere else, you
3 have three options to dispose of treated effluent. One is
4 direct discharge into a waterway. That would mean a
5 pipeline into a river, lake, stream or ocean. That would be
6 called direct discharge. The second is injection well,
7 which is somehow letting -- putting that water into the
8 ground.

9 And the third is using it for irrigation. So,
10 those really are the only three -- the only three methods to
11 get rid of wastewater effluent.

12 Q. And the County of Maui does not directly discharge
13 wastewater into the ocean, does it?

14 A. No, we do not.

15 Q. Some places in Hawaii do that, I understand?

16 A. That's correct. Oahu does it. I know Kauai has a
17 plant that does it. I'm not sure if Big Island does or not.

18 Q. But in any event, that's not our practice?

19 A. That's correct.

20 Q. And, in fact, our wastewater goes the other two
21 routes, some of it is injected, and some of it is recycled;
22 is that correct?

23 A. That's correct. About 23 percent last year was
24 recycled, and the rest was disposed of down the injection
25 wells.

1 MR. SCHWARTZ: Objection.

2 CHAIRMAN STARR: Excuse me, Mr. Schwartz.

3 MR. SCHWARTZ: The answer wasn't responsive to the
4 question.

5 CHAIRMAN STARR: So noted.

6 Q. (By Ms. Lovell) What are some of the challenges
7 that your division faces in trying to recycle more
8 wastewater than is currently recycled?

9 A. The challenges are that the treatment -- the
10 treatment methodology is a little different, so there is
11 capital costs and operational costs to do that, distribution
12 to willing land owners and the energy utilization that it's
13 necessary to pump that water as well as something that
14 doesn't get a lot of attention, because of the huge swings
15 between winter peak flow with the rain and summer low flow,
16 customers who demand stable levels of water don't want to be
17 told, hey, we don't have the water this week.

18 MR. SCHWARTZ: Objection. Not relevant.

19 MR. TAYLOR: Let me just say something different.
20 Balancing --

21 CHAIRMAN STARR: Wait a minute, Mr. Taylor, hold
22 on. Once again, so noted, but I would ask you to restate
23 your response.

24 MR. TAYLOR: Balancing the supply of water we have
25 versus the demand of potential customers would be that

1 problem.

2 Q. (By Ms. Lovell) Is it technically feasible for
3 the County to abandon any of its wells that are in use today
4 other than the two that we're talking about replacing at the
5 Kahului plant on a short-term basis?

6 A. In the short-term basis, there is nowhere else to
7 put the effluent other than down the injection wells. So,
8 no, it is not technically feasible to abandon the injection
9 wells on a short-term basis.

10 Q. What about on a longer term basis, what if the
11 County achieves its stated goals of recycling more water,
12 does that mean that injection wells can be taken out of
13 service forever?

14 A. Even if the County built and were operating what
15 most people would consider 100 percent recycled water
16 system, let's say today, 100 percent of the water could be
17 recycled. Let's say we had pipelines and customers. During
18 rainy days and rainy weeks, the flow can double. The ground
19 is saturated. You can't irrigate with that water because
20 the ground is saturated, and it would just run surface flow
21 downhill to the ocean.

22 So, on the rainy days -- even if you had 100
23 percent reuse on the dry days, on the rainy days, you have
24 to either put the water into the ground or direct discharge
25 to the ocean. There's nothing else to do with that water on

1 those rainy days. So, even if we had what people call 100
2 percent reuse, either an outfall, direct ocean discharge, or
3 some sort of injection would still have to be necessary for
4 those rain events.

5 And so, the number of injection wells is driven by
6 the rain events, not by the average dry day. So, the number
7 of injection well and the hydraulic capacity of those wells
8 is independent of whether or not you have a recycled water
9 system.

10 Q. Now, could you explain a little bit how the
11 injection wells fit into the overall plant design?

12 A. The treatment plant that's shown on the -- on your
13 exhibits and on the Smart Board.

14 Q. Exhibit 4.

15 A. Exhibit 4. The treatment plant has a number of
16 different processes that are all in that plant. It starts,
17 water comes from the headworks. It has screening and takes
18 grit out; aeration, which starts a biological process;
19 clarification, which settles that primary biological
20 process; digestion, clarification, centrifuges for solid
21 processing, et cetera, et cetera. And finally, after the
22 water has been separated from all of the stuff, the
23 injection wells are this final process called effluent
24 disposal, which is the connection pipe that connects all the
25 injection wells, plus the eight wells themselves.

1 So, they're really the last process of a dozen or
2 so processes which treat the wastewater.

3 Q. There was some discussion earlier about whether or
4 not taking Wells 1 and 2 out of service and replacing them
5 with two new injection wells has any additive harmful effect
6 on the environment. Would you please explain to us that
7 issue and how this replacement project does not have any
8 additional impact on the environment?

9 MR. SCHWARTZ: Objection. Leading the witness.
10 I'll withdraw it in the interest of expedition.

11 CHAIRMAN STARR: Thank you. Please go ahead.

12 MR. TAYLOR: Whether the water goes down wells in
13 this part of the plant or wells in some other part of the
14 plant, as Ms. Lovell explained earlier with her bathtub
15 analogy, which was really quite accurate, whether you have
16 one drain or eight drains in your bathtub, they all go to
17 the same place.

18 So, replacing two wells with two other wells that
19 are all on the same site is going to have no change to
20 any -- to anything outside that fence line. The water is
21 still going to the same place. Whatever is going to happen
22 to it would be the same. And there will be no change by
23 replacing two wells with two other wells of the same size in
24 the relative same location.

25 Q. (By Ms. Lovell) Now, does the chemical

1 composition or do the constituents of the water change at
2 all when you take these two wells out of service and put two
3 replacement wells into service?

4 A. No, the complete treatment process is completed
5 before the water is distributed to the injection wells. So,
6 there's no additional change to water quality in the
7 distribution piping or in the injections.

8 Q. Why is this project deemed to be maintenance and
9 repair?

10 A. From an engineering perspective, maintenance means
11 to maintain, to keep the existing performance, the existing
12 original permitted performance. That is maintenance. Under
13 maintenance, you may have things like cleaning. You may
14 also have repairs. But repairs to fix things to make them
15 as they were is a subcategory of maintenance. When you fix
16 things, sometimes you have to replace parts. Replacing
17 parts is a subcategory of repair, so the hierarchy from an
18 engineering/maintenance/replacement standpoint is
19 maintenance is everything.

20 Repair is a subcategory of maintenance, again, to
21 keep the existing performance. And replacement is a
22 possible subcategory of repair to meet, again, to meet
23 existing performance. So, they're all subcategories of
24 maintenance, which is really the big picture.

25 Q. Instead of replacing injection -- existing

1 injection Wells Number 1 or 2, why don't you just repair
2 them?

3 A. We hired CH2MHill exactly for that reason.
4 CH2MHill is probably the largest of the national wastewater
5 engineering firms. And they have a lot of international
6 experience. We wanted to make sure we hired the most
7 knowledgeable engineering consultants to help answer exactly
8 that question.

9 So, the report they wrote, which I think everybody
10 has a copy of, we wanted to find out how do we reestablish
11 this existing permitted capacity, how do we maintain them.
12 We were open to any kind of maintenance, whether it was
13 repair, replacement. We said what is our options? And
14 CH2MHill determined that there is no way to repair the
15 existing wells without replacing them. So, in order to meet
16 that maintenance goal of maintaining existing permitted
17 capacity, the only repair method that will work is
18 replacement of the two wells.

19 Q. So, you couldn't just put whatever the industrial
20 equivalent of is Drano is down the drain?

21 A. That is something we're trying in some of the
22 other wells that aren't as badly degraded, and we hope some
23 of that works. But according to CH2MHill and their
24 expertise, that will not maintain the system and reestablish
25 the existing permitted operational performance.

1 Q. And I guess the -- what about Roto-Rooter, is
2 there something like that that you can do?

3 A. Actually, you're laughing, but we do that
4 regularly. We have a high-powered air compressor, and we
5 use the industrial equivalent of Drano and Roto-Rooter and
6 try to clean these out. And sometimes they could be
7 collapsed. There's really no way to repair a well that is
8 not functional. That's really the conclusion we've come to
9 with the help of our consultants.

10 Q. When was this project first started, this
11 replacement project replacing Wells 1 and 2?

12 A. The effort started in fiscal year 2007 with a
13 request to Council in the CIP budget for funds to do the
14 study that's in front of you, so it was in fiscal year 2007
15 that we said we need to do something about this. We're not
16 sure exactly what to do. So, that's again when we came up
17 with the strategy to hire a consultant who knew a lot more
18 than we did. And that's how we started this effort.

19 Q. And was there a specific line item for that study?

20 A. Yes, it was. It was in the fiscal year 2007
21 capital improvement budget, and it was requested and
22 approved as a single line item, as all the capital
23 improvement projects are.

24 Q. And what kind of the discussion and public
25 participation process took place for that line item?

1 A. The budget every year, in case anyone doesn't
2 follow it, the Mayor proposes a budget. It gets wide public
3 scrutiny. It goes through Council budget committee hearings
4 where the public comes and testifies about, you know,
5 whether they support a project or don't, et cetera,
6 et cetera. And there's discussion by the Council members on
7 the individual projects.

8 Eventually, they -- in this case, they voted it
9 out of committee. And then it went to first reading and
10 second reading of full Council, which also had public
11 testimony. And then I believe there were two other years
12 for both design and construction that went through the same
13 process. So, there were -- there were at least nine -- at
14 least nine times that there were -- there was, the public
15 was invited to testify on this project.

16 Q. And to your knowledge, did anyone from the
17 Appellants testify on any aspect of the budget process
18 relating to this project?

19 A. I don't recall anyone at all, Appellant or not,
20 testifying on this item.

21 Q. And you were there?

22 A. I was there.

23 Q. Now, what about this year's budget, has anyone
24 from the Appellant testified on your portion of the budget
25 that the Council is considering right now?

1 A. Not to my knowledge. And certainly not the day
2 that we were -- I was there for two days where my particular
3 items were in front of Council. And during neither of those
4 two days did anyone from the public testify about our
5 project.

6 Q. Now, Mr. Taylor, if you want to do a capital
7 improvement project at one of your wastewater plants, if you
8 wanted to change the process, if you wanted to, for
9 instance, increase recycling and reuse, legally speaking,
10 what do you need to do vis-a-vis the Council?

11 A. Any major change to the treatment plants,
12 including the things you talked about, are really decisions
13 of the County Council. Specific construction projects,
14 specific improvement projects are line items that the
15 Council approves budget every year. So, the process is that
16 we ask the Mayor. We say we would like to do this. Here is
17 how much we think it would cost.

18 If the Mayor includes it in the Mayor's proposed
19 budget to Council, then Council evaluates whether or not to
20 include that. Council can also decide to add something that
21 they want that we didn't ask for. But any way you slice it,
22 in order for us to proceed with any major project, that
23 Council has to put it in their approved budget as a specific
24 line item that they approve and they approve the funding
25 for. We are not allowed to take money from one thing and

1 say, well, we don't want to do that, we'll use it for this
2 other thing.

3 So, any increases in, for example, the recycled
4 water system, would have to be specifically approved by the
5 County Council and funded by the County Council. And we
6 would be directed to carry those out.

7 Q. Now, could you tell us a little bit about sewer
8 rates and fees and who sets those and how they work?

9 A. The wastewater utility, which is run under our
10 division, is completely self funded by sewer rates. So, we
11 get no money from property taxes or anything else. All of
12 our facilities, our salaries, our electricity, everything we
13 do is paid for out of sewer rates. Sewer rates 100 percent
14 fund our operation, and none of that money goes to police
15 cars or anything else. So, it's sort of run like a little
16 business.

17 The County Council sets the sewer rates, and
18 again, approves the projects we do, so that ultimately, the
19 County Council has responsibility to set the sewer rates so
20 they match what they're telling us to do.

21 Q. Are there any consequences of delaying this
22 particular well replacement project?

23 A. Yes.

24 Q. What are they?

25 A. As I noted before, we don't control how much water

1 comes into the plant. If more water comes into the plant
2 than they have injection well capacity, the injection wells
3 will -- basically, all the injection wells come off a common
4 pipe. So, the water flows into this common pipe, and it
5 just starts flowing down the wells, a lot like the bathtub
6 analogy you heard from Ms. Lovell earlier.

7 Just like the bathtub analogy, if we don't have
8 enough drains to get rid of the water coming in, it will
9 overflow the plant. In this case, in this particular case
10 of the Kahului plant, there are two low points in the plant
11 system. Both of them are kind of -- can I point, Trish?

12 So, if we get more water than we can handle with
13 the injection wells, the water will back up in the injection
14 wells, back up in this feed pipe, and overflow either this
15 location or this location. And it floods this back area,
16 runs out the beach right here and directly to the ocean.
17 So, if we don't have enough injection well capacity, the
18 water overflows the plant, floods the plant, and runs into
19 the ocean.

20 Q. Okay. Now, why are the two new wells, replacement
21 wells going to be sited at some distance from the existing
22 ones that they are replacing?

23 A. If you look at the photo of the plant site, you
24 can see it's already pretty congested. We have -- we have
25 areas we need access for maintenance and trucks and things

1 like that. So, we need to get the wells somewhere where
2 they're not in the way of other operations, that are out of
3 the way. And those are the locations that were chosen so as
4 to be out of the way for normal operations and leave room
5 for things we know might happen in the future.

6 For example, you see some space here, and there's
7 some space here. But those are -- there's some space right
8 here. Those things are saved for possible future
9 improvements that may have to happen. So, we try to be
10 careful about putting small things, for example, like these
11 injection wells, they'll only have a footprint about the
12 size of this table. So, we don't want to put that right in
13 the middle of an area that we might need for something
14 later. So, those areas were chosen to be backed away from
15 the ocean, not right next to the existing wells in a place
16 that was convenient to not impede operations.

17 Q. They will still be on the facility site though,
18 won't they?

19 A. Yes, that's correct.

20 Q. So, we're talking about replacement that all
21 happens within the existing footprint of the plant?

22 A. That is correct.

23 Q. Is there anything else that you would like to tell
24 the Commission about this project, or have we covered it
25 all?

1 A. I think the only thing I would say is there were a
2 lot of analogies thrown around earlier about cars and repair
3 and maintenance. And if I could just make a general comment
4 about that as it applies to this facility.

5 Q. Certainly.

6 A. This facility has only one purpose, and that is to
7 treat and dispose of wastewater. The injection wells alone
8 have no use. The plant without -- the rest of the plant
9 without the injection wells have no use. It's a very
10 expensive thing, but it's a thing just like your car. Your
11 car without one tire has no use. Your car without a
12 transmission has no use. The plant without injection wells
13 has no use.

14 Although it's big and it's far more than \$125,000,
15 replacing the plant would cost hundreds of millions of
16 dollars. So, a million-dollar project, though it seems so
17 large, is, in the realm of how much that facility costs, a
18 relatively small expenditure for replacement. And if you
19 look at the whole cost of 300, \$400 million, a \$2 million
20 parts replacement is probably equivalent to the cost of
21 replacing your tires, you know, or the cost of replacing
22 your transmission. Probably less than that.

23 So, I know we get kind of lost in these big
24 numbers sometimes. But when you run large utilities like
25 water, wastewater, power, everything is expensive. There's

1 nothing small. And I would just, in those analogies you
2 used earlier, I would consider this a relatively small
3 repair/replacement of a large existing system, which is just
4 a part of its whole thing.

5 Q. Fair enough. And I think there was one other
6 thing that we needed to clarify. And that is on any given
7 day, how many people in your division are doing maintenance?

8 A. We have 120 people in our division, and most of
9 them, including project managers, are somehow involved in
10 daily operation maintenance. And we have a few clerks and
11 things like that. But maybe 90 people, plus a small army of
12 private contractors and consultants like people like
13 CH2MHill. Basically, this year in the fiscal year '11
14 budget, our request to Council, which is being heard right
15 now, is about \$61 million. Almost every dime of that is for
16 operation, maintenance and replacement.

17 So, there's a lot of people. We do a lot of large
18 projects just to keep the system operational.

19 MS. LOVELL: Thank you. I have no further
20 questions at this time.

21 CHAIRMAN STARR: Okay. Thank you, Ms. Lovell.
22 Mr. Schwartz, it's your turn now for cross.

23 MR. SCHWARTZ: Thank you. I'll make it brief
24 because the day has been long, and I apologize for the
25 amount of time. It took a while to get the direct, so we'll

1 try and make it quick.

2 CROSS-EXAMINATION

3 BY MR. SCHWARTZ:

4 Q. Dave, you said, if I understood you correctly,
5 that it's not the individual Wells 1 and 2 that are being
6 repaired, they are being replaced; is that right?

7 A. That's correct.

8 Q. And so, the -- it's the repair and maintenance
9 that you're talking about that's of the facility; is that
10 right?

11 A. The repair is to the final plant process, which is
12 the effluent disposal process. And the repair is to that,
13 which includes replacement of roughly 20 or so of that last
14 plant process.

15 Q. It's repair of the whole plant's process?

16 A. It's repair of the final plant process. There are
17 many processes of the plant. The final one is the effluent
18 disposal process. It's repair of that system.

19 Q. So, repair of the system. So, how does that
20 comport with your SMA application that cites repair and
21 maintenance of underground utility lines, including, but not
22 limited to the distribution lines that Mr. Shibuya referred
23 to; how does your statement that this is repair of the
24 system relate to the specific exemption that's there?

25 MS. LOVELL: Could you please cite to us a

1 particular --

2 MR. SCHWARTZ: Sure. It's your exhibit.

3 CHAIRMAN STARR: Why don't you start with this
4 question again with the citation to clarify.

5 Q. (By Mr. Schwartz) Exhibit 1, page 9 is the
6 special management area application that I believe you
7 submitted; is that right?

8 A. That's correct.

9 Q. And number 4 is circled, isn't that right, on
10 page 9?

11 MS. LOVELL: It's page 9 of --

12 MR. SCHWARTZ: Exhibit 1.

13 MR. TAYLOR: I don't have the exhibits from today.
14 I just have my stuff. Okay. I'm looking at it now.

15 CHAIRMAN STARR: It's on the board, too, Dave.

16 MR. TAYLOR: I'm sorry, could you repeat your
17 question? I don't know what the word comport means.

18 Q. (By Mr. Schwartz) How does it -- to you, is it
19 the same thing to say repair and maintenance of a
20 underground utility line is the same as repair and
21 maintenance of the plant effluent disposal system; are those
22 the same things or different things?

23 A. I think repair and maintenance of the effluent
24 disposal lines is a subcategory, of course, of repair and
25 maintenance of underground utilities. Of course it is.

1 That's what it is.

2 Q. But your, as I understand it, none of the existing
3 lines are being repaired; is that right?

4 A. The system is being repaired.

5 Q. The system is being repaired, that's the point.

6 Thank you. The next question is you stated that -- are you
7 familiar with the requirements of Maui County exemption list
8 under -- the exemption list that was reviewed and approved
9 by the Environmental Council on January 10, 2007?

10 A. I'm generally familiar with it.

11 Q. Okay. And so, Number 2 under that says that the
12 following types of projects will not be exempt. It says,
13 "Projects in statutorily defined areas, including, but not
14 limited to, special management areas, shoreline areas,
15 except where work is eligible for exemption and there is no
16 negative impact on the conditions that" -- so, my question.

17 CHAIRMAN STARR: Excuse me, is this part of the
18 exhibit? Has this been entered?

19 MR. SCHWARTZ: This is something that's the
20 County's exemption list on which they rely for this -- in
21 this decision.

22 CHAIRMAN STARR: Can we find it in the document?

23 MR. SCHWARTZ: It's a reference. It's a document
24 that's referenced, in effect, in the decision that went from
25 the Planning Director to Mr. Taylor, which says -- which

1 says we're -- basically, it relies on exemption Class 2 and
2 exemption Class 4 for saying you're granted an environmental
3 assessment exemption here.

4 CHAIRMAN STARR: What page is that?

5 MR. SCHWARTZ: On Exhibit 1, page 6.

6 CHAIRMAN STARR: Okay. Now, please begin your
7 question again.

8 MR. SCHWARTZ: Okay. Exhibit 1, page 6.

9 CHAIRMAN STARR: And it should reference the
10 document.

11 MR. SCHWARTZ: There are supposedly two classes of
12 exemptions that are listed, Class 2 and Class 4. So, I'm
13 asking you whether or not you are aware of the prohibition
14 that exists on -- in the -- in this County's exemption list
15 for developments -- sorry.

16 COMMISSIONER MARFDIN: I believe it's on the board
17 right now.

18 CHAIRMAN STARR: Begin your question again,
19 please, Mr. Schwartz. And it should relate to the evidence.

20 Q. (By Mr. Schwartz) The Department of Environmental
21 Management made a declaration of exemption from the Hawaii
22 Environmental Policy Act, right; Ms. Okuma filed that
23 exemption, right, that declaration?

24 A. Yes, she signed a letter saying that. I don't
25 know exactly what its called technically, but I assume

1 you're stating the right title for it.

2 Q. And Number 10 up there says that this action
3 involves an action that triggers compliance with Chapter 343
4 related to environmental impact statements, except for these
5 two classes of exemption, right?

6 MS. LOVELL: Well, that's not --

7 CHAIRMAN STARR: Ms. Lovell.

8 MR. SCHWARTZ: I'm trying to set the precedent of
9 a question.

10 CHAIRMAN STARR: Can I ask you to begin again and
11 make it either a positive, a positive question, not a
12 circuitous?

13 Q. (By Mr. Schwartz) Are you familiar with the
14 prohibition on exemptions for -- for projects in specially
15 defined areas including special management areas and
16 shoreline areas in the Maui County -- in the Maui County
17 exemption list?

18 MS. LOVELL: I object to the form of that question
19 because it's incomplete and misleading.

20 MR. SCHWARTZ: What's incomplete about it?

21 CHAIRMAN STARR: Mr. Schwartz, can you ask your
22 question and phrase it in terms of the document that's in
23 evidence?

24 Q. (By Mr. Schwartz) Let me just ask you about
25 Class 4. Are any of the so-called equipment installations

1 here, do which ones of those apply to injection wells
2 and/or -- and/or appurtenant piping?

3 A. It says equipment installations, including, but
4 not limited to, so -- and then it lists a lot of things,
5 pumps, electrical transformers, et cetera, et cetera,
6 emergency generators. So, it's giving a general class of
7 stuff. And it says, including, but not limited to. So,
8 it's -- it's a judgment of are these of the same level of
9 scope of those things.

10 Q. And your view is that those are within that class,
11 that the injection -- replacement injection wells and new
12 pipe, piping is equipment installation?

13 A. Yes.

14 Q. Within that?

15 A. Yes.

16 Q. I'm going to forego further questions at this
17 point and hold the remainder for our closing statement.
18 Thank you.

19 CHAIRMAN STARR: Okay. I guess that's the end of
20 cross. Do you have any redirect, Ms. Lovell?

21 MS. LOVELL: No, I do not have any redirect. I
22 have one very brief offer of proof, which I think might
23 prevent me from having to call another witness. And my
24 offer of proof under your -- your rules is that, if called,
25 the Deputy Director of the department would testify that

1 both she and the Director did, in fact, meet with the
2 Appellant to have the discussion that was stated this
3 morning that did not take place.

4 MR. SCHWARTZ: I object to that.

5 CHAIRMAN STARR: Mr. Schwartz, please use the
6 microphone.

7 MR. SCHWARTZ: I have no idea what the -- what the
8 Appellant's counsel is referring to, so we object to an
9 offer of proof of something we don't know anything about.

10 CHAIRMAN STARR: Ms. Lovell, if you want to call a
11 witness.

12 MS. LOVELL: Yes, I'll will very briefly.

13 CHAIRMAN STARR: Yeah, hold on. I apologize for
14 that. Commissioner Marfdin, and I apologize. It's been a
15 long day.

16 COMMISSIONER MARFDIN: I have a couple of real
17 quick ones.

18 CHAIRMAN STARR: Take your time.

19 COMMISSIONER MARFDIN: You said that 23 percent of
20 the effluent is currently reprocessed, processed to the
21 degree it could be used for irrigation; is that correct?

22 MR. TAYLOR: Let me be clear. That's a
23 county-wide number. At the Kahului treatment plant, almost
24 all of the water is disposed of down injection wells. A
25 little bit is used for irrigation on site. There's also an

1 irrigation system that serves between the plant and the Kite
2 Beach area. And then there's a standpipe that people
3 needing water for dust control and things come and fill up
4 trucks. But generally, the -- there's no major recycled
5 water system.

6 COMMISSIONER MARFDIN: Next, you mentioned that
7 you showed us where the overflow has gone in the past when
8 there's been overflow. How often does that occur?

9 MR. TAYLOR: Hopefully very, very, very rarely.
10 It's a violation of our permit. It's not something we want
11 to do. In my -- since 1992, I can only think of -- of a
12 handful of times it's happened. Since I've been division
13 chief, I think only once. But again, the hydraulics are
14 obvious, so we know what will happen.

15 COMMISSIONER MARFDIN: The injection well goes how
16 deep?

17 MR. TAYLOR: I think you have a report that shows
18 in front of you there's eight injection wells. They're each
19 a little bit different. The depth of it is driven by the
20 geology. You have to basically drill them down to a point
21 where the geology is acceptable to the Department of Health
22 requirements.

23 COMMISSIONER MARFDIN: Is it below the water
24 table?

25 MR. TAYLOR: Yes, they're about between 350 and

1 400 feet deep. So, the water table is, you know, ten feet
2 deep or something like that.

3 COMMISSIONER MARFDIN: And any effluent pumped
4 down there would have to seep out through the basalt into
5 the open ocean; is that correct?

6 MR. TAYLOR: The water isn't pumped. The water
7 flows by natural gravity, and it exits the injection well at
8 the bottom, and it goes wherever the laws of physics take it
9 at that point.

10 COMMISSIONER MARFDIN: Is that generally toward
11 the center of the island or generally toward the ocean?

12 MR. TAYLOR: I think most people would think it's
13 generally towards the ocean. So, whether or not it gets to
14 the ocean you can swim in, close to the ocean or 100 miles
15 away or in 15 minutes or in 15,000 years, I do not know.

16 CHAIRMAN STARR: Okay.

17 COMMISSIONER MARFDIN: I'll pass for now.

18 CHAIRMAN STARR: Commissioner Hiranaga, please,
19 your turn.

20 COMMISSIONER HIRANAGA: Just one question. And
21 I'm not sure if you have the answer, because you're not a
22 geologist, right?

23 MR. TAYLOR: I'm not a geologist.

24 COMMISSIONER HIRANAGA: But the three options to
25 dispose of treated effluent is either disposal, direct

1 disposal into the ocean, injection wells or through
2 irrigation?

3 MR. TAYLOR: That's correct.

4 COMMISSIONER HIRANAGA: The irrigation method,
5 where does that water go ultimately?

6 MR. TAYLOR: Well, like with all irrigation, it
7 gets soaked up by the plants, and it goes into their life
8 cycle and then evaporated. I think they call it
9 evapotranspiration.

10 COMMISSIONER HIRANAGA: But not all the water is
11 absorbed by the plants. Isn't there percolation into the
12 ground?

13 MR. TAYLOR: That would depend on the irrigator.
14 I think, as everyone knows from your own garden, you can
15 overwater more than your plants can soak up, or you can
16 water just enough that your plants soak up every drop. So,
17 that really depends on how the irrigation system is set up
18 and not really anything about the disposal system on our
19 end.

20 COMMISSIONER HIRANAGA: So, some of the water may
21 be absorbed, but balanced -- if properly administered, would
22 evaporate?

23 MR. TAYLOR: Again, that depends on who is using
24 it, how much they're using, their irrigation techniques,
25 their grading of the site and any kind of on site --

1 COMMISSIONER HIRANAGA: Weather conditions?

2 MR. TAYLOR: Things that they do, that's correct.

3 COMMISSIONER HIRANAGA: Okay. Thank you.

4 CHAIRMAN STARR: Commissioner Shibuya.

5 COMMISSIONER SHIBUYA: Dave, thanks for coming
6 here. And I believe you have a very good reliability rate
7 in various treatment plants here on Maui. What is that
8 reliability rate?

9 MR. TAYLOR: The -- I think you need to define
10 what you mean by reliability rate.

11 COMMISSIONER SHIBUYA: Make sure it's processing
12 and it doesn't spill into the ocean.

13 MR. TAYLOR: Overall, we track the total amount of
14 volume that comes into our system versus how much gets away
15 from us somehow. And that rate is, I think this last year
16 it was above -- I know the number we shoot for is 99.9978
17 percent. And it was right around there, maybe a little bit
18 higher, but right around that level of reliability. Almost
19 three nines, 99.999 if you rounded it.

20 COMMISSIONER SHIBUYA: And that is impressive.
21 Thank you for that kind of service. But I just want to --
22 it translates through some processes. Can you describe the
23 processes that you treat, such as primary, secondary and
24 tertiary and what is involved in each one of these as it
25 applies to Kahului treatment plant?

1 MR. TAYLOR: Trish, could I have the photo again?
2 All the wastewater that comes into the plant comes in at
3 this location called the headworks. So, there's screens
4 here and grit settling here, which is considered primary
5 treatment, just treatment by the laws of gravity. Then it
6 goes through -- then all the water goes through these
7 systems, which are aeration. Aeration is where we add -- we
8 add oxygen in defined amounts to create environments where
9 certain specific microorganisms grow. And they basically
10 eat the waste in the wastewater.

11 So, after it goes through this secondary system,
12 this is known what is secondary treatment when you use
13 biology to further treat the waste. These are clarifiers.
14 They're basically big settling tanks where after the
15 microorganisms have feasted, they get heavy, and they sink.
16 So, this is the process where the separation happens. Solid
17 material is taken out of there and run into another set of
18 aerators called digesters here. The clean water from the
19 top of the clarifiers goes through filtration over here, and
20 then is chlorinated.

21 In addition, the solid material goes through these
22 buildings where it's dried and hauled off. So, the water --
23 and this building is an ancillary building with centrifugal
24 blowers and emergency generators and power controls and
25 things like that. So, the path of the wastewater comes

1 through here. The primary treatment -- primary treatment,
2 secondary treatment, tertiary treatment and then disposal of
3 the injection wells, which are -- there's eight of them
4 along the back. One, two, three, four, five, six, seven,
5 and there's one right there.

6 So, that's basically how the plant works, and
7 that's the kind of primary, secondary, tertiary languages as
8 described in that plant.

9 CHAIRMAN STARR: Commissioner Shibuya.

10 COMMISSIONER SHIBUYA: I just want to ask you to
11 wait two minutes for a technical -- Kenny, do you need to --

12 MR. HULTQUIST: I just need to switch over the
13 tape real quick.

14 CHAIRMAN STARR: Okay. We'll give you that.

15 (Pause.)

16 CHAIRMAN STARR: Please continue, Commissioner
17 Shibuya.

18 COMMISSIONER SHIBUYA: Dave, can you point out
19 where the proposed Wells 1 and 2 replacements will be
20 located?

21 MR. TAYLOR: Yes. Existing Well 1 and 2 are here
22 and here. The proposed replacements are here and over here
23 somewhere.

24 COMMISSIONER SHIBUYA: And in terms of capital
25 improvements, you know, when I made the analogy about the

1 car, the engine goes out, we somehow get an improved engine
2 if possible. We try to do an improved type version. What
3 would it cost if you had any improvement to this current
4 process, and what would that improvement do?

5 MR. TAYLOR: I think you would have to reverse
6 your question and ask what you want the improvement to do,
7 and then maybe I could answer how much it would cost. You
8 could technically make distilled water and boil it off into
9 the atmosphere. I mean you can do anything you want, so I
10 don't really know how to answer that question at all.

11 COMMISSIONER SHIBUYA: So, how much solid material
12 enters the injection wells, what percentage or maybe pounds?

13 MR. TAYLOR: It's so low it's even hard to say.
14 It's -- the total suspended solids, which is measured in
15 milligrams per liter, that's just like parts per million,
16 averages about two milligrams per liter. So, you could
17 multiply that by five million gallons with a conversion
18 fraction from liters and get the total pounds of stuff
19 that's in that water. But I think you would find it's very,
20 very, very low, so low that the water from the water
21 fountain has a very similar total suspended solids, if not
22 higher.

23 So, it's -- if you hold it up, it looks like
24 drinking water. So, there's not a -- there's very little
25 solid material in it already.

1 COMMISSIONER SHIBUYA: Okay. Thank you. And in
2 terms of rain, you mentioned that when it rains, you have
3 increased volume of water coming in. Can you explain why
4 this phenomenon happens?

5 MR. TAYLOR: A lot of the wastewater system in
6 Wailuku-Kahului was built in the 1930's, 1940's. It's got
7 old clay pipe that has old joints that leak. And opposite
8 of water -- of potable water systems, because sewer systems
9 are not pressurized, they just run downhill. They don't
10 leak out. They leak in. So, when it rains, the ground
11 floods with water. It's like a sponge. That water pressure
12 pushes inward. And that pressure is enough to push that
13 volume of ground water into the sewer pipes.

14 In addition, you've got all kinds of people's
15 houses that we found their rain gutters connected to the
16 sewer, which they're not supposed to, all kinds of things
17 beyond our control. People have flooding in their streets,
18 and they open manhole covers to drain them. So, we have --
19 we have over 200 miles of lines out there that we don't
20 really have a whole lot of say over what comes in. So, the
21 bottom line is we can get double the plant flow in the
22 winter by these kind of things beyond our control.

23 COMMISSIONER SHIBUYA: And I just wanted to ask
24 you, maybe you can confirm this or deny this. In Honolulu,
25 I was talking with a crew that was actually cleaning out the

1 sewer line in Honolulu, in Waikiki to be specific, and the
2 guy was swearing that the worst thing that the people could
3 do was use soap. Is that your experience? He's talking
4 about bar soap.

5 MR. TAYLOR: I don't know what he's referring to,
6 but I really don't know anything about that.

7 COMMISSIONER SHIBUYA: Okay. Because it has
8 residuals that build up on the inside, and it turns into
9 grease. And grease would clog up the thing. That's what he
10 was -- he actually showed me the orange stuff.

11 MR. TAYLOR: Certainly grease can compound
12 problems in the collection system. Whether or not soap is
13 the cause of grease, I really do not know.

14 COMMISSIONER SHIBUYA: Okay. Thanks. In terms of
15 we've heard arguments that we shouldn't be spending the
16 money on these injection wells, but instead save that money
17 and reinvest it into relocating that treatment plant
18 somewhere inland. Now, what's your thoughts on that?

19 MR. TAYLOR: Could we put the picture back up,
20 Trish? Regardless of what we do in the long term, whether
21 we relocate the treatment plant, whether we build recycled
22 water systems, for the near term, let's call it the next ten
23 years, even if we had a recycled water system tomorrow, we
24 would still need enough injection well capacity that when
25 the winter rains come, we can dispose of the water through

1 the wells. So, this project of replacing two poorly
2 functioning wells with two new ones is necessary regardless
3 of whatever scenario we take in the future for this
4 treatment plant.

5 COMMISSIONER SHIBUYA: Dave, this is my last
6 question. I went on the web site and I was very interested
7 in, and it's the CWG, I think it's community working group.
8 I believe the environmental management people have had this,
9 and this is dated October 29th, 2009. And it has some data
10 in terms of if you were to make some improvements, it will
11 probably take them beyond the current residents' ability to
12 pay. Can you comment on that?

13 MR. TAYLOR: The public's ability and/or
14 willingness to pay is really something that the County
15 Council decides. And all I can tell you is that wastewater
16 is heavily discussed in the County Council during budget.
17 They don't give me an easy time up there, and the County
18 Council has numerous studies about how much different things
19 cost. They're very knowledgeable about it. And ultimately,
20 they have made the decisions that they've made about
21 balancing priorities, costs, wastewater versus other things,
22 sewer rates versus what people want, and again, ultimately,
23 the elected officials make those decisions.

24 We don't make those decisions within the
25 department. We simply identify scenarios and let the County

1 Council know what the implications of various choices are,
2 and then we implement their choices.

3 COMMISSIONER SHIBUYA: The last, just this point
4 here, that it costs to pump a million gallons of treated
5 water \$700 per million gallons. That's an incredible amount
6 of energy and cost burden laid on residents and/or the
7 County of Maui. I just want everybody to understand that.
8 Thank you.

9 CHAIRMAN STARR: Okay. Commissioner Marfdin.

10 COMMISSIONER MARFDIN: Mr. Taylor, when the rain
11 events occur and you get the high flow in, the amount of bad
12 stuff in it probably doesn't -- would I be correct in saying
13 the amount that goes in wouldn't be substantially increased,
14 you're just increasing the amount of water mixing with
15 roughly the same amount of bad staff; is that generally
16 correct?

17 MR. TAYLOR: To some extent, that's correct. You
18 may get a lot of dirt. You don't get anymore human waste.
19 But you still may have organic material and inorganic
20 material.

21 COMMISSIONER MARFDIN: The second thing I wanted
22 to ask is, and you started to allude to it. You said ten
23 years down the road, we're still going to need something
24 like this. It seems to me we're going to need something
25 like this even further down the line. Even if we start to

1 have a huge recycling program, aren't we going to need to
2 get rid of storm waste and other kinds of things?

3 MR. TAYLOR: Any wastewater system anywhere will
4 always have to have some way to deal with the extra storm
5 flow. And that's going to be either direct discharge to a
6 river, lake, stream or ocean, or putting it into the ground.
7 I know of no other practical way to deal with the huge
8 swings between dry days like this and heavy rain days other
9 than one of those two.

10 COMMISSIONER MARFDIN: So, the question I was
11 asking earlier of James. Because we're not changing the
12 amount of effluent going down, today we're having no
13 additional influence on whatever bad things may or may not
14 be happening. I did raise the duration problem, but
15 basically, you're saying we're going to need something like
16 this on a long-term basis anyway, so the duration problem
17 doesn't seem to be a problem in that we'll need some sort of
18 capacity to deal with this down the road anyway; is that
19 generally correct?

20 MR. TAYLOR: Yes, what I think a lot of people
21 don't understand is the plant is only rated for average
22 daily flow of 7.9 million gallons a day. That's roughly
23 another, I don't know, I can't do this in my head, but maybe
24 6,000 more homes or equivalent. That's from the four or
25 five million gallons that goes up through this today to

1 almost eight. But the rain event can bump that to 12 in any
2 given day.

3 The point that I was trying to make is the
4 injection well hydraulic capacity is not driven by the
5 number of houses. It's not driven by development. It's so
6 overly driven by how much water comes in during the rain
7 events. And even if the wells sit idle, the extra wells sit
8 idle for two years, they're there waiting for that day. And
9 that is a staple of all utility management, water, power,
10 sewer. A lot of this stuff we have is waiting for that bad
11 day, because the public doesn't want -- the permits and the
12 public want service on that day. And so, a lot of what we
13 do, both power, water, sewer, is basically just having extra
14 stuff that's designed for that bad day.

15 The number of injection wells is solely driven by
16 the peak hydraulic loading on that rainy day. And no matter
17 what we do, we're still going to have to have a way to get
18 rid of water on that day.

19 COMMISSIONER MARFDIN: And this may be my last
20 one. In the process of doing this, I presume, and correct
21 me if I'm wrong, that you and James had a quite a lot of
22 information passed between you. So, he understood -- you
23 have seem to have a very good handle on the technical
24 aspects of this. He understood the planning aspects, and it
25 sounds like he received sufficient information to enable him

1 to make reliances about what is going on when he drafted the
2 Director's recommendations. Is that -- would that be fair
3 to say?

4 MR. TAYLOR: I can tell you that myself, as well
5 as my staff, met with Jim maybe dozens of times during the
6 course of his report. He works in the same building as we
7 do. So, it's -- some of these were in the hallway
8 conversations that led to five minutes in my office with,
9 you know, a couple of copies we would get him. There was --
10 I can tell you that Jim -- Jim's diligence in chasing down
11 the details was -- was way beyond any level of
12 professionalism I would have imagined from anybody in his
13 job.

14 I mean he really went above and beyond really
15 trying to understand all the details from us. And he, I
16 think, left no stone unturned pushing us for answers. And
17 every time we would give him answers, he would have more
18 questions, more detail. And we would give him more answers,
19 and we went down to the site. So, I think he does have a
20 really excellent understanding of the technical aspects, and
21 it's not -- it's not an accident. He really put a lot of
22 work into it finding that out.

23 COMMISSIONER MARFDIN: And his questions were to
24 make sure that this proposed project is in compliance with
25 all the regulations that we're subject to?

1 MR. TAYLOR: Yes. And regardless of what a lot of
2 people think, I found in my history of doing projects, I
3 have been doing CIP projects my entire time at the County
4 since 1992, the Planning Department I think is harder on the
5 internal departments than they are with the public. I have
6 never had an easy time of convincing them of anything. I
7 don't feel like I've ever gotten special treatment, and
8 frankly, I think it's kind of been the opposite.

9 But I think the level of detail that Jim really
10 forced us to go into for his report was -- was exceptionally
11 high.

12 COMMISSIONER MARFDIN: Thank you very much.

13 CHAIRMAN STARR: Commissioner Tagorda, it's your
14 turn.

15 COMMISSIONER TAGORDA: Yes. Very, very quick
16 question. Your department hired the engineering firm of
17 CH2MHill, and they were hired for what purpose, to
18 rehabilitate, to study the rehabilitation assessment of all
19 the wells in that facility, or just 1 and 2?

20 MR. TAYLOR: No, they were hired -- originally,
21 all we had -- we test all the injection wells of all of our
22 plants every six months. And we test them by -- with a
23 pressure meter and a flow gauge. So, we own 18 injection
24 wells county-wide. Every six months, every one of those is
25 tested. And what we've found is the total capacity had been

1 declining at the treatment plants. So, we said we have to
2 do something. We can't have this decline and decline and
3 decline, because again, we need to maintain the current
4 permitted operational levels. We didn't know quite what to
5 do.

6 No one on staff, including myself, had ever
7 installed an injection well. The last installations were
8 done in the early '90s. I was a junior engineer. I had no
9 involvement in the project. So, we hired CH2MHill to look
10 at the information, look at the data, look at the situation
11 and do a preliminary assessment of what can we do. Can we
12 clean, can we fix, what can we do. So, once that
13 preliminary report that you read ended with this -- some
14 recommendations, we extended their contract to start doing
15 more and start actually designing and start helping us with
16 permits and things like that.

17 But their original scope of work was to look at
18 our situation and to recommend what our options were and how
19 could we solve this problem.

20 COMMISSIONER TAGORDA: And when you have this
21 recommendations from this engineering firm, were you
22 adopting such recommendations or use them?

23 MR. TAYLOR: Yeah, in fact, the replacement -- the
24 replacement of these two is directly what they recommended.
25 So, we looked at their recommendations. Ultimately, it's

1 our decision whether to agree with the recommendations or
2 not, but we agreed with the recommendation and then gave
3 them authority and an extended contract to actually start
4 helping us implement their recommendations.

5 COMMISSIONER TAGORDA: But their analysis is just
6 based on records and data you submitted to them. And when
7 they recommended some methodology to look at directly into
8 those casing, none of those was, I believe, taken by you
9 folks.

10 MR. TAYLOR: Actually, I think you're referring
11 specifically where they mention put a camera down and --

12 COMMISSIONER TAGORDA: Yes, yes.

13 MR. TAYLOR: We have cameras like that. We did do
14 that. We communicate that with them.

15 COMMISSIONER TAGORDA: Instead of the Drano and
16 salt.

17 MR. TAYLOR: Yeah, all of those things were tried,
18 and this is typical with a consulting firm like theirs.
19 They don't usually come do work. We usually do work. It's
20 their expertise that helps direct us what to do. So, we do
21 do a lot of those things that we recommend based on their
22 technical expertise.

23 COMMISSIONER TAGORDA: I was glad to hear from you
24 over these years you've been working there there's only one
25 occurrence of overflow of wastewater on those two lower

1 spots in the facility. Up to this moment, up to this time,
2 were there any preventative measures that that will not
3 happen again, or were you cited on that occasion?

4 MR. TAYLOR: Well, the preventative measures are
5 things like keeping the plant operating correctly so that
6 the wells don't clog, cleaning the wells, and then
7 implementation of the projects such as the one before you
8 today to take preventative measures to see that we don't
9 have less disposal capability than we need. So, this is
10 just a large thing, but it's a -- it's on a long list of
11 things we've done to keep that from happening.

12 COMMISSIONER TAGORDA: And just one more question.

13 CHAIRMAN STARR: Yeah, go ahead.

14 COMMISSIONER TAGORDA: You mention about 23
15 percent, but it's county-wide recycling reuse, how many
16 percent do we use at that facility in terms of recycling and
17 reuse and irrigation? Do we have comprehensive actions to
18 do that in the future or now?

19 MR. TAYLOR: At this plant currently, the
20 percentages are low. I'm sure they're in the single digits.
21 Because the bottom line is the reason for that is I think
22 everybody knows this location. We're kind of isolated from
23 the rest of the island by Kanaha pond. There's no way to
24 get a pipeline through Kanaha pond. You've got to go around
25 it. And the only water users that are available in Central

1 Maui, Maui Lani Golf Course, Keopuolani Park, they both have
2 brackish water wells, and they have cheap sources of water.

3 So, you're talking about taking it further and
4 further and finding customers. So basically, it really just
5 comes down to a utility economic analysis of who wants the
6 water, who is willing to pay for the infrastructure and who
7 can use the water.

8 COMMISSIONER TAGORDA: Thank you.

9 CHAIRMAN STARR: Commissioner Shibuya.

10 COMMISSIONER SHIBUYA: Dave, from your
11 experiences, can you help the audience on Akaku as well as
12 here, what kind of help can we do as users of this sewage
13 system? I'm a septic guy, so we cannot use Clorox in our
14 system, because I'm feeding the bugs with the bug machine.

15 COMMISSIONER HIRANAGA: Mr. Chair, can we stay on
16 point?

17 CHAIRMAN STARR: You're out of order, Commissioner
18 Hiranaga. Please, Commissioner Shibuya, please ask your
19 question.

20 COMMISSIONER SHIBUYA: I just want to have this
21 analogy in terms of how the residents can help make -- be
22 part of the solution and not be part of the problem in the
23 sewage treatment plant. What can they do?

24 MR. TAYLOR: The wastewater system is intended for
25 human waste, shower water, laundry water. That's it.

1 Everything else should go not down the drain.

2 CHAIRMAN STARR: Okay. Thank you. Okay. Thank
3 you very much, Mr. Taylor. I appreciate your forbearance.
4 We're going to take a quick recess, five minutes. We'll be
5 back here at 31 minutes after 4.

6 (Recess taken.)

7 CHAIRMAN STARR: Okay. I thank everyone for their
8 forbearance and their patience. It's been a long day. We
9 have -- both counsels are going to expedite their closing,
10 and we thank them for that. So, in ten minutes or so --
11 each side will get ten minutes or so, and then we'll see if
12 we can get through deliberation. And if not, we'll have to
13 defer until another day. Mr. Schwartz, thank you very much
14 for your being willing to move it up. And the floor is
15 yours for your closing.

16 MR. SCHWARTZ: Do I have a final five minutes at
17 the end; is that right, Mr. Chairman?

18 CHAIRMAN STARR: If you need a full five.

19 MR. SCHWARTZ: I'll make it as quick as I can.

20 CHAIRMAN STARR: Thank you.

21 MR. SCHWARTZ: First of all, I want to thank the
22 Commission. It's been a very long day, and I have not been
23 the most proficient at doing this work. I was never a trial
24 lawyer and never wanted to be. And I appreciate your
25 forbearance in doing this. I was always about finding

1 compromises and working out arrangements for mutual
2 agreement rather than disagreement, so I apologize about my
3 lack of proficiency with the rules of the Commission.

4 But let me make it simple so you understand our
5 case. We said in our briefs we understand that there is a
6 legal requirement that the County has to adhere to to get a
7 certain amount of injection wells in there as backup
8 capacity, and we understand that. So, we don't have a
9 problem with whether or not the wells get built. We said
10 that in our briefs. What we have a problem is is to make
11 sure that the County is equally concerned about compliance
12 with all the laws, not just the safe drinking water backup
13 injection well law requirement.

14 And the other laws that are -- have been violated
15 in our view where errors of law have occurred from the
16 Planning Director's decision is, first of all, that the
17 Planning Director has failed to follow the requirements of
18 the special management area in granting a 205-22, in
19 granting an exemption for a project that is acknowledged to
20 be construction and is not repair and maintenance of utility
21 lines, but is a new construction of new pipes and new wells
22 in new locations. That is development. And under the law,
23 they're required to seek a permit. And they should have
24 sought a permit. And if they had sought a permit, we could
25 have worked things out. They should still do that, and you

1 should require them to do it because that is the law.

2 These exemptions are to be construed narrowly.
3 There's plenty of case law on that. If you look at the
4 Russell decision, if you look at the opinion of the Attorney
5 General in '96, if you look at the corporate counsel's
6 opinions, you will see that publicly available documents
7 that say exemptions are to be construed narrowly, not
8 broadly. And they are to be -- and that the burden of
9 proving eligibility is on the person or agency that seeks
10 the exemption. And in this case, the attempt to fudge the
11 exemption by saying, well, it's repair of the system, that's
12 not what the language of the exemption says, nor does it say
13 that these are the kinds of utility lines that are being
14 repaired. That's not what's happening.

15 There's construction. And so, under the CM --
16 under the special management area requirements, there should
17 have been a permit. It should have been a major permit.
18 And then there would have been a full hearing of the issues,
19 the environmental issues that are associated with that. The
20 second thing is that, as Mr. Buika indicated, he did not
21 show consistency with the objectives and policies of 205-A,
22 Section 2. He did not -- he says he took three days, but
23 there's no written findings other than what's there. He
24 says he didn't check them out case by case. He didn't make
25 that determination, and there is no restoration or

1 improvement. This is simply maintaining the status quos at
2 best, if it's that. It may be an actual extension of
3 duration, and it may be an addition depending on whether or
4 not this law is followed.

5 Moreover, it's clear that from his statements that
6 he did not contact any of the agencies that should have been
7 contacted before granting an exemption under the law for
8 the -- for the EA preparation. He did not contact the
9 Office of Environmental Policy, quality control. He did not
10 contact the DAR, because this is about the oceans. He did
11 not contact the Department of Health. And here is an
12 important point for you to bear in mind. The County has
13 been artful in confusing the requirements of the Safe
14 Drinking Water Act with the requirements of the Clean Water
15 Act. Those are two different statutes within the EP --
16 within the federal level, and there are two different
17 statutes in Hawaii.

18 We are asking the department to comply with both,
19 not just one. And compliance means that they're not allowed
20 to discharge, whether directly or indirectly. And we've
21 cited case law on point in the Ninth Circuit that we ask you
22 to take a look at in our briefs saying that any discharge,
23 whether it's direct or indirect, still is subject to NPDES
24 permit. And this County is subject to potential fines, the
25 citizens of this County, who will wind up paying those fines

1 if there's an enforcement action for discharges without an
2 NPDES permit under either the state law or the federal law.
3 This county is subject to penalties of \$32,000 per day per
4 well per pollutant. That's potentially what's at risk here,
5 so we're saying please comply. You heard the County say we
6 did not -- we have never heard from the Department of Health
7 that we are in violation. But you didn't hear the County
8 say, well, we asked them whether or not we need a permit.
9 We found out we didn't need a permit. We applied for a
10 permit and were told under the -- under the NPDES Clean
11 Water Act, we found out we didn't need one. I haven't heard
12 that. That hasn't happened.

13 I ask you to look at our basic argument, which is
14 that they have a responsibility to comply with this
15 requirement. And you have a responsibility not to authorize
16 the additional violations that will come from allowing new
17 wells to be constructed, built and operated and discharged
18 into the ocean through the injection wells. So, there's a
19 problem about the Clean Water Act. There's a problem, and
20 you've heard it from the beginning, nobody has paid
21 attention to and there's no reference in this discussion to
22 the public trust duty under Article 11 of Hawaii
23 Constitution. And that is very important. The Public Trust
24 Doctrine mandates a duty on the County government to
25 conserve and protect all waters of the U.S., all waters of

1 Hawaii.

2 And there's no effort being -- there's an error in
3 this decision for failure to show any attempt to address the
4 constitutional responsibility. So, discarding valuable
5 waters and polluting nearshore waters by these injection
6 wells is exactly what the Public Trust Doctrine was supposed
7 to prevent. So, let me just close by saying the law, I
8 think, on this is very clear. You have a duty in our view
9 to reverse the improperly granted exemptions and to indicate
10 that a permit will only be granted if it's sought as a major
11 permit under the SMA with a full environmental audit. And
12 let's just be clear. If it's all that clear, then -- an
13 environmental assessment, sorry, full environmental
14 assessment. If it's all that clear that there's no big
15 problem that comes from an environmental assessment, it
16 shouldn't be that costly or time-consuming to do one.

17 Instead, they've exempted themselves from that.
18 And in doing that, they've cut the public out of the
19 process. The injection wells are a out-of-sight/out-of-mind
20 approach to waste management and technology that's not used
21 in most places in the U.S. And despite the number that they
22 quoted, that number is not just about wastewater injection
23 wells. That number they quoted was about chemical injection
24 wells, which was a whole different thing. So, the bottom
25 line, this has been a dark-of-the-night operation, out of

1 sight, out of mind. And we need to be straightforward with
2 the public and say here are the challenges and get the
3 department to obey the law; the Coastal Zone Management Act,
4 the Hawaii Environmental Policy Act, the clean -- the Clean
5 Water Act and the federal water pollution control
6 requirements of state and the state constitutional
7 requirements.

8 If you do that, we will be happy to work with the
9 County and help expedite things so that these wells can be
10 done. But when these wells are put in, they will be put in
11 with appropriate controls on -- on the technology so we get
12 better treatment, less pathogens in the ocean, less coral --
13 less harm to coral because the nutrients that go down there
14 will be reduced, and instead, we will begin to create water
15 that's capable of being reused safely and beneficially on
16 land. That's what we're asking for. It's within your
17 power. It's legally required, and there have been errors of
18 law that the County has failed to address in its -- in its
19 comments and its argument.

20 And that's what we ask you to address today. So,
21 thank you for your attention. And that's our ten minutes.

22 CHAIRMAN STARR: Thank you, Mr. Schwartz.
23 Ms. Lovell, please, the floor is yours.

24 MS. LOVELL: Thank you. And on behalf of my
25 clients and myself, thank you very much for your attention

1 during a very long but I think interesting day. At the end
2 of this long day, where are we? We've heard from the
3 Appellant a lot of argument about laws and a lot of argument
4 that the County is in violation of this and that, and this
5 law requires this and this law requires that. But what
6 evidence have you heard that the County has ever violated
7 any law? What evidence have you heard that the EPA requires
8 the County to have some permit that the County doesn't have?

9 What witness came in to tell you that the EPA
10 requires an NPDES permit for a direct outfall instead of the
11 UIC or underground injection control permit that governs
12 injection wells? The County today put on two very
13 knowledgeable witnesses. The planner, who did a really
14 terrific job on his report, explained carefully his thought
15 processes, how he went about doing his work, what laws he
16 considered, what he looked at, what evidence he had and so
17 forth. And then our wastewater chief explained how the
18 whole process worked and why this well replacement project
19 is -- fits well within the exemptions.

20 At the end of the day, two wells are being taken
21 out. Two new, better functioning wells are being put in.
22 The Planning Department determined that taking two out and
23 putting two in was not going to have any additional impact
24 on the environment. And therefore, they exempted it under
25 exemptions that apply to such projects. While I commend

1 your attention and all of your detailed questions, I fear
2 that there has been kind of a diversion of our attention
3 from the real issues.

4 The real issues are was the finding that this
5 project, taking two wells out replacing like for like, was
6 entitled to an exemption, was not development, did not have
7 any additional cumulative impact on the environment. Was
8 that based on a clearly erroneous finding of material fact
9 or erroneous application of law? Was it arbitrary or
10 capricious? Was it a clearly unwarranted abuse of
11 discretion? After listening to the care that Jim Buika gave
12 to his analysis, I urge you not to find that there was
13 anything arbitrary or capricious or abusive about the
14 process.

15 And with respect to whether there were erroneous
16 findings of fact or erroneous conclusions of law, that those
17 have not been proved to you by the party that has the burden
18 of proof; therefore, I urge you to uphold the Planning
19 Director's decision. Thank you.

20 CHAIRMAN STARR: Okay. Mr. Schwartz, your final
21 comment?

22 MR. SCHWARTZ: The -- I'll make this brief. The
23 counsel, corporate counsel has asked you what evidence is
24 there for our proposition that these laws are being
25 violated. And they -- and that the decision is erroneous as

1 a matter of law. The counsel has failed to understand or
2 make clear to you, I'm sure she understands perfectly well,
3 the difference between questions of fact and questions of
4 law. We have cited cases that specifically say that these
5 kinds of discharges, indirect discharges into the ocean are
6 subject to NPDES requirements at state and federal levels
7 and urge you to look at those cases.

8 The counsel has been masterful in doing, on the
9 one hand, on the other hand. On the one hand, she said
10 we're worried about this intervention early on, because
11 they'll call so many witnesses. They'll take up so much
12 time. They'll argue about the injection wells. They don't
13 talk about the real issue, which is the legality of the
14 decision. We have talked about the legality of the
15 decision. And we have cited specific cases, and we have
16 cited specific laws.

17 And I want -- under your rules, you are authorized
18 to take judicial notice of anything of -- to take notice of
19 anything that the judiciary could take judicial notice of.
20 And we will be happy to submit posthearing memos to make
21 clear that under *State of Hawaii versus Smith*, you have
22 broad degree to -- and under, I'm sorry, a series of cases
23 that we will cite, you have broad discretion to take
24 advantage -- to take judicial notice of things like the fact
25 that water discharged near the -- near the ocean is more

1 likely to go into the ocean than it is uphill. And you are
2 able to take cognizance of the requirements of the Federal
3 Water Pollution Control Act and the State Water Pollution
4 Control Act and the other -- and the appropriate case law
5 under the environmental policy -- the Environmental Policy
6 Act and under the Coastal Zone Management Act and under your
7 own rules.

8 If you look at that, you will see that there are
9 clear errors of law, so let's make it simple. There is a
10 lawful way to do the work, and there's an unlawful way.
11 There's a way that includes the public, and there's a way
12 that excludes the public. Regrettably, the County has
13 chosen a way to exclude the public and not follow the legal
14 procedures that are required. So, we are urging you to look
15 at this. And I will tell you there's one other way in which
16 the County has misled, and that's with respect to the legal
17 standards that you are to apply.

18 They're only looking at the legal standards of the
19 County and your legal standards. But your legal standards
20 say -- that is, for review of the Planning Director's
21 decision, your legal standards say that if a more
22 restrictive requirement applies under state law, you are
23 required to apply the more restrictive requirement, not the
24 less so. And that's the case with the coastal zone -- the
25 State Coastal Zone Management Act 205-A. That's the case

1 with Chapter 343 and the exemptions that are allowed under
2 that. And that's the case with Chapter 91 standards of
3 review. If it is clearly erroneous as a matter of law, then
4 it's not a burden of proof question. It's a question of
5 law.

6 Is it legal, or is it not legal? That's part of
7 what you have to determine, and we've cited chapter and
8 verse case law and statutory law and so on. So, we are
9 asking the County to set a model for being law abiders, not
10 law avoiders. And that's what's been happening here. So,
11 we ask you please hold the County to do what you would ask
12 any private citizen to do if they proposed a construction
13 project on SMA land and didn't go through the Hawaii
14 Environmental Policy Act and didn't do the other things
15 they're required to do, and the end result of that was to
16 put tons of pollution into the ocean and cause harm to our
17 coral and harm to the people who go swimming and using and
18 working in the waters. That's what we're asking you to do.
19 Ask the County to follow the law.

20 CHAIRMAN STARR: Thank you, Mr. Schwartz.
21 Ms. Lovell.

22 MS. LOVELL: Sorry? No, I think that's it. I
23 don't get another chance. Probably just as well.

24 CHAIRMAN STARR: Okay. Thank you. So, Members,
25 that concludes the presentation portion. We can move on to

1 deliberation. And as part of the deliberation, if there's a
2 desire to question the attorneys, we can do that now. We
3 are running very, very short of time. If there's a desire
4 to defer this because there will be a number of questions,
5 then probably we should defer. If there's not and there's a
6 desire for action on the members, that's acceptable by the
7 Chair.

8 Please, someone either show if you want to ask
9 some questions, or show if you want to make a motion or show
10 if you want to defer. Commissioner Marfdin.

11 COMMISSIONER MARFDIN: I don't have any questions.
12 I asked all my questions already. If we have to defer, we
13 can. But I would be -- Trish, could you put up the
14 criteria? I'm going to make a motion.

15 CHAIRMAN STARR: Okay. That's fine.

16 COMMISSIONER MARFDIN: I move that we uphold the
17 Director's decision, because I don't believe that the
18 preponderance of evidence as presented today and in the
19 documents that we read carefully show that -- that the
20 Director's decision was clearly erroneous findings of
21 material fact, that I don't believe -- well, there might be
22 questionable erroneous application of laws. I don't think
23 there was a preponderance of evidence that he erroneously
24 applied the laws.

25 I don't believe that it was either arbitrary or

1 capricious in its application, and I don't believe it was at
2 all shown that he -- a clearly unwarranted abuse of
3 discretion. So, I move we uphold the decision of the
4 Director.

5 CHAIRMAN STARR: Is there a second to that motion?

6 COMMISSIONER TAGORDA: I second.

7 CHAIRMAN STARR: Okay. So, we have a motion by --
8 we have a motion by Commission Marfdin. We have a second by
9 Commissioner Tagorda. The motion is -- yeah, please leave
10 that up. The motion is to deny the request by the
11 Appellant.

12 COMMISSIONER MARFDIN: The motion was to uphold
13 the decision of the Director.

14 CHAIRMAN STARR: Well, I guess you can, yeah, I'll
15 accept that, though we actually are deciding on the --

16 COMMISSIONER MARFDIN: If you want a different
17 motion, make a different motion.

18 CHAIRMAN STARR: That's fine. Okay. Before --
19 and the contested case Chair will only vote if my vote will
20 change the outcome. And do we have any discussion, any
21 deliberation? Commissioner Shibuya.

22 COMMISSIONER SHIBUYA: I just wanted to make a
23 friendly amendment that at least we accept the Director's
24 opinion. However, I would like to have at least a query by
25 the County to the Environmental Protection Agency in terms

1 of the applicability of NPDES type of requirements and/or
2 some environmental assessment if needed be.

3 CHAIRMAN STARR: Is there a second to that
4 amendment? Not seeing that, the amendment dies.
5 Commissioner Hiranaga.

6 COMMISSIONER HIRANAGA: I just have a question
7 regarding procedure. Because this is an appeal of the
8 Director's decision, do you need to have an affirmative vote
9 granting the appeal, or nonaction results in the denial of
10 the appeal?

11 CHAIRMAN STARR: I'm going to ask corp counsel to
12 address that.

13 MR. GIROUX: What you would want is an affirmative
14 vote either way granting or denying the appeal. Until --
15 until the -- that decision is made, it's pretty much status
16 quo. So, you're being asked to go either way. You have to
17 be aware that you don't have full quorum right now. So, if
18 you -- if there's a deadlock, then again, the decision will
19 remain as status quo.

20 COMMISSIONER HIRANAGA: So, no action results in
21 continuance until we get a majority vote?

22 MR. GIROUX: Until you have a full quorum.

23 COMMISSIONER HIRANAGA: Well, we have quorum. We
24 just don't have full Commissioners seated.

25 MR. GIROUX: Yeah, you don't have a full body.

1 CHAIRMAN STARR: Okay. Any other comments? Okay.
2 We will -- oh, sorry, Commissioner Shibuya.

3 COMMISSIONER SHIBUYA: I feel that this body has
4 the authority and should be making a decision, and I think
5 we do have enough in terms of the data that was presented,
6 arguments that we heard today, and I think many of us are
7 ready to decide. All I'm saying is I would like to support
8 the Director's approval. However, I would like to have the
9 County address the environmental assessment requirements,
10 specifically NPDES and the Clean Water Act type of
11 compliance if they're so needed.

12 MS. KAPUAALA: Excuse me, Mr. Chair.

13 CHAIRMAN STARR: Yes.

14 MS. KAPUAALA: Trisha Kapuaala, Zoning
15 Administration Enforcement Division. Maybe James Giroux can
16 also help me, but in granting or denying appeals, there are
17 typically no conditions.

18 CHAIRMAN STARR: Hold on. I'll let Mr. Giroux
19 answer. Then Commissioner Hiranaga.

20 MR. GIROUX: I wasn't going to address the issue
21 because the motion died. But, yeah, there's no conditions
22 on -- you can, you know, if you -- I believe that there is
23 a -- the ability to remand back, you know, for a review.
24 But, yeah, there's the idea that there was a decision. It's
25 granting or denying. And, you know, the result is is it

1 going to be looked at as an SMA major, or is the exemption
2 going to stand? So, I think you need to look at it in that
3 context.

4 CHAIRMAN STARR: Commissioner Hiranaga. Okay.
5 Anything -- anything further? Commissioner Shibuya.

6 COMMISSIONER SHIBUYA: Just a quick one. I
7 believe it is a SMA major. As I pointed out, that the cost
8 of value of the operation is in excess of \$1 million, which
9 exceeds the \$125,000 threshold.

10 CHAIRMAN STARR: Okay. Commissioner Marfdin.

11 COMMISSIONER MARFDIN: I concede to Mr. --
12 Commissioner Shibuya, that we're to require an SMA if a
13 minor would not be appropriate because of the cost. But I
14 believe that the Director appropriately made the exemptions
15 submitted as not an SMA major either, it is an SMA exempt.
16 And that's why I'm trying -- I'm voting to uphold the
17 decision of the Director. I would add, Commissioner
18 Shibuya, I agree with your concerns, and I would hope that
19 the department would look, whichever way this comes out,
20 would look a little bit further into this issue.

21 Because it seems to me somebody might or might not
22 want to take the greater issue beyond what we're being asked
23 to do, which is merely to say whether the decision was
24 proper, and raise the whole issue about the County behavior
25 in general. The reason I can support the motion is because

1 there's no intensification. The Appellants have raised the
2 issue of, even if there is no intensification of use, there
3 might be considerations that the County is not following.
4 But that's not before us today. That's some other message
5 on some other day.

6 CHAIRMAN STARR: Okay. Are we ready for the vote?
7 Okay. The motion before us is to --

8 COMMISSIONER MARFDIN: Uphold the decision.

9 CHAIRMAN STARR: Yeah, uphold the decision of the
10 Director. And based on that neither items one, two or three
11 have been met. Is that stated correctly?

12 COMMISSIONER MARFDIN: Uh-huh.

13 CHAIRMAN STARR: All in favor, please raise your
14 hand.

15 All opposed.

16 Okay. We have five yay's, one nay. Chair did not
17 vote, which I guess is that -- that's a yay.

18 MR. GIROUX: You don't have to act because there's
19 been action.

20 CHAIRMAN STARR: So, the motion passes. And the
21 Director's exemption stands. I would like to thank everyone
22 for their hard work. We will need the findings of fact,
23 conclusions of law and decision and order, which I believe
24 is generally drafted by the prevailing side.
25 Mr. Schwartz.

1 MR. SCHWARTZ: We would only like to note for the
2 record our exception.

3 CHAIRMAN STARR: Use the mic.

4 MR. SCHWARTZ: We would only like to note for the
5 record our exception of the decision of the Commission.

6 CHAIRMAN STARR: Your exception to the decision is
7 on the record, and you'll have the opportunity to do
8 exceptions to the findings of fact, conclusions of law. And
9 I'll ask Ms. Lovell to prepare that and then serve it on the
10 other party and to corp counsel.

11 MR. GIROUX: And then it will be put on the agenda
12 for discussion, review.

13 CHAIRMAN STARR: It will go onto our agenda for
14 review, discussion and eventual adoption.

15 MS. LOVELL: That was my question, the schedule of
16 all this. Ordinarily, I would prefer to have the transcript
17 available before I -- before I complete the final draft. In
18 order to be accurate, it really helps to have the
19 transcript.

20 CHAIRMAN STARR: Okay. Well, it will probably
21 take a couple of months, as soon as we can, to process it
22 and speak with Mr. Yoshida. We'll put it on the agenda.

23 MS. KAPUAALA: As soon as the transcript becomes
24 available, which is in two weeks, according to Rachelle.
25 How much time would you need, Jane?

1 MS. LOVELL: At least two weeks after that, maybe
2 three.

3 CHAIRMAN STARR: Okay. Staff can deal with that.
4 Mr. Schwartz, really quick.

5 MR. SCHWARTZ: Will the Appellants prior to the
6 time of the review of the exceptions have the opportunity to
7 look at the transcript and get a copy?

8 MS. KAPUAALA: Yes. We will definitely e-mail you
9 a copy of the transcripts.

10 CHAIRMAN STARR: I would like to thank everyone.
11 We still have some housekeeping matters. Can we just defer
12 them to our next meeting?

13 COMMISSIONER TAGORDA: Second.

14 COMMISSIONER HIRANAGA: Mr. Chair, can we just
15 handle C, which is minutes?

16 CHAIRMAN STARR: If you wish. Commission Marfdin.
17 Go ahead and make the motion.

18 COMMISSIONER HIRANAGA: I'm make a motion to
19 accept action minutes dated April 13th, 2010; regular
20 minutes dated February 23rd, 2010, and the other minutes
21 dated March 23rd, 2010.

22 COMMISSIONER MARFDIN: Second.

23 CHAIRMAN STARR: Motion to accept the three
24 minutes listed by Commissioner Hiranaga. Seconded by
25 Commissioner Marfdin, I believe. All in favor, please say

1 aye.

2 All opposed.

3 Minutes are accepted.

4 Hana next Tuesday. Where are we meeting?

5 MR. YOSHIDA: I guess if you want to carpool,
6 we're meeting here at 9:00. If you're going to meet us in
7 Hana, meet us at the Hana Ranch Restaurant at 11:15.

8 COMMISSIONER MARFDIN: Hana Ranch Restaurant
9 11:15. May I?

10 CHAIRMAN STARR: Yeah, go ahead, Commissioner
11 Marfdin.

12 COMMISSIONER MARFDIN: One other thing for Hana,
13 you guys are going to have to figure out what to do for
14 dinner. And a lot of the roadside stands are closed.

15 MR. YOSHIDA: We made arrangements with a caterer.

16 COMMISSIONER FREITAS: I thought you were going to
17 cook.

18 CHAIRMAN STARR: Just to put in a plug, it's going
19 to be a great meeting, a great experience, so I really
20 suggest all members who can make it, you will not regret it.

21 COMMISSIONER MARFDIN: I also urge you, last week
22 I passed out a rules of the road and things to see along the
23 way. And I invite you to -- if you're not -- if you're the
24 driver, don't look at it. If you're not the driver, it's
25 something to pass the time as you take your two and a half

1 to three hours to get there.

2 CHAIRMAN STARR: Thank you, Commissioners,
3 Mr. Giroux, Trish, everyone else, you did great.

4 MS. KAPUAALA: Thank you.

5 CHAIRMAN STARR: And Clayton, anything else?

6 MR. YOSHIDA: So, we're deferring the other
7 matters?

8 CHAIRMAN STARR: Yeah. Make your motion.

9 COMMISSIONER MARFDIN: Move to defer the rest of
10 the matter to our next meeting.

11 COMMISSIONER TAGORDA: Second.

12 CHAIRMAN STARR: All in favor, say aye.

13 Opposed.

14 Thank you. We are adjourned.

15 (The meeting adjourned at 5:09 p.m.)
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C E R T I F I C A T I O N

I, RACHELLE PRIMEAUX, Notary Public for the State of Hawaii, certify:

That the proceedings contained herein were taken by me in machine shorthand and were thereafter reduced to print under my supervision by means of computer-aided transcription; that the foregoing represents, to the best of my ability, a true and accurate transcript of the proceedings had in the foregoing matter.

I further certify that I am neither attorney for any of the parties hereto nor in any way concerned with the cause.

Dated this _____ day of _____, 2010.

NOTARY PUBLIC, State of Hawaii
My commission expires 6/14/2012