

BOARD OF WATER SUPPLY  
COUNTY OF MAUI

REGULAR MEETING  
MINUTES OF DECEMBER 19, 2013

The regular meeting of the Maui County Board of Water Supply was held at the Department of Planning Conference Room, 250 South High Street, Wailuku, Maui, on Thursday, December 19, 2013.

CALL TO ORDER

The meeting was called to order by Chair Kamai at 9:05 a.m.

ATTENDANCE

Members present: William Kamai, Chair  
John Hoxie, Jr., Vice Chair  
Patricia Eason  
Donald Gerbig  
Robert Joslin  
James Rust  
Michael Suzuki  
Thomas Watanabe

Excused: Cyrus Kodani

Staff present: Dave Taylor, Director  
Paul Meyer, Deputy Director  
Pam Pogue, Water Resources and Planning Division Manager  
James Giroux, Deputy Corporation Counsel  
Gaye Hayashida, Commission Support Clerk

Others: Grant Chun, Vice President, Maui, A& B Properties, Inc.  
Kent Hiranaga, former Board of Water Supply member  
Pam Pogue, Water Resources & Planning Division Program  
Manager, Department of Water Supply  
Dan Chang, Safe Drinking Water Branch, State of Hawaii  
Department of Health  
Robert Whittier, Safe Drinking Water Branch, State of Hawaii  
Department of Health  
Irene Bowie, Executive Director, Maui Tomorrow  
Mae Nakahata, agronomist, HC&S  
Audrey Moniz  
Thomas Kolbe, Deputy Corporation Counsel

ANNOUNCEMENTS

None.

## APPROVAL OF MINUTES

### Minutes of November 21, 2013

Chair Kamai asked for a motion to approve the minutes of November 21, 2013.

Motion: Member Joslin moved to approve the minutes of November 21, 2013,

Second: Member Gerbig.

Discussion: None.

Vote: Unanimous. Motion carried. The minutes of November 21, 2013 were approved.

## TESTIMONY FROM THE PUBLIC

All written and oral testimonies given at this meeting were on agenda item VII. Unfinished Business, A. Discussion and possible action regarding the Regulatory - Legislative Investigative Committee's Draft Recommendation letter regarding the Draft Wellhead Protection Ordinance.

Grant Chun, Vice President, Maui, A&B Properties, Inc., gave testimony against this proposed ordinance as this will add another layer of regulations and additional costs to Maui residents. A copy of the written testimony (by Mercer "Chubby" Vicens) is attached.

Kent Hiranaga, gave testimony against this proposed ordinance because it may have unintended consequences. He supports the draft response letter by the board chair and urges the department and the county council to proceed with extreme due diligence.

Pam Pogue, Program Manager, Water Resources & Planning Division, Department of Water Supply, addressed the 3 points of the board's draft letter. She explained that there is no regulation that addresses the future quality of our drinking water and the objective of this ordinance is to do just that. The science involved in the peer review of the source water assessment report is very solid and it's been done in 49 other states. In terms of the impact of the Wellhead Protection Overlay Districts they are not looking at past practices but rather at existing laws with the Department of Water Supply as a zoning overlay and it would not be retroactive. She thanked the board for their diligence in this matter.

Irene Bowie, Executive Director, Maui Tomorrow, testified in support of the department's Wellhead Protection Ordinance and stated that it makes economic sense because it would protect the public's investment in the county's well systems. The term "unintended consequences" is the new buzz word and has come to mean never moving

forward on progressive and safe policies. It is this board's responsibility to insure safe drinking water for the public not to protect corporate interests.

Mae Nakahata, agronomist, Hawaiian Commercial & Sugar Company, gave testimony against this proposed ordinance because it creates an additional layer of bureaucracy. The EPA law on pesticide use has evolved over time and requires regular evaluations of pesticides to protect people and the environment, and the requirements have changed taking into account new scientific knowledge and mandating additional testing. A copy of her written testimony is attached.

### UNFINISHED BUSINESS

Discussion and possible action regarding the Regulatory - Legislative Investigative Committee's Draft Recommendation letter regarding the Draft Wellhead Protection Ordinance.

The board reviewed the draft letter regarding Draft Ordinance 19.94 Wellhead Protection Overlay District that was previously distributed. Don Gerbig, chair of the BWS Regulatory-Legislative Committee read the letter into the record. A copy of the draft is attached.

Chair Kamai stated that because this draft letter was just given to the board no action will be taken on this matter today and will be deferred to the next meeting in January.

### APPEALS

Appeal No. 13-05, an appeal by Audrey Moniz. The appellant is appealing the decision by the Director of the Department of Water Supply denying her request to be granted a waiver of the Water System Development Fee

This matter was deferred to the January 16, 2014 meeting.

### OTHER BUSINESS

Receipt of Board Member request for agenda items to be placed on future agendas

There were no requests from the members at this time.

### COMMUNICATIONS

There were no Communication items on this agenda but Deputy Director Meyer informed the board that the department's preliminary budget was submitted to the managing director and the budget director. At this time they do not know the administration's position on the Water Department's budget. He added that there are a number of projects that are reflected in this budget.

## DIVISION REPORT

### November Operational Division Reports

Deputy Director Meyer stated that the division reports pretty much speak for themselves though he wanted to highlight a couple of things. The flume project is moving along well due to the mostly dry weather. The Wailoa Ditch is below 10% capacity in the last 2 weeks. In Lahaina there is continuing low level flows in Kahoma Valley but there is enough water flow out of the Honolua ditch system.

They are still running the Pookela Well Upcountry because of the dry weather. He noted that it is remarkably dry for mid December. This is the driest he has seen in the last 30 years.

## ADJOURNMENT

There being no further business the meeting was adjourned at 10:46 a.m.

Prepared by:

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Gaye Hayashida  
Commission Support Clerk

Approved for distribution:

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Paul J. Meyer  
Deputy Director

Board's Draft Letter - WPOD Proposed Ordinance

Board of Water Supply  
Maui County

Draft Ordinance 19.94 Wellhead Protection Overlay District.

Mr. David Taylor – Director  
Maui Department of Water Supply  
200 South High Street  
Wailuku, HI 96793-2155

Date: December 18, 2013

**Subject:** The Board of Water Supply Concerns with Draft Ordinance Title 19, Maui County Code Chapter 19.94 Wellhead Protection Overlay District.

Director Taylor,

Please review the County Board of Water Supply's (Board) concerns as summarized below.

**1 - Requirement For This Ordinance**

The Board has reviewed the forty (40) plus county, state and federal overlapping regulations meant to protect our groundwater systems as provided in recent testimony.

While the department's concern for additional protections is well intended, there did not appear to be any justifiable need, nor were there any historical examples presented during testimony that showed any failures of these current county, state and federal regulations. Adopting additional groundwater regulations, such as this ordinance before the Board, would be redundant unless there could be some clearly demonstrated scenarios presented by the department detailing prior failures within our current regulatory system. Neglecting to show such a need has become a primary source of our concerns for supporting this additional groundwater regulation.

**2 – Source Water Protection Models' (SWAP)**

The Board is also concerned that the single peer review, and the related methodology that was applied to support the SWAP, does not rise to a sufficient acceptable level when it comes to implementing a program that would set into motion an overbearing set of parameters with increasing reviews and oversight that will cripple a property owner's allowable use. The Board, however, **would be in favor of having additional studies** performed by other experts prior to the acceptance of -or the shelving of- this proposed county policy.

**3 – Impact of Establishing a Wellhead Protection Overlay Districts (WPOD)**

This ordinance would fortuitously instigate newly prohibited uses that will not be clearly understood by the public-at-large. Such a vastly imperious ordinance will affect most, if not all, property uses and their related property values if that property falls under the prevue of these WPODs. This proposed ordinance, with its rather large WPOD envelopes, will literally have the unintended consequence of a *taking* of the affected owner's property.

The Board, consequently, cannot support the current Draft Ordinance Title 19, Maui County Code Chapter 19.94 Wellhead Protection Overlay District in its present form.

*William Kamai, Chairman  
Maui Board of Water Supply*

## Written Testimony



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### **A BILL FOR AN ORDINANCE AMENDING TITLE 19, MAUI COUNTY CODE, TO ESTABLISH A WELLHEAD PROTECTON OVERLAY DISTRICT**

**MERCER "CHUBBY" VICENS  
A&B PROPERTIES  
ALEXANDER & BALDWIN, INC.**

**DECEMBER 19, 2013**

Chair Kamai and Members of the Maui Board Of Water Supply:

I am Mercer "Chubby" Vicens, testifying on behalf of A&B Properties (A&B) on "A BILL FOR AN ORDINANCE AMENDING TITLE 19, MAUI COUNTY CODE, TO ESTABLISH A WELLHEAD PROTECTON OVERLAY DISTRICT."

Hawaii's Wellhead Protection Program, which was approved by the U.S. Environmental Protection Agency in 1995, is a statewide program that provides financial assistance to public water suppliers for the development of State accepted and endorsed plans that delineate wellhead and recharge areas, inventory contaminant sources, provide contingency planning and source management, plan for new well siting, and for other program activities such as public education. It is our understanding that wellhead protection programs are not required to include the establishment of an overlay zoning district with prohibited land uses and permit requirements as proposed in this bill. We believe that the proposed overlay/permit system will unnecessarily add another layer of regulation and additional costs for Maui residents and businesses.

Many of the uses proposed to be banned or restricted presently exist in areas that are being proposed as wellhead protection overlay districts. Existing laws, regulations, along with the implementation of best management practices have

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alleviated residual impacts of these land uses on our water resources. Examples of best management practices that protect our water resources include gas stations with leak detection and double walled tanks, chemical supply warehouses with regulations on containment and security to prevent releases into the environment, golf courses that monitor soil moisture, water, and fertilizer use to prevent leaching of nutrients into the groundwater, and hospitals with strict rules on collection and disposal of bio-waste and medications.

It is our understanding that past instances of potable well contamination were primarily due to land use activities occurring prior to the construction of the water wells, and not related to land use activities undertaken after the water wells were installed. We believe that the proper siting of future wells, which includes a thorough assessment and investigation of prior uses in the area, will aid in effectively controlling future water well contamination issues.

Finally, we believe that this bill may negatively impact future water source development in Maui County. The new prohibitions and restrictions of various uses on lands surrounding new water wells will likely result in private landowners being less willing to offer their lands for new water well sites and neighbors raising concerns about the restrictions a new well will impose on their property. Remote locations for drinking water wells may subsequently need to be considered, which may increase the overall cost of new water development in Maui County due to greater well drilling, pipeline, and power transmission costs.

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Based on the aforementioned, we respectfully request that the Maui Board Of  
Water Supply recommend to the Maui County Council the disapproval of this bill.

Thank you for the opportunity to testify.



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### TESTIMONY

#### RE: DRAFT WELLHEAD PROTECTION ORDINANCE

Chair Kamai and Members of the Board of Water Supply:

My name is Mae Nakahata, agronomist for Hawaiian Commercial and Sugar Company. In addition to research, one of my responsibilities includes Weed Control. This involves working with pesticides on a daily basis and being familiar with the regulations associated with its' use. HC&S opposes this ordinance that creates an additional regulatory layer that is duplicative of existing law.

The major intent of wellhead protection is protection from pesticide contamination. As decisions are made it is important to understand current pesticide regulations.

EPA law has evolved over time. Since the inception of pesticide law in 1910 created to stop deceptive marketing practices, the current law updated in 1996 is a robust working document that requires regular evaluations of pesticides to protect people and the environment not only for today but for future generations. Note that this is the same year that the SDWA (Safe Drinking Water Act) proposed that states have wellhead protection plans. But, did the SDWA update this requirement based on other agency updates?

Those not involved in pesticide applications are not familiar with pesticide law where the label is the law. Labels are very detailed dictating how much, how often and under what conditions pesticides may be applied. Violations are not only a State but a Federal offense. It says so on the package. Requirements for registrants change over time taking into account new scientific knowledge and mandate additional testing to establish product safety. Leachability, environmental fate and degradation products and their fate are examples of these tests. Additionally, safety factors are applied to threshold levels taking into account infants and the physiologically sensitive population. Those that are

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thought to be significant threats also have buffer requirements around the wellhead. Labels are changed based on findings regulators have made evaluating over one hundred required tests. Unlike older chemistries which have been detected in groundwater, newer chemistries are applied in ounces per acre and less frequently. Therefore, the probability that these compounds will have significant leaching resulting in future groundwater contamination is unlikely. As EPA has taken leachability and environmental fate into account in their current label methodology, additional regulatory layers for pesticide users seem to be repetitive and difficult to justify given the current pesticide approval process. Making decisions on current chemicals based on the behaviour of older compounds is not justified.

To those concerned about older chemistries still in use, these labels and use patterns have changed over time. All of these pesticides including atrazine and hexazinone, still in use, fall under the restricted category determined by EPA or the State as individual localities look at their unique situations. HDOA has mandated that certain pesticides be restricted even as EPA may not have done so in the original process. This is because the States know their soils and are able to determine risks not recognized at the national level. EPA consults with the States before final labels are issued. Other detected pesticides such as DBCP are no longer used.

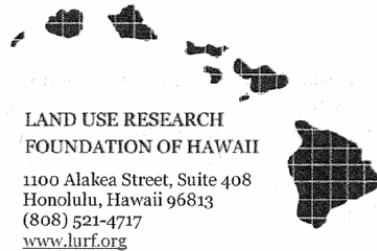
Restricted use pesticides means the users of these pesticides must undergo tests for certification. Certification requires renewals ensuring that users are aware of changes in science and the best methods to safely use the product. In addition, those deemed the riskiest are given a single use permit meaning every time the product is used, you need to apply for a permit, stating how and why it is needed. The use of restricted use pesticides is monitored by the state with vendors required to report purchases of RUPs to the State Department of Agriculture on a regular basis.

In summary, there are regulations managing pesticide leachability and wellhead protection. The county needs to carefully determine whether this highly technical area is one in which it should be involved or whether it should be left at a higher

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level with collaborative relationships with agencies. Understanding pesticide use practices is a first step to making a sound decision. With that understanding, it should be obvious that additional wellhead protection measures are not needed. We therefore respectfully request your opposition to this measure. Thank you for this opportunity to provide our opinion on this matter.

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Honorable William Kamai, Chair,  
and Members of the Board of Water Supply  
County of Maui  
200 South High Street  
Kalana O Maui Building, 5<sup>th</sup> Floor  
Wailuku, Maui, Hawaii 96793-2155

**Comments in Opposition to a Proposed Bill for an Ordinance Amending Title 19, Maui County Code, to Establish a Wellhead Protection Overlay District**

**Thursday, December 19, 2013, at 9:00 a.m. in Planning Department Conference Room, First Floor, Kalana Pakui Building, 250 South High Street, Wailuku, Hawaii 96793**

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

LURF appreciates the opportunity to provide its comments in **OPPOSITION** to this proposed measure.

**Intent of the Proposed Bill.** LURF understands that this proposed ordinance intends to ensure the protection of drinking water sources from certain land uses which may contaminate groundwater sources, by establishing Wellhead Protection Overlay Districts ("WPODs"). The stated purpose and intent of the proposed WPOD is to: protect the public's health, welfare and safety by minimizing the risks of contamination of aquifers; preserve and protect existing and potential drinking water sources; implement land use policies consistent with the Maui County General Plan and Community Plans; and to restrict and prohibit land uses that are incompatible with groundwater protection.

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**LURF's Position.** In Maui County, and state-wide, LURF members have been stewards of Hawaii's fresh water resources and active partners with the State and counties in conservation of watersheds that preserve and protect existing and potential drinking water sources. However, LURF respectfully recommends that the Maui County Board of Water Supply ("Board") **DISAPPROVE** the transmittal of this bill to the Maui County Council at this time.

Referral of this matter to this Board's Regulatory & Legislative Committee has resulted in a report citing several concerns pertaining to the proposed measure, and recommendations that this Board review the actual WPOD Zones for each of the County wellheads that will be affected in order to better understand the impact upon existing properties. Despite reviewing the Department of Water Supply's response to the Committee report, LURF still concurs with the Committee's recommendation of **DISAPPROVAL** of the proposed bill for a number of reasons:

- **Current Federal and State Regulations Already Exist to Protect the Groundwater Supply.** Current Federal, State and County regulations address the prevention of the release contaminants by regulating use and storage of potential contaminants and requiring action plans and reporting should an accidental release occur. The proposed WPOD program appears to be a questionable attempt to duplicate the existing Federal and State laws, rules and regulations relating to safe drinking water, which continue to successfully protect the public's health, welfare and safety. The existing Federal Safe Drinking Water Act and Federal and State regulations governing injection wells, hazardous waste, solid waste management facilities, underground storage tanks, pesticide use, and petroleum and hazardous material storage already effectively address the ground water contamination concerns that the proposed bill purportedly intends to focus upon.

These existing laws, rules and regulations, and current agency enforcement have been effective in minimizing the risks of present day contamination of aquifers and in preserving and protecting existing and potential drinking water sources. This ordinance would have no impact on contamination from prior activities and uses that are no longer allowed or practiced, nor would it protect groundwater from unauthorized activities or practices by unknowledgeable citizens. Public education and regular updates to the inventory in the Source Water Assessment Program (SWAP) may best serve this purpose.

- **No Federal or State Mandates for County WPODs.** LURF understands that the establishment of WPODs with prohibited uses and permit requirements is an optional activity for the State's endorsement of a Wellhead Protection Program, as is preparing wellhead protection messages to educate water users, businesses and the general public.

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- **The Proposed Bill Would Result in Substantial Unnecessary Costs for Maui County.** Landowners and businesses would need to invest significant time and money seeking permits and renewals for restricted uses in the WPOD. Maui DWS staff would need to invest significant time reviewing permits and permit renewals and monitoring conditions imposed. Further, both parties would incur time and cost for legal challenges, especially associated with the specific delineation of zones that by definition of zoning would be more precise than the science that set the lines.

LURF believes the proposed bill is unsound because it fails to include specific information regarding the need for additional employees, equipment, and other costs which is unnecessary and would overlap the efforts of other Federal and State agencies. As mentioned, the bill also fails to address the costs of legal challenges relating to the new program. Passage of such a bill without knowing the resulting costs to the Maui County taxpayers would be imprudent.

- **The Proposed Bill Will Discourage Future Water Source Development in Maui County.** The unnecessary additional requirements and restrictions imposed by the proposed bill will make the much needed development of additional ground water supplies on Maui even more expensive and cost-prohibitive. Private landowners will be less willing to provide land for new water well sites since the bill will restrict uses on lands that surround water wells.

The proposed bill could also create unintended negative consequences on the development of new water resources by Maui County. To avoid restrictions and impacts on surrounding land uses and landowners, the County may be forced to site future drinking water wells in remote locations in areas currently zoned conservation, which will also increase the costs of new water development due to higher capital, power, and transmission costs required by such remote well locations.

- **The Proposed Bill Will Negatively Impact Landowners in the Vicinity of Existing and Future Water Wells by Imposing Restrictions on the Use of Their Lands.** The proposed bill would prohibit certain uses in the vicinity of existing or future water wells and require five-year permits. These new restrictions and requirements are another strong **disincentive** for property owners to expand, reconstruct, or develop their property.

New investment in property in such areas would also be discouraged as any new land use in the vicinity of water wells could be prohibited, or may be required to obtain WPOD wellhead protection permits that are limited to five years, which is too short a period of time to qualify for financing or to justify any substantial investment.

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- **The Proposed Bill May Subject the County to Legal Challenges by Surrounding Property Owners.** The proposed bill may also subject Maui County to legal challenges which could result in the County compensating landowners for the loss of value of surrounding properties during land purchases or condemnations for new County water well sites.
- **The Proposed Bill Will Negatively Impact the “Vested Rights “of Landowners, Owner-Builders, and Developers of Master Planned Communities.”** While the proposed bill includes a very weak “non-conforming use and facility” provision which would only allow continuation of **existing** land uses and facilities in the vicinity of water wells at the time of enactment of the bill, it would also prohibit and restrict any expansion or reconstruction of those existing land uses and facilities which are considered “non-conforming.”

The fact that the proposed bill would prohibit and restrict any new land uses or facilities - even those which have been **fully approved and permitted** by Maui County but not yet built - is one of the measure’s most significant and serious flaws.

The proposed bill would detrimentally affect many areas of Maui County that have been designated for urban and other land uses; that have obtained approved zoning for those uses; or that have secured other land use and building permits which are consistent with the Maui County General Plan, the various Island Plans, and the various Community Plans. The bill would impose new laws, rules and regulations that would change existing laws and regulations by prohibiting or restricting the approved land uses which are consistent with the above-referenced Maui plans, thereby rendering the prior governmental land use plans and approvals void or ineffective. Many Maui landowners who have already obtained government approvals and assurances for certain land uses and developers of master planned communities have all expended substantial funds **in reliance** on those existing governmental land use approvals.

Because the proposed bill would change the existing laws and regulations to prohibit or substantially restrict a use or project **after** the government has already granted land use, subdivision, or building permit approval, and the landowner has altered its position in reliance upon such governmental land use approval, the prohibitions and restrictions of the proposed bill could provoke “vested rights” and “zoning estoppel” claims against Maui County, resulting in expensive and lengthy litigation.

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• **The Proposed Bill Violates the Spirit and Intent of the “Right to Farm” Law and Will Negatively Impact Farmers and Agricultural Operations.** The proposed bill also restricts the agricultural use of fumigants and pesticides, reclaimed water for agricultural irrigation and confined animal feeding operations on lands within a WPOD. These restrictions would create major obstacles for farmers and agricultural operators, and violate the spirit and intent of the Hawaii State Planning Act and Hawaii’s “Right to Farm” law, HRS Chapter 165. Under the Hawaii State Planning Act, it is a declared policy of this State to “foster attitudes and activities conducive to maintaining agriculture as a major sector of Hawaii’s economy.” Accordingly, Hawaii’s “Right to Farm” law protects farmers from nuisance law suits “if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices.” The “Right to Farm” law further creates a rebuttable presumption that a farming operation does not constitute a nuisance.

The proposed bill is inconsistent with Hawaii’s “Right to Farm” law because it restricts farming and agricultural operations even if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices. It will put farmers in the impossible position of having to prove no impact of a practice, rather than regulators having to show a detrimental impact.

Based on all of the issues and concerns discussed above, LURF must **OPPOSE** the proposed bill, and respectfully urges this Board to **DISAPPROVE** its transmittal to the Maui County Council.

Thank you for the opportunity to provide comments and concerns regarding this matter.